UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40584

ESTATE OF GORDON B. McLENDON,
Deceased, GORDON B. McLENDON, JR.,
Independent Executor,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

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ESTATE OF GORDON B. McLENDON,
Deceased, Donor, GORDON B. McLENDON,
JR., Independent Executor,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the United States Tax Court

December 28, 1995

Before DAVIS, and JONES, Circuit Judges, and HINOJOSA*, District Judge.

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* District Judge of the Southern District of Texas, sitting by designation.

EDITH H. JONES, Circuit Judge:**

This case involves determination of the estate and gift tax due from the Estate of Gordon R. McLendon, a fabled Texas broadcaster. On March 5, 1986, McLendon transferred certain remainder interests in two family partnerships to his son and to a trust for the benefit of his daughters by means of an annuity arrangement, reserving for himself a life estate in each. He died only five months later. Valuation and taxation of those interests turns on the characterization of those interests, a question of Texas limited partnership law, and on estimation of McLendon's life expectancy. The Tax Court determined both these questions adversely to the Estate and found that the Estate owed an additional $1,461,005 in federal estate tax and $11,165,696 in federal gift taxes. For the following reasons, we reverse.

I.

FACTS

In the early 1950s, Gordon and his father B.R. McLendon organized the 458-station Liberty Broadcasting System, and for thirty years Gordon was involved in the operation and ownership of radio and television stations and movie theaters. Certain of these business operations were organized and administered in the form of two family-controlled partnerships -- Tri-State Theaters and The McLendon Company. From stipulated facts, the Tax Court made

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

voluminous findings relating the basic structure and nature of these partnerships,[1] a summary of which follows.

a. Tri-State Theaters -- By partnership agreement dated December 10, 1981, Gordon and his son Gordon B. McLendon, Jr. ("Bart"), as general partners, joined with Gordon's mother and father, Jeanette and B.R. McLendon, as limited partners, to form a Texas limited partnership known as Tri-State Theaters. This limited partnership resulted from the restructuring of a general partnership that had been owned by the McLendon family since the 1930s. By the date of the disputed transfer, March 5, 1986, Gordon's mother and father had passed away and their estates had elected to retain their interests in Tri-State. Gordon and Dorothy M. Manning were independent co-executors of B.R.'s estate. Bart was the executor of Jeanette's estate.[2] Tri-State's principal business activities in 1986 were leasing of real estate for drive-in theaters and management of its investments.

The original partnership agreement provided that the general partners would have total control over all daily partnership matters, and prohibited admission of new limited or general partners without the consent of all partners. Tri-State

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[1] See Opinion of the Tax Court, pp. 15-24.

[2] On March 5, 1986, the Tri-State partnership interests were held as follows:

General Partners:	**Gordon**	30%
	Bart	10%
Limited Partners:	**Estate of B.R.** (Gordon & Dorothy - coexecutors)	30%
	Estate of Jeanette (Bart - executor)	30%

Agreement, § 7.04. Further, the agreement provided a right of first refusal to the existing general partners before any transfer or disposition of a partnership interest by any partner. § 9.04. In the event of the death of a general partner, the surviving general partner would have the right to purchase the decedent's interest. However, the original agreement called for the liquidation of the partnership at Gordon's death. § 10.01(c).

On May 30, 1985, Tri-State's partnership agreement was amended to delete § 10.01(c) (requiring liquidation on Gordon's death) and to revise § 9.04 such that a testamentary transfer of a general partner's interest would not trigger the right of first refusal/buy-back provisions. Jeanette passed away on July 25, 1985, but her estate elected to retain her interest in Tri-State.

On August 23, 1985, Gordon and Bart further amended the Tri-State limited partnership agreement to provide that upon Gordon's death or disability, Bart would have sole and exclusive management control of the partnership, and that Bart would have the authority to expel any partner who might institute legal proceedings contesting his managerial decisions. Further, each partner irrevocably waived the power to dissolve and terminate the partnership and the right to seek a court decree of dissolution. § 10.01(c) (amended).

b. The McLendon Company -- By partnership agreement dated November 20, 1972, Gordon and his parents formed a Texas general partnership known as The McLendon Co. for the purpose of assuming the business theretofore conducted by The McLendon Corp.

