

By Stephen M. Breitstone

Estate Planning for Negative Capital

A solution for real estate owners when the debt owed on a property exceeds its basis

Clients with long term real estate holdings often have negative capital, which results from cashing out with refinancings and from depreciation. The body of estate-planning literature contains few works that do justice to the central estate-planning considerations for holders of interests in real estate with negative capital--debt in excess of basis.

Typically, the fact pattern arises when a taxpayer holds real estate long term, employing leverage that generates deductions and/or tax deferred proceeds of non-recourse financings. Ultimately, such property will have a low income tax basis relative to its fair market value and its nonrecourse encumbrances. Under the rule established by the U.S. Supreme Court in *Commissioner v. Tufts*,¹ the minimum gain recognized upon a disposition of such property will be the amount by which the nonrecourse debt exceeds the property's adjustment income tax basis. Upon a disposition of the property in a taxable transaction, there will be phantom gain recognized in excess of the cash proceeds. In some instances, the tax imposed upon this gain can even exceed the cash proceeds from the sale.

Effective planning with negative capital requires an evaluation of income tax as well as estate, gift and generation-skipping transfer (GST) tax planning considerations. **Since leveraged real estate investments are typically held in entities that are taxed as partnerships, it also requires a working knowledge of Subchapter K, the provisions of the Internal Revenue Code that govern the taxation of partnerships and limited liability companies (LLCs) taxed as partnerships.**



Stephen M. Breitstone co-heads the Wealth Preservation Group at Meltzer, Lippe, Goldstein & Breitstone LLP in Mineola, N.Y.

In planning for real estate with negative capital, the income tax considerations may be paramount. Estate-planning techniques that involve the use of grantor trusts may not work well for this type of asset. Grantor retained annuity trusts (GRATs) and installment sales to intentionally defective grantor trusts (IDGTs) can trigger unintended adverse income tax consequences when there's negative capital.

If properly structured, the entity freeze technique can avoid the negative income tax considerations of GRATs and IDGTs, while permitting a shift of value with minimal estate, gift and GST tax friction. **Most importantly, unlike its counterpart freeze techniques, the entity freeze can enable a basis step-up upon death that can eliminate the negative capital and refresh depreciation deductions for the succeeding generation.** I believe that the step-up can't be accomplished by the GRAT or IDGT, unless, of course, income tax is paid on the inherent built in gain that the negative capital represents. The potential to obtain this basis step-up makes the entity freeze the preferred method of estate planning for real estate with negative capital.

The Cost of Negative Capital

In estate and gift tax planning, there's a tradeoff between saving estate and gift taxes ultimately paid and obtaining a basis step-up upon death (saving income taxes). Lifetime property transfers typically forego a basis step-up upon death, whereas a basis step-up to FMV will be available when property is held until death. While the disparity between income tax rates and estate and gift tax rates has been greatly reduced or eliminated—at least for the time being—the amount subject to taxation can differ for income tax and transfer tax purposes.

For assets with liabilities in excess of basis, obtaining the basis step-up on negative capital can be the central consideration—at least as important as avoiding

estate and gift taxes. In fact, failure to properly plan for negative capital can have disastrous consequences,

Example: AB Partnership holds real property X with an FMV of \$10 million, subject to a mortgage of \$8 million. X has an adjusted income tax basis of \$1 million. If X were sold for its FMV, the resulting income tax liability could exceed the equity in the property, depending upon the tax rate on the transaction. If the tax rates were straight capital gains rates of 15 percent, the tax would be \$1.35 million. While less than the \$2 million equity value, the tax is 67.5 percent of that equity. If the gain constituted unrecaptured IRC Section 1250 gain, the tax rate would be 25 percent. At that rate, the tax would be \$2.25 million, which exceeds the value of the equity. State and local taxes would also come into play where applicable.

