ALL IN THE FAMILY: SHOULD THE
ATTRIBUTION CONCEPT APPLY TO
DISALLOW A MINORITY DISCOUNT
FOR LACK OF CONTROL?*

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INTRODUCTION

An important estate planning aspect of closely-held corporations1 is the method of valuation of shares of stock.2 Because there
is generally no established market for the stock of closely-held
corporations, valuation is based on criteria which include the underly-
ing asset value of the corporation, the capitalized earnings of the
corporation, the dividend-paying capacity of the corporation and
“other relevant factors.”3

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1. For purposes of this article, the term closely-held corporation is used to
identify:

Those corporations the shares of which are owned by a relatively limited
number of stockholders. Often the entire stock issue is held by one family.
The result of this situation is that little, if any, trading in the shares takes
place. There is, therefore, no established market for the stock and such
sales as occur at irregular intervals seldom reflect all of the elements of a
representative transaction as defined by the term ‘fair market value.’

2. For a discussion of the valuation of shares of stock in closely-held corpora-
tions, see Cohan, Valuation of Interests in Closely Held Businesses, 44 TAXES 504
(1966); Emory, A Professional Appraiser's Approach to Fair Market Valuation of
Closely-Held Securities, 8 EST. PLAN. 228 (1981); Engelbrecht & Davison, A Statistical
Look at Tax Court Compromise in Estate and Gift Tax Valuation of Closely
Held Stock, 55 TAXES 395 (1977); Engelbrecht & Leeson, Valuation of Closely Held
Stock, 31 TAX. EXEC. 57 (1978); Fellows & Painter, Valuing Close Corporations for
Federal Wealth Transfer Taxes: A Statutory Solution to the Disappear-
ing Wealth Syndrome, 30 STAN. L. REV. 895, 896 n.10 (1978).

following criteria for the valuation of closely-held stock: “(2) In the case of shares
of stock, the company's net worth, prospective earning power and dividend-paying

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One of the "other relevant factors" in such a valuation is the minority discount for lack of control. Discounts may also be allowed to reflect lack of marketability, and other factors important to closely-held corporations.

A minority discount for lack of control is based on the rationale that a minority shareholder lacks sufficient control to influence the payment of compensation and dividends, the management of the corporation and the decision to liquidate. The concept that a minority interest in a closely-held corporation should be discounted to reflect the lack of control of a minority shareholder is generally accepted.

capacity, and other relevant factors... " It should be noted that Treas. Reg. § 25.2512-2(f) applies to the valuation of closely-held stock for gift tax purposes. Id. at § 25.0-1(a)(1), 3 Fed. Tax Reg. at 759. Treas. Reg. § 20.2031-2(f) applies identical criteria, id. at § 20.2031-2(f), 3 Fed. Tax Reg. at 572, to the valuation of closely-held shares for estate tax purposes. Id. at § 20.0-1(a)(1), 3 Fed. Tax Reg. at 537. The dividend-paying capacity is often considered to have little importance in the valuation of stock in a closely-held corporation. Arneson, Dividend Paying Capacity Has Little or No Relevance in Valuing Most Closely Held Corporations, 59 Taxes 251, 252 (1981).

4. Treas. Reg. § 25.2512-2(f), 3 Fed. Tax Reg. 759, 759 (West 1982) provides: "Some of the 'other relevant factors' referred to in subparagraphs (1) and (2) of this paragraph are: ... the degree of control of the business represented by the block of stock to be valued. ..." Id. See Rev. Rul. 59-60, 1959-1 C.B. 237, 238-39 which provides that one of the factors to be considered in the valuation of shares of stock of a closely-held corporation includes "the size of the block to be valued." See also Maher, An Objective Measure for a Minority Interest and a Premium for a Controlling Interest, 57 Taxes 449, 450 (1979), where the author stated:

It has long been recognized that the owner of a minority interest in a closely held business is at a distinct investment disadvantage. As a practical matter such security owners can be frozen out of decisions that affect the management and operation of the enterprise. Courts have often concluded that business values should be discounted if they represent a minority interest.


7. E.g., Estate of Piper v. Commissioner, 72 T.C. 1062, 1082-84 (1979) (discussed in the text accompanying notes 106-11 infra), which allowed a discount to reflect the undiversified nature of the stock portfolios held by an investment company. See also Moyer, supra note 2, at 51-52.

8. See Arneson, Minority Discounts Beyond Fifty Percent Can Be Supported, 59 Taxes 97, 110 (1981); Maher, supra note 4, at 450; Kelley, supra note 2, at 237.

In a recent revenue ruling, however, the Internal Revenue Service applied a family attribution concept to disallow a minority discount for lack of control in a situation where the transfer was part of a family controlling interest. The purpose of this article is to review the position of the Internal Revenue Service regarding the minority discount for lack of control in light of the treasury regulations, rulings and cases. An examination of the applicable authority and the underlying rationale for the minority discount for lack of control will reflect that the position of the Internal Revenue Service is incorrect.

REVENUE RULING 81-253

The factual situation addressed by Revenue Ruling 81-253 involved a donor who owned one hundred percent of the shares of stock of a closely-held corporation and made simultaneous gifts of these shares equally to three children. The only asset of the corporation was a parcel of real estate. According to the facts: (1) there was no restriction on the voting or disposition of corporate shares; (2) there were no negotiations under way for the disposition of the corporation's asset or a disposition of shares; and (3) there was no evidence of family discord or other factors that would indicate that the family would not act as a unit.

After reviewing the statutory background, the ruling refers

But see Richardson v. Commissioner, 151 F.2d 102, 103 (2d Cir. 1945), cert. denied, 326 U.S. 796 (1946).

10. Rev. Rul. 81-253, 1981-2 C.B. 187, 187-88. Family attribution is a concept which attempts to define ownership through characteristics of control. For example, a husband may exercise an element of control even though stock in a corporation is owned by his wife. Attribution rules apply in situations covered by I.R.C. §§ 267, 318, 544, 554 and 1563. Under I.R.C. § 318 an individual shall be considered to constructively own the stock of related persons. For a discussion of attribution, see Cheifetz, Ownership Through Association: The Rules of Attribution, 60 Taxes 669 (1982). One article has objected to the term "family attribution" in regard to the disallowance of a minority discount. See note 23 infra.

12. Id.
13. Id.
14. Id. This fact is probably included to eliminate any confusion regarding a discount for lack of marketability. See note 5 and accompanying text supra.

15. Rev. Rul. 81-253, 1981-2 C.B. 187, 187. This fact is probably included to distinguish the facts from Blanchard v. United States, 291 F. Supp. 348 (S.D. Iowa 1968) (discussed in the text accompanying notes 48-56 infra), where negotiations had been undertaken and were a factor in the court's decision. Id. at 351.