By 1986, The McLendon Co. was operating primarily as an investment company holding real estate, ancient coins and antiquities, and short-term money funds. The company had four employees including an accountant, two clerks, and a secretary. At the time of formation, the partners' interests were held as follows: B.R. held 50%, Gordon held 49%, and Jeanette held 1%. Following the deaths of B.R. and Jeanette, the partnership continued with the successors in interest of each of their estates (as above). As a consequence of Texas community property laws, each estate held a 25.5% interest in The McLendon Co. In August 1985, Gordon assigned a 3% percent interest of The McLendon Co. to Bart. By the time of the disputed transfers, the interests in The McLendon Co. were held thus:

Gordon	46.0%
Bart	3.0%
Estate of B.R.	25.5%
(Gordon & Dorothy - coexecutors)	
Estate of Jeanette	25.5%
(Bart - executor)	

The original McLendon Co. agreement provided for B.R. and Gordon to be managing partners. The McLendon Co. Partnership Agreement § 6. As in the Tri-State Agreement, transfer of partnership interests without the consent of the other partners was prohibited. Also, in the case of retirement or death of a partner, the other partners had first right to purchase the interests or terminate and liquidate the partnership. Id. On August 23, 1985, Gordon and Bart executed amendments that mirrored the amendments to the Tri-State agreement (made the same day). The amendments' preamble noted a desire, acknowledged by the Tax Court, to protect control of the partnership.[3] The amendments provided that Bart would be the sole and exclusive managing partner on Gordon's death, and that any partner contesting the managing partner's management decisions was subject to expulsion by the managing partner (without causing dissolution or liquidation of the partnership). Further, each partner irrevocably waived the power to dissolve and terminate the partnership as well as the right to seek a court decree for that purpose.

The Tax Court heard testimony from Jean Pallas, now Chief Financial Officer for both partnerships. As an accountant with Peat Marwick who prepared partnership returns for the partnerships beginning in 1983, and later as a fulltime employee of the partnerships, Pallas was familiar with the details of the family's financial and business matters. The Tax Court recounted:

> Pallas was present at a meeting in August 1985, during which some of the previously described amendments to the Tri-State and McLendon Co. partnership agreements were adopted. Pallas believed that the amendments were adopted for the primary purpose of ensuring that the partnerships would continue in an orderly fashion with Bart firmly in control. From Pallas' perspective, the amendments reflected Gordon's concern that his daughters did not possess the business acumen needed to manage the partnerships. Pallas was

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[3] Specifically the preamble stated:

> In order to provide strong, effective, consistent management for and thereby protect and preserve the assets of THE MCLENDON COMPANY, . . . the undersigned being all of the current partners of the Partnership and having agreed and hereby agreeing, pursuant to Section 10 of the Partnership Agreement, to continue the partnership with the successors in interest of B.R. MCLENDON and JEANETTE MCLENDON, both deceased, do hereby amend the Partnership Agreement as follows: . . .

> also aware that Gordon's daughters had caused discord within the family by bringing a lawsuit against their maternal grandparents' estates. Finally, Pallas believed that Gordon was concerned that the executors named in his mother's will, including his former wife, were not prepared to act in the best interests of the partnerships.

Opinion of the Tax Court, p. 24.

c. Gordon's Medical Condition -- Gordon was diagnosed with esophageal cancer in May 1985. Although Gordon's condition initially improved following radiation therapy, the cancer recurred in September 1985. From October 1985 through April 1986, Gordon received six courses of chemotherapy from M.D. Anderson's world-renowned cancer treatment facility. On December 3, 1985, after three courses of chemotherapy, Gordon's doctor wrote on his discharge summary:

> The patient had an esophagogastroduodenoscopy on November 26, 1985, and it showed complete endoscopic remission confirmed by multiple biopsies of the affected area.

On December 5, 1985, Gordon attempted suicide by shooting himself in the head with a handgun. Gordon's note indicated his belief that he would eventually succumb to the cancer and that he did not want to prolong the suffering of his family. After being hospitalized for over a month for treatment of injuries from the failed suicide, Gordon began a fourth course of chemotherapy. In late January 1986, on his return home, Gordon received periodic in-home examinations and treatment from Dr. Gruebel. Dr. Gruebel's impression at the time was that he was doing well.

