

Formula and Defined Value Clauses – the Fight against the IRS’s Public Policy Arguments

INTRODUCTION

Some taxpayers seek to make gifts of property to both charitable and non-charitable beneficiaries in such a way that they will avoid paying gift or estate tax. For example, decedents leave a certain dollar amount of their estate to specific beneficiaries with the residuary estate passing to charities that qualify for the estate tax charitable deduction.<sup>1</sup> However, the problem that taxpayers can face using these techniques is that they might own property that is difficult to value. The IRS might prove that the property transferred to the non-charitable beneficiaries (i.e. children) is actually greater in value than what the taxpayer claimed.<sup>2</sup> If the IRS is successful in proving a higher value for the property, then the taxpayer or its estate will incur current gift or estate taxes.

Consequently, taxpayers use defined value or formula clauses to circumvent this problem. By using such clauses, taxpayers can limit the amount of the gift to non-charitable beneficiaries to a specified value and claim a charitable deduction for the greater value allocated to the charitable beneficiaries. The IRS typically contests these clauses by claiming they are against public policy, since such clauses reduce or eliminate the IRS’ incentive to conduct an audit and results in the taxpayer or its estate paying less tax.<sup>3</sup>

Generally, there are two types of defined value clauses.

- 1) A savings clause, which is also known as a formula transfer clause, limits the amount transferred. For example, a taxpayer may transfer to the trustees of a trust a fractional

share of the property (where the fractional share is determined by a formula) and require that if the IRS finds a higher value that the excess be returned to the donor;<sup>4</sup>

- 2) A formula allocation clause allocates the amount transferred among transferees. For example, a taxpayer may transfer all of a particular asset and allocate that asset among taxable and non-taxable transferees by a formula. Some examples of non-taxable transferees include charities and spouses. Under this formula allocation clause, the amount given to a charity, or other non-taxable transferee, is determined by the value of the asset. This asset value is the amount finally determined for gift or estate tax purposes or in an agreement among the transferees.<sup>5</sup>

Even though the formula value clause discussed herein, which is the type of clause used in *Estate of Christiansen*, does not directly apply to defined value clauses, it does, however, operate similar to a defined value clause.<sup>6</sup> Formula clauses involve formulaic gifts that are based on property with a defined value. The value is determined as of the date of the transfer and is going to designated recipients. Any property with a value in excess of that formulaic defined value, determined as of the date of the transfer, would go to a designated charity and would not revert back to the grantor. Thus, if the value of the transferred property exceeds the formulaic defined value, then the property would be reallocated so that the charity would receive the property allocable to the value in excess of the defined value.<sup>7</sup>

The estate planning technique utilized in formula value clauses, for estate tax, and in defined value transfers, for gift tax, involves a charitable lid. A charitable lid is a technique whereby if the IRS reduces a valuation discount during an IRS examination, then the difference, or this

excess amount, goes to the named charity. Thus, a charitable lid puts a lid, or a cap, on the amount of tax owed with the IRS receiving nothing in extra taxes and the charitable organization receiving more in value. For example, a taxpayer gifts away property but provides that to the extent that if the final value of the gift, determined for federal gift or estate tax purposes, exceeds a certain dollar amount, the remaining excess value goes to the named charitable organization. Thus, any increase in value during an IRS examination will only increase the amount that goes to charity and no additional estate or gift tax results due to the increased charitable tax deduction.<sup>8</sup> This can be a very useful estate planning tool especially if there is an increase in the federal estate tax.<sup>9</sup>

The IRS's main position is that these types of clauses should not be recognized for tax purposes on the grounds that it is against public policy, since these clauses would reduce the IRS's incentive to audit returns.<sup>10</sup> Two variations of the charitable lid technique were involved in *Christiansen* and *Petter*. The court in both cases ruled against the IRS and held that such clauses are valid and are not void as being against public policy.<sup>11</sup> This is a very important development in estate planning, since it is the first time in over 60 years that the Federal Circuit Court has addressed public policy arguments raised by the IRS against these types of clauses.<sup>12</sup>

## HISTORICAL BACKGROUND

The first case to deal with the IRS public policy argument against these types of clauses was *Procter*.<sup>13</sup> In *Procter*, the drafting language of a transfer instrument specified that if any federal court of last resort held that any part of the transfer at issue was subject to gift tax, the gift portion of the property "shall automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of"<sup>14</sup> the donor. This type of clause is referred

to as a savings clause, since the property returns to the grantor to the extent of any increase in value. The Second Circuit in *Procter* refused to give effect to savings clauses because it created a condition subsequent to the transfer and violated public policy because it discouraged the collection of tax, obstructed justice by requiring the court to pass on a moot case and caused any court opinion to be a mere declaratory judgment.<sup>15</sup>

Similar valuation adjustment clauses have been rejected by the IRS. In Revenue Ruling 86-41, a valuation adjustment clause provided that the transferee would reconvey to the transferor a sufficient portion of the real estate to reduce the value of the transferred interest to \$1,000 as of the date of the gift. Further, the valuation adjustment clause required that the transferee repay to the transferor an amount equal to the excess of the value of the property over \$1,000, as determined by the IRS. Similar to the Court's reasoning in *Procter*, the IRS rejected both of those provisions because it created a condition subsequent to the transfer and, thus, was ruled by the IRS to be an invalid transfer.<sup>16</sup>

Then, 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 a family limited partnership and transfers of those family limited partnership interests to charitable and non-charitable donees.<sup>17</sup> Although the Fifth Circuit gave effect to defined value clauses in *McCord*, it did not address any public policy arguments. *McCord* involves a gift made by a formula giving specified dollar amounts of family limited partnership interests to trusts for children and to charities. The case involved a married couple who formed a family limited partnership with their children. The family assigned partnership interests to trusts, which was for their children, and to charities. The assignment of the partnership interest contained a formula clause specifying that the couple's

children, trusts for the children's benefit and a charity were to receive limited partnership interests having an aggregate fair market value of \$6,910,933. The remaining portion of the assigned interests, or the excess, was to pass to another charitable organization. A formula clause was used to allocate the interests among the assignees, and the aggregate value of the assigned interests to be transferred was determined by the assignees pursuant to an agreement. Any resulting transfer taxes would be paid by the children.<sup>18</sup>

