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Earmarked Charitable Contributions: In Search of a Standard

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EARMARKED CHARITABLE CONTRIBUTIONS: IN SEARCH OF A STANDARD

Brinley v. Commissioner[1]

The charitable contribution deduction has been a part of the federal income tax since 1917.[2] Yet, there is no agreement among the circuits on the criteria by which to test whether a payment should qualify as a charitable contribution.[3] The confusion in this area was brought to a head when, in two 1984 cases recognized by the courts as involving virtually identical facts, *Brinley v. Commissioner*[4] and *White v. United States*,[5] the courts not only reached different results, but analyzed the case differently.

A contribution is deductible only if it is either "to" or "for the use of" an organization qualified under Internal Revenue Code section 170(c)(2)(B) to receive charitable gifts. The Internal Revenue Code, by requiring the contribution to be to an "organizational donee," distinguishes between public charity which is deductible, and private charity which is not deductible. The distinction between public and private charity produces close cases when a contribution, although providing a benefit to the charitable organization, has been "earmarked" by the donor for a particular use.[6]

The "to" or "for the use of" language of I.R.C. section 170 includes contributions in the form of services performed for a charitable organization by allowing a deduction for unreimbursed expenses incurred while performing those services.[7] Thus, a deduction is allowed for the expenses of meals and lodging, otherwise non-deductible living expenses, when a taxpayer is away

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1. 52 T.C.M. (P-H) 1665 (1983), *aff'd on rehearing*, 82 T.C. 932 (1984). In order to avoid confusion of the two *Brinley* opinions, the Tax Court's first opinion will be referred to as "*Brinley I*" and the reconsideration will be referred to as "*Brinley II*."

2. Revenue Act of 1917, § 1201(2), ch. 63, 40 Stat. 300, 330.

3. *See, e.g.*, Stubbs v. United States, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971) (intent the sole test to determine whether a charitable contribution); Crosby Valve & Gauge Co. v. Comm'r, 380 F.2d 146 (1st Cir. 1967), *cert. denied*, 389 U.S. 976 (1967) (intent irrelevant in determining whether a payment is a charitable contribution); *see also* Colliton, *The Meaning of "Contribution or Gift" for Charitable Contribution Deduction Purposes*, 41 OHIO ST. L.J. 973, 973-74 (1980) ("the courts have adopted three apparently inconsistent analyses to decide whether a deduction is allowable").

4. *Brinley II*, 82 T.C. 932.

5. 725 F.2d 1269 (10th Cir. 1984), *rev'g* 514 F. Supp. 1057 (D. Utah 1981).

6. 2 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, 35.1.2 (1981).

7. *Id.*

from home and performing charitable services.[8]

Brinley and *White*, which involve both an earmarked contribution and deduction of living expenses, provide a unique opportunity for reconsideration of the standards used to determine the deductibility of charitable contributions. This Note suggests a new test to determine whether a payment should qualify as a charitable deduction, and suggests that *Brinley* and *White* can be reconciled.

The facts in the two cases cases are virtually indistinguishable.[9] In both, parents sought a charitable deduction for money they paid directly to a child for expenses while serving away from home as a full-time missionary for the Church of Jesus Christ of Latter-Day Saints (LDS Church).[10]

The prospective missionary is called by the Church to two years of voluntary service in the mission field.[11] Upon acceptance of the call to mission work, the missionary begins service as an ordained minister of the LDS Church.[12] The missionary first goes through a training program conducted by the Church at Provo, Utah. After completing the training program, the missionary begins work at the designated mission site.[13]

The Church determines the minimum amount required for the missionary's living expenses. The Church's policy is to ask the missionary's parents to contribute the amount needed for living expenses directly to the missionary on a monthly basis.[14] In these cases, the contributions *in fact* supported the mis-

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8. *See* Treas. Reg. § 1.262-1(b)(5), T.D. 7207, 1972-2 C.B. 106, 159-60.

9. *Brinley II*, 82 T.C. at 936; *see also White*, 725 F.2d at 1270 (stating that most of the 25,000 LDS missionaries are supported the same way as the missionary in that case).

10. *Brinley II*, 82 T.C. at 932; *White*, 725 F.2d at 1270.