In early February 1986, Gordon fell at home and was admitted to the hospital for treatment of his injuries. On February 14, 1986, while hospitalized, Gordon purportedly dictated[4] a letter to Dr. Freireich, his oncologist, which evidenced a renewed sense of confidence. Gordon stated that he was feeling much better even though the chemotherapy was described as "very, very debilitating." Stating that he was "beginning to make plans for the rest of my life," Gordon inquired specifically about his "total remission" and prognosis for the future asking, "Can I make long term plans?" Gordon's doctor responded on February 19, 1986. Advising against further surgical procedures, the doctor noted:

> The objective evidence that we have has failed to demonstrate any residual disease. This includes endoscopy with biopsies of the esophagus which have proven to be negative on several occasions and the repeated x-ray examinations by CT scan which fail to reveal any evidence of residual malignancy. [By] clinical and laboratory objective criteria, the present condition of your illness must be characterized as "complete remission". The word remission is used advisedly, because the risk of recurrence is still much in the picture. On the other hand patients who are cured of their disease are exclusively drawn from the population of patients who have a "complete remission." To state that positively, you are certainly a candidate for long term control which fulfills medical and lay criteria for curability. Unfortunately the maturity and quantity of our clinical data does not permit good estimates of the risk of recurrence in your specific instance. It is therefore necessary for me as a physician, to

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[4] The letter presented to the Tax Court was apparently dictated, but never signed. The initials of Gordon's personal Secretary, Billie P. Odom, were on the bottom of the letter. Odom was not called to explain the circumstances surrounding the letter. However, the record contains a responsive letter from Gordon's doctor dated February 19, 1986, indicating receipt of a letter from Gordon dated February 14, 1986.

> advise you of the risk that the disease might recur, but to state frankly and without hesitation that the possibility that your disease has been permanently eradicated is definite and significant and in my professional opinion, should form the basis for your planning for the future.
>
> Sincerely,
> Emil J. Freireich, M.D., D.Sc. (Hon.)

Gordon returned home under 24-hour care from a staff of private duty nurses. Notes taken by these nurses show that during the period March 2 through March 5, 1986, Gordon was able to take short walks and perform minor tasks, but was at times sick to his stomach, was in constant need of pain medication, and was receiving artificial sustenance to ensure proper caloric intake. Gordon was examined at home on March 5, 1986 by Dr. Gruebel. It was Dr. Gruebel's impression at that time that Gordon was "markedly improved" and in the best condition since he had come into her care in January. In late March, Gordon completed his final course of chemotherapy.

In May 1986, tests revealed a recurrence. Treatments were discontinued within a few weeks. After having survived longer than 75 percent of patients diagnosed with esophageal cancer, Gordon died at home on September 14, 1986.

d. Gordon's Will -- Gordon executed his last will and testament on October 24, 1985, naming Bart as independent executor. The will provided for several specific bequests to specific individuals, dividing the rest of his estate into five equal parts. One-fifth was to be distributed to Gordon's grandchildren, one-fifth to Bart, and the remaining three-fifths were to be held in gradually liquidating trusts for the benefit of Gordon's three daughters.

e. The March 5, 1986 Annuity Transaction -- On March 5, 1986, Gordon, as annuitant, entered into a private annuity agreement with Bart (individually) and the McLendon Family Trust[5] as obligors. Gordon sold remainder interests in certain of his assets to the obligors in exchange for an initial payment of $250,000 and annual payments for the rest of Gordon's life. Bart purchased 25% of the interests and the McLendon Family Trust purchased 75%. The ultimate purchase price was to be set by expert independent valuation in the near future.

The parties specifically described Gordon's assets to be transferred in Exhibit A to the annuity agreement, which reads:

> Assets . . . to be exchanged with the Obligors for a private annuity include a remainder interest only ([Gordon] retaining the life interest) in the following assets:
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> 1. A thirty percent (30%) general partnership interest in Tri-State Theaters, a Texas limited partnership.
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> 2. A forty-six percent (46%) general partnership interest in The McLendon Company, a Texas general partnership.
>
> 3. All of the outstanding shares of Gordon B. McLendon, Inc. (formerly OSS, Inc.), a Texas corporation.
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> 4. Twenty (20) acres [ ] of undeveloped land situated in Denton County . . .

