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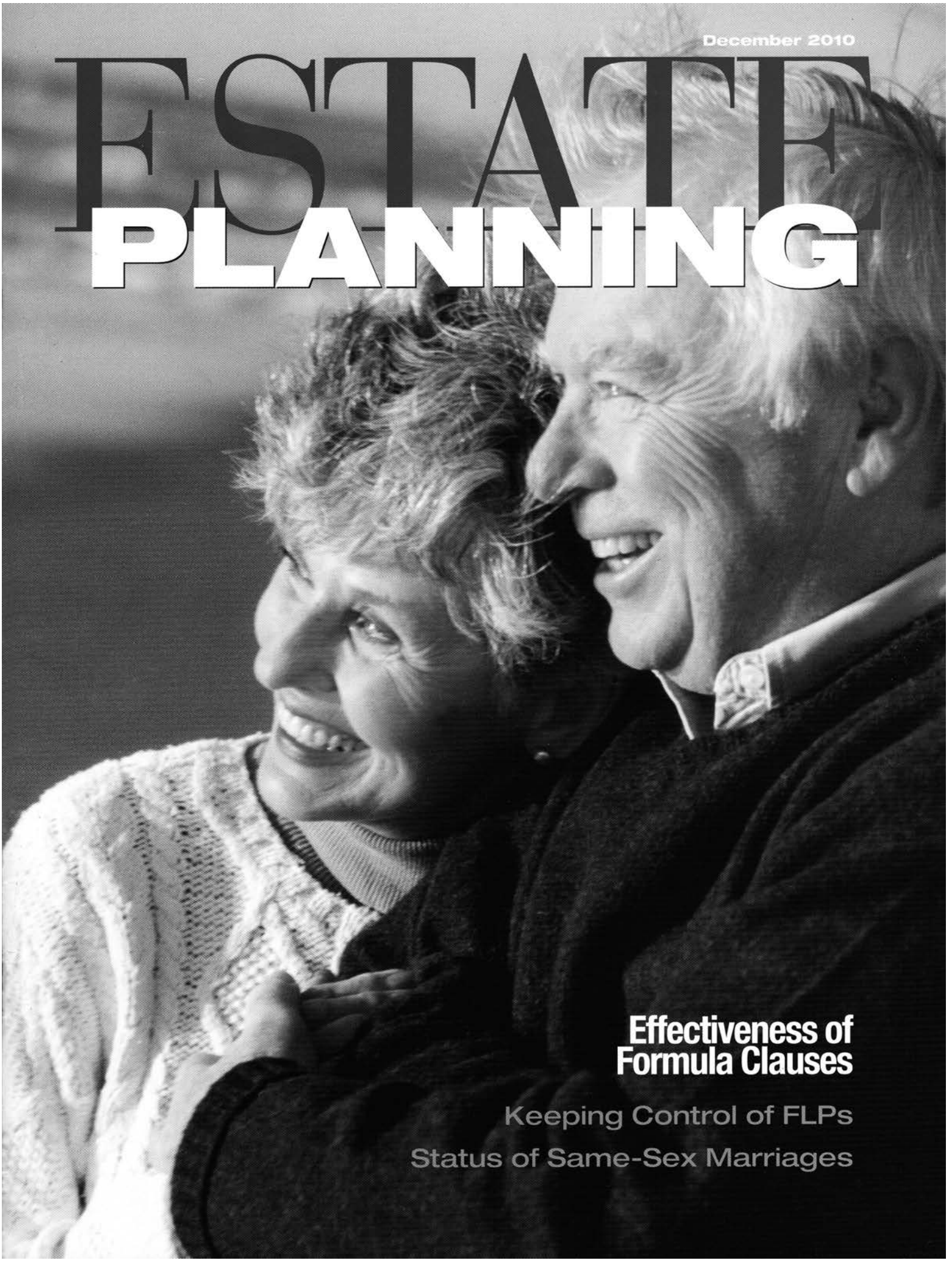
ESTATE PLANNING



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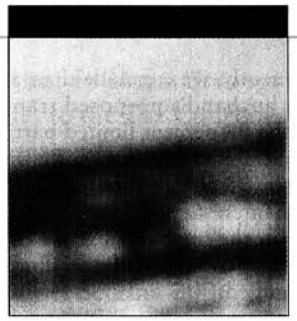

Controlling the FLP—Is the Taxpayer a Safe Choice?

