

## Estate Taxes and Disclaimers Involving Charities - NATHAN KIYAM

Suppose your will creates a trust for your son and daughter. The trust is for their benefit. Son and daughter are trustees to pay themselves only for education, health, and/or support. After one dies or disclaims, their portion goes to the other for education, health, and/or support. If your son disclaims his benefits as a beneficiary to help your daughter to take his benefits, would the fact that your son was also a trustee affect the disclaimer? The Internal Revenue Service (“IRS”) has said no, because the son’s power to direct benefits as a fiduciary is limited by an ascertainable standard which is education, health, and/or support.<sup>1</sup>

Now, suppose your will makes a bequest to your son and daughter, but if they disclaim, then their shares are to go to a foundation you set up. Your son and daughter are directors of the foundation. The foundation is meant to support education by giving grants to local students. If your son disclaims his benefits so that they go to the foundation, will the fact that your son was also a director affect the disclaimer? Using the above reasoning, one would think the IRS would say no, because the son’s power to direct benefits as a fiduciary of the foundation is limited by an ascertainable standard which is educational benefits for local students. On the contrary, the IRS has said yes.<sup>2</sup> The son cannot direct his disclaimed portion as a fiduciary of the foundation as opposed to a fiduciary of a trust. Even though greater funding for qualified charities furthers social policies benefiting the public, and therefore, merits more leniency, the IRS has still obligated additional requirements for a disclaimer to a qualified charity or private foundation.<sup>3</sup>

In twenty-five Private Letter Rulings (PLRs), the IRS has ruled that the disclaimant (the person who disclaims) must be distanced from controlling any property he or she disclaims that goes specifically to a foundation with whom the disclaimant is also affiliated.<sup>4</sup>

This article argues that the IRS's interpretation of disclaimers is incorrect in forcing disclaimants to be separated from the disclaimed property in their affiliation with the 501(c)(3) charity and detrimentally affects charities' support. This article rejects the IRS's interpretation of disclaimers by providing a background of the disclaimer rules, identifying the IRS's interpretation, and arguing against the IRS's interpretation. The arguments against the IRS's interpretation includes: first, the IRS falsely analogizes to Revenue Ruling 72-552; second, the IRS unofficially creates an interest and transfer; third, the fiduciary exception should include charities; fourth, control is covered by non-profit laws; and finally, on balance, supporting charities is a greater benefit than limiting a disclaimant's control within 501(c)(3) entities.

## I. Background

### a. The History and the Basics of the Law

A disclaimer is an unequivocal refusal to accept property attempted to be transferred.<sup>5</sup> The origins of a disclaimer are derived from the common-law principle that a gift is a bilateral transaction requiring, first, the donor's intent to give and, second, the donor's delivery with the donee's acceptance.<sup>6</sup> Thus, where the donee refuses to accept, there is a disclaimer, and a gift is not achieved. The disclaimer is said to have the effect of canceling the gift or transfer from the start or *ab initio*.<sup>7</sup> Thus, the disclaimer is not itself a transfer, but only a cancellation of the transfer.<sup>8</sup> In cases where a transfer is created with a secondary beneficiary or residual clause, such as in trusts or estates, if the first transfer is disclaimed and cancelled *ab initio*, the property passes after the disclaimer to second person as though the initial transfer never occurred.<sup>9</sup> Thus, it is treated as a transfer from the transferor to the next person in line.

Moreover, a disclaimer is pertinent to gift and estate taxes. Estate taxes were established to tax accumulated property upon death by taxing an estate. Gift taxes were established as a

means of preventing the avoidance of estate taxes by transfers made while the person is alive.<sup>10</sup> With the creation of gift and estate taxes came the use of disclaimers for tax purposes to reorder estate distributions, which led to the eventual creation of Internal Revenue Code (I.R.C.) §2518.

Similarly, a disclaimer for tax purposes also cancels a transfer to the disclaimant *ab initio*.<sup>11</sup> A qualified disclaimer under I.R.C. §2518 causes the transfer to be treated as passing directly from the transferor to the next person entitled to the property.<sup>12</sup> If the first transfer was from an estate, a disclaimer maintains the transfer is from the estate to the next person in line.

The use of disclaimers is significant in estate planning as a means of enabling parties to plan orders of distribution and change them later if another sequence is more beneficial.

#### b. The Use of Disclaimers by Estate Planners

Estate planners utilize disclaimers to provide flexibility after a will or trust has been written and after time has changed the facts and circumstances surrounding the creation of the will or trust.<sup>13</sup> Disclaimers allow a legatee, devisee, or beneficiary to redirect property to go to another for a variety of estate planning purposes such as: helping the successor beneficiaries who need the income more; minimizing the spouses' estate to reduce taxes; directing benefits to a marital trust, family trust or spouse;<sup>14</sup> skipping a generation;<sup>15</sup> avoiding creditors of an indebted beneficiary; or giving to charity for the estate to obtain a deduction.<sup>16</sup> The commonality in these uses is flexibility, allowing estate planners to order the distributions which can later be reordered by a disclaimer in light of the circumstances at the time of death.<sup>17</sup>

#### c. The Benefits of Disclaiming to a Charity

Because a disclaimer causes the transfer to go directly from the transferor to the next person in line, if that next person is a 501(c)(3) charity, the transferor can get a tax deduction.<sup>18</sup> This option allows estate planners to consider a deduction to the estate by disclaiming properties

to qualifying 501(c)(3) charities as allowed by Treasury Regulation §20.2055-2(c)(1)(i).

Likewise, disclaimers offer flexibility in selecting which property and how much of it to disclaim if it is severable, such as cash.<sup>19</sup> A practical example of a disclaimer to charity is where illiquid properties such as real estate<sup>20</sup> or artwork<sup>21</sup> has appreciated so much that the estate would be in a better position donating all or part of it than to consume the cash of the estate to pay its taxes.

Thus, where a person has accumulated great wealth or property, the planning of the estate using wills, trusts, and gifts is also likely to involve planning for disclaimers by sequencing the order of distributions or providing a residuary clause to charity to create an option for a charitable deduction during the post-mortem tax planning stage. Disclaimers are so important that some have claimed that the failure to consider disclaimers may constitute malpractice.<sup>22</sup>

#### d. I.R.C. §2518. Disclaimers

Lastly, to qualify as a tax disclaimer in accordance with the rules, the disclaimer must follow I.R.C. §2518. The code and regulations require: (1) the disclaimer must be irrevocable and unqualified; (2) the disclaimer must be in writing; (3) the writing must be delivered within the time limits; (4) the disclaimant must not have accepted the interest disclaimed or any of its benefits; and (5) the interest disclaimed must pass without any direction by the disclaimant.<sup>23</sup>

This article focuses on the IRS's interpretation of the requirements of not accepting the property and not directing disclaimed property by the disclaimant who is affiliated with the charity.

## II. IRS's Interpretation of Disclaimers to Charities

### a. IRS's Opinion Regarding Disclaimant's Affiliation with the Charity

If a disclaimant is affiliated with the 501(c)(3) charity to which the disclaimed property passes after the disclaimer, then the disclaimant's affiliation and control may negate the disclaimer according to the IRS. In a series of twenty-five PLRs, the IRS has laid out its position

regarding a disclaimant's affiliation with the 501(c)(3) charity.<sup>24</sup> The facts typically provide that the disclaimant wishes to disclaim property he or she is receiving. The next person entitled to receive the disclaimed property is a 501(c)(3) foundation. The disclaimant is also a director, trustee, officer, president, executive, or other employee of the foundation. The IRS indicated that additional steps are necessary to distance the disclaimant from control over the disclaimed property within the foundation for the disclaimer to be qualified.

b. Additional Steps IRS Requires Disclaimant and/or Foundation to Take

The additional steps necessary for the disclaimant to be distanced from the foundation vary based on the facts. These steps may be required on the foundation and/or the disclaimant.

