

STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

218 W. Huron, LLC, 114 W. Liberty, LLC, 207 S. Main, LLC
309 S. Main, LLC, & 112 W. Liberty, LLC
Petitioners,

v

MTT Docket Nos. 449484, 449485,
449532, 449533, 449534

City of Ann Arbor,
Respondent.

Tribunal Judge Presiding
Victoria L. Enyart

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF PETITIONERS
UNDER MCR 2.116(A) and MCR 2.116(D)(1) FOR THE 2010 TAX YEAR

ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF RESPONDENT
UNDER MCR 2.116(A) and MCR 2.116(D)(1) FOR THE 2011 TAX YEAR

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioners, 218 W. Huron, LLC, 114 W. Liberty, LLC, 207 S. Main, LLC, 309 S. Main, LLC, and 112 W. Liberty, LLC, appeals the uncapping of the subject properties by Respondent, City of Ann Arbor, for the 2010 and 2011 tax years.

No hearing was held in this matter; instead it was determined that the Tribunal would render a decision based on the Stipulation of Facts and submitted briefs. Petitioners submitted their Brief on August 15, 2014. Respondent submitted its Response Brief on September 5, 2014.

Based on the stipulated facts, submitted briefs, exhibits, and case file, the Tribunal finds that no transfer of ownership occurred in 2009, under MCL 211.27a(7)(l), and therefore there is no uncapping for the 2010 tax year. Further, a transfer of ownership did occur in 2010 under MCL 211.27a(6)(e), resulting in an uncapping for the 2011 tax year. The subject properties' taxable value ("TV") for the tax years at issue shall be as follows:

Parcel Number: 09-09-29-222-005

Year	TV
2010	\$104,317
2011	\$112,900
2012	\$112,900

2013	\$112,900
2014	\$112,900

Parcel Number: 09-09-29-143-021

Year	TV
2010	\$139,624
2011	\$180,200
2012	\$180,400
2013	\$184,729
2014	\$187,684

Parcel Number: 09-09-29-131-016

Year	TV
2010	\$229,615
2011	\$436,400
2012	\$444,000
2013	\$454,656
2014	\$461,930

Parcel Number: 09-09-29-130-009

Year	TV
2010	\$209,351
2011	\$390,300
2012	\$386,300
2013	\$395,571
2014	\$401,900

Parcel Number: 09-09-29-143-022

Year	TV
2010	\$91,797
2011	\$188,500
2012	\$188,800
2013	\$193,331
2014	\$196,424

PETITIONERS' CONTENTIONS

Petitioners state that in 2002, Andrei C. Gulvezan (“Andrei”) conveyed the properties to wholly owned LLC’s of which he was the sole member. Further, Petitioners state that Andrei created a Revocable Living Trust on February 16, 2009, “and conveyed the Membership interests in all of the LLCs from himself as sole individual Member to himself as Trustee as sole Member.” Petitioners’ Brief at 4, Stipulated Facts. Petitioners argue that this transfer is not an

event resulting in an uncapping of the taxable values, as there was no change in ownership of the LLCs ownership interests under the law cited by the Tribunal in *Anderson v Chocoday Twp*, 24 MTTR 16 (Docket No. 433005, December 18, 2013).

Alternatively, Petitioners argue that the February 16, 2009 conveyance did not result in an uncapping under MCL 211.27a(7)(l) because the transfer was between entities under common control. Petitioners state that Andrei had total control of the LLCs and his Revocable Living Trust and ownership of the LLCs was conveyed by assigning the membership interests to the Trust. Petitioners contend that RAB 1989-48 states that an individual is qualified to be considered as part of a group of commonly controlled entities, and therefore:

Andrei is thus granted the status of a business entity doing business as a sole proprietorship, which owned the LLCs (a business entity), and transferred such ownership to his Revocable Living Trust (also a business entity) to which he retained all aspects, powers, and entitlements as owner, Settlor, Trustee and beneficiary. These are all commonly controlled entities, and so excepted from a “transfer.” Petitioner’s Brief at 10.