[5] The trust was created the same day to gradually liquidate with mandatory distributions to be made equally to each of Gordon's three daughters over 17 years. Bart was named trustee, with MBank Dallas, N.A. as successor trustee in case Bart was unable to serve.

> 5. All of the rights of Gordon B. McLendon in the pension plan of The McLendon Company . . .

The aggregate value of the five assets listed in Exhibit A was eventually determined for purposes of the Annuity Agreement to be $18,363,970; Gordon's partnership interests in Tri-State and The McLendon Co. were valued at $9,500,000 and $4,200,000 respectively.

As to the annuity, the parties specified in Exhibit A that

> [t]he value of the remainder interest to be transferred to the Obligors hereunder as a percentage of the total value of the Property shall be determined with reference to Internal Revenue Service tables relating to remainder interests. The amount of the annual annuity payments shall be determined with reference to Internal Revenue Service life annuity tables.

Gordon was 65 years old on March 5, 1986, resulting in an actuarial life expectancy of 15 years on the date of the agreement. The amount to be paid to Gordon under the agreement was calculated by first computing the present value of a remainder interest in the transferred assets. With the present value determined as $5,881,695, reference to IRS tables was made to determine the appropriate annuity payment: $865,332. The obligors claim to have made a supplemental payment of $600,000 in September 1986.

f. Gordon's Federal Estate Tax Return -- The Estate paid federal estate taxes in the amount of $636,590. Implicit in its return was the Estate's position that Gordon had received full and fair consideration for the assets transferred in the annuity agreement.

However, the Commissioner took a different view of the valuation of the assets exchanged in the annuity agreement. The Commissioner found the values of the transferred Tri-State and McLendon Co. partnership interests to be $43,940,952 and $11,375,516 (as opposed to the $9,500,000 and $4,200,000 values assigned by the parties to the annuity). Further, whereas the parties to the agreement assigned Gordon a life expectancy of 15 years derived from actuarial tables and premised the value of the annuity thereon, the Commissioner viewed the consideration given as merely the $250,000 initial payment. Believing that the value of the interests transferred was significantly greater than the value of the consideration received, the Commissioner determined that the annuity transfer was in part a gift, within the meaning of I.R.C. § 2512(b) (West 1987), and accordingly, asserted a gift tax deficiency against the estate. I.R.C. § 2501, et. seq. (West 1987). Further, the Commissioner asserted an estate tax deficiency arising out of Gordon's retention of a life estate in the transferred interests. I.R.C. §§ 2001, 2036(a) (West 1987). The Commission assessed substantial estate and gift tax deficiencies and related penalties. The Estate sought review of the assessment by the United States Tax Court.

g. Ruling of the Tax Court -- The case was tried to the Tax Court in March, 1992. The Estate argued that the Commissioner overvalued the transferred interests by treating them as "partnership interests" instead of mere "assignee interests in partnership interests." The Estate argued that although the agreement on its face purported to transfer "partnership interests," such a transfer was prohibited by state law without express consent of the other partners. Additionally, the Estate defended the use of the actuarial tables to value the annuity and remainder interests as proper, noting that at the date of the agreement Gordon's cancer was in remission and his death was not imminent.

The Tax Court issued an extensive memorandum opinion rejecting the Estate's principal contentions and imposing deficiencies of over $12.5 million in additional federal estate and gift tax, but no penalties. The Tax Court's holding was premised on its finding that the annuity transaction was not "a bona fide arm's length transaction free from donative intent," but instead an agreement entered "primarily for the purpose of achieving testamentary objectives." Opinion of the Tax Court, p. 72; Id. at 51. Further, the Tax Court found that by means of the annuity agreement, Gordon transferred partnership interests, not mere assignee interests or monetary interests in the partnership interests. Id. at 52-53. The court also rejected the Estate's proposed application of the annuity tables, finding that departure from the annuity tables was warranted in light of Gordon's medical condition. In summary, the court held:

> The parties to the private annuity agreement understated the full fair market value of the assets (including the two partnership interests) that were the subject of that agreement. As of March 5, 1986, the aggregate fair market value of the several assets in question was $23,162,970.00, compared with the $18,362,970.00 figure used

> by the parties to the agreement. Further, the value of a remainder interest in those assets was understated as a consequence of Gordon's use of the annuity tables in carrying out that computation. It necessarily follows that Gordon did not receive adequate and full consideration in exchange for the property interests that he transferred pursuant to the private annuity agreement.
>
> Given the relationship of the parties to the private annuity agreement, a presumption arises that the difference in the consideration received by Gordon and the value of the property that he transferred represents a taxable gift.

