## On *Estate of Elkins* and a New Path to Valuation of Collectibles

## INTRODUCTION

Oscar Wilde famously wrote that "there are a lot of people who know the price of everything and the value of nothing."[1] Over a century later, billionaire art collector Stefan Edlis appropriated the phrase to illustrate the character of a steadily growing global market for artwork.[2] Ownership and transfer of artistic works, particularly contemporary pieces, has blossomed from a niche business into an explosive trend. Yet what is the value of only part of a piece of art? Partial ownership of art might have once sounded absurd – like purchasing a rare Ferrari without a steering column. In 2021, however, the democratization of art appears to be in its early stages. The internet and new blockchain technologies have opened a world of possibilities wherein artwork can be sold to investors in small shares.[3] In such an environment, how might one value partial interests in art against the backdrop of a lucrative market in which Jeff Koons' *Rabbit* fetches $91 million dollars at auction?[4]

The question appears to have been provisionally answered in the Fifth Circuit Court of Appeals in *Estate of Elkins v. Commissioner*[5], specifically with respect to the estate tax in the United States. Having accepted that there is no recognized market for fractional shares in art, the court focused on whether and to what extent a fractional share discount would be available to the decedent, who owned roughly 73 percent of 63 contemporary pieces of artwork. The court answered by accepting the expert testimony of the decedent's estate, who collectively asserted that massive discounts were appropriate for each of the works in part because of the principle that the intrinsic value of property goes down when the rights and obligations attached thereto are shared. In this case, the decedent's children had executed various co-tenancy agreements with the decedent that restricted the use, movement and alienation of the works. Even though the

fair market value of tangible personal property is considered the price to which a hypothetical buyer and seller would agree with access to reasonable knowledge of the relevant facts, the *Estate of Elkins* case at the Tax Court level became tangled up in what the decedent's children would pay to retrieve their father's large ownership interest. It seems that the procedural history of the case wedged in the Fifth Circuit, and now some taxpayers may see a substantial planning opportunity[6], one that may contravene the purpose of the estate and gift taxes and deserves reflection and consideration of reform.

This paper will evaluate *Estate of Elkins* and its impact on the valuation of artistic works for the purpose of estate and gift taxation planning. The case produced an impactful holding, the key to which was the legal strategy of the Internal Revenue Service and its inability to offer evidence of a proper valuation discount for the dozens of works in the Elkins collection to the contrary of the Estate's experts. The court's holding failed to settle decades of confusion regarding the application of cost-to-partition discounts versus fractional share discounts such as those for minority shares and lack of marketability.[7] Further, it both underscored the particularities in valuing collectibles such as paintings while also applying a similar discount framework to items such as real property or securities. Moreover, the court endorsed the view that no market exists for partial interests in art against the backdrop of increased partial interest transactions worldwide. As a result of the inconsistencies outlined above, the United States Congress might consider a new Internal Revenue Code Section 2705 that could deny lucrative discounts where one member of a family gifts or bequests a portion of a collectible asset such as a painting to another member of the family. In that case, the steep discounts allowed by the court in *Estate of Elkins* would become unavailable and the decedent's estate would be on the hook for the fair market value of his entire share of the collection.

Part I will provide an overview of the current market for artistic works at its highest level, and how those works are typically appraised for sale and transferred. Part II will discuss the valuation structure permitted in the Internal Revenue Code for the purposes of estate and gift tax planning that are utilized in countless strategies for the transfer of property, including artistic works. Part III will review the background and holding of *Estate of Elkins*. Part IV will provide the legal justifications for the holding therein, and alternatively supply a critique and different viewpoint of the discounts applied. Finally, Part V will (i) discuss reforms that have been proffered to combat excessive discounts, specifically the so-called aggregation and attribution approaches and (ii) set forth a new path that would address the issues set forth above with greater precision and clarity, namely a new Section 2705 that would block certain lucrative discounts.

## PART I

The substantial rise of artistic works as an asset class among the super wealthy of the world renders urgent the law's treatment of art sales and other dispositions. Even during the COVID-19 pandemic, the number of auction sales more than doubled at some auction houses.[8] Sotheby's saw a single auction haul in June 2020 of $363 million dollars, and Christie's followed a month later with an auction garnering $337 million dollars in total sales.[9] This section will provide an overview of the distinct features of art as an asset class, as well as how such works are valued for sale, and more importantly to the discussion at hand, for the purposes of gifts and bequests.

### a. The exceptionality of art

Most pieces of art are entirely unique and not fungible.[10] Unlike assets like publicly traded securities, the price of a work of art entails a subjective analysis and can be disputed as between appraisers and experts.[11] The actual cost of the raw materials (canvas, paint, sculptural

stone, etc.) involved in producing the work reflect a small and sometimes negligible amount of the work's stated worth.[12] The intrinsic value of art can be measured in many ways, weighing multiple factors – an art historian, for instance, might utilize the time and effort involved in crafting the work, as well as the reputation of the artist, the condition of the piece and the general exceptionality of the work.[13] However, a consumer or an artist herself might attach an additional emotional premium on the work, complicating the process of valuing the work for the purpose of sale or other disposition such as a gift or bequest.[14]

**b. The basics of art sales**

Sales of artistic works generally qualify for treatment as a capital asset and as such for a preferential income tax rate.[15] A piece of art is considered a "collectible" under Internal Revenue Code Section 408, which entails a targeted higher rate of 28 percent on gains.[16] The collectible category is a vestige of the original capital asset rate (also 28 percent), though very little is known as to why Congress chose to single out artworks as worthy of a higher tax rate than, for instance, gains on the sale of securities.[17] Works of art are frequently donated as well, oftentimes reaping substantial tax benefits to the donor.[18]

**c. How gifts and bequests of art are valued and taxed**

Disposition of a work of art via gift or bequest requires that it be valued for the purpose of estate and gift taxes. We will see that the notion of value is a complex and loophole-ridden minefield, one that certain taxpayers can navigate to their benefit and to the chagrin of the Service.