11. *White*, 514 F. Supp. at 1058. A call to a mission originates from the determination by local LDS officials (called bishops or branch presidents) that a member of their congregation has demonstrated "adherence to the faith and doctrines of the religion by observing its standards and commandments." Appellant's Brief on Appeal at 4, *Brinley II*.

12. *White*, 514 F. Supp. at 1058. Following ordination, the missionary is given the religious title of "Elder." Appellant's Brief on Appeal at 5, *Brinley II*. The authority of an Elder in the LDS Church is as follows:

> Elders: Elders have authority to preside over meetings and conduct them as prompted by the Holy Ghost. They also have authority to teach and expound the scriptures; to watch over the church; to baptize; lay on hands for the bestowal of the Holy Ghost; confirm those baptized, members of the church; administer the sacrament, and ordain other elders and also priests, teachers, and deacons.

Id. (citing 1 B. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 193-94 (Century 1) (1930)).

13. *White*, 514 F. Supp. at 1058.

14. *White*, 725 F.2d at 1270. In *Brinley II*, the claimed deduction of $942 related to their missionary son's expenses for the period October 15, 1977 to December 31, 1977.

The $942 related to the following expenses:

Travel agent	$170

sionary while in the mission field and also paid a portion of the cost of the travel to the mission site. In each case, the parents *then* claimed a charitable contribution deduction for money paid to support their missionary son.[15]

In *Brinley I*, the parents claimed their contribution was to the LDS Church whether the money was paid directly to the church or to their missionary son.[16] The Brinleys argued that because the contribution was "to the church" it should be deductible under I.R.C. section 170.[17] The Commissioner argued that the deduction should not be allowed because the church never had control of the funds and the Brinley's might have been motivated by a desire to benefit their son rather than the charity.[18] The Tax Court held that to qualify as a charitable contribution, the funds must be contributed to a qualified organization as required by I.R.C. section 170(c). The court also required the contribution to be absolute. This requirement does not allow the donor to "earmark" a designated individual to receive the contribution. The court found that these requirements were not met because the funds were contributed directly to the Brinleys' son.[19]

On substantially identical facts, the District Court of Utah in *White*[20] denied the taxpayers' deduction.[21] The *White* court used the two requirements

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Room and Board during training	50
Room and Board in Michigan (approx. $200 per mo.)	500
Religious Literature	72
Incidentals	50
Car rental required by mission	93
Mileage to/from airport for departure to Michigan	7
TOTAL	$942

Appellant's Brief on Appeal at 7, *Brinley II*.

15. *Brinley II*, 82 T.C. at 934.

16. *Brinley I*, 52 T.C.M. (P-H) at 1668.

17. I.R.C. § 170 (1985) provides, in part:

(a) Allowance of deduction —

(1) GENERAL RULE. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary. . . .

(c) Charitable contribution defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of — . . .

(2) A corporation, trust, or community chest, fund, or foundation — . . .

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

18. *Brinley I*, 52 T.C.M. (P-H) at 1668.

19. *Id.* at 1669.

20. 514 F. Supp. at 1058. The taxpayer when served with a deficiency notice may choose to pay the deficiency and sue for a refund in federal district court, or ignore the deficiency notice and defend in the Tax Court. The Whites chose the former route.

21. *Id.* at 1061. The taxpayers' argument, that the contribution met the "to or for the use of" requirement of § 170, was essentially the same one made by the taxpay-

identified by the Tax Court in *Brinley I* to measure the deductibility of the contribution.[22] The court found that the contribution failed to meet either requirement. The first requirement was not satisfied because the missionary was not a qualified recipient. Because the contributed funds were earmarked for the taxpayer's son and he, rather than the church, had discretion as to how they were spent, the requisite organizational control over the gift was found lacking.[23]

The district court's decision in *White* was reversed by the Tenth Circuit Court of Appeals.[24] The taxpayers again argued that the contribution was "to" or "for the use of" the LDS Church. The contribution was characterized as one of services and the deduction was claimed for incidental expenses incurred in the rendition of those services.[25] The government argued that the Church must have control of the contribution for it to be deductible. The Tenth Circuit agreed with the taxpayer's characterization of the transaction and found that control by the organization had never been required for deduction of expenses incident to the rendition of charitable services.[26]

Following the decision in *White*, which was favorable to their position, the Brinleys were granted reconsideration by the Tax Court. Because *White* arose in another circuit, the Tax Court was not bound by that decision.[27] The Brinleys requested a deduction for the payment of costs incident to their son's rendition of services to the LDS Church.[28] The Commissioner argued that characterization of the deduction as one of expenses incident to the donation of services was improper in this case because the Brinleys contributed no ser-

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ers in *Brinley I*. *Id.* at 1059.