In the PLRs, the following thirteen steps or actions were accepted by the IRS in groups or in isolation. The disclaimant resigned as a fiduciary of the charity with or without any other action.<sup>25</sup> The foundation amended governance such as the bylaws, articles, or declaration of trust to have other steps to distance disclaimant's control over disclaimed property.<sup>26</sup> The foundation approved a board resolution establishing certain requirements.<sup>27</sup> The disclaimant irrevocably withdrew his or her powers within the charitable foundation.<sup>28</sup> The foundation separated disclaimed property from general assets.<sup>29</sup> The foundation created an independent committee with control over the property.<sup>30</sup> The foundation designated a special director or trustee with control over the disclaimed property with some PLRs requiring independence from disclaimant's relatives.<sup>31</sup> The foundation required no control by disclaimant over the disclaimed property.<sup>32</sup> The foundation required no control of any proceeds if the property is sold.<sup>33</sup> The foundation required no control over special committee or directors. The foundation required no control by disclaimant over other directors or members.<sup>34</sup> The foundation increased the number of directors

or trustees.<sup>35</sup> Finally, the disclaimant served only as an advisor to the charitable entity by a donor-advised fund with recommendations reviewed by an independent committee.<sup>36</sup>

The foregoing thirteen steps or actions were not all taken at once, but groups were taken in conjunction with others to establish the separation of control depending on the circumstances. A few steps enacted alone were sufficient. However, most steps needed to be in conjunction with other steps to ensure separation of control, but which step was included with other steps depended on the facts and other actions taken. If a disclaimant had resigned, either a few or no other steps were needed. If the entity's governance was amended, separating disclaimed property with no control by disclaimant was also included. In some cases, independent directors were added, and in other cases, a committee was formed. The steps needed depends on the facts.

The common denominator among the PLRs is that the IRS insists that the disclaimant must be separated from directing control over the disclaimed property from within the foundation. The IRS requests not only that the disclaimant take these steps to make a disclaimer qualified, but also that the foundation take steps where needed to distance disclaimant's control.

#### c. Rules Cited for the IRS's Interpretation

Throughout the twenty-five PLRs, the following rules have been cited as authority. Internal Revenue Code (I.R.C.) §2518(b)(4) requires the disclaimant not to direct the disclaimed property in passing to any person other than the disclaimant.<sup>37</sup> Treasury Regulation §25.2518-2(d)(2) indicates that if the disclaimant is also a fiduciary, the disclaimant cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest.<sup>38</sup> Nevertheless, the disclaimant can direct enjoyment where the power to redistribute to another person is limited by an ascertainable standard such as for health, maintenance, or support.<sup>39</sup> The gist of these rules target whether the disclaimant is still directing enjoyment after the attempted disclaimer.

However, the IRS has also cited in all of the twenty-five PLRs Revenue Ruling 72-552 (“RR 72-552”) as to why the IRS interprets the disclaimant to be directing control within the fiduciary without the additional steps. RR 72-552 states that if a gift or inter vivos transfer to a 501(c)(3) entity is made by a donor who is affiliated with the charity and retains power over directing the donated property, then the transfer is not considered a gift or inter vivos transfer, but is determined as part of the estate.<sup>40</sup> The issues with this ruling are that: the facts are different from the PLRs; RR 72-552 includes the gift transfer as part of the estate, whereas the disclaimers are used during estate transfers; and the holding of RR 72-552 says the charitable deduction can still be taken by the estate which the PLRs are trying to obtain.

The IRS’s reason for citing to RR 72-552 appears only its earliest rulings, PLR 9008011, which states, “See also Rev. Rul. 72-552, 1972-2 C.B. 525, which holds that the power possessed by the officer of a charitable foundation to determine the disposition of property transferred by that officer to the foundation is a retained power to determine who shall possess or enjoy the property for purposes of section 2036 of the Code.”<sup>41</sup> Apparently, the IRS is citing to that interpretation to indicate that a disclaimant who has control over disclaimed property within the foundation is also directing enjoyment with wholly discretionary powers.

Thus, once again, the focus by the IRS is whether the disclaimant has the power to direct the disclaimed property. The biggest issues with this interpretation is that using RR 72-552 is a false analogy, and the regulation’s concern over control is already limited by non-profit laws preventing abuse by disqualified persons, private inurement doctrine, and self-dealing.

### III. IRS’s Misinterpretation and Clash of Public Policy

#### a. Revenue Ruling 72-552 is a False Analogy

RR 72-552 is misinterpreted by the IRS when used by an analogy to justify the significant steps to distance the disclaimant from the foundation for many reasons.

First, the facts of the PLRs are different than the RR. RR 72-552 focuses on a gift from a transferor to a foundation with which the transferor is also affiliated. Substantially all of the facts of the PLRs provide that the disclaimant, as an attempted transferee, is the one who is affiliated with the foundation. The actors, transferor and transferee, are factually different. This is significant because the action taken is also factually and fundamentally different. In RR 72-552, the transferor is making a transfer. In the PLRs, the transferee is attempting to disclaim. A disclaimer is not a transfer. Thus, the facts feature significant differences. This is significant not only on the basis of the facts being different, but also in the context of the policy justifications.

Second, the policy justifications of RR 72-552 do not align with or justify the additional steps required in the PLRs. In the RR, the transferor had possession prior to the transfer. The purpose of preventing a transferor from having control within the foundation is to prevent gifts of property that remains in the donor's possession. This purpose aligns with the policy reason for gift taxes, which is to prevent the avoidance of estate taxes by fake inter vivos transfers.<sup>42</sup> Thus, the result of RR 72-552 was to nullify the gift and include the transfer in the estate because the transferor could still direct the property while he was alive – but the transfer was effectuated as an estate transfer. On the other hand, the PLRs are not contesting whether the transferor still retained possession or direction. The PLRs focus on the disclaimer, which is neither a transfer nor initiated by the transferor. The disclaimant never had possession before the transfer. Thus, there cannot exist an abuse of a transferor standing on both sides of the transfer. The disclaimant never stood on the before-side. The disclaimant is merely attempting to cancel the transfer. Therefore, the policy of preventing fake gifts to avoid estate taxes does not apply in the PLRs



because the disclaimant is not the transferor, the disclaimant does not stand on both sides of the transfer, and the disclaimant is neither taxed nor attempting to avoid taxes or claim a deduction.

Third, the result of RR 72-552 is not in dispute in the PLRs. The result of RR 72-552 is to nullify the gift to include the transfer in the estate under I.R.C. §2036. The PLRs are not disputing whether the transfer is included in the estate, because in most of the PLRs, the disclaimer is following an estate transfer. Thus, whether or not the transfer is part of the estate would not change the disclaimant's reaction and attempt to disclaim.

Finally, RR 72-552 concludes that the charitable deduction is permitted whether or not the transferor stood on both sides of the transaction. In the PLRs, by contrast, the charitable deduction is in dispute. It seems peculiarly odd that the RR allows a transferor who gifts to a foundation with which the transferor is also affiliated to take a charitable deduction to the estate, but in the PLRs, a disclaimant cannot. RR 72-552 states that the transfer is included in the estate and permits the charitable deduction to be taken by referring to I.R.C. §2055 depicting it as a deductible transfer from the estate. Meanwhile, the PLRs are all attempting to take a deduction for the estate's taxes which is at issue. If the RR permits the charitable deduction whether or not the transferor is affiliated with the foundation, it stands to reason that a transferee who is affiliated should not affect the deduction either. The transferees in the PLRs are further removed by the fact that they are not even claiming the deduction; the transferor is. Thus, where RR 72-552 permits the transfer to be a deduction to the estate instead of by a gift, the transferee's affiliation in the PLRs should not affect the tax deduction because it is taken from the estate.

b. The IRS is Unofficially Interpreting Ownership and Creating a Gift

The PLRs have resulted in the IRS interpreting ownership over the property. The IRS requires additional steps that, if not taken, may result in the disclaimant owning the property

interest before the foundation. However, the courts have already ruled that federal tax law does not create property rights, but merely attaches consequences to rights created under state law.<sup>43</sup> State law controls the nature of the legal interest.<sup>44</sup> Furthermore, tax liability follows ownership, and the determination of ownership is controlled by the states.<sup>45</sup>