Petitioners further argue that the 2009 conveyance did not result in an uncapping under MCL 211.27a(6)(c) and MCL 211.27a(7)(f), which deal with transfers of property into a Trust. Petitioners state that conveyances into a Trust for the benefit of the settlor or spouse do not constitute an uncapping as recognized in STC Bulletin No. 16 of 1995.

Petitioners next state that Andrei died on February 14, 2010, at which time the membership interests in each LLC were titled in the name of the Revocable Trust, meaning that neither the LLCs nor the membership interests in the LLCs were conveyed as the result of Andrei’s death. Petitioners argue that only a change of beneficiary to Andrei’s spouse occurred, which does not result in an uncapping under MCL 211.27a(6)(e). Accordingly, Petitioners contend that there should be no uncapping for the 2011 tax year. In further support of this argument, Petitioners state that the terms of the Revocable Trust direct that there is a Family Trust and a Marital Trust, but the Marital Trust was not funded upon Andrei’s death and all assets went into the Family Trust. Petitioners argue that the potential for two Trusts does not result in an uncapping, as stated by the Tribunal in *Marilyn Kohnert v Bagley Twp*, 15 MTTR 167 (Docket No. 312290, December 16, 2005). Petitioners contend that the present beneficiary is thus determined by looking solely at the Family Trust, and that Andrei’s surviving spouse “is

clearly a present beneficiary upon Andrei's death by the very terms of the Trust." Petitioners' Brief at 16. Petitioners state that the children are strictly contingent beneficiaries since "the current benefits are mandated to the surviving spouse for her lifetime, and the children are allowed a[s] contingent beneficiaries 'in the event of the disability or incapacity of Settlor's spouse.'" Petitioners further state that the spouse must consent to any other possible distribution to the children, which is a condition precedent that renders the children as contingent beneficiaries. Petitioners assert that the test is not whether the children *could* benefit; it is whether they are present beneficiaries, which Petitioners argue they are not as their right to any Trust benefits is subject to the death, incapacity, or written consent of the surviving spouse.

RESPONDENT'S CONTENTIONS

Respondent contends that MCL 211.27a(6)(h) required the uncapping of the taxable values in 2010, following the assignment to the LLCs in 2009. Respondent further states that Petitioners' reliance on *Anderson v Chocoy Twp, supra*, is misplaced, as that case involved completely different facts and MCL 211.27a(6)(h) was not at issue. Respondent states that the exemptions from uncapping in MCL 211.27a(6)(c) and (7)(f) do not apply "because those exemptions apply specifically when an individual 'conveys the property to the trust.' This case, however, involves a transfer of ownership interests in LLCs to a trust." Respondent's Brief at 9. Respondent further argues that "MCL 211.27a(6)(h) unambiguously applies to transfers of ownership interests in an LLC MCL 211.27a(6)(c) or MCL 21.27a(7)(f) do not refer to a transfer of ownership interests, but rather unambiguously apply to '[a] conveyance' that 'conveys the property to the trust,' which the facts of this case do not fit." Respondent's Brief at 12.

Respondent further argues that the exemption in MCL 211.27a(7)(l) does not apply because the transfer was for purposes of estate planning and the requirement of "common control" cannot be satisfied as the transactions were not a business activity. Respondent further contends that the LLCs and the Revocable Trust were not under common control "because each transfer was between an LLC, which had no interest in the Revocable Trust before the transfer, and the Revocable Trust, which had no interest in the LLC before the transfer." *Id.* Respondent asserts that the decision in *C & J Investments of Grayling, LLC v City of Grayling*, unpublished

opinion per curiam of the Court of Appeals, issued November 13, 2007 (Docket No. 270989) supports its position.

