State Law & State Taxation Corner

By *Thomas E. Rutledge*

The Nevada Restricted LLC/LP: Damned If You Do and Damned If You Do

In 2009, Nevada adopted amendments to its limited liability company (LLC) and limited partnership (LP) acts providing for the elective status of a "restricted" LLC or LP.[1] Having elected that restricted status, the LLC or LP is precluded from making distributions to its members/partners during the 10 years subsequent to its organization or such shorter or longer period as may be set forth in the documents controlling a particular restricted LLC or LP. The limited commentary available indicates that these provisions were created for purposes of structuring estate planning vehicles[2] that, not being permitted to make distributions for a significant period of time, would justify significant discounts on the value at the time of grant.[3] In fact, however, there remains a significant risk that those restrictions will be treated as a Code Sec. 2704(b) "applicable restriction" and, therefore, for purposes of valuation, ignored. Further, under the guidance of *A.J. Hackl*[4] and the recently rendered *Price*,[5] gifts of units in a restricted LLC or LP likely will not qualify for the annual exclusion under Code Sec. 2503(b). Ultimately, the use of a restricted LLC or LP in an estate plan entails significant uncertainty and consequent risk.

The Restricted LLC and LP

The inclusion into the statutes of the "restricted" LLC/LP was accomplished through the addition of two sections to each act. Initially, the definition of a "restricted" LLC or LP was added, indicating that an LLC or LP is "restricted" if it "elects to include the optional provisions" provided by the operative provision of each act.[6]

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With respect to each act, there is then set forth the consequences of a particular LLC or LP having elected "restricted" status. Essentially, and although it appears that either a shorter or longer period may be dictated by the articles of organization, as a "default"[7] rule the LLC or LP may not, from either its date of formation as a "restricted" LLC or LP or the amendment of the articles of organization/certificate of limited partnership electing into that status, "make any distributions to its members/partners" until ten (10) years thereafter.[8]

So there you have it: for a period of 10 years, purportedly as a "default" rule, a Nevada "restricted" LLC or LP may not make a distribution to its members or partners.

While certainly not the focus of this review, an issue with respect to how compensation will be paid for the operation of a restricted LP bears noting. While the provision in the LLC Act refers to distributions "to its members with respect to their member's interests,"[9] the amendment to the LP act refers simply to distributions "to its partners" without any the inclusion of conforming language such as "with respect to their interests in the partnership."[10] It would appear that the statute, therefore, permits a "management fee" or similar compensatory arrangement being paid to a manager who is as well a member in that, in each instance, that compensation will not be remitted "with respect to their member's interest[s]," but rather with respect to managerial services provided. Conversely, in that the substantive restriction imposed upon a "restricted" LP is not so qualified, and in that any distribution made to a partner, even if for services rendered, would and should likely be characterized as a distribution,[11] absent retaining a nonpartner to manage the operations of the restricted LP, it does not appear possible for it, during the 10-year restriction period, to compensate the person or party so charged.[12]

> Ultimately, the use of a restricted LLC or LP in an estate plan entails significant uncertainty and consequent risk.

Gifts of Future Interests in Property

Code Sec. 2503(b), on an annual basis, excludes from the definition of "taxable gifts" the first $13,000[13] of gifts made to any person "other than gifts of future interests in property." Gifts of future interests are subject to gift tax unless sheltered by the donor's lifetime annual gift tax exemption.[14] A "future interest in property" is defined as including not only reservations and remainders, but also "other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at a future date or time."[15] Conversely, "[a]n unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain) is a present interest in property."[16] From this direction there has followed a significant line of cases, exemplified by *E.F. Fondren*,[17] that have held that the question of whether a gift constitutes a current or future interest depends not on when ownership of the gift is transferred but when enjoyment or income from it begins to flow to the grantee. As stated in *Fondren*, "The question is of time, not when title vest but when enjoyment begins. Whatever puts the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment makes the gift one of the future interests within the meaning of the regulation."

A.J. Hackl[18]

A.J. Hackl, a successful businessman, determined to diversify his investments in publicly traded securities by investing in real estate, specifically tree-farming operations. Because his existing investments already generated considerable current income, long-term growth was the objective of the tree-farming activities. To that end, he purchased real estate with little, if any, marketable timber (such land being available at significantly lower cost than land containing marketable timber), thereby providing greater long-term return on his investment. Mr. and Mrs. Hackl purchased two farms, one in Florida and one in Georgia, and contributed them to a newly organized Indiana limited liability company called Treeco, LLC. The Hackls each took back 50,000 voting and 450,000 nonvoting units in the LLC. Later, the Hackls made additional contributions of cash and of marketable securities to Treeco, to provide working capital and finance additional acquisition of tree-farming properties.