The PLRs mandating the additional steps is requiring a foundation and/or the disclaimant to take these steps to insure how the ownership is to pass. This is contrary to what the Supreme Court has previously stated. State laws decide whom the interest passes to and through, and if the state law defines the requirements for a disclaimer and decides the ownership of the interest, then the PLRs are interpreting ownership in the face of state laws given credence by the Supreme Court. Most states originate a disclaimer with property-law concepts in that the transfer is not complete until it is accepted by the recipient, and that a person cannot be forced to accept property against his or her will.<sup>46</sup> A disclaimer is a repudiation, renunciation, or denial of an interest transferred to the disclaimant which effectively cancels the transfer specifically made to the disclaimant.<sup>47</sup> The disclaimer has the effect of canceling the transfer back from the moment the transfer was created as cancelled *ab initio* or an *ab initio* defeasance.<sup>48</sup>

Thus, where the states have defined a disclaimer to defeat title ownership *ab initio*, the PLRs requiring the additional steps is reinterpreting the ownership of the transfer. This seems at odds especially where a disclaimant meets states laws, but fails to take the additional steps in the PLRs. In such a scenario, the PLRs interpret the disclaimer as void and the disclaimant as having ownership before transferring to the foundation. However, the states will have interpreted the transfer to the disclaimant as cancelled *ab initio*. The IRS's holding in the PLRs results in the disclaimant having possession whereas complying with the state law defeats the disclaimant's title entirely. With state laws given credence by the Supreme Court to interpret

title, the PLRs are, in contrast, interpreting title without authority and creating an ownership with the disclaimant that was defeated by state laws considering the transfer cancelled *ab initio*.

The IRS's strongest contention against this may be that they are only interpreting the tax liability and not necessarily changing the resulting legal title. In other words, regardless of the IRS's interpretation of the title, the property interest is still in the hands of the charity in the end.

However, this argument is flawed for two reasons. First, the IRS is creating an interest which is legal title for the disclaimant before transferring to the foundation. The disclaimer is interpreted by the state laws as effectively canceling that legal title's existence. Second, assuming the disclaimant retained control within the foundation, the IRS would interpret this as the disclaimant had possession and transferred it to the charity. This interpretation by the IRS is creating an intent to transfer and creating a transfer from the disclaimant to the charity where the disclaimant's intent did not exist. The disclaimant is disclaiming and by virtue of the disclaimer, has no intention to take title, let alone gift the title to the charity. A gift requires a voluntary transfer with donative intent.<sup>49</sup> The IRS's interpretation causes the disclaimant to have title and forcibly creates a transfer to the foundation from the disclaimant. Because a transfer requires donative intent, the IRS is also forcibly creating donative intent where it does not exist. The disclaimant did not make the choice to transfer to the charity. The disclaimant did not affirmatively deliver the property. The disclaimant only reactively chose to refuse the property. The disclaimant had no voluntary choice as to either the transfer itself or the selection of the transferee. Therefore, the resulting legal title by the foundation is forcibly created by the IRS interpreting title as a transfer from disclaimant, has no donative intent as grounds for the transfer, and was not voluntarily made by the disclaimant.

Lastly, assuming disclaimant retained control within the charity, the IRS's interpretation effectively makes the transfer to the charity from the disclaimant as a donor affiliated with the charity. Ironically, this effect is the fact pattern the IRS argues against in RR 72-552. The IRS is creating a situation of a gift by the disclaimant where disclaimant has control within the charitable foundation similar to the donor gifting to the charity as the facts of RR 72-552. This is not only ironic, but also contrary to the gift requirements of relinquishing all dominion and control.<sup>50</sup> Thus, even the IRS's interpretation that the transfer is not from the estate, but is a gift from the disclaimant, is an issue because it could not be considered a gift under RR 72-552. The IRS has created the very issue under RR 72-552 that they cite as authority for this interpretation.

c. Regulation's Exception for Fiduciaries should include a Disclaimant Director

Treasury Regulation §25.2518-2(d)(2) indicates that if the disclaimant is also a fiduciary, the disclaimant cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. However, the regulation provides an exception for disclaiming fiduciaries if the disclaimant's power to redistribute to another person is limited by an ascertainable standard.<sup>51</sup> The ascertainable standard is not defined, but examples include distributions that are made for health, maintenance, or support.<sup>52</sup>

Fiduciary in these instances is not specifically defined. The examples provided are confined to fiduciaries of a trust. Thus, we can deduce that a trust fiduciary is included. However, this category should also include a foundation fiduciary for several reasons.

First, a foundation is not always strictly a corporate entity. A trust foundation may also be qualified as a charity receiving 501(c)(3) status. In situations where a foundation is also a trust, the IRS clearly cannot remove the fiduciary definition because the regulation already provides examples of trusts in the regulation regarding fiduciaries.

Second, while the IRS has not interpreted any PLRs explicitly to state that a director of a foundation is a fiduciary, a majority of the PLRs includes the rules pertaining to fiduciaries where there is a foundation as a corporation or trust foundation.<sup>53</sup> The IRS referring to Treasury Regulation §25.2518-2(d)(2) about fiduciaries where the foundation is a trust or corporation suggests that the IRS may be defining fiduciary to include corporate and trust foundations also.

Third, fiduciaries of a trust and corporation are often treated similarly in certain ways such as having similar responsibilities, duties, and powers.<sup>54</sup> Thus, where they are treated with the same duties, the IRS's definition of fiduciary should be extended to both fiduciaries as well.

Even if the definition of fiduciary were not to include a corporate foundation, some parts of the treasury regulation explaining the qualified disclaimer do not reference a fiduciary. Under Treasury Regulation §25.2518-2(e)(1)(i), the regulation did not mention fiduciary, but rather stated that a disclaimant, either alone or in conjunction with another, who has the power to direct redistribution is allowed if the power is limited by an ascertainable standard.

Thus, the argument seems to focus on whether the foundation's distributions can be considered limited by an ascertainable standard. The issue is whether 501(c)(3) rules limiting a charity's use of assets to charitable purposes is considered limited to an ascertainable standard.

A charity's distributions and use of assets are limited to the charitable purpose for which the foundation is substantiated under I.R.C. §501(c)(3). These laws limit the distributions to charitable purposes and forbid any personal use of charitable assets.<sup>55</sup> The non-profit laws scrutinize the charitable entity under both organizational and operational tests to limit the use of funds towards charitable purposes.<sup>56</sup> Moreover, disqualified persons and self-dealing rules prohibit any relatives of donors or employees of the charity from taking advantage of those assets or using such assets for personal use beyond what is allowed for charitable purposes.<sup>57</sup>

Thus, a foundation's use of its assets is limited to an ascertainable standard which is the charitable purpose. The use cannot be personal or for anything beyond the charitable purpose. The limitation is an ascertainable standard which is the charitable purpose defined under I.R.C. §501(c)(3). Any use beyond the charitable purpose would effectively cause the charity to lose its exemption status which permits tax deductions for donations. Although the repercussions of the PLR are the same in that the deduction would not be allowed, the repercussions under non-profit laws for private use of assets or self-dealing would actually be more devastating because all deduction would be completely lost to all donations to the charity. Therefore, the concept of limited to an ascertainable standard should include charitable purposes because non-profit laws limit distributions backed by a devastating punishment of losing 501(c)(3) status.

Moreover, Treasury Regulation §25.2518-2(d)(2) indicates that a fiduciary cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. If the disclaimant is a fiduciary within the 501(c)(3) entity, the disclaimant does not have wholly discretionary power to direct enjoyment. As stated above, it is limited to the charitable purpose of the 501(c)(3) entity. Any personal use of a charity's assets is limited by the private inurement doctrine and rules of self-dealing and disqualified persons within the non-profit laws.

Additionally, Treasury Regulation §25.2518-2(e)(5) Example (12) illustrates what a limited ascertainable standard can be: health, maintenance, or support of the beneficiaries. Charitable purposes include general welfare, health, or education of society. The charitable purposes seem aligned with the examples provided as a limited ascertainable standard. The only difference is that a charitable purpose would benefit society at large either directly to specific members of society or an entity benefiting the public or indirectly to society such as through supporting education or the environment. Thus, a limited ascertainable standard should include

charitable purposes because the standards are similar with only one difference: charities benefit a broader audience. Furthermore, the policy reasons to support charities outweigh the arguments to limit the definition of an ascertainable standard to only beneficiaries of a trust. This will be further explained in the final point about policy reasons supporting charities.