**i. Fair market value**

The Treasury defines "fair market value" for purposes of determining the gross estate as "the price at which the property would change hands between a willing buyer and a willing

seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[19] Crucially, items are to be valued at their sale price in a market commonly sold to the public (in other words, the retail price at which the item or a comparable item would be sold).[20] The "willingness" requirement reflects the Treasury's desire to highlight that a hypothetical transaction should be void of coercion (which could drive the price of the item down).[21]

**ii. Expert valuation**

Once valued, gifts or bequests of works are taxed at a top rate of 40 percent (unless part or all of the unified estate and gift tax is assigned), providing a powerful motivation to value the works in a manner consistent with the interests of the taxpayer.[22] In the case of a decedent collector, where articles having artistic or intrinsic value (including "jewelry, furs, silverware, paintings, etchings, engravings, antiques, books, statuary, vases, oriental rugs, coin or stamp collections") in excess of $3,000, the Treasury Regulations require inclusion of a report completed by an expert appraiser to substantiate the listed value on the estate tax return, as well as an affidavit from the executor.[23] When utilizing an expert appraiser, "care should be taken to see that they are reputable and of recognized competency to appraise the particular class of property involved."[24] A proper appraisal by an expert may reference the work's "medium, date created, date and method of acquisition (if not self-created by decedent), ownership history, past exhibitions of the work, sales prices of comparable works of art, and quoted prices in dealers' catalogs", as well as the authenticity of the work, particularly where the artist is famous.[25] The most accurate evidence of the value of a work of art is generally considered its purchase price at auction.[26]

A subsequent sale after a decedent's death can inform the value of the artworks to the detriment of the estate. In *Estate of Newberger v. Commissioner*[27], the decedent died during the Great Recession when the art market was suffering. His federal estate tax return listed a value of $5 million dollars for a Picasso and $450,000 for a Motherwell.[28] The Picasso was subsequently sold for $13 million dollars and the Motherwell for $1.4 million dollars when the market had rebounded.[29] The Service issued a deficiency notice and the Tax Court eventually ruled that the Picasso was worth $10 million dollars at the decedent's death by adjusting the eventual sale price downward commensurate with the time passed between the two dates.[30] The Service has stated that the amount paid by the buyer, which includes any premium directed to an auction house or other third party, determines market value and not the final amount received by the seller.[31] Substantial under-valuations by the taxpayer or her experts can lead to high penalties.[32]

#### iii. Art Advisory Panel

Valuations of artistic works submitted to the Service via federal estate tax returns or gift tax returns can be reviewed by the Service's own group of experts called the Art Advisory Panel of the Commissioner of Internal Revenue.[33] The Art Advisory Panel was created in 1968 and consists of museum curators, dealers and art scholars.[34] Once it has reached a consensus value for a work, the Panel generally recommends a specific valuation in its advisory role, which is adopted as the Service's appraisal after approval from the National Office Art Valuation Group staff.[35] The Art Advisory Panel reviews thousands of artistic works each year – in 2015, they recommended acceptance of the stated value of 35 percent of the works presented, but recommended valuation adjustments for 65 percent.[36]

**PART II**

Art is an emotionally charged asset class. For psychological and sentimental reasons beyond the scope of this analysis, the visual medium inflames the passions of collectors and causes great consternation in planning the estates of wealthy connoisseurs.[37] Additionally, typical estate planning vehicles for wealth transfer such as Intentionally Defective Grantor Trusts, Grantor Retained Annuity Trusts and Charitable Remainder Annuity Trusts do not function as well without steady and substantial cash flow to fund the annuity or unitrust payment as the case may be.[38] This section will discuss the various techniques currently at play for minimizing federal estate and gift taxes on items of personal property, focusing on how artworks vary from other property when calculating discounts.

**a. Overview: fractional interests in property**

Estates (and donors, in the case of gifting) are generally permitted to take a discount against the full value of a piece of property for the purpose of calculating estate or gift taxes if ownership is split into several undivided interests.[39] The onus is on the estate or donor to establish entitlement to a valuation discount, and both the Service and the courts have taken a "facts and circumstances" approach to assessing the merits, often based on little empirical data.[40] Courts have historically been more accepting of discounts on fractional shares of real property than personal property.[41]

There is no consensus related to the manner by which the Service should accept or deny discounted valuations of artistic works as opposed to more traditional property of great value such as a family limited partnership.[42] Courts had implicitly acknowledged prior to *Estate of Elkins* that the same theoretical issue applies to artwork as an asset class versus real property or shares in a family limited partnership – namely, a fractional interest in some property ought to be

assigned a discount because of difficulties involved in bringing it to retail market for sale.[43] The Service and the courts have classified such discounts in a number of subcategories, most notably for cost-to-partition discounts and what we will call henceforth "fractional share discounts," the latter stemming from the character of the partial interest and various difficulties in selling a partial interest in a retail market.

**b. Cost-to-partition discounts**

A tenant in common is sometimes entitled to a valuation discount where the process of partitioning the property would be costly.[44] The property can either be sold outright, the profits then divided among co-tenants (a "partition-in-sale") or the property can be subdivided so that each co-tenant has a fee simple interest in her portion of the original property (a "partition-in-kind").[45] The courts have not settled on a clear formula for tabulating such a discount, nor is there any consensus on whether a partition discount is always appropriate. In *Ludwick v. Commissioner*[46], the petitioners were a husband and wife who each held an undivided one-half interest in a Hawaiian vacation home in trust and had attempted to take a deduction on their tax returns based on the degree to which the paper value of the property had decreased when they transferred it into trust as tenants in common.[47] They argued that the property would be extremely difficult to sell to a third party.[48] The court then held that a discount was warranted in this case for the hypothetical cost of partitioning the tenancy (in other words, "the cost to end joint ownership involuntarily by a judicially mandated sale"), which entailed a discount less than the 30 percent the petitioners had initially claimed on their respective returns.[49]

The *Ludwick* case reflected a position the Service had taken years prior in a Technical Advice Memorandum responding to an estate that claimed a discount for the testator's undivided one-half interest in a ranch.[50] The Service agreed that the partial interest would make the

property harder to sell, but insisted that the cost of partition, and crucially not the marketability of the ranch, was the appropriate formula for discount.[51]

**c. Fractional share discounts**

Courts have emerged as skeptics regarding the blanket application of partition discounts.[52] In recent years, they have moved towards a valuation approach that "should be backed by a well-qualified expert and a thorough valuation that combine[s] real world data with well-reasoned analysis."[53] For example, in *Estate of Baird v. Commissioner*[54], the court rejected the Service's argument that only a partition discount was appropriate for a partial interest in timberland. The court instead held in favor of the estate, which had presented an appraisal from an expert in the field of timberland sales.[55] This holding falls in line with a wider array of case law (as well as a few rulings by the Service) related to application of fractional ownership discounts to real property and some personal property.[56]

**i. Minority discount (and control premium)**

A discount may be warranted if the taxpayer lacks control over the property. In the case of real property, the minority discount essentially reflects the cost of partitioning because each co-tenant is entitled to compel liquidation.[57] However, in the case of interests in businesses, the discount can be more broadly construed. The Regulations state that a controlling block of stock in a non-publicly traded corporation is worth more per share than a non-controlling block.[58] The Service built upon this principle in Revenue Ruling 93-12, in which it stated that five 20 percent blocks of stock gifted from the taxpayer to her children would be valued separately and each accorded a minority interest discount.[59] Contrarily, the Service might then impose a premium atop a controlling block of stock because the owner would then have certain inherent powers – to hire and fire officers, to pay out dividends, to force a sale, etc. The minority discount

mechanism has proved to a powerful tool for wealth transfer.[60] The rationale in Revenue Ruling 93-12 has been extended in limited circumstances to real property interests.[61]