After the assignment, the family limited partnership redeemed the interests of the charities in accordance with the family limited partnership agreement. The Tax Court held that the value of the gifts, which were the values used by the taxpayers for gift tax purposes, 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. By reducing the value of the gift, the gift tax would be less and less taxes would go to the IRS.<sup>19</sup> The Tax Court held that such an adjustment (the reduction in the value of the gift) was not appropriate, since the parents did not prove that their valuation of such an obligation was reliable.<sup>20</sup> On appeal, the Fifth Circuit reversed the Tax Court. The Fifth Circuit held that the valuation used by the estate was correct, post-gift acts of donees cannot change the value of the interest transferred on the date of the gift, and the value of the gifts was to be determined by the amount of estate tax the donees assumed. In other words, the Fifth Circuit gave effect to defined value clauses by ruling that the Tax Court should have applied the defined value clause under its plain wording.<sup>21</sup> Even though estate planners have been using such clauses for years, and *McCord* gave effect to such clauses, the IRS's public policy objection to defined value clauses was still not addressed by the Fifth Circuit. The Fifth Circuit chose not address this public policy issue, since the IRS did not raise any public policy arguments.<sup>22</sup> Thus, this issue remained unresolved until 2009 when the

Court in *Christiansen* and *Petter* rejected the IRS's public policy objections to valuation adjustment clauses.<sup>23</sup>

## ANALYSIS OF CHRISTIENSEN<sup>24</sup> AND PETTER<sup>25</sup>

### Christiansen<sup>26</sup>

Helen Christiansen, the decedent, and her husband owned and operated cattle ranches in South Dakota as sole proprietorships. The sole proprietorships were ultimately reorganized as two limited Partnerships: MHC Land and Cattle, Ltd. and Christiansen Investments, Ltd. The decedent, under her will, left her entire estate to her daughter and only child, Christine Christiansen, with the daughter having the right to disclaim property. If Christine Christiansen disclaimed any portion of the estate, 75% of the disclaimed property would pass to a charitable lead annuity trust ("CLAT") and 25% would pass to a qualified charitable foundation, which the decedent had established. The trust had a 20-year term and, since the trust is a charitable lead trust with the foundation being the income beneficiary, the foundation is guaranteed to receive an annuity of 7% of the corpus' net fair market value at the time of the decedent's death.<sup>27</sup> If Christine Christiansen was still alive at the end of the 20-year term, then she would receive the balance of the property remaining in the trust.<sup>28</sup>

At the time of the decedent's death, the decedent held a 99 percent limited partnership interest in each entity. Christine Christiansen and her husband were members of Hamilton Investments, which was the general partner of both MHC Land and Cattle, Ltd. and Christiansen Investments, Ltd. The estate had the decedent's limited partnership interests appraised, which resulted in a 35 percent minority interest discount. Thus, the decedent's family limited

partnership interests were reported on the estate-tax return at their discounted value, which was over \$6.5 million. Christine Christiansen retained \$6,350,000 and disclaimed the balance. After Christine Christiansen's disclaimer, \$40,555.80 passed to the Foundation and \$121,667.20 passed to the Trust. The decedent's estate deducted the entire amount that passed to the Foundation. The decedent's estate also deducted the part passing to the Trust that was equal to the present value of 7% of \$121,667.20 per annum for 20 years. As a result, the total deduction for the part passing to the Trust was about \$140,000.<sup>29</sup>

The main issue in *Christiansen*, and the IRS's main concern, is the formula disclaimer language that is coupled with a savings clause, which reads 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.”<sup>30</sup>

The formula disclaimer language 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.<sup>31</sup> This charitable lid technique has great implications and, in regards to the property being disclaimed, comes into play if the estate assigned a value that eventually turned out to be lower than the value determined by the IRS during audit.<sup>32</sup> In *Christiansen*, the formula disclaimer language provided that if value of the property being disclaimed is ultimately lower than the value the IRS believes it should be, then the daughter, Helen Christiansen, would take her \$6.35 million. The estate tax would then be paid on this amount. On the other hand, if the IRS is successful in proving that the value of the decedent's estate is actually greater than the value claimed by the decedent's estate, then the formula value clause, which utilizes the charitable lid technique, would allow for an increase in the estate's charitable deduction without any additional estate tax.<sup>33</sup> Therefore, the IRS in *Christiansen* challenged the valuation of the decedent's family limited partnership interests during audit to ultimately prove that the estate could not claim an increased charitable deduction for the increased value of the disclaimed property passing directly to the Foundation.<sup>34</sup>

The IRS successfully reduced the family limited partnership discounts from 53.2% to 29.2%, after challenging the valuation of the decedent's interests. The fair market value of the decedent's estate was stipulated to be \$9,578,895.93 rather than the \$6,512,223.20 that the estate had reported. The language of the formula disclaimer clause, as applied to the enhanced value of the estate assets, would result in property with a fair market value of \$2,421,671.95 going to the Trust. It would also result in property with a fair market value of \$807,223.98 going to the Foundation. The estate claimed an increased charitable deduction for the full, or enhanced,

amount passing to the Foundation and also for the increased value of the Trust's annuity interest. The IRS, however, objected to any deduction for the property passing to the Trust<sup>35</sup> and objected to any increase in the deduction for the property passing to the Foundation. The IRS raised two arguments in its objection. First, the IRS argued that any amount passing to the charity was contingent on a post-death, post-disclaimer condition subsequent. Second, the IRS argued that the adjustment clause in the disclaimer is void as being against public policy.<sup>36</sup>