22. *Id.* at 1058.

23. *Id.* at 1061.

24. White v. United States, 725 F.2d 1269, *rev'g* 514 F. Supp. 1057.

25. *Id.* at 1270-71.

26. *Id.* at 1271.

27. *Brinley II*, 82 T.C. at 936. The Tax Court is required to follow decisions of the court of appeals in the circuit where appeal of the case under consideration would lie. Golsen v. Comm'r, 54 T.C. 742, 757 (1970).

28. *Brinley II*, 82 T.C. at 934-35. The Brinleys' argument, adopting the Tenth Circuit's characterization, was that the transaction should be governed by Treas. Reg. § 1.170-1(g), T.D. 7207, 1972-2 C.B. 106, 118, which provides:

> Contributions of services. No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible. For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder.

vices to the LDS Church themselves.[29] According to the Commissioner, it was necessary for the charitable organization to control the funds in order to prevent taxpayers from "channel[ing] funds to their son for the son's personal use ostensibly as a charitable contribution."[30] The Tax Court held for the Commissioner that classification of Brinley's payment as one of expenses incident to charitable services was improper.[31]

The Tax Court in *Brinley II* recognized that if parents had performed the services themselves the deduction would have been allowed because the expenses would have been incurred incident to the donation of services.[32] In addition, the court recognized that if the funds were contributed to the church, which in turn used them to support the contributor's son, the deduction would be allowed.[33] Therefore, the deductibility of the contribution depended on the contribution being *to* a qualified *organization.* As they had ruled previously in *Brinley I*, the Tax Court found that this requirement had not been met.[34]

The *White* court, in allowing the deduction, relied entirely on the unreimbursed expenditures analysis.[35] The test used to determine the deductibility of these expenses is the "primary purpose" test. This test focuses on "whether the expense provided a substantial, direct, personal benefit to the taxpayer or to someone other than the charity."[36] If the deduction had been sought by the person performing the services, the missionary son, there is no question that the deduction would have been allowed.[37] The courts differed as

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29. *Brinley II*, 82 T.C. at 934.
30. *Id.* at 934.
31. *Id.* at 938.
32. *Id.*
33. *Id.* at 940.
34. *Id.* at 941.
35. The term "unreimbursed expenditures" refers to Treas. Reg. § 1.170A-1(g) allowance of deduction for expenses incident to the performance of charitable services.
36. *Brinley*, 82 T.C. at 936. The primary purpose test is used to distinguish deductible business expenses from non-deductible personal expenses. The test is applied by analogy to expenses that have both personal and charitable elements.

A deduction may not be allowed for a contribution if the donor receives a significant benefit. *E.g.*, Constancio Babilonia, 49 T.C.M. (P-H) 941, 945 (1980) (parents of Olympic figure skater not allowed to deduct expenses of daughter's skating lessons because substantial benefit to her personal career was fatal to her claim that her services were contributed for the benefit of the United States Olympic Committee), *aff'd*, 681 F.2d 678 (9th Cir. 1982); David L. Hamilton, 48 T.C.M. (P-H) 737, 740 (1979) (deduction not allowed for expenses of transporting Girl Scouts to and from activities because taxpayer's four children were the principal beneficiaries of the expense). If the benefit received is merely incidental to the charitable contribution, the personal benefit to the donor should not be fatal to the deduction. *See, e.g.*, Sherman H. Sampson, 51 T.C.M. (P-H) 1146, 1153 (1982) (taxpayer allowed to deduct expenses of buying information and drugs in furtherance of state drug enforcement activity, even though motivated by drug-related deaths of his children, because overriding motivation was to benefit the community).
37. This is the transaction that Treas. Reg. § 1.170A-1(g) was designed to cover. *See Brinley II*, 82 T.C. at 938; *White*, 725 F.2d at 1271.

to whether the "unreimbursed expenses" analysis applied when the parents bore the expense and requested the deduction for the son's charitable services.