The IRS might argue against non-profit laws and limitations being included in the definition of limited to an ascertainable standard by referring to Treasury Regulation §25.2518-2(d)(2) which defines distributions limited to an ascertainable standard as not including discretionary allocations among members of a *designated class*.<sup>58</sup> The IRS may also refer to the regulations which permits distributions only to *designated beneficiaries* limited to the standard.<sup>59</sup>

However, there are four problems with this argument. First, not all foundations provide benefits to a designated class, let alone to designated beneficiaries. The purpose may be environmental, and no class of society may benefit directly. The purpose may be indirect and no specific members of society may be selected recipients, such as proceeds going to libraries. The purpose may even be specific to a school, library, or park for its costs of upkeep and continued use by the public. In these cases, there often is not a designated class or persons of society.

Second, in some cases, there may possibly exist a designated beneficiary for which the charity is providing benefits. The designated beneficiary may be an entity as a school or library. The designated beneficiary may be certain applicants that meet a charity's purpose. Thus, in some situations, it could even meet the definition of distributions for a designated beneficiary.

Third, if the IRS requires designated beneficiaries to allow the disclaimant to be a fiduciary, then the IRS must also require no open classes of beneficiaries in trusts contrary to other rules such as I.R.C. §674(b)(5)(A), which includes a class of beneficiaries.<sup>60</sup> For example, if a disclaimant is a trustee and an income beneficiary, and the secondary beneficiary to the

disclaimant's interest is the children of A who is still alive, then the children of A represents an open class. Even if the distributions to the children of A are limited to their health and support, the IRS's definition does not permit the disclaimer to be qualified here as well. Although, no specific PLRs or cases illustrate this, it seems that not permitting a designated class to be a beneficiary would have unintended repercussions to wills and trusts in other areas of the law.

Finally, allowing more donations to charities as a policy argument would easily outweigh limiting the definition of an ascertainable standard to specific people for their personal benefit. This will be further expanded upon in the final point of supporting charities as a policy argument and the repercussions of the IRS's interpretation which would hinder the growth of charities.

In conclusion to this point, a disclaimant with the power to direct distributions within a 501(c)(3) entity should be included in the exception of distributions limited to an ascertainable standard. For one, the disclaimant is limited to a charitable purpose and cannot personally use the property. Thus, the use of property is limited to an ascertainable standard which is the charitable purpose. More importantly, the charitable purpose is a greater cause to support than a few designated beneficiaries for the benefit of their personal health, maintenance, or support.

#### d. IRS's Issue Over Control is Covered by Non-Profit Laws

The IRS's strongest argument and primary issue with the disclaimant's affiliation with the charity is simply that the disclaimant's control and direct the property. This is essentially why the IRS is insisting on additional steps to distance the control. Treasury Regulation §25.2518-2(e) restricts direction by disclaimant over the disclaimed property. Introducing RR 72-552 in the PLRs suggests that the IRS is of the opinion that any control by a disclaimant within the foundation is effectively directing its use even though the IRS's interpretation which causes a disclaimer to fail, ironically, turns it into the very facts of RR 72-552 the IRS advocates



against. Control is essentially the issue the IRS is worried about, but control is an issue that is already covered by the limitations of non-profit laws imposed on 501(c)(3) entity's use of assets.

As stated earlier, 501(c)(3) entities are limited by the use of their assets for charitable purpose. A donor cannot donate and use the charity's assets for personal gain if the donor is affiliated with the 501(c)(3) entity.<sup>61</sup> The rules preventing private inurement have been broadened by the courts to encompass any insider or any employee who has control over the property.<sup>62</sup> A charity cannot siphon off any of its earnings to its founders, members of its board, their families, or any insider or employee with control.<sup>63</sup> Both the private inurement and private benefit doctrines focus on the insider's control of the charity's funds, assets, or disbursements, and whether any of the entities expenses or use was for personal gain or private use.<sup>64</sup>

The PLRs focus on a disclaimant's control of disclaimed property within the foundation. If the underlying premise of the IRS is that the control must be distanced from the disclaimant, then the rules preventing private benefit essentially prevent personal control by the disclaimant. The only control that disclaimant can have is limited to the entity's charitable purpose, and thus, leading back to the point that control is limited to an ascertainable standard.

Furthermore, Treasury Regulation §25.2518-3(c) states that a disclaimer of a specific pecuniary amount out of a bequest or gift may be qualified provided that no income or other benefit of the disclaimed amount "*inures*" to the benefit of the disclaimant either prior to or subsequent to the disclaimer. The same language of no income shall inure is also a limitation under I.R.C. §501(c)(3).<sup>65</sup> Thus, this illustrates that the use of the same language suggests the two codes should be given the same treatment in that the I.R.C. §501(c)(3) limitation on inuring property to private individuals complies with the requirement under Treasury Regulation §25.2518-3(c) that the disclaimed property does not inure to the benefit of the disclaimant.

In *Estate of Christiansen*, the court held that disclaimed property going to a charitable entity is prevented from private abuse and limited to charitable purposes only.<sup>66</sup> Moreover, the court held that enough safeguards existed including the executor's and trustee's fiduciary duty to prevent private abuse, the state attorney general's duty to enforce such responsibility, and the private inurement and self-dealing limitations.<sup>67</sup> *Estate of Petter* also found that such enforcers provide confidence to support Congress's overall policy encouraging charitable transfers.<sup>68</sup>

The IRS may argue against this, indicating that the premise of preventing control by the disclaimant is to make the disclaimer a complete refusal to accept or direct the property. Yet, when the disclaimed property passes to the charitable entity, the disclaimant cannot make personal use of the asset. Thus, where there is no personal control, there is no acceptance of the property. Besides, directing use of the proceeds is irrelevant to a disclaimer for three reasons. First, the directing is done through a separate entity. Second, the directing is limited to the entity's charitable purpose. Finally, the IRS permits similar directing by a disclaiming fiduciary within a trust, which suggests that not all directing is impermissible or indicative of acceptance.

Finally, a strong contention against the IRS's interpretation of such control comes from the Supreme Court's definition of what control is in private use versus charity use in *Merchants Nat. Bank of Boston v. Comm'r*.<sup>69</sup> The Supreme Court held that to the extent that there is power with a private donee or trustee to divert the property to private use, the deduction will be limited to the portion that the power cannot be exercised.<sup>70</sup> In essence, the Supreme Court stated that for any part of a donation to charity that a private individual still retains private control, the deduction is not allowed.<sup>71</sup> However, under the facts in the PLRs, the disclaimant completely resigns private control of the property to go to a separate entity, the charity. The property transfers without any restrictions by the disclaimant. The disclaimant may have some control

within the charity if affiliated. Regardless, the use cannot be for private use or within private control. The use is limited to charitable use, and therefore, consistent with the Supreme Court's holding. Thus, the disclaimer should be permitted because private control cannot be exercised.

In closing, the disclaimant is limited in any private control over the property within the charity by the private inurement and private benefit doctrines. As there cannot be a private use, the disclaimant is effectively not accepting or directing the asset. Therefore, there cannot be abuse by a disclaimant in privately using disclaimed property within the charity because the disclaimant cannot personally use the property due to non-profit laws covering 501(c)(3) entities.

e. Clash of Policies and the Repercussions of Either Interpretation

i. Policy for IRS's Interpretation is to Minimize Control within the Charity

One purpose behind the additional steps sets out in the PLRs is to prevent the disclaimant from directing the disclaimed property.<sup>72</sup> This suggests the policy rationale is to uphold the disclaimer as an unconditional refusal and prevent disclaimant from directing the property.<sup>73</sup> However, the regulations permit exceptions if the directing is limited, suggesting that a refusal can still be accomplished by limited control such as within the context of a charity.