As for the IRS's first argument, the Eighth Circuit held that the transfer to the charity was not contingent because the formula clause operated to transfer 25% of the total estate in excess of \$6,350,000, regardless of the estate's ultimate valuation.<sup>37</sup> So, the percentage that is transferred remains at 25%. The IRS's public policy objection specifically states that fractional disclaimers, which have a practical effect of disclaiming all amounts above a fixed-dollar amount, should be disallowed because such disclaimers fail to preserve a financial incentive for the IRS to audit an estate's tax return. The IRS argues that by upholding such a disclaimer, any post-challenge adjustment to the value of an estate would just end up being offset by an equivalent additional charitable deduction. Thus, the disclaimer should be disqualified as against public policy, since such a scenario would provide no possibility of enhanced tax receipts as an incentive for the IRS to audit the return and ensure accurate valuation of the estate.<sup>38</sup>

The Eighth Circuit did agree that a disclaimer of all amounts in excess of a fixed-dollar amount "may marginally detract from the incentive to audit estate tax returns."<sup>39</sup> However, the Eighth Circuit still rejected the IRS's public policy argument against the formula disclaimer language, which limited the tax exposure of the estate regardless of what values the IRS used in the estate tax audit. The Eighth Circuit gave three reasons: (1) the IRS's role is to enforce tax

laws and not to maximize tax receipts; (2) Congress never intended a policy that would encourage the IRS to audit tax returns and, in fact, there is a Congressional policy favoring gifts to charity; and (3) other mechanisms exist to ensure appropriate valuation of estates, including the fiduciary duties of executors and directors of charitable organizations.<sup>40</sup>

In regards to the Court's third reason, the Eighth Circuit further added that state laws impose personal liability on fiduciaries, and state and federal laws impose financial liability or sanctions upon false statements. Furthermore, the beneficiaries taking the disclaimed property have an interest in making certain that the executor or administrator does not under-report the estate's value. In *Christiansen*, the disclaimant was the executor and a board member of the Foundation. Because of the disclaimant's fiduciary obligation, any self-dealing on her part would be a violation of her general legal, fiduciary obligation, and the state attorney general has authority to enforce these fiduciary duties. The Eighth Circuit, thus, held that there are enough mechanisms in place to promote and police the accurate reporting of estate values beyond just the threat of audit by the IRS. The IRS's public policy argument was, therefore, dismissed.<sup>41</sup>

The Eighth Circuit allowed an increase in charitable deduction to reflect the increase in the value of the estate's property that went to the Foundation<sup>42</sup> and recognized formula disclaimer clauses as an effective hedge against valuation adjustments by the IRS.<sup>43</sup> The formula clause used in *Christiansen* was upheld and was distinguished from the savings clause in *Procter* because the decedent in *Christiansen* was giving away a fixed set of rights with uncertain value.<sup>44</sup> The savings clause in *Procter* operated so that the donor takes the property back.<sup>45</sup> Thus, the distinction between *Christiansen* and *Procter* is that the property in *Christiansen* is going to charity as opposed to returning to the donor, which is *Procter*.<sup>46</sup> Further, the IRS audit

in *Christiansen* did not change what the decedent, Helen Christiansen, had given; rather the IRS audit caused a final allocation of the shares that the donees had received.<sup>47</sup> The Court in *Petter* upheld a defined value gift tax clause and again rejected the IRS's public policy-based arguments less than one month after the Eighth Circuit's decision in *Christiansen*.<sup>48</sup>

### Petter<sup>49</sup>

Anne Petter was a schoolteacher in the State of Washington. Her uncle was one of the founders of United Parcel Service of America, Inc. ("UPS"), and she inherited a significant amount of shares from her uncle in 1982. UPS was a privately held company at the time Anne Petter inherited shares of UPS. Anne Petter had three children: Donna, Terry and David.<sup>50</sup>

Anne Petter realized a net worth of about \$12 million from her inheritance by 1998. Anne Petter retained an estate planning attorney to provide a comfortable life for her children and grandchildren and to give some money to charity. She also wanted two of her children, Donna and Terry, to learn how to invest and manage money to eventually manage the family's assets.<sup>51</sup>

The estate planning attorney created an ILIT, a charitable remainder unitrust and formed a single member LLC, Petter Family LLC ("PFLLC"). In addition, utilizing a part-gift/part-sale transaction, the attorney formed two intentionally defective grantor trusts, one for Donna and one for Terry. Donna and Terry each were trustees of their own grantor trust. Anne Petter's third child, David, was disabled and was not involved in the transactions at issue.<sup>52</sup>

UPS went public during the planning phase, which locked-up Anne's shares. The lock-up period ended in May, 2001, at which time Anne's shares were worth \$22.6 million. Thereafter, Anne contributed 423,136 shares of UPS stock worth \$22,633,545 to the PFLLC in return for

22,633,545 membership units. These membership units were divided into three classes: Class A (Anne), Class D (Donna) and Class T (Terry). The holders of each class of units had the right to elect a manager by majority vote. Anne became the manager of the Class A units, Donna managed Class D and Terry managed Class T. Anne, however, maintained a veto power over all corporate decision making.<sup>53</sup>

Anne's attorney formed two intentionally defective grantor trusts to transfer the units to Donna and Terry, since at such time the units were divided into classes. Donna was trustee of her trust as well as a beneficiary along with her descendants. Terry was the trustee of his trust as well as a beneficiary along with his descendants. The transfer of PFLLC units to the trusts was structured as a gift, which was followed by a sale. In March, 2002, Anne Petter transferred PFLLC units to the trusts so that the PFLLC units would make up 10% of the trusts' assets. Three days later, Anne Petter sold to the trusts PFLLC units worth 90% of the trusts' assets in return for promissory notes.<sup>54</sup> With regard to these transfers, Anne Petter also transferred some of the PFLLC units to The Seattle Foundation and the Kitsap Community Foundation, both of which are public charities under internal revenue code §501(c)(3). In addition, both charities are community foundations offering donor-advised funds, which are funds owned and controlled by the charities.<sup>55</sup>

“The division of PFLLC's units among gifts to the trusts and community foundations, and gifts and sales to the trusts, meant that Anne Petter had to value what she was giving and selling.”<sup>56</sup> Anne's attorney used a formula clause to separate the PFLLC units between the charities and the trusts, which would ensure that the trusts did not get so much that Anne would have to pay gift tax, was in accordance with a formula clause. The formula clause for Terry's

transfer document reads in part as follows (Donna's transfer document is similar, except Kitsap Community Foundation is substituted for the Seattle Foundation)<sup>57</sup>:

“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.

