§ 1.663(c)-3 Applicability of separate share rule to certain trusts.

(a) The applicability of the separate share rule provided by section 663(c) to trusts other than qualified revocable trusts within the meaning of section 645(b)(1) will generally depend upon whether distributions of the trust are to be made in substantially the same manner as if separate trusts had been created. Thus, if an instrument directs a trustee to divide the testator’s residuary estate into separate shares (which under applicable law do not constitute separate trusts) for each of the testator’s children and the trustee is given discretion, with respect to each share, to distribute or accumulate income or to distribute principal or accumulated income, or to do both, separate shares will exist under section 663(c). In determining whether separate shares exist, it is immaterial whether the principal and any accumulated income of each share is ultimately distributable to the beneficiary of such share, to his descendants, to his appointees under a general or special power of appointment, or to any other beneficiaries (including a charitable organization) designated to receive his share of the trust and accumulated income upon termination of the beneficiary’s interest in the share. Thus, a separate share may exist if the instrument provides that upon the death of the beneficiary of the share, the share will be added to the shares of the other beneficiaries of the trust.

(b) Separate share treatment will not be applied to a trust or portion of a trust subject to a power to: (1) Distribute, apportion, or accumulate income, or (2) distribute corpus to or for one or more beneficiaries within a group or class of beneficiaries, unless payment of income, accumulated income, or corpus of a share of one beneficiary cannot affect the proportionate share of income, accumulated income, or corpus of any shares of the other beneficiaries, or unless substantially proper adjustment must thereafter be made (under the governing instrument) so that substantially separate and independent shares exist.

(c) A share may be considered as separate even though more than one beneficiary has an interest in it. For example, two beneficiaries may have equal, disproportionate, or indeterminate interests in one share which is separate and independent from another share in which one or more beneficiaries have an interest. Likewise, the same person may be a beneficiary of more than one separate share.

(d) Separate share treatment may be given to a trust or portion of a trust otherwise qualifying under this section if the trust or portion of a trust is subject to a power to pay out to a beneficiary of a share (of such trust or portion) an amount of corpus in excess of his proportionate share of the corpus of the trust if the possibility of exercise of the power is remote. For example, if the trust is subject to a power to invade the entire corpus for the health, education, support, or maintenance of A’s other income which is so substantial as to make the possibility...
of exercise of the power remote. If in-
stead it appears that A and B have sep-
arate shares in a trust, subject to a
power to invade the entire corpus for
the comfort, pleasure, desire, or happi-
ness of A, separate share treatment
shall not be applied.

(e) For taxable years ending before
December 31, 1978, the separate share
rule may also be applicable to succes-
sive interests in point of time, as for
instance in the case of a trust pro-
viding for a life estate to A and a sec-
ond life estate or outright remainder to
B. In such a case, in the taxable year of
a trust in which a beneficiary dies
items of income and deduction prop-
erly allocable under trust accounting
principles to the period before a bene-
iciary’s death are attributed to one
share, and those allocable to the period
after the beneficiary’s death are attrib-
uted to the other share. Separate share
treatment is not available to a suc-
ceeding interest, however, with respect
to distributions which would otherwise
be deemed distributed in a taxable year
of the earlier interest under the throw-
back provisions of subpart D (section
665 and following), part I, subchapter J,
chapter 1 of the Code. The application
of this paragraph may be illustrated by
the following example:

Example. A trust instrument directs that
the income of a trust is to be paid to A for
her life. After her death income may be dis-
tributed to B or accumulated. A dies on June
1, 1956. The trust keeps its books on the basis
of the calendar year. The trust instrument
permits invasions of corpus for the benefit of
A and B, and an invasion of corpus was in
fact made for A’s benefit in 1956. In deter-
miming the distributable net income of the
trust for the purpose of determining the
amounts includible in A’s income, income
and deductions properly allocable to the pe-
riod after A’s death are treated as income
and deductions of a separate share; and for
that purpose no account is taken of income
and deductions allocable to the period after
A’s death.

14021, Dec. 31, 1960, as amended by T.D. 7633,
44 FR 57926, Oct. 9, 1979; T.D. 8849, 64 FR
72243, Dec. 28, 1999]

§ 1.663(c)–4 Applicability of separate
share rule to estates and qualified
revocable trusts.

(a) General rule. The applicability of
the separate share rule provided by sec-
tion 663(c) to estates and qualified rev-
ocable trusts within the meaning of
section 645(b)(1) will generally depend
upon whether the governing instru-
m ent and applicable local law create
separate economic interests in one ben-
eficiary or class of beneficiaries of such
estate or trust. Ordinarily, a separate
share exists if the economic interests
of the beneficiary or class of bene-
eficiaries neither affect nor are affected
by the economic interests accruing to
another beneficiary or class of bene-
eficiaries. Separate shares include, for
example, the income on bequeathed
property if the recipient of the specific
bequest is entitled to such income and
a surviving spouse’s elective share that
under local law is entitled to income and
appreciation or depreciation. Fur-
thermore, a qualified revocable trust
for which an election is made under
section 645 is always a separate share
of the estate and may itself contain
two or more separate shares. Con-
versely, a gift or bequest of a specific
sum of money or of property as defined
in section 663(a)(1) is not a separate
share.

(b) Special rule for certain types of ben-
eficial interests. Notwithstanding the
provisions of paragraph (a) of this sec-
tion, a surviving spouse’s elective
share that under local law is deter-
m ed as of the date of the decedent’s
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