A taxpayer who creates a family limited partnership with an eye to estate tax reduction must beware of retaining excessive express or implied control over the partnership operations.

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The use of family limited partnerships implicates many tax issues, including a "Green Book" proposal to repeal their benefits entirely.[1] One of the more confounding concepts to appreciate fully is whether the taxpayer can retain control over the general partner or even any share of the control over the general partner and still escape estate tax inclusion in those situations in which satisfying the bona fide sale exception is not assured.[2] This article will address the taxation of the property or assets transferred to a family limited partnership (FLP) based on control over the general partner.[3] It also focuses on whether the existence of "fiduciary duties" imposed by law on the general partner is enough to prevent a finding of control under Sections 2036(a)(1) and (2). Last, it discusses whether the criteria relevant to the lack of a bona fide sale is so inter-related under the two tax provisions that there is little chance of success when control is retained.

Theories for finding control

In general, control over the FLP can be found to exist under three theories:

1. A legally enforceable "right" allows the taxpayer to receive the benefits of the FLP (the "retained rights" theory). This is tested under both prongs of Section 2036 mentioned above.
2. An implied understanding allows the taxpayer to receive the benefits of the FLP (the "implied understanding" theory).
3. An express understanding allows the taxpayer to receive the benefits of the FLP (the "express understanding" theory).[4]

The third theory is eschewed here since most planners will be astute enough not to put such an understanding in writing and, in fact, this theory is not often analyzed in great detail in the cases on the subject. Section 2036(a) includes in the estate the value of property to the extent of any interest in the property the taxpayer has transferred without receiving adequate and full consideration in money or money's worth, retaining for life either (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who will possess or enjoy the property or the income therefrom. The first clause of the statute prohibits taxpayer "retained rights" while the second can be said to prohibit "retained interests." Advisors might be encouraged to allow their clients to control that which they seek to exclude after reviewing certain private letter rulings and the notable Supreme Court case of *Byrum*.[5] *Byrum*, is often

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cited as precedent for the proposition that "control" in a fiduciary capacity does not cause inclusion under the retained rights or the retained interest prohibitions contained in the Code.

Letter rulings

In Ltr. Rul. 9310039, husband and wife formed a limited partnership and contributed cash in exchange for a 1% general partnership interest and 98% limited partnership interest. The general partner had exclusive management control over the partnership, including the power to make distributions. The general partner was not required to make any distributions until the partnership terminated but had discretion to make distributions to partners, according to their percentage interests, at any time before the partnership terminated. Dissolution may occur by agreement of the partners, judicial decree, or withdrawal of the last remaining general partner. On dissolution or termination, liquidating distributions will be made to the partners and in accordance with their percentage interests. The husband planned to transfer his 98% limited partnership interest to his wife, which he sought to exclude from his gross estate. Citing *Byrum* and other authority, the ruling opined:

> In this case, the husband, as general partner, controls the management of the partnership as well as the timing and amount of any distributions that may be made before termination or dissolution of the partnership. *However, in exercising this authority, he is under a fiduciary duty to act in the best interests of all partners....*
>
> Thus, after the proposed transfer, the husband would not retain a right under section 2036(a)(2) of the Code to designate the persons who shall possess or enjoy the transferred partnership interest or income from it, nor would he have the power to alter, amend, revoke, or terminate enjoyment of the interest for purposes of section 2038(a).... Consequently, we conclude that, after the husband's proposed transfer of the 98 percent limited partnership interest to the wife, the value of the 98 percent limited partnership interest *would not be includible* in the husband's gross estate under sections 2036(a).... [Emphasis added.]