17. Id. at 188. The ruling cites Treas. Reg. § 25.2512-1, which provides: The value of the property is the price at which such 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. The value of a particular item of property is not the price that a
to four cases which have "held or implied" that a minority discount is not available when a transfer is part of a family controlling interest.\(^{18}\) The ruling indicates that the Internal Revenue Service will follow these four cases.\(^{19}\) The ruling also refers, without discussion, to seven cases which have allowed a minority discount,\(^{20}\) and indicates that the Internal Revenue Service will not follow these decisions.\(^{21}\)

In its concluding paragraphs Revenue Ruling 81-253 states clearly the position of the Internal Revenue Service regarding minority discounts for lack of control:

It is the position of the [Internal Revenue] Service that ordinarily no minority discount will be allowed with respect to transfers of shares of stock among family members where, at the time of the transfer, control (either majority voting control or de facto control) of the corporation exists in the family. . . .\(^{22}\)

Thus, the Service appears to be applying the concept of family attribution so as to disallow a minority discount for lack of control in the valuation of closely-held shares.\(^{23}\) There is, however, one exception. The ruling states: "When there is evidence of family dis-


\(^{22}\) Id.

\(^{23}\) One article has objected to the use of the term "family attribution" in regard to the disallowance of a minority discount. Eichel & Abrams, Family Ownership May Jeopardize Minority Discounts on Closely-Held Stock, 60 TAXES 378, 378-79 (1982). The authors note:

'Family attribution' appears to be a term of art where various forms of common or family ownership are asserted to be attributed to the decedent, donor or donees where closely held stock is involved. In a way the term is misleading, implying as it does somehow an applicability of Section 318 . . . Since Section 318 by its terms specifically limits its operation to these listed sections, there can be no means to extend it to the estate and gift tax areas. Therefore, it should be noted that there is no specific statutory basis for the family attribution concept in estate and gift tax cases.
cord or other factors indicating that the family would not act as a unit in controlling the corporation, a minority discount may be allowed.\textsuperscript{24}

The justification offered for the position of the Internal Revenue Service is premised upon the concept that a “unity of ownership and interest” exists in regard to a family controlling interest.\textsuperscript{25} The unity of ownership rationale is, in turn, based upon the assumption that the only willing buyer of a minority interest would be another family member. The ruling says:

It is unlikely that under circumstances such as exist in the instant case, shares that are a part of a controlling interest would be sold other than as a unit except to a family member in whose hands the shares would retain their control value because of the family relationship.\textsuperscript{26}

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\textit{Id.}
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Another author has gone so far as to suggest that I.R.C. § 318 applies to the valuation of closely held stock. \textit{See} Norris, \textit{supra} note 2, at 187-88. The application of the attribution rules of I.R.C. § 318 to the valuation of closely-held stock is “unsupported by statute.” Eichel & Abrams, \textit{supra} note 23, at 390. \textit{See generally} Fellows & Painter, \textit{supra} note 1, at 928.


\textsuperscript{25} \textit{Id.} To support the “unity of ownership and interest” argument, the Internal Revenue Service cites \textit{Cutbirth} v. United States, 76-2 U.S. Tax Cas. ¶ 13,147 (N.D. Tex. 1976) and \textit{Dattel} v. United States, 76-1 U.S. Tax Cas. ¶ 13,119 (N.D. Miss. 1975). Both cases concerned the issue of whether minority discounts should be allowed for undivided interests in real property. \textit{Cutbirth}, 76-2 U.S. Tax Cas. at 85,666; \textit{Dattel}, 76-1 U.S. Tax Cas. at 84,343. Like the other cases cited in the Revenue Ruling, \textit{Cutbirth} and \textit{Dattel} do not directly address the question of family attribution in the context of closely-held corporations. \textit{Id.} The other cases cited in the ruling are: \textit{Powers} v. Commissioner, 312 U.S. 259 (1941); \textit{Maytag} v. Commissioner, 187 F.2d 962 (10th Cir. 1951); \textit{Messing} v. Commissioner, 48 T.C. 505 (1967), \textit{acq.} 1968-1 C.B. 2 (which is cited for the proposition that the fair market value of a piece of property depends on the facts and circumstances); \textit{Estate of Schroeder} v. Commissioner, 13 T.C. 259 (1949), \textit{acq.} 1949-2 C.B. 3 (which is cited for the proposition that a minority discount may be proper where the shareholder is unrelated to other shareholders).

\textsuperscript{26} Rev. Rul. 81-253, 1981-2 C.B. 187, 188. The approach adopted by the Internal Revenue Service in Rev. Rul. 81-253 bears a striking similarity to suggestions contained in a recent article. \textit{See} Fellows & Painter, \textit{supra} note 1, at 927-28 where the authors note:

As the previous section suggested, lifetime transfer of minority interests should be considered as part of the original controlling block to prevent control from escaping taxation. The disappearing wealth syndrome, however, may take a second form. Even if no single shareholder owns a controlling interest, the interests of a group of stockholders may be sufficiently similar that the groups as a unit exercises de facto control of the enterprise. When such de facto control exists, the shares of members of the controlling group are more valuable than if no control existed; this de facto control is not taken into account in valuing the shares. To the extent that members of the controlling group transfer their stock by gift or at death to other persons with similar interests, de facto control is transferred free of any tax because no value in the form of a control premium is assessed against the shares transferred. One solution would be to attribute the ownership of voting shares by related family members and entities when valuing the
BACKGROUND

Despite the fact that authority for a minority discount for lack of control is contained in the treasury regulations\(^\text{27}\) and an early revenue ruling,\(^\text{28}\) the Internal Revenue Service continues to litigate the question\(^\text{29}\) and disallow minority discounts for lack of control in its published rulings.\(^\text{30}\)

Because of the "inconsistency" of judicial authority,\(^\text{31}\) an analysis of the eleven cases\(^\text{32}\) cited by the Internal Revenue Service in Revenue Ruling 81-253 is in order. In considering these cases, one must remember the question for resolution: whether it is appropriate to apply the family attribution concept to disallow a minority discount for lack of control.\(^\text{33}\)

THE CASES THE INTERNAL REVENUE SERVICE INDICATES IT WILL FOLLOW

The most significant of the four cases which will be followed

shares for transfer tax purposes. Under this approach, if A, B and C, who are brothers, each own 30 percent of the outstanding voting shares of XYZ Corporation, after A makes a gift of the remaining 10 percent interest in the corporation to his son, S, the 10 percent interest would be valued as if part of a 100 percent control block because A will be deemed to be constructive owner of all of the shares immediately before the gift. Similarly, if A were to die owning a 30 percent interest, it would be valued as if part of a 100 percent control block.

