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**TBA CLE  
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**ESTATE PLANNING CONSIDERATIONS**

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## I. INTRODUCTION

### *Who Needs an Estate Plan?*

According to the National Association of Estate Planners & Councils, it is estimated that more than half of all Americans do not have an up-to-date estate plan. Unfortunately, estate planning has become one of the most overlooked areas of financial wellness.

In the recent past, many families sought estate planning solutions to avoid adverse tax consequences. For example, in 2000, the federal estate tax exemption was only \$675,000; currently, however, the 2022 federal estate tax exemption for an individual will be \$12.06 million and \$24.12 million for a couple, up from \$11.7 in 2021. The anticipation of the current administration's tax legislation is creating anxiety among many taxpayers, the Build Back Better bill passed in the House of Representatives on November 19, 2021. The Senate will now decide whether it should be passed, revised or rejected. One major change many thought would be included was reducing the federal estate tax exemption. Regardless if any changes are made now, the federal estate tax exemption amount is still dropping on January 1, 2026 from \$11 million to \$5 million (adjusted for inflation). That is only four years away and Congress could still make changes to the estate tax laws in interim.

Regardless of whether an estate is impacted by the federal estate tax, basic estate planning should be on every client's to-do list. A basic plan includes establishing financial and medical powers of attorney to make decisions if you cannot, and deciding who will receive your assets, retirement benefits, home, or even proceeds from a life insurance policy upon your death.

There are certain documents every client should have regardless of their health, wealth, and age:

1. **Durable power of attorney** – Authorizes someone to act on your behalf in the event that you become unable to handle your financial affairs. The person you designate in the durable power of attorney can pay bills, file taxes, direct investments, etc. on your behalf.
2. **Medical power of attorney/advanced directives** – Allows you to specify the medical treatments you desire in the event you cannot express your wishes and it appoints someone to make other medical decisions for you in the event of your incapacity.
3. **Last Will and Testament** – The will is the core of any estate plan, and it distributes your property as you desire after your death. If you die without a will, then disbursements are made according to Tennessee's intestate succession laws, which might not align with your wishes. A will also names an executor to manage and settle your estate administration.

In addition to the basic estate planning documents outlined above, there are areas of greater complexity that must be addressed with every client. These topics include planning for clients where a special needs trust is required, those who have qualified retirement plans, such as IRA's

or 401(k)'s, those owning out of state real property, those wanting to protect their beneficiaries and assets, and those with out of date planning. Of course, you cannot talk about estate planning without mentioning trusts, in the past decade, Tennessee has become a leading state in the nation's trust industry. Tennessee's laws now provide a trustee (the person or entity responsible for the trust's administration) with tools that allow the trustee to be proactive and flexible in administering the trust. Historically, the trustee was limited to administering a trust as it was written. However, laws can and frequently do change, which can leave a document drafted a decade prior out-of-date. Tennessee's trust laws provide a trustee with tools to manage this challenge. These tools include methods for clarifying, revising, or terminating a trust agreement, potentially without going to court, which saves time and money. The Tennessee legislature has made a concerted effort to keep our trust laws at the forefront. In addition to our comprehensive Tennessee Uniform Trust Code, our laws permit decanting, community property trusts, a long-perpetuities period, and self-settled asset protection trusts.

Given the constant change, uncertainty, and increase in litigation in almost every area of life, asset protection is more important than ever. Asset protection is an essential component of all estate planning and warrants the same level of thought as taxes and dispositive planning.

## II. ESTATE PLANNING BASICS

### 1. Preliminary Documents

- a. **Durable Power of Attorney for Finances** (either Immediate or Springing)
  - i. Can avoid a costly conservatorship proceeding
- b. **Durable Power of Attorney for Healthcare**
  - i. Provisions for the valid execution of a healthcare power are at TCA S. 34-6-203
  - ii. If an individual does not have a durable power of attorney for healthcare, then TCA S. 68-11-1806 applies.
- c. **Living Will**
  - i. Statutory form, TCA S. 32-11-105
- d. **Disposition of Remains**
  - i. See TCA S. 62-5-701, et seq
  - ii. Pursuant to TCA § 62-5-701, et seq, I direct that upon my death [Insert: location, manner, and/or conditions of disposition and arrangements for funeral goods and services].
  - iii. If the person who is to handle the disposition of remains is not the next of kin, you must include directions allowing such person to take control of the remains in your estate planning documents. TCA S. 62-5-701 defines “disposition directions” as a “legible written instrument signed by the decedent and acknowledged by a notary or witnessed by two (2) persons who are qualified adults; provided, that such written instrument may be, but is not limited to, a letter of instructions, a will, a trust document, or an advance directive.”
  - iv. Otherwise, you will be subject to the default statutory rule. TCA S. 62-5-703 gives the right to control the disposition of remains to next of kin, in descending order, until (12) In the absence of any person listed in subdivisions (1)-(11), any other person willing to assume the responsibilities to act and arrange the final disposition of the decedent's remains, including the funeral director with custody of the body, after attesting in writing that a good faith effort has been made to no avail to contact the individuals listed in subdivisions (1)-(11).
  - v. Note that under TCA S. 62-5-706(2), the personal representative of the estate of the decedent does not, by virtue of being the personal representative, have a greater claim to the right of disposition than the person would otherwise have.
  - vi. Further, under TCA S. 68-3-502, the funeral director shall obtain the personal data [for the filing of the death certificate] from the next of kin or the best qualified person or source available and shall obtain the medical certification from the person responsible for medical certification.

### 2. Intestate Succession (without a will, TCA S. 31-2-104)

- a. Surviving spouse takes ALL property if there are **no** surviving issue (children, grandchildren, etc.)

- b. Surviving spouse takes a child's share if issue survive the decedent, but never less than 1/3 of the entire intestate estate
- c. Surviving Spouse → Issue → Parents → Brothers and Sisters (or their issue) → Grandparents (or their issue) → State of Tennessee

**3. Elective Share** (TCA S. 31-4-101)

- a. Surviving spouse can elect to take a statutory share of the deceased spouse's estate in lieu of what is provided in the will, or in the absence of a will, in lieu of the intestate share.
- b. Election must be made within 9 months of death.
- c. Cannot take both under will AND elective share; cannot take both elective share AND intestate share
- d. Sliding scale elective share
  - i. Marriage < 3 years = 10% of net estate
  - ii. Marriage 3-6 years = 20% of net estate
  - iii. Marriage 6-9 years = 30% of net estate
  - iv. Marriage 9 or more = 40% of net estate
- e. Note: Net estate is all the decedent's property subject to disposition under the will or intestate succession reduced by secured debts, funeral expenses, award of exempt property, homestead and year's support
- f. Practice Note: A prenuptial agreement can avoid an intestate or elective share to the extent that it doesn't leave the surviving spouse a ward of the state.

**4. Per Stirpes**

- a. **Per Stirpes (by Right of Representation)**: Younger generation descendants divide the share the older generation descendant would have received had that older generation descendant survived the intestate. Under per stirpes, the level of children is always used because it is the first level below that of the Intestate.
  - i. In effect, these younger generation descendants "represent," that is, stand in the shoes, of the older generation.

**5. Last Will and Testament**: legal instrument declarative of a person's intention to be performed after his death with respect to the disposition of his property, the guardianship of his children, or the administration of his estate. TCA S. 32-1-101

**a. Types of Wills**

- i. **Attested**: Formal typed will such as an attorney would prepare (TCA S. 32-1-104)

1. Requirements:

- a. There must be **two witnesses** who know that the witnessed instrument is a will. This is called a "publication" and it will often be inferred.
- b. The witnesses must see the testator's signature affixed or must see it at the time the testator acknowledges it.
- c. The witnesses must then sign in the presence of the testator AND of one another.

2. Attestation Clause

- a. Reciting (a), (b) and (c) above is effective to create a rebuttable presumption of fact that the will was duly executed.

**b. Practice Note: SAMPLE IN APPENDIX B**

3. The statute provides expressly that signing by the testator consist in:
    - a. Signing himself, or
    - b. Acknowledging a signature already made, or
    - c. Having another sign for the testator at his direction and in his presence
  4. Having a beneficiary serve as a witness necessary to probate does not invalidate the will. However, the interested witness can take no more than an intestate share, measured in value at the time of the testator's death.
  5. A notary's certificate will assist in probating a will in common form without the witnesses being present, but it has no impact on the validity of the will itself.
  6. **Practice Note:** The Testator should sign, or at least initial, at the bottom of each page. Before the Testator signs on the final page, ask, "**Do you declare this to be your Last Will and Testament, and ask that we witness it and the notary take the oath?**" The Testator should respond with an audible "yes."
    - ii. **Holographic** (TCA S. 32-1-105)
      1. All material provisions must be entirely in the handwriting of the testator, and the will must be signed by the testator.
      2. No witnesses to a holographic will are required, but the handwriting and signature must be proved to be that of the testator by that of two disinterested witnesses as the time of probate.
- 6. Testamentary Capacity** (TCA S. 32-1-102)
- a. Any person of sound mind and 18 years of age or more can make a will.
  - b. "**Sound mind**" for this purpose means, generally, that the testator knows
    - i. The nature and effect of the act of making a will;
    - ii. The nature and extent of his property;
    - iii. The names and kinship of the natural objects of his bounty.
  - c. The issue is mental capacity. A will written by one who is physically frail, but in full possession of faculties, is a valid will.
  - d. The soundness of mind is tested as of the time of signing the will.
- 7. Lapsed Legacy Statute** (TCA S. 32-3-105)
- a. Provides that (contrary to common law rule) when a devisee or legatee predeceases the testator leaving issue surviving the testator, the issue will take, per stirpes, in the absence of a contrary provision in the will. If there are no issue of the devisee surviving the testator, the common law rule applies (the legacy lapses).
  - b. **Practice Note:** If the Testator does not want the issue of the beneficiary to take, then make sure that the will provides that the beneficiary takes only if the beneficiary survives the Testator.
    - i. If you do not want the issue to take: I devise ten thousand dollars (\$10,000.00) to JACKSON PIERSON, if he survives me.

- ii. If you want the issue to take, then I recommend, for clarity: I devise ten thousand dollars (\$10,000.00) to JACKSON PIERSON, or, if he does not survive me, then to his issue who survive me, per stirpes.

**8. Vesting of Real and Personal Property (TCA S. 31-2-103)**

- a. Vestiture of realty in the heirs is direct and immediate but personal items vests in the personal representative for payment of expenses, debts and taxes, after which it is distributed to the heirs.
- b. **Practice Note:** Make the real property part of the probate estate. Your Wills should always include a provision addressing the real property or you will have problems when the Executor tries to sell the property.
  - i. **Example:** I direct pursuant to Tennessee Code Annotated Section 31-2-103 that any interests in real property which I may own at my death be administered as part of my estate subject to the control of my personal representative, who shall have full power to grant, bargain, sell, convey, lease, encumber, manage, and otherwise deal in any lawful manner with said real property at any time during the administration of the estate, in the discretion of my personal representative, without the approval or joinder of any beneficiary and without the necessity of any person or entity looking to the application of any proceeds that may or might result from any acts of my personal representative in the premises; provided, however, that the provisions of this Article shall not have the effect of revoking or varying any written agreement entered into during my lifetime as to the ownership, use, descent or rights in or to, any real property.

**9. Exoneration**

- a. Under the doctrine of exoneration, an heir or devisee is generally entitled to have encumbrances upon real estate paid from the estate's personal assets, unless the will directs otherwise. This would include property passing by intestacy. This does not apply to mortgages on property passing by right of survivorship.
- b. **Practice Note:** To avoid the doctrine of exoneration, you might use the following language: I direct that all of my legally enforceable debts, including funeral and testamentary expenses and expenses of my last illness, be paid as soon as may be convenient after my death; provided however that for real estate encumbered by mortgages or other security instruments or liens ("**Secured Debt**"), my beneficiary of said real estate in ARTICLE may elect to either 1) retain the real estate and pay the remaining Secured Debt with the beneficiary's own personal assets, or 2) the beneficiary may elect to sell the real estate to satisfy the Secured Debt and keep the remaining proceeds. In the event my real estate passes to my Residuary beneficiaries, said Secured Debt may be paid off or retained in the discretion of my Executor. I further direct that all estate, inheritance and other taxes of the same nature (except any generation-skipping taxes imposed by the Internal Revenue Code or by any state) which are payable because of my death, including any interest or penalties thereon, with respect to the property comprising my estate for such tax purposes, whether or not such property passes under this Will and whether such taxes are payable by my estate or by any recipient or beneficiary of any such property, shall be paid entirely out of my

Residuary Estate as an expense of administration and without apportionment, and with no right of reimbursement from any recipient or beneficiary of any such property.

## **10. Run the Signing Meeting with Precision**

- a. Follow the rules to the "t"
  - i. Review the documents one more time
  - ii. Check for any revisions
  - iii. Discuss questions that will be asked
    1. Is this your \_\_\_\_\_ for the time being?
    2. Have you read it and do you understand what it does with your Estate?
    3. Do you want us to be witnesses for you today?
    4. Gather 2 witnesses and notary – in the same room and in sight of each other
    5. Sign by Testator – both Will and Affidavit of Subscribing Witnesses
    6. Sign by Witnesses
    7. Notarized by Notary last
  - iv. What if Testator cannot sign? (T.C.A. § 32-1-104(a)(1))
    1. If a testator acknowledges to attesting witnesses that an instrument, other than a holographic or nuncupative will, is the testator's will, any person can sign the testator's name:
      - a. At the testator's direction.
      - b. In the testator's presence.
      - c. In the presence of two or more attesting witnesses.
  - v. What about the Witnesses signatures?
    1. The attesting witnesses must sign the will in the presence of the testator and each other (T.C.A. § 32-1-104(a)(2)).
    2. A will is still valid even if attested to by an interested witness. An interested witness is one who has some personal or beneficial

interest in the will. However, unless the will is also attested to by two disinterested witnesses, any interested witness can only receive a bequest up to value of the witness's intestate share, if any. (T.C.A. § 32-1-103.)

3. For a will executed before July 1, 2016, the signatures of witnesses to a self-proving affidavit are considered signatures to the will itself, if:

- a. The signatures are necessary for the will to be validly executed.
- b. The signatures are made at the same time the testator signs the will.
- c. The affidavit meets the same requirements as a self-proving affidavit.
- d. (T.C.A. § 32-1-104(b)(1); *In re Estate of Stewart*, 545 S.W.3d 458, 460-61 (Tenn. Ct. App. 2017).)