Id. at 70. Accordingly, the court held "that [Gordon's estate] is liable for Federal gift tax to the extent that the value of the remainder interest transferred by Gordon exceeds the $250,000 amount that Gordon actually received at the time the private annuity agreement was executed." Id. at 72. Also, the Tax Court determined that Gordon's life estate in the partnership interests was includable in Gordon's estate. Gordon's estate appeals from the Tax Court's decision.

II.

DISCUSSION

Both the gift and estate tax issues turn on the fair market value of the interests transferred to Bart and the McLendon Family Trust. Gift tax liability may be assessed against a transfer for less than adequate consideration. I.R.C. §§ 2501(a), 2512(b) (West 1987).[6] Estate tax is payable if Gordon transferred

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[6] I.R.C. § 2512, entitled "Valuation of Gifts," provides in subsection (b):

> (b) Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property

his partnership interests while retaining life estates and continuing to enjoy the benefits of the assets, except in a case of a bona fide sale for an adequate and full consideration. I.R.C. § 2036(a) (West 1987).[7] The gift and estate tax laws are construed in pari materia. Appellant challenges several of the Tax Court's legal conclusions and factual findings. This court reviews decisions of the Tax Court applying the same standards used in reviewing a decision of the district court: Questions of law are reviewed de novo; findings of fact are reviewed for clear error. Estate of Hudgins v. C.I.R., 57 F.3d 1393, 1396 (5th Cir. 1995).

a. Characterization of the Interests Transferred

Both the gift tax and estate tax issues turn on categorization of partnership interests Gordon transferred. The Estate suggests that the interests transferred could only be remainders in "assignees' interests" in the partnerships, not the actual partnership interests themselves. Texas law, relied on by the Estate, prohibits the transfer of partnership interests without agreement by the other partners. See, e.g., TEX. REV. CIV. STAT. ANN.

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exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

[7] I.R.C. § 2036, entitled "Transfers with retained life estate," sets out the general rule in subsection (a):

> **(a) General rule.** -- The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death--
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or . . .

Art. 6132b, §§ 18(g)[8] and 27(1)[9] (Vernon 1970). The Tax Court initially noted that the private annuity did not appear to be an arm's-length transaction and that "special scrutiny" was owed in intrafamily transactions. The transaction, the Tax Court concluded, was the functional equivalent of a transfer of full partnership interests, because

> Bart, a general partner in both Tri-State and McLendon Co., effectively controlled the partnerships and served as attorney in fact for Gordon, as trustee of the McLendon Family Trust, and as legal representative for his grandparents' estates. In light of the intrafamily nature of the transaction and Bart's position of ultimate control, we conclude that as a practical matter the interests transferred by Gordon to Bart (individually and as trustee) were the equivalent of partnership interests. In sum to assume that Gordon merely transferred "assignee" interests would be to exalt form over substance.

Opinion of the Tax Court, p. 53. But as the Commissioner now concedes, these statements are factually incorrect. On March 5, 1986, Bart was not a representative of the Estate of B.R., which

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[8] Section 18, titled "Rules Determining Rights and Duties of Partners and Employees" provides:

> (g) No person can become a membership without the consent of all of the partners.

[9] Section 27 of the Texas Uniform Partnership Act provides:

> (1) A conveyance by a partner of his interest does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs; it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled and, for any other purpose, to require reasonable information or account of the partnership transactions and to make reasonable inspection of the partnership books.

held a 30% limited partnership stake in Tri-State and a 25.5% general partnership stake in The McLendon Co. As noted above, Gordon and Dorothy Manning were co-executors of B.R.'s estate. The Commissioner responds that this error is insignificant because Gordon might have acted as a representative of the Estate of B.R. In essence, the Commissioner argues that because Gordon and Bart had the capacity to represent the other partners, all partners gave their effective consents to Gordon's transfer of his interests.