Id. The article also indicates, as does Rev. Rul. 81-253, that family discord should be a factor to be considered in the application of family attribution rules:

Application of the attribution rules, however, may create harsh results. De facto control is not the equivalent of ownership of actual control. At any time, one of the shareholders may find it contrary to his own interest to agree with the others. Even assuming that initial transferees from a majority shareholder will have common interests and will share jointly in the benefits of control, subsequent transferees are less likely to share those interests. Thus, the control enjoyed by the donor or decedent is tenuous at best, making imposition of the transfer tax inappropriate.

Id. at 928.

It is interesting to note that the solution offered by the authors is an amendment to the Internal Revenue Code requiring that all gratuitous transfers of corporate stock be aggregated rather than assessed separately. Id. at 924-26.

29. See, e.g., cases at notes 18 and 20 supra.
32. See notes 18 and 20 and accompanying text supra.
33. As will be seen, some of the cases this article will discuss do not even concern the concept of family attribution, while others only impliedly accept or reject its use.
by the Internal Revenue Service is *Driver v. United States*.\(^{34}\) In *Driver* the donor made gifts of 11,424 shares to eight individuals.\(^{35}\) Half of the gifts were made on December 31, 1968, and the other half were made on January 2, 1969.\(^{36}\) Approximately sixty-six percent of the stock was given to donor's nephew, James O. Driver, Driver's wife and his three children.\(^{37}\) The District Court for the Western District of Wisconsin specifically rejected the minority discount for the lack of control stating: "We deal here with an effort to convert a transfer of a majority interest into one of a minority interest by effecting it in two installments two days apart."\(^{38}\) The court also rejected a discount for a lack of marketability.\(^{39}\)

The taxpayer in *Driver* cited *Whittemore v. Fitzpatrick*\(^{40}\) for the proposition that neither family attribution nor cumulation of gifts made two days apart, and in different years, was appropriate.\(^{41}\) The government cited *Blanchard v. United States*\(^{42}\) to establish the contrary.\(^{43}\) The court, however, distinguished both cases, stating: "The facts in both cases are substantially different from those of the instant case, and neither purports to enshrine form over substance."\(^{44}\) In reaching its decision, the court aggregated the two minority gifts and valued the stock as if a majority block had been transferred, thus holding that the minority discount for lack of control was inapplicable.\(^{45}\)

Although *Driver* has been subject to criticism,\(^{46}\) the Internal

\(^{34}\) Driver v. United States, 76-2 U.S. Tax Cas. ¶ 13,155, at 85,695 (W.D. Wis. 1976).

\(^{35}\) Id. at 85,696.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. at 85,699.

\(^{39}\) Id.


\(^{41}\) Driver v. United States, 76-2 U.S. Tax Cas. at 85,699.


\(^{43}\) Driver v. United States, 76-2 U.S. Tax Cas. at 85,699.

\(^{44}\) Id.

\(^{45}\) Id. at 85,699-700.

\(^{46}\) For the most direct criticism of *Driver*, see Estate of Bright v. United States, 658 F.2d 999, 1005 (5th Cir. 1981) (discussed in the text accompanying note 83 infra). See also Fellows & Painter, *supra* note 1, at 913-14, where the authors note: *Driver v. United States* provides a good example of the judicial confusion that attends the concepts of majority premium and minority discount.

\(\ldots\) The court cannot avoid the difficult question presented by the case—whether small gifts of stock should be aggregated and valued as a part of a majority block rather than treated as separate minority blocks for the gift tax—by asserting it is neither permitting a discount nor assessing a premium. \(\ldots\). The court's statement that valuation was made without application of a discount or premium is contradicted by the method the court
Revenue Service cited this case in Revenue Ruling 81-253 to support the proposition that the concept of family attribution should, and will be applied to disallow a minority discount.\textsuperscript{47}

\textit{Blanchard v. United States}\textsuperscript{48} is another of the four cases cited in Revenue Ruling 81-253 which the Internal Revenue Service indicates it will follow.\textsuperscript{49} In \textit{Blanchard}, a donor made gifts of 458 shares of stock to six irrevocable trusts for the benefit of grandchildren.\textsuperscript{50} The date of the transfers in trust was December 10, 1959, and the gifted shares were subsequently sold on December 31, 1959 for $707.45 per share—to a single purchaser.\textsuperscript{51} The position of the Internal Revenue Service was that this arm’s length sale of the stock was the best evidence of its value.\textsuperscript{52} The District Court for the Southern District of Iowa noted:

Apparently, the plaintiff relies on the principle of non-aggregation in order to reach the better-established principle that the per share value of minority interests in closely-held corporations, or any corporation for that matter, is usually less than the per share value of the controlling interest. \ldots More to the point, the Government has no real quarrel with validity of this valuation principle. Rather, the Government contends that \ldots overriding considerations should prevent its application to the facts of this case.\textsuperscript{53}

One of the “overriding considerations” noted by the court was the fact that negotiations for the sale of the stock from the six donee trusts to the single purchaser had been completed in October or November of 1959, when a general understanding as to the purchase price had been reached.\textsuperscript{54} The court therefore concluded that the stock should be valued as part of a majority interest, thus disallowing the taxpayer’s previously claimed minority discount for lack of control.\textsuperscript{55} The determining factor in \textit{Blanchard} was the

\begin{flushleft}
\textit{Id.}\\
\textsuperscript{47} Rev. Rul. 81-253, 1981-2 C.B. 187, 188. \\
\textsuperscript{49} Rev. Rul. 81-253, 1981-2 C.B. 187, 188. \\
\textsuperscript{50} Blanchard v. United States, 291 F. Supp. at 349. \\
\textsuperscript{51} \textit{Id.} \\
\textsuperscript{52} \textit{Id.} at 350. \\
\textsuperscript{53} \textit{Id.} at 351. \\
\textsuperscript{54} \textit{Id.} \\
\textsuperscript{55} \textit{Id.} at 352.
\end{flushleft}
price paid by a willing buyer shortly after the gift.\textsuperscript{56}

The remaining two cases which the Internal Revenue Service indicates it will follow\textsuperscript{57} do not hold that the concept of family attribution applies to disallow a minority discount.\textsuperscript{58}

In \textit{Hamm v. Commissioner},\textsuperscript{59} the donor made gifts to two trusts.\textsuperscript{60} Noting that "valuation of closely held stock is basically a question of judgment rather than of mathematics,"\textsuperscript{61} the United States Court of Appeals for the Eighth Circuit concluded:

If, in view of the over-all complete ownership of the common by the Hamm family, this minority interest point has any real validity, the foregoing convincingly demonstrates that the minority interest aspect was considered by the Court and that its determination was made as to that specific interest.\textsuperscript{62}

As a result, an argument could be made that the valuation reflected a minority discount for lack of control.\textsuperscript{63}