**ii. Lack of marketability discount**

A discount may also be applied where there is no retail market for the interest in property being valued. Courts have applied discounts of up to 30 percent under this line of reasoning.[62] The valuation discount for lack of marketability is the most commonly sought and most commonly granted of the discounts listed herein by the courts.[63] Such discounts are generally granted to interest holders in privately held corporations and partnerships, where courts typically recognize that such interests are less attractive to investors than a publicly traded stock (assuming that a rational investor would choose the latter – a liquid investment – over the former).[64] Critically, no consideration is made as to whether the buyer is a member of the seller's family (unless the buyer retains an interest)[65] when determining whether a market exists, even if the likely buyer will indeed be a family member.[66]

Courts and taxpayers alike may sometimes confuse the lack of marketability discount and the minority discount.[67] The lack of marketability discount "serves as compensation for limitations upon free exit" whereas the minority discount "serves as compensation for lack of control over the investment."[68] One could have a controlling interest in a partnership, for instance, and qualify for the lack of marketability discount because there is no retail market for such an interest at the time of sale.[69] In *LeFrak v. Commissioner*[70], the court permitted both a minority discount of 20 percent and a lack of marketability discount of 10 percent on a partial interest in real property, where the minority discount was deemed appropriate for lack of control of the property and the marketability discount was allowed in order to account for "the diminution in value attributable to the lack of a ready market for the property."[71] Though

conceptually these discounts should be viewed separately, they have occasionally been applied as a combined discount.[72]

**d. Limitations in the Code**

The Internal Revenue Code contains several restrictions on valuation techniques that hamper substantial discounts in a few narrow circumstances involving transactions either typically or exclusively among family members. Internal Revenue Code Sections 2701 to 2704 were enacted in 1990 in response to a series of planning mechanisms employed in the 1970s and 1980s to effectuate an "estate freeze," which limited the value of property for the gifting generation and passed appreciation in the gifted property to the recipient generation(s).[73] For the purposes of this paper, Sections 2702 and 2703 provide the most relevant limitations. Section 2702 was drafted in response to the proliferation of Grantor Retained Income Trusts, which allowed for valuation abuses as between the income and remainder interests.[74] It applies when a transferor makes a gift in trust to a member of her family but also retains an interest in the trust.[75] In general, the value of the retained interest will be treated as zero, so the gift amount will be the value of the full amount in trust.[76]

Section 2703 was drafted in response to "buy-sell" agreements, which permitted members of family owned businesses to purchase their deceased relative's interest in the entity at a fixed price, sometimes less than fair market value.[77] It states that, in general, the value of property "shall be determined without regard to (1) any option, agreement, or other right to acquire or use the property at a price less than the fair market value…or (2) any restriction on the right to sell or use such property."[78] However, an exception exists where "(1) it is a bona fide business arrangement, (2) it is not a device to transfer such property to members of the decedent's family for less than full and adequate consideration…[and] (3) its terms are

comparable to similar agreements entered into by persons in an arms' length transaction."[79] If these parameters are met, then the interest will be valued in accordance with the agreement.

**PART III**

*Estate of Elkins* represented a significant progression in the realm of valuations and discounts for gift and estate tax purposes. No such case existed before 2015 which validated the principle that, much like a minority interest in a family limited partnership or real property, the owner of a fractional interest in a piece of art was entitled to a substantial discount – one worth millions of dollars if adequately proven by the estate's experts. What follows is a summary of the salient facts of *Estate of Elkins* at the Tax Court and Fifth Circuit levels.

**a. Background: the Elkins family**

James A. Elkins Jr. was the Houston-based son of the founder of famous Texas law firm Vinson & Elkins. Over the course of his lifetime, Elkins and his wife purchased dozens of pieces of contemporary art, including works by Pablo Picasso, Henry Moore, Jackson Pollock, Paul Cezanne, Jasper Johns, Ellsworth Kelly, Cy Twombly, Robert Motherwell, Sam Francis, and David Hockney.[80] The art was mostly displayed in the family home as well as Mr. Elkins' office.[81] With the assistance of sophisticated (and perhaps brazen) legal counsel, Mr. Elkins sought to minimize his estate tax liability by structuring several agreements and transactions that would ostensibly reduce the value of the works by fractionalizing ownership.

First, Mr. and Mrs. Elkins each created a grantor retained income trust (an instrument, as discussed above, that has been all but eliminated because of Section 2702) for their undivided 50 percent interest in three works of art – at the conclusion of the ten-year term, each of their three living children would be a one-third owner of the three works.[82] Mrs. Elkins ended up passing away roughly nine years into the agreement, so her share passed to Mr. Elkins.[83] At the end of

the term, Mr. Elkins' share passed to the children and they executed a lease agreement permitting him to retain the works year round.[84]

When Mrs. Elkins died, her 50 percent community property interest in the remaining 61 pieces of artwork owned by the couple passed to Mr. Elkins, who then chose to disclaim an amount equal in value to his wife's unified estate and gift tax credit in favor of his three children.[85] Mr. Elkins retained an interest of 73.055 percent in these 61 works and proceeded to execute a co-tenancy agreement that provided substantial restrictions on alienation, possession and control of the works.[86] When Mr. Elkins died, his estate filed a return claiming a combined 44.75 percent discount for lack of control and marketability, determined after a valuation by Sotheby's Inc. that stipulated a fair market value on the 64 works at roughly $35 million dollars.[87] The Service issued a notice claiming no discount was appropriate and that $9 million dollars in estate taxes were due, and the Estate subsequently filed a timely petition for review at the Tax Court level.[88]

**b. Section 2703 analysis**

A threshold issue at the Tax Court level concerned applicability of Internal Revenue Code 2703. As discussed above, it mandates that, in certain intra-family transactions, the value of any property be determined without regard to restrictions on the right to sell or use the property for estate tax purposes.[89] The Service argued that language in the co-tenancy agreement for the 61 pieces of art as well as in the leasing agreement for the GRIT art were controlled by Section 2703 and therefore the value of such artworks should be calculated *without* view towards any of the restrictions thereon.[90] The Commissioner argued of the restrictions in the agreements that "the only apparent reason for including the restriction on sale language in the Cotenants' Agreement and the Art Lease Agreement was to reduce the value of Decedent's retained

fractional interests in the Artwork . . . a purpose which section 2703 was specifically intended to prevent."[91]

The Estate chose not to argue that Section 2703 did not apply to the GRIT art, so the Tax Court concluded that it would apply, particularly because the relevant leasing agreement restricted sale of each party's percentage in the works, which is precisely the interest being valued for federal estate tax purposes.[92] However, the Estate affirmatively argued that Section 2703 was inapplicable to the remaining works because the co-tenancy agreement did not restrict alienation of the fractional interests, but rather the art itself.[93] The Tax Court believed that both parties missed the mark in their respective analyses – it instead held that Section 2703 would indeed apply to the remaining 61 works because the relevant language in the co-tenancy agreement in effect waived each party's right to a partition action, which constitutes a restriction on the "use" of the property.[94] We will see, nevertheless, that application of Section 2703 did not foreclose the Tax Court from permitting discounted fair market values under the Regulations.