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Within about a year, Treeco was merged into a Georgia limited liability company, Hacklco, LLC, which was subsequently merged into Treesource, LLLP, a Georgia limited liability limited partnership. Each of these entities was actively involved in tree farming, including planting 8-10 million trees on its properties and retaining consulting and management services.

Pursuant to Treeco's operating agreement, Hackl was appointed as manager for life, or until his resignation, removal or incapacity, and he had the ability to appoint a successor manager during his lifetime or by his will. The "management of [Treeco would] be exclusive vested in a manager," it being required that the manager perform his or her duties "in good faith, in a manner the Manager reasonably believes to be in the best interest of the Company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances." The manager could make distributions, but prior to dissolution "no Member shall have the right to withdraw the Members Capital Contribution or to demand and receive property of the Company or any distribution in return for the Member's Capital Contribution, except as may be approved by the Manager." The manager had the sole authority to approve or disapprove a proposed transfer of a membership interest. If the transfer were approved, the transferee would be admitted as a member of the company. Alternatively, if the transfer were not approved by the manager, the transferee would succeed only to the economic rights of membership, and would not succeed to any right to participate in the business of the company or otherwise exercise rights as a member.[19]

> Absent contrary guidance from the IRS and the courts, treating the election to be a Nevada "restricted" LLC or LP other than an applicable restriction is a dangerous proposition.

In December 1995, subsequent to the formation of Treeco and the adoption of its Operating Agreement, Mr. and Mrs. Hackl initiated a gifting program pursuant to which 500 voting and 700 nonvoting units were transferred to each of their eight children and to the spouses of each of those children. The gifts were "split" pursuant to Code Sec. 2513, and were treated as gifts qualifying for the annual exclusion pursuant to Code Sec. 2053(b). Subsequently, the gift program was extended to where these individuals received 500 voting units and 750 nonvoting units, while at the same time an irrevocable trust was set up for the petitioner's minor grandchildren pursuant to which 1,250 units were transferred to the trust on behalf of the 25 minor grandchildren. Three of Hackl's children were named as the trustee of that irrevocable trust. As described by the Tax Court:

> The primary business purpose of all three of the above entities [Treeco, Hacklco and Treesource] has been to acquire and manage plantation pine forests for long-term income appreciation for petitioners and their heirs and not to produce immediate income. Petitioners anticipated that all three entities would operate at a loss for a number of years, and therefore, they did not expect that these entities would be making distributions to members during such years.... Neither Treeco nor its successors had at any time through April 5, 2001, generated net profits or made distributions of cash or other property to members.[20]

As noted in the opinion:

> [T]he sole issue for determination by the Court is whether Petitioner's gifts of units in Treeco qualify for the annual exclusion provided by section 2503(b), a dispute which turns on whether the transfers constitute gifts of a present interest for purposes of the statute.[21]

The Tax Court determined that gifts of Treeco shares were gifts of future interest in property because the gifts did not "render an economic benefit presently reachable by the donees."[22]

On appeal, the Seventh Circuit affirmed. It noted that the Hackls had indeed given up all of their legal rights to the interests. However, the court said that this simple fact did not automatically make these present interest gifts. The court said that the "sole distinction between present and future interests lies in the question of whether there is postponement of enjoyment of specific rights, powers or privileges which would be forthwith existent if the interest were present."[23] In other words, "the phrase 'present interest' connotes the right to substantial present economic benefit."[24] The court determined that Treeco's operating agreement clearly foreclosed the donee's ability to realize

any substantial present economic gain[25] because Treeco's restrictions on transferability essentially meant that they were without immediate value and the absence of current economic return from continued ownership.[26] Ultimately, the court said that the Hackls' gifts, while outright transfers, were not gifts of present interests.[27]

W.M. Price[28]

Walter M. Price, in anticipation of selling his heavy equipment company, contributed the stock into a limited partnership, which then sold it to a group of employees. The partnership was comprised of a one-percent general partner, Price Management Corp., the Walter Price Revocable Trust and the Sandra Price Revocable Trust, each 49.5-percent limited partners. The proceeds of the stock sale were invested in marketable securities. LP units were in turn gifted to the Prices' three adult children.