4. If the witnesses' signatures on the affidavit occur on the same day as the testator's signature, there is a rebuttable presumption that the witnesses signed at the same time as the testator. However, if the witnesses' signatures on the affidavit are treated as signatures on the will, the affidavit cannot also be used as a self-proving affidavit. (T.C.A. § 32-1-104(b)(2).)

vi. Notary

1. Neither the testator's signature nor the witnesses' signatures to the will must be notarized. However, witnesses to a self-proving affidavit must sign under oath (T.C.A. § 32-2-110).

b. What to do with the original documents?

- i. Keep them at firm in safekeeping and send bound set of drafts home to client
- ii. Send home with client but make sure file is noted in case documents are not found

### III. COMPLEX CONSIDERATIONS FOR THE ESTATE PLANNER

#### 1. Go with the Flow – Planning during Lockdown or other Unusual Circumstances

- a. Client is in assisted living on lockdown
- b. You and your colleagues are sent home to work remotely
- c. Zoom can actually be a great tool
  - i. See into their lives – setting, children, pets, comfort, no travel considerations
  - ii. Red flags?

#### 2. Handle Remote Signings with Special Care

- a. Options
  - i. Remote signing
  - ii. Curbside/ Drive-Thru signing
  - iii. In-person (increasing again)
- b. The mechanics
  - i. Send documents in advance
    - 1. Original documents marked with flags where client should initial or sign are mailed to client via FedEx with return envelope.
  - ii. At Zoom meeting with client at home and witnesses/ notary in office:
    - 1. Review all docs with client, especially in sticky situations, and have client affirm verbally;
    - 2. Have client "publish" the Will;
    - 3. Tilt camera to show pen on paper;
    - 4. Watch witnesses sign and notary notarize.
  - iii. Change the attestation clause / notary clause
  - iv. Follow the rules
  - v. Client sends original signature pages via return envelope for compilation with the witness / notary pages and Executive Orders are attached.

- c. Who is in the room? Harder to control on the client's side of the camera.
  - i. TRANSITION = In addition to planning around unusual circumstances, it is important to consider special assets that a client may have that require an extra step or two, which brings us to Tip # 13...

### **3. Go with the Flow – Planning during Lockdown or other Unusual Circumstances**

- a. Client is in assisted living on lockdown
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  - ii. Red flags?

### **4. Watch Out for Retirement Benefits**

- a. Do you have an Eligible Designated Beneficiary (“EDB”)? An eligible designated beneficiary (EDB), unlike mere “designated beneficiaries” (DBs), is still entitled to the life expectancy payout. So if the IRA owner dies leaving her IRA to an EDB, required minimum distributions (RMDs) to the EDB must be paid in annual instalments based on the life expectancy of the EDB (or more rapidly).

### **5. Planning for Special Needs Beneficiaries**

- a. Asset titling – avoid outright gifts or bequests to SN bene
- b. Include required language concerning what expenses are properly paid by the trust
- c. Sample language: Authority for supplemental care trust. If any property passing under the terms of this instrument is to be held in trust for or distributed free of trust to a beneficiary who (or whose spouse) at the time of distribution qualifies for government assistance due to disability, indigence, or other cause (or may so qualify within a reasonable time), then the trust protector, if a trust protector has been appointed for the trust, otherwise the trustee is authorized, in his sole discretion, either to modify such trust or transfer such gift into trust for such beneficiary as set forth in this paragraph. While the beneficiary lives, any such modified or created trust shall be held for the sole benefit of the beneficiary under the terms of this paragraph. After the trust is funded, the trustee, in the trustee's complete, sole, absolute, and unfettered discretion, may disburse funds from the trust solely for the supplemental care of the beneficiary. Supplemental care of the

beneficiary shall mean non-support care that is over and above the support and care provided to the beneficiary (or whose spouse) from benefits received through government assistance. Under no circumstance may the beneficiary or any legal guardian or representative of the beneficiary compel distributions from the trust to or for the benefit of the beneficiary. At the time the trust is funded, the trust protector, if a trust protector has been appointed for the trust, otherwise the trustee may modify the definition of supplemental care to comply with laws in effect at that time, it being my intention to allow establishment of a trust for the beneficiary which will not disqualify the beneficiary (or whose spouse) from receiving government assistance. The trustee may exercise all powers set forth in T.C.A. Section 35-50-110 that are consistent with my intention to allow a supplemental care trust. Upon the death of the beneficiary, any remaining trust assets shall be distributed under the terms of this instrument, as if I had died on the date of the beneficiary's death and the beneficiary had predeceased me.

**6. Avoid gifts of appreciated property/ Maximize Step Up**

Since most clients no longer face estate taxes, the new tax planning goal is maximizing the step-up in cost basis at death, which minimizes or avoids capital gains tax when the surviving spouse, children or beneficiaries sell the assets after the decedent's passing.

If assets are left in trust for the surviving spouse at the first death make sure you either place assets in QTIP trust so assets get step-up at second death or allow for a power of appointment that causes estate tax inclusion at the second death.

Use the Tennessee Community Property Trust to obtain 100% step-up at the death of the first spouse to pass. The trust must contain certain statutory language as to consequences, have a Tennessee resident or Tennessee bank or trust company as trustee, and be signed by both spouses. The types are trust are ideal for families who wealth is mostly in their real property, and it is anticipated the spouse would be unable to maintain the real property after the first death.

**Practice Tips:** Avoid lifetime gifts of appreciated property. Always direct clients to CPA to discuss tax implications when requesting you to assist them with gift of real property. The Donee does not receive a step-up at the donor's death.

**7. Plan for Business Assets – Don't lose the Farm or Nightclub or Accounting**

**Firm**

- a. Address business interests in the Will
- b. Assign interests in LLCs or Corporations to a Revocable Trust using a "Transfer Designation for Membership Interest In \_\_\_\_\_, LLC" like this:

I, \_\_\_\_\_, pursuant to the provisions of the Tennessee Uniform Transfer on Death Security Registration Act (T.C.A. Section 35-12-101 et seq.) hereby direct that upon my death, all of my membership interest in \_\_\_\_\_, LLC, a Tennessee

limited liability company, shall be distributed to the then-serving trustees of the EXUM REVOCABLE TRUST AGREEMENT dated \_\_\_\_\_. It is my intent in executing this transfer designation to avoid the need to probate my estate with any court following my death, and to instead allow the trustees of the EXUM REVOCABLE TRUST AGREEMENT to serve as my personal representative in handling all post-death matters related to such membership interest. I retain the right to revoke or amend this transfer designation prior to my death.

**8. Plan for Flexibility.**

- a. Provisions for disclaimers are now routinely included in wills to provide flexibility and allows for the surviving spouse to decide whether or how much to disclaim depending on the tax laws and other factors after the first spouse's death.

**SAMPLE FUNDING CLAUSE:** Residuary Disposition if My Wife Shall Survive Me. I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises) wherever situated and whether acquired before or after the execution of this Will to my wife, if she shall survive me; provided, however, that if my wife disclaims some portion, or all, of my residuary estate, then such disclaimed portion shall be distributed to the Trustee of the \_\_\_\_\_ Family Trust under ARTICLE \_\_\_\_ of this Will, to be held, administered and distributed under the terms of that trust.

**9. Begin with the End in Mind – Planning for future litigation**

- a. Communication
- i. With children, especially if unequal division
  - ii. With witnesses, at execution of documents
  - iii. With friends and "strangers"
- b. Medical evaluations
- c. Videotaping/ recording execution
- d. Warning attorneys-in-fact and other fiduciaries
- e. Construction of Wills/ Trusts or in a Will Contest Case
- i. Testamentary Capacity / Undue Influence / Improper Execution:
    - 1. Burden of proof is on the proponents of the Will, then once proven, burden shifts to contestants to prove other grounds (capacity, undue influence).
    - 2. Evidence of due execution
      - a. Will has all signatures

- b. Affidavit or testimony of notary and witnesses
  - c. Affidavit or testimony of attorney prepared the Will  
(YOU!)
- ii. Attorney testifying as the drafter, witness or notary of a Will
- 1. What can I say?
  - 2. Whose file is it anyway?
  - 3. In the case of *In re Estate of Annie Clare Hamilton, et al v. Morris, et al*, the Court of Appeals finds that an exception to the attorney-client privilege exists in the case of a dispute between heirs or beneficiaries in Will contests as the testimony of the drafting attorney.<sup>34</sup> The court cited American Jurisprudence and the rule that "...communications by a client to the attorney who drafted his will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees or other parties who claim under him...." 81 Am. Jur. 2d Witnesses §389. The allowance of the exception was, the Tennessee court found, "...to help establish the intent of the testatrix or testator...."<sup>35</sup>
  - 4. Object to discovery requests until protected by Order.
- iii. "All" may not mean all: Draft carefully and correctly
- iv. Cheap or charitable: Check to be sure that formulas work and are clear

#### IV. CASE LAW UPDATES

##### **Smaldino v Commissioner of Internal Revenue**

Attached in APPENDIX A is a recent Tax Court decision (T.C. Memo. 2021-127, November 10, 2021) which provides a number of important lessons for estate planning attorneys to consider when structuring and implementing plans.

**Brock case** - Heirs-at-law: See *In re Estate of Brock*, 536 S.W.3d 409 (Tenn. 2017) - Intestate heirs had standing to challenge last Will despite being disinherited in that Will and the penultimate (next to last) Will. Attached in APPENDIX A

**V. APPENDIX A**

**UNITED STATES TAX COURT**

*T.C. Memo. 2021-127*

*November 10, 2021.*

LOUIS P. SMALDINO, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 5437-18.

Lavonne D. Lawson and *Charles W. Morris*, for petitioner.

*Jenny R. Casey*, *Emerald G. Smith*, and *Kim-Khanh Nguyen*, for respondent.

**MEMORANDUM FINDINGS OF FACT AND OPINION**

THORNTON, *Judge*: Petitioner owned and operated numerous rental properties in southern California. He placed 10 of these properties in Smaldino Investments, LLC (LLC), which he owned through a revocable trust. In 2013 he transferred about 8% of the LLC class B member interests to the Smaldino 2012 Dynasty Trust (Dynasty Trust), an irrevocable trust that he had created a few [\*2] months earlier for the benefit of his children and grandchildren. Around the same time, petitioner purportedly transferred about 41% of the LLC class B member interests to his wife, Agustina Smaldino, who purportedly retransferred them to the Dynasty Trust the next day.

On petitioner's 2013 gift tax return, he reported as a taxable gift only the approximately 8% of the LLC class B membership interests he had transferred directly to the Dynasty Trust. Respondent determined that petitioner had made a taxable gift to the Dynasty Trust of 49% of the class B membership interests, including the approximately 41% interest that assertedly had passed from petitioner to the Dynasty Trust indirectly through Mrs. Smaldino. After revaluing the LLC interests, respondent determined that petitioner had a \$1,154,000 gift tax deficiency for 2013.

The issues for decision are: (1) the proper characterization for gift tax purposes of petitioner's purported transfer of LLC class B member interests to Mrs. Smaldino followed by her purported retransfer of these same interests to the Dynasty Trust and (2) the fair market value of the LLC class B member interests that petitioner transferred, directly or indirectly, to the Dynasty Trust.

**[\*3] FINDINGS OF FACT<sup>1</sup>**

The parties have stipulated some facts. We incorporate by this reference the parties' stipulation of facts and the attached exhibits. When he timely petitioned this Court, petitioner resided in California.

**Petitioner's Background and Estate Planning**

After practicing for a time as a certified public accountant and serving as the treasurer of a computer company, petitioner purchased his father's liquor store business, which he then operated for over 35 years. He eventually expanded his business holdings to include apartment buildings, which he managed as a sole proprietor. By 2008 he had sold all his liquor stores, and his only remaining business was owning and managing what ultimately became an \$80 million portfolio of real estate.

Petitioner has been married to Mrs. Smaldino since 2006. She has a master's degree in economics and since about 1995 has worked almost continuously in petitioner's businesses--first in his liquor-store business and, after a three-year interval, in his property-management business. [\*4] Petitioner has 6 children from a prior marriage and 10 grandchildren. Two of the children work in petitioner's property-management business.

In 2012, when he was 69, a health scare motivated petitioner to get his estate planning in order. He and Mrs. Smaldino agreed that she should have security in her own assets; they did not want her assets and his children's assets commingled as part of the estate plan. Petitioner wanted to pass his business to his children and grandchildren and to give many of his remaining assets to Mrs. Smaldino. Similarly, she wanted petitioner's progeny to have the property-management business.

Petitioner and Mrs. Smaldino developed a plan to provide his progeny a bundle of assets comprising certain properties in the property-management company and to provide her a separate group of assets that would far exceed any share that the children received. As explained below, this plan involved placing certain of petitioner's business properties in the LLC and then transferring interests in the LLC to a trust for the benefit of his children and grandchildren. Petitioner resolved to transfer up to 50% of the LLC interests, the maximum he could transfer without triggering reassessment of property taxes on the LLC's assets.

### **[\*5] *Smaldino Investments, LLC***

Petitioner created the LLC in 2003, but it remained inactive until late 2012, when he transferred 10 of his real estate holdings to it. As trustee of the Smaldino Family Trust (a revocable trust that petitioner had created on the same day in 2003 as the LLC), he held all the ownership interests in the LLC and served as its manager.

The LLC's operating agreement distinguishes a "Member" from an "Assignee". A "Member" has both an economic interest in the LLC and the right to participate in the LLC's affairs. By contrast, the operating agreement defines an "Assignee" as a person who is assigned all or part of a member's economic interest but who lacks other rights accorded to members, such as the right to vote or participate in management or the right to obtain information about the LLC's business and affairs. The operating agreement expressly states: "Member" as defined herein does not include an Assignee." It further states:

*11.5 Transfer and Assignment of Membership Interests* . No Member shall be entitled to transfer, assign, convey, sell, encumber or in any way alienate all or any part of such Member's Membership Interest, and no Assignee shall be admitted as a substituted Member, except as expressly provided for in Section 11.5(c) herein.

\* \* \* \* \*

(b) *Substitution of Members* . An Assignee of a Membership Interest shall have the right to become a substituted Member only if [\*6]

(i) the requirements of this Section 11.5 are met, (ii) such Assignee executes an instrument satisfactory to the Board accepting and adopting the terms and provisions of this Operating Agreement, and (iii) such person pays any reasonable expenses in connection with such substituted Member's admission as a new Member. The admission of an Assignee as a substituted Member shall not result in the release of the Member who assigned the Membership Interest from any liability that such Member may have to the Company.

(c) *Permitted Transfers* . Subject to the provisions of Subparagraph 11.5(f)(iii), the Membership Interest of any Member may be transferred, and the Assignee thereof shall be admitted as a substituted Member, without the prior Written consent of the Board to: (i) any other Member or (ii) a revocable or irrevocable trust for the benefit of the Member or the Member's children, grandchildren or other family members who are descendents [sic] of Louis P. Smaldino (or, where the Member is a trust, a revocable or irrevocable trust for the benefit of any beneficiary of the Member's trust who is otherwise a permitted transferee).