**c. Fair market value analysis**

In its petition, the Estate asserted that the art had been overvalued, and offered three expert witnesses to testify to that effect.[95] The Estate's experts testified to the "specific economic analysis of the value of fine art assets, analysis of the art market, and legal analysis of the law of partition," sometimes recommending up to roughly 80 percent discounted valuations of the lesser known works due in large part to the great difficulty of selling such a work in fractions.[96] The Service's expert, on the other hand, merely testified to the notion that there are no established markets for fractional interests in art but that some sales of fractional interests may have historically occurred.[97] The Service did not provide alternate discounted valuations for the works because its legal theory was, in relevant part, that "the fair market value of tangible

personal property must be determined with reference to the market in which the property is most commonly sold to the public and, in the case of art, that market is the retail market whereby *all* fractional interest holders agree to sell . . . the underlying art."[98]

The Tax Court determined that there was no bar as a matter of law on granting a discount in this case.[99] However, the Tax Court was unmoved by the testimony of the Estate's experts (whose testimony the Tax Court made a point to state it could accept or reject in its sound judgment), instead asserting that they had not considered "the expense and inconvenience of annually moving the art from the hypothetical buyer's premises back to Houston," which would cause the Elkins children to "reassess their professed desire to cling, at all costs, to the ownership status quo."[100] In other words, they "would be willing to forgo the financial gain from a sale" in order to continue to receive the "psychic" benefits of the works.[101] Finally, the Tax Court surmised that a hypothetical buyer of a fractional interest in artwork was entitled to a nominal discount of 10 percent "to assure himself or herself of a reasonable profit on a resale of those interests to the Elkins children."[102]

**d. The Fifth Circuit's final judgment**

When the Fifth Circuit got its hands on the case on appeal, it had a markedly different viewpoint. First, the court stated that there existed no prohibition on valuation discounts for artistic works so long as the quantum is justified with credible and substantial evidence.[103] It distinguished previous case law referenced by the Tax Court because the estates in those cases did not present evidence to the degree and depth of the Elkins Estate.[104] The court dismissed the Commissioner's perspective that "the Tax Court's sole reason for rejecting the discounts determined by the Estate's experts was their failure to include, or assign sufficient weight to, the Elkins heirs' strong emotional ('psychic') attachment to the family's works of art."[105]

In a further blow to the Service, the court reviewed the Tax Court's opinion *de novo*, with the Service having (perhaps stubbornly) refused to enter any evidence of a lesser discount on the artwork.[106] The court held that the evidentiary showing by the Estate's experts was sufficient to justify discounts above and beyond the 44.75 percent originally proffered when the return was filed – thereby endorsing fractional ownership discounts of between 50 and 80 percent.[107] The court stated that the Tax Court made a reversible error in considering the perceptions of the Elkins children as opposed to the traditional, purely hypothetical buyer and seller tabulation of fair market value.[108] Practitioners have inferred that the holding in *Estate of Elkins* is tantamount to an endorsement, at least in theory, of the possibility that enormous discounts on fractional interests in artworks are achievable with careful planning.[109]

**PART IV**

The Fifth Circuit's approach in *Estate of Elkins* was the first to recognize the inclusion of an expert's *full* fractional share discount in the valuation of works of art on the estate tax return. The court proposed a new understanding of fractional interests in artwork – that they would be worth less (in this case, a *lot* less) than their proportionate share of the entire work(s) of art as a whole.[110] This section will explore the consequences of *Estate of Elkins* and how the decision may have highlighted why valuations of artistic works is an area of the law open to reforms.

**a. Conflicting prior case law**

In the past, courts had awarded only nominal discounts for fractional interests in collections of art. In *Estate of Scull v. Commissioner*[111], considered to be the first case with precedential value on fractional interests in artwork, the decedent held a 65 percent interest in a series of artworks (the other 35 percent held by his wife, from whom he had been separated).[112] Like *Estate of Elkins*, the Tax Court weighed different theories on the value of artwork from the

testimony of the experts offered by the estate and the Service; however, it made a separate determination about the decedent's fractional interest, proffering that a hypothetical buyer would expect a minimal discount to reflect the marital circumstance.[113] The Tax Court ultimately believed that "a purchaser would not require a reduction in excess of [five] percent for any uncertainties involved in acquiring decedent's 65-percent interest."[114]

In *Stone v. United States*[115], the decedent was also the owner of a collection of relatively high value artworks. The Government argued that a discount would not be justifiable for personal property, but the court clarified that the respondent's position was based off an incorrect reading of prior case law in which it was asserted that no discount would be afforded personal property "with no evidence to support it."[116] The court directed the parties to confer and attempt to settle their respective valuation issues, but the parties failed and appeared before the court again, which subsequently held that the estate had not proven that anything more than a nominal discount of five percent proposed by the Government was appropriate and held as such.[117] The discount took into account projected (i) fees for selling the art at auction, (ii) legal fees for enforcing a hypothetical seller's right to partition and (iii) "uncertainties involved in waiting for the partition action to become resolved."[118]

The court in *Stone* emphasized the notion that the art market is distinct from the real estate or business market in the sense that the proper marketplace for a partial interest in artwork is one in which all interest holders have agreed to sell or initiate a partition action in the full work of art.[119] The Tax Court in *Estate of Elkins* would respond nearly a decade later by concluding that "[t]he fact that there exists a retail market for works of art with multiple owners does not necessarily mean that all fractional interests in art must be valued as if it is certain that the art will be sold in that market. The regulation should not be read in a vacuum, without

reference to actual circumstances."[120] The Fifth Circuit proved willing and able to reconcile historical variations in approach.

**b. The potential effects of *Estate of Elkins***

The result of *Estate of Elkins* came to be largely due to the sophistication of the family and its experts as well as the tactical blunders of the Service.[121] Instead of providing alternate expert testimony as to a reasonable discount for the works (perhaps even five percent, in line with *Estate of Scull* and *Stone*), the Service was steadfast in its legal theory that no discount was appropriate because the only market in which a sale would be appropriate is one in which all interest holders acquiesce to a sale.[122] The Fifth Circuit appears to have merely taken the logic echoed in *Stone* to its conclusion – if the petitioner provides credible expert testimony as to the valuation discounts appropriate for each work that is not sufficiently rebutted by the Service, a court ought to approve the estate's valuation.