In \textit{Richardson v. Commissioner},\textsuperscript{64} the donor made gifts of stock of two corporations to five trusts created for the benefit of his children.\textsuperscript{65} One of the corporations was a closely-held investment company which owned a stock portfolio.\textsuperscript{66} In disallowing a minority discount, the Circuit Court of Appeals for the Second Circuit noted:

Closely-held stock of a family holding company which was never sold on the open market and was never intended by the organizers of the corporation to be sold, but was intended to be held by members of the family to evidence their respective beneficial rights in securities which were bought and sold by the corporation and which were dealt in on the open market, can only be valued in any real practical way \textit{by primarily considering the value of the securi-}

\textsuperscript{56} \textit{Id.}
\textsuperscript{57} Hamm \textit{v. Commissioner}, 325 F.2d 934 (8th Cir. 1963), \textit{cert. denied}, 377 U.S. 993 (1964); Richardson \textit{v. Commissioner}, 151 F.2d 102 (2d Cir. 1945), \textit{cert. denied} 326 U.S. 796 (1946).
\textsuperscript{58} See notes 59-67 and accompanying text \textit{infra}, where the \textit{Hamm} and \textit{Richardson} cases are discussed.
\textsuperscript{59} Hamm \textit{v. Commissioner}, 325 F.2d at 934.
\textsuperscript{60} \textit{Id.} at 935.
\textsuperscript{61} \textit{Id.} at 940.
\textsuperscript{62} \textit{Id.} at 941.
\textsuperscript{63} The underlying net asset value was $11,509.96 per share and the Tax Court determined that the value was $8,506.40 per share. \textit{Id.} at 937. An argument can be made that the value of $11,509.96 per share was discounted by $3,178.56 per share to reflect a minority discount for lack of control. \textit{See} text accompanying note 62 \textit{supra}.
\textsuperscript{64} Richardson \textit{v. Commissioner}, 151 F.2d at 102.
\textsuperscript{65} \textit{Id.} at 103.
\textsuperscript{66} \textit{Id.} at 104.
ties owned by the corporation. Any other approach would, in our opinion, be futile.\textsuperscript{67}

The decision stands for the proposition that valuation should be based solely on underlying asset value in the context of the family corporation owning investment assets. As a result, it ignores not only the minority discount for lack of control but also the capitalized earnings of the corporation and the dividend-paying capacity of the corporation. This approach based solely on underlying asset value has generally not been followed in other cases.\textsuperscript{68}

**The Cases the Internal Revenue Service Indicates it will Not Follow**

Of the seven cases which the Internal Revenue Service indicates it will not follow, four are gift tax cases\textsuperscript{69} and three are estate tax cases.\textsuperscript{70}

The most significant of the seven cases is *Estate of Bright v. United States*.\textsuperscript{71} In *Bright*, the decedent owned fifty-five percent of the stock of various closely-held corporations as community property with her spouse.\textsuperscript{72} The remaining forty-five percent was owned by unrelated parties.\textsuperscript{73} The case specifically concerned a minority discount to reflect lack of control.\textsuperscript{74}

\textsuperscript{67.} Id. at 105 (emphasis by the court).


\textsuperscript{69.} Id. at 105 (emphasis by the court).


\textsuperscript{71.} Id. at 1000.

\textsuperscript{72.} Id. at 1000.

\textsuperscript{73.} Id.

\textsuperscript{74.} Id. at 1000-01.
The United States Court of Appeals for the Fifth Circuit first rejected the Internal Revenue Service's argument that the decedent's interest in the corporation was an undivided one-half interest in the control block of fifty-five percent. Having lost this argument, the Service then argued for an application of the doctrine of family attribution. This doctrine, however, was categorized by the court as being "non-mandatory."

The court concluded that the concept of family attribution had never been applied in the estate tax situation. It referred to the analogous gift tax area, and concluded that the weight of authority rejected family attribution in that area as well. The court then discussed Blanchard v. United States and concluded that the result in that case was based on the fact that there was a written agreement to sell the shares of the corporation as a control block. The court also discussed the facts and holding of Driver v. United States. Acknowledging that Driver impliedly followed the fam-

75. Id. at 1001.
76. Id. at 1001-02.
77. Id. at 1001 n.2. The court stated:
At several points, the government's brief seems to disavow any attempt to import family attribution into this area. A close reading of the government's brief reveals, however, that the government shuns only the argument that family attribution requires or mandates that the stock of related parties be valued as a unit. The government's position is that the relationship between the decedent, executor or legatee, on the one hand, and another stockholder, on the other hand, is a fact relevant to value. When we refer in this opinion to family attribution, we refer to this non-mandatory version. Similarly, our opinion deals only with family attribution based on the identity of the decedent, the executor or the legatee. It is this identity which is irrelevant under the case law and reasoning which this opinion will develop.

Id. (emphasis by the court).
79. Estate of Bright, 658 F.2d at 1003.
80. 291 F. Supp. 348 (S.D. Iowa 1968). Blanchard is one of the four cases that the IRS indicates in Rev. Rul. 81-253 it will follow. See text accompanying notes 48-56 supra.
81. Estate of Bright, 658 F.2d at 1004-05.
82. 76-2 U.S. Tax Cas. ¶ 13,155 at 85,701 (W.D. Wis. 1976). Driver is one of the
ily attribution doctrine, the court concluded: "Our research has led us to the conclusion that Driver stands alone in judicially en-grafting a family attribution doctrine upon the standards governing gift or estate tax valuation, and, for the reasons set out in this opinion, we decline to follow it." 84

The court next referred to the willing buyer-seller rule, 85 and noted that it was apparent from the language of the applicable Treasury Regulation and court decisions 86 that the willing buyer and seller are “hypothetical” figures—not the estate itself or any specific seller. 87 The court thus concluded that any family attribution facts were irrelevant—valuation must be based on the sale by a hypothetical seller. 88 The court stated: “[T]he relationship between Mr. and Mrs. Bright [the decedent] and their stock is an irrelevant, before death fact. . . . It is clear that the ‘willing seller’ cannot be identified with Mrs. Bright, and therefore there can be no family attribution with respect to those related to Mrs. Bright.” 89

The court in Bright refused to consider a third argument raised by the government, since it had not been raised in the lower court. 90 That argument concerned the proposition that the decedent’s interest represented a swing interest 91 and would thus have a special value to the remaining shareholders who could acquire a control interest by acquiring the swing interest. 92 According to the court: “The ‘willing buyer-seller’ rule renders irrelevant only the real seller and buyer, not the other stockholders.” 93