The Entity Freeze

The entity-freeze technique, which I'll refer to as the "freeze partnership," is generally governed by IRC Section 2701. The enactment of Section 2701 provides a clear set of rules that should eliminate much of the uncertainty surrounding the freeze partnership. The freeze partnership typically has two classes of partnership interests: the preferred interest, which is entitled to a preferred return and a liquidation preference (like preferred stock) and the junior equity interest, which is entitled to growth and appreciation (like common stock).

In the typical freeze partnership, the preferred interest is retained and the junior equity interest must be worth at least 10 percent of the value of the partnership at the time of the transfer. The transaction is called a freeze partnership because the value of the preferred interest is frozen at the time the junior interest is transferred or otherwise acquired. Assuming the hurdle rate is met and the preferred return is paid, only the junior equity interest appreciates in value as the partnership assets earn income and appreciate in value over time.

Within the family context (that is, with a family-controlled entity), Section 2701 imposes certain requirements to avoid a deemed gift, which can be as much as

the entire value of the entity, even though a preferred interest is retained. Section 2701 applies when the junior equity interest (or any equity interest under the literal wording of the statute) is transferred in a family-controlled corporation or partnership, to a member of the transferor's family (generally, of an equal or lower generation). Treasury Regulations Section 25.2701-1 sets forth the general rules. Certain technical definitions apply.²

Whether a capital shift occurs is measured on the date of the freeze recapitalization.

As a threshold matter, for IRC Section 2701 to apply, there must be a transfer. Even if no actual gift has occurred, as when there's a transfer for full and adequate consideration, there can be a transfer for purposes of Section 2701, resulting in a deemed gift. The term "transfer" includes transactions such as contributions to the capital of a corporation (or partnership), recapitalization of a corporation (or a partnership), redemptions and certain other terminations of an interest in such entities. Thus, even if no gift was intended, the creation of a partnership among family members, in which each member contributes its share to capital, must satisfy the requirements of Section 2701 to avoid a deemed gift.

Another element necessary for Section 2701 to apply is that the transferor must retain either (1) an "extraordinary payment right," or (2) a "distribution right" in the case of a controlled entity. Treas. Regs. Section 25-2701-2 defines these terms.

There's no recognition event going from the straight partnership to the freeze partnership as long as there's no capital shift and no debt shift. Likewise, in the absence of an actual direct or indirect gift of interests in the freeze partnership, there will be no deemed taxable gift as long as the requirements of Section 2701 are satisfied.

Note that if those requirements aren't satisfied, there will be a deemed gift of as much as the entire value of the interest retained by the senior generation (Senior). Whether a capital shift occurs is measured on the date of the freeze recapitalization. A capital shift occurs when one partner's share of capital, based upon a hypothetical liquidation value, is enhanced at the expense of another, either at the time of a capital contribution or at the time of a recapitalization. Such a shift of capital could result in a taxable gift or a taxable grant of a capital interest as compensation for services performed.

Additionally, there may be significant non-tax benefits to the freeze technique. Senior may want more immediate and certain income from the entity to sup-

When the requirements of Section 2701 are satisfied, the difference is the gift tax value of the junior equity interest.

port current lifestyle needs and the junior generation (Junior) may be more willing to take risks and wait longer for the rewards.

History

Prior to the enactment of Section 2701 in 1990, as part of the Chapter 14 regime,³ taxpayers could shift income to the next generation by recapitalizing a business entity (whether a partnership or a corporation) into separate classes of ownership interests, typically a preferred interest and a common interest. However, unlike under current law, there was no need to provide for preferred dividends that would actually be paid. The preferred dividends could be non-cumulative, so that dividends not paid in one year (or for several years) wouldn't entitle the holder of the preferred interest to a makeup distribution in future years. **The unpaid current dividend would be lost, or more aptly put, shifted to the holders of the junior equity.** Moreover, the rights to a liquidation preference could be illusory. Under the entity's organiza-

tional documents, the right to the liquidation preference could lapse under certain circumstances, such as upon the preferred interest holder's death. Likewise, the holder of the preferred interest could have a lapsing right to "put" its interest to the entity for a fixed price or to "call" its capital from the entity in a redemption. However, these rights would seldom be exercised in the family context. They were mainly inserted into the transaction as window dressing so appraisers would attribute a high value to the preferred interest, which would reduce or, more likely, negate a gift upon the grant of the junior equity to members of the younger generation.