According to the court in *White*, expenditures on behalf of a dependent child should be governed by the same test applicable to expenses incurred by the parents if they had performed the services.[38] In reaching this conclusion, the court appears to have inferred from the language of I.R.C. section 262 that the family was the proper tax-paying unit.[39]

The Tax Court in *Brinley II* criticized the *White* court's conclusion that the "primary purpose" test applied when the parent's were requesting a deduction for expenses incurred by their son.[40] According to the *Brinley II* court, the "plain meaning" of Treasury Regulation 1.170A-1(g) does not support the *White* court's implication that the parents and son could be treated as members of a single tax-paying unit. The Tax Court cited I.R.C. section 7701(a)(14) and Treasury Regulation 1.6012-1(a)(4) as making it "clear that, regardless of age, individual family members are separate taxpayers."[41]

Neither the *Brinley II* nor the *White* court satisfactorily resolved the issue of whether the individual or the family is the proper unit for taxation.[42] The

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38. *White*, 725 F.2d at 1272.

39. I.R.C. § 262 provides that: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." However, Treas. Reg. § 1.262-1(b)(5) provides an exception to the rule of non-deductibility for expenses which are deductible under Treas. Reg. § 1.170A-1(g) (which allows for deduction of unreimbursed expenses while performing charitable services). The court's reasoning apparently is that, because "personal" and "family" expenses are not distinguished in the Code and Regulations, if family expenses are not deductible, neither are the living expenses of the taxpayer who performs the charitable services personally. 725 F.2d at 1271.

40. *Brinley II*, 82 T.C. at 937. The court also criticized the holding in *White*, arguing that it would allow the parents and son both to claim a deduction for the same expense in certain circumstances. *Id.* at 939. This criticism is not justified because the son's basis for claiming the deduction, that he has incurred unreimbursed expenses, is lost when he is reimbursed by his parents.

41. *Id.* at 938. The authority cited by the court does not provide the clarification claimed. I.R.C. § 7701(a)(14) defines a "taxpayer" as "any person subject to any internal revenue tax." Treas. Reg. § 1.6012-1(a)(4) states that a minor is subject to the same requirements for filing a return as any other individual. Therefore, a minor is not subject to tax unless he or she has gross income of at least $1,750 from personal service or funds held in trust for them. It is interesting to note that neither *Brinley* decision mentions the son's age or status (whether claimed by his parents as a dependent).

42. This does not appear to be answered clearly in either the code or regulations. The trend appears to be toward viewing the family as the proper unit of taxation. *See* D. Bradford & U.S. Treasury Staff, Blueprints for Basic Tax Reform 92-94 (2d. ed., rev. 1984) (recommending "the family as the primary tax unit" in the model tax). *See generally* Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (recommending that the family be chosen as the unit of taxation).

This trend can also be seen from the history of the income tax in the United States. Under the 1913 tax, every individual was required to file a tax return. However, tax reforms in 1948, following the decision in Poe v. Seaborn, 282 U.S. 101 (1930), allowed for optional joint filing by a husband and wife. The evolution of the tax treat-

result reached in *White*, that the family is the proper tax unit, at least in the LDS missionary cases, is probably correct.[43]

The LDS missionary cases could also be decided in favor of the taxpayer if the contribution was held either "to" or "for the use of" the LDS Church.[44] The court in *Brinley II* applied the "contributions analysis" because they held that Treasury Regulation 1.170A-1(g) was not applicable when the parents were seeking a deduction for payment of the missionary son's expenses. Under that test, the deductibility of the contribution is determined by asking: what was the donor's intent in making the contribution? The court treated the question whether the donor made the contribution with the requisite intent to benefit the charity as equivalent to the question whether the LDS Church was given control over the contributed funds.[45] Since the funds were paid directly to the missionary son, the court found that the LDS Church did not have direct control over the funds.[46] The Brinleys argued that their son was an agent of the LDS Church. The Tax Court rejected their argument because the funds were received by the son without being handled by a church official.[47]

In reaching this conclusion, the court distinguished *Winn v. Commis-*

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ment of the family is discussed in Bittker, *supra*, at 1399-1416.