The gift documents also provide in section 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.”<sup>58</sup>

Thereafter, Anne Petter transferred 8,459 LLC units in two separate transactions for each of the two grantor trusts and the foundations.<sup>59</sup> The assignment document allocated the units by formula, with the trusts receiving units worth \$4,085,190 "as finally determined for federal gift tax purposes,"<sup>60</sup> and allocated the excess units to charitable foundations.<sup>61</sup> In return for Anne Petter's transfer of the units to the two respective trusts, Donna and Terry, as trustee for their trust, each gave Anne Petter a 20-year \$4,085,190 secured note with quarterly amortized payments. There were reallocation provisions that each party agreed to transfer units to the other

if a party initially received more units than it was entitled to receive based on values as finally determined for federal gift tax purposes.<sup>62</sup>

Anne Petter's attorney, while planning the transaction, used a 40% discount on the market value of the UPS stock. If Anne merely transferred and sold her UPS stock outright, she would have been taxed on the full value of the UPS stock because UPS stock is publicly traded and easy to price. However, a gift of membership units in an LLC is harder to value because provisions in the operating agreement restrict members' rights to sell, and typically no single member is allowed to sell LLC assets without approval of the managers. Thus, this creates the possibility of a more taxpayer-friendly valuation.<sup>63</sup>

Anne's attorney retained an appraisal company to value the units. The appraiser determined the value of each unit to be \$536.20, reflecting a total combined discount of 53% for lack of control and lack of marketability. Based on that appraisal, the attorney allocated the units among the parties to the gift and sale transactions.<sup>64</sup>

In August, 2003, Anne Petter filed a gift tax return reporting the gift and sale transactions. The return described the formula transfers and included copies of detailed documentation for all of the entities and transactions. The IRS then began its audit in January, 2005. Due to the defined value clause used by Anne's attorney, a revaluation of the PFLLC units would trigger a reallocation of the shares from the grantor trusts to the charities and, thus, result in a greater charitable deduction for Anne Petter without any additional gift tax.<sup>65</sup>

The IRS had two main objections to the transaction: (1) The IRS believed that the discount on the units was too aggressive, determined that a 29.2% discount was more appropriate and that

the value of each unit should be much higher than what was reported on the gift tax returns, which would inflate the value passing to the trusts and the charities; and (2) The IRS stated that the formula clauses were void because they are contrary to public policy, which meant that Anne Petter would not get an additional charitable deduction with the units still to be reallocated to the charities.<sup>66</sup> This also would mean that the shares sold to the trusts were sold for “less than full and adequate consideration”<sup>67</sup> and, therefore, were partly transferred by sale and partly by an additional \$2 million taxable gift to each trust.<sup>68</sup>

Although Anne and the IRS reached a compromise on the final value of each unit using a 35% discount, no compromise was made on the formula clause. Anne petitioned the Tax Court asking it to decide whether to honor the formula clause for the gift and the sale. In addition, Anne Petter asked when she may take the charitable contribution deduction for the additional units passing to the foundations, if the formula clause is honored.<sup>69</sup>

The Court in *Petter* ruled that Anne’s transfers and the formulas used to effect those transfers were not void as contrary to public policy. The frustration of public policy that would be caused by allowing the contested deduction must be “severe and immediate,”<sup>70</sup> for the public-policy exceptions to the Internal Revenue Code to be valid.<sup>71</sup>

The general public policy encourages gifts to charities.<sup>72</sup> Further, the charitable foundations in *Petter* were not helping Anne Petter reduced her tax bill.<sup>73</sup> Anne's gift made the charities equal members in the PFLLC, giving to charities power to protect their interests through suits for breach of the operating agreement or breach of a manager's fiduciary duties, as well as for the right to vote on questions such as amending the operating agreement and adding new members.

Thus, Anne's gift was made in good faith and, thus, in accordance with Congress's overall policy of encouraging gifts to charities.<sup>74</sup>

Similar to the Eighth Circuit's opinion, Anne's gifts were not as susceptible to abuse as the IRS maintains. Even though there is no executor to act as a fiduciary, as in *Christiansen*, the PFLLC managers were the fiduciaries for the foundations per the terms of the gift.<sup>75</sup> Thus, the PFLLC managers could effectible police the trusts for improper dealings that could lead to misallocated gifts.<sup>76</sup> Donna and Terry were managers of their respective units and also trustees and beneficiaries of the trusts. So, they owed a duty of loyalty and duty of care to the members, which included the foundations. Thus, Donna and Terry were prevented from engaging in grossly negligent or reckless conduct, intentional misconduct or knowing violations of the law.<sup>77</sup> The directors of the Seattle Foundation and the Kitsap Community Foundation also owed fiduciary duties to their organizations to ensure that the appraisal was satisfactory before signing off on the gift. The directors of the foundations also had a duty to bring a lawsuit if it was later determined that the appraisal was wrong.<sup>78</sup>

The court acknowledged the issue of a recipient not wanting to alienate a donor. However, it observes that the transfers were irrevocable and that any lawsuits by a foundation would be against the trusts, not the donor.<sup>79</sup> The IRS Commissioner could revoke the foundations' 501(c)(3) exempt status "if he found they were acting in cahoots with a tax-dodging donor,"<sup>80</sup> and the state's attorney general "is also charged with enforcing charities' rights."<sup>81</sup>