Pre-Section 2701 law also allowed an appraisal to value the preferred interest at 100 percent of the entity value, leaving no value to be allocated to the junior interest. Any option value to the junior interest would typically be ignored, even though it constituted real economic value.⁴ Outside the family context, the option value is meaningful, since it represents the rights of the holders of the junior equity to participate in the growth in value or upside of a business enterprise. As a result of the manner in which the junior interest was valued under pre-Section 2701 authorities, the transfer of the common interest had little to no gift tax value—even though in reality, it represented a significant shifting of wealth to the junior equity holders.

Section 2701

Under Section 2701, retained interests are given a zero value unless they include a right to receive a qualified payment, which is valued according to FMV.⁵ If a qualified payment right is held along with an extraordinary payment right, the rights are valued as if each was exercised in the manner resulting in the lowest value for all such rights.

If the requirements of Section 2701 are satisfied, the retained preferred interest isn't valued at zero, but rather, the FMV of the retained preferred interest is deducted from the FMV of the partnership capital. The remainder will be a gift unless the holders of the junior equity pay or contribute an equivalent value of their interest. Notwithstanding the "subtraction method" employed by the Treasury regulations, Section 2701 deems the junior equity interest to have a value of not less than 10 percent of the sum of: 1) the total value of all equity interests in the entity, and 2) the total amount of indebtedness of the

entity to the transferor.

When the requirements of Section 2701 are satisfied, the difference is the gift tax value (less consideration paid) of the junior equity interest. This calculation is made in accordance with Treas. Regs. Section 25.2701-3. The regulations contain certain biases, which can have a significant impact upon the planning.

Easier Said Than Done

The freeze partnership can be used to transfer values out of the estate without triggering inherent gain on negative capital assets and without foregoing the basis step-up that result from many common estate-planning techniques. Both GRATs and IDGTs typically involve a transfer of negative capital assets to a grantor trust. Absent the grantor trust rules, a transfer to a GRAT would be treated as a part sale/part gift to the extent liabilities exceed basis, and a transfer to an IDGT would be treated as an IRC Section 453 installment sale. Under well-established authorities, no income tax consequences apply to such a transfer, since the grantor continues to be treated as the owner of the trust property under the grantor trust rules.⁶

The problem with transfers to grantor trusts is that, eventually, the trust will cease to be a grantor trust. At that time, the tax consequences avoided at inception may be triggered. The GRAT technique is unsuitable for negative capital assets assuming the GRAT ends during the grantor's lifetime, as this will trigger gain if the grantor trust assets are subject to liabilities in excess of basis.⁷ If upon termination of the GRAT term, the negative capital assets remain in trust, and the trust continues to be a grantor trust, the negative consequences of either gain recognition or loss of a basis step up will still be inevitable.

There's also significant risk that the IDGT will cause, at some point, gain recognition on the negative capital assets, since, in general, the IDGT will terminate its grantor trust status upon the grantor's death. The law isn't clear on whether the grantor's death should likewise be deemed a sale triggering gain. There's disagreement among respected commentators as to this issue.⁸ Similarly, there's a serious question as to whether the grantor's death gives rise to an IRC Section 1014 basis step-up.⁹

Another concern is that there may be gain recogni-

tion on the unpaid installment notes upon the grantor's death or other termination of grantor trust status in the context of an installment sale to a grantor trust.¹⁰ Even if gain isn't recognized at the time of death,¹¹ gain recognized after death is income in respect of a decedent when the note is paid.¹² Under such installment sale reporting, the successor in interest reports the deferred gain as installment payments are made. This result occurs because, under Revenue Ruling 85-13, the original installment sale to the grantor trust wasn't deemed a sale for federal income tax purposes, and the decedent didn't report income under the installment method

IRC Section 721 affords nonrecognition treatment upon the contribution of appreciated property to a partnership.

during his lifetime. Thus, payments subsequent to the decedent's death constitute gain.