The logical next step would be to treat dependent children as a part of that unit. Congress, in I.R.C. § 73 (requiring amounts received and expended with respect to the services of a child to be included in the child's tax computation), has provided a statutory rule in this area. However, as a matter of tax policy, should this rule should be changed for *dependent children*? More specifically, as in the Mormon missionary situation, where § 73 does not apply because the child has no income (because the support received is a non-taxable gift under I.R.C. § 102), must the deductible expenses of the child be treated as incurred by a separate taxpayer? This narrower question arises in a number of situations (*e.g.*, a student supported by gifts from his parents pays interest on student loans, or personal property tax on her automobile) with the result that the amounts are not deductible by the parent under the specific language of I.R.C. §§ 163-164 because the expenses are not the *legal liability* of the parent. *Cf.* I.R.C. § 164(b)(5). But a contribution or gift is no one's *legal liability*. Therefore, in the charitable contribution context, the question of what is the taxpaying unit is unavoidable.

43. In the LDS missionary cases, the missionary probably does not have enough income to require him to file a separate return. *See* Treas. Reg. § 1.6012-1(a)(2)(iii)(a). Reimbursement for expenses, received by the missionary from either the parents or the LDS Church, does not constitute income to the missionary. Rev. Rul. 62-113, 1962-2 C.B. 10.

If the missionary is considered a separate taxpayer and does not file a return, the deduction would be lost. However, where the missionary's expenses are borne by a separate tax-paying entity, in this case the family, that entity should get the benefit of the deduction. *See* Rockefeller v. Comm'r, 676 F.2d 35 (2d Cir. 1982) (where taxpayer allowed a deduction, for salaries of employees whose services were provided to charity). The argument for allowing the deduction is strongest where, as in *White*, the missionary son is a dependent. *See White*, 725 F.2d at 1271.

44. *Brinley II*, 82 T.C. at 933.

45. *Id.* at 937.

46. *Id.* at 938-39.

47. *Id.* at 940-41.

sioner.[48] In *Winn*, the taxpayers made a $10,000 contribution in support of Presbyterian mission work in Korea and the funds were actually so used. Their contribution was in the form of a check payable to the "Sara Barry Fund."[49] The taxpayers restricted their contribution this way to avoid having part of their contribution go to the World Council of Churches, a cause they did not support, as it might if contributed as an unrestricted gift to the church. The court held that the contribution was deductible.[50] In so holding, the Fifth Circuit found that the following three factors were sufficient to establish that the contribution was "for the use of" the church and therefore deductible: 1) the charitable organization solicited the contribution; 2) the funds were received by an official of the organization; and 3) the officer handled the funds according to the organization's wishes.[51] In *Brinley II*, the court found that a church official had not received the funds.[52] The failure to satisfy this requirement, reasoned the court, prevented the LDS Church from being able to control the contribution through its officer.[53]

In *Brinley II*, the Tax Court's insistence on the purely formal presence of a church official in determining the deductibility of the contribution is troubling. The Tax Court, by insisting on literal compliance with the elements of the "*Winn* test," failed to take into account the substantial control exercised by the LDS Church over the missionaries. Therefore, it is likely that the Fifth Circuit will reverse the Tax Court's decision in *Brinley II*.[54] The district court

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48. 595 F.2d 1060 (5th Cir. 1979), *rev'g on this point* 67 T.C. 499 (1976).

49. *Winn*, 595 F.2d at 1065. The local Presbyterian church sponsored "Sara Barry Days" to solicit funds from members for Sara Barry's mission work in Korea. All contributions received during the "Days" were deposited into Sara's personal account by Sara's father, an elder at the church. Sara Barry was the Winns' first cousin. *Id.*

50. *Id.*

51. *Id.* The Tax Court, however, had found that these facts did not show the donation was ever under the general control of the Presbyterian Church. Therefore, the Tax Court had disallowed the deduction because, even though they were convinced the taxpayer intended the funds to be used by Sara Barry in her missionary work, the contribution was not "to or for the use of" a qualified organization as required by I.R.C. § 170. *Winn*, 67 T.C. at 511.