Anne's gift was made in good faith, and Anne was not using these clauses solely to avoid tax. Due to the above-mentioned enforcement mechanisms, these types of formula clauses do not cause severe and immediate frustration of the public policy in favor of promoting tax audits.<sup>82</sup>

The Court in *Petter* also recognized that the Code and Regulations allow the use of formula clauses in various circumstances, so that formula clauses should not be preemptively declared to be against public policy in all circumstances. For example, formula descriptions of annuity amounts for charitable remainder annuity trusts under Regulation §1.664-2(a)(1)(iii), formula marital deduction clauses in wills under Revenue Procedure 64-19, formula generation-skipping transfer exemption allocations under Regulation §26.2632 -1(d)(1) and formula descriptions of annuity amounts in grantor retained annuity trusts under Regulation s5.2702-3(b)(1)(ii)(B) are all sanctioned formula clauses. Therefore, there is no general public policy against formula clauses.<sup>83</sup> This acknowledgment is particularly helpful to taxpayers.

The IRS argues that the similar clauses above are different from the formula clause at issue, since money passing under the similar clauses above will not escape taxation. This is not true. Formula provisions in charitable remainder trusts under Internal Revenue Code §664 do escape taxation, since the corpus of the trust will pass to a charity tax-free.<sup>84</sup>

Anne's transfers amounted to gifts of an aggregate and set number of units, when evaluated at the time she made them, to be divided at a later date based upon values as finally determined for federal gift tax purposes. The formula clause used to "effect these transfers were not void as contrary to public policy, as there was no 'severe and immediate' frustration of public policy as a result, and indeed no overarching public policy against these types of arrangements in the first place."<sup>85</sup>

In regards to when Anne Petter was entitled to claim a charitable income tax deduction for her gifts of the additional units to the foundations due to the revalued membership unit price as finally determined for gift tax purposes, the Court found that the deduction should be taken at the

time the gift was made in 2002. A gift tax charitable deduction is allowed for the year of the original transfer rather than in a later year when the reallocation was made after the value for federal gift tax purposes was finally determined.<sup>86</sup>

The IRS argued that this case is similar to *Commissioner v. Procter*. In *Procter*, the taxpayer had transferred property to trusts for his children. The taxpayer then provided that if the value transferred was determined to be in excess of his gift tax exemption, then the excess amount of property reverted to him. This was an attempt to undo a gift by the using a condition subsequent, and this condition subsequent was held to be contrary to public policy.<sup>87</sup> It would not only frustrate tax collection, it would also require courts to pass on meaningless cases. If the court decided a gift had occurred, then the condition subsequent would undo the gift and there would have been no point in the court hearing the case to determine whether there was a gift.<sup>88</sup>

However, the formula clause in *Petter* does not completely share the same characteristics as a prohibited *Procter* savings clause, which returns property to the grantor to the extent of any finally determined increases in value. Instead, under a *Petter*-type formula clause, the taxpayer gifts away the same property no matter what the final valuation of the gifted property, with the only uncertainty being who receives the gift based on values finally determined for federal gift tax purposes. So, a taxpayer using the *Petter* defined value clause, or defined formula clause, is not trying to get any property back if the value turns out to be higher than expected. The taxpayer transfers the entire interest and parts with all of the property. The only thing that a subsequent valuation affects is who gets the property as between the recipient's of the gift and the charities. After a final determination of the value of the gift for federal gift tax purposes, a

higher value means that the charities would get more and other recipients (children) would get less.<sup>89</sup>

The Court's determination was meaningful as it allocated the property between the children and the charities and, thus, distinguished *Petter* from *Procter*. The reason for this distinction is primarily due to the general public policy that gifts to charities should be encouraged.<sup>90</sup> Thus, there was no taxable gift by Anne Petter.<sup>91</sup> A *Procter* savings clause does violate public policy,<sup>92</sup> and a *Petter* formula value clause, or defined value clause, does not violate public policy.<sup>93</sup>

## SUMMARY

One of the great challenges in planning intra-family transfers is determining the value of the assets to be transferred. While taxpayers generally obtain independent appraisals, the IRS is not bound by the appraisal and frequently does challenge them; particularly the amount determined by the appraiser for minority interest and other discounts. Thus, it is difficult for estate planners to assure that they are not making taxable gift. A gift will result where an asset is sold to children or trusts for their benefit, if the value is ultimately determined for federal gift tax purposes to be higher than the purchase price.<sup>94</sup>

*Christiansen* and *Petter* are important taxpayer victories for estate planners. Under these types of formula and defined value clauses, a taxpayer is given some comfort and protection against the risk of making an unintended gift by providing that a charity will receive any portion of the transfer above a fixed value.

*Christiansen* is significant for validating formula disclaimers and rejecting the IRS's public policy argument against such clauses. *Christiansen* involves a formula disclaimer rather than an intervivos defined value clause and so does not directly apply to defined value clauses.<sup>95</sup> The Fifth Circuit has upheld defined value clauses in *McCord*, albeit the Court did not address the IRS public policy argument. *Petter* directly addresses the validity of defined value clauses in inter vivos gift and sale transactions that have the effect of limiting gift tax exposure, even if this case still does not resolve all issues regarding the effectiveness of defined value clauses.<sup>96</sup>

There are advantages and disadvantages to using a *Christiansen*-type formula clause where the bequest is to the children of a grantor (or a non-spouse) and the disclaimed property passes to charity. One advantage is that the intended beneficiary has the option to pay more tax or to disclaim to the contingent beneficiary who was originally selected by the donor. The advantage is that this weakens the IRS's arguments under *Procter*. A second advantage is that this type of transaction is similar to letter rulings that have authorized straightforward formula disclaimers.<sup>97</sup>