\* \* \* \* \*

(f) *No Effect to Transfers in Violation of Agreement*. Upon any transfer of a Membership Interest in violation of this Section 11.5:

(i) The transferee shall have no right to vote or participate in the management of the business, property, and affairs of the Company, or to exercise any rights of or to become a Member; and

(ii) Such transferee shall be an Assignee and thereafter shall only receive the allocation of the Company's Net Income and Net Loss and shall receive those Distributions to which the transferor of such Economic Interest would otherwise be entitled under this Operating Agreement.

[\*7] The LLC's operating agreement provides for class A voting units and class B nonvoting units, as "identified as such on Exhibit 'A'". Initially, exhibit A of the operating agreement identified 40 class A voting units and 960 class B nonvoting units, all held by petitioner as trustee of the Smaldino Family Trust. On April 1, 2013, exhibit A was amended to restate the membership interests as 10 class A voting units and 990 class B nonvoting units, all held by petitioner as trustee of the Smaldino Family Trust. This amendment indicates that petitioner executed it on April 1, 2013.

### **Smaldino 2012 Dynasty Trust**

Petitioner created the Dynasty Trust to provide for his heirs. His son Allen Douglass Smaldino is the trustee. The trust's beneficiaries are five of petitioner's children and their children. Mrs. Smaldino is not a beneficiary of the trust. The trust agreement indicates that petitioner and Allen Douglass Smaldino executed it on December 21, 2012.

### **Transfers of LLC Interests**

The following documents were executed as part of petitioner's family estate plan.

1. Petitioner, as trustee of the Smaldino Family Trust, executed a document captioned "ASSIGNMENT SEPARATE FROM CERTIFICATE", which states [\*8] that he "assigns and transfers" to Mrs. Smaldino a "sufficient number" of nonvoting units in the LLC "so that the fair market value of such nonvoting units as determined for federal gift tax purposes shall be Five Million Two Hundred Forty Nine Thousand One Hundred Eighteen and 42/100ths Dollars (\$5,249,118.42)". Petitioner and Mrs. Smaldino decided upon this amount on the basis of her then-available Federal estate and gift tax exemption.<sup>2</sup> This document, which is signed by both petitioner and Mrs. Smaldino, states that it is "Effective: April 14, 2013" but does not indicate the date it was executed.

2. Mrs. Smaldino executed an "ASSIGNMENT SEPARATE FROM CERTIFICATE", which states that she "assigns and transfers" to Allen Douglass Smaldino, as trustee of the Dynasty Trust, nonvoting shares of the LLC that are described identically as in the certificate whereby petitioner had purportedly assigned these same LLC interests to her. This document, which is signed by both Mrs. Smaldino and Allen Douglass Smaldino, states that it is "Effective: April 15, 2013" but does not indicate the date it was executed.

3. Petitioner, as trustee of the Smaldino Family Trust, executed a document captioned "ASSIGNMENT SEPARATE FROM CERTIFICATE", which states that he "assigns and transfers" to Allen Douglass Smaldino, as trustee of the [\*9] Dynasty Trust, a "sufficient number" of nonvoting units in the LLC "so that the fair market value of such nonvoting units as determined for federal gift tax purposes shall be One Million Thirty One Thousand Eight Hundred Eighty One and 58/100ths Dollars (\$1,031,881.58)." This document, which is signed by both petitioner and Allen Douglass Smaldino, states that it is "Effective: April 15, 2013" but does not indicate the date it was executed.

When the dust settled, the Dynasty Trust wound up with 49% of the LLC class B member interests that previously had belonged to petitioner.<sup>3</sup> Petitioner hired James A. Biedenbender to value a 49% ownership interest in the LLC class B units. In a report dated August 22, 2013, Mr. Biedenbender opined that "a 49% Class B units nonvoting member's interest in the Company [the LLC] as [of] April 15, 2013 for certain tax reporting requirements on Form 709, US Gift Tax Return" was \$6,281,000.

In exchange for the use of Mrs. Smaldino's available Federal estate and gift tax exemption, on June 10, 2013, petitioner amended the Smaldino Family Trust to provide her additional moneys and properties. The LLC's operating

agreement [\*10] was never amended to account for any transfer of units to Mrs. Smaldino. However, exhibit A of the operating agreement was amended "as of April 15, 2013" to show the Dynasty Trust as holding a 49% ownership interest in the LLC (consisting of two blocks of class B nonvoting units--one of 409.5 units and the other of 80.5 units, representing 40.95% and 8.05%, respectively, of the 1,000 aggregated voting and nonvoting units) and to show petitioner, as trustee of the Smaldino Family Trust, as holding the remaining 51% ownership interest (consisting of 500 class B nonvoting units as well as the 10 class A voting units). This amendment is signed by petitioner as the LLC's manager but does not indicate the date on which it was executed.

### **Creation and Elimination of Guaranteed Payment**

As originally drafted, the LLC's operating agreement provided that its manager, i.e., petitioner, was entitled to annual compensation of 10% of the LLC's annual net cashflow, subject to decrease at the manager's sole discretion. Before 2013 petitioner received no annual compensation from the LLC.

On April 15, 2013, the LLC's operating agreement was amended to delete the provision for manager compensation and instead to provide the class A voting member, i.e., petitioner, with guaranteed payments. The amended operating agreement states:

[\*11] "*Guaranteed Payment*" shall mean a guaranteed payment to be made to the Class A Voting Member in the amount of \$10,000 per month, which is intended to constitute a guaranteed payment within the meaning of Code Section 707(c) and shall not be treated as a Distribution for purposes of computing the recipient's Capital Account.

The amendment further states that the LLC shall make monthly guaranteed payments beginning May 15, 2013, but that if the LLC is unable to make any payments because of insufficient funds, the class A voting member (i.e., petitioner) "shall promptly make Additional Capital Contributions sufficient to enable the Company to make such payments on a timely basis". This amendment indicates that it was executed on April 15, 2013, by petitioner as trustee of the Smaldino Family Trust, which is identified, directly above his signature, as the LLC's "SOLE MEMBER".

On December 31, 2013, the LLC operating agreement was amended to delete the guaranteed payment provision and to restore the previously deleted provision for manager compensation (except increased from 10% to 20% of annual net cashflow). The amendment indicates that petitioner and Allen Douglass Smaldino executed it on December 31, 2013.

### **[\*12] The LLC's Partnership Returns**

In 2014 the LLC filed its initial partnership tax return on Form 1065, U.S. Return of Partnership Income, for tax year 2013.<sup>4</sup> On the Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., attached to this Form 1065, the LLC listed petitioner as a 51% partner and the Smaldino Family Trust as a 49% partner for the whole year.<sup>5</sup> Mrs. Smaldino was not listed as a partner for any part of 2013.

On its 2013 Form 1065 the LLC also reported that in 2013 it had paid petitioner \$40,000 in guaranteed payments and as of yearend 2013 had accrued a yearend liability of \$40,000 "DUE TO MANAGER".

### **Gift Tax Returns**

On his 2013 Federal gift tax return, petitioner reported a taxable gift to the Dynasty Trust of \$1,031,882, described as "INTEREST IN SMALDINO [\*13] INVESTMENTS, LLC". He did not elect to split the gift,<sup>6</sup> and he did not report any gift to Mrs. Smaldino.<sup>7</sup>

On her 2013 Federal gift tax return, Mrs. Smaldino reported a taxable gift to the Dynasty Trust of \$5,249,118, described as "INTEREST IN SMALDINO INVESTMENTS, LLC". Mrs. Smaldino allocated against this transfer \$5,249,118 of her \$5,250,000 available Federal estate and gift tax exemption, resulting in zero reported gift tax due. She did not elect to split the gift.

### **Notice of Deficiency**

By notice of deficiency respondent determined that for 2013 petitioner had a \$1,154,000 deficiency in gift tax. The notice explained that respondent had determined that in 2013 petitioner had made taxable gifts totaling \$8,180,000, made up of: (1) a \$2,157,071 gift of the LLC interests that petitioner had made directly to the Dynasty Trust and (2) a \$6,022,929 gift of the LLC interests that petitioner assertedly had made indirectly to the Dynasty Trust through Mrs. Smaldino.

## **[\*14] OPINION**

### **I. General Legal Principles**

Section 2501 imposes a tax for each calendar year "on the transfer of property by gift" by any taxpayer. Section 2511(a) provides that this gift tax "shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible". If a donor transfers an interest in property to his or her spouse as a gift, the value of the property interest is generally allowable as a deduction in computing the donor's taxable gifts for the year. Sec. 2523(a).

### **II. The Parties' Contentions**

The parties agree that the total LLC units transferred to the Dynasty Trust as of April 15, 2013, constituted a 49% class B member interest in the LLC.<sup>8</sup> The parties disagree about the extent to which these transfers should be characterized as gifts from petitioner to the Dynasty Trust and the value of the transferred interests for gift tax purposes. [\*15] Petitioner contends that he gave to the Dynasty Trust only an 8.05% LLC class B member interest. He contends that the Dynasty Trust received the 40.95% LLC class B member interest as a gift from Mrs. Smaldino and not from him. He further contends that his 2013 gift tax return correctly reported the value of the 8.05% gift interest as \$1,031,882, according to Mr. Biedenbender's appraisal, which opined that the fair market value of a 49% class B member interest in the LLC as of April 15, 2013, was \$6,281,000.<sup>9</sup>

Respondent contends that petitioner made a taxable gift to the Dynasty Trust of a 49% class B member interest in the LLC, including an indirect gift of the 40.95% class B member interest that he purportedly transferred to Mrs. Smaldino and that she purportedly retransferred to the Dynasty Trust a day later. Although respondent determined in the notice of deficiency that the fair market value of the 49% class B member interest (the subject interest) was \$8,180,000, in this proceeding he contends, on the basis of his expert's report and testimony, that the fair market value of the subject interest was actually \$8,421,000.

### **III. Sufficiency of Pleadings**

At the conclusion of the trial, respondent's counsel made an oral motion to conform the pleadings to the proof to increase respondent's valuation of the subject [\*16] interest to \$8,421,000, in accordance with his expert's report and testimony. On brief petitioner objects to the granting of respondent's motion on the ground that "respondent has not moved for leave to increase the deficiency."

Pursuant to Rule 41(b), respondent's failure to formally amend his pleadings to assert an increased deficiency is not necessarily fatal if the issue giving rise to an increased deficiency was tried with petitioner's express or implied consent. As the Court explained in *McGee v. Commissioner*, T.C. Memo. 2000-308, 2000 Tax Ct. Memo LEXIS 366, at \*19-\*20:

Section 6214(a) provides that this Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount determined by the Commissioner in the notice of deficiency if the Commissioner asserts a claim at or before the hearing or rehearing. Consistent with the general mandate of section 6214(a), this Court generally will only exercise its jurisdiction over an increased deficiency where the matter is properly pleaded. See *Estate of Petschek v. Commissioner*, 81 T.C. 260, 271-272 (1983), affd. 738 F.2d 67 (2d Cir. 1984); *Markwardt v. Commissioner*, 64 T.C. 989, 997 (1975).

Rule 41(b)(1), however, provides that when an issue not raised in the pleadings is tried with the express or implied consent of the parties, that issue is treated in all respects as if it had been raised in the pleadings. Thus, where respondent raises an issue that could result in an increased

deficiency without formally amending his pleading and that issue is tried with petitioner's express or implied consent, the requirement in section 6214(a) that respondent make a claim for the increased deficiency is satisfied. *See Woods v. Commissioner*, 91 T.C. 88, 93 (1988).

[\*17] In his pretrial memorandum filed about two weeks before trial respondent advised that his expert witness would testify that the fair market value of the subject interest was \$8,421,000 and that respondent might move to conform the pleadings to the proof at trial. Petitioner received respondent's expert witness report well before the trial and never objected at trial to the introduction into evidence of the higher values found by respondent's expert. Petitioner cross-examined respondent's expert witness about his methodology. Petitioner has not expressly argued prejudicial surprise, and we see none. We conclude that the issue of a value for the subject interest higher than that determined in the notice of deficiency was tried with at least petitioner's implied consent, making formal amendment of the pleadings unnecessary, *see* Rule 41(b), and satisfying the requirement in section 6214(a) that respondent make a claim for the increased deficiency, *see Woods v. Commissioner*, 91 T.C. 88, 93 (1988). Accordingly, we will deny respondent's motion as moot.

#### **IV. Burden of Proof**

Respondent bears the burden of proving that petitioner is liable for any increased deficiency. *See* Rule 142(a) (1). The burden of proof is otherwise on petitioner to show that respondent's determinations are incorrect.<sup>10</sup> *See id.*; *Welch* [\*18] *v. Helvering*, 290 U.S. 111, 115 (1933). For the most part, however, we decide this case on the basis of the preponderance of evidence in the record rather than by placement of the burden of proof.

#### **V. The Purported Transfer to Mrs. Smaldino**

It is well established that the substance of a transaction, rather than the form in which it is cast, determines the tax consequences unless it appears from an examination of the statute and its purpose that form was intended to govern. *Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260, 265-267 (1958); *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945); *Stewart v. Commissioner*, 714 F.2d 977, 988 (9th Cir. 1983), *aff'g* T.C. Memo. 1982-209. Section 2511(a) implicitly embodies principles of substance over form by including "indirect" transfers in the definition of a taxable gift. *Sather v. Commissioner*, 251 F.3d 1168, 1174 (8th Cir. 2001), *aff'g in part, rev'g in part* T.C. Memo. 1999-309. Heightened scrutiny is appropriate in cases, such as this one, where all the parties to the transactions in question are related. *See Brown v. United States*, 329 F.3d 664, 673 (9th Cir. 2003); *Kuney v. Frank*, 308 F.2d 719, 721 (9th Cir. 1962) ("Transactions between persons in a close family group, whether or not involving partnership interests, [\*19] afford much opportunity for deception and should be subject to close scrutiny." (quoting H.R. Rept. No. 82-586, at 33 (1951), 1951-2 C.B. 357, 381)); *Estate of Bongard v. Commissioner*, 124 T.C. 95, 119 (2005) ("A transaction between family members is \* \* \* subjected to heightened scrutiny to ensure that it is not a sham or disguised gift.").

Respondent contends that the doctrine of substance over form demands that we disregard petitioner's purported transfer of the LLC member interests to Mrs. Smaldino and her purported retransfer of these same interests to the Dynasty Trust a day later because these actions were "part of a prearranged plan between all parties involved to effectuate the transfer of the ownership of the LLC" from petitioner to the Dynasty Trust. Respondent urges us to treat the two purported transfers, in accordance with their asserted substance, as an indirect gift from petitioner to the Dynasty Trust.