A second policy reason may be inferred from RR 72-552, in that the additional steps is to prevent abuse of gift tax rules by fake gifts from donors who still retain control. Yet, under the facts of the PLRs, the gift tax issue is moot because the disclaimant is not being taxed, the estate is. Additionally, the disclaimant is only responding to a transfer and does not stand on both sides of the transfer. Thus, the issue of a fake gift is moot when a disclaimant did not voluntarily start the transfer. Also, it seems ironic that the IRS is preventing the transfer from the estate to the charity, and effectively calling it a transfer from the disclaimant to the charity. The irony is that

the IRS is preventing the facts of RR 72-552, but causing a failed disclaimer to result in the creation of a transfer from a donor affiliated with the charity, the very facts of RR 72-552.

One final policy justification for the IRS may be that the IRS is attempting to maintain consistency with a refusal being a complete relinquishing of control similar to a gift. However, control is still limited by non-profit laws preventing private use of charitable assets. Also, the pretext and possibility of abuse is different. Donors in gifts choose and plan their transfers. Disclaimants are refusing the transfer, not controlling how it started or where it goes. The disclaimed property goes to a separate entity that is regulated by non-profit laws. Overall, there is less of a chance of abuse by a disclaimant who did not start or select the transferee and cannot privately control the property after it transfers to a 501(c)(3) entity due.

The IRS may argue that this creates inconsistencies by a different definition of control for gifts than disclaimers. It should be noted that giving stricter adherence to dominion and control for a gift transfer than a disclaimer seems consistent with past treatment of gifts as there is more abuse available by gaining the benefits of a gift under the veil of one. Moreover, treating one aspect of gifts differently from another for a factual variance is not uncommon as the courts in the past have more strictly applied the formalities of transfer against gift causa mortis than to a gift inter vivos.<sup>74</sup> It can similarly be seen as justified to place greater scrutiny on control over the donor than the disclaimant, as the degree of voluntariness in the transfer varies substantially.

#### ii. Repercussions of the IRS's Interpretation Limits Charitable Transfers

A clear repercussion of the IRS's interpretation is that it will decrease properties and funds disclaimed to charities where wealthy taxpayers who create foundations want their family members to be both part of the foundation and permitted the option to disclaim benefits for the charity. Preventing disclaimers in such contexts will prevent the donations of properties as well.

Furthermore, another repercussion of the IRS's interpretation is that it will diminish the flexibility and usefulness provided by disclaimers. The purpose of disclaimers is to provide options during post-mortem stage where a will or trust document created decades earlier did not contemplate factual changes over time. However, the IRS's interpretation closes a door on family members who are affiliated with foundations created by wealthy taxpayers.

Lastly, an unintended repercussion of the IRS's interpretation is that if the disclaimer fails, the disclaimant is treated as donating to the charity with which the disclaimant is affiliated. This is ironically the very facts of RR 72-552 which the IRS cites as advocating against. Thus, the IRS is creating a situation that would further complicate the matter. It would likely cause the disclaimant's donation to the charity to not be a donation, but be part of disclaimant's estate at death. Now, would this also cause a generation skipping tax because the property passes through two estates? The answer to this only further complicates the matter.

### iii. Public Policy Against IRS's Interpretation is to Support Charities

The most important public policy against the IRS's interpretation is to broadly encourage transfers to charities. This consideration has been significant in the public policies behind I.R.C. §501(c)(3), and has often been given greater deference. The Supreme Court has said that Congress enacted I.R.C. §501(c)(3) and §170 to provide tax benefits to charitable organizations and to encourage the development of private institutions that serve a useful public purpose.<sup>75</sup> Furthermore, the Supreme Court justifies this public policy as it provides a benefit to the public at large or in localities that would otherwise have required significant expenditures by the government.<sup>76</sup> Non-profit entities serve the public and localities that would otherwise be too costly for the government. Additionally, many courts construe liberally the exemption in favor of 501(c)(3) entities.<sup>77</sup> In *Estate of Christiansen*, the court decided with the public policy that the

rules are enacted to encourage charitable donations as opposed to siding with the IRS's argument that deduction should be strictly construed to enforce accurate reporting requirements.<sup>78</sup> The court also indicated that the relevant policy is more general in nature in encouraging charitable donations as a broad policy. Furthermore, *Estate of Christiansen* involved a disclaimer to a charity, the value of which was not determined until later, and the court permitted the later valuation for the deduction to further Congress's intent to encourage transfers to charity.<sup>79</sup>

Similarly, disclaimed properties passing to a charity should be supported by the public policies broadly construed even where a disclaimant may be directing its use within the charity. The charity already has limitations in place to prevent abuse of private controls. Furthermore, in *Estate of Christiansen*, the court allowed an increase in charitable deduction because the court felt that there were enough safeguards and enforcers in place to prevent inappropriate actions, such as enforcement by executors, trustees, and the state attorney general.<sup>80</sup>

As indicated above, non-profit laws limit the use of these assets and provide a safeguard to prevent private abuse of charitable assets. With less capacity for abuse, encouraging transfers to charities should be supported and augmented by not requiring the additional steps in the PLRs.

As a counterargument, the wealthy taxpayer can still donate directly to other 501(c)(3)s that do not have affiliated beneficiaries. However, this argument does not account for how many wealthy taxpayers do not just donate, but create 501(c)(3) entities to further a cause or benefit the public. Any abuse by creating 501(c)(3)s is covered under non-profit laws and should not be monitored by disclaimer laws, as disclaimer laws can only invalidate a single transfer.

Finally, as an added support of charities, not only would the use of disclaimers directing disclaimed property to charities increase charitable donations, it would also increase the creation of charitable foundations. Wealthy taxpayers often utilize foundations as a tax deduction. When

taxpayers are wealthy enough, their estate planners often create charities with which the taxpayer's family members are affiliated, creating this very situation. Permitting the disclaimant family members to direct property they disclaim within the foundation would augment the creation of foundations by wealthy taxpayers seeking to utilize the flexibility of disclaimers. Any abuse in creating 501(c)(3) entities should be monitored by non-profit laws that would invalidate the 501(c)(3) status, not disclaimer laws which can only invalidate a single transfer.

#### iv. Repercussions of Disclaiming the IRS's Interpretation is Minimal

Lastly, if the disclaimant is permitted to be affiliated with the charity without additional steps, the repercussions would be minimal. The first repercussion is that more disclaimers will be used to direct assets to the charitable foundation. This is a nominal repercussion as it is supported by public policy encouraging charitable transfers. The second repercussion is that disclaimants will be permitted to control the disclaimed property within the foundation. This is also nominal because, as indicated above, the control of the disclaimed property is limited to charitable use. No individual affiliated with the charity may be permitted to privately benefit or use charitable property inconsistent with charitable use. Also, any private use may subject the 501(c)(3) entity with the significant risk of losing its tax-exempt status completely. Finally, the IRS may argue that such disclaimers may be abused by for-profit companies, but these facts are strictly for charities that can give a deduction and limit the use of assets to charitable purposes.

#### v. On Balance, Supporting Charities is a Far Greater Benefit

The IRS's policy justification is limited to preventing abuse by disclaimants who direct property after it is disclaimed. However, this directing of property is limited to the charitable purpose for which the charity was created. This limitation not only has a drastic punishment, which is to lose its 501(c)(3) status and all deductions that come with it, but is also enforceable

by state laws of fiduciary duties, the state attorney general, and the IRS. Thus, the limitation is enforceable given multiple enforcement agents. With so many enforcers involved, a court can have confidence that the gift was made in good faith and in keeping with Congress's intent and overall policy of encouraging gifts.<sup>81</sup> Thus, this policy is limited in scope in whom it affects.

On the contrary, allowing disclaimants to be affiliated with the charity without additional requirements augments transfers to charity and the creation of charities which supports the public and greater causes. The benefit here is clearly greater than the harm, if any harm exists. The benefit is to a wider audience of supporting charities. The harm is abuse by a disclaimant in directing disclaimed property, but this directing is limited to the charitable purpose of the charity.

Therefore, the public policy supporting charitable transfers is clearly a greater good than the harm the IRS remotely finds in a disclaimant directing the limited use of disclaimed property.

