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Eighth and Ninth Circuits (and Tax Court) Affirm "Charitable Lid" Estate Planning Technique – Breathes New Life Into Defined-Value Clauses

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Overview

The United States Court of Appeals for the Eighth Circuit[1] has affirmed the Tax Court in a case involving the "charitable lid" estate planning technique utilized with intervivos defined-value transfers[2] – a technique that effectively caps an estate's tax liability. The Tax Court, in a decision filed three weeks after the Eighth Circuit's opinion, blessed the technique in a gift tax case.[3] In mid-2011, the Tax Court upheld the concept in another gift tax case.[4]

The estate planning version of the technique involves an estate plan whereby the decedent leaves a set dollar amount of the estate to the decedent's children (or specific beneficiaries) with the residuary estate passing to a charitable organization.[5] The portion passing to the charity qualifies for the estate tax charitable deduction and, thus, puts a "lid" on the amount of estate tax owed. That could be a particularly useful concept (especially for farm and ranch estates) if the Administration succeeds in its present attempts to eliminate valuation discounts for closely-help business interests[6] or in its attempts to push through the Congress an increase in the federal estate tax.[7]

Two different variations of the technique were involved in the cases and were unsuccessfully challenged by the IRS. The Eighth Circuit's opinion is also the first Federal Circuit Court opinion in over 60 years to deal with the public policy arguments raised against the technique by the IRS.[8]

Estate of Christiansen v. Comr.[9]

The decedent owned cattle ranches in South Dakota with her husband. For many years they operated the cattle ranches as sole proprietorships. But, the sole proprietorships were ultimately reorganized as two limited Partnerships - MHC Land and Cattle, Ltd., and Christiansen Investments, Ltd. The decedent's husband died in 1986 and the decedent continued to operate the ranches until her death in 2001. Under the decedent's 2000 will, the decedent left her entire estate to her daughter (her only child), with the daughter having the right to disclaim property. Any disclaimed property would pass 75 percent to a charitable lead annuity trust (CLAT) and 25 percent to a private foundation (a qualified charity) that the decedent had established. The trust had a 20-year term and would pay an annuity of 7 percent of the corpus's net fair market value at the time of the decedent's death to the foundation. At the end of the 20 years, if the daughter were still alive, she would receive the balance of the property remaining in the trust.

> **Note:** A CLAT is a charitable lead trust whose charitable income beneficiary is guaranteed an annuity fixed as a percentage of the trust's initial assets and paid for a term of years.[10]

At the time of her death, the decedent held a 99 percent limited partnership interest in each entity. Another entity, Hamilton Investments, became the general partner of both limited partnerships and had the decedent's daughter and son-in-law as its members. At the time of death, the decedent also owned other real estate valued at $219,000, and over $700,000 in cash and other assets. The estate had the decedent's limited partnership interests appraised which resulted in a 35 percent minority interest discount. The result was that the decedent's FLP interests were reported on the estate-tax return at their discounted value - slightly over $6.5 million. The daughter retained $6,350,000 - an amount she believed would allow the family business to continue, as well as to provide for her and her own family's future, and disclaimed the balance. The disclaimer resulted in $40,555.80 passing to the Foundation and $121,667.20 to the Trust.[11] The decedent's estate deducted the entire amount that passed to the Foundation, and the part passing to the Trust that was equal to the present value of 7 percent of $121,667.20 per annum for 20 years. The total deduction, therefore, was approximately $140,000.

> **Note:** The estate did not deduct the value of the daughter's contingent-remainder interest in the trust's corpus

The dilemma facing the IRS. The disclaimer language coupled with the savings clause laid a trap for IRS. If IRS, upon audit, succeeding in increasing the value of the decedent's estate that effort would result in an increase in the estate's charitable deduction, without resulting in any additional estate tax.

The IRS did challenge the valuation of the decedent's FLP interests, and reduced the FLP discounts by approximately 35 percent. IRS also took the position that the daughter's disclaimer was not "qualified" such that none of the estate's property passing to either the Trust or the Foundation generated a charitable deduction. The parties settled the valuation issue before trial, stipulating that the fair market value of the decedent's interest in Christiansen Investments was $1,828,718.10, and that the decedent's interest in MHC Land and Cattle was worth $6,751,404.63. Coupled with the decedent's other property interests, IRS valued the decedent's estate at $9,578,895.93 rather than the $6,512,223.20 the estate reported.