In support of his position, respondent relies on a line of cases in which the courts have employed substance over form principles to recharacterize multistep property transfers among related parties as indirect gifts between the persons who were determined to be, in substance, the actual donors and donees. *See, e.g.*, *Heyen v. United States*, 945 F.2d 359 (10th Cir. 1991) (treating the decedent's inter vivos transfers of stock shares to multiple nonfamily members, who [\*20] immediately reconveyed the shares to members of the decedent's family, as indirect transfers from the decedent to the ultimate donees); *Estate of Bies v. Commissioner*, T.C. Memo. 2000-338 (treating the decedent's inter vivos transfers of closely held corporation stock to her daughters-in-law and granddaughter-in-law, each of whom immediately transferred the stock to her husband, as indirect transfers from the decedent to those husbands); *Estate of Cidulka v. Commissioner*, T.C. Memo. 1996-149 (treating the decedent's inter vivos transfers of stock to his daughter-in-law, who immediately transferred the stock to her husband, as gifts of minority stock interests to the decedent's son for purposes of valuing blocks of shares).

Petitioner counters that those cases are not controlling because none involved an interspousal transfer like the one at issue here. He does not expressly dispute, however, that the transactions in question were part of a prearranged plan to transfer ownership of 49% of the LLC class B member interests to the Dynasty Trust while using Mrs. Smaldino's estate and gift tax exemption. Indeed, petitioner testified that he intended for the properties in the LLC to be divided among five of his children, as beneficiaries of the Dynasty Trust, while Mrs. Smaldino would receive a larger share of assets that were "outside the LLC". Mrs. Smaldino testified that before the purported transfer in question she had already [\*21] made "a commitment, promise" to her husband and family that she would transfer the LLC units to the Dynasty Trust. When asked on direct examination whether she could have changed her mind if she had wanted to, she responded: "No, because I believe in fairness."

Petitioner nevertheless urges that we should respect his purported transfer of the LLC member interests to Mrs. Smaldino because, he says, it was sanctioned by section 2523(a), which generally exempts interspousal transfers from gift tax. Petitioner cites the legislative history of section 2523(a), which indicates that in enacting this exemption of spousal gifts from the gift tax in 1981 (replacing a prior deduction limited to one-half of spousal gifts), Congress intended that a "husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes", so that "no tax \* \* \* [is] imposed on transfers between a husband and wife." S. Rept. No. 97-144, at 127 (1981), 1981-2 C.B. 412, 461. Petitioner suggests that the legislative policies informing section 2523(a) negate the substance over form doctrine as respondent seeks to apply it in this case.<sup>11</sup> Consequently, petitioner urges, we should reject [\*22] respondent's recharacterization of the purported interspousal transfer of the LLC member interests as an indirect gift from petitioner to the Dynasty Trust.

Pursuant to its terms, however, section 2523(a) applies in the first instance only if the donor "transfers \* \* \* an interest in property" to his or her spouse. For the reasons discussed below, we conclude that petitioner's actions were ineffective to transfer membership interests in the LLC to Mrs. Smaldino. Consequently, section 2523(a) is inapplicable, and we agree with respondent that in substance the Dynasty Trust received all its membership interests from petitioner.

As a threshold matter, we observe that petitioner's execution of a certificate of assignment to Mrs. Smaldino, although a factor to be considered, is not controlling. The courts have "never regarded 'the simple expedient of drawing up papers,' \* \* \* as controlling for tax purposes when the objective economic realities are to the contrary." *Kerr v. Commissioner*, 113 T.C. 449, 464 (1999) (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1979)), *aff'd*, 292 F.3d 490 (5th Cir. 2002). "[E]xecution of a gift document, alone, is not a sufficient objective manifestation of an intent to donate. \* \* \* Circumstances surrounding the writing must show that the writing was meant to be effective." *Linton v. United States*, 630 F.3d 1211, 1218-1219 (9th Cir. 2011). [\*23] Consonant with these principles, "courts have often recognized that the tax consequences of a transaction involving a nominee or straw party must be determined with regard to the true beneficial interests involved. '[Transactions] which do not vary, control or change the flow of economic benefits, are to be dismissed from consideration'". *Snyder v. Commissioner*, 66 T.C. 785, 791 (1976) (quoting *Higgins v. Smith*, 308 U.S. 473, 476 (1940)); *cf.* sec. 1.704-1(e)(2)(i), Income Tax Regs. ("The reality of the transfer and of the donee's ownership of \* \* \* [an interest in a partnership] attributed to him are to be ascertained from the conduct of the parties with respect to the alleged gift and not by any mechanical or formal test.").

The LLC's operating agreement distinguishes the assignment of economic rights in the LLC from the transfer of membership interests. It states that "[n]o member" shall be entitled to transfer or assign any part of the member's ownership "except as expressly provided for in Section 11.5(c)". Section 11.5(c), captioned "Permitted Transfers", expressly provides for transfers of membership interests, without prior board approval, only to (1) other members and (2) to trusts created for the benefit of petitioner's descendants (e.g., the Dynasty Trust). Petitioner's purported transfer to Mrs. Smaldino is not among the types of transfers "expressly provided for" in section 11.5(c). [\*24] Under section 11.5(f) of the operating agreement, captioned "No Effect to Transfers in Violation of Agreement", upon any transfer of a membership interest in violation of section 11.5, the transferee is treated not as a member but as an assignee, lacking the full rights and privileges of a member. Under section 11.5(b), the assignee of a membership interest can become a "substituted member" only if certain conditions are met, including the assignee's execution of an instrument adopting the terms and provisions of the operating agreement. Nothing in the record suggests that Mrs. Smaldino ever executed any such instrument or otherwise suggests that under the terms of the operating agreement she would have received anything more than an assignee's interest in the LLC as a result of the purported transfer in question. *Cf. McCord v. Commissioner*, 120 T.C. 358, 371-373 (2003) (finding that for gift tax purposes the donors assigned only economic rights with respect to a limited partnership rather than all their rights as partners), *rev'd on other grounds*, *Succession of McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006).

The record does not suggest that petitioner, in his dual roles as trustee of the Smaldino Family Trust and as manager of the LLC, gave express or implied consent for the admission of Mrs. Smaldino as a member in disregard of the operating agreement's restrictions. To the contrary, the record shows that on April [\*25] 15, 2013--a day after he purportedly transferred the LLC member interests to Mrs. Smaldino--petitioner executed an amendment to the LLC operating agreement (providing for guaranteed payments to himself) which identified the Smaldino Family Trust as the LLC's "SOLE MEMBER".

The LLC's operating agreement defines class A voting units and class B nonvoting units as those units "identified as such on Exhibit 'A'". Exhibit A was never amended to show that Mrs. Smaldino held any class B nonvoting units (or any other member interest). Instead, exhibit A of the operating agreement was amended only to show that as of April 15, 2013, the Dynasty Trust held a 49% member interest in the LLC (consisting of two blocks of class B nonvoting units--one of 409.5 units and the other of 80.5 units, representing 40.95% and 8.05%, respectively, of the 1,000 aggregated class A voting units and class B nonvoting units) and to show petitioner, as trustee of the Smaldino Family Trust, as holding the remaining 51% member interest (consisting of 500 class B nonvoting units as well as the 10 class A voting units).

Notably, this amendment to the LLC's operating agreement, although purporting to be effective April 15, 2013, is undated (unlike all the other operating agreement amendments in the record). Also undated are the certificates of assignment from petitioner to Mrs. Smaldino, purporting to be effective April 14, [\*26] 2013, and from petitioner to the LLC and from Mrs. Smaldino to the LLC, each purporting to be effective April 15, 2013. The missing dates take on added significance when we consider that the dollar amounts stated in the certificates of assignment, as well as the ownership percentages stated in the LLC operating agreement amendment, all depend directly on the Biedenbender valuation of a 49% class B nonvoting member interest.<sup>12</sup> The Biedenbender valuation report, however, is dated August 22, 2013--over four months after the transfers purportedly occurred. On the basis of all the evidence in the record we find it more likely than not that the undated certificates of assignment and associated operating agreement [\*27] amendment were executed no earlier than August 22, 2013.<sup>13</sup> Given that this date is more than four months after the stated effective dates of the purported transfers of the LLC membership interests to both Mrs. Smaldino and the Dynasty Trust, as a practical matter there was never a time when Mrs. Smaldino would have been able to effectively exercise any ownership rights with respect to any LLC membership interests. Moreover, for the reasons previously discussed, we do not believe that petitioner ever intended for her to do so.

Finally, the LLC's 2013 partnership return reported that in 2013 the only partners were petitioner with a 51% interest (ostensibly by virtue of his role as trustee of the Smaldino Family Trust) and the Smaldino Family Trust with a 49% interest.<sup>14</sup> The LLC did not report Mrs. Smaldino as being a partner at any time.

On the basis of all the evidence in the record, we conclude that petitioner never effectively transferred any membership interest in the LLC to Mrs. Smaldino and consequently that the Dynasty Trust received its entire 49% of the class B membership interests as a gift from petitioner. Accordingly, we sustain [\*28] respondent's determination that for tax year 2013 petitioner made a taxable gift to the Dynasty Trust of a 49% class B member interest in the LLC.

## **VI. Valuation of the 49% Class B Member Interest**

### **A. General Valuation Principles**

We must now determine the value of the 49% class B member interest in the LLC as of April 15, 2013, when it was transferred to the Dynasty Trust.

A gift of property is valued as of the date of the transfer. Sec. 2512(a). If property is transferred for less than adequate and full consideration, then the excess of the value of the property transferred over the consideration received is generally deemed a gift. *See* sec. 2512(b). A gift is measured by the value of the property passing from the donor, rather than by the property received by the donee or upon the measure of enrichment to the donee. *See* sec. 25.2511-2(a), Gift Tax Regs. Typically, we consider information available on or close to the valuation date and facts that were reasonably known on the valuation date. *Estate of Gilford v. Commissioner*, 88 T.C. 38, 52-53 (1987).

For gift tax purposes, the value of the transferred property is generally the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. [\*29] 546, 551 (1973)

(quoting section 20.2031-1(b), Estate Tax Regs.); see sec. 25.2512-1, Gift Tax Regs. The determination of property value for gift tax purposes is an issue of fact, and all relevant factors must be considered. See *Anderson v. Commissioner*, 250 F.2d 242, 249 (5th Cir. 1957), *aff'g in part and remanding* T.C. Memo. 1956-178; *LeFrak v. Commissioner*, T.C. Memo. 1993-526.

For gift tax purposes, transfers of interests in a single-member LLC are valued as transfers of interests in the LLC rather than as transfers of proportionate shares of the underlying assets. See *Pierre v. Commissioner*, 133 T.C. 24 (2009), *supplemented by* T.C. Memo. 2010-106.

## **B. Expert Opinions**

The parties rely on expert opinions to value the subject interest. We evaluate expert opinions in the light of all the evidence in the record and may accept or reject the expert testimony, in whole or in part, according to our own judgment. See *Helvering v. Nat'l Grocery Co.*, 304 U.S. 282, 295 (1938); *Estate of Mellinger v. Commissioner*, 112 T.C. 26, 39 (1999). "The persuasiveness of an expert's opinion depends largely upon the disclosed facts on which it is based." *Estate of Davis v. Commissioner*, 110 T.C. 530, 538 (1998). We may be selective in our use of any part of an expert's opinion. See *id.*

### **[\*30] 1. The Biedenbender Report**

Petitioner relies on the expert opinion of Mr. Biedenbender, a certified public accountant and appraiser at BizValPlus, Inc. Mr. Biedenbender opined that the fair market value of a 49% class B member interest as of April 15, 2013, was \$6,281,000, calculated as follows. Mr. Biedenbender first determined the LLC's net asset value (NAV) as of April 15, 2013, to be \$26,795,639. On this basis he estimated the fair market value of a 49% class B member interest in the LLC (before discounts and other adjustments) to be \$13,130,000.<sup>15</sup> From this amount he subtracted \$2,928,000, which he estimated to be the present value of petitioner's rights to guaranteed payments under the LLC's operating agreement as in effect on April 15, 2013. To the resulting \$10,202,000 he applied a 38.43% combined discount for lack of control and lack of marketability to conclude that the net fair market value of a 49% class B member interest in the LLC was \$6,281,000.

### **2. The Eichorst Report**

Respondent relies on the expert opinion of Jared Eichorst, a principal at AltaView Advisors, LLC, and formerly a manager with Deloitte Transactions and [\*31] Business Analytics, LLP, where he was the national practice leader for estate and gift tax valuations of closely held investment holding entities. Mr. Eichorst opined that the fair market value of a 49% class B member interest as of April 15, 2013, was \$8,421,000, calculated as follows. Using the adjusted NAV method, Mr. Eichorst first determined the LLC's fair market value as of April 15, 2013, to be \$26,852,186. To this value he applied a 36% combined discount for lack of control and lack of marketability to arrive at an aggregate equity value of \$17,185,399. Multiplying this value by 49% he determined that the fair market value of a 49% class B interest was \$8,421,000 (rounded). Mr. Eichorst opined that the class A guaranteed payment rights did not affect the value of the class B member interests.

## **C. Net Asset Value**

Both experts agree that the preferred approach to valuing the subject interest begins with determining the LLC's NAV, calculated by subtracting the market value of its liabilities from the market value of its assets. Indeed, the experts are only \$56,547 apart in their opinions as to the LLC's NAV: \$26,795,639 according to Mr. Biedenbender versus \$26,852,186 according to Mr. Eichorst. The experts agree about the values of the LLC's 10 real estate properties, which are the LLC's principal assets. The Eichorst report also includes, however, certain incidental [\*32] assets that are omitted from the Biedenbender report, e.g., \$200,000 of fixtures, furniture, and equipment. Other differences, such as slightly higher mortgage balances reflected in the Eichorst report as compared to the Biedenbender report, cut in petitioner's favor. Mr. Eichorst's report indicates, and petitioner does not dispute, that he identified and valued the LLC's assets and liabilities on the basis of the LLC's internally prepared balance sheets, adjusting the reported values to April 15, 2013. Mr. Biedenbender's report does not completely explain how he identified the LLC's assets and liabilities or why certain incidental assets appear to have been omitted. Finding the Eichorst report more reliable than the Biedenbender report in this regard, we accept its conclusion that the LLC's NAV as of April 15, 2013, was \$26,852,186.

#### D. Guaranteed Payments

On April 15, 2013, the LLC's operating agreement was amended to provide petitioner, as the sole class A member, a guaranteed payment of \$10,000 per month beginning May 15, 2013. The record indicates that the LLC paid or accrued \$80,000 in guaranteed payments to petitioner during 2013 (\$10,000 per month for eight months). On December 31, 2013, the LLC's operating agreement was amended to delete the provision for guaranteed payments. The parties and their experts disagree primarily on whether the provision for guaranteed payments [\*33] should be separately taken into account in valuing the subject interest and, if so, in what manner.