52. *Brinley II*, 82 T.C. at 941. *But see White*, 725 F.2d at 1270 (stating that the missionary is an ordained minister of the church).

53. *Brinley II*, 82 T.C. at 941. The court's conclusion that the organization's ability to control the donation through the officer was critical to the holding in *Winn* ignores the facts of that case. In *Winn*, the taxpayer used the church elder's control over his contribution to accomplish his object—keeping the World Council of Churches from receiving any part of his contribution. *Winn*, 595 F.2d at 1065.

54. The taxpayers in *Brinley I* filed an appeal in the Fifth Circuit Court of Appeals on October 25, 1984.

The court of appeals could allow the deduction by applying their own "*Winn* test." *See supra* text accompanying note 51 for the elements of that test. In *White*, which is factually indistinguishable, the Tenth Circuit Court of Appeals found that: 1) the LDS Church asked the missionary's parents to contribute the amount determined to be the minimum necessary amount required for living expenses; 2) the missionary is an ordained minister of the Church; and 3) the LDS Church exercises almost complete con-

in *White* set out the traditional control standard for measuring the deductibility of a contribution. The gift must be made to a qualified recipient and the recipient must control the gift.[55] I.R.C. section 170 requires that the contribution be to a qualified recipient. Control by the recipient is required to insure that the gift has the "quality of indefiniteness" which separates public from private generosity.[56] To meet the requirements of section 170, the taxpayer must show that the funds were contributed "to or for the use of" a qualified recipient, in this case the LDS Church.[57] However, because the contribution is not made directly to the Church, the parents are left with the argument that the funds were "for the benefit of" the Church by furthering it's missionary work. In *White*, the district court acknowledged that the LDS Church obtained a benefit from the contribution, but would not allow the deduction because the specific use of the funds was controlled by the missionary, not by the LDS Church.[58]

The district court in *White* suggested that if the funds had been contributed by the parents to the LDS Church and then given to the missionary son, the contribution would have been deductible.[59] However, this statement is at best broad, and is probably incorrect because it implies that the insertion of the LDS Church as a "straw man" would change the result.

If the parents made the contribution to the LDS Church without specifying the beneficiary, the contribution would be deductible. That result recognizes that discretion over the use of the gift by the charitable organization is the essence of the control requirement.[60] If instead, the donation is made to

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trol over the missionary's activities. *White*, 725 F.2d at 1270.

55. *White*, 514 F. Supp. at 1058.

56. *White*, 514 F. Supp. at 1061. The "quality of indefiniteness" leaves the choice of where to use the funds with the charity. *Id.* Indefiniteness is the opposite of earmarking.

57. *Id.* at 1059. *See* IRS PUBLICATION NO. 78, CUMULATIVE LIST OF ORGANIZATIONS (1977) (listing the LDS Church as a qualified recipient of charitable gifts).

58. *White*, 514 F. Supp. at 1059; *see also* Murray F. Davenport, 44 T.C.M. (P-H) 1546, 1548 (1975) (taxpayer not allowed a deduction for expenses of an apartment rented for and used by charitable organization because payment directly to the landlord denied the organization the option of either choosing another apartment or putting the funds to another use entirely).

The taxpayers made the additional argument that the missionary was an authorized agent of the LDS Church, and therefore was a qualified recipient of the donation. The court, however, used the lack of control by the church to dispose of this argument as well. *White*, 514 F. Supp. at 1060-61. *But see* Morey v. Riddell, 205 F. Supp. 918 (S.D. Cal. 1962) (deduction allowed for contributions, in the form of checks payable to church's ministers and used in part to pay their living expenses, because donors intended to give funds to ministers as agents of the church).

59. *White*, 514 F. Supp. at 1059.

60. *E.g.*, Rev. Rul. 62-113, 1962-2 C.B. 10 (unless "distinctly marked" so that they can only be used by him, receipt by missionary son of funds from pool of funds to which parent had contributed not enough to make contribution non-deductible); *cf.* Peace v. Comm'r, 43 T.C. 1, 7-8 (1964) (contributions to missionary pool specified for benefit of certain missionaries held deductible because in correspondence with donor

the Church but earmarked by the donor for the benefit of a specified individual, application of the "control requirement" precludes deduction.[61] Therefore, whether a gift to a charitable organization which will foreseeably benefit identifiable individuals is deductible turns on a finding of control over the contribution by the organization.