#### IV. Conclusion

The IRS imposing additional steps to separate a disclaimant from disclaimed property within the foundation is unwarranted. The IRS erroneously analogizes to RR 72-552, creates a transfer lacking donative intent, should apply the fiduciary exception to disclaimants who are fiduciaries of the charitable entity, confuses the control issue which is already covered by non-profit laws preventing self-dealing and private inurement, and is unsupported by public policy which would prefer encouraging charitable transfers over limiting a disclaimant's control.

When assessing the IRS's interpretation, consider the purpose the rules are to serve. The rules are to serve the public and the government which indirectly serves the public. Charities are the epitome of serving the public while unburdening the government. To encourage charitable transfers supports not only the public, but lessens the government's public burdens.



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<sup>1</sup> See Treas. Reg. §25.2518-2(e)(1)(ii); See, e.g., Treas. Reg. §25.2518-2(e)(5) Example 11-12 (1986).

<sup>2</sup> See P.L.R. 2010-32-002 (Aug. 13, 2010); P.L.R. 2008-02-010 (Jan. 11, 2008); P.L.R. 2007-44-005 (Nov. 2, 2007) (all three PLRs require the disclaimant to take additional measures to separate control from the disclaimant such as amending foundation's bylaws to not give disclaimant control).

<sup>3</sup> *Id.*

<sup>4</sup> See Appendix A for a list these twenty-five PLRs (the three PLRs listed in *supra* note 2 are also in the list).

<sup>5</sup> John Price, *Price on Contemporary Estate Planning 2015 ed.*, Wolters Kluwer, 12,071 (2014).

<sup>6</sup> *US v. Irvine*, 511 US 225, 239 (1994). (citing to multiple authorities including, as earliest, *Blanchard v. Sheldon*, 43 Vt. 512, 514 (1871)).

<sup>7</sup> *Id.* (citing to multiple authorities including, as earliest, *Burritt v. Silliman*, 13 N.Y. 93, 97-98 (1855)).

<sup>8</sup> See Unif. Probate Code §2-1105(f), 8 U.L.A. 140 (Supp. 1999) (the uniform rules adopts the state-law perspective that a disclaimer “is not a transfer, assignment, or release.”).

<sup>9</sup> *Irvine*, 511 US at 239.

<sup>10</sup> *Id.* at 235. See also *Estate of Sanford v. Comm’r*, 308 U.S. 39, 56 (1939) (important purpose, if not the main purpose, of gift taxes was to prevent avoidance of death taxes by taxing gifts).

<sup>11</sup> I.R.C. §2518(a).

<sup>12</sup> *Id.*; Treas. Reg. §25.2518-1(b); See also *Brown v. Routzahn*, 63 F.2d 914, 917 (6th Cir. 1933) (among the earliest cases to adopt the state and common law concept that a disclaimer is not a transfer, but a refusal of a gift.)

<sup>13</sup> Price, *supra* note 5, at 12,071.

<sup>14</sup> See, e.g., *Estate of Robert W. Gorre Jr.*, T.C. Memo. 1994-331 (tax court upheld a marital deduction from a partial disclaimer); See, e.g., P.L.R. 2012-45-004 (Nov. 9, 2012) (spouse disclaims her interest in the IRA so the disclaimed property passes to the Marital Trust and Family Trust); See, e.g., P.L.R. 2008-32-018 (Aug. 8, 2008) (wife's disclaimer caused brokerage accounts to go to a trust that creates a marital trust and family trust).

<sup>15</sup> Skipping a generation may be subject to the general skipping transfer tax (GSTT).

Disclaiming could also be used by that next generation beneficiary to prevent a generation from skipping and prevent the GSTT.

<sup>16</sup> Price, *supra* note 5, at 12,083 (includes a list of other reasons for which a disclaimer is used by estate planners).

<sup>17</sup> See, e.g., P.L.R. 2004-42-027 (October 15, 2004) (irrevocable trust creates a sequence of distributions where principal goes to spouse's estate, but if spouse disclaims, to Trust 2 for spouse, but if spouse disclaims Trust 2, to Trust 3 for spouse, but if spouse disclaims Trust 3, to Trust 4 for spouse, but if spouse disclaims, to Trust 5).

<sup>18</sup> Treas. Reg. §20.2055-2(c)(1)(i); See P.L.R. 93-17-039 (April 30, 1993) (held that assuming the disclaimers are qualified under I.R.C. §2518 and the foundations are exempt under I.R.C. §501(c)(3), “any property passing to the [f]oundations as a result of the disclaimer will be eligible for the estate tax charitable’ deduction under [I.R.C.] 2055.”); See also P.L.R. 95-50-026 (December 15, 1995) (allowed a charitable deduction where a disclaimer of a portion of income in a charitable remainder unitrust will go to the charitable remainder, a University).

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<sup>19</sup> Treas. Reg. §25.2518-3(a)(ii); *See also* Treas. Reg. §25.2518-3(d) (examples of selectively disclaiming properties includes a number of stock shares, a select acres of land of the whole, or a select property like a painting or jewelry).

<sup>20</sup> *See* P.L.R. 86-26-046 (March 27, 1986) (where decedent's children disclaimed part of the property which was forty acres of unimproved land, but kept the house and some surrounding land).

<sup>21</sup> *See* P.L.R. 91-13-004 (March 29, 1991) (where A received \$100,000 and a Collection, A's disclaimer of a portion of the Collection to a Museum qualified under 501(c)(3) was a deduction if the disclaimer was qualified).

<sup>22</sup> Jerry A. Kasner, Benton C. Strauss, Michael S. Strauss, *Post-Mortem Tax Planning*, Thomson Reuters Tax and Accounting, ¶ 14.05 (2016).

<sup>23</sup> I.R.C. §2518; Treas. Reg. §25.2518-2(a).

<sup>24</sup> *See* Appendix A for a list of these twenty-five Private Letter Rulings.

<sup>25</sup> *Compare* P.L.R. 90-08-011 (Feb. 23, 1990) (disclaimant's resignation from his position as trustee of foundation was by itself sufficient), *with* P.L.R. 93-19-022 (May 14, 1993) (disclaimant was not only ineligible for any capacity within foundation, but also resigned as trustee of the charitable trust).

<sup>26</sup> *See* Appendix A (Of the 25 PLRs listed, 20 of them involve amending governing documents or approving a board resolution that incorporates other steps such as segregating disclaimed property and providing exclusive control to independent directors or special committees); *E.g.*, P.L.R. 2004-20-007 (May 14, 2004) (foundation amended both its Articles of Incorporation and Bylaws to require disclaimed property held in segregated Special Fund exclusively controlled by a Special Fund Committee); *E.g.*, P.L.R. 2001-49-015 (Dec. 7, 2001) (foundation amended its Trust Agreement to set up a segregated Special Account directed by Special Trustees).

<sup>27</sup> *E.g.*, P.L.R. 95-32-027 (Aug. 11, 1995) (Board resolution to provide exclusive control over disclaimed property to independent directors composed of any director other than the disclaimant or anyone related to disclaimant).

<sup>28</sup> *See* P.L.R. 1999-29-027 (July 23, 1999) (where additional steps taken to ensure that disclaimants had no power to dispose of or otherwise deal with disclaimed property included that disclaimants irrevocably waived and renounced the right at all times within the foundation to elect or remove members and directors of the foundation, appoint any committee over disclaimed property, and exercise any control over disclaimed property).

<sup>29</sup> *See* Appendix A (21 of the 25 PLRs listed include segregating properties as one of the steps)

<sup>30</sup> *E.g.*, P.L.R. 2007-44-005 (Nov. 2, 2007) ("Separate Fund Committee" with exclusive control over disclaimed funds separated from general assets was established by amending bylaws); *E.g.*, P.L.R. 2005-19-042 (May 13, 2005) ("Special Fund Committee" was created by amending bylaws and given exclusive control over disclaimed funds); *E.g.*, P.L.R. 1999-03-019 (Jan. 22, 1999) ("Disclaimed Property Fund Committee"); *E.g.*, P.L.R. 1999-44-038 (Nov. 5, 1999) ("Grantmaking Committee" created with exclusive rights to distribute and select recipients).