Mr. Biedenbender treated the guaranteed payment as an annuity of \$10,000 per month for 40 years. He calculated the present value for this "annuity" to be \$2,928,000 using a risk-free long-term monthly applicable Federal rate (AFR) of 2.67% as in effect in April 2013. He subtracted this amount from what he determined to be the fair market value of a 49% class B member interest in the LLC before applying discounts.

By contrast, Mr. Eichorst concluded that the guaranteed payment rights should not be taken into account in valuing the transferred class B member interests because, he opined, the guaranteed payments would not affect the fair market value of the LLC using the NAV approach and would not change the discounts needed to properly value the LLC. He opined that the guaranteed payments are comparable to asset management fees paid by comparable real estate investment holding companies, the values of which would not ordinarily be affected by asset management fees within the range indicated by the amounts of the guaranteed payments.

Petitioner counters that Mr. Eichorst has mistakenly equated guaranteed payments and management fees. Petitioner asserts that "any buyer of the minority [\*34] interest at issue in this case would fully understand that the operating agreement requires Mr. Smaldino, as the voting member, be paid the guaranteed payment whether or not entity level management fees are paid." Petitioner further asserts that "it remains common sense that the minority interest in question is less marketable than a similar interest not constrained by the guaranteed payment required and payable to the voting member" under the LLC operating agreement. In support of his position petitioner points to chapter 14 of the Code, which imposes special rules for valuing retained interests in multitiered family partnerships. Section 2701 (which is in chapter 14) applies when a parent--such as petitioner--transfers certain partnership interests to family members while retaining an interest in the partnership after the transfer. Specifically, if the parent retains an "applicable retained interest", including a "distribution right", it is usually valued at zero.<sup>16</sup> See sec. 2701(a)(3)(A), (b)(1)(A). The statute expressly provides, [\*35] however, that "any right to receive any guaranteed payment described in section 707(c) of a fixed amount" is not a "distribution right". Sec. 2701(c)(1)(B)(iii). Hence, such a right is not an "applicable retained interest" within the meaning of section 2701(b)(1), and chapter 14 does not mandate that it be valued at zero.

Petitioner asserts, and respondent does not expressly dispute, that the guaranteed payment rights in question were designed specifically to qualify under section 707(c). Hence, petitioner reasons, under chapter 14 these guaranteed payment rights are not to be disregarded in the valuation process.

Neither party has otherwise argued the applicability of chapter 14 to this case, and we surmise that petitioner does not mean to suggest that chapter 14 should apply to this case other than to support his favored treatment of guaranteed payments. It is instructive, however, to consider the valuation methodology of chapter 14 more comprehensively. For those situations in which section 2701 applies, the value of the junior interest transferred is generally calculated by subtracting the value of the senior interests (including rights to distribution of [\*36] income or capital that are preferred to rights of the transferred interest) from the aggregate value of all family-held equity interests and then allocating the remaining value among the transferred interest and other interests of the same or junior classes. See sec. 25.2701-3(b)(1) through (3), Gift Tax Regs. The amount thus allocated to the transferred interest is then reduced to take into account minority and similar discounts, as appropriate. *Id.* subpara. (4); see Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts*, para. 136.2.8 (2021), Westlaw FTXIEG (describing subtraction method under section 2701).

We conclude that it is appropriate, in valuing the transferred class B units for gift tax purposes, to subtract from the LLC's NAV (before applying any discounts) the value of the class A units retained by petitioner, including the value of his priority claims, i.e., the guaranteed payments; to then allocate the remaining value among the transferred and retained class B units; and to then apply appropriate minority and marketability discounts to the transferred class B units. That approach is consistent not only with chapter 14 but also with this Court's decision in *McCord v.*

*Commissioner*, 120 T.C. at 376--a case that did not involve the application of chapter 14. *McCord* involved the valuation for gift tax purposes of gift class B limited partner interests in a limited partnership. The class A limited partners' sole economic interest consisted of a guaranteed payment for the use of [\*37] their capital. *Id.* n.12. In valuing the gift class B limited partner interests, the Court first subtracted from the partnership's NAV (before applying any discounts) the class A limited partners' priority claims against the partnership's assets under the terms of the partnership agreement.<sup>17</sup> *Id.* at 376.

In keeping with this methodology, we agree with petitioner that the guaranteed payments should be taken into account in valuing the gift class B interests. We are unable, however, to agree with Mr. Biedenbender's methodology in all respects. For one thing, as respondent points out, Mr. Biedenbender has not meaningfully explained why his calculation applies the risk-free AFR rate.<sup>18</sup> On brief, petitioner suggests that the AFR rate is appropriate because, he says, "[t]he guaranteed payment is payable in all circumstances, whether the LLC has cash flow or profit or not." Petitioner's argument ignores, however, that under the terms of the operating agreement, if the LLC is unable to make any guaranteed [\*38] payments because of insufficient funds, the class A voting member (i.e., petitioner) "shall promptly make Additional Capital Contributions sufficient to enable the Company to make such payments on a timely basis." In effect, then, petitioner bore the risk of the LLC's inability to make guaranteed payments because of insufficient funds.

In his rebuttal expert report, Mr. Eichorst opines that a 6.75% discount rate is appropriate because, as he explains and petitioner does not expressly dispute, it is consistent with capitalization rates used in valuing the LLC's underlying assets. We find Mr. Eichorst's methodology more reliable than Mr. Biedenbender's in this regard. Accordingly, we accept Mr. Eichorst's use of a 6.75% discount rate. According to Mr. Eichorst's rebuttal expert report, adjusting Mr. Biedenbender's present value calculations to use this 6.75% discount rate yields a present value for the guaranteed payments of \$1,647,412.<sup>19</sup>

We also agree with respondent that Mr. Biedenbender has incorrectly--and inconsistently with the methodology of chapter 14 on which petitioner selectively relies--deducted the full present value of the guaranteed payments against the 49% transferred class B member interest rather than against the entirety of class B [\*39] member interests. We will make appropriate adjustments in this regard in our calculations below.

The LLC's operating agreement was amended on December 31, 2013, to eliminate the provision for guaranteed payments. Respondent argues that this is a reason to disallow any reduction in value of the subject interest by the present value of the future guaranteed payments. Generally, however, subsequent events are not considered in fixing fair market value, except to the extent that they were reasonably foreseeable at the date of valuation. *Olson v. United States*, 292 U.S. 246, 257 (1934) ("Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value[.]"); *First Nat'l Bank of Kenosha v. United States*, 763 F.2d 891, 894 (7th Cir. 1985); *Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1982); *Estate of Gilford v. Commissioner*, 88 T.C. at 52. Respondent has not asserted that the elimination of the provision for guaranteed payments was reasonably foreseeable as of April 15, 2013, and has not otherwise advanced any meaningful argument as to why or how the eventual elimination of the provision for guaranteed payments should be factored into the valuation of the gift of the subject [\*40] interest as of April 15, 2013. Nor has respondent argued that the elimination of the provision for guaranteed payments on December 31, 2013, gave rise to a separate gift from petitioner to the other class B members at that time. We deem respondent to have waived any such arguments.<sup>20</sup>

#### **E. Discounts for Lack of Control and Marketability**

In valuing the transferred class B member interests, Mr. Biedenbender applied a 38.43% combined discount for lack of control and lack of marketability. Mr. Eichorst applied a similar combined discount rate of 36%.

On brief petitioner asserts that Mr. Biedenbender's slightly higher combined discount rate is explained by his taking into account the guaranteed payment, which is not taken into account in Mr. Eichorst's analysis. Petitioner states: "The only significant difference between the appraisal reports as presented is the treatment of the required guaranteed payment."

As discussed *supra*, in valuing the transferred class B member interests we will make an appropriate adjustment for the value of the guaranteed payment rights [\*41] retained by petitioner. Consequently, it would be inappropriate to make redundant adjustments to the discount rate for these same guaranteed payment rights. See *Shepherd v. Commissioner*, 115 T.C. 376, 398 n.20 (2000), *aff'd*, 283 F.3d 1258 (11th Cir. 2002). Consequently, petitioner having advanced no other meaningful argument for Mr. Biedenbender's slightly higher combined discount rate, we will apply Mr. Eichorst's 36% combined discount rate.

## VII. Summary and Conclusion

On the basis of all the evidence in the record, we conclude and hold that petitioner made a gift to the Dynasty Trust of 49% of the class B membership interests in the LLC.

The value of this gift is \$7,820,008, calculated as follows:

[\*42]

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LLC's NAV as of 4/15/13	\$26,852,186
Less : Value of retained class A member interests, including guaranteed payment rights <sup>1</sup>	(1,915,934)
Value allocated to aggregate class B member interests	24,936,252
Value allocated to 49% class B member interest before discounts <sup>2</sup>	12,218,763
Less : 36% combined discount	(4,398,755)
Value of transferred 49% class B member interest	7,820,008

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<sup>1</sup>The indicated value of the retained class A member interests is the sum of \$1,647,412, representing the guaranteed payments' present value as of April 15, 2013, and \$268,522, representing a 1% allocable share (10 class A units divided by 1,000 total LLC membership units) of the LLC's NAV of \$26,852,186.

<sup>2</sup>Calculated as 49% of \$24,936,252.

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We have considered all other arguments the parties have advanced for different results. Arguments not expressly addressed herein we conclude are irrelevant, moot, or without merit.

*Decision will be entered under Rule 155.*

## Footnotes

<sup>1</sup>Unless otherwise indicated, all section references are to the Internal Revenue Code (Code) in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

<sup>2</sup>For tax year 2013 the basic exclusion amount was \$5,250,000. Sec. 2010(c)(3); Rev. Proc. 2013-15, sec. 2.13, 2013-5 I.R.B. 444, 448.

<sup>3</sup>More precisely, the Dynasty Trust ended up with 49% of the aggregated 1,000 class A voting units and class B nonvoting units, or 49.49% of just the class B nonvoting units. In this proceeding, perhaps rounding down 49.49% to 49%, the parties and their experts uniformly refer to the transfers in question as ultimately resulting in the Dynasty Trust's holding a 49% class B member interest. For simplicity, we refer to the subject interest in the same manner.

<sup>4</sup>Before 2013 the LLC was treated as a disregarded entity for income tax purposes. Unless it elects otherwise, an LLC with only one member is treated for income tax purposes as the member's sole proprietorship--otherwise known

as a "disregarded entity". See sec. 301.7701-3(a) and (b)(1), *Proced. & Admin. Regs.*

<sup>5</sup>The listing of the Smaldino Family Trust as a 49% partner appears to have been in error. For subsequent years the LLC's Schedules K-1 listed the Dynasty Trust as the 49% partner.

<sup>6</sup>The gift-splitting election of sec. 2513 allows married couples to treat gifts to third parties as though made one-half by each spouse.

<sup>7</sup>Pursuant to sec. 6019(2) taxpayers are not required to file gift tax returns for transfers between spouses.

<sup>8</sup>Each of the transfer documents describes the transferred LLC interests not in terms of percentage interests but rather in terms of a defined value, i.e., a "sufficient number" of nonvoting units in the LLC "so that the fair market value of such nonvoting units as determined for federal gift tax purposes shall be" a specified dollar amount. Petitioner concedes that these defined value clauses do not define or limit the amount of his taxable gifts to be determined in this proceeding.

<sup>9</sup>The math is off slightly, presumably because of rounding.

<sup>10</sup>Petitioner does not contend and the record does not establish that he has met the requirements of sec. 7491(a) to shift the burden of proof to respondent as to any relevant factual issue.

<sup>11</sup>To be clear, the allowance of the marital deduction under sec. 2523(a) is not directly at issue in this case. Petitioner's 2013 gift tax return did not claim any marital deduction inasmuch as he did not report any gift to Mrs. Smaldino. Similarly, respondent's determination does not expressly address the allowability of any marital deduction inasmuch as it treats the transfer in question as an indirect gift from petitioner to the Dynasty Trust.

<sup>12</sup>Mr. Biedenbender's report opined that the fair market value of "49%, Class B nonvoting" units was \$6,281,000. This amount equals (rounded to the nearest dollar) the sum of the dollar values reported on the two certificates of assignment whereby petitioner purportedly transferred \$5,249,118.42 of class B units to Mrs. Smaldino on April 14, 2013, and \$1,031,881.58 of class B units to the Dynasty Trust on April 15, 2013. Consequently, the fair market values stated on the certificates of assignment are clearly based on Mr. Biedenbender's valuation. Moreover, these same valuations necessarily determined the LLC ownership percentages represented by these two blocks of the LLC class B units (40.95% and 8.05%, respectively) as stated in the LLC operating agreement amendment.

In this regard, we note that the parties have stipulated that petitioner and Mrs. Smaldino decided on the \$5,249,118.42 amount stated in the certificate of assignment from him to her "by determining Mrs. Smaldino's available [F]ederal estate and gift tax exemption." We do not view this stipulation as contrary to our conclusion that the exact dollars-and-cents value stated in the certificate of assignment was derived from the Biedenbender valuation by allocating to Mrs. Smaldino an LLC ownership percentage that would result in a value approximating but not exceeding her available \$5,250,000 estate and gift tax exemption.

<sup>13</sup>This conclusion aligns with the fact that the Smaldino Family Trust was identified as the LLC's "SOLE MEMBER" on April 15, 2013, when (as previously noted) petitioner signed an amendment to the LLC operating agreement.

<sup>14</sup>This seemingly erroneous attribution of a 49% interest to the Smaldino Family Trust was corrected on the LLC's 2014 partnership return to show the 49% interest as belonging to the Dynasty Trust.

<sup>15</sup>The math appears to reflect rounding. Although Mr. Biedenbender's report suggests at various places that the guaranteed payment amount was subtracted after application of discounts, his cover letter calculation can be duplicated only by applying the discounts after subtracting the guaranteed payment as described above.

<sup>16</sup>As an exception to this general rule, an applicable retained interest is not valued at zero if it is a qualified payment right. For this purpose, a "qualified payment" is defined as a cumulative dividend payable periodically at a fixed rate or a comparable payment under a partnership interest. Sec. 2701(c)(3)(A). Qualified payments rights are generally valued under normal valuation procedures using appropriate market discount rates. See Boris I. Bittker &

Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts*, para. 136.2.8 (2021), Westlaw FTXIEG. The similarity between guaranteed payment rights and qualified payment rights has led one commentator to observe that "even if a guaranteed payment were governed by Sec. 2701, it would constitute a qualified payment right and thus would be subject to the same fair market value principles as a guaranteed payment not subject to Sec. 2701, with a couple of exceptions." Louis S. Harrison, "Special Valuation Rules Can Save Transfer Taxes", 11 J. Partnership Tax'n 239, 247 n.29 (1994). Neither party has argued that the guaranteed payments at issue in this case constitute qualified payment rights under sec. 2701.