Here's where the disclaimer language kicked in. As applied to the enhanced value of the estate assets, the disclaimer resulted in property with a fair market value of $2,421,671.95 going to the Trust and property with a fair market value of $807,223.98 going to the Foundation. The estate claimed an increased charitable deduction for the full (enhanced) amount passing to the Foundation and also for the increased value of the Trust's annuity interest. However, IRS objected to any deduction for the property passing to the Trust, and objected to any increase in the deduction for the property passing to the Foundation. The IRS objection was two-fold: (1) any amount passing to the charity was contingent on a post-death, post-disclaimer condition subsequent – the IRS's ultimate determination of the value of the decedent's estate;[12] and (2) the adjustment clause in the disclaimer should be declared void on public policy grounds because, if upheld, it would discourage IRS from examining estate tax returns.

Issues before the court. One issue before the Tax Court was whether the estate could claim a charitable deduction for the present value of the 7 percent annuity from the trust to the foundation. That depended upon whether the daughter's undisclaimed contingent-remainder interest in the trust required disallowance of the deduction. Another issue was whether the estate could claim an increased charitable deduction for the increased value of the disclaimed property (as a result of the audit) passing directly to the foundation.

The disclaimer language. The key component to the case was the disclaimer. The disclaimer read (in part) as follows:

> "A. Partial Disclaimer of the Gift: Intending to disclaim a fractional portion of the Gift, Christine Christiansen Hamilton hereby disclaims

> that portion of the Gift determined by reference to a fraction, the numerator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001, less Six Million Three Hundred Fifty Thousand and No/100 Dollars ($6,350,000.00) and the denominator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001 ("the Disclaimed Portion"). For purposes of this paragraph, the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001, shall be the price at which the Gift (before payment of debts, expenses and taxes) would have changed hands on April 17, 2001, between a hypothetical willing buyer and a hypothetical willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts for purposes of Chapter 11 of the [Internal Revenue] Code, as such value is finally determined for federal estate tax purposes."

The disclaimer was artfully drafted. As noted above, it contained the phrase "as such value is finally determined for federal estate tax purposes." The disclaimer also utilized a "savings clause" which specified that to the extent that the disclaimer was not effective to make it a qualified disclaimer, the daughter would do whatever was necessary to make the disclaimer a qualified disclaimer in accordance with I.R.C. §2518. That language was the heart of the "charitable lid" concept mentioned above – it would come into play if the estate assigned a value to the property being disclaimed that ultimately turned out to be lower than IRS believed it should be. If that happened, the daughter would take (and the estate tax would be paid on) her $6.35 million. But the residue would be divided between the Foundation and the Trust. Likewise, the daughter's failure to disclaim her remainder interest in the Trust would mean that she would capture much of the value of any underreporting as she approached retirement age.

The Tax Court and appellate decision. The Tax Court upheld the disclaimer as to the amount that passed to the foundation, and held that the decedent's estate was entitled to a charitable deduction for the amount.[13] The Tax Court noted that the Regulation at issue (Treas. Reg. §20.2055-2(b)(1) was clear and unambiguous in that it made no reference to the "existence or finality of an accounting valuation at the date of death or disclaimer." Instead, the court noted, the Regulation was couched in terms of the existence of a transfer as of the date of a decedent's death.[14] In addition I.R.C. §2518 specifies that a qualified disclaimer relates back to the time of death by allowing disclaimed amounts to pass as though the initial transfer had never occurred. On that point, the appellate court (which affirmed the Tax Court on all points) noted that "all that remained following the disclaimer was the valuation of the estate, and therefore, the value of the charitable donation." Thus, the foundation's right to receive 25 percent of any amount in excess of $6.35 million was certain as of the date of the decedent's death. The appellate court pointed out that IRS had "failed to distinguish between post-death events that change the *actual value of an asset or estate* and events that occur post-death that are *merely part of the legal or accounting process of determining value* at the time of death." [emphasis added] Thus, contingencies that are beyond the process of determining value result in disallowed deductions, but those that are part of the legal or accounting process of determining date-of-death value are permissible. Indeed, the appellate court noted that Treas. Reg. §20.2055-2(e)(2)(vi)(a) specifies that references to values "as finally determined for Federal estate tax purposes" are sufficiently certain to be considered "determinable" for purposes of qualifying as a guaranteed annuity interest. That's the language that was used in the disclaimer. Therefore, the court reasoned the Regulation distinguishes between fixed, determinable amounts (the disclaimer language at issue) from fluctuating formulas that depend on future conditions for their determination.