Byrum, is often cited as precedent for the proposition that "control" in a fiduciary capacity does not cause inclusion under the retained rights or the retained interest prohibitions.

There was thus no application by the IRS, informally, of the retained interest rule of Section 2036(a)(2) to the FLP scenario.

In Ltr. Rul. 9131006, the taxpayer formed a limited partnership and received 1,000 units consisting of both general and limited interests in exchange for her interest in a farm she transferred to the partnership. Net income, losses, and distributions were to be apportioned among partners in the same proportions as the number of units held by each bore to the total number of units outstanding. Overall management authority was invested in the general partners. The amount and timing of all distributions was reserved to the discretion of the general partners. The limited partners were prohibited from taking any part in or from interfering in the management of the partnership. Transfers of both general and limited partnership interests were made after formation, but the taxpayer retained both general and limited partnership interests that enabled her to control management of the partnership including control over any distributions to be made from the partnership. Sometime later, the control over the general partner was relinquished by the taxpayer. As to both the Sections 2036(a)(1) and 2036(a)(2) issues, the ruling held:

> In the present situation, the decedent was (after the initial transfers) the controlling general partner who had management authority over the partnership including the express authority to control partnership distributions. However, similar to the decedent in *Byrum*, the decedent in the instant case occupied a fiduciary position with respect to the other partners and could not distribute or withhold distributions, or otherwise manage the partnership for purposes unrelated to the conduct of the partnership business. Therefore, as was the case in *Byrum*, the value of transferred units is *not includable* in the decedent's gross estate under section 2036 of the Code. [Emphasis added.]

Court cases

In *Byrum*, the decedent was a controlling shareholder and a member of the board of directors of a closely held corporation. The Supreme Court held that the stock in the corporation transferred by the decedent to an irrevocable trust he created was not included in his gross estate under Section 2036, although the decedent expressly retained the

1 General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals, Dept. of Treasury May 2009, page 121 (often referred to as the "Green Book").

2 Of course meeting the bona fide sale exception in Section 2036 can be determinative of the tax outcome and, indeed, is one of the difficulties in focusing on this issue because courts often stop their analysis of the facts in a given case once the exception is found to be met, and thus no clear findings are made on the "retained right" and "retained interest" prongs of Section 2036(a), discussed in this article.

3 FLP is used herein to indicate a partnership or an LLC for which the taxpayer is claiming, among other things, an estate tax discount for his or her interest in the entity or a discount for gifts of interests in the entity made *inter vivos*.

4 "Taxpayer" is used here to indicate the senior family member who is planning a transfer of assets to an FLP.

5 408 U.S. 125, 30 AFTR2d 72-5811 (1972).

right to vote the stock he had transferred, as well as the right to veto the sale or disposition of the stock by the trustee of the trust. The trustee of the irrevocable trust was independent. It could appear at first blush, therefore, that control of or participation in control of the general partner of the FLP is not a basis to cause inclusion under Section 2036(a)(1) or (2) due to the existence of legally enforceable fiduciary duties. Subsequent developments in this area of the law, however, have cast serious doubt on this conclusion.

The now well-known case of *Estate of Strangi*,[6] was decided twice in the Tax Court and twice by the Fifth Circuit. In the discussion that follows, *Strangi I* and *III* refer to the Tax Court decisions and *Strangi II* and *IV* are the Fifth Circuit opinions. In *Strangi I*, the IRS moved 52 days before trial to amend its pleadings to add a claim that under Section 2036, the estate should include the value of the assets held in the FLP in the estate of the decedent. The Tax Court denied the motion as untimely, and an appeal was taken. In the appeal, *Strangi II*, the Fifth Circuit held for the taxpayer and a victory was perhaps prematurely celebrated by many planners. As is now common knowledge, the case was also remanded to the Tax Court on the Section 2036(a) issue. The Tax Court once again addressed the matter in *Strangi III* and stated:

> The issue for decision on remand is whether the value of property transferred by Albert Strangi (decedent) to the Strangi Family Limited Partnership (SFLP) and Stranco, Inc. (Stranco) is includable in his gross estate pursuant to section 2036(a).