<sup>17</sup>In *McCord v. Commissioner*, 120 T.C. 358, 376 (2003), *rev'd on other grounds*, *Succession of McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006), the Court stated that it concurred with the methodology of the taxpayer's expert who "subtract[ed] \$20,000 from \* \* \* [the limited partnership's] NAV to reflect the class A limited partner's \$20,000 priority claim against \* \* \* [the limited partnership's] assets under the terms of the partnership agreement." The Opinion does not otherwise discuss the terms or valuation of the guaranteed payment.

<sup>18</sup>Respondent has not otherwise expressly disputed Mr. Biedenbender's treatment of the guaranteed payments as an annuity payable for 40 years. We deem respondent to have waived or conceded any argument in this regard.

<sup>19</sup>More precisely, Mr. Eichorst calculated the present value of 49% of the guaranteed payments to be \$807,232. This is mathematically equivalent to a present value of \$1,647,412 ( $\$807,232/.49$ ) for 100% of the guaranteed payments.

<sup>20</sup>For the sake of completeness, we note that sec. 2701(d) provides a lookback rule that requires an addition to be made to the transferor's taxable gifts or taxable estate if a qualified payment right is valued at an amount other than zero at the time of the sec. 2701(a) transfer but payments under the qualified payment right are not made as projected in the sec. 2701(a) valuation. *See Bittker & Lokken, supra*, para. 136.2.9. Respondent has not argued that sec. 2701(d) has any applicability to this case, and we deem any such argument to be waived.

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536 S.W.3d 409  
Supreme Court of Tennessee,  
AT KNOXVILLE.

IN RE: ESTATE OF J. Don BROCK

No. E2016-00637-SC-R11-CV

September 6, 2017 Session

FILED 11/22/2017

**Synopsis**

**Background:** Five of decedent's seven children filed will contest challenging will that expressly disinherited them. The Chancery Court, Hamilton County, No. 15-P-245, Jeffrey M. Atherton, Chancellor, dismissed action due to lack of standing. Contesting children appealed. The Court of Appeals, 2016 WL 6503696, affirmed. Contesting children filed application for permission to appeal, which was granted.

**[Holding:]** The Supreme Court held that decedent's children who were expressly disinherited by will had standing to bring will contest to challenge validity of will.

Reversed and remanded.

West Headnotes (8)

- [1] **Wills** ⇌ Persons Who May Attack or Contest Will or Probate

Whether a contestant has standing to bring a will contest is a threshold question of law separate and apart from the merits of the will contest itself. Tenn. Code Ann. § 32-4-101(a).

3 Cases that cite this headnote

- [2] **Appeal and Error** ⇌ De novo review  
**Appeal and Error** ⇌ Conclusions of law

The Supreme Court reviews de novo the determination of questions of law and affords

no presumption of correctness to lower court rulings.

1 Cases that cite this headnote

- [3] **Action** ⇌ Moot, hypothetical or abstract questions

**Constitutional Law** ⇌ Advisory Opinions

The province of courts is to decide, not advise, and to settle rights, not to give abstract opinions.

1 Cases that cite this headnote

- [4] **Action** ⇌ Persons entitled to sue

The standing doctrine ensures that a particular litigant has a sufficiently personal stake in litigation to warrant an adjudication.

1 Cases that cite this headnote

- [5] **Action** ⇌ Persons entitled to sue

Establishing standing does not require a litigant to show a likelihood of success on the merits of the underlying claim.

- [6] **Wills** ⇌ Persons Who May Attack or Contest Will or Probate

Decedent's children who were expressly disinherited by will had standing to bring will contest to challenge validity of will; if will were invalidated, children would have shared in the decedent's estate under the laws of intestacy and under prior wills.

1 Cases that cite this headnote

- [7] **Wills** ⇌ Nature and form of remedies in general

**Wills** ⇌ Scope of Inquiry and Powers of Court

A will contest allows a court to make a determination, once and for all, about how a decedent's estate should be distributed.

1 Cases that cite this headnote

[8] **Wills** ⇐ Duty to produce and offer will for probate

Where the parties dispute which testamentary documents, if any, represent the decedent's last valid will and testament, the competing instruments must all be submitted for adjudication in a will contest.

1 Cases that cite this headnote

**\*410 Appeal by Permission from the Court of Appeals, Chancery Court for Hamilton County, No. 15-P-245, Jeffrey M. Atherton, Chancellor**

#### Attorneys and Law Firms

Jerry H. Summers and Marya Lyn Schalk, Chattanooga, Tennessee, and William David Cunningham, Lafayette, Georgia, for the appellants, Melissa Sue (Brock) Adcock, Krystal Gail (Brock) Parker, Jennifer Rebecca Brock, Darryl William Brock, and Walter Edward Brock.

Richard W. Bethea, Jennifer Kent Exum, Cameron A. Kapperman, Nathan L. Kinard, Chattanooga, Tennessee, for the appellees, Sammie M. Brock and W. Norman Smith, Co-Executors of the Estate of J. Don Brock.

John R. Branson, Memphis, Tennessee, for the amici curiae, Brenda Dattel Meece and Lisa Ann Dattel.

Walter W. Bussart, Lewisburg, Tennessee, for the amicus curiae, David Edmundson Rackley.

Albert W. Secor, Hixson, Tennessee, amicus curiae.

Cornelia A. Clark, J., delivered the opinion of the court, in which Jeffrey S. Bivins, C.J., and Sharon G. Lee, Holly Kirby, and Roger A. Page, JJ., joined.

#### OPINION

Cornelia A. Clark, J.

We granted permission to appeal to determine whether the contestants—five of the decedent's seven children—have standing to bring this will contest. The contestants were expressly disinherited by a will dated October 1, 2013, and admitted to probate and by a prior will, dated October

11, 2012, produced during this litigation. The trial court dismissed this will contest for lack of standing, concluding that two prior decisions of this Court—Cowan v. Walker, 117 Tenn. 135, 96 S.W. 967 (1906) and Jennings v. Bridgeford, 218 Tenn. 287, 403 S.W.2d 289 (1966)—required the dismissal. The Court of Appeals affirmed. Although we agree with the courts below that Cowan and Jennings include imprecise language that could be viewed as establishing a broad, bright-line rule that persons disinherited by facially valid successive wills lack standing, we conclude that those decisions are factually distinct and did not announce such a broad rule. We reaffirm the general rule, long recognized in Tennessee, that to establish standing a contestant must show that he or she would be entitled to share in the decedent's estate if the will were set aside or if no will existed. The contestants here have satisfied this requirement by showing that they would share in the decedent's estate under the laws of intestacy and under prior wills. Thus, the judgments of the trial court and Court of Appeals dismissing this will contest for lack of standing are reversed, and this matter is remanded to the trial court for further proceedings consistent with this decision.

#### I. Factual Background<sup>1</sup>

Dr. J. Don Brock ("Dr. Brock"), a resident of Hamilton County, Tennessee, was diagnosed with mesothelioma in May 2012, and died on March 10, 2015, leaving a sizeable estate.<sup>2</sup> Dr. Brock was survived by \*411 his spouse, Mrs. Sammie Sprouse Brock ("Mrs. Brock"), by his seven children that he and his former wife adopted during their marriage of more than thirty years, five of whom were biological siblings, and by his two stepdaughters, Mrs. Brock's children from a prior marriage.

On March 31, 2015, Dr. Brock's attorney filed a petition in the Chancery Court of Hamilton County ("Probate Court")<sup>3</sup> for testate administration of Dr. Brock's October 1, 2013 Will ("2013 Will"). In accordance with paragraph two of the 2013 Will, the Probate Court named Mrs. Brock and W. Norman Smith as co-executors of Dr. Brock's estate (collectively "Proponents"), and letters testamentary were issued to them on April 6, 2015.

The 2013 Will divided Dr. Brock's estate ("Estate") among Mrs. Brock, Dr. Brock's stepdaughters, Christie Sprouse

Gleeson and Devin LeAnn Sprouse, and Dr. Brock's eldest two children from his first marriage—Elizabeth Foster Brock and Benjamin Garrison Brock. The 2013 Will expressly excluded Dr. Brock's five other children from his first marriage—biological siblings Walter Edward Brock, Jennifer Rebecca Brock, Darryl William Brock, Melissa Sue Brock Adcock, and Krystal Gayle Brock Parker (collectively "Contestants"). As for the Contestants, the 2013 Will treated them as "having predeceased [Dr. Brock] without surviving descendants."

On September 3, 2015, the Contestants filed a notice of will contest as to the 2013 Will, alleging improper execution or attestation, lack of testamentary capacity, and fraud and/or undue influence. Specifically, the Contestants challenged the authenticity of Mr. Brock's signature, which appeared only on the last page of the 2013 Will, alleging that Mrs. Brock had signed Dr. Brock's name for decades, having worked at Astec Industries as his receptionist and assistant for twenty years before their marriage in 1998. The Contestants further alleged that the attesting witnesses to the 2013 Will "were not disinterested witnesses" but were officers or employees of Astec Industries with a financial interest in the company. The Contestants pointed out that the first twenty-four pages of the 2013 Will were not signed or initialed, including the pages that disinherited the Contestants. The Contestants also averred that Dr. Brock lacked testamentary capacity, stating that the 2013 Will had purportedly been prepared and signed more than a year after Dr. Brock had been diagnosed with mesothelioma in 2012 and after he had undergone aggressive treatments for the disease. Lastly, the Contestants alleged fraud and undue influence. The Contestants claimed that Mrs. Brock as well as Elizabeth and Benjamin Brock had confidential relationships with Dr. Brock and used their relationships to exert undue influence over him in the procurement of the 2013 Will. The Contestants claimed that Mrs. Brock had been Dr. Brock's mistress, receptionist, and assistant for approximately twenty-four years before their 1998 marriage. After the marriage, the Contestants claimed, Mrs. Brock acted to isolate Dr. Brock from the Contestants and interfere with their ability to see or speak with him. The Contestants alleged that Mrs. Brock had fraudulently conspired with her own daughters, with Benjamin and Elizabeth Brock, and with others to deprive them "of \*412 their rightful inheritances" by exerting undue influence over Dr. Brock while he was under the physical and mental disabilities caused by mesothelioma. The Contestants alleged that they were unaware Dr. Brock had disinherited them until the Proponents produced the 2013 Will after his

death, and they claimed that their disinheritance conflicts with statements Dr. Brock made indicating that they would be provided for after his death.

On September 14, 2015, the Contestants and the Proponents entered an agreed order acknowledging that the Contestants had standing to challenge the 2013 Will and transferring the case to the Circuit Court for Hamilton County ("Circuit Court").<sup>4</sup> Subsequently, however, counsel for the Proponents provided the Contestants with signed copies of the following four wills dated before Dr. Brock's 2013 Will: (1) an October 11, 2012 Will ("2012 Will"); (2) a December 27, 2006 Will ("2006 Will"); (3) an April 28, 1998 Will ("1998 Will"); and (4) a March 18, 1994 Will<sup>5</sup> ("1994 Will").<sup>6</sup> Additionally, on November 12, 2015, the Proponents filed a motion asking the Circuit Court to transfer the case back to the Probate Court for a determination of the Contestants' standing.

On November 24, 2015, the Circuit Court granted the motion, and less than a month later, December 22, 2015, the Proponents filed in the Probate Court a motion to amend or set aside the agreed order recognizing the Contestants' standing and a motion to dismiss the Contestants' will contest action for lack of standing. As support for this motion, the Proponents attached a copy of Dr. Brock's 2012 Will, which also disinherited all the Contestants. The Proponents argued that under this Court's decisions in Cowan and Jennings, a party disinherited by facially valid successive wills lacks standing to bring a will contest challenging the most recent will.

On December 31, 2015, the Contestants moved to expand the scope of their will contest to include the 2012 Will, the 2006 Will, the 1998 Will, and the 1994 Will, in addition to the 2013 Will. The Contestants asserted that, while none of them would inherit under the 2012 Will, only two of them were excluded under the 2006 and 1998 Wills and only one of them was excluded under the 1994 Will. The Contestants additionally pointed out that, as Dr. Brock's children, they would inherit under the laws of intestacy should all of the wills be declared invalid. The Contestants argued that Cowan and Jennings are factually distinct and should not be interpreted as announcing a broad, bright-line rule that persons disinherited by facially valid successive wills lack standing to bring a will contest.

\*413 The Probate Court held a hearing on the motions on February 3, 2016, set aside the agreed order recognizing the Contestants' standing, ruled, based on Cowan and Jennings, that the Contestants lacked standing, and dismissed their will contest. But the Probate Court did so reluctantly and was “extremely troubled ... that the status of the Tennessee law in its current form is harsh[,] neither fair nor equitable, and promotes the potential for fraud by simply creating two wills and [having] one insulate the other.” Having ruled that the Contestants lacked standing, the Probate Court declined to rule on the Contestants' motion to amend their will contest, finding it moot. The Contestants filed a motion to alter or amend, again arguing that Cowan and Jennings are factually distinct. The Probate Court denied the motion, and the Contestants appealed.

The Court of Appeals affirmed the Probate Court’s judgment. In re Estate of Brock, No. E2016-00637-COA-R3-CV, 2016 WL 6503696, at \*7 (Tenn. Ct. App. Nov. 3, 2016), perm. app. granted (Mar. 8, 2017). But, like the Probate Court, the Court of Appeals also was “troubled that standing could potentially be used by a wrongdoer to insulate his or her wrongdoing from being challenged.” Id. at \*6. Nevertheless, the Court of Appeals concluded that Cowan and Jennings controlled and required it, as an intermediate appellate court, to affirm the judgment of dismissal. Id. We granted the Contestants' application for permission to appeal.

## II. Standard of Review

[1] [2] Whether a contestant has standing to bring a will contest is a threshold question of law separate and apart from the merits of the will contest itself. See Tenn. Code Ann. § 32-4-101(a) (2015) (“If the validity of any last will or testament, written or nuncupative, is contested, then the court having probate jurisdiction over that last will or testament must enter an order sustaining or denying the contestant’s right to contest the will.”); Crocker v. Balch, 104 Tenn. 6, 55 S.W. 307, 307 (1900); see also In re Estate of Boote, 198 S.W.3d 699, 714 (Tenn. Ct. App. 2005) (“As soon as the probate court is made aware of a contest, it must halt the ... probate proceedings and determine whether the person seeking to contest the will has standing to pursue a will

contest.”); Jolley v. Henderson, 154 S.W.3d 538, 542–43 (Tenn. Ct. App. 2004). This Court reviews de novo the determination of questions of law and affords no presumption of correctness to lower court rulings. Johnson v. Hopkins, 432 S.W.3d 840, 844 (Tenn. 2013).