Consequently, it would appear imprudent to plan on avoiding gain upon the death of the grantor of a trust that purchased property during the grantor's lifetime under an installment sale transaction. This is especially so if the note is outstanding upon death.

Moreover, with respect to a negative capital asset, at a minimum, the loss of a basis step up will result in the succeeding generation being forced to pay a price in income tax terms. The succeeding generation will be saddled with phantom income that would have been avoided had there been a basis step up on the negative capital. The lack of a basis step up means that the succeeding generation won't benefit from depreciation deductions that would otherwise be available to offset the phantom income that results from amortization of the indebtedness. This phantom income usually results from gross rental income being applied to principal amortization. Thus, this phantom income will typically be subject to taxation at ordinary income rates. Alternatively, if the

succeeding generation sells the property, the gain (even if taxed at capital gains rates) may consume all or a portion of the inherited equity. In extreme cases, the tax can exceed the equity value, leaving the heirs with a tax liability they don't deserve. This liability could bankrupt the heirs.

Through proper structuring, substantially all of the income tax benefits that can be achieved through grantor trust techniques can be achieved through the freeze partnership. However, the income tax disadvantages and the uncertainty of whether gain is recognized and whether there will be a basis step-up upon death of the grantor can be avoided. If properly structured, it should be possible to obtain a basis step-up under Section 1014 on the liabilities in excess of basis plus any equity value retained by the senior preferred interest.

It's also notable that the entity freeze, if properly

The higher returns that must be paid on the senior preferred interest may be a real impediment to effectuating a viable freeze.

structured, can entirely eliminate the risk that the built-in gain on liabilities in excess of basis will be triggered upon the grantor's death or other termination of the grantor trust.

Low Basis Leveraged Real Estate

Generally, IRC Section 721 affords nonrecognition treatment upon the contribution of appreciated property to a partnership.¹³ If the contributed property has an FMV in excess of its adjusted income tax basis, IRC Section 704(c) will come into play to require certain allocations to avoid shifting the precontribution gain to the noncontributing partner.

IRC Section 752 governs how partnership indebtedness is allocated among partners. Recourse debt is allocated to the partner who bears the economic risk of loss. A different set of rules applies for nonrecourse debt

since the partners don't bear the economic risk of loss.

Typically, when property is contributed subject to nonrecourse indebtedness, the default provisions of the Section 752 regulations preclude such a debt shift. However, if the property is subject to recourse indebtedness, if the indebtedness is guaranteed by one of the partners or if the lender is a related party to the partnership, a debt shift is possible. In the context of a freeze partnership, in which the contributing partner is a member of the senior generation making a contribution in exchange for a preferred partnership interest, there generally will be no debt shift if the contributing partner is personally liable for the debt or is a guarantor, because the liabilities will be allocated to the contributing partners.

Transactional Structures

Armed with the guiding principles behind a successful freeze partnership, consider some of its key transactional structures.

Simple real estate freeze partnership. In the simple real estate freeze partnership structure, Senior contributes low basis leveraged real estate to a limited partnership or LLC in exchange for a frozen preferred interest that accrues a "qualified" payment or distribution equal to a percent return of the value of Senior's capital contribution, which must be determined by appraisal. The appraisal determines the market rate of return that would have to be paid on the preferred interest, so that it would be worth no less than 90 percent of the value of the family-controlled interests in the partnership. The 90 percent value requirement is a function of IRC Section 2701's requirement that at least 10 percent of the partnership equity is attributable to the junior equity interest.¹⁴ If Senior has contributed noncontrolling interests in lower tier real estate partnerships or LLCs, his preferred interest should be valued at a discount to reflect lack of marketability and control. Under the Section 2701 regulations, there's a rule that all family-controlled interests should be valued as if held by a single individual.¹⁵ If that rule were applicable, no such discounts would apply. However, this regulation contains a rule that, notwithstanding the family attribution rules, actual FMV is used for capital contributions. Thus, on these facts, there may be valuation discounts applicable to the contribution of interests in lower tier entities—perhaps

even of family-controlled interests. Some practitioners are concerned that if the lower tier entities were created principally for the purpose of creating discounts, the government may not recognize the discounts. Others are concerned that unless the lower tiered entities have non-family members as partners, the discounts wouldn't be recognized.