Respondent contends that the 2011 uncapping was also proper based on the 2010 distribution from the Revocable Trust into the Family Trust. Respondent states that the exemptions in MCL 211.27a(6) and (7) do not apply “primarily because Mrs. Gulvezan is not a sole present beneficiary of the Family Trust, which is a prerequisite for those exemptions to apply.” Respondent’s Brief at 16. Respondent asserts that when Andrei died the 100% ownership interest in the LLCs was distributed to the Family Trust, which is a transfer resulting in an uncapping under MCL 211.27a(6)(h) as a conveyance of more than 50% of an ownership interest in one legal entity to another legal entity. Respondent argues that this distribution was not a conveyance to a trust by the settlor or the settlor’s spouse, or both, and MCL 211.27a(6)(c) and (7)(f) would therefore not apply. Rather, Respondent contends that the distribution “involved the creation of two new trusts by the Revocable Trust and not a change in beneficiaries of the three trusts, which are the facts to which MCL 211.27a(6)(e) would apply.” Respondent’s Brief at 18. Respondent further states that MCL 211.27a(6)(d) states that a transfer of ownership includes a conveyance by distribution from a trust except when the distributee is the sole present beneficiary or the spouse of the sole present beneficiary. Respondent argues that the sole present beneficiaries of the Family Trust are Andrei’s children and not Mrs. Gulvezan. Respondent relies on *in re Childress Trust*, 194 Mich App 319; 486 NW2d 141 (1992) in support of its argument that “the provisions governing the Family Trust that direct the trustee to ‘pay and deliver the entire residue and remainder’ to Mr. and Mrs. Gulvezan’s children after they have both passed render the children ‘present beneficiaries.’” Respondent’s Brief at 20. Respondent further states that the facts in *LaMonte Durbrow III Trust v Leelanau Twp*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 312818) are similar to the present case and the Court of Appeals found that a transfer of ownership occurred because provisions of the Family Trust established that the spouse was not a sole present beneficiary. Respondent argues that the Family Trust in the present case imposes similar constraints on distributions to Mrs. Gulvezan as were contained in *Durbrow*.

Respondent further states that *Kohnert, supra*, does not apply to the facts of this case and appears to have been misread by Petitioners, as *Kohnert* involved transfer of property from a living trust to a new marital trust.

STIPULATED FACTS¹

1. Andrei C. Gulvezan was the owner of the subject properties prior to January 18, 2002, having acquired such at various dates.
2. Each of the subject properties is in a Commercial Class for purposes of real property tax, and was at all times used for the conduct of business by the respective owners, being held for investment and the production of income.
3. On January 18, 2002, Andrei C. Gulvezan formed five Limited Liability Companies, of which he was the sole Member and which are the Petitioners in these cases. The name of each LLC corresponds to one of the subject properties.
4. On December 31, 2002, Andrei C. Gulvezan conveyed each subject property by Quit Claim Deed to the Petitioner LLC whose name corresponds to the subject property's address.
5. On February 16, 2009, Andrei C. Gulvezan created and signed the Andrei C. Gulvezan Revocable Living Trust.
6. On February 16, 2009, Andrei C. Gulvezan assigned to Andrei C. Gulvezan, as Trustee of the Andrei C. Gulvezan Revocable Trust all Interest of Andrei C. Gulvezan in each of the Limited Liability Companies.
7. Andrei C. Gulvezan died on February 14, 2010.
8. Property Transfer Affidavits (PTAs) were not filed with the Ann Arbor City Assessor's Office in connection with the 2009 assignment referenced in Paragraph 9 of the Stipulation nor were PTAs filed in connection with Andrei C. Gulvezan's death in 2010.
9. By letter of October 26, 2012, the office of the City Assessor for Ann Arbor gave written notice of the retroactive uncapping of each of the properties stating that "[d]ue the fact [sic] the Assessor's Office has information showing that interest in the referenced properties were [sic] transferred in 2009 upon the assignment of the sole member of the

¹ Stipulated Facts filed by the parties on August 5, 2014

Limited Liability Company to a trust on February 16, 2009, the Assessor's Office is compelled to uncap these properties for Tax Year 2010."

10. By letter of December 18, 2012, the office of the City Assessor further gave written notice that "when Andrei [C. Gulvezan] passed away in 2010, another uncapping occurred for Tax Year 2011."
11. These cases were timely filed with the Tax Tribunal, and ultimately consolidated for determination by the Court pursuant to this Court's Order for Consolidation of July 14, 2014.

CONCLUSIONS OF LAW

MCR 2.116(A) provides that the parties may submit an agreed upon stipulation of facts, and if the stipulated facts are "sufficient to enable the court to render judgment in the action, the court shall do so."

MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

A proceeding before the Tax Tribunal is original, independent, and de novo. MCL 205.735a(2). The Tribunal's factual findings must be supported "by competent, material, and substantial evidence." *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp, supra at 352-353*.

Under the General Property Tax Act, property taxes are based on the property's taxable value for the tax year at issue. MCL 211.27a provides that a property's taxable value is the lesser of the property's state equalized or capped taxable value, and a property's capped taxable value is, absent a transfer of ownership, determined mathematically by taking into consideration the prior tax year's taxable value, physical losses to the property, the lesser of the rate of inflation or 5%, and physical additions to the property, including omitted property (i.e., property not previously assessed). If a transfer of ownership has occurred, the property's taxable value is "uncapped" and the "taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer." MCL

211.27a(3). MCL 211.27a(6) includes a non-exhaustive list of events that constitute a transfer of ownership and MCL 211.27a(7) lists events that are not a transfer.

There are two separate transfer of ownership issues in this case: the 2009 transfer of the membership interests in the LLCs to the Revocable Trust, and the transfer from the Revocable Trust to the Family Trust following Andrei's death in 2010.

With respect to the 2009 transfer, Petitioners set forth several arguments as to why no uncapping occurred. First, Petitioners contend that the conveyance of the membership interests in the LLCs to the Revocable Trust is not an uncapping event due to the nature of revocable trusts and Andrei's control over the assets, as stated by the Tribunal in *Anderson v Chocolay Twp*, 24 MTTR 16 (Docket No. 433005, December 18, 2013). Respondent argues that the uncapping following the 2009 transfer is required under MCL 211.27a(6)(h), which provides that a transfer of ownership includes "a conveyance of an ownership interest in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity if the ownership interest conveyed is more than 50% of the corporation, partnership, sole proprietorship, limited liability company, limited liability partnership, or other legal entity." The Tribunal finds that its decision in *Anderson* involved a completely different factual situation that would not be applicable to the present case. In *Anderson*, property was conveyed out of a revocable trust to the settlor and her children as joint tenants, with a reservation of a life estate, and then a subsequent deed conveyed a 1% interest in the property to the settlor and 33% interests to each of her three children. The present appeal does not involve a transfer out of a trust or the creation of joint tenancies. Rather, this case involves the transfer of membership interests in LLCs to Andrei's Revocable Trust. The conveyance of a 100% membership interest in each LLC to the Revocable Trust would be a conveyance of an ownership interest that constitutes a transfer of ownership resulting in uncapping under MCL 211.27a(6)(h), unless an exemption applies.

Petitioners next contend that there should be no uncapping pursuant to MCL 211.27a(7)(l) because the transfer was between entities under common control. Petitioners argue that Andrei owned and controlled the LLCs as the sole member and he was the settlor and trustee of the Revocable Trust. MCL 211.27a(7)(l) states that a transfer or ownership does not include "[a] transfer of real property or other ownership interests among corporations, partnerships,

limited liability companies, limited liability partnerships, or other legal entities if the entities involved are commonly controlled.”

In *Sebastian J. Mancuso Family Trust v City of Charlevoix*, 300 Mich App 1; 831 NW2d 907 (2013), the Court of Appeals stated:

The exception in MCL 211.27a(7)(1) applies if (1) the transaction is between legal entities, and (2) the legal entities involved are commonly controlled. Even assuming that trusts are legal entities within the meaning of the statute, the exception applies only if the legal entities are “commonly controlled.” MCL 211.27a does not define “commonly controlled.” “A court may consult dictionary definitions when terms are not expressly defined by a statute.” *Oakland County Rd Comm’rs v Mich Prop & Cas Guar Ass’n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The term “common” is defined as “belonging equally to, or shared alike by, two or more or all in question.” Random House Webster’s College Dictionary (1997), p 264. “Control” means “to exercise restraint or direction over; dominate, regulate, or command.” *Id* at 288.