<sup>31</sup> *E.g.*, P.L.R. 2006-16-026 (April 21, 2006) (three Special Directors were added by amending bylaws of foundation of which the disclaimant cannot be a part of or appoint or remove); *E.g.*, P.L.R. 91-41-017 (Oct. 11, 1991) (bylaws amended to give control over disclaimed property to "Independent Directors" which was defined as any director who is neither the disclaimant nor anyone related to the disclaimant); *E.g.*, P.L.R. 2006-49-023 (Dec. 8, 2006) ("Special Trustee" was created by amending Trust Agreement which included a term that the trustees other than disclaimant would appoint the Special Trustee to oversee disclaimed property exclusively).

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<sup>32</sup> See Appendix A (Almost every case where a segregated property was created, control by disclaimant was not permitted as the purpose of creating the segregation of property from general assets).

<sup>33</sup> P.L.R. 1999-29-027 (July 23, 1999).

<sup>34</sup> See P.L.R. 1999-29-027 (Jul 23, 1999) (disclaimant irremovably waived and renounced the right at all times to “participate in the election and/or removal of members and directors” of the foundation).

<sup>35</sup> E.g., P.L.R. 93-50-033 (Dec. 17, 1993) (The board of trustees was not only increased, but a separate committee composed of trustees exclusive of disclaimant was created to oversee disclaimed property).

<sup>36</sup> Two PLRs address this: See, P.L.R. 2005-18-012 (May 6, 2005); P.L.R. 95-32-027 (Aug. 11, 1995).

<sup>37</sup> See also Treas. Reg. §25.2518-2(a)(5).

<sup>38</sup> P.L.R. 92-35-022 (May 29, 1992) (citing authority to Treas. Reg. §25.2518-2(d)(2) as do most of the PLRs in Appendix A).

<sup>39</sup> Treas. Reg. §25.2518-2(e)(1)(i)-(ii). See, e.g., Treas. Reg. §25.2518-2(e)(5) Examples (11) and (12).

<sup>40</sup> Rev. Rul. 72-552, 1972-2 C.B. 525.

<sup>41</sup> P.L.R. 90-08-011 (Feb. 23, 1990).

<sup>42</sup> *Irvine*, 511 US at 235. See also *Estate of Sanford v. Comm’r*, 308 U.S. 39, 56 (1939) (important purpose, if not the main purpose, of gift taxes was to prevent avoidance of death taxes by taxing gifts).

<sup>43</sup> *US v. Nat’l Bank of Commerce*, 472 U.S. 713, 722 (1985).

<sup>44</sup> *Aquilino v. US*, 363 U.S. 509, 514 (1960).

<sup>45</sup> *US v. Mitchell*, 403 U.S. 190, 197 (1971).

<sup>46</sup> *Jewett*, 455 U.S. at 323.

<sup>47</sup> *City Nat. Bank & Trust Co. of Columbus v. US*, 203 F.Supp. 398 (S.D. Ohio 1962) (citing Black, Law Dictionary (4<sup>th</sup> Ed. 1951) at page 550).

<sup>48</sup> *Irvine*, 511 U.S. at 239. (An important consequence to exemplify this cancellation of the transfer is that a disclaimer as an ab initio defeasance which bars disclaimant’s creditors from reaching the disclaimed property)

<sup>49</sup> *Jewett v. Comm’r*, 455 U.S. 305, 323 (1982). (citing to Black’s Law Dictionary 417 (5<sup>th</sup> ed. 1979)).

<sup>50</sup> Treas. Reg. §25.2511-2(b); See also *Smith v. Shaughnessy*, 318 U.S. 176, 181 (1943) (A gift for tax purposes is made when the donor parts with dominion and control leaving the donor with no power to change its disposition).

<sup>51</sup> Treas. Reg. §25.2518-2(e)(1)(i)-(ii). See, e.g., Treas. Reg. §25.2518-2(e)(5) Examples (11) and (12).

<sup>52</sup> See Treas. Reg. §25.2518-2(e)(5) Example (12).

<sup>53</sup> E.g. P.L.R. 93-20-008 (May 21, 1993); E.g. P.L.R. 93-50-032 (Dec. 17, 1993); E.g. P.L.R. 95-32-027 (Aug. 11, 1995).

<sup>54</sup> No rules are specifically involved. The similarities are viewed just in general.

<sup>55</sup> Treas. Reg. §1.501(c)(3)-1; See also I.R.C. §4941-4946.

<sup>56</sup> Treas. Reg. §1.501(c)(3)-1.

<sup>57</sup> I.R.C. §4941 (self-dealing); I.R.C. §4946 (disqualified persons); I.R.C. §4942; I.R.C. §4945 (taxable expenses).

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- <sup>58</sup> Treas. Reg. §25.2518-2(d)(2).
- <sup>59</sup> Treas. Reg. §25.2518-2(e)(1)(ii).
- <sup>60</sup> I.R.C. §674 (Pertains to power to control enjoyment in trusts and certain limitations by fiduciaries with interest)
- <sup>61</sup> I.R.C. §501(c)(3) (“no part of the net earnings of which inures to the benefit of any private shareholder or individual”); *See also Orange County Agr. Soc., Inc. v. Comm’r*, 893 F.2d 529, 534 (2nd Cir. 1990) (“An organization will not qualify for tax-exempt status if even a small part of its income inures to a private individual.”)
- <sup>62</sup> *United Cancer Council, Inc., v. Comm’r*, 165 F.3d 1173, 1176 (7th Cir. 1999).
- <sup>63</sup> *Id.*
- <sup>64</sup> *Rameses School of San Antonio, Texas v. Comm’r*, 93 T.C.M. (CCH) 1092, 1098, 2007 T.C.M. (RIA) 2007-085, at 6 (citing *Founding Church of Scientology v. US*, 412 F.2d 1197 (1969)).
- <sup>65</sup> I.R.C. §501(c)(3) (“no part of the net earnings of which inures to the benefit of any private shareholder or individual”); *See also* Treas. Reg. §1.501(c)(3)-1(e) (“its profits do not inure to the benefit of individual members”).
- <sup>66</sup> *Estate of Christiansen v. Comm’r*, 586 F.3d 1061, 1065 (8th Cir. 2009).
- <sup>67</sup> *Id.*
- <sup>68</sup> *Estate of Petter v. Comm’r*, 653 F.3d 1012 (9th Cir. 2011) (the court noted that enforcers of the charity’s rights is a fiduciary duty imposed on directors, the IRS which could revoke the tax exemption or the state attorney general).
- <sup>69</sup> *Merchants Nat. Bank of Boston v. Comm’r*, 320 U.S. 256, 260 (1943).
- <sup>70</sup> *Id.*
- <sup>71</sup> *Id.*
- <sup>72</sup> *See, e.g.*, P.L.R. 90-08-011 (Feb. 23, 1990).
- <sup>73</sup> Treas. Reg. §25.2518-2(d)(2).
- <sup>74</sup> *Newman v. Bost*, 122 N.C. 524 (1898).
- <sup>75</sup> *Bob Jones University v. US*, 461 U.S. 574, 587 (1983).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Debs Memorial Radio Fund, Inc. v. Comm’r*, 148 F.2d 948 (2nd Cir. 1945) (I.R.C. §501(c)(3) “... should be liberally construed in favor of exemption.”); *See also, Broadway Theatre League of Lynchburg, Virginia, Inc. v. U.S.*, 293 F.Supp. 346, 353 (W.D. Va. 1968) (foundations “organized and operated exclusively for [charitable] purposes is remedial and is applied with liberality” and cites cases from the 6th, 7th, 3rd, 5th, 2nd, and 1st circuits.); *Cf. Omaha Live Stock Traders Exchange v. U.S.*, 244 F.Supp. 384, 386 (D. Ne. 1965) (Citing a 9th circuit case, “A tax exemption statute is to be strictly construed and any doubt must be resolved in favor of the government.”)
- <sup>78</sup> *Estate of Christiansen*, 586 F.3d at 1065.
- <sup>79</sup> *Id.*
- <sup>80</sup> *Id.*
- <sup>81</sup> *See also, Estate of Petter*, 653 F.3d at 1020 (a court found confidence in encouraging charitable transfers backed by enforcers including directors with a fiduciary duty to the charitable entity, the IRS, and state attorney generals).