Another concern is that since the partnership is essentially between the grantor and a grantor trust, it won't be recognized as a partnership for income tax purposes. It will become a partnership for income tax purposes only at the time the trust ceases to be a grantor trust, likely not until the grantor's death. At that point, it will become a partnership between the grantor's estate and the former grantor trust. There will be significant uncertainty as to the treatment of the termination event. It will also be unclear as to whether there will be a basis step-up to the estate for the entire share of liabilities in excess of basis of the contributed property that would have been treated as transferred from the grantor. There may also be a question as to whether gain would be recognized—although I believe the better view is that no such gain is recognized.

Liabilities with Senior. This uncertainty can be avoided by some structuring when the freeze partnership is created to keep the liabilities with Senior, by treating the entity as a partnership for income tax purposes, rather than a disregarded entity. To accomplish this, create a nondisregarded entity to be the initial partner, who will acquire the junior equity interest. An example of a nondisregarded entity is an LLC with the grantor and one other member—even one with a small interest. It's important to note that the low basis leveraged property should be contributed in exchange for the senior preferred ownership interest. Different property, presumably unencumbered property or cash, should be contributed to the nondisregarded entity formed to hold the junior equity interest. The nondisregarded entity would, in turn, contribute this property to the partnership in exchange for the junior equity interest. This other property can be contributed either by the grantor or by other family members. If the grantor contributes it, the grantor would receive, in exchange, an ownership interest in the nondisregarded entity. The grantor could then gift or sell that interest to a grantor trust. All of the income tax items (except for the small percentage

owned by others) would flow through to the grantor either directly as the holder of the senior preferred interest, or indirectly from the nondisregarded junior equity interest holder through the grantor trust as grantor. The separate existence of the junior equity interest holder should be sufficient to treat the partnership as a freeze partnership with two partners for income tax purpose. One partner would be the grantor. By operation of the second tier rule for nonrecourse liabilities under Section 752, all of the liabilities the contributed property was subject to at the time of contribution, would be allocated to the grantor's senior preferred interest.

The freeze partnership may not work particularly well for low yielding assets that wouldn't generate a sufficient return to pay the required return on the senior preferred interest.

This interest would be included in the grantor's estate for estate tax purposes upon the grantor's death, which should result in a basis step-up for the entire negative capital under Section 1014.

Leaky freeze. It may be the case that the freeze partnership is the planning vehicle of choice because the GRAT and IDGT don't work well for low basis leveraged assets with liabilities in excess of basis. However, the freeze partnership may not apply the artificially lower rates used in GRATs (the Section 7520 rate) or IDGTs (the Section 1274 applicable federal rate (AFR)). The rate that must be paid on the preferred interest is determined by appraisal and may be considerably higher than the Section 7520 or AFR rate.

The higher returns that must be paid on the senior preferred interest may be a real impediment to effectuating a viable freeze. For this reason, the freeze partnership has sometimes been referred to as a "leaky freeze."

It's leaky because too much must be paid back to Senior, which cuts against traditional estate-planning objectives. Accordingly, it may be desirable to seek methods to minimize the return that must be payable to Senior.