> **Note:** IRS based its position on Rev. Rul. 86-41[15] in which it disregarded two value

adjustment clauses in a deed associated with a gift of real estate as amounting to a transfer subject to a condition subsequent.[16]

The appellate court also noted that while the disclaimer language at issue could discourage IRS from examining estate tax returns, the court noted that the IRS' role is not simply to "maximize tax receipts," but to enforce the tax laws. Here, the drafting of the disclaimer was within the bounds of the statute and Regulation. In addition, the court said the Congress never intended a policy that would provide incentives for the IRS to challenge and/or audit returns.[17]

Subsequent Tax Court Case – *Petter v. Comr*.[18]

In a decision delivered less than a month after the Eighth Circuit's decision in *Christiansen*, the Tax Court upheld a defined-value gift tax clause and again rejected the IRS' policy-based arguments.

Fact of the case. In *Petter v. Comr.*,[19] the petitioner inherited several million dollars worth of stock in United Parcel Service (UPS) – at the time a closely-held company. Her tax advisors set up various estate planning documents for her, including a life insurance trust, charitable remainder trust and a limited liability company. Also included in the mix were intentionally-defective grantor trusts. Later, the petitioner's stock approximately doubled in value when UPS stock became publicly traded.

The estate plan. Utilizing a part-gift/part-sale transaction, the petitioner transferred her interests in the LLC to the intentionally-defective grantor trusts. She initially gifted 10 percent of the LLC value (via LLC ownership units) to each of two intentionally-defective grantor trusts.

Note: An intentionally-defective grantor trust is a grantor trust that is drafted in a manner ensuring that the grantor continues to pay income tax on the income and assets of the trust, but reduces the grantor's estate by the amount of property transferred to the trust. The beneficiaries eventually receive the trust property without reduction for taxes – which the grantor has already paid.

Three days later she sold the remaining 90 percent of the LLC value equally to the trusts. Simultaneously with the gifts to the trusts, she also gave LLC ownership units to two charities. The split between the charities and the trusts was in accordance with a formula which read as follows:

"1.1.1. [Transferor] assigns to the Trust as a gift the number of Units described in Recital C above that equals one-half the minimum dollar amount that can pass free of federal gift tax by reason of Transferor's applicable exclusion amount allowed by Code Section 2010(c). Transferor currently understands her unused applicable exclusion amount to be $907,820, so that the amount of this gift should be $453,910; and 1.1.2 assigns to The Seattle Foundation as a gift to the A.Y. Petter Family Advised Fund of the Seattle Foundation the difference between the total number of Units described in Recital C above and the number of Units assigned to the Trust in Section 1.1.1.

1.2 The Trust agrees that, if the value of the Units it initially receives is finally determined for federal gift tax purposes to exceed the amount described in Section 1.1.1, trustee will, on behalf of the Trust and as a condition of the gift to it, transfer the excess Units to The Seattle Foundation as soon as practicable."

Both the sale and pledge documents contained similar clause language, and both trusts paid their note obligations.[20]

IRS audit. An appraiser determined the value of the transfers, and the transfers were reported on the petitioner's gift tax return with appropriate documentation. IRS audited the petitioner's gift tax return, made an upward adjustment to the value of the gifts and took the position that the defined-value clause was invalid for gift tax purposes for public policy reasons – the same argument they had made

unsuccessfully in *Christiansen*. IRS argued that the petitioner had really made gifts of actual ownership units in the LLC rather than gifts of ownership units in accordance with a formula.

Tax Court's holding and rationale. The Tax Court rejected the IRS' position, noting that "the plain language of the documents shows that Anne was giving gifts of an ascertainable dollar value of stock; she did not give a specific number of shares or a specific percentage interest in the [LLC]." The court also rejected the IRS' public policy argument. On this point, the court noted that the charities conducted arm's-length negotiations, retained separate legal counsel and successfully insisted on changes to the transfer documents to protect their interests – they weren't simply passively assisting the petitioner's desire to reduce tax.

> **Note:** The court also noted that IRS has approved formula clauses in other settings – those involving disclaimers, charitable remainder trusts and where the marital deduction is claimed.