State Tax Commission (STC) Bulletin No. 16, “Transfers of Ownership,” September 20, 1995, states that the STC has specifically adopted Revenue Administrative Bulletin (RAB) 1989-48 to define “commonly controlled” entities for purposes of MCL 211.27a(7)(1). The Court of Appeals has also held in *C & J Investments of Grayling, LLC v City of Grayling*, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2007 (Docket No. 270989), that “RAB 1989-48 defines three categories of groups that can qualify as entities under common control: (1) parent-subsidiary entities under common control; (2) brother-sister entities under common control²; and (3) a combination of entities under common control.³” While not binding, the Tribunal finds that the STC Bulletin, RAB, and opinion in *C & J Investments* are persuasive and applicable to the determination in the present case.

The Tribunal finds that this case does not involve parent-subsidiary entities. Further, this case does not involve a combination of entities under common control. While a group of three or more entities does exist, RAB 1989-48 further requires that “[a]t least one entity is the common

² “In order to qualify under that category, the same persons must own a controlling interest in each entity.” *C & J Investments*.

³ “To qualify as a combined group of entities, there must be a group of three or more entities. Further, the entities must also be engaged in business or trade activity.” *C & J Investments*.

parent entity of a parent-subsidary group of entities under common control AND is also a member of a brother-sister group of entities under common control.” [Emphasis in original.] There are no parent-subsidary entities involved in this case, and therefore, there can be no combination of entities under common control within the meaning of the RAB.

In order to qualify as brother-sister entities under common control, the RAB requires that the entities: (1) be engaged in a business activity and (2) the same five or fewer persons must own a controlling interest in each entity. The Stipulated Facts reflect that the properties are held for investment and income producing purposes, and so the business activity requirement is met. Further, the same five or fewer persons must own a controlling interest in each entity. There is no definition in the RAB for a controlling interest in an LLC, however, Andrei owned 100% of the membership interest in each LLC, which would clearly be a controlling interest. “Controlling interest” is defined in the RAB for a trust as “ownership of an actuarial interest of at least 80 percent of such trust.” “Actuarial interest” is not defined in the RAB; instead, the RAB refers to IRC 1.414(c)-2 (b)(2)(ii) for the definition, which states that “the actuarial interest of each beneficiary of trust or estate shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary.” In addition to being the settlor, Andrei was the Trustee and beneficiary of the Revocable Trust during his lifetime, and was entitled to “all or so much of the net income of the Trust . . .” as the settlor shall direct or in the Trustee’s discretion was needed for the settlor’s health, support, maintenance and education. P-10 at 4. This reflects at least an 80% actuarial interest in the Revocable Trust.

The RAB further requires that the same five or fewer persons must be the same persons whose ownership is considered for the effective control requirement. Andrei was in effective control of the LLCs, as again, he owned 100% of the membership interest. The RAB provides that under the brother-sister entities test, effective control over a trust exists if “[p]ersons own an aggregate actuarial interest of more than 50 percent of such trust” As analyzed above with respect to the controlling interest, Andrei had at least an 80% actuarial interest in the Revocable Trust. Accordingly, the same person (Andrei) owned a controlling interest in each LLC and the Revocable Trust, and Andrei was in effective control of each LLC and the Revocable Trust. As such, the LLCs and the Revocable Trust are brother-sister entities under common control. Under MCL 211.27a(7)(l) a transfer of ownership interests among LLCs or other legal entities is not a

transfer of ownership if these entities are commonly controlled. Based on the above analysis and the MCL 211.27a(7)(l) there was no transfer of ownership in 2009 that would result in an uncapping of the taxable value for the subsequent 2010 tax year.

If the entities were not found to be under common control, Petitioners further argue that there is no transfer of ownership under MCL 211.27a(6)(c) and (7)(f). MCL 211.27a(6)(c) states that a transfer of ownership includes “[a] conveyance to a trust . . . except if the settlor or the settlor's spouse, or both, conveys the property to the trust and the sole present beneficiary or beneficiaries are the settlor or the settlor's spouse, or both.” Similarly, MCL 211.27a(7)(f) exempts from a transfer of ownership “[a] conveyance to a trust if the settlor or the settlor's spouse, or both, conveys the property to the trust and the sole present beneficiary of the trust is the settlor or the settlor's spouse, or both.” Both provisions relate to a transfer that “conveys the property” to the trust. Respondent argues that there was not a conveyance of property here, but that there was a transfer of LLC ownership interests. The Schedule A attached to the Revocable Trust does not list the parcels under appeal as trust property. Instead, Schedule A lists “[a]ll interest of Andrei C. Gulvezan in the following Limited Liability Companies” P-10. [Emphasis removed.] This evidences that the parcels themselves were not conveyed to the Revocable Trust, but that only the membership interests in the LLCs were conveyed.