## III. Analysis

[3] [4] [5] The province of courts “is to decide, not advise, and to settle rights, not to give abstract opinions.” Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 203 (Tenn. 2009) (quoting State v. Wilson, 70 Tenn. 204, 210 (1879) (internal quotation marks omitted)). To ensure that judicial power remains within these constraints, Tennessee courts utilize justiciability doctrines. Id. at 202–03. The justiciability doctrine at issue in this appeal—standing—ensures that a particular litigant has a sufficiently personal stake in litigation to warrant an adjudication. Am. Civil Liberties Union of Tenn. v. Darnell, 195 S.W.3d 612, 619 (Tenn. 2006); Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). Establishing standing does not require a litigant to show a likelihood of success on the merit[s]” of the underlying claim. Am. Civil Liberties Union of Tenn., 195 S.W.3d at 620.

[6] [7] This appeal, of course, requires us to consider the standing requirement in the context of a will contest. A will contest allows a court to make a determination, \*414 once and for all, about how a decedent’s estate should be distributed. Jones v. Witherspoon, 182 Tenn. 498, 187 S.W.2d 788, 791 (1945); see In re Estate of Barnhill, 62 S.W.3d 139, 143 (Tenn. 2001). The procedures governing the probate and contest of wills originally derived from the ecclesiastical courts of England but are now governed by statute. Petty v. Call, 599 S.W.2d 791, 793 (Tenn. 1980). As a result, the standing requirement for will contests has been included in will contest statutes in “all but a handful of states.” Eunice L. Ross & Thomas J. Reed, Will Contests § 3:2 (2d ed. June 2017 Update) [hereinafter Will Contests]. These statutes “are divided into two classes: (1) those which confer [standing] on anyone who is ‘interested’ or ‘aggrieved’ by the probate of a will; and (2) those which have no statutory standard for standing.” Id. (footnotes citing statutes omitted).<sup>7</sup> Statutes of the first type, which expressly confer standing on “interested” or “aggrieved” persons, have generally been interpreted as

requiring a showing of “a direct pecuniary interest in denying probate to the will, because he or she would receive a greater share of the decedent’s assets if the will were not probated.” Id. (footnote citing cases omitted). Statutes that do not include a specific standard have nevertheless been interpreted in the same manner as statutes that do. Id. As a result, “[t]here is little difference between the [S]tates on the practical meaning of standing to object to probate of a will.” Id.

The law of Tennessee well illustrates this point. As already explained, standing is a threshold issue in a will contest, and the probate court is statutorily required to “enter an order sustaining or denying the contestant’s right to contest the will.” Tenn. Code Ann. § 32-4-101(a). Although our statute does not include either the word “interested” or the word “aggrieved,” prior Tennessee decisions have explained that a contestant must show that he or she would be entitled to share in the decedent’s estate if the will were set aside or if no will existed. See, e.g., Warmath v. Smith, 198 Tenn. 257, 279 S.W.2d 257, 258 (1955) (“Only such persons as would be entitled to share in the real and personal estate of decedent, if there were no will, or if the will was set aside, are entitled to impeach its validity.”); Cowan, 96 S.W. at 970 (stating that to establish standing “a contestant must have a substantial interest which is to be served by his [or her] contest”); Bowers v. McGavock, 114 Tenn. 438, 85 S.W. 893, 896 (1905) (“No one can question the validity of a will, or any provision in it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled to an interest in the property involved in the controverted provision.”); Ligon v. Hawkes, 110 Tenn. 514, 75 S.W. 1072, 1073 (1903) (“No one except those directly interested in the estate of a decedent has the right to call in question the validity of his or her will.”); In re Estate of Boote, 198 S.W.3d at 714 (“Standing to pursue a will \*415 contest is limited to those who would benefit under the terms of another will or codicil or the laws of intestate succession if the will contest is successful.”); Jolley, 154 S.W.3d at 543 (stating that to establish standing a contestant must have a “substantial interest which is to be served by” the contest and concluding that a ten dollar bequest is “a de minimis interest” and insufficient to establish standing); In re Estate of West, 729 S.W.2d 676, 677–78 (Tenn. Ct. App. 1987) (“[I]t is well settled in this [S]tate that before [a contestant] may go forward with a will contest he must show that he would take a share of the decedent’s estate if the probated will were set aside.”); Allred v. Allred, 5 Tenn. App. 200, 201 (Tenn. Ct. App. 1927) (“The general rule is that any person who would have an

interest in the estate, should the will be denied probate, may contest the will whether his interest is that of an heir, or that of a legatee or devisee under a prior will superseded by the later will.”). On the other hand, “[a] stranger to an estate, one who would take nothing if the will was set aside,” lacks standing to bring a will contest. Warmath, 279 S.W.2d at 260 (citing Wynne v. Spiers, 26 Tenn. 394, 407 (1846)); see also Bowers, 85 S.W. at 896 (“It has been held by this [C]ourt that a stranger will not be permitted to contest the execution of a will....”); Ligon, 75 S.W. at 1073 (“A stranger will not be permitted to disturb the existing probate.”).

In this case, the Contestants’ standing was not initially contested, and an agreed order acknowledging standing was entered. This is understandable, as Contestants clearly would have standing if the only testamentary document at issue were the 2013 Will admitted to probate. As Dr. Brock’s children, all of the Contestants would take a share of his estate under the laws of intestate succession if the 2013 Will were set aside and no other will admitted to probate. Tenn. Code Ann. § 31-2-104(a)–(b)(1) (2015 & 2017 Supp.). Thus, the question presented in this appeal is whether, based on Cowan and Jennings, the Contestants lack standing because the facially valid signed copy of the 2012 Will that immediately preceded the 2013 Will also disinherited them.

After carefully considering Cowan and Jennings, we agree with the Contestants that those decisions are factually distinct and do not deprive the Contestants of standing to bring this will contest.

We begin with Cowan. There, the decedent’s will of November 30, 1901 (“1901 Will”) was submitted for probate. Cowan, 96 S.W. at 967. The 1901 Will disinherited the decedent’s nephew, who would have received one-twelfth of the decedent’s estate under the laws of intestacy. Id. at 968. The decedent’s nephew contested the 1901 Will, alleging undue influence and lack of testamentary capacity. Id. at 967. The proponents of the 1901 Will denied these allegations and also asserted that the nephew lacked standing because an earlier will, dated September 22, 1900, and its April 10, 1901 codicil (collectively “1900 Will”) had also disinherited the decedent’s nephew. Id. at 968. The proponents of the 1901 Will produced “uncontroverted testimony” of the “due legal execution and publication” of the 1900 Will and of “the fact that, at the time of the execution [of the 1900 Will], the [decedent] was of sound mind and disposing memory.” Id.

The trial court excluded this “uncontroverted testimony” and allowed the nephew’s will contest action to proceed. *Id.* But the *Cowan* Court reversed, concluding that the trial court had erred by excluding the 1900 Will and the evidence of its validity. *Id.* at 971. In doing so, the *Cowan* Court acknowledged that the nephew, “being one of the next of kin of the deceased,” had “prima facie” standing to contest the 1901 Will. *Id.* \*416 *Id.* at 970. Nevertheless, the *Cowan* Court explained, the nephew’s “prima facie” right had been “met and destroyed” by the 1900 Will disinheriting the nephew because it was “*confessedly valid in every respect.*” *Id.* at 970–71 (emphasis added). Based on the uncontroverted evidence of the 1900 Will’s validity, it was “clear” to the *Cowan* Court that the decedent’s nephew “had no substantial interest” in the decedent’s estate and therefore lacked standing to maintain the will contest. *Id.* at 971.

As the discussion in *Cowan* reveals, the contestant had not challenged the validity of the 1900 Will and its validity actually was established in the trial court by “uncontroverted testimony.” *Id.* at 969. Given these facts, the *Cowan* Court’s holding that the nephew lacked standing to challenge the 1901 Will is unremarkable. Even if the nephew had succeeded in contesting the 1901 Will, he still would not have been entitled to any part of the decedent’s estate because the 1900 Will, “confessedly valid in every respect” and proven so with “uncontroverted testimony,” also had disinherited him. *Id.* at 970–71.

The facts of *Jennings* are even more distinguishable. *Jennings* involved a collateral attack by an heir of the decedent upon a judgment rendered in a *prior* will contest case. 403 S.W.2d at 289. The prior will contest involved two wills, and “the sole question was whether a paper writing, dated February 13, 1953, or a paper writing, dated March 31, 1961, was the Last Will and Testament of [the decedent].” *Id.* at 289–90. The 1961 will was contested on the grounds of the decedent’s mental incompetence, duress, and undue influence. *Id.* at 289. “A jury found in favor of the writing dated March 31, 1961;” and the Court of Appeals affirmed the jury’s decision in a reported decision. *Id.* (citing *Williams*

*v. Bridgeford*, 53 Tenn.App. 381, 383 S.W.2d 770 (1964)). Nevertheless, an heir of the decedent filed a collateral attack upon the judgment the Court of Appeals had affirmed. *Id.* at 291. The heir argued that the judgment in the prior will contest had been procured by fraud because the person who submitted the will for probate knew the decedent did not have the required mental capacity to make a will. *Id.* at 290. The trial court rejected the heir’s collateral attack, and the *Jennings* Court affirmed. *Id.* at 293. The *Jennings* Court emphasized that the validity of the March 31, 1961 will as the decedent’s last will and testament had been judicially established in the prior will contest and that the heir had failed to prove extrinsic fraud—a necessary showing to any successful collateral attack on a final judgment. *Id.* at 292–93. Thus, the validity of the will challenged by a collateral attack in *Jennings* had already been judicially established in a prior will contest.

As the foregoing discussion illustrates, in both *Cowan* and *Jennings* the validity of wills disinheriting those who brought the legal actions had already been judicially established either by admission and uncontroverted evidence, as in *Cowan*, or by a final judgment in a prior will contest, as in *Jennings*. The same certainly cannot be said of this case. No court has made any determination as of yet about the validity or invalidity of any of Dr. Brock’s wills. Thus, *Cowan* and *Jennings* simply do not control the outcome of the standing issue in this appeal. The Proponents point out, correctly, that *Cowan*<sup>8</sup> and *Jennings*<sup>9</sup> \*417 contain language that could be viewed as creating a broad, bright-line rule that persons disinherited by *facially valid* successive wills lack standing.<sup>10</sup> But, a review of the facts reveals that the wills involved in *Cowan* and *Jennings* had already been judicially determined to be valid in all respects, not only *facially valid*.<sup>11</sup> We therefore decline to perpetuate an erroneously broad interpretation of *Cowan* and *Jennings* and hold that their discussion of successive wills must be understood within and confined to the factual circumstances in which it originated. *State v. Lancaster*, 119 Tenn. 638, 105 S.W. 858, 862 (1907) (“Decisions must be construed in the light of the question with which the court is dealing, and of the facts before the court.”).

Furthermore, even if Cowan and Jennings were not limited by their distinct factual circumstances, we would not embrace such a broad, bright-line rule that would deprive litigants of any opportunity to litigate the validity of either will. As the trial court here explained, such a rule would be harsh, unfair, inequitable and promote “the potential for fraud by simply creating two wills and [having] one insulate the other.” Not only does such a broad rule create a potential for fraud, it lacks a logical basis. The Kansas Supreme Court succinctly described the logical pitfalls, stating:

How an unprobated will could be said to be a valid will and used in litigation as a valid will to the prejudice of an heir *who has never had a chance to question its* \*418 *validity* calls for a subtlety of reasoning which we would not care to follow.

Marr v. Barnes, 126 Kan. 84, 267 P. 9, 10 (1928) (emphases altered). Indeed, although only a few courts in other jurisdictions have addressed this precise issue, the majority of courts to do so have rejected such a broad rule. See In re Robinson’s Estate, 211 Cal.App.2d 556, 27 Cal.Rptr. 441, 442 (1963) (holding that heirs had a sufficient interest to qualify as contestants of the will which substantially diminished their rights to succeed as heirs, despite “a prior will, or a number of prior wills,” which “might affect their rights to succeed as heirs to the same extent, or to a greater extent than did the will before the court”); Stephens v. Brady, 209 Ga. 428, 73 S.E.2d 182, 184 (1952) (“The mere existence of a prior unprobated will could have no effect on the interest of the husband, as an heir, to [contest] the second will.”); In re Jack Wong Yuen & Lei Young Wong Yuen Revocable Living Tr. Dated April 22, 1996, 130 Hawai’i 533, 312 P.3d 1240, 1244 (Haw. Ct. App. 2013) (declining to hold that persons disinherited by a prior testamentary instrument lack standing to contest a subsequent testamentary instrument because “an heir-at-law who successfully challenges a testamentary instrument has the possibility of taking via intestacy, depending on the outcome of this proceeding and further proceedings”); In re Estate of Schlenker, 209 Ill.2d 456, 283 Ill.Dec. 707, 808 N.E.2d 995, 999 (2004) (stating that an heir is an “interested person” under an Illinois statute and, as such, has standing to contest a will even though the decedent executed prior wills disinheriting the heir); Estate of Malcolm, 234 Ill.App.3d 962,

176 Ill.Dec. 734, 602 N.E.2d 41, 43 (1992) (holding that legatees under three wills of the decedent were “interested persons” for purposes of standing to contest the third will, even though they would receive the same amount under both the second and third wills because the legatees anticipated contesting the second will and could not contest the second will before the third will was invalidated); Marr, 267 P. at 10 (declining to deny standing to a person disinherited by successive wills); Murphy’s Ex’r v. Murphy, 65 S.W. 165, 166 (Ky. 1901) (stating that an “heir of the decedent ha[s] the right to contest the will which was probated, without reference to the provisions of any previous will, which might never be offered for probate, or, if so offered, might also be the subject of contest”). But see In re Estate of Keener, 167 Ill.App.3d 270, 118 Ill.Dec. 164, 521 N.E.2d 232, 234 (1988) (holding that a person disinherited by several consecutive wills was not an “interested person” for purposes of the will contest statute).

Thus, we conclude that, when properly distilled to the factual circumstances in which they arose, Cowan and Jennings establish only that, if the validity of a will disinheriting the person bringing the will contest has already been established either by admission or judicial determination, then the person lacks standing. Jennings, 403 S.W.2d at 290–91; Cowan, 96 S.W. at 970.<sup>12</sup> This rule clearly does not require dismissal of Contestants’ will contest for lack of standing. None of Dr. Brock’s wills have been judicially determined to be valid. Nor have the Contestants admitted or conceded the validity of any of Dr. Brock’s wills. To the contrary, the Contestants have filed a notice of contest as to Dr. Brock’s 2013 Will and have sought to amend the notice to contest all of the prior \*419 wills the Proponents produced after this will contest was filed. All but one of the Contestants would share in Dr. Brock’s estate under at least one of the wills predating 2012, and all of the Contestants would receive a share of Dr. Brock’s estate under the laws of intestacy. Thus, the Contestants have shown that they would be entitled to share in Dr. Brock’s estate if no will existed and the 2013 Will were set aside. Nothing more is required to establish standing to pursue this will contest.