One of the two remaining estate tax cases allowed a minority

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83. Estate of Bright, 658 F.2d at 1005.
84. Id. at 1005.
85. Id. The court quoted Treas. Reg. § 20.2031-1 (b): “The fair market value is 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.” Id.
86. 658 F.2d at 1005-06.
87. Id.
88. Id. at 1007.
89. Id. at 1006.
90. Id. at 1008.
91. For a discussion of “swing value” and its impact on the valuation of minority interests in closely-held corporations, see Moroney, supra note 2, at 153-54, where the author states: “A minority interest may enjoy some ‘swing value’ if it can join hands with other minority stockholders and achieve some ‘degree of control’ . . . for the purpose of electing a board of directors or merging with another company or liquidating the corporation, as the case may be.”
92. Id. at 1007-08.
93. Id. at 1007.
discount for lack of control,\textsuperscript{94} while the other rejected the valuation of stock owned as community property as a majority interest.\textsuperscript{95} In \textit{Obermer v. United States},\textsuperscript{96} the decedent owned fifty percent of a family corporation.\textsuperscript{97} The other fifty percent of the shares was owned by the decedent's spouse.\textsuperscript{98} The District Court for the District of Hawaii allowed a minority discount of thirty-three and one third percent of the adjusted book value.\textsuperscript{99} The court reasoned:

The so-called mythical buyer would also only obtain 50 percent control of the corporation, the other 50 percent being held by Mrs. Obermer. This divided control did not result in any difficulty so long as Mr. and Mrs. Obermer were living and not estranged. However, the injection of a new owner of Mr. Obermer's half of the stock would certainly complicate matters. Mrs. Obermer certainly could block liquidation of the corporation since the . . . law requires 66 2/3 percent stock ownership to approve any liquidation, and liquidation would seem highly improbable on her part because of the large capital gains tax which would have to be paid, amounting to some $145,000.00. Taking into consideration Mrs. Obermer's good health and life expectancy at age 63, according to the testimony, a mythical purchaser would certainly have to wait a long time for her death and possible liquidation of her stocks at that time. Thus, he would be tied down to having to get along with the income producing ability of the corporation, at least until and unless some other arrangement could be reached with the other stockholder, or she died.\textsuperscript{100}

In \textit{Estate of Lee v. Commissioner},\textsuperscript{101} the decedent owned eighty percent of the common stock and one hundred percent of the preferred stock of a closely-held corporation as community property with her spouse.\textsuperscript{102} The court concluded that the decedent's interest in the community property should be valued separately, \textit{i.e.}, as a minority interest,\textsuperscript{103} and allowed a discount.\textsuperscript{104}

The remaining four cases which the Internal Revenue Service

\textsuperscript{94} Obermer v. United States, 238 F. Supp. 29, 36 (D. Hawaii 1964) (discussed in the text accompanying notes 96-100 infra).
\textsuperscript{96} 238 F. Supp. 29 (D. Hawaii 1964).
\textsuperscript{97} Id. at 31.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 36.
\textsuperscript{100} Id. at 34.
\textsuperscript{102} Id. at 868.
\textsuperscript{103} Id. at 875-76.
\textsuperscript{104} Id. at 877.
indicated it will not follow are gift tax cases. 105 In *Estate of Piper v. Commissioner*, 106 a donor made a gift of all the outstanding shares of two investment corporations to his son and eleven trusts created for the benefit of each of his grandchildren. 107 The value of the stock of the investment companies was initially determined by valuing the shares of stock owned by the investment companies, less a discount for the cost involved in registering such shares. 108 The taxpayer and the Internal Revenue Service agreed that a discount should also be allowed to reflect the undiversified nature of the stock portfolios held by the investment companies, but could not agree as to the amount of the discount. 109 The real question was whether a further discount should be allowed for lack of marketability. 110 After allowing a seventeen percent discount for the undiversified nature of the stock portfolio, the Tax Court also allowed a thirty-five percent discount for lack of marketability. 111 The case does not, however, involve a discount to reflect the lack of control of a minority interest.

In *Clark, Jr. v. United States*, 112 the donor made gifts of voting and non-voting stock to seven donees. 113 The District Court for the Eastern District of North Carolina allowed a discount of forty percent based on the consideration of the following facts:

that the shares of the corporation had no ready market, that the investment portfolio represented a trapped-in capital gains tax liability, that the shares given represented a series of minority interests, that the corporation at this date was faced with the possibility of tax liability because of a history of accumulation of past earnings, that the investment portfolio had not been professionally managed, and that there was no reasonable expectation that the income of the corporation would increase dramatically. 114

As a result, the minority discount for lack of control was one of

106. 72 T.C. 1062 (1979).
107. *Id.* at 1063.
108. *Id.* at 1080-81.
109. *Id.* at 1082.
110. *Id.* at 1084-86.
111. *Id.*
112. 75-1 Tax Cas. § 13,076, at 87,486 (E.D.N.C. 1975).
113. *Id.* at 87,487.
114. *Id.* at 87,489.
several criteria in the valuation process, but the weight accorded the minority discount factor was not reflected.

In *Whittemore v. Fitzpatrick*, the donor made gifts of 600 shares equally to his three children. The taxpayer argued that the gifts should be valued separately while the Internal Revenue Service argued that the gifts should be aggregated. The District Court for the District of Connecticut referred to the control issue as follows: "The conflict is of obvious importance for its impact on value because the power to vote 600 shares would carry power to elect the corporate directors,—not so as to 200 shares." Based on the court's construction of the applicable statute, it held that the gifts should be valued separately. In proceeding with its valuation, the court initially applied underlying asset value of the corporation. It then allowed an additional discount of sixteen percent to reflect the lack of control of a minority interest. In refusing to aggregate the three gifts to the taxpayer's children, the court clearly indicated its rejection of the concept of family attribution.

In *Bartram v. Graham*, the donor transferred 370 shares of stock in an investment company to trusts established for the benefit of his children. The District Court for the District of Connecticut allowed a discount of twenty percent because "the minority position in a closely-held corporation not traded in on any market would undoubtedly cause investors generally to seek a discount from liquidating values, and disposal of the number of shares here involved would require some time, effort and expense." Although the concept of family attribution was not applied, it should be noted that the stock was owned by approximately forty-three different shareholders including individuals, trusts, estates and other entities.

**Earlier Authority Concerning the Discount**

Revenue Ruling 81-253 was preceded by the publication of two
similar letter rulings. The factual situation in Letter Ruling 8010017 is similar to that in Revenue Ruling 81-253, except that in the former the gifts from the donor were made to three trusts for the benefit of the donor's children rather than directly to the children. The difference in Letter Ruling 8010017 is the statement that the gift tax is intended to supplement the estate tax by preventing the loss of tax where large estates are split up by gifts to numerous donees. The Letter Ruling refers to the Tax Reform Act of 1976 and concludes that the tax burden should be substantially the same whether transfers are made during life or upon death. The Ruling states that: "Discounting intra-family transfers of interests in family controlled businesses to reflect minority interests will not permit achievement of the committee's objective of equal tax bases for lifetime or deathtime transfers of the same amount of wealth." This "equal treatment" argument is not expressed in Revenue Ruling 81-253.