Neither the Service nor the Treasury has issued any clarification on the efficacy of fractional share discounts in artwork, leaving open the possibility that wealthy and sophisticated collectors could carefully navigate this ruling to wildly successful ends.[123] For instance, a married couple might own a large collection of sculptures worth millions of dollars – when the first spouse dies, his 50 percent interest could pass to a Qualified Terminable Interest Property trust, allowing the surviving spouse to retain the sculptures until death.[124] Then, in theory, both the 50 percent interest in trust and the 50 percent interest owned by the surviving spouse would be entitled to a fractional share discount.[125]

While the appeal of saving millions of dollars on transfer taxes for a $35 million dollar art collection is unmistakable, there are practical barriers with respect to extending the *Estate of Elkins* precedent. Chiefly, the Estate went to extreme pecuniary lengths to defend its position

with an overwhelming amount of expert testimony. The Elkins family had also been advised in advance of decedent's death to place substantial restrictions on control, possession and alienation of the works – the children were, after all, emotionally attached to the collection (a fact that may not always be true in future applications of the ruling). This helped fend off any argument in favor of a substance-over-form attack on the arrangement as merely a series of transactions intended to erode the estate tax base.[126]

Following the letter of a co-tenancy agreement would likely be onerous on a family interested in structuring a transaction similar to the Elkins'. Typically, such an agreement will stipulate that the works of art must be transported to the different owners for a time each year commensurate with her proportion of interest.[127] The risk of damage during transport may obviate any perceived benefit of a fractional ownership structure (in addition to the costs of a monthly or yearly rental agreement overlaid atop the co-tenancy agreement should the family wish to keep the works in place and pay fair market rent to do so).[128] Even the Elkins family could not keep up with its own rental agreement, and was ultimately forced to pay back-rent of roughly one million dollars.[129]

Furthermore, the specter of Section 2703 looms over any agreement in which the right to sell or use the artwork is restricted. The Tax Court in *Estate of Elkins* ruled that such a provision in the co-tenancy agreement would not be considered when valuing the fractional interests of artwork (in other words, that Section 2703 applied). Even so, the Fifth Circuit permitted discounts on a separate legal theory set forth by the Estate. A future taxpayer might not be so successful should a court wish to apply the full force of Section 2703, even in the face of expert testimony regarding fractional discount values.[130]

#### c. The ineffectiveness of a general rule for fractional ownership

The courts in *Estate of Scull*, *Stone* and *Estate of Elkins* set forth convoluted and overlapping holdings regarding the proper standards by which to measure fractional interests in artistic works. *Estate of Elkins* is undoubtedly the largest leap towards generic treatment of partial interests, such as those in real property and family limited partnerships. Even so, there is no clear direction on use of cost-to-partition discounts versus fractional share discounts. In *Stone*, the district court (notably not the Tax Court) stated that "the costs of a court-ordered partition must be considered in determining the fair market value of the Estate's interest in the collection."[131] One of the Elkins' experts, providing testimony on the law of partition and its application to a potential discount, stated that a cost-to-partition discount on some of the lesser-known works would be 100 percent – a result the Tax Court and Fifth Circuit rejected.[132] Such an outcome, if taken to its practical extreme, results in patent absurdity. Cunning taxpayers might be capable of wiping out entire collections by replicating some of the circumstances in *Estate of Elkins*.

Others have argued that an optimal approach would be for the courts and the Service to explicitly endorsed the fractional share discount method of valuation.[133] This generalized methodology could be a misguided salve. The Service has not made a proclamation one way or the other since issuance of a Technical Advice Memorandum in 1993[134], but appears to be consistent in its opposition to discounts of more than a nominal value, if at all. One can only hypothesize that the Service is concerned about a potential snowball effect after a Federal Circuit Court endorsed fractional share discounts in *Estate of Elkins* (in which it ironically dropped the proverbial ball). Such concern is certainly not unfounded – if taken to extremes, fractional share

discounts can subvert the revenue-raising purposes of the transfer taxes in favor of considerable tax savings on the very segment of the population with the capability to pay the tax.

### d. The changing landscape of marketability of fractional shares

The *Estate of Elkins* case reflects a general acceptance of the notion that there is no market for fractional ownership in artworks, amplified by the lengths to which they and their counsel went to prevent alienation of the works.[135] There are signs, however, that new markets may be opening in the form of shares of physical and digital artworks. Whether those cause a seismic shift in the art world is a question only answered by time itself, but it does warrant reconsideration of the full application of a discount for lack of marketability, which often total 10 percent[136] but can approach 30 percent[137] – a not insignificant discount for collections valued in the eight-figure range.

The art market can be distinguished from sale of publicly exchanged securities due to the barriers to entry from an information standpoint. Provenance, artists' background and previous appreciation are all imperative to investigate before purchase, which is something auction houses, galleries and experts are more adept at providing to customers.[138] However, new technologies are paving the way for a form of fractional ownership facilitated by internet sales. For example, companies can now divide tangible artwork into many digital shares and sell small portions over the internet. Maecenas, a UK-based purveyor of such shares, recently sold a $1.7 million dollar share of Warhol's *14 small Electric Chairs* to 800 online investors.[139] Masterworks, a US-based company, recently purchased Warhol's *1 Colored Marilyn* for $1.8 million dollars and sold it in shares as small as $20 to 1,300 investors.[140] Online sales of fractional shares of artwork are typically sold via blockchain technology and cryptocurrencies.[141]

As these are issues of first instance, it will ultimately be up to a court to decide whether and how a marketability discount should be applied to the value of a piece of art if the market for fractional shares continues to grow. Future treatment of marketability discounts may turn on how courts view the character of partial ownership moving forward – namely, whether what is being valued is a piece of property or the interest being held. If partial interest sales in artwork were to blossom into a business model rivaling that of the auction houses, discounts may no longer be deemed appropriate, especially where no restrictions on alienation and control exist (unlike the Elkins family).

## PART V

Legal scholars have presented various reform opportunities with respect to valuation discounts for partial ownership. As we have seen, artwork takes the current valuation regime to a new dimension because the fractional interests are a legal fiction – a work can certainly be cycled among owners every year, but ultimately it is a stationary, non-fungible article. A painting is not valuable in terms easily translatable to real property, or other personal property for that matter.[142] Further, its immense value derives in large part from the emotional attachment of its interest holders, a fact at clear odds with the hypothetical buyer and seller model of computing fair market value. This section will explore existing methodologies for reform, specifically the aggregation and attribution approaches, as well as a new opportunity to amend the Internal Revenue Code to address intra-family transfers and determine how they might apply to the exceptional universe of fine arts.