The question under consideration was whether the LP units gifted to the Price children were current or future interests? The court, citing the Regulations,[29] the Supreme Court[30] and the ruling of the Tax Court in *Hackl*,[31] determined that the units were future interests not subject to the Code Sec. 2503(b) annual exemption.[32]

Initially, the court noted that the assignee children were not formally admitted as limited partners, and as mere assignees did not even have the few rights afforded limited partners under the controlling agreement. Setting aside the issue of status, the court wrote:

> But even if it were to be assumed, contrary to the foregoing analysis, that the donees did somehow become substituted limited partners, it would not affect our conclusion that contingencies stand between the donees and their receipt of economic value for the transferred partnership interests so as to negate finding that the donees have the immediate use, possession, or enjoyment of the transferred property.[33]

The units were unmarketable consequent to a right of first refusal at a formulative valuation but lacking a required deadline for closing. While in certain years cash distributions had been made, there was no obligation that they be made.

> Because the timing and amount of any distributions are matters of pure speculation, the donees acquired no present right to use, possess, or enjoy the income from the partnership interests.[34]

"Applicable Restrictions"

An "applicable restriction," as that term is used in Code Sec. 2704(b), is any restriction on the ability to liquidate the entity that is more restrictive than the limitations that would generally apply under the relevant state law. Code Sec. 2704(b)(1) states that if:

> (A) there is a transfer of an interest in a corporation or partnership to (or for the benefit of) a member of the transferor's family, and
>
> (B) the transferor and members of the transferor's family hold, immediately before the transfer, control of the entity, any applicable restriction shall be disregarded in determining the value of the transferred interest.[35]

Under this statute, an applicable restriction is a provision that limits the ability of the entity to liquidate if (1) the restriction lapses after the transfer, or (2) the transferor or any member of the transferor's family can remove or reduce the restriction after the transfer.

Reg. §25.2704-2(b) specifies that "[a]n applicable restriction is a limitation on the ability to liquidate the entity (in whole or in part) that is more restrictive that the limitations that would apply under the State law generally applicable to the entity in the absence of the restriction,"[36] which interpretation has been quoted and adopted by the Tax Court.[37] Reg. §25.2704-2 also provides that a restriction is an applicable one only to the extent that the restriction will lapse by its terms, or that the transferor and any members of the transferor's family can remove the restriction immediately after the transfer. Moreover, "[a] restriction imposed or required to be imposed by federal or state law is not an applicable restriction."[38]

Legislative history on the meaning of applicable restriction is rather limited.[39] The House Conference Report provides the record of the agreements reached between the House and the Senate in negotiating OBRA 1990 in pertinent part states:

> Under the conference agreement, any restriction that effectively limits the ability of a corporation or partnership to liquidate is ignored in

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valuing a transfer among family members if (1) the transferor and family members control the corporation or partnership and (2) the restriction either lapses after the transfer or can be removed by the transferor or members of his family, either alone or collectively.

Example 8.—Mother and Son are partners in a two-person partnership. The partnership cannot be terminated. Mother dies and leaves her partnership interest to Daughter. As the sole partners, Daughter and Son, acting together could remove the restriction on partnership termination. Under the conference agreement, the value of the Mother's partnership interest in her estate is determined without regard to the restriction. Such value would be adjusted to reflect any appropriate fragmentation discount.[40]

These statements provide the basic explanation of Congress's language and the term "applicable restriction" as it is used in Code Sec. 2704(b).

The Tax Court addressed this specific issue in *B.P. Kerr*.[41] In this case, the IRS contended that the provisions of a partnership agreement (which contained a provision for a 50-year term, or dissolution by agreement of all partners) were applicable restrictions under Code Sec. 2704(b).[42] After comparing the provisions of the partnership agreement to Texas partnership law, the court concluded the restrictions contained in the partnership agreement were no more restrictive than the limitations that generally would apply to all partnerships in Texas.[43] Accordingly, the court held that the partnership agreement did not contain "restrictions on liquidation that constitute applicable restrictions within the meaning of section 2704(b)."[44]

Are Interests in a "Restricted" LLC or LP a "Future Interest"?