In Letter Ruling 8149011, the Internal Revenue Service stated that a minority discount for lack of control is not applicable in closely-held corporations, but that discounts may be allowed for lack of marketability or for the non-voting nature of stock. The factual situation of Letter Ruling 8149011 involved a donor's gifts of fifteen percent of the non-voting shares of stock of a closely-held corporation. This situation is different from that of Revenue Ruling 81-253 in that the Letter Ruling donor retained control of the corporation. It is also different in that there is no special rule regarding family discord. The Internal Revenue Service argued:

Under the circumstances of this case, it is unlikely that any shares will ever be sold to a non-family member because the donor owned all of the shares originally and the shares all remain in the family even after the transfer.

131. Id. at 14.
132. Id.
135. Id. at 8.
136. Id. at 1.
Thus, the shares retain their control value and it cannot be said that the stock is worth any less now than before, especially where, as here, the donor still has the majority control. Accordingly, the donor has no basis for claiming a minority interest discount, and the value of the shares is measured by the value of the property passing from the donor.139

Some other earlier authority rejected the family attribution rules and did allow a minority discount for lack of control.140

The Initial Response to Revenue Ruling 81-253

Estate of Andrews v. Commissioner141 was the first case decided after the publication of Revenue Ruling 81-253. In Andrews, the Tax Court allowed a discount for lack of control and marketability in valuing the stock of several corporations for estate tax purposes even though all stock was owned by family members.142 The decedent owned approximately twenty percent of the outstanding shares of four closely-held corporations.143 The other eighty percent of the stock of the corporations was owned by the decedent’s brothers and sisters.144 The shares had been acquired upon the death of the decedent’s father.145 The corporation had been managed by the decedent and his two brothers and there was no evidence of any family discord.146

Dissatisfied that none of the experts had given appropriate weight to either the corporation’s net assets or earnings and dividend-paying capacity, the court exercised its own best judgment of value.147 To this valuation the court applied a discount for lack of marketability and for lack of control.148 The Tax Court did not reveal the computations which supported its determining of the ultimate fair market value of the stock of the four corporations.149

Although the Internal Revenue Service had permitted a dis-

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139. Id. at 5-6.
140. See, e.g., Koffler v. Commissioner, 37 T.C.M. (CCH) 697, 703-04 (1978); Estate of Kirkpatrick v. Commissioner, 34 T.C.M. (CCH) 1490, 1501 (1975); Gallun v. Commissioner, 33 T.C.M. (CCH) 1316, 1321 (1974); Dean v. Commissioner, 19 T.C.M. (CCH) 281, 288 (1960); Estate of Heppenstall v. Commissioner, 8 T.C.M. (CCH) 136, 142-43 (1949).
141. 79 T.C.M. (P-H) ¶ 79.58, at 79-491 (Nov. 29, 1982).
142. Id. at 79-501 to -502.
143. Id. at 79-492.
144. Id.
145. Id.
146. Id.
147. Id. at 79-501.
148. Id.
149. Id. at 79-501 to -502.
count in initially computing the taxpayer's deficiency. The Tax Court allowed the Service to alter its position and argue that no discount should be allowed. The Service thus offered the two-fold argument that the "willing seller" of the stock of the corporations would be presumed to be one of the five family members and that any sale of stock would be either to a remaining family member, or as part of a controlling family interest. Although the Tax Court distinguished the concepts of a discount for lack of marketability and a discount for lack of control, they were ultimately considered together, because the Service's basis for opposing both discounts was the same.

The Tax Court reviewed Estate of Bright v. United States and decided to follow the "Fifth Circuit's well reasoned and thoroughly researched opinion." In reaching its decision, the court rejected Richardson v. Commissioner and concluded that it should be "read narrowly in view of the long series of subsequent cases in which we have allowed discounts in valuing shares of family corporations that held operating as well as investment assets." It refused to follow Blanchard v. United States, stressing that it was a "unique situation involving a planned sale." The court also rejected Rothgery v. United States.

150. Id. at 79-499. Rev. Rul. 81-253, 1981-2 C.B. 187 was published after the statutory deficiency notice had been issued to the taxpayer. After the publication of Rev. Rul. 81-253, 1981-2 C.B. 187, the Internal Revenue Service will undoubtedly disallow minority discounts for lack of control in every situation. Estate of Andrews v. Commissioner, 79 T.C.M. (P-H) (Nov. 1, 1982) reflects a situation where the Internal Revenue Service allowed a minority discount in its notice of deficiency and attempted to argue its current position under Rev. Rul. 81-253, 1981-2 C.B. 187. This Revenue Ruling does not reflect a general change in the position of the Internal Revenue Service but will predictably cause a consistent disallowance of a minority discount for lack of control in future notices of deficiency.


152. Id.

153. Id. at 79-499 to -500.

154. Id. at 79-500. Estate of Bright v. United States, 658 F.2d 999, 1005 (5th Cir. 1981) (allowing a minority discount for lack of control), is one of the seven cases that the IRS indicates in Rev. Rul. 81-253 that it will not follow. See notes 71-93 and accompanying text supra.


156. Id. Richardson v. Commissioner, 151 F.2d 102, 105 (2d. Cir.) cert. denied, 326 U.S. 796 (1945) (disallowing a minority discount for lack of control), is one of the four cases that the IRS indicates in Rev. Rul. 81-253 that it will follow. See notes 64-68 and accompanying text supra.


158. Id. at 79-500. Blanchard v. United States, 291 F. Supp. 348, 352 (S.D. Iowa 1968) (disallowing a minority discount for lack of control), is another of the four cases that the IRS indicates in Rev. Rul. 81-253 that it will follow. See notes 48-56 and accompanying text supra.


160. 425 F.2d 591, 594 (Ct.Cl. 1973). In that case the Court of Claims relied on net
Although the opinion refers only twice to Revenue Ruling 81-253 and does not analyze the ruling, it must be considered a definite rejection of the ruling as to valuation for estate tax purposes. In addition, the decision presumably reflects the position of the Tax Court in future gift tax cases involving situations similar to that of Revenue Ruling 81-253.

**DISCUSSION**

Although Revenue Ruling 81-253 addresses a limited factual situation, it can be anticipated that the Internal Revenue Service will disallow a minority discount for lack of control in virtually every situation where at the time of the transfer, a family member individually—or family members voting together—control the corporation.

The following factual situations represent common situations in which the Internal Revenue Service may attempt to disallow a minority discount for lack of control:

1. A father owns one hundred percent of the stock of a closely-held corporation and makes gifts of forty-eight percent of the stock equally to his two children. Each of the children is a minority insider. The control of the corporation remains in the father.