### a. Aggregation approach

"Aggregation" in valuation cases revolves around the amount of control held by a transferor of property over life and death. [143] Aggregation targets a scenario where the transferor

intentionally breaks up a control block, ostensibly in order to achieve transfer tax savings.[144] In its initial proposal for such an approach, the Treasury stated that the value for estate and gift tax purposes of partial interests "would be a pro rata share of the fair market value of that portion of the asset owned by the donor or decedent."[145] For example, if someone owned 60 percent of the outstanding stock of a corporation worth $100,000 and chose to gift half of her interest to a child, the *remaining* portion ultimately subject to estate tax would be valued as if it were still half of a controlling block (in other words, it would be assessed as a control premium by aggregating transfers in life and death).[146] Such a reform would effectively attack minority and some marketability discount positions because the taxpayer would always be seen as a controlling interest holder who could liquidate and convert the property to a marketable format.[147]

Ironically, the aggregation approach fails to attack fractional share discounts in artwork for this very reason. The courts and the Service alike have taken no issue with controlling shares (such as Mr. Elkins 73 percent stake) in artwork. In *Estate of Elkins*, the Service may not have raised the issue because (i) the co-tenancy agreement placed each interest holder on equal footing and (ii) the agreement in conjunction with the non-fungibility of the asset meant that the market for these particular works was (as they argued) non-existent at the time. Had Mr. Elkins gifted smaller interests during his lifetime and called for a minority discount, perhaps the aggregation approach might have proved an effective response. The fact remains that taxpayers who place adequate restraints on their works in carefully drafted agreements have no reason to worry they will be assessed for a control premium, so aggregation lacks the tailored needs of this asset class.

**b. Attribution approach**

"Attribution" in valuation cases stands for the proposition that minority discounts are not appropriate when the property in question is entirely controlled by the family of the initial

donor.[148] The attribution theory purports that such transactions are not rooted in economic reality because the actors are more prone to be cooperative.[149] The Service initially endorsed the attribution approach in Revenue Ruling 81-253[150] in order to hobble the minority discount. However, it later relented and permitted the minority discount in Revenue Ruling 93-12, ostensibly because its original ruling was inconsistent with its position on blockage discounts in *Rushton v. Commissioner*[151], in which it argued that the block was to be valued "with reference to each separate gift."[152]

The Fifth and Ninth Circuits (in addition to the Tax Court) have denied the application of family attribution in disputes involving estate taxes.[153] Use of family attribution, according to the courts, would classify the seller as a family member of the buyer, in doing so violating the objectivity requirement in the hypothetical buyer-seller method of computing fair market value.[154] The Tax Court in *Estate of Elkins* referenced family attribution only once during its analysis of an appropriate discount methodology, citing *Propstra* and *Estate of Bright* for their rejection of the legal theory as irreconcilable with the objective fair market value standard.[155]

The attribution theory has mostly been confined to interests in a family limited partnership. It is possible that a wealthy parent could transfer ownership of an art collection to a family limited partnership[156], in which case gifts of partial interests in the partnership itself could be subject to a minority discount per Revenue Ruling 93-12. No such scenario has been tested in the Tax Court. Ultimately, attribution fails for the same reason in this case as with aggregation – Mr. Elkins personally held about 73 percent of the collection over his lifetime. As such, the Estate was not seeking a minority discount, but rather a fractional share discount (to which no control premium would apply, as discussed above). Again, this unique scenario in which neither the minority discount nor the control premium applies escapes the umbrella of proposed reform.

### c. A new path – IRC Section 2705

As previously discussed, artistic works are unique in that they are (i) generally non-fungible, (ii) often valued in relation to emotional connections and other factors not related explicitly to the materials used to create them and (iii) perceived as unmarketable unless all portions are conveyed at once or all owners acquiesce to the sale. Further, the discounted valuation framework of minority discounts and control premiums does not appear to apply. This niche treatment, together with the overlay of *Estate of Elkins*, is ripe for reform through bold intervention as a result of the extraordinary asset values only just beginning to appear in the last few decades. Without such intervention, artwork may be seen as a vehicle for transfer tax minimization through Elkins-like arrangements, thereby subverting the revenue raising aims of the transfer taxes as drafted.

While the utility of Section 2703 is still debatable after *Estate of Elkins*, the case made clear that the Internal Revenue Code as written would not prevent deep discounts resulting from intra-family non-commercial transfers. The 1990 legislation package of which Section 2703 was in part drafted to blunt the profound financial effects of various estate planning techniques that froze the value of property for the transferring generation of a family and locked in appreciation for the recipient generation. Though an estate freeze is not precisely the technique utilized by the Elkins family and its advisors, the intra-family character of these non-commercial transfers make this portion of the Internal Revenue Code a natural fit for expanded coverage to partial ownership valuations of certain non-fungible assets. A new Section 2705 could address such transfers by requiring that the portion of a "collectible" (as already defined in Section 408 to include works of art[157]) being transferred from one "member of the family" to another (as already defined in Section 2704(c)(2)) via gift or bequest be valued in *direct proportion* to the

fair market value of the entire collectible item(s).[158] Such a reform would effectively render any discount proffered by an estate and its experts improper where fractions of collectible property are being valued.[159]

As applied to *Estate of Elkins*, new Section 2705 would provide a decisive result. Mr. Elkins' children already owned a portion of the art collection via their father's disclaimer of his late wife's share of most of the works, up to the value of the unified gift and estate tax credit at her time of death. A bequest of Mr. Elkins' remaining 73 percent of the collection under the current regime afforded the Estate a deep partial ownership discount and the children full ownership of the collection. Under a new Section 2705, the Estate would be required to take the full, roughly $35 million dollar value of the collection and simply multiply that amount by Mr. Elkins' ownership share of 73 percent (in other words, his direct proportion of the total fair market value of the collection) for a rough value added to the gross estate of $25.5 million dollars. While new Section 2705 could be perceived as punitive, it draws a bright line for a narrow grouping of transfers and an asset class that is governed by a greater degree of valuation manipulation (both in terms of fair market value and discounted valuations) than other assets such as real property or publicly traded securities that can often be easily appraised without the emotional charge of psychic attachment or the complications associated with authenticity and evolving artist popularity. Fundamentally, such a proposal would blunt the impact of *Estate of Elkins* and provoke greater reflection about the efficacy and fairness of substantial valuation discounts.