The Tribunal finds that certain provisions of MCL 211.27a refer to a conveyance and/or transfer in general (e.g. (6)(a), (e), (f), (7)(d), (g), (i)), others refer to a conveyance and/or transfer of property (e.g. (6)(c), (i), (7)(a), (c), (f), (n), (o), (p)), other provisions refer to a conveyance and/or transfer of ownership interests (e.g. (6)(h), (j), (7)(k)), and still other provisions refer to a conveyance and/or transfer of property and ownership interests (e.g. (7)(j), (l), (m)).

The primary goal in statutory interpretation is to give effect to the Legislature's intent. *Mt. Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007). When interpreting a statute, the statute must be considered as a whole and the words used are to be given their plain meaning. *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). “When the plain and ordinary language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.” *Moshier v Whitewater Twp*, 277 Mich App 403, 407; 745 NW2d 523 (2007). The Tribunal finds that MCL 211.27a(6)(c) and (7)(f)

only refer to a conveyance of property, not a conveyance of ownership interest. Given the fact that the Legislature included reference to both conveyances of property and ownership interests in other sections of MCL 211.27a, the Tribunal finds that MCL 211.27a(6)(c) and (7)(f) were intended only to exempt from a transfer of ownership those that conveyed property to a trust and do not include transfers that conveyed ownership interests to a trust. Accordingly, the transfer of the LLC ownership interests to the Revocable Trust would result in an uncapping of the taxable value in the year following the transfer, absent another provision that would make the transfer exempt (which for the 2010 tax year would be the common control exemption found in MCL 211.27a(7)(l)).

With respect to the 2010 transfer from the Revocable Trust following Andrei's death, Petitioners contend that the transfer from the Revocable Trust to the Family Trust is not a transfer that would result in an uncapping, as it was a transfer making the surviving spouse the sole present beneficiary. MCL 211.27a(6)(e) states that a transfer of ownership includes "[a] change in the sole present beneficiary or beneficiaries of a trust, **except** a change that adds or substitutes the spouse of the sole present beneficiary." [Emphasis added.] MCL 211.27a(6)(d) also provides that a transfer of ownership includes "[a] conveyance by distribution from a trust, **except** if the distributee is the sole present beneficiary or the spouse of the sole present beneficiary, or both." [Emphasis added.] Petitioners assert that Andrei's children are not present beneficiaries, but are contingent beneficiaries under the terms of the Trust and Michigan trust law. Respondent cites to the Court of Appeals' decisions in *Childress*, *supra* and *Durbrow*, *supra* as supporting its position that Andrei's spouse is not the sole present beneficiary.

In *Childress*, a beneficiary requested information regarding the trust from the trustee, who refused, stating that the petitioner was only a contingent beneficiary not entitled to the information. The Court of Appeals found that the petitioner had a vested future interest, based on the following authority:

A remainder interest vests upon the death of the grantor, not upon the death of the life tenant. *In re Hurd's Estate*, 303 Mich 504, 509; 6 NW2d 758 (1942); *In re Patterson's Estate*, 227 Mich 486, 489–491; 198 NW 958 (1924). The possibility of the death of the remainderman before the life tenant does not prevent taking a vested remainder. *Hurd's Estate*, *supra*; *Holmes v Holmes*, 215 Mich 112, 117; 183 NW 784 (1921). A remainder interest that becomes possessory upon the death of the lifetime beneficiary is vested even if the holder of the life interest

may invade the principal and has discretion to exhaust the corpus. *Broas v Broas*, 153 Mich 310, 311–312; 116 NW 1077 (1908). *Id* at 323.