In the leaky freeze, comparatively high rates of return must be paid on preferred interests to avoid the negative gift tax consequences. To minimize the "leaky" aspect of the freeze, it should be possible to reduce the equity that would otherwise be allocated to the senior preferred interest by introducing into the capital structure a note owed to the senior generation that bears interest at the AFR. Assuming that note represents bona fide indebtedness, it should effectively reduce the equity that must accrue the higher rate of return that must be paid on the senior preferred interest. Section 2701 clearly contemplates that there may be indebtedness owed to Senior within the capital structure of a freeze partnership. It does this by measuring the 10 percent minimum value that must be attributed to the junior equity against the total equity plus indebtedness owed to Senior.¹⁶ **If the equity is too thin, this note might be reclassified as equity for tax purposes, which would likely defeat this strategy.** In addition, it's likely that if the entity were leveraged in this manner, a somewhat higher return would be warranted on the remaining equity. However, this shouldn't be sufficient to negate the benefits of interposing leverage to the transferor into the structure. Lastly, exercise care if the AFR note is granted to Senior in connection with a contribution of appreciated property to the freeze partnership, because the disguised sale of property rules of IRC Section 707(a)(2)(B) may be applicable.

Reverse freeze. Lastly, the freeze partnership may not work particularly well for low yielding assets that wouldn't generate a sufficient return to pay the required return on the senior preferred interest. In those situations, the "reverse freeze" may be a viable alternative. Instead of giving the junior equity to Junior, the transferor retains the junior equity and the preferred stock is gifted to Junior. Alternatively, Junior contributes assets to the freeze partnership in exchange for its preferred interest. In either case, the higher yields that must be paid on the preferred interest will accrue to the benefit of Junior. Over time, this return may be more valuable than the growth and appreciation that would be earned by the junior equity

interest now held by Senior. Note that in this scenario, the imposition of family attribution upon the valuation of the preferred interest contemplated in the Section 2701 regulations may actually benefit the junior holders of the preferred interest. This is because **equity that accrues to the preferred return won't be discounted, and the rate of return that will be required on the preferred interest may be higher than the return generated by the underlying partnership assets. This arbitrage can shift value away from Senior.**

Overcoming Hurdles

A great deal of income tax and estate planning sophistication is required to properly design and effectuate a freeze partnership. To be competitive with other freeze techniques, such as installment sales to IDGTs and GRATs, entity freezes governed by IRC Section 2701 present a number of significant hurdles. However, only with the partnership freeze will there be certainty as to the ability to obtain a basis step-up upon death for real estate subject to liabilities in excess of basis or negative capital. Moreover, other techniques may actually trigger this built-in gain, which can result in a tax that consumes a substantial portion or, perhaps, the entire equity value of these low basis leveraged assets. Unfortunately, the partnership freeze technique is often overlooked because it presents significant complexities. Also, since the return that must be paid on the frozen ownership interest can't be tied to the AFR, the economics of the freeze partnership can be a challenge to the planner. However, it's possible to overcome these challenges by using the right ideas and techniques.

Endnotes

1. *Commissioner v. Tufts*, 461 U.S. 300 (1983).
2. Partnership freezes aren't the only estate freeze techniques that may be subject to Internal Revenue Code Section 2701. If the Internal Revenue Service believes that a note to an intentionally defective grantor trust is equity rather than debt, it will argue that the trust is a preferred partnership interest subject to IRC Section 2701. Unless the retained interest includes a qualified payment right, the interest is valued at zero, causing the transferred asset to be a taxable gift valued at full fair market value. See *Karmazin v. Comm'r*, T.C. Docket No. 2127-03; See also IRS Private Letter Ruling 9535026 (May 31, 1995).
3. See Revenue Reconciliation Act of 1990, passed by Congress on Oct. 27, 1990 and signed by President George H.W. Bush on Nov. 5, 1990. Under this act, mostly in Section 2701, there are a number of provisions that were specifically