However, it is not clear how much control is required. One argument is that the language of Treasury Regulation 1.170A-1(g) does not make it clear that there is a requirement of control by the organizational donee.[62] At the other extreme, the use of a strict requirement of control has produced questionable results.[63] In cases that have arisen in the context of gifts to church missionaries, control seems to be found by compliance with the church's contribution procedure.[64] If compliance with the LDS Church's donation program

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the organization expressed an intention to determine finally how the funds were distributed).

61. *See Brinley II*, 82 T.C. 932; Rev. Rul. 62-113, 1962-2 C.B. at 11 (contribution to church fund "earmarked for particular individual" treated as gift to that individual and not deductible); *cf.* Thomason v. Comm'r, 2 T.C. 441, 443 (1943) (taxpayer not allowed to deduct payments for education and maintenance of child, a ward of charitable organization after having lived with taxpayer for 12 years, for whom taxpayer "felt a keen fatherly and personal interest"). *But see Winn*, 595 F.2d 1065 (where deduction allowed when church elder, the missionary's father, received the contribution and deposited it directly in missionary's personal bank account). Note that in *Winn*, the Tax Court found that the missionary's father was "a mere conduit" used to transfer funds from the church to the missionary's own account. 67 T.C. at 510.

62. *See* Archbold v. United States, 444 F.2d 1120 (Ct. Cl. 1971), where the court pointed out that the examples in the regulations (currently § 1.170A-1(g)), namely, the cost of a uniform and "out of pocket transportation expenses," are expenses over which the donee has no control whatsoever. *Id.* at 1123. *Accord* Travis Smith v. Comm'r, 60 T.C. 988 (1973) (where taxpayer, member of church in Ohio, allowed deduction of expenses incurred during missionary trip to Newfoundland even though the church did not initiate, control, or receive a direct benefit from his services). Use of this argument has been limited to the "unreimbursed expenses" analysis.

63. *See, e.g., Winn*, 67 T.C. at 510-11 (taxpayer not allowed deduction even though court felt that the funds were contributed by the taxpayer intending to benefit Presbyterian missionary).

64. *See* Morey v. Riddell, 205 F. Supp. at 920-21 (court seemed to ignore the lack of control where taxpayer's donations were made by checks payable to the church's ministers, because the church, as part of their theology, objected to operating as a structured organization); Robert N. Mayo, 40 T.C.M. (P-H) 526 (1971) (taxpayer not allowed deduction for payment directly to Mennonite missionaries, rather than through the church's established channels, because the court found that this course of action was taken to insure that those missionaries would receive more than the amount allocated by the church). *But see Winn*, 595 F.2d at 1065 (where taxpayer allowed deduction though made so as to avoid benefit being available for certain of the church's beneficiaries). It may be possible to reconcile *Winn* with the other results because the church had specified that all donations during that period would go to the beneficiary that was designated by the donor.

It should also be noted, because many of the organizations that receive charitable contributions are churches, that there are potential Constitutional problems with the establishment clause. *See* U.S. CONST. amend. I. This is particularly so when the gov-

is the standard, the contribution in *Brinley* should be deductible.[65]

The control requirement is important to insure that the donated funds are used for charitable purposes.[66] This policy would still be protected if the control requirement was satisfied by a finding that the organization exercised substantial control over the contribution program. Substantial control could be established by the organization sanctioning the distribution of donations and directing the activities of the recipients. Application of this "purposive" standard, while very similar to the "*Winn* test," would shift the emphasis away from the formal requirement that an official of the organization handle the gift.

If this "purposive control standard" is applied when the parents of the missionary make the contribution to the LDS Church and the Church reimburses the missionary's expenses, the contribution should be deductible.[67] The deduction should also be allowed in the *Brinley II* situation, where the payment is made directly to the missionary, rather than to him through the Church. This result is required because the substance of the transaction is not changed merely because the Church does not "lay hands" on the money.[68]

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ernment is put in a position of telling the church how it must structure its solicitation of contributions for missionaries. The court's awareness of potential conflict with the establishment clause may explain the result in Morey v. Riddell, 205 F. Supp. 918 (S.D. Cal. 1962).