Importantly, the petitioner maintained an arm's length involvement with the charities.

Appellate Decision

On appeal, the Ninth Circuit affirmed.[21] At the appellate level, the IRS dropped the public policy argument, and focused its objections to the enhanced charitable deduction resulting from the increased value of the gifted property. IRS continued to press its argument that the charitable deduction should be disallowed under Treas. Reg. §25.25.22(c)-3(b)(1) because the transfer of additional LLC units to the charities was subject to a condition precedent – the final determination by the IRS (on audit) of the reported value of the LLC units. As noted above, that final determination lowered the reported value of the interests and triggered an additional transfer to the charities via the defined value clause. IRS also claimed that I.R.C. §2001(f)(2) supported their argument of a conditional gift because the "value as finally determined for gift tax purposes" is defined in that provision as the value reported on the return unless modified by IRS on audit. So, under that reading of the statute, IRS again argued the amount the charity received was the amount reported on the gift tax return. Any later IRS change in value would be ignored.

The Ninth Circuit disagreed with the IRS position. Importantly, the court noted that the gifts to the charity were effective as soon as the transfer documents were executed and the LLC units were delivered. So the charities had an immediate right to receive a pre-defined number of units with only the value of the pre-defined numbers left open. Any subsequent valuation change by IRS did not mean that the foundations would receive any additional LLC units. On the I.R.C. §2001(f)(2) argument, the court determined that it did not apply for gift tax purposes.

***Hendrix v. Comr.*[22]**

In *Hendrix*, the taxpayer made a gift of a small amount to a charitable donee. The gift was in the form of a fixed dollar amount of stock that was transferred to family trusts, with the excess passing to the charity. The transfers to trust were structured as part gift/part sale transactions with only the excess of the aggregate amount of the defined transfers to the trusts over the consideration that the trusts paid treated as a gift. The IRS objected on the basis that the defined value formula clause was not bona fide because it was not arm's length. The Tax Court, however, disagreed. The court noted that the transfers to the trusts did cause the trusts to incur economic and business risk. That was the case because if the value of the stock as initially computed was undervalued, more shares would shift from the trusts to the charity.

Prior Fifth Circuit Case – *McCord*[23]

In 2006, the United States Court of Appeals for the Fifth Circuit decided a case involving the use of defined-value clauses in the context of an FLP and transfers of those FLP interests to charitable and non-charitable donees.[24] Under the facts of the case, a married couple formed an FLP with their children and assigned partnership interests to several assignees (trusts for the

children and charities) that contained a formula clause specifying that (1) the couple's children, trusts for the children's benefit, and a charity received interests having an aggregate FMV of a set dollar amount ($324,345.16 – as determined by the base fair market value as determined by appraisal, less the amounts given to non-exempt donees, and less the amount given to a second exempt donee); and (2) another charitable organization received any remaining portion of the assigned interests. The children agreed to pay any resulting transfer taxes. Under a second agreement, the assignees allocated the assigned interests among themselves in accordance with a formula clause, based on an agreed aggregate value for the assigned interests. After the assignment, the FLP redeemed the interests of the charities in accordance with the FLP agreement. The Tax Court applied a 15 percent minority interest discount and a 20 percent lack of marketability discount to the FLP interests. Those interests were valued as an assignee interest because, under Texas law, the FLP agreement, and the assignment agreement, only economic rights in the FLP were assigned and there was no indication that the partners explicitly consented to admit the assignees as partners. The Tax Court also held that the value of the gifts was *not to be reduced* to reflect the donees' contingent obligation to pay the additional real estate tax that would have been imposed if the parents had died within three years of the gift. Such an adjustment was not appropriate, the Tax Court believed, because the parents didn't show that their valuation of such an obligation was reliable. On appeal, the Fifth Circuit reversed the second holding, ruling that the valuation used by the estate was correct, and the value of the gifts was to be determined by the amount of estate tax the donees assumed.

> **Note:** *Hendrix* is appealable to the Fifth Circuit. If the case ends up in the Fifth Circuit, it is possible that the rationale of *McCord* could be expanded. There are two issues in *Hendrix* that were not involved in *McCord* – public policy and whether an arm's length transaction was involved. In that respect, the Fifth Circuit could benefit from the Eighth Circuit's decision in *Christiansen*.