The facts in *Strangi* were that on 8/12/1994, the decedent's attorney-in-fact formed SFLP under Texas law. A corporation (Stranco) was designated in the SFLP agreement as the managing general partner. Among other things, the partnership agreement stated that the general partner had authority to act for the partnership in a prudent and businesslike manner and at all times in the best interests of the partnership. The SFLP agreement gave the other limited partners no authority or right to take part in the management of the business or transact any business for the entity. The general partner had the right to make distributions at such times and such amounts as the managing general partner in

[6] "Strangi I," 115 TC 478 (2000); "Strangi II," 293 F.3d 279, 89 AFTR2d 2002-2977 (CA-5, 2002); "Strangi III," TCM 2003-145; "Strangi IV," 417 F.3d 468, 96 AFTR2d 2005-5230 (CA-5, 2005).

his sole discretion determined taking into account the reasonable business needs of the partnership and in proportion to the interests in the partnership. On 8/12/1994, the agent for the taxpayer transferred $9,876,929 to SFLP in exchange for a 99% limited partnership interest in the partnership held by taxpayer. The assets amounted to 98% of the entire wealth of Mr. Strangi, leaving him with a dearth of liquid assets but with some assets that were capable of being made liquid.

All of the contributed property was properly reflected in the capital account of the taxpayer. Stranco held the 1% general partnership interest. The taxpayer then purchased 47% of Stranco, with his four children purchasing 53% among them equally. The children later gave away a 1% interest in Stranco to a local charitable organization, thus reducing the children's share of Stranco to 52%. Consequently, the taxpayer never owned a controlling interest in the general partner. Stranco established bylaws and observed all of the requisite corporate formalities in its organization. The taxpayer and his four children were named the initial five directors of Stranco on 8/17/1994, effective as of 8/12/1994. The agent of the taxpayer acting under a power of attorney was then hired as the manager of the day-to-day business for Stranco as well as SFLP, both pursuant to an enforceable written management agreement.

The taxpayer was terminally ill when the partnership was formed. He died of cancer on 10/14/1994 at the age of 81, just two months after SFLP was funded. Personal expenses were paid from SFLP to the taxpayer or for the benefit of the taxpayer. The payment of personal expenses were, however, offset by credits to the shareholders of the general partner, Stranco, on the books of Stranco. The decedent remained in possession of his home, the ownership of which had also been transferred to SFLP. Rent for use of the home was paid by way of bookkeeping entries evidencing the accrual of the amounts due. The decedent's agent presumably acted pursuant to fiduciary duties to SFLP and to the other limited partners under relevant provisions of the Texas partnership law.[7]

Retained rights under Section 2036(a)(1)

In *Strangi III*, the Tax Court found that *Byrum* did not apply on the grounds that Mr. Strangi retained rights to income under Section 2036(a)(1). The Tax Court held:

> As a threshold matter, we observe that our analysis above of the expressed documents suggests inclusion of the contributed property under section 2036(a)(1) based on the "right to the income" criterion, without need further to probe for an implied agreement regarding other benefits such as possession or enjoyment.

Recall that Mr. Strangi was only a minority shareholder of the general partner and only one of five directors of the general partner Stranco. In finding inclusion based on retained rights, the Tax Court examined the management agreement, which provided the manager of SFLP with the following authority and powers:

1. *Allocations.* Distributions to each partner were to be made in accordance with the partner's interest in the partnership.
2. *Authority of general partner to act.* Power to act solely, exclusively, and absolutely for and on behalf of the partnership and all of the partners in connection with all aspects of the business of the partnership.
3. *Power to deal with and operate partnership.* Power to acquire, hold, lease, encumber, pledge, option, sell, exchange, transfer, dispose, or otherwise deal with real or personal property of any nature whatsoever as may be necessary or advisable for the operation of the partnership.
4. *Power to determine use of revenue.* Power to determine the use of the revenues of the partnership for partnership purposes.
5. *Power to make loans.* Power to borrow or lend money for partnership purposes.
6. *Power to manage.* Power to manage affairs in a prudent and businesslike manner; to act at all times in the best interests of the partnership.
7. *Limited partners excluded.* Power to prevent limited partners from taking part in the management of the business or transact any business for the partnership.