It is difficult to conceive of an argument that would support the position that an interest in a restricted LLC/LP is anything other than a future interest. During the period of restriction, it is entirely true that the assets of the LLC/LP may appreciate to the ultimate benefit of the members/partners, but both the case law and the regulations make clear that such appreciation within the organization does not exempt the interest therein from characterization as a future interest. Furthermore, there has been rejected the argument that there has been a full and complete conveyance of the interest in the organization such that there is a present, as contrasted with a future, interest.[45] During the period of restriction, allocations of LLC/LP income would result in a tax liability of an individual member/partner even as the restricted LLC/LP is precluded from making distributions sufficient to satisfy those debts. Consequently, the members/partners in a restricted LLC/LP bear a significant risk of phantom income, indicating that rather than there being an immediate economic benefit, there is an immediate economic risk.

Ergo, as an interest in a restricted LLC/LP is almost certainly a "future interest," gifts thereof may not be made pursuant to the annual exemption of Code Sec. 2503(b).

Is the Election to be a "Restricted" LLC or LP an "Applicable Restriction"?

A point of significant ambiguity, and therefore concern, is whether the very act of being a "restricted" LLC or LP is an applicable restriction? An LLC or LP organized in Nevada is not, *ad initio*, restricted. Rather, an otherwise complete LLC or LP elects into that status by adding an *optional* provision to its articles of organization/certificate of limited partnership. In the March 31, 2009, testimony of Robert C. Kim to the state Senate Committee on Judiciary, he stated that as to the restricted LLC or LP, "You could opt into this rule if you wanted and only if you wanted to."[46] The statutes themselves refer to the election of restricted status as being "optional" and an election. While there may be default consequences to having made that election, there is nothing default about the restricted status. If the acts said "Every LLC/LP shall be restricted as set forth in section ___ unless a contrary election is made in the articles of organization/certificate of limited partnership," then it would be possible to consider "restricted" status as being a default rule and in so doing avoid characterization of the consequences of that status as an applicable restriction. That is not, however, the statutory formula.

Furthermore, a merger approved by a majority of the members of the LLC could be used to accomplish a *de facto* amendment of the LLC's organizational

documents and the deletion of the restriction.[47] Therefore, absent the transfer of a majority of the units in the restricted LLC/LP outside of the family, the restriction on distributions will fall within the scope of an "applicable restriction."

Absent contrary guidance from the IRS and the courts, treating the election to be a Nevada "restricted" LLC or LP other than an applicable restriction is a dangerous proposition. In consequence, the "restricted" LLC or LP likely does not justify additional valuation discounts.

Conclusion

Absent contrary guidance from the IRS, the use of a Nevada "restricted" LLC or LP for estate planning purposes with the anticipation that the transfer of units therein will qualify under Code Sec. 2503(b) for the annual exclusion exemption from the gift tax and/or that consequent to the long time horizon before the LLC/LP may make distributions there is justified a significant reduction in the present value of the units, seems at best foolhardy.

Postscript

In an earlier column I criticized the Nevada corporate charging order for, while stating that the holder of a charging order against corporate shares would have the rights of an assignee thereof, not defining in the corporate context what are the rights of an assignee. *See* Thomas E. Rutledge, State Law & State Taxation, *Nevada's Corporate Charging Order: Less There Than Meets the Eye*, J. PASSTHROUGH ENTITIES, Mar.–Apr. 2008, at 21. Nevada has added a new subsection (3) to NRS §78.746 defining the rights of an assignee. *See* 2009 Nevada S.B. 55, §6.5.

ENDNOTES

1 These additions to the Nevada LLC and LP Acts were effective Oct. 1, 2009.

2 For a brief review of the use of LLCs and LPs in estate planning, *see* Stephen L. Owen, Tax Tip, *An Update on Family Entities and Discounting*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2002, at 47.

3 *See Nevada Restricted LLCs*, 35 ESTATE PLANNING REVIEW 95 (Nov. 18, 2009) (statement by Steven Oshins—"My aim in getting this legislation passed was to try and create a state statute that would enable us to increase the discount ceiling."); *Nevada Jumps Ahead with New "Restricted" Entities*, ESTATE PLANNING REVIEW 53, 53 (July 21, 2009) (statement by Steve Oshins—"This difference stems from a default lock-in of 10 years from the entity's underlying assets. The difference should provide a measurably higher ceiling for valuations involving a Nevada restricted LLC or LP than is currently available in any other state.").