Another Tax Court Opinion – *Wandry v. Comr*.[25]

The Tax Court had another opportunity to rule in a case involving gifts of membership interests in an LLC under a defined value formula clause. In *Wandry v. Comr*.,[26] the parents formed an FLP and wanted to make gifts to their children and grandchildren. Their advisors informed them about making tax-free annual exclusion gifts via transfers of FLP interests and additional gifts, some of which would be covered by the gift tax exemption for each of them. In early 2000 their gift-giving program began, with the gifts consisting of specific dollar amounts of FLP interests rather than a set dollar amount of FLP interests. In 2001, the family established a family business and as part of the business, formed an LLC under Colorado law. Over the next year, all of the FLP's assets had been transferred to the LLC and the parents' gift-giving continued via the LLC. Again, pursuant to their tax attorney's advice, the gifts were of specific dollar amounts rather than specific numbers of membership units in the LLC.

An appraiser determined that a 1 percent interest in the LLC was worth $109,000 as of mid-2005. As a result, the couple's tax attorney reported total gifts of $1,099,000 for each parent. Pursuant to written gift document, the number of LLC units gifted was fixed as of the date of the gift with the number based on the fair market value of the gifted units to be determined after the transfer either by an appraiser, the IRS or court of law. The IRS, on audit, increased the value of the gifts and assessed a deficiency. IRS claimed that the written gift document constituted an admission that the parents were transferring a fixed percentage of LLC interests, that the LLC's capital accounts controlled the nature of the gifts and were adjusted in accordance with how the gifts were described, that the transfer of a fixed percentage of LLC interests had occurred and the adjustment clause was either ineffective for valuation purposes or void on public policy grounds.

The Tax Court disagreed with the position of the IRS, pointing out that the parents gave gifts of specific dollars amounts to their children and

grandchildren. The court also pointed out that an LLC's capital accounts have no bearing on the nature of gifted LLC interests.[27] The court also noted that the formula clause at issue was truly a formula clause that was comparable to the adjustment clause that the court approved in *Petter*[28] and was permissible because it simply corrected the allocation of LLC units among the parents and the donees.[29] It didn't allow the parents to re-claim the gifted units once the gifts had been made if a higher unit value was established post-gift.[30] Also, the court rejected the public policy argument of the IRS even though the case did not involve charitable gifts.

Wandry would be appealable to the U.S. Circuit Court of Appeals to the Tenth Circuit, where there is little if any useful precedent on the matter. While the defined value clause did, in reality, end up returning LLC units to the parents, that is seemingly no different than traditional formula clause language in wills and trusts that split estate assets between a marital trust and bypass trust via defined value clause language.

> **Update:** A notice of appeal in *Wandry* was filed in the Tax Court on August 28, 2012.

Conclusion

Christiansen and *Petter* are important taxpayer victories for estate planners. *Christiansen* could be termed a "landmark" case for validating formula disclaimers and rejecting the IRS's public policy argument against such clauses.[31] However, *Christiansen* does not directly apply to defined-value clauses – the case involved a formula disclaimer rather than an intervivos defined-value clause. But, as noted above, the Fifth Circuit has upheld a defined-value clause,[32] even though the court did not address the IRS public policy argument.

Petter validates defined-value gift clauses for gift tax purposes and provides a roadmap for the methodology to be used in structuring transactions.

In any event, the cases represent a huge blow to the IRS public policy arguments and, taken together, lend tremendous credibility to defined-value clauses for both estate and gift tax purposes.

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[1] Estate of Christiansen v. Comr., No. 08-3844, 2009 U.S. App. LEXIS 24932 (8th Cir. Nov. 13, 2009), *aff'g,* 130 T.C. 1 (2008).

[2] There are two basic types of defined value clauses – formula transfer clauses and formula allocation clauses. For further discussion of such clauses see, McCaffrey, "Tax Tuning The Estate Plan by Formula, Univ. of Miami School of Law, Philip E. Heckerling Institute on Estate Planning, ¶402.4 (1999).

[3] Petter v. Comr., 2009-290.

[4] Hendrix v. Comr., T.C. Memo. 2011-133.

[5] An alternative technique is for the estate plan to leave everything to a specific beneficiary with that beneficiary having the power to disclaim whatever property the beneficiary desires to disclaim with the disclaimed property passing to charity.

[6] See H.R. 436 (proposed estate tax legislation) which the Administration has endorsed.