As to income, expenses, distributions, and dissolution the management agreement provided:

8. *Power over income and capital distributions.* Income from operations and capital transactions, after deduction for certain expenses were to be distributed at such times and in such amounts as the general partner, in its sole discretion, determined, taking into account the reasonable business needs of the partnership (including plans for expansion of the partnership's business).
9. *Power to determine distributions.* Determination regarding whether to make distri-

[7] In New York State, for instance, general partners have fiduciary duties in their partnership capacities. See McKinney's Partnership Law § 43; NY Jur. 2d, Business Relationships, § 1872, Breach of Fiduciary Duty; Newburger, Loeb & Co., Inc. v. Gross, 563 F. 2d 1057 (CA-2, 1977), *cert. den.* 434 U.S. 1035.

butions and the amount of distributions to be made were final and binding on all partners. Assets of the partnership could be distributed in-kind in the sole and absolute discretion of the managing general partner.

10. *Power over dissolution and termination.* Power over dissolution and termination could occur on the unanimous vote of the limited partners and unanimous consent of the general partners.

The Tax Court cited *Estate of Pardee*[8] in support of its finding that, under this management agreement, Section 2036(a)(1) applied. In *Pardee*, the taxpayer transferred property to his irrevocable trust of which he was the sole trustee. The trust instrument allowed distributions for the benefit of his children according to an ascertainable standard. The taxpayer was divorced, and pursuant to the child support provision of his divorce agreement, he was required to make certain monthly payments. The Tax Court found that to the extent principal was necessary to generate the income the taxpayer was required to pay in child support, it was property over which the taxpayer retained a right under Section 2036(a)(1). The fact that the taxpayer made payments as trustee was ignored.

In *Strangi III*, the agent of the taxpayer, as the manager of SFLP and manager of the general partner Stranco, could determine whether to make a distribution from SFLP that could benefit the taxpayer and did so. Thus the *Strangi III* court concluded this power held by the agent of the decedent would likewise trigger Section 2036(a)(1). The connection in the reasoning to *Pardee* seems stretched because the manager in *Strangi* was not required to make distributions to the taxpayer under any enforceable agreement. But this highlights the fact that Section 2036(a)(1) is triggered by the mere right to distribute not the actual distribution. *Strangi III* thus defines "right" more broadly than *Bryrum*. The Tax Court in *Strangi III* simply brushed aside any discussion of fiduciary duty on the issue of retained rights. The Tax Court instead stated:

> When distilled to their most essential terms, the governing documents gave Mr. Gulig *(the agent of the taxpayer)* authority to specify distributions from SFLP which is entirely consistent with his authority under the 1988 power of attorney."

The meaning of the language, "When distilled to their most essential terms..." indicates to this observer that the review was based on a totality of the circumstances, rather than a technical examination of the rights and duties of the parties operating pursuant to otherwise legally enforceable agreements. It also may have appeared to the Tax Court that the fiduciary duties attendant in the legal relationships created by the agreements was not a factor to be considered in connection with the retained rights theory.