The Tax Court attributed some weight to the evidence showing that the purpose of the transactions was to minimize control by Gordon's daughters while giving them an equal share of the income. Consequently, the court did not utterly disregard the transfers as urged by the Commissioner but treated them, under the respective partnership agreements, as a default, in the case of Tri-State, see Article IX, § 9.04 of the Tri-State Agreement, and a prohibited sale or assignment, in the case of The McLendon Co., see The McLendon Co. Agreement, §§ 6 & 10. Significantly, the Tax Court did not discuss Texas partnership law, but rested its holding entirely on its view of the parties' documents and relationships. Also significant in our view is the Tax Court's reluctance to characterize the annuity transaction as a contrivance to avoid estate taxes. The Court's opinion alludes in many ways to the maneuvering of the transactions in the direction of tax-avoidance (e.g., the secretary's failure to testify about Gordon's letter to his doctor, the doctor's optimistic reply, the aggressive valuation of interests), but the court never finds that Gordon and Bart perpetrated a sham. We are therefore inclined to take the parties' documentation at face value.

Viewing the transaction at face value, it is evident that the Tax Court's neglect of Texas law was unfortunate. The Tax Court does not sit to create its own rules of business organization governance. Where the Internal Revenue Code has not superseded state law, the tax consequences of a transaction must depend on the nature of the deal under state law. Accordingly, we look to Texas law as well as the various agreements to evaluate the transactions executed among Gordon, Bart and the Trust.

Gordon assigned remainder interests in the two partnerships, along with other property, to Bart and the McLendon Family Trust in exchange for the annuity. The Tax Court gauged the effect of the transfers by the fact that the Annuity Agreement assigned remainder interests in assets, including a "thirty percent (30%) general partnership interest in Tri-State Theatres [partnership]" and a "forty-six percent (46%) general partnership interest in The McLendon Company [partnership]." Because no reference was made to "assignee" interests in describing the partnership interests transferred, the Tax Court reasoned, the Annuity Agreement must have transferred remainder interests in the full general partnership interests. The Court also believed that the signatures of Gordon and Bart, standing alone, evinced the practical unanimous consent of the partners to this transfer.

These conclusions do not accurately reflect the parties' intentions or capacities when placed against the background of state law.

First, neither partnership agreement permitted sale or transfer of partnership interests without consent of the partners. No person could demand admission to the partnership unless consent was granted by all the partners, in the case of Tri-State, § 7.04 of the partnership agreement, or by the partners of the McLendon Company, § 6. Texas law reinforced this right of exclusivity, born of the intimate nature of the partnership relationship and the apparent authority of each partner to conduct partnership business. Thomas v. American Nat'l. Bank, 704 S.W.2d, 321, 323 (Tex. 1986). The Commissioner agrees that if, under Texas law, a partner attempts to transfer a general partnership interest without the other partners' consent, the transferred interest is an assignee interest, limited to the non-control right to receive distributions from the partnership. IRS Brief at 17, n.16, and 29-30 citing Thomas, supra; Tex. Rev. Civ. Stat. Ann. art 6132b § 27(1); Art. 6132a § 20(c).[10]

The question, then, is whether consent of all the partners was given to Gordon to transfer remainder interests in his full general partnership interests. The Tax Court imputed consent by virtue of the signatures to the Annuity Agreement of Bart, individually and for the McLendon Family Trust, and Gordon. In our view, the imputation was erroneous. The Annuity Agreement does not

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[10] At the time the Annuity Agreement was executed, Texas had not yet adopted the Revised Limited Partnership Act, Tex. Rev. Civ. Stat. Ann. art. 6132a-1 (Supp. 1995).

purport to be a document signed or consented to by either partnership. Neither Bart nor Gordon signed as partners in Tri-State or The McLendon Company. More significantly, there is no signature of approval by the Estate of B.R. or Jeannette, although those entities remained as partners in each partnership. The absence of these approvals is no mere technical oversight. First, other partnership documents, such as the amendments of August 1985, were signed formally by all affected partners as partners. Second, as the Commissioner concedes, Bart is not an executor of B.R.'s estate and had no authority to bind that interest. There is no formal consent of all the partners.