[7] *Id.* An amended version of H.R. 436 (H.R. 4154) (which the Administration also endorses) would prevent the federal estate tax from being eliminated for deaths in 2010. While the Bill would also prevent the modified carry-over basis rules from taking effect in 2010, under those rules up to $3 million of stepped-up basis can be allocated to assets passing to a surviving spouse, and an additional $1.3 million can be allocated at the executor's discretion to other assets. H.R. 4154 passed the U.S. House on Dec. 3, 2009, with no Republicans supporting the bill and, at the present time, the Bill does not have the necessary 60 votes in the Senate to get the measure to the Senate floor for a vote. A proposal for unanimous consent to continue the federal estate tax for 2010 failed in the Senate on Dec. 16, 2009.

[8] The first case to deal with the IRS public policy arguments was *Procter v. Comr., 142 F.2d 824 (4th Cir. 1944), cert. den., 323 U.S. 756 (1944)*(drafting language specified that if any federal court of last resort determined that any part of the transfer at issue was subject to gift tax, the gift portion "shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the

sole property of Frederic W. Procter free from any trust hereby created"; court ruled that clause imposed impermissible condition subsequent on the transfer in violation of public policy); see also Ward v. Comr., 87 T.C. 78 (1986)(same; gift tax case); Harwood v. Comr., 82 T.C. 239 (1984), *aff'd*, 786 F.2d 1174 (9th Cir. 1986)(same; case involved transfer of limited partnership interests and gift tax); Estate of McLendon v. Comr., T.C. Memo. 1993-459, *rev'd*, 135 F.3d 1017 (5th Cir. 1998)(gift tax case where Tax Court disregarded adjustment clause and appellate court reversed on other grounds).

[9] *Id.*

[10] Treas. Regs. §§26.2642-3(b); 25.2522(c)-3(c)(2)(vi).

[11] The Tax Court ruled that the daughter's disclaimer as to the 75 percent passing to the CLAT did not satisfy all of the Code requirements to be a qualified disclaimer. Estate tax was owed on the enhanced value of the estate due to the disqualification of this portion of the disclaimer. The estate did not appeal this aspect of the case.

[12] Treas. Reg. §20.2055-2(b)(1) specifies that a disclaimer is not a "qualified" disclaimer if the property transferred as a result of the disclaimer is "dependent upon the performance of some act or the happening of a precedent event…".

[13] Remember, the disclaimer as to the 75 percent of the disclaimed property passing to the CLAT was not part of the appeal. See note 10 *supra*.

[14] See Treas Reg. §20.2055-2(b)(1).

[15] 1986-1 T.C. 300.

[16] One clause stated that the transferee was to reconvey the property to the transferor a sufficient amount of the property to reduce the value of the transferred interest to $1,000 as of the date of the gift. The other clause required the transferee to repay the transferor an amount equal to the excess value of the property over $1,000, as finally determined by IRS.

[17] The court also noted that other checks existed to ensure appropriate valuation of estates, including the fiduciary duties of executors and directors of charitable organizations, among others.

[18] T.C. Memo. 2009-280.

[19] *Id.*

[20] In addition, the charities were represented by different legal counsel.

[21] Petter, *et al*. v. Comr., No. 10-71854 (9th Cir. Aug. 4, 2011).

[22] T.C. Memo. 2011-133.

[23] 461 F.3d 614 (5th Cir. 2006), *rev'g in part*, 120 T.C. 358 (2003).

[24] *Id.*

[25] T.C. Memo. 2012-88.

[26] Id.

[27] In any event, the court held that the IRS had not established that the LLC's capital accounts were adjusted to match the how the gifts were categorized.

[28] T.C. Memo. 2009-280.

[29] The court noted that the parents and the donees had "competing interests" in "allocations and *distributions* based on their capital accounts." This is not unlike the charities involved in *McCord, Christiansen* and *Petter* which had an economic incentive and fiduciary duty to determine whether its interest had been valued in the correct manner.

[30] Thus, the court reasoned, *Comr. v. Procter, 142 F.2d 824 (4th Cir. 1944)* was not controlling.

[31] The court's opinion resolves the uncertainty that has surrounded the validity of intervivos defined value clauses (because of the success IRS has had in positing public policy arguments against such clauses).

[32] 461 F.3d 614 (5th Cir. 2006), *rev'g in part*, 120 T.C. 358 (2003).