Implied understanding

As to the "implied understanding" theory, the Tax Court listed factors in support of a finding that an implied agreement existed to benefit the taxpayer even though the court found that all the proverbial i's were dotted and t's crossed in the transaction. It is also important to keep in mind that the implied agreement must be one made contemporaneously with the transfers in order for the government to succeed. An agreement found to come into existence later should not be enough to satisfy the prohibition. The Tax Court pointed to the following factors in finding the existence of an implied agreement:

1. *Amount of assets transferred to the FLP vs. assets retained.* There was a transfer of the majority of the taxpayer assets to the FLP. The Tax Court ruled that it was unreasonable to think the taxpayer would liquidate assets to provide for his basic costs of living.
2. *Continued use of FLP assets by decedent.* There was continued occupation of transferred property [the home used by the taxpayer] by the taxpayer.
3. *Co-mingling of assets.* There was a co-mingling of personal and entity assets.
4. *Disproportionate distributions.* There were disproportionate distributions to the partners.
5. *FLP funds used for personal/estate expenses.* Rent charged and reported as income but paid by way of a bookkeeping entry, and not the actual transfer of funds, were mere "accounting manipulations." Payment of the back surgery costs of an injured helper attending to the taxpayer were personal, not partnership, expenses. Payment of estate taxes notwithstanding pro-rata amounts either advanced or distributed to Stranco for these amounts were also "mere accounting manipulations," said the court.
6. *Testamentary characteristics of the transaction.* The court found that due to the close proximity of the death of the decedent, there was a reasonable expectation to incur expenses that made the proper accounting between the entities unavailing. The fact that the purpose of the partnership

[8] 49 TC 140 (1967).

did not include the need for a joint investment vehicle for the management of partnership assets was also fatal.

7. *Bona fide negotiations.* There was little if any input from other family members.
8. *Circumstances of decedent.* Mr. Strangi was advanced in age and suffering from serious health issues causing his death in a short time following first instituting the transaction.
9. *Practical changes resulting from the transaction.* There was little practical change in the management of affairs of the taxpayer before and after the transaction.

Retained interests—Section 2036(a)(2)

Citing *Byrum*, in *Strangi III* the Tax Court first stated in connection with the retained interest prong of the statute:

> Additionally, retention of a right to exercise managerial power over transferred assets or investments does not of itself result in inclusion under section 2036(a)(2).

Then, in discussing the application of Section 2036(a)(2), the Tax Court did consider the fiduciary duty argument and specifically the *Byrum* case. The estate argued strenuously that the word "right" as used in Section 2036(a)(2) is not to be construed as control. On these facts where the taxpayer was only a limited partner who expressly could not participate in control of the business of the partnership by virtue of acting as an officer, director, or stockholder of a corporate general partner, control should not be found to exist, claimed the estate. The estate also pointed out that the decedent was a minority shareholder of Stranco and thus was without the ability to elect a majority of the directors, thus retaining even less control than was present in *Byrum*.

The Tax Court found the following factors to be present in *Byrum* that distinguished the Supreme Court directive and thus triggered the application of the retained interest prong of Section 2036(a)(2):

Legally enforceable fiduciary duties that are not likely to be enforced will not deter a court from finding the existence of retained rights under either of the two prongs of Section 2036(a).

1. *Independent fiduciary.* Even though Mr. Byrum controlled the corporate entity, any distributions made by Mr. Byrum were made to a trust for which there was an independent trustee. The agent of the taxpayer controlled SFLP in *Strangi*.
2. *Income subject to outside market forces.* The income stream into the corporate entity that Mr. Byrum controlled was subject to the economic ups and downs of an ongoing business. In *Strangi*, the SFLP assets were mere investment assets and a home, not any ongoing business.
3. *Realistic enforcement of fiduciary duties.* Duties existed to unrelated minority shareholders resulting in a realistic possibility for enforcement and an objective business environment against which to judge potential dereliction of those duties that were not present in *Strangi*. The Tax Court found that it was unlikely that the agent would have really enforced the obligations, and because the decedent was the only limited partner, the duties owed were really owed to only the decedent—not any other minority owner who would realistically enforce the obligations. The court stated: "Intra family fiduciary duties within an investment vehicle simply are not equivalent in nature to the obligations created by *United States v. Byrum, supra* scenario."