**CONCLUSION**

This paper explored the legal landscape related to fractional ownership discounts and their applicability to artistic works. It contemplated the distinctive properties of art and the

emotional weight attached to ownership thereof that render the traditional hypothetical buyer-seller model of valuation difficult to apply and easy to manipulate in a market where fractional share ownership will likely become more popular every year. The paper concluded that the unique characteristics of artistic works as an asset class militate in favor of a specialized approach. Specifically, a new Section 2705 could address works of art as part of the existing collectible class which is already subject to a higher income tax rate than other capital assets. New Section 2705 would disallow valuation manipulations for the purpose of transfer tax minimization by computing the value of portions of collectibles transferred between members of the family as gifts or bequests simply – as a direct proportion of the total fair market value of the asset(s). Under this approach, the Elkins Estate would have paid transfer taxes reflecting the reality that, through their father's death, the children would come to own the collection outright.

Attempts to uniformly apply the current regime of heavy fractional share discounts for real property and partnership interests to artwork suffer from a failure of imagination – one that leaves wealthy taxpayers with sophisticated advisers at an advantage and simultaneously extracts the teeth from the revenue-raising ends of the estate and gift taxes. A stronger approach would reform the valuation system for collectibles, including works of art, such that the ballooning market for fine arts does not fundamentally outpace the government's ability to tax it in accordance with the letter and spirit of the law.

[1] Oscar Wilde, *Lady Windermere's Fan* (1892).
[2] *See* Nathaniel Kahn, *The Price of Everything*, HBO DOCUMENTARY FILMS (2018).
[3] *See* Sophie Chung, *Fractionalized Art Ownership and Securities Law*, CENTER FOR ART LAW, Nov. 19, 2019.
[4] *See* Scott Reyburn, *Jeff Koons 'Rabbit' Sets Auction Record for Most Expensive Work by Living Artist*, THE NEW YORK TIMES, May 15, 2019.
[5] 767 F.3d 443 (5th Cir. 2014).
[6] *See* Paul Sullivan, *A Potential Game Changer for Estate Taxes on Art*, THE NEW YORK TIMES, Oct. 3, 2014.
[7] *See infra* Part II(b)-(c).
[8] Sherri Cohen, *The International Art Market: Reflections on Auction Houses' Response to the Global Pandemic*, TRUSTS AND ESTATES MAGAZINE, Jan. 2021.
[9] *Id.*
[10] John Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U.L. REV. 335, 338 (1994).
[11] *Id.*
[12] Stephen Gara & Craig Langstraat, *Property Valuation For Transfer Taxes: Art, Science, Or Arbitrary Decision?*, 12 AKRON TAX J. 125, 144 (1996).
[13] Emily Lanza, *Rauschenberg's Canyon: Value in the Eye of the Beholder*, THE LEGAL PALETTE, Jul. 2018.
[14] *Id.*
[15] Anne-Marie Rhodes, *Big Picture, Fine Print: The Intersection of Art and Tax*, 26 COLUM. J.L. & ARTS 179, 184 (2003).
[16] *Id.* at 185-86. There is also a 3.8 percent healthcare surtax for most high earners. IRC § 1411.
[17] *Id.*
[18] *See id.* at 187-90.
[19] Treas. Reg. 20.2031-1(b). The definition for purposes of valuing gifts mirrors that of bequests. *See* Treas. Reg. 25.2512-1.
[20] *See id.*
[21] *See* Steinkamp*, supra* note 10 at fn. 76.
[22] *See* IRC § 2001.
[23] Treas. Reg. § 20.2031-6(b).
[24] Treas. Reg. § 20.2031-6(d).
[25] Gara & Langstraat, *supra* note 12 at 145.
[26] *Id.* at 146.
[27] T.C. Memo. 2015-246 (Dec. 22, 2015).
[28] *Id.* at *3-4.
[29] *Id.* at *4.
[30] *Id.* at *6. The Motherwell was deemed properly valued by the estate's experts. *Id.*
[31] Tech. Adv. Mem. 92-35-005 (May 27, 1992).
[32] 10 Warren's Heaton on Surrogate's Court Practice § 157.07 (2021).
[33] Christine Steiner & Bee-Seon Keum, *The Cultural Identity and Legal Protection of Art: Art Law: Looking Back, Looking Forward*, 20 CHAP. L. REV. 119, 142 (2017).
[34] *Id.*
[35] *See* Steinkamp*, supra* note 10 at 407.

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[36] *See* Steiner & Keum*, supra* note 33 at fn. 117.
[37] *See* Constance Tromble Eyster and Ramsay Slugg, *Estate Planning with Art: Selling, Gifting or Donating Art*, ACTEC TRUST AND ESTATE TALK (Feb. 2, 2021).
[38] *See id.*
[39] Maren Eisenmesser, *Discounts for Fractional Ownership of Real Property are Accepted, So Why Haven't the IRS and Courts Accepted Discounts for Fractional Ownership of Artwork?*, 14 BROOK. J. CORP. FIN. & COM. L. 75, 78 (2019).
[40] 1 Valuation Handbook § 7.02 (2020).
[41] Lance Hall, *Undivided Interest Discounts for Tangible Personal Property*, 11 VALUATION STRATEGIES 34, 34 (2008).
[42] *See* 1 Valuation Handbook § 5.04 (2020).
[43] *See generally* Estate of Scull v. Comm'r, T.C. Memo 1994-211, 67 T.C.M. (CCH) 2953 (T.C. May 12, 1994).
[44] *See supra* note 40.
[45] *See, e.g.*, Estate of Cervin v. Comm'r, T.C. Memo. 1994-550, *rev'd in part*, 111 F.3d 1252 (5th Cir. 1997).
[46] T.C. Memo. 2010-104.
[47] *Id.* at *1-2.
[48] *Id.* at *4.
[49] *Id.* at *8, *13-14.
[50] Tech. Adv. Mem. 93-36-003 (Sept. 10, 1993).
[51] *Id.*
[52] *See* Steven C. Colburn & Ted D. Englebrecht, *Valuing Fractional Undivided Interests for Estate Tax Purposes*, 30 REAL EST. TAX'N 87, 93 (2003).
[53] Carsten Hoffmann, *The Quest for Higher Ground Concerning Undivided Interest Discounts Continues*, VALUATION STRATEGIES, Sept./Oct. 2002, at 1.
[54] 82 T.C.M. (CCH) 666 (2001).
[55] *Id.* at *28-29.
[56] *See*, *e.g.*, Propstra v. United States, 680 F.2d 1248 (9th Cir. 1982).
[57] *See generally* Estate of Williams v. Comm'r, T.C. Memo. 1998-59.
[58] Treas. Reg. § 20.2031-2(e).
[59] *See* Rev. Rul. 93-12, 1993-1 C.B. 202.
[60] *See, e.g.*, Estate of Frank v. Comm'r, 69 T.C.M. 2255 (1995).
[61] *See, e.g.*, Estate of Busch v. Comm'r, T.C. Memo. 2000-3.
[62] *See* Estate of O'Connell v. Comm'r, 37 T.C.M. 1138 (1978).
[63] Gara & Langstraat, *supra* note 12 at 151.
[64] *See id.* at 151-52.
[65] *See infra* Part II(d).
[66] *See Propstra*, 680 F.2d at 1251–52; Estate of Jung v. Comm'r, 101 T.C. 412, 437–38 (1993).
[67] Gara & Langstraat, *supra* note 12 at 154.
[68] *Id.*
[69] *Id.*
[70] 66 T.C.M. (CCH) 1297, at 60 (1993).
[71] *Id.* at 49-50.
[72] *See, e.g.*, Estate of Titus v. Comm'r, 57 T.C.M. (CCH) 1449, 1456 (1989).