Some of the disadvantages to using this type of clause include: (1) the disclaimants cannot be beneficiaries of the trust to which the disclaimed assets pass; (2) the disclaimants cannot have any fiduciary power over disclaimed assets that are not limited by an ascertainable standard; (3) there are mechanical issues where there are multiple beneficiaries in a trust, such as which beneficiary must sign the disclaimer; and (4) if adult beneficiaries are not permitted to disclaim on behalf of minor beneficiaries under state law, then difficulties arise in obtaining appropriate disclaimers from the minor beneficiaries so that the disclaimed assets can pass to a charity.<sup>98</sup>

Property may avoid a gift tax deficiency under a typical defined formula clause. But, less property than what was previously anticipated may be transferred, even if the value of property is

appreciated. Under a defined value clause, a grantor will transfer its entire interest in the property and the allocation of what is received in return may be adjusted. A grantor trust purchases an entire interest in property from a grantor in return for a fractional share of asset held by the grantor trust. The numerator of the fractional share is the fair market value of the property, as finally determined for federal gift tax purposes, and the denominator is the value of the asset. If the IRS challenges the valuation, then the value of the property that is received in the exchange is adjusted instead of what the grantor transferred. The reason for this is that the grantor transfers the entire property and parts with all of the interest in the property.<sup>99</sup>

Defined valuation clauses can also be useful to plan against any possible retroactive changes in tax laws governing family limited partnerships, since there is no published authority against them. The Courts in *Christiansen* and *Petter* rejected the IRS argument that the formula and defined value clause was void for as contrary to public policy, because the formula and defined value clause allocated value among the recipients and did not undo a transaction by giving property back to a grantor (as in a *Procter* savings clause). Defined value clauses are worthwhile and are best in situations that involve hard to value assets, since the clause protects against the risk that the value used in a large transaction is incorrect.<sup>100</sup>

Using a formula allocation clause is more advantageous than using a savings clause (also known as a formula transfer clause). Formula transfer clauses are simpler to administer and do not require involving a third party. However, formula allocation clauses fall more directly within the underlying principle in *Christiansen* and *Petter* of rejecting the IRS's public policy arguments.<sup>101</sup>

One of the first reasons the Eighth Circuit in *Christiansen* rejected the IRS's public policy argument was that the IRS has a duty to enforce tax laws instead of trying to raise revenue. This reasoning applies to all defined value clauses. The fiduciary duty reasons the Eighth Circuit provided apply mainly to formula allocation clauses and do not apply as strongly to formula transfer clauses. If the recipient in a formula transfer clause is a trust, then the fiduciary has no duty to determine whether an excessive value is or is not being transferred to the trust.<sup>102</sup>

Under the *Christiansen* and *Petter* formula and defined value clauses, a subsequent audit by the IRS triggers a final allocation of the gifted property among the donees and does not change what the donor gave. Under a formula transfer clause, whatever does not pass under the formula is retained by the donor. Thus, this could be viewed by courts as a taking back of property by the donor after the value of the property is finally determined for gift tax purposes, in which case it could be viewed as being more closely related to a *Procter*-type savings clause.<sup>103</sup>

The fact that charities were recipients of the excess amounts of property in *Christiansen* and *Petter* was crucial to the distinctions between the formula and defined value clauses and the savings clause in *Procter*. Excess amounts of property pass to charities under the formula and defined value clauses, and there is a general public policy favoring charitable gifts. Further, the IRS Commissioner has the ability to revoke the 501(c)(3) exempt status of charities if there is any wrongdoing by the charities.<sup>104</sup>

A charity must be used to more closely resemble the facts of *Christiansen* and *Petter*, since the underlying principles would then apply more directly.<sup>105</sup> Using a charity is imperative to receiving a charitable tax deduction to eliminate gift and estate tax. It is also advantageous to

have true charitable intent rather than using charities to solely avoid taxes. Anne Petter had charitable intent, which is a fact that seemed to influence the Court.<sup>106</sup>

It is helpful for charitable recipients to be actively involved in the planning process, if achieving the same outcome as in *Christiansen* and *Petter* is desired. When Anne Petter made the charities equal members in the PFLLC, gave the charities the right to file lawsuits for breach of the operating agreement or breach of a manager's fiduciary duties and gave the charities the right to vote on matters, such as amending the operating agreement and adding new members, then the Court felt assured that Anne Petter was making a good faith gift to charities. Managers of a family LLC will owe a charity a fiduciary duty, and each party will assure that neither is being cheated, if both a charity and a family trust are partners with each other.<sup>107</sup>

Thus, it is important that formula allocation clauses require that the parties involved have fiduciary duties to enforce the determination of the value of the property. To meet this requirement, a formula allocation clause should allocate the amount that is in excess of the formula amount either to a charitable foundation or to a trust where the parties have fiduciary duties and have an obligation to ensure that the entity is receiving its appropriate share under the formula transfer. It would be more advantageous to have a professional, independent fiduciary implement the formula allocation. It is best to use a fiduciary that is neither the donor nor the beneficiary of the trust, since the donor or the beneficiary could have an incentive to violate fiduciary duties.<sup>108</sup>

Anne Petter's attorney used a professional appraiser to appraise the value of the gift for purposes of making the original allocation under the formula assignment.<sup>109</sup> Using a reputable

appraiser will provide the appearance that the grantor is making a good faith gift or transfer, and it will aid in avoiding the appearance that the donor is using the formula just to avoid taxes.<sup>110</sup>