The appeal to the Fifth Circuit in *Strangi IV* focused on whether the finding of the Tax Court was clearly erroneous. The circuit court affirmed and found, among other things, that payments made on behalf of the estate of the taxpayer should be considered in finding the existence of an implied agreement to retain benefits because the payment of one's estate taxes surely is a benefit. The principle gleaned is that legally enforceable fiduciary duties that are not likely to be enforced will not deter a court from finding the existence of retained rights under either of the two prongs of Section 2036(a). Further illustrative of these points is another recent case from the Tax Court involving an FLP that instead allowed the court to arrive at a favorable result for the taxpayer.

In *Estate of Mirowski*,[9] the testator held 100% of the interest in the family limited partnership ("MFV") after making significant transfers of securities and other property rights. Although the Tax Court found the bona fide sale exception to Section 2036 was met, the application of Section 2036(a) arose in connection with gifts of interests in property to three trusts created by the decedent from MFV

[9] TCM 2008-74.

for the benefit of the children of the taxpayer. These gifts gave rise to the claim by the Service that Section 2036(a) applied and a detailed analysis of the powers held by the taxpayer over MFV as donor of the interests to the trusts was made in the opinion. MFV paid $36,415,810 for transfer taxes, legal fees, and other obligations incurred by the taxpayer, Ms. Mirowski, as the result of her death.

Ms. Mirowski retained assets outside MFV amounting to over $7.5 million, cash and cash equivalents of $3.3 million, and the right to millions of dollars of royalty income she expected to receive from existing patent rights she still owned. Ms. Mirowski was not expected to die at the time the transfers to her three trusts were made, although she suffered from diabetes and hypertension at the time. The creation of MFV took place over the course of at least a year, and the taxpayer participated actively in the process. Shortly after having an operation on her foot ulcer, the taxpayer died suddenly at age 73.

Retained rights—Section 2036(a)(1)

The Service argued:

> Decedent was designated MFV's general manager at the time of its formation, and continued to be its general manager until the time of her death.... As General Manager, decedent had exclusive authority to manage MFV's affairs.... Her authority included the authority to decide the timing and amounts of distributions from MFV.... Decedent could not be removed and replaced as General Manager because, even after the gifts to the daughter's trusts, she still held a majority (52%) interest.... Thus when decedent formed and funded MFV and at her death, she expressly retained, [sic] the right to possession or enjoyment of, or the right to income from, the transferred assets.

The court, however, ruled that no retained right was held by the taxpayer due to limitations on the authority of the general manager of the FLP to make distributions and also due to the fact that Maryland law imposed on her fiduciary duties to the other members of the MFV. In the opinion, the Tax Court found the following factors regarding the agreements governing MFV that points us toward the kinds of provisions one would like to see included in the FLP agreement supporting a finding of no retained rights:

1. *Allocations.* Profit and loss (other than profit and loss derived from capital transaction) for any tax year was to be allocated to MFV's interest holders in proportion to their respective percentage interests and MFV. The taxpayer's capital account was to be credited with the respective contributions of property made to MFV.
2. *Authority of general partner to act.* MFV was to be managed by a general partner *who could be, but did not have to be*, a member of MFV.
3. *Power over capital distributions.* No interest holder was to have the right to receive the return of any capital contribution except as otherwise provided in the agreement. The agreement provided that there would be a return of capital contribution only in the event of liquidation or dissolution. Profit and loss from a capital transaction was to be allocated to MFV's interest holders in proportion to their respective capital accounts. Gross receipts from a capital transaction must be distributed in proportion to the respective capital accounts of the interest holders after the payment of all expenses incident to the capital transaction, payment of debts and liabilities outstanding, and the establishment of any reserves that the general manager deemed necessary for liabilities or obligations.
4. *Power over distributions in liquidation.* If MFV were to be liquidated, its assets were required to be distributed to the interest holders in accordance with the balance in their respective capital accounts.
5. *Right to return assets.* During the normal course of operations, the taxpayer was not entitled to the return of assets that she transferred to MFV.
6. *Fiduciary duties.* All of the powers of the initial general partner were subject to the applicable state law and its

fiduciary duties imposed on general partners.