2. A father makes a gift of a twenty-six percent interest to his spouse and a gift of a forty-eight percent interest of the stock equally to his two children. This situation involves gifts to minority insiders where no individual controls the corporation.

3. A father makes a gift of all of the stock in a closely-held corporation equally to his three children. This is the Revenue Ruling 81-253 situation and differs from the second factual situation only to the extent that stock ownership is concentrated in one rather than in two generations.

Letter Ruling 8149011 would disallow a minority discount for asset value exclusively to evaluate an automobile dealership. The value of the corporation was held to correspond with the value of its underlying assets. *Id.* at 594.

162. *Id.* at 79-491 to 502.
163. Rev. Rul. 81-253, 1981 2 C.B. 187, 188. The Internal Revenue Service notes that the minority discount is not proper where control—"either majority voting control or de facto control"—exists in the family. *Id.* See also Letter Ruling 8149011, at 8 (Westlaw Aug. 31, 1981).
164. For purposes of the article, a minority insider is defined as a minority shareholder who is a member of the family.
165. The father would be majority insider. For purposes of this article, majority insider is defined as a majority shareholder who is a member of the family; a minority outsider is defined as a minority shareholder who is not a member of the family.
lack of control in the first factual situation. Revenue Ruling 81-253 and Letter Ruling 8010017 would disallow a minority discount for lack of control in the second and third factual situations.

Each of the three factual situations can be analyzed in light of the following criteria:

1. the relative influence of the minority shareholder as to the operations of the corporation;
2. the likely identity of the purchaser of a minority interest and the ability of the minority shareholder to effect a sale to the possible purchasers;
3. the control value of the minority shares to the possible purchaser of the minority interest; and
4. the applicability of a minority discount for lack of control.

This type of analysis is important because the value of the majority shares is based on a sale to a willing buyer, whether hypothetical or otherwise. Each of these factors is analyzed below.

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168. An analysis which focuses on a hypothetical willing seller, or buyer, is somewhat misleading. The logical result as to a willing seller can be reached in one of two ways. First, the identity of the willing seller can be that of a hypothetical willing seller. See Estate of Bright v. United States, 658 F.2d 999, 1005-06 (5th Cir. 1981) ("It is apparent from the language of the regulation that 'willing seller' is not the estate itself, but it is a hypothetical seller."). If the willing seller were a hypothetical willing seller, there would be no resulting family attribution. See notes 84-89 and accompanying text supra. One author has criticized reference to a hypothetical willing seller. See Feld, supra note 5, at 937-38, where the author notes:

Attention has focused instead on an inadvertent semantic formulation suggesting that a minority shareholding generally should be treated as if held by an outsider . . . When applied to stock in a closely held corporation, however, this general statement can be misleading. . . Yet, it is apparent that substantially more wealth has been conferred on the donee than he could obtain simply by reselling the stock interest to an outsider, because an element of the wealth conferred, participation in control, could not be conveyed to an outsider by conveying the shares.

Id.

Another approach would be to analyze value in terms of the actual willing seller, but to attribute no control to the minority shareholder because of the family relationship.

The concept of the hypothetical buyer is more persuasive. See Obermer v. United States, 238 F. Supp. 29, 34 (D. Hawaii 1964) (referring to the "so-called mythical buyer."). The value to a minority outsider would be different, i.e., less, than the value to a minority insider who could acquire control. As a result, the price should be based on the price that the hypothetical buyer would pay since the hypothetical buyer would take into account the block's swing value when purchasing the shares. See note 91 where "swing value" is discussed.
THE INFLUENCE OF MINORITY SHAREHOLDER

In the first situation, the minority shareholders have little influence. The donor retains control over the election of directors, the payment of compensation, the declaration of dividends and the management of the corporation. Depending on the requirements of state law, the minority shareholders may, however, be able to prevent liquidation. The minority shares would have a control element only to the extent that the donor gratuitously made decisions after considering the best interests of the minority shareholders. Regardless of the existence of family harmony, the donor would have control of the corporation.

In the second and third factual situations, the minority shareholders also lack the ability to control the corporation. However, in these situations each minority shareholder has a swing interest which could influence corporate control when exercised in combination with other minority shareholders.

In the second factual situation, a child would need to ally with the other child and one parent to gain voting control. If the parents acted as a unit, the children would have no more influence than the minority shareholders in the first factual situation. As a result of the potential to form such an alliance the lack of control factor in the second situation is somewhat less severe than in the first. In the third factual situation, where the swing value of the minority blocks is more pronounced, the lack of control factor is least severe. The swing value is more evident in the third situation because control can be acquired through an alliance with only one of the two remaining shareholders.

In sum, there is no possibility of real control for the minority shareholder in the first factual situation, a tenuous chance for control is the second situation and at least a fair chance in the third.

LIKELY IDENTITY OF PURCHASER

Having established the fact that the minority interest in each

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169. See Kelley, supra note 2, at 237-39.
170. Id.
171. Id. De facto control based on family harmony is tenuous at best. See Maher, supra note 4, at 450, where the author notes:

   The position of the IRS is based on the assumption that family relationships will prevent minority shareholders from being 'frozen out.' Needless to say, this is not always the case. Perhaps a minority interest discount should be allowed where there is no requirement that the shares be held and voted to maintain family control.

Id.
172. Arneson, supra note 2, at 99; Moroney, supra note 2, at 153.
of the three factual situations lacks control, at least to some extent, the next question concerns the likely identity of the purchaser of the minority interest. In each of the factual situations, the minority shares could be sold to an outsider. The minority shares could be sold as a part of a unit, or in separate blocks. However, it would be unlikely that an outsider would purchase a minority interest except as part of a unit. The shares could also be sold to an insider. In the first factual situation, the minority shares could be sold to the shareholder who already had control. In all three situations, the minority shares could be sold to another minority shareholder. In this latter respect, a minority interest would have value to another minority shareholder who was attempting to gain control. This is more of a factor in the third situation than in the second.\(^1\)

Concerning the minority shareholder’s ability to effect a sale: In the first situation, the minority shareholder would have no control to negotiate a sale of the controlling block to an outsider. As a result, if the minority shares were sold as a unit, their sale would most probably occur as a result of negotiations undertaken by the majority shareholder.\(^2\) In the second and third factual situations, a minority shareholder could, of course, sell separately to an insider or outsider. Moreover, control to negotiate the sale of a controlling unit could be achieved through an alliance. As a result, potential swing value does exist in situations two and three as to a potential sale of a block to an outsider.\(^3\)

**Control Value to Purchaser**

The third criterion to be analyzed involves the control value of the minority shares to the potential purchaser. In the first factual situation, the minority shares lack control in the hands of a minority outsider or insider. The shares have no control value to the majority insider since the majority insider already has control. An

\(^{1}\) In the second factual situation, control could be acquired by one of the children only upon purchase of the shares from the remaining child and one of the parents. Control could be acquired in the third situation upon purchase of the shares from one of the remaining two shareholders.