## CONCLUSION

There is a difference between *Procter*, on the one hand, and both *Christiansen* and *Petter*, on the other hand, that is important. In *Procter*, if a court determined that any portion of a gift would be subject to gift tax, then that portion would revert back to donor.<sup>111</sup> The formula and defined value clauses in *Christiansen* and *Petter* operate so that any gift amount, which on a revaluation by the IRS would be subject to estate or gift tax, would pass to a charity and not revert back to the donor. These clauses are permissible, since public policy weighs in favor of giving gifts to charity.<sup>112</sup> *Procter* still applies to situations where a grantor directs any portion of a gift, which is a taxable, to revert to the grantor. The transfer in such a situation would be considered to be conditional and void pursuant to *Procter*.<sup>113</sup> Thus, *Procter* is still good law. In any event, *Christiansen* and *Petter* represent a huge setback to the IRS's public policy arguments and, taken together, authorize the use of formula clauses and defined value clauses for both estate and gift tax purposes.<sup>114</sup>

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<sup>1</sup> Rubin, Charles. "GIFT OVER' FORMULA CLAUSE RESPECTED BY TAX COURT." *USLaw*. 25 Dec. 2009. [http://www.uslaw.com/library/Taxation\\_&\\_Estate\\_Planning/GIFT\\_FORMULA\\_CLAUSE\\_RESPECTED\\_TAX\\_COURT.php?item=675765](http://www.uslaw.com/library/Taxation_&_Estate_Planning/GIFT_FORMULA_CLAUSE_RESPECTED_TAX_COURT.php?item=675765). 25 Mar. 2010.

<sup>2</sup> See *Estate of Helen Christiansen v. Commissioner of Internal Revenue*, 586 F.3d 1061; 2009 U.S. App. LEXIS 24932 (8<sup>th</sup> Cir. 2009), *affirming*, 130 T.C. 1 (U.S. Tax Ct. 2008); *Estate of Anne Y. Petter v. Commissioner of Internal Revenue*, T.C. Memo. 2009-280, 2009 WL 4598137 (U.S. Tax Ct. 2009).

<sup>3</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. No. 1; *Estate of Petter* T.C. Memo. 2009-280.

<sup>4</sup> 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).

<sup>5</sup> *Id.* at ¶402.4

<sup>6</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 16-17.

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<sup>7</sup> "TAX NOTES - WEEKLY ANALYSIS: Formula Clauses - Hedging Value and Legislative Risks." LexisNexis Communities. 16 Mar. 2010. Mar. 25, 2010  
<[http://www.lexisnexis.com/Community/taxlaw/blogs/taxanalystsnewsheadlines/archive/2010/03/24/TAX-NOTES-\\_2D00\\_-WEEKLY-ANALYSIS\\_3A00\\_-Formula-Clauses-\\_2D00\\_-Hedging-Value-and-Legislative-Risks.aspx](http://www.lexisnexis.com/Community/taxlaw/blogs/taxanalystsnewsheadlines/archive/2010/03/24/TAX-NOTES-_2D00_-WEEKLY-ANALYSIS_3A00_-Formula-Clauses-_2D00_-Hedging-Value-and-Legislative-Risks.aspx)>

<sup>8</sup> Leibell, David Thayne, "Will *Petter v. Commissioner* shut down the Internal Revenue Service's attack on charitable lids?" *Trusts and Estates* (2010), available at [http://trustsandestates.com/wealth\\_watch/charitable-lids-win-in-petter0120/index.html](http://trustsandestates.com/wealth_watch/charitable-lids-win-in-petter0120/index.html) (last visited March 25, 2010).

<sup>9</sup> "H.R. 436--111th Congress: Certain Estate Tax Relief Act of 2009 (Introduced in House)." Library of Congress. 2009. March 25, 2010 <<http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.436:>>

<sup>10</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 16; *Estate of Petter* T.C. Memo. 2009-280 at 12.

<sup>11</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 18; *Estate of Petter* T.C. Memo. 2009-280 at 16.

<sup>12</sup> *Commissioner of Internal Revenue v. Procter*, 142 F.2d 824 (4<sup>th</sup> Cir. 1944), *cert. denied*, 323 U.S. 756 (1944).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 827.

<sup>15</sup> *Id.* at 827.

<sup>16</sup> Rev. Rul. 86-41, 1986-1 C.B. 300

<sup>17</sup> *McCord v. Commissioner of Internal Revenue*, 461 F.3d 614 (5<sup>th</sup> Cir. 2006), *rev'g in part*, 120 T.C. 358 (2003).

<sup>18</sup> *Id.* at 618.

<sup>19</sup> *Id.* at 619-620

<sup>20</sup> *Id.* at 622

<sup>21</sup> *Id.* at 632

<sup>22</sup> *Id.* at 632; LISI Estate Planning Newsletter #1578 (January 14, 2010) at [http://www.leimbergservices.com.\(LISI\)](http://www.leimbergservices.com.(LISI)).

<sup>23</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 18; *Estate of Petter* T.C. Memo. 2009-280 at 16.

<sup>24</sup> *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. No. 1.

<sup>25</sup> See *Estate of Petter* T.C. Memo. 2009-280.

<sup>26</sup> *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. No. 1.

<sup>27</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 3-4; 26. C.F.R. § 26.2642-3(b) (2009); 26. C.F.R. § 25.2522(c)-3(c)(2)(vi) (2009).

<sup>28</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 3.

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<sup>29</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 5-6.

<sup>30</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 5.

<sup>31</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 5.

<sup>32</sup> McEowen, Roger A. "Eighth Circuit (and Tax Court) Affirms 'Charitable Lid' Estate Planning Technique – Breathes New Life Into Defined-Value Clauses." *Iowa State University Center for Agricultural Law and Taxation* (November 16, 2009, Updated Dec. 12 and 16, 2009): at [www.calt.iastate.edu](http://www.calt.iastate.edu) <<http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20Eighth%20Circuit%20Affirms%20Charitable%20Lid%20Estate%20Planning%20Technique.pdf>> 25 Mar. 2010.

<sup>33</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 16.

<sup>34</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 16-17.