65. *See White*, 725 F.2d at 1270 (parents' payments were made to son at the request of the LDS Church).

66. *White*, 514 F. Supp. at 1061; *see also Brinley II*, 82 T.C. at 941.

Another policy furthered by the control requirement is administrative convenience. By limiting the number of qualified recipients of charitable contributions, the burden is on the Internal Revenue Service of insuring that all the contributions are used to benefit public rather than private needs. *White*, 514 F. Supp. at 1061. This policy has been attacked because it puts a more difficult burden on the deduction of charitable expenses than on business expenses. The argument made is, because both charitable contributions and business expenses allow a deduction for what otherwise would be a non-deductible personal expense, the standard for deductibility should be the same. In the business expense area the standard is the "primary purpose" test. In areas where there were perceived abuses, new sections of the tax code have been enacted. *See, e.g.*, I.R.C. § 274 (dealing with entertainment and travel expenses). Therefore, difficulties in administering charitable contributions should be dealt with by the tax code rather than by a doctrine such as the control requirement. Newman, *The Inequitable Tax Treatment of Expenses Incident to Charitable Service*, 47 FORDHAM L. REV. 139, 154 (1978).

67. The controls placed by the LDS Church on donations made to their missionaries would be sufficient to establish control under this test. *See White*, 725 F.2d 1270 (the Church 1) Sets and solicits the monthly donation of an amount necessary to meet the missionary's minimum living expenses and considers any amount above this a non-deductible gift; and 2) exercises almost total control over the activities of the missionary).

68. This result is required because the form of the transaction is ignored so that transactions which are economically the same will produce the same tax liability. *See* Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 729 (1929); Knetsch v. United States, 364 U.S. 361, 366 (1960).

Future cases dealing with charitable contributions should be decided by combining the "purposive control standard" and the "primary purpose" test.[69] The Commissioner, by arguing both elements of the proposed test in *Brinley I*, has recognized that both elements are at issue in a charitable contribution case.[70] Also, a careful reading of the Tenth Circuit's opinion in *White* implies that both the control and primary purpose tests were considered.[71]

The suggested test incorporates the reasoning of both the *Brinley II* and *White* courts. It retains the control test, although "watered down" from the way it was applied by the Tax Court. Thus, the concern that parents could abuse the charitable contribution deduction, by using it to pay their son's expenses that are personal and not charitable, is addressed. The test also adopts the "primary purpose" test to insure that the donor's intent in making the contribution will be considered in determining the deductibility of the gift.

The proposed test makes it clear that the "expenses incident to the rendition of charitable services" case does not have to be a special situation subject to a different test as both the *White* and *Brinley II* courts suggest.[72] The acceptance by the LDS Church of the services contributed by the missionary son would satisfy the "purposive control standard." The payment of the missionary's living expenses would be deductible under Treasury Regulation 1.170A-1(g), which by cross-reference to Treasury Regulation 1.162-1(b)(5) allows the deduction of living expenses when away from home and incurred incident to the donation of charitable services. Therefore, but for the Tax Court's insistence on formalistic application of the requirement of control by the organizational donee, the different approaches of the *White* and *Brinley II* courts can be reconciled.

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69. This two-part test is suggested by Professor Peter Wiedenbeck. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, n. 64 and accompanying text (1985).

70. In *Brinley I*, the Commissioner argued both that the LDS did not have control over the donation, and that the parent's contribution might have been motivated by the desire to benefit their son rather than the Church. 52 T.C.M. (P-H) at 1668.

71. This inference can be drawn from the court's emphasis on facts establishing substantive control over the contributions, though their decision was based on the unreimbursed expenditures analysis which required them to deal only with the primary purpose test.

72. *See White*, 725 F.2d at 1271 (a requirement of "control over the expenditure of funds . . . has never been applied to expenses incurred by a taxpayer performing services for a bona fide charitable organization"); *Brinley II*, 82 T.C. at 937 (incurred by a taxpayer performing services for a bona fide charitable organization"); *Brinley II*, 82 T.C. at 937 (court will continue to apply different tests depending on whether unreimbursed expenses or earmarked contribution).