7. *Right to admit additional partners.* The general partner could not admit additional members to MFV *without the approval of all the members.*

As to income, expenses, distributions, and dissolution the partnership agreement provided:

8. *Power to determine distributions.* The taxpayer, as the majority percentage member of MFV (or as MFV's general manager), *did not have the authority to determine* the timing and amount of distributions of cash flow and capital. The timing and the amount of all distributions was to be determined *by the members holding a majority of the percentages then outstanding*; MFV was required to make, within 75 days after the end of each tax year, distributions to its interest holders of cash flow for the tax year in proportion to such members' respective percentage interests.
9. *Power to determine dissolution and termination.* The general partner could not sell or otherwise dispose of any of the assets of MFV other than in the ordinary course of an MFV's operations *without the approval of all the members of MFV*; involuntary withdrawal of a member (including death) was to cause MFV to be dissolved *unless the remaining members unanimously were to elect* to continue the business; the general partner could not liquidate and dissolve MFV without the approval of all the members.

Although the list of powers, rights, and authority is not identical to the list in *Strangi III*, there is enough similarity to see the lines developing in the Tax Court. Ms. Mirowski retained the sole and exclusive authority to manage MFV's affairs but limitations on these powers as indicated by the emphasis added in the list above and the provisions of state law that imposed fiduciary duties to the other members of MFV, namely the trusts created for her daughters to which the gifts were made, yielded a different result than in *Strangi III*. It appears in this instance that fiduciary duty was a factor to be considered in finding whether the taxpayer retained any "right" to enjoy the property. The concept is not explained, however, in any detail in the opinion.

Implied agreement

The *Mirowski* court also found no implied agreement existed between the taxpayer and the trustees of the trusts. Again the court considered several of the factors listed in *Strangi III:*

1. *Amount of assets transferred to FLP vs. assets retained.* Here enough assets were retained to meet obligations and pay back MFV for the payment of estate expenses.
2. *Continued use of FLP assets.* Even though MFV assets were used for the benefit of the taxpayer, there was sufficient asset reserve to have paid back all the funds so used, said the court. Also, at the time of the transfer, there was no expectation of the death of the decedent, as she was not ill.
3. *Testamentary characteristics of the transaction.* The taxpayer did not anticipate having to pay estate tax because she was in good health when the transaction was instituted.

Retained interests—Sections 2036(a)(2)

The crux of the argument made by the IRS in connection with the retained interest prong of the tax prohibition was that the taxpayer controlled the power to determine the timing of the distribution of the capital transaction proceeds. The court applied the same tests and analysis as were used to reject the retained rights argument made by the service. That analysis is discussed herein above and applies here as well. It is often the case that the two prohibited prongs of Section 2036(a) attract the same analysis by courts.

Conclusion

Significant limitations on the rights and authority of the general partner seems wise where the taxpayers desires some involvement with the general partner of the FLP. Yet, avoiding a finding of an implied understanding under the "testamentary characteristics" factor, noted above, seems in many ways tied to a successful finding that the arrangement was bona fide. One cannot fail to notice in the *Mirowski* case that great emphasis was placed on the bona fide nature of the arrangement due, among other things, to the unexpected death of the taxpayer.

There is an absence of language in the opinions reviewed here setting forth a bright-line rule to be followed in all cases and, of course, the existence of an implied understanding is a factual determination. Factual differences in the governing agreements could be seized on to reach different results in a given case, and the requirements of fiduciary duties have not been emphasized enough by the courts to provide significant comfort to planners. Until the meaning of the term "right" is ruled on by the Supreme Court in a context more closely related to family limited partnerships, it seems risky to allow the taxpayer to control, or have participation in the control of, the general partner of an FLP, under either of the two prongs of Section 2036(a). ■