Imputing consent of all the partners to Bart's individual signature because of his portfolio of responsibilities in Tri-State and The McLendon Company contradicts the principle expressed in Estate of Bright v. United States, 682 F.2d 999 (5th Cir. 1981) (en banc), that the character of a transfer will not be interpreted specially for estate tax purposes because of its intrafamily nature. Although Bright's precise issue of valuation is not before this court, the principle of treating ownership interests in closely held companies according to objective criteria is generally relevant. The objective criteria here are specified by Texas law governing transfers of partnership interests.

Further, construing the Annuity Agreement to effect transfers of remainder interests in the general partnership interests rather than assignee interests also undermines Gordon's admitted estate planning goal. The Tax Court acknowledged that

Gordon did not want his daughters to participate in management of the estate assets and erected various devices in the partnership documents to prevent management interference by the daughters or the estate partners. If the McLendon Family Trust succeeded to a general partnership position, however, Bart's exclusive management rights would be imperilled by his sisters' demonstrated litigiousness. Only by relegating the McLendon Family Trust, a liquidating trust, to an assignee role would Bart's control remain secure. The Tax Court's findings thus fail to enforce the only reading of the Annuity Agreement that is consistent with Gordon's intent.[11]

b. Proper Use of Actuarial Tables for Valuation of the Remainder Interests

Having determined the nature of the partnership interests transferred, we must discuss the value of the remainder interest in assignee interests in those partnership interests. Section 25.2512-5, Gift Tax Regs., contains actuarial tables to assist in the computation of the fair market value of annuities, life estates, terms for years, remainders, and reversions transferred after November 30, 1983 and before May 1, 1989. The Estate and the Commissioner disagree whether the actuarial tables were properly applied in computing the value of the remainder interests and the annuity agreement for which they were exchanged.

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[11] The Tax Court lays some emphasis on the fact that Gordon intended to dispose of his interests in a manner substantially equivalent to that provided in his will, and the Commissioner contends that the transfer of assignee interests in the partnership interests does not comport with Gordon's design of leaving his property to his children and grandchildren in equal shares. We disagree. The practical effect of transferring assignee interests in partnership interests was to grant the devisees all the rights, save control, that they would otherwise enjoy.

The Tax Court correctly noted that the use of actuarial tables to determine the present value of future interests has been recognized and approved for many years. The tables "afford a reasonable norm and some degree of certainty in ascertaining the value of property and the consequent tax liabilities of beneficiaries thereof." Miami Beach First Nat'l Bank v. United States, 443 F.2d 116 (5th Cir. 1971); see also Bank of California v. United States, 672 F.2d 758, 760 (9th Cir. 1982) ("The approach [espoused in Rev. Ruling 80-80] is sound. It reflects an important principle enunciated throughout the case: actuarial tables provide a needed degree of certainty and administrative convenience.").

> It is only where the established facts are sufficient to justify a departure from the Regulations that exceptions are allowed. Such exceptions have been recognized where the death of a life tenant is imminent or predictable. See, for example, Estate of Nellie H. Jennings, 10 T.C. 323 (1948), where at the time of the decedent's death the life tenant, who died two months thereafter, was helpless, with a complete loss of memory and almost total paralysis as the result of a cerebral attack; or Estate of John P. Hoelzel, 28 T.C. 384 (1957), where the beneficiary at the time of the decedent's death was suffering from an incurable and inoperable cancer of the lung and her surgeon and physician were both of the opinion that she would die within a year. In such exceptional cases, the value of the remainder interest may be determined with reference to the actual physical condition of the beneficiary rather than by exclusive use of the established mortality tables. See Revenue Ruling 66-307, 1966-2 Cum. Bull., p. 429.