[73] *See* Staff of the Joint Comm. on Tax'n, 101st Cong., *Federal Transfer Tax Consequences of Estate Freezes* at 9.
[74] *See* Laura Cunningham & Noël Cunningham, *The Logic of the Transfer Taxes: A Guide to Federal Taxation of Wealth Transfers*, WEST ACADEMIC PUBLISHING (2018) at 135.
[75] IRC § 2702(a)(1).
[76] IRC § 2702(a)(2)(A).
[77] Cunningham & Cunningham, *supra* note 74 at 182.
[78] IRC § 2703(a).
[79] IRC § 2703(b).
[80] Estate of Elkins v. Comm'r, 140 T.C. 86, 87 (T.C. March 11, 2013).
[81] *See id.*
[82] *Id.* at 87-88.
[83] *Id.* at 88.
[84] *Id.*
[85] *Id.* at 89.
[86] *Id.* "The estate planning insight was to take a plain vanilla tenancy in common of the fractional interests and layer it with numerous restraints on alienation, possession, and control." Moses Luski, *Estate of Elkins v. Commissioner of Internal Revenue: Cautionary Tale and Gem*, SHUMAKER, LOOP & KENDRICK L.L.P, Spring 2015.
[87] *Id.* at 91-92.
[88] *Id.* at 92.
[89] IRC § 2703(a)(2).
[90] *Estate of Elkins*, 140 T.C. at 110.
[91] *Id.*
[92] *Id.* at 113.
[93] *Id.*
[94] *Id.* at 116.
[95] *Id.* at 93.
[96] Luski, *supra* note 86 at 3.
[97] *Id.* at 104-05.
[98] *Id.* at 110 (emphasis added).
[99] *Id.* at 126.
[100] *Id.* at 108-09, 127-28. The Tax Court inferred as much from the testimony of one of the Elkins children, who stated she would pay a "fair price" to capture any fractional interests that were sold to third parties. *Id.* at 128-30.
[101] *Id.* at 122.
[102] *Id.* at 134.
[103] *See Estate of Elkins*, 767 F.3d at 450.
[104] *Id.*
[105] *Id.* at 451.
[106] *Id.* at 449.
[107] *Id.* 452-53.
[108] *Id.* at 452.
[109] *See* Elizabeth Bowers et. al., *Forging Elkins: How to Copy This Taxpayer Victory*, 29 PROBATE & PROPERTY 24, 25 (2015).

[110] Quincy Cotton et al., *Fractional Interests in Art and Other Valuation Challenges*, ROBERTS & HOLLAND L.L.P. EST. & GIFT TAX PLAN. NEWSL., Nov. 2014, at 2.
[111] 67 T.C.M. (CCH) 2953.
[112] *Id.* at *8.
[113] *Id.* at *23.
[114] *Id.* at *71.
[115] No. C06-0259, 2007 U.S. Dist. LEXIS 38332 (N.D. Cal. May 25, 2007).
[116] *Id.* at *19 (citing Estate of Pillsbury v. Comm'r, T.C. Memo 1992-425, 64 T.C.M. (CCH) 284 (1992)).
[117] Stone v. U.S., No. C06-0250, 2007 U.S. Dist. LEXIS 58611, at *6-8 (N.D. Cal. Aug. 10, 2007).
[118] *Id*. at *6.
[119] *See supra* note 40.
[120] *Estate of Elkins*, 140 T.C. at 123.
[121] *See* Luski, *supra* note 86 at 2.
[122] *See id.* at 3.
[123] *See* Bowers et. al., *supra note* 109 at 25.
[124] *Id.*
[125] *Id.*
[126] *See* Laura Cunningham, *Remember the Alamo: The IRS Needs Ammunition in its Fight Against the FLP*, TAX NOTES FEDERAL: SPECIAL REPORT, Mar. 13, 2000, at 1468.
[127] *See* Sullivan, *supra* note 6.
[128] *Id.*
[129] *See* Bowers et. al., *supra note* 109 at 29.
[130] *See* Cunningham, *supra* note 126 at 1468.
[131] *See Stone*, No. C06-0259, at *6.
[132] *Estate of Elkins*, 140 T.C. at 99, 104.
[133] Eisenmesser, *supra* note 39 at 96.
[134] *See supra* Part II(b).
[135] *See supra* Part III(a).
[136] *See supra* note 70.
[137] *See, e.g.*, Estate of O'Connell v. Comm'r, 37 TCM 1138 (1978).
[138] *See* Chung*, supra* note 3.
[139] *Id.*
[140] Oscar Holland, *How art 'shares' could make you a Warhol collector for just $20*, CNN STYLE, Aug. 21, 2018.
[141] *See* Chung, *supra* note 3.
[142] *See supra* Part I(a).
[143] *See* Cunningham, *supra* note 126 at 1467.
[144] *See id.*
[145] *See id.* (quoting Treasury Department, *Tax Reform for Fairness, Simplicity, and Economic Growth*, Vol. 2, 387 (Nov. 1984)).
[146] *See id.*
[147] *See id.* at 1471.
[148] *See id.* at 1466.
[149] *See id.*

[150] 1981-2 C.B. 182.
[151] 498 F.2d 88 (5th Cir. 1974).
[152] *Id.* at 92.
[153] *See generally Propstra*, 680 F.2d 1248; Estate of Bright v. Comm'r, 658 F.2d 999 (5th Cir. 1981); Estate of Lee v. Comm'r, 69 T.C. 860 (1978).
[154] Gara & Langstraat, *supra* note 12 at 155.
[155] *See Estate of Elkins*, 140 T.C. at fn. 13.
[156] *See* Sullivan, *supra* note 6.
[157] *See supra* Part I(b). As previously mentioned, collectibles are already treated differently than other capital assets.
[158] This valuation technique would pierce through the interest held and value the property itself, which would ideally fend off an argument by a sophisticated taxpayer claiming that the valuation was of the partial interest and not of a collectible item.
[159] This approach might also encourage charitable giving of collectibles, which can reduce gross estate values and increase the number of culturally relevant works accessible to the public that have long been held privately.