## Appendix A

### List of 25 Private Letter Rulings that the IRS has Required Additional Steps on the Disclaimant

<u>PLR</u>	<u>Summary of Additional Steps Taken to Distance Disclaimant</u>
<u>PLR 201032010</u>	(1) Bylaws of Foundation were amended, (2) Segregated and separate account to maintain the disclaimed property, (3) Disclaimant retained no power to direct the separate account
<u>PLR 201032002</u>	(1) Bylaws of Foundation were amended, (2) Segregated and separate account to maintain the disclaimed property, (3) Disclaimant retained no power to direct the separate account
<u>PLR 200802010</u>	(1) Bylaws of Foundation were amended, (2) Segregated and separate account to maintain the disclaimed property, (3) Disclaimant retained no power to direct the separate account
<u>PLR 200744005</u>	(1) Bylaws of Foundation were amended, (2) Segregated and separate account to maintain the disclaimed property, (3) Disclaimant retained no power to direct the separate account, (4) Power over separate account is held with a special committee, (5) Disclaimant retained no power to elect or remove members of the special committee
<u>PLR 200649023</u>	(1) Trust Agreement of foundation were amended, (2) Separate account maintained disclaimed property, (3) Special trustees had power to direct the separate account, (4) Disclaimant retained no power to direct the separate account, (4) Disclaimant retained no power to elect or remove the special trustee.
<u>PLR 200616026</u>	(1) Bylaws of Foundation were amended, (2) Separate account maintained, (3) Disclaimant retained no power to direct the separate account, (4) Power over separate account is held only with special directors, (5) Disclaimant retained no power to elect or remove members of the special directors
<u>PLR 200519042</u>	(1) Charter of Incorporation and Bylaws of Foundation were amended, (2) Segregated and separate account maintained, (3) Disclaimant retained no power to direct the separate account, (4) Power over separate account is held with a special committee, (5) Disclaimant retained no power to elect or remove members of the special committee
<u>PLR 200518012</u>	(1) Disclaimant is not employed by the trust or foundation and neither is there an intent to be, (2) Donor advised fund was established by a trust administered by the foundation, (3) Disclaimant only gives advice to the foundation that is reviewed by an independent committee
<u>PLR 200420007</u>	(1) Articles of Incorporation and Bylaws of Foundation were amended, (2) Segregated and separate account maintained, (3) Disclaimant retained no power to direct the separate account, (4) Power over separate account is held with a special committee, (5) Disclaimant retained no power to elect or remove members of the special committee
<u>PLR 200204022</u>	Charitable Unitrust and Family Charitable Trust are involved, (1) Trust agreement was amended, (2) Segregated accounts was created for disclaimed property separate from other property, (3) Disclaimants are trustees, but renounce their rights to select charitable remainder beneficiaries, (4) Special disclaiming trustees had exclusive right to direct the segregated account, (5) Special trustee cannot be disclaimant or anyone related or subordinated to disclaimant, (6) Disclaimants are NOT on the board of the foundation.
<u>PLR 200149015</u>	(1) Trust Agreement of foundation was amended, (2) Segregated and separate account maintained disclaimed property, (3) Special trustees had power to direct the separate account, (4) Disclaimant retained no power to direct the separate account, (5) Disclaimant retained no power to elect or remove special trustee or be a special trustee, (6) Disclaimant could not revoke or amend these proposed amendments to the trust agreement
<u>PLR 199947022</u>	(1) Bylaws of Foundation were amended, (2) Segregated and separate account to maintain disclaimed properties, (3) Power over separate property is by directors who have not made disclaimers with respect to such properties

<b><u>PLR 199944038</u></b>	(1) Code of Regulations of foundation was amended, (2) Separate account maintained disclaimed property, (3) Grantmaking Committee had power to direct separate account, (4) Disclaimant retained no power to direct the separate account, (5) Disclaimant had no power to vote over directing those funds, (6) Disclaimant retained no power to elect or remove the special trustee or be a special trustee, (7) Disclaimant could not revoke or amend these proposed amendments
<b><u>PLR 199929027</u></b>	Disclaimed properties were paintings, (1) Bylaws were amended, (2) Four additional members to the board of foundation were added, (3) Committee was created to have exclusive power to administer and dispose of artwork, (4) Disclaimants waived their rights with the Foundation to (a) elect members or directors of the foundation; (b) vote to appoint members of the committee; (c) participate in any control, directly or indirectly, over the paintings or the proceeds thereof should the paintings be sold.
<b><u>PLR 199903019</u></b>	Charitable Trust is involved, (1) Trust was amended, (2) Separate account was created for disclaimed funds called "disclaimed property fund," (3) Control to manage separate account is with disclaimed property funds committee, (4) Disclaimant could not serve on this committee, (5) Disclaimant could not vote or direct separate account, (6) Disclaimant could not discharge, appoint, or elect any member of the DPF committee
<b><u>PLR 9823043</u></b>	QTIP trust disbursing money to foundation, (1) Declaration of Trust of Foundation was amended, (2) Separate Fund account was to hold disclaimed property, (3) Separate Fund Trustees was to administer the separate account, (4) Disclaimant will have no discretionary power to direct the disclaimed property, (5) Disclaimant will not select or appoint any trustees over separate account.
<b><u>PLR 9532027</u></b>	Two sons and two donor advised funds are involved: Son 1: will make recommendations that the foundation may accept or reject, Son 1 is a director of foundation, Son 1 is to abstain on voting on any distributions Son 1 recommends, and only independent directors can direct distributions in the DAF. Son 2: will make recommendations that will be reviewed by an advisory committee if the foundation makes a favorable report, advisory committee is to review for consistency with foundation's objectives, and Son 2 does not sit on board of foundation nor intends to be.
<b><u>PLR 9350033</u></b>	Charitable Remainder Trust, (1) Disclaimant resigns as trustee of the trust, but remains a trustee of foundation, (2) Declaration of trust of foundation was amended, (3) Board of foundation expanded from 2 to 4 with disclaimant abstaining from appointing them, (4) Separate account was created for disclaimed properties or funds, (5) Separate committee will administer the separate account, (6) Disclaimant will abstain from any actions related to establishment of separate account or selection of committee members
<b><u>PLR 9350032</u></b>	Charitable trust is involved, (1) Disclaimants resign as trustees of foundation, but remains as trustees over charitable trust, (2) Family of disclaimant is to be successor trustees of foundation
<b><u>PLR 9320008</u></b>	(1) Bylaws of Foundation were amended, (2) Segregate & separate account to maintain disclaimed properties, (3) Independent directors have sole authority over the separate account (independent directors is any director other than disclaimant)
<b><u>PLR 9319022</u></b>	Charitable trust involved, (1) Disclaimant resigns as co-trustee of the charitable trust, (2) Disclaimant waives rights to appoint successor or serve as part of Grants Committee, (3) Foundation (Corporation II) provides that disclaimant is ineligible to serve in any capacity on the foundation.
<b><u>PLR 9317039</u></b>	(1) Bylaws of Foundation were amended, (2) Separate account to maintain disclaimed properties, (3) Independent directors have sole authority over the separate account (independent directors is any director other than disclaimant)
<b><u>PLR 9235022</u></b>	(1) Bylaws of Foundation were amended, (2) Separate account maintained, (3) Power over separate account is held with a special committee, (4) Disclaimant will not be part of special committee
<b><u>PLR 9141017</u></b>	(1) Bylaws of Foundation were amended, (2) Segregate and separate account to maintain disclaimed properties, (3) Independent directors have sole authority over the separate account (independent directors cannot be disclaimant or anyone related)
<b><u>PLR 9008011</u></b>	Disclaimant is not part of foundation. Disclaimant's wife and adult children are cotrustees of foundation.