\(^{2}\) Conceivably, the majority shareholder could sell his shares to an outsider who would gain control without negotiating the sale of all shares of the corporation as a unit. Any negotiations for the sale of shares as a unit would probably be dominated by the majority shareholder.

\(^{3}\) In the third factual situation, two of the three shareholders could negotiate with an outsider who was seeking control and thus set the terms of the sale of a controlling interest. In the second situation, the swing value is not as great in regard to the children since each child would need to ally with the remaining child and one parent to transfer control.
outsider who purchases shares as a unit would gain control only through the purchase of the majority shares.

In the second and third factual situations, the minority shares lack control value to a minority insider except to the extent that the insider can acquire control through purchase of the other minority blocks. The minority interest would, however, have control value in these situations to an outsider who purchased shares as a unit since the minority shares would represent control when aggregated. The shares would lack control value to a minority outsider if purchased separately.

**Applicability of Minority Discount**

The minority shares in the first factual situation lack control value regardless of the purchaser. Even if sold as a unit with the majority shares to an outsider, the control value exists in the majority shares, not the minority blocks. The lack of control element exists as to sales to a minority insider or minority outsider. The minority shares lack control value if sold to the majority shareholder since the majority shareholder already has control. Any control value would need to be based on the proposition that the majority shareholder will gratuitously protect the interests of the minority shareholder. Only in this respect does a minority shareholder have "de facto" control or enjoy a "unity of interest." The minority shareholder, however, lacks the ability to sell shares without the assistance of the majority shareholder except at a substantial discount because of the lack of control. As a result, a minority discount for lack of control should be allowed in this situation.

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176. If a minority outsider negotiated the purchase of shares from one of the three minority shareholders, the purchase of a second block of minority shares would have control value.  

177. *See* Feld, *supra* note 5, at 943, where the author notes:  

But the holder of less than the majority of shares may be a part of a control group which would have control of the corporation even without his participation, *i.e.*, a minority insider. In the event of a dispute between the shareholder and the control group, the group could overrule him. The opportunity to sell his shares may be more limited than in the all-minority interest case. This would appear to be the most appealing case for application of the discount to shares which are held by a member of the controlling group.  

*Id.*


179. *Id.*  

180. Although a minority discount should be allowed, a proper question is: "[A] [d]iscount from what?" Moroney, *supra* note 2, at 144-45. *See also* Fellows & Painter, *supra* note 1, at 908-16. Arguably, the method of valuation will represent a majority premium or a minority discount.
In the second factual situation, the blocks owned by the two children have swing value, but only to the extent of a coalition between both children and one parent. The swing value could have some relevance to a negotiation for the sale of shares as a unit to an outsider. The swing value may also be relevant in a sale to a minority insider or minority outsider who is seeking control. The control value is tenuous, however, and somewhat remote in that the swing value exists only if a coalition with two other shareholders can be created. As a result, a minority discount could be allowed. The swing value aspect of the minority shares could potentially be used to reduce the minority discount for lack of control, but by a minimal amount, if at all.

In the third situation, a minority shareholder would need to ally with only one other shareholder to negotiate a sale of shares as a unit. The shares would lack control value in any sale to a minority outsider. However, the swing value is relevant in a sale to either of the remaining shareholders because the purchaser would gain control. As a result, the minority shares should also be discounted to reflect lack of control. The minority discount could be reduced, but not eliminated, to reflect the swing value of the shares.\textsuperscript{181}

The argument proposed in Revenue Ruling 81-253 that a minority interest is part of a “unity of interest” or represents “de facto” control\textsuperscript{182} is tenable only in the second and third factual situations. “De facto” control or “unity of interest” applies only gratuitously in the first.

A minority shareholder is arguably part of a “family controlling interest” to the extent he has a swing value. To the extent that a minority shareholder has a “unity of interest” with other shareholders, “de facto” control would exist. A definite “unity of interest” would apply only to the extent of any voting trust arrangement or other agreement regarding control.\textsuperscript{183} In the absence of any agreement, a minority shareholder would be forced to rely on family harmony to enjoy any element of control. Although family discord would suggest that control does not exist, the absence of family discord does not necessarily indicate the presence of control value.\textsuperscript{184} In addition, any sale by a minority shareholder

\begin{footnotes}
\item[181] For suggested reductions to reflect swing value, see Moroney, \textit{supra} note 2, at 152-53.
\item[183] Fellows & Painter, \textit{supra} note 1, at 906.
\item[184] Even in the absence of family discord, any control would be tenuous at best. See Arneson, \textit{supra} note 8, at 96, where the author notes:

If a control group exists, rather than a clear-cut one-person majority, the
\end{footnotes}
MINORITY DISCOUNTS

1983] 693
to an outsider or insider may affect whatever family harmony ex-
ists. As a result, "de facto" control exists only to the extent that
voting control exists through agreement.

Consequently, in cases similar to that involved in Revenue
Ruling 81-253, a minority discount should be allowed for lack of
control. A reduction in the minority discount, however, may be
proper to reflect the swing value of the minority shares.185

CONCLUSION

The family attribution concept should not be applied to disal-
low a minority discount in the valuation of closely-held shares. Al-
though there is some case law which supports such an
application,186 the better view is that shares should be valued sepa-
ately rather than aggregated under current law.187 In certain fac-
tual situations,188 the size of the minority discount for lack of
control may be properly reduced to reflect a swing value.189

The question of whether special legislation is necessary to dis-
allow minority discounts for lack of control is beyond the scope of
this article.190

It is anticipated that estate planning practitioners will con-
tinue to reflect the minority discount for lack of control in valuing
gifts of shares in closely-held corporations. Revenue Ruling 81-253
does not change the existing climate in which the Internal Reve-
nue Service frequently challenges the minority discount for lack of
control. Although in terrorem tactics on the part of the Internal
Revenue Service in litigating the applicability of minority dis-
counts for lack of control may be somewhat successful, it is sug-
gested that the Internal Revenue Service direct its efforts toward a
reform in legislation—rather than toward disallowing such
discounts.

permanence and cohesiveness of this group should be examined. The
same could apply to a controlling family situation; in many of these situa-
tions, a majority-insider may be even more subject to being shut out in
transactions that would affect the value of his interest should he fall from
grace or should factions develop.

Id.
185. Moroney, supra note 2, at 153-54.
186. Driver v. United States, 76-2 U.S. Tax Cas. ¶ 13,155, at 85,701 (W.D. Wis.
1976).
188. One situation would be the factual situation described in Rev. Rul. 81-253,
189. See Moroney, supra note 2, at 153-54.
190. For an analysis of this question, see Fellows & Painter, supra note 1, at 921-
26.