4 *A.J. Hackl, Sr.*, CA-7, 2003-2 USTC ¶60,465, 335 F3d 664, *aff'g*, 118 TC 279, Dec. 54,686 (2002).

5 *W.M. Price*, 99 TCM 1005, Dec. 58,103(M), TC Memo 2010-2.

6 *See* NRS §86.___ (not yet codified), created by section 26 of 2009 S.B. 350 (definition of "Restricted Limited Liability Company"); *see also* NRS §87A.___ (not yet codified), created by section 38 of 2009 S.B. 350 (definition of "Restricted Limited Partnership").

7 The description of these limitations as being "default" is specified in subsection (2) of NRS §86.___ (§27 of 2009 S.B. 350) and likewise in subsection (2) of NRS §87A.___ (§39 of 2009 S.B. 350).

8 NRS §86.___(1) (§27 of 2009 S.B. 350); §87A.___(1) (§39 of 2009 S.B. 350).

9 NRS §86.___ (§27(1) of 2009 S.B. 350).

10 NRS §87A.___ (§39 of 2009 S.B. 350). *See also* UNIFORM LIMITED PARTNERSHIP ACT (ULPA) §102(5), 6A U.L.A. 359 (2008) (defining a "distribution"); adopted without modification at NRS §87A.035.

11 While the payment might be a Code Sec. 707 guaranteed payment, for state law purposes it is still a distribution.

12 Certain states exclude compensatory payments from the definition of "distributions" as that term is used in assessing whether a distribution is proper. *See, e.g.*, KY. REV. STAT. ANN. §362.2-508(8); *id.* §275.225(7); VA. CODE §13.1-1035(E); DEL. CODE ANN. tit. 6, §18-607(a); COLO. CODE §7-80-606(1). Nevada has no such provision.

13 Since 1999, the prior $10,000 exclusion has, at an annual basis been adjusted for inflation. Code §2503(b)(2). The $13,000 figure here recited is that for 2010.

14 *See* Code Sec. 2505.

15 Reg. §25.2503-3(a).

16 Reg. §25.2503(b). *See also R.E. Hamilton*, CA-9, 77-1 USTC ¶13,196, 553 F2d 1216 (*citing* LOWNDES, KRAMER & MCCORD, FEDERAL ESTATE AND GIFT TAX §33.5 (3d ed. 1974)) ("If the donee does not have the right to immediate possession or enjoyment, his interest is a future interest even though possession or enjoyment is deferred for only a short time.").

17 *E.F. Fondren*, SCt, 45-1 USTC ¶10,164, 324 US 18, 65 SCt 499.

18 The following description is in part adopted from Turney P. Berry and Thomas E. Rutledge, *What the Hackl?: Tax Court Expands Gifts of Future Interests to Encompass Nearly All Gifts of Closely Held Business Interests*, CCH LLC ADVISOR (May 2002).

19 Thomas E. Rutledge, State Law & State Taxation Corner, *Assigning Membership Interests: Consequences to the Assignor and Assignee*, J. PASSTHROUGH ENTITIES, July–Aug. 2009, at 35.

20 Note 4, *supra*.

21 Note 4, *supra*, 118 TC at 286.

22 Note 4, *supra*, 118 TC 279.

23 Note 4, *supra*, 335 F3d at 667 (*quoting A. Howe*, CA-7, 44-1 USTC ¶10,115, 142 F2d 310, 312).

24 Note 4, *supra*, 335 F3d at 667 (*citing E.F. Fondren*, SCt, 45-1 USTC ¶10,164, 324 US 18, 20).

25 *Id.*

26 *Id.*

27 *Id.* at 668.

28 Note 5, *supra*.

29 Reg. §25.25-03-3(a) and (b).

30 *Fondren*, note 17, *supra*, at 20-21 ("it is not enough to bring the exclusion into force that the donee has vested rights. In addition he must have the right presently to use, possess or enjoy the property.").

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[31] Note 4, *supra*, 118 TC at 293 (a present interest involves the "unrestricted and noncontingent right to the immediate use, possession, or enjoyment (1) of property or (2) of income from property, both of which alternative in turn demand that such immediate use, possession, or enjoyment be of a nature that substantial economic benefit is derived therefrom.").

[32] The annual exclusion under Code Sec. 2503(b) applies to gifts "other than gifts of future interests in property." Code §2503(b)(1).

[33] Note 5, *supra*, at 12.