In *Durbrow*, there was a transfer to a family trust following the settlor's death. The Tribunal concluded that based on the language of the trust, the spouse was not the sole present beneficiary. The Court of Appeals, in an unpublished opinion, affirmed the determination of the Tribunal. Specifically, the Court of Appeals found that the language of the trust indicated there were multiple present beneficiaries, not just the settlor's spouse. Further, the trust provided for distributions to the settlor's children during the spouse's lifetime, but required that the trustee consult with the spouse before making any distribution; however, the trust provided that the decision to make any distributions was solely within the trustee's discretion. The Court of Appeals reasoned that:

While the Trust certainly contemplates distributions to the settlor's spouse, the language does not require that all of the assets be used for her benefit. If the trustee decides that there was an emergency or that the settlor's spouse had adequate income, he was free to make a distribution to the settlor's children and their issue during the lifetime of the Trust Because the settlor's children and their issue could receive distributions at any time, they are present beneficiaries, and the settlor's spouse is not the sole present beneficiary under the Trust.

The Tribunal finds that in the present case, the settlor's children had a vested interest in the trust at the time of Andrei's death, even though the spouse was the lifetime beneficiary able to exhaust the corpus of the trust. Further, *Durbrow* involved similar facts to the present case. While unpublished opinions do not constitute binding precedent; however, they may be considered "instructive or persuasive." MCR 7.215(C)(1); *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011). The Tribunal finds that the Court of Appeals' reasoning in *Durbrow* is instructive in this matter. Specifically, Section V, subsection C, subparagraph 2 (P-11 at 7) gives the spouse limited power to invade the principal in an amount no greater than \$5,000 or 5% of the market value in each calendar and subparagraph 3 provides limited power to the Trustee to distribute from the principal "amounts as it deems necessary or advisable in the Trustee's discretion to reasonably and adequately provide for the health, education, support and maintenance of Settlor's spouse." Like *Durbrow*, the Family Trust contemplates distributions to Andrei's spouse, but does not require that all of the assets be used for her benefit. The Family Trust specifically allows for distributions to the children during the spouse's lifetime. Section V,

subsection C, subparagraph 4 provides for distributions necessary to assist “in meeting the requirements for the health, support, maintenance and education of Settlor’s children until such time as they attain the age of legal majority . . .” and further provides for advances from the Family Trust directly to a child or an institution of the child’s choosing for payment of expenses of higher education. In addition, subsection C, subparagraph 1 states that to the extent the net income of the Family Trust is not distributed to the spouse, it shall be accumulated or distributed to the children “as if the Settlor’s spouse were then deceased . . .” subject to the consent or failure to object by Settlor’s spouse. Further, should Settlor’s spouse disclaim her right to receive distribution of the income, this disclaimed income shall either be accumulated or distributed to Settlor’s children. Given these provisions, the Tribunal finds that Andrei’s spouse is not the sole present beneficiary, as several scenarios exist under the terms of the Family Trust, during the spouse’s lifetime, in which the children may receive a distribution or monies paid for their benefit. As such, a transfer of ownership did occur which would result in the uncapping of the taxable value for the 2011 tax year.

Given the above, the Tribunal finds that there are no genuine issues of material fact, and based on the Briefs, Stipulated Facts, and submitted documents, Petitioners are entitled to summary disposition in its favor for the 2010 tax year, as the transfer of the LLC membership interests to the Revocable Trust was exempt under MCL 211.27a(7)(l). Further, Respondent is entitled to summary disposition in its favor for the 2011 tax year, as the settlor’s spouse was not the sole present beneficiary, and therefore, a transfer of ownership under MCL 211.27a(6)(e) occurred.

JUDGMENT

IT IS ORDERED summary disposition is GRANTED in favor of Petitioners under MCR 2.116(A) and 2.116(I)(1) for the 2010 tax year.

IT IS FURTHER ORDERED summary disposition is GRANTED in favor of Respondent under MCR 2.116(A) and 2.116(I)(1) for the 2011 tax year.

IT IS FURTHER ORDERED that the property’s taxable values for the tax years at issue shall be as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect

the property's taxable values within 20 days of entry of this Final Opinion and Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, and prior to July 1, 2012, at the rate of 1.09%, and (iv) after June 30, 2012, through December 31, 2014, at the rate of 4.25%.

This Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

By: Victoria L. Enyart

Entered: Oct 15, 2014
klm