<sup>35</sup> The Court held that the estate was not allowed to receive a deduction for the value of the remainder interest that might go to the daughter. The Court reasoned that one cannot disclaim to a trust where the disclaimant is also the beneficiary. For a deduction to be allowed, the disclaimed interest should be able to pass without direction on the disclaimant's part and to a person other than the disclaimant. The daughter retained a contingent-remainder interest in the Trust's property. The disclaimed interest in the property was not severable property or an undivided portion of the property, which means that the disclaimer was not a qualified disclaimer under 26. C.F.R. § 25.2518-2(e)(3) (2009). Thus, the daughter's disclaimer failed, which prevented the estate from deducting the value of the property ending up in the Trust. See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 9-11.

<sup>36</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 7, 14-15.

<sup>37</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 15-16.

<sup>38</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 16.

<sup>39</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 17.

<sup>40</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 17.

<sup>41</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 17-18.

<sup>42</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 12.

<sup>43</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 17.

<sup>44</sup> See *id.* 586 F.3d 1061, *aff'g*, 130 T.C. at 15, 17.

<sup>45</sup> See *Procter*, 142 F.2d at 825-826.

<sup>46</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 15; *Procter*, 142 F.2d at 825-826.

<sup>47</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 15.

<sup>48</sup> See *Estate of Petter* T.C. Memo. 2009-280.

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<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 1.

<sup>51</sup> See *id.* at 1.

<sup>52</sup> See *id.* at 1-2.

<sup>53</sup> See *id.* at 2.

<sup>54</sup> See *id.* at 3.

<sup>55</sup> See *id.* at 4.

<sup>56</sup> See *id.* at 4.

<sup>57</sup> See *id.* at 4.

<sup>58</sup> See *id.* at 4.

<sup>59</sup> See *id.* at 6.

<sup>60</sup> See *id.* at 4.

<sup>61</sup> See *id.* at 5.

<sup>62</sup> See *id.* at 4.

<sup>63</sup> See *id.* at 7.

<sup>64</sup> See *id.* at 7-8.

<sup>65</sup> See *id.* at 8.

<sup>66</sup> See *id.* at 8.

<sup>67</sup> See *id.* at 8.

<sup>68</sup> See *id.* at 8.

<sup>69</sup> See *id.* at 9.

<sup>70</sup> See *id.* at 12 citing *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 16.

<sup>71</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 12.

<sup>72</sup> See *id.* at 12.

<sup>73</sup> See *id.* at 13.

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<sup>74</sup> See *id.* at 16.

<sup>75</sup> See *id.* at 13.

<sup>76</sup> See *id.* at 13.

<sup>77</sup> See *id.* at 13.

<sup>78</sup> See *id.* at 13.

<sup>79</sup> See *id.* at 14.

<sup>80</sup> See *id.* at 14.

<sup>81</sup> See *id.* at 14.

<sup>82</sup> See *id.* at 14 citing *Commissioner v. Tellier*, 383 U.S. 687, 694, 86 S.Ct. 1118, 16 L.Ed.2d 185 (1966).

<sup>83</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 14.

<sup>84</sup> See *id.* at 15.

<sup>85</sup> See *id.* at 16.

<sup>86</sup> See *id.* at 16.

<sup>87</sup> See *Procter*, 142 F.2d at 828.

<sup>88</sup> "Taxpayers prevail on use of fixed dollar formula valuation clauses." *Lexology*. 31 Dec. 2009.  
<<http://www.lexology.com/library/detail.aspx?g=e11e16c6-f90a-42f6-9bd5-e1e52e657f88>> 25 Mar. 2010.

<sup>89</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 12.

<sup>90</sup> See *id.* at 17.

<sup>91</sup> See *id.* at 17.

<sup>92</sup> See *Procter*, 142 F.2d at 828.

<sup>93</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 17.

<sup>94</sup> See "Taxpayers prevail on use of fixed dollar formula valuation clauses."

<sup>95</sup> See *McEowen* at 5.

<sup>96</sup> See LISI Estate Planning Newsletter #1578.

<sup>97</sup> Akers, Steve R. "TRANSFER PLANNING, INCLUDING USE OF GRATS, INSTALLMENT SALES TO GRANTOR TRUSTS, AND DEFINED VALUE CLAUSES TO LIMIT GIFT EXPOSURE." *NAECP Journal of Estate & Tax Planning*. (12 June 2008): 90. <<http://www.naepc.org/journal/issue05n.pdf#search=%22petter%22>> 25 Mar. 2010.

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<sup>98</sup> See Akers at 90.

<sup>99</sup> American Bar Association, Section on Real Property, Trust and Estate Law, *43rd Annual Philip E. Heckerling Institute on Estate Planning Reports 1-20*, 171, available at [http://www.abanet.org/rppt/meetings\\_cle/heckerling/2009/Heckerling\\_Report\\_2009.doc](http://www.abanet.org/rppt/meetings_cle/heckerling/2009/Heckerling_Report_2009.doc) (last visited Mar. 25, 2010).

<sup>100</sup> American Bar Association at 65.

<sup>101</sup> See LISI Estate Planning Newsletter #1578.

<sup>102</sup> See LISI Estate Planning Newsletter #1578.

<sup>103</sup> See LISI Estate Planning Newsletter #1578.

<sup>104</sup> See LISI Estate Planning Newsletter #1578.

<sup>105</sup> See LISI Estate Planning Newsletter #1578.

<sup>106</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 6.

<sup>107</sup> See LISI Estate Planning Newsletter #1578.

<sup>108</sup> See LISI Estate Planning Newsletter #1578.

<sup>109</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 7.

<sup>110</sup> See LISI Estate Planning Newsletter #1578.

<sup>111</sup> See *Procter*, 142 F.2d at 828.

<sup>112</sup> See *Estate of Petter* T.C. Memo. 2009-280 at 12.

<sup>113</sup> See *Procter*, 142 F.2d at 828.

<sup>114</sup> See *Estate of Christiansen* 586 F.3d 1061, *aff'g*, 130 T.C. at 18; *Estate of Petter* T.C. Memo. 2009-280 at 17.