- designed to preclude entity freeze planning techniques that were condoned by case law. See, e.g., *Estate of Harrison v. Comm’r*, 42 T.C.M. 1307 (1987); *Estate of Watts v. Comm’r*, 51 T.C.M. 60 (1985), *aff’d*, 823 F.2d 483 (11th Cir. 1987); *Estate of John G. Boykin*, 53 T.C.M. 345 (1987). These cases involved rights belonging to the senior preferred interest holder that lapsed upon death, but which were allowed to be taken into account in determining whether there was a gift. See also IRS Technical Advice Memorandum 8510002 (Nov. 26, 1984) and IRS TAM 8401006, (Sept. 28, 1983) (holding that decedent taxpayer’s voting control should be taken into account in valuing stock for estate tax purposes when the taxpayer owned voting shares in a family-owned corporation that became nonvoting at his death).
4. One method of valuing the option is known as the Black Scholes equation, first articulated by Fischer Black and Myron Scholes, in their 1973 paper, “The Pricing of Options and Corporate Liabilities.”
 5. IRC Section 2701(a)(3)(A).
 6. See *Rothstein v. United States*, 735 F.2d 704 (2d Cir. 1984) and Revenue Ruling 85-13, 1985-1 C.B. 184.
 7. See Treasury Regulations Section 1.1001-2(c), Ex. 5 (providing grantor recognizes gain upon termination of grantor trust status equal to the excess of his relief from partnership debt over the basis in his partnership interest). See also *Madorin v. Comm’r*, 84 T.C. 667 (1985) (upholding Ex. 5 in Treas. Regs. Section 1.1001-2(c) on similar facts, when the grantor realizes gain from debt relief on disposition of trust assets at the moment when grantor trust status ceases and trusts became separate taxable entities); Rev. Rul. 77-402, 1977-2 C.B. 222 (ruling grantor recognizes gain on cessation of grantor trust status as a taxable disposition of partnership interest measured by the difference between the basis in the partnership and his share of partnership liabilities).
 8. Compare Jonathan G. Blattmachr, Mitchell M. Gans and Hugh H. Jacobson, “Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor’s Death,” 97 *J. Tax’n* 149 (2002); Carol A. Cantrell, “Gain Is Realized at Death,” *Trusts & Estates* (February 2010) at p. 20; Deborah D. Dunn and David A. Handler, “Tax Consequences of Outstanding Trust Liabilities When Grantor Trust Status Terminates,” 95 *J. Tax’n* 49 (2001). See also IRC Section 684 (codifying that losing grantor trust status on foreign grantor trusts results in recognition of gain). Treasury regulations extend the rule of foreign grantor trusts to domestic grantor trusts. Treas. Regs. Section 1.684-2(e)(2), Ex. 2. See also *Crane v. Comm’r*, 331 U.S. 1 (1947) (many commentators believe *Crane* is the basis for the “no gain on death” rule). These commentators also argue that death of the grantor of a domestic grantor trust should have the same result as a foreign grantor trust. See Rev. Rul. 77-402, 1977-2 C.B. 222 (holding that gain is recognized when a trust ceases to be a grantor trust by reason of expiration or lapse of powers).
 9. See Treas. Regs. Section 1.1014-2(a)(1) (stating that there will be a basis step-up on property acquired from a decedent only if the property is included in the decedent’s gross estate for estate tax purposes).
 10. See, e.g., Carol A. Cantrell, “Income Tax Problems When the Estate or Trust is a Partner,” for ALI-ABA Planning Techniques for Large Estates, May 16-20, 2011 (November 2010).
 11. See IRC Section 453B(c).
 12. IRC Section 691; Treas. Regs. Section 1.451-1(b)(2).
 13. Compare with IRC Section 351, which conditions nonrecognition upon transfer of appreciated property to a corporation upon the transferors having “control” immediately after the contribution. Control is defined as ownership of 80 percent or more of the combined classes of stock immediately after the contribution.
 14. IRC Section 2701(a)(4)(A). Alternatively, the junior generation can contribute 10 percent of the capital to the partnership.
 15. Treas. Regs. Section 25.2701-6. There’s a question as to whether this rule continues to apply in light of the change in the government’s position on intrafamily discounts as reflected in Rev. Rul. 93-12.
 16. IRC Section 2701(a)(4)(A).