[34] Note 5, *supra*, at 14.

[35] *See* Code Sec. 2704(b)(2). The Treasury Secretary is authorized to promulgate regulations which provide that other restrictions shall be disregarded in determining the value of a transfer. *See* Code Sec. 2704(b)(4).

[36] 26 C.F.R. §25.2704-2(b).

[37] *See M.B. Harper Est.*, 79 TCM 2232, Dec. 53,939(M), TC Memo. 2000-202; *B.P. Kerr*, 113 TC 449, 472, Dec. 53,667 (1999) (stating that the pertinent question to ask is "whether the partnership agreements involved herein impose greater restrictions on the liquidation of [the partnerships] than the limitations that generally would apply to the partnerships under state law").

[38] 26 C.F.R. §25.2704-2(b).

[39] *See Kerr*, note 37, *supra*, at 470. In this, case the Tax Court went through the legislative history of Code Sec. 2704, specifically looking to the meaning of the term "applicable restriction." *Kerr*, note 37, *supra*, at 470-71. However, the court noted that "there is no meaningful explanation of the detailed language or concepts that were made a part of section 2704 as finally enacted." *Kerr*, 113 T.C. at 471. Code Sec. 2704 was enacted as part of the Omnibus Budget Reconciliation Act of 1990 ("OBRA 1990"), in conjunction with the repeal of Code Sec. 2036(c). While the special valuation rules, of which Code Sec. 2704 was a part, were enacted to substitute for the former Code Sec. 2036(c), there is very little record of legislative history relating to Code Sec. 2704. In the House bill underlying OBRA 1990, there were no provisions for special valuation rules at all. *See* H.R. 5835, 101st Cong., 2d Sess. (1990). Special valuation provisions first appeared in the in the Senate version of the bill, which included a specific provision for IRC §2704. *See* S. 3209, 101st Cong., 2d Sess. (1990). This version used broad language which stated: "[f]or purposes of this subtitle, the value of any property shall be determined – (1) without regard to any restriction other than a restriction which by its terms will never lapse." S. 3209, 101st Cong., 2d Sess. (1990). The original broad language was drastically changed in the ensuing conference agreement between the House and Senate managers of the legislation. *Kerr*, 113 T.C. at 471. However, very little direct legislative history exists to provide a meaningful explanation of what Congress meant by the term applicable restriction in the subsequent versions of the legislation.

[40] H. Conf. Rept. 101-964, at 1137 (1990).

[41] *B.P. Kerr*, 113 TC 449, Dec. 53,667 (1999). *B.P. Kerr* has been cited to and followed by the United States Tax Court in several subsequent cases. *See, e.g., I.F. Knight*, 115 TC 506, 519, Dec. 54,136 (2000); *M.B. Harper Est.*, 79 TCM 223, Dec. 53,939(M), TC Memo. 2000-202.

[42] *Id.* at 470.

[43] *Id.* at 473. Texas law provides for the dissolution and liquidation of a limited partnership pursuant to the occurrence of events specified in the partnership agreement or upon the written consent of all the partners. *Kerr*, 113 T.C. at 473.

[44] *Id.*

[45] *See, e.g., Price, supra* note 5, *citing Hackl, supra* note 4, 118 TC at 292 ("The [*Hackl*] Court rejected the taxpayers' argument that a gift that takes the form of an outright transfer of an equity interest in a business or property is necessarily a gift of a present interest.").

[46] Minutes of the Senate Committee on Judiciary, Seventy-fifth Session (March 31, 2009) at p. 19, testimony of Robert C. Kim on Senate Bill 350. *See also supra* note 3 (suggesting a higher discounting opportunity is available in Nevada "by simply electing to be treated as a restricted entity." (Emphasis added.) A piece authored by Steve Oshins, *The New Nevada Restricted LLC and LP Legislation: A "Why?" and "How to?" Guide* and posted at *www.oshins.com/nevadarestrictedllclp.html* has a telling section heading, namely, "How to Opt Into the Restricted Entity."

[47] *See* NRS §92A.150(1) (merger of LLC by majority of the members); *id.* §92A.250(1)(e) (articles of organization of LLC surviving merger to control surviving organization). *Contrast* NRS §86.286(1) (default rule of unanimous consent of the members required in order to amend operating agreement). *See generally* Ernest L. Folk, III, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 Va. L. Rev. 1261 (Nov. 1963).