[8] It is true, as the Proponents point out, that it will be no easy task for Contestants to mount a successful will contest on the 2013 and prior wills. But, as already noted, a litigant need not establish a likelihood of success on the merits to establish standing. Furthermore, although the Proponents are correct that expeditious and inexpensive administration of estates is

a laudatory objective, “fraud should never be insulated from the reach of the court because the court may have more work to do to detect and correct the fraud.” Estate of Malcolm, 176 Ill.Dec. 734, 602 N.E.2d at 44. Thus, on remand, and consistent with the purpose of a will contest, a determination will be made, once and for all, about how Dr. Brock’s estate should be distributed. See In re Estate of Barnhill, 62 S.W.3d at 143; Jones, 187 S.W.2d at 791. Where, as here, the parties dispute which testamentary documents, if any, represent the decedent’s last valid will and testament, the competing instruments must all be submitted for adjudication in the will contest. Bearman v. Camatsos, 215 Tenn. 231, 385 S.W.2d 91, 95 (1964); Durell v. Martin, 172 Tenn. 97, 110 S.W.2d 316, 318 (1937); Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576, 582 (1926); In re Estate of Boote, 198 S.W.3d at 714.

#### IV. Conclusion

For the reasons stated herein, the judgments of the trial court and Court of Appeals are reversed, and this matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are taxed to Sammye M. Brock and W. Norman Smith, as co-executors of the Estate of J. Don Brock, for which execution may issue if necessary.

#### All Citations

536 S.W.3d 409

#### Footnotes

- 1 This matter was dismissed for lack of standing before trial. Background facts are gleaned from documents that have been filed in the will contest and are included in the record on appeal. Our recitation of these facts does not amount to a determination of their accuracy or evidentiary weight.
- 2 Dr. Brock held a Ph.D. in mechanical engineering. He founded Astec Industries, Incorporated (“Astec Industries”) in 1972 and remained its CEO until 2014. By 1995, Astec Industries had grown into a “successful multi-national, multi-division corporation involved in the manufacturing and sale of asphalt manufacturing plants, paving equipment, and other related equipment and products.” Astec Industries stock has been traded publicly on the NASDAQ stock exchange since 1986.
- 3 The Chancery Court for Hamilton County served as the probate court. See Tenn. Code Ann. § 16-16-201(a) (2009 & Supp. 2017).
- 4 See Tenn. Code Ann. § 16-10-103 (2009) (“The circuit court has jurisdiction to try and determine all issues made up to contest the validity of last wills and testaments.”); Tenn. Code Ann. § 32-4-109 (2015) (“Any court of record that has probate jurisdiction, whether a chancery court or other court of record established by private or public act, has concurrent jurisdiction with the circuit court to conduct a trial upon the validity of a will in the manner and to the extent prescribed in this chapter. Notwithstanding law to the contrary, prior to the certification of the fact of the contest pursuant to § 32-4-101(a)(2), the contestant shall elect, in the notice of contest, either the circuit court or the chancery court, or other court of record having such concurrent jurisdiction, to conduct a trial upon the validity of the will.”).
- 5 Although the 1994 Will was dated March 18, 1994, the affidavit attached to it and purporting to prove it was not signed until March 22, 1994.
- 6 Counsel for the Proponents also turned over unsigned copies of a 1983 Will and a 1997 Codicil to the 1994 Will.
- 7 The Uniform Probate Code falls into the first class by conferring standing to bring a will contest on any “interested party” but goes further by defining that term as including the decedent’s surviving spouse, children and heirs, as well as devisees and personal representatives under former wills. See Unif. Probate Code § 3-401 (stating that “[a] formal testacy proceeding,” the term the Uniform Probate Code uses to refer to

"litigation to determine whether a decedent left a valid will," "may be commenced by an *interested person* filing a petition as described in Section 3-402(a)" (emphasis added); Unif. Probate Code § 1-201 (defining "Interested person" as including "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against" a decedent's estate and "persons having priority for appointment as personal representative"); see also Will Contests § 3:3 (discussing standing under the Uniform Probate Code).

8 The Court in Cowan stated: "[W]e think this prima facie case [of standing] is necessarily met and destroyed by the existence of the earlier, valid, but unprobated, will. This leaves him a stranger to the estate, and as such without any right of contest." 96 S.W. at 970.

9 The Jennings Court stated:

We, therefore, hold that where a Will, which on its face is valid and *is not challenged as being improperly executed*, and which leaves nothing to one who is attempting to attack collaterally the probate of a subsequent Will, that person has no interest entitling her to set aside the probate of the later Will.

Id. at 291 (emphasis added).

10 We do not agree with the Proponents, however, that the Court of Appeals applied such a broad rule in Keasler v. Estate of Keasler, 973 S.W.2d 213 (Tenn. Ct. App. 1997). There, the decedent's son filed an action contesting her 1986 will, alleging undue influence and lack of testamentary capacity. The proponents of the will denied these claims and also alleged lack of standing based on the decedent's 1984 will, which also left nothing to the decedent's son. The trial court granted summary judgment to the proponents of the will on the claims of undue influence and lack of testamentary capacity to make the 1986 claim. The Court of Appeals affirmed the trial court's decision. Even though the Court of Appeals had already rejected the merits of the son's challenges to the 1986 will, it also explained that the son actually lacked standing to contest the 1986 will *because he had not challenged the validity of the 1984 will that also disinherited him*. 973 S.W.2d at 222 (emphasis added). Therefore, in concluding that the son lacked standing, the Court of Appeals in Keasler properly applied the limited rule that Cowan and Jennings announced.

Similarly, we do not view the Court of Appeals' decision in Jolley as applying such a broad rule. The Court of Appeals noted that the decedent had disinherited each of the contestants in his 1998 and 1997 wills, yet the Court of Appeals actually ruled that the contestants lacked standing because they had received only a de minimis ten dollar cash bequest in the decedent's 1985, 1977, and 1975 wills, which was insufficient to confer standing to contest the subsequent wills disinheriting them. 154 S.W.3d at 543. The Court of Appeals did not base its determination of no standing in Jolley on facially valid successive wills disinheriting the contestants.

11 This factual distinction was emphasized in at least one Court of Appeals' decision. See In re Estate of Otte, No. 02A01-9402-PB-00023, 1995 WL 116013, at \*2 (Tenn. Ct. App. Mar. 15, 1995) ("In Cowan, the [S]upreme [C]ourt held that the right of the petitioner therein, one of the next of kin of the deceased, to contest the validity of the will of the deceased was eliminated by the existence of an earlier *valid*, but unprobated, will; thus making him a stranger to the estate and as such, without any right to contest the will. The rule adopted in Cowan was later affirmed in [Jennings]." (emphasis added)).

12 See also Mitchell v. Redvers, No. MMXCV094010266S, 2009 WL 5511262, at \*2-3 (Conn. Super. Ct. Dec. 17, 2009) (discussing Jennings and concluding that the plaintiffs lacked standing to contest a 2002 will because they had failed to challenge the execution and validity of a 1990 will disinheriting them).

**VI. APPENDIX B**

IN WITNESS WHEREOF, I, **TESTATOR**, the Testator, sign my name to this my Last Will and Testament, consisting of this and the preceding \_\_\_\_\_ ( ) typewritten pages, and for the purpose of identification, I have signed or initialed each page, all in the presence of the persons witnessing it, at my request, on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at Murfreesboro, Tennessee.

\_\_\_\_\_  
**TESTATOR**, Testator

Signed and declared by **TESTATOR**, to be **TESTATOR**'s Last Will and Testament in the presence of all of us at one and the same time, and we, at **TESTATOR**'s request and in **TESTATOR**'s presence and in the presence of each other, have subscribed our names as witnesses, and we do hereby attest to the sound and disposing mind of **TESTATOR** and to the performance of the aforesaid act of execution at the place and on the date hereinabove set out.

WITNESSES:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

residing at \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

residing at \_\_\_\_\_  
\_\_\_\_\_

**VI. APPENDIX B**

IN WITNESS WHEREOF, I, **TESTATOR**, the Testator, sign my name to this my Last Will and Testament, consisting of this and the preceding \_\_\_\_\_ ( ) typewritten pages, and for the purpose of identification, I have signed or initialed each page, all in the presence of the persons witnessing it, at my request, on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at Murfreesboro, Tennessee.

\_\_\_\_\_  
**TESTATOR**, Testator

Signed and declared by **TESTATOR**, to be **TESTATOR's** Last Will and Testament in the presence of all of us at one and the same time, and we, at **TESTATOR's** request and in **TESTATOR's** presence and in the presence of each other, have subscribed our names as witnesses, and we do hereby attest to the sound and disposing mind of **TESTATOR** and to the performance of the aforesaid act of execution at the place and on the date hereinabove set out.

WITNESSES:

Signature	Print or Type Name
residing at _____	
_____	

Signature	Print or Type Name
residing at _____	
_____	



## VII. APPENDIX C

[SAMPLE]

CONFIDENTIAL  
ESTATE PLANNING QUESTIONNAIRE

CLIENT DATA:

Full Name \_\_\_\_\_

U.S. Citizen (Y/N)? Male \_\_\_ Female \_\_\_

Known by Any Other Names \_\_\_\_\_

Address \_\_\_\_\_

(Street)

(City)

(County)

(Zip Code)

Date of Birth: \_\_\_\_\_

Place of Birth: \_\_\_\_\_

Previous Marriages (Details) \_\_\_\_\_

Client's Social Security No. \_\_\_\_\_

Occupation/Employer: \_\_\_\_\_ Annual Salary: \_\_\_\_\_

CLIENT'S SPOUSE DATA:

Full Name \_\_\_\_\_

U.S. Citizen (Y/N)? \_\_\_\_\_ Male \_\_\_ Female \_\_\_

Known by Any Other Names \_\_\_\_\_

Address \_\_\_\_\_

Date of Birth: \_\_\_\_\_

Place of Birth: \_\_\_\_\_

Previous Marriages (Details) \_\_\_\_\_

Spouse's Social Security No. \_\_\_\_\_

Occupation/Employer: \_\_\_\_\_ Annual Salary: \_\_\_\_\_

Name of Broker \_\_\_\_\_

Name of Accountant \_\_\_\_\_

Name of Life Insurance Agent \_\_\_\_\_

Name of Bank \_\_\_\_\_

Preference as to Bank and Trust Department \_\_\_\_\_

Were you referred by anyone? Yes No

If yes, who? \_\_\_\_\_

Is it ok for us to thank the person who referred you? Yes No

Do you consent to the transmission of confidential information to you via email? Yes No

Have you ever lived or owned property in the following states (please circle):

Arizona	Indiana	Nevada	Texas	Wisconsin
California	Louisiana	New Mexico	Washington	

Do you have:

	<u>Client</u>	<u>Spouse</u>
Last Will and Testament	Yes No	Yes No
Revocable Trust	Yes No	Yes No
Durable Power of Attorney	Yes No	Yes No
Health Care Power of Attorney	Yes No	Yes No
Living Will	Yes No	Yes No
Irrevocable Trust	Yes No	Yes No
Pre-marital or Post Nuptial Agreement	Yes No	Yes No
Made substantial (over \$10,000) gifts	Yes No	Yes No
Ever Filed Gift Tax Returns	Yes No	Yes No
S-Corp stock ownership	Yes No	Yes No
Beneficiary of a Trust with Power of Appointment	Yes No	Yes No
Frozen Embryos	Yes No	Yes No

Do you anticipate receiving an inheritance? \_\_\_\_\_  
 Do you wish to leave any assets directly to grandchildren? \_\_\_\_\_  
 Do you have a safe deposit box? \_\_\_\_\_  
 Do you own any property in another state? \_\_\_\_\_  
 Any legal obligations from a previous marriage, i.e., life insurance? \_\_\_\_\_  
 Do any of your family members have special needs, if so please describe? \_\_\_\_\_  
 Is either spouse a Veteran? \_\_\_\_\_  
 Do you own any Digital Assets? \_\_\_\_\_

Who will serve as your **Executor(s)**? (*This is the person who handles your estate when you die, and it may be more than one person*) \_\_\_\_\_

Each spouse for the other? Yes No

Someone else? Alternate(s) (if above person(s) unable to serve): \_\_\_\_\_

Who will be **Guardian(s)** of your minor children, if applicable? (*Who will your children live with if both you and your spouse die?*) \_\_\_\_\_ Alternate(s) (if above person(s) unable to serve): \_\_\_\_\_

Who will be the **Trustee(s)** of the assets you leave for your children until they are old enough to manage their own money? \_\_\_\_\_ Alternate(s) (if above person(s) unable to serve): \_\_\_\_\_

**Children (Client or Spouse)**

Is there a physical possibility of more children? \_\_\_\_\_

Are there any adopted children? \_\_\_\_\_

Do you have any deceased children? \_\_\_\_\_; If yes, date of death \_\_\_\_\_

Are there any children of deceased child(ren)? \_\_\_\_\_

1. Child's Name \_\_\_\_\_  
 Date of Birth \_\_\_\_\_ ALL Phone Nos. \_\_\_\_\_  
 Address \_\_\_\_\_  
 Child's Children \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_

Comments \_\_\_\_\_

2. Child's Name \_\_\_\_\_  
 Date of Birth \_\_\_\_\_ ALL Phone Nos. \_\_\_\_\_  
 Address \_\_\_\_\_  
 Child's Children \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_

Comments \_\_\_\_\_

3. Child's Name \_\_\_\_\_  
 Date of Birth \_\_\_\_\_ ALL Phone Nos. \_\_\_\_\_  
 Address \_\_\_\_\_  
 Child's Children \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_  
 \_\_\_\_\_ Age: \_\_\_\_\_

Comments \_\_\_\_\_

**DISCLOSURE:**

These materials do not constitute and should not be treated as, legal, tax or other advice regarding the use of any particular tax, estate planning or other technique, device or suggestion, or any of the tax or other consequences associated with them. Although reasonable efforts have been made to ensure the accuracy of these materials and the presentation, neither Jennifer Kent Exum, Ashley D. Stearns nor Trail, Colemans & Stearns, PLLC, Chambliss, Bahner & Stophel, P.C. assumes any responsibility for any individual's reliance on the written or oral information presented during the presentation. Each attendee should verify independently all statements made in the materials and during the presentation before applying them to a particular fact pattern, and should determine independently the tax and other consequences of using any particular device, technique or suggestion before recommending it to a client or implementing it for a client.