Miami Beach, 443 F.2d at 120. Revenue Ruling 80-80, 1980-1 C.B. 194, successor to Revenue Ruling 66-307 cited in Miami Beach, provides in pertinent part:

> [T]he current actuarial tables in the regulations shall be applied if valuation of an individual's life interest is required for purposes of the federal estate or gift taxes unless the individual is known to have been afflicted, at the time of transfer, with an incurable physical condition that is in such an advanced stage that death is clearly imminent. Death is not clearly imminent if there is a reasonable possibility of survival for more than a brief period. For example, death is not clearly imminent if the individual may survive for a year or more and if such a possibility is not so remote as to be negligible. If the evidence indicates that the decedent will survive for less than a year, no inference should be drawn that death will be regarded as clearly imminent, because this question depends on all the facts and circumstances.

The Tax Court's only analysis of Revenue Ruling 80-80 takes place in a footnote where the court noted the permissible exception to use of the actuarial tables for those with an incurable physical condition at an advanced stage where death was clearly imminent. The court also noted that the actuarial tables may nevertheless be used in cases where the individual may survive for a year or more. Curiously, the Tax Court then found that the Commissioner's rejection of the tables was reasonable "in light of the evidence presented regarding Gordon's medical condition." Opinion of the Tax Court, pp. 58-59 n.17. The court did not find that Gordon's death was clearly imminent. On the contrary, the court acknowledged that there was not a certainty of imminent death on March 5, 1986. Indeed, after reviewing the extensive medical expert testimony, the Tax Court found Gordon's life expectancy on that date to be one year. Id. at 70. Though the court found Gordon was "an increasingly sick man" and "the overall trend was one of fairly rapid deterioration," see id. at 69, these findings do not suffice to paint this as an "exceptional case" where death was imminent or clearly predictable.

This case is distinguishable from the Jennings and Hoelzel cases discussed in Miami Beach. Gordon was not disabled in a way comparable to Jennings, nor were his doctors certain of the recurrence and ultimate terminal nature of his cancer as were Hoelzel's.[12] Given that the court found Gordon's life expectancy to be one year, and that the facts do not suggest that Gordon's death was clearly imminent as of March 5, 1986, we reject the notion that the Tax Court or the Commissioner had the discretion to disavow the actuarial tables in this case. "The mere fact that a life tenant is suffering from an incurable fatal disease is not by itself enough to justify departure from the actuarial tables." Bank of California, 672 F.2d at 760. The Tax Court's holding supporting the Commissioner's rejection of the estate's use of the actuarial tables is reversed as matter of law as inconsistent with Revenue Ruling 80-80, and the relevant case law.

c. Validity of the Annuity Transaction

It follows from the previous discussion that the Annuity Agreement should not have been discounted by the Tax Court because of the alleged inadequate consideration for which Bart and the

[12] Probabilities are not sufficient. The tables are adequate for situations where there are probabilities of disease or death. Departure from the tables is reserved for those cases where death is "clearly imminent or predictable." For example, in Miami Beach, the beneficiary was afflicted with serious and chronic medical conditions, none of which had advanced to a terminal stage at the time of transfer. 443 F.2d at 120. The Fifth Circuit in that case reversed an attempted departure from the tables. Id.

McLendon Family Trust became obliged. The value of the assets sold by Gordon were lower and the consideration contracted for was higher than the Tax Court acknowledged. Consequently, Gordon negotiated full and adequate consideration for the assets he sold subject to the Annuity Agreement.[13] There is no basis for assessing gift tax liability pursuant to § 2501. Likewise, the Commissioner did not correctly include in Gordon's estate the assets sold pursuant to the Annuity Agreement. Under 26 U.S.C. § 2036(a), the fact that Gordon reserved a life estate -- selling an assignee interest not in his entire partnership interest but only in his remainder interest -- does not result in retention of the value of his "partner's" interest in his taxable estate. Consequently, no issue arises under 26 U.S.C. § 2036(a).

III.

CONCLUSION

The remaining Tax Court findings regarding the gift tax and the estate tax all depend on the findings which we have above found to be in error. Having determined that under Texas law the Annuity Agreement merely transferred assignee interests in the two partnerships and that the actuarial tables were properly used to value the annuity, we **REVERSE** the decision of the Tax Court and **REMAND** for further proceedings consistent herewith.

[13] The Commissioner does not appear to contend that if its positions on the nature of the interests transferred and the use of the actuarial tables are rejected, then full and adequate consideration was still not paid.