

THE FEDERAL INCOME TAX EFFECTS OF THE MISSOURI VERSION OF THE UNIFORM DIVORCE ACT

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Let us consider an everyday kind of transaction. Suppose that a husband and wife, after several years of marriage during which they have acquired a house and some other property, are divorced¹ and, pursuant to the divorce decree (or a settlement agreement), the wife receives the house and the husband is obliged to make periodic payments to the wife.² Sooner or later, both the husband and wife may seek advice about the federal income tax consequences of these events. The husband will want to know whether the transfer of his interest in the house³ was a taxable event and whether the periodic payments are deductible as alimony. The wife will need to know the basis of the house when she sells it, and whether the periodic payments are includible in her income. Unfortunately, if these events

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1. As a result, no doubt, of excessive exposure to the writings of sociologists, divorce reformers are not content to use simple words like "divorce;" what used to be a "divorce" is now, in Missouri, a "dissolution of marriage." Whether the marital status of one who has been through a "dissolution of marriage" is "dissolved" or "dissolute" is unclear. It is likely that most people (even most lawyers) will continue to use "divorce" in everyday speech, and I shall do the same in this Article. Another manifestation of the divorce-reform crowd's urge to create new jargon is the use of the term "maintenance" (which used to be something that was done to machinery) in place of "alimony."

2. In order to avoid awkward phrases like "the transferee spouse," it will be assumed throughout this Article that the spouse transferring appreciated property and paying alimony is the husband, although of course this will not always be the case. Cf. INT. REV. CODE OF 1954, § 7701(a)(17).

3. Because the public suffers from the delusion that joint ownership of property is a desirable estate-planning device, it is likely that a married couple's house will be jointly owned so that, at least if record ownership is to be controlling for tax purposes, the common situation in which the wife emerges from the divorce proceedings with ownership of the family home involves a transfer of the husband's undivided one-half interest to her. See note 28 *infra*. If the wife receives the family home (previously owned jointly) and the husband receives other jointly owned property of approximately equal value, it is arguable that the entire transaction is a non-taxable division of joint property. See cases cited note 32 *infra*.

take place in Missouri, the conscientious tax adviser will not be able to answer these "simple" questions with any assurance.

The principal causes of uncertainty about how the transaction described above should be taxed are the "marital property" provisions of the new Missouri "dissolution of marriage" law.⁴ These provisions⁵ require the court granting a divorce or legal separation to "set aside to each spouse his property" and to make a "just" division of the "marital property," defined as "all property acquired by either spouse subsequent to the marriage" with five exceptions of uncertain scope. This definition of "marital property" is roughly similar to the usual definitions of community property, although the classification of property as marital property is important only if the spouses are divorced or legally separated.⁶ In making a just division of the marital property the court is directed to consider "all relevant factors," some of which are listed.

4. MO. REV. STAT. §§ 452.300-415 (Supp. 1973).

5. *Id.* § 452.330 provides, in part:

1. In a proceeding for nonretroactive invalidity, dissolution of the marriage or legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:

(1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(2) The value of the property set apart to each spouse;

(3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(4) The conduct of the parties during the marriage.

2. For purposes of sections 452.300 to 452.415 only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired by gift, bequest, devise or descent;

(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of legal separation;

(4) Property excluded by valid agreement of the parties; and

(5) The increase in value of property acquired prior to the marriage.

3. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2.

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6. *Id.* § 452.330.2.

The parties may settle the disposition of their property and other matters⁷ by entering into a written separation agreement, which will be binding upon the court unless it is "unconscionable."⁸ These provisions, with one significant exception,⁹ were taken from the Uniform Divorce Act¹⁰ and, while the subject of this Article is the Missouri law, what is said here will be applicable also to property transfers in other states which adopt the Uniform Act.¹¹

The marital property provisions of the new Missouri divorce law render the tax treatment of property transfers and alimony payments unclear. As to property transfers, the problem is that the new law appears to give the wife an interest in property that previously would have been regarded as belonging to the husband. Since this is so, it is possible to argue that a "transfer" of appreciated property to the wife is part of a "division" of property between "co-owners," and therefore not taxable. Although transfers of appreciated property in connection with a divorce are usually taxable,¹² divisions of community

7. *Id.* § 452.325 states that the parties may enter into an agreement providing for the maintenance of either spouse, the disposition of property owned by either spouse, and the custody, support, and visitation of their children.

8. *Id.* § 452.325.2. Terms relating to child support, custody, and visitation are not binding upon the court.

9. Under the Uniform Act the division of property is to be made "without regard to marital misconduct," UNIFORM MARRIAGE AND DIVORCE ACT § 307, but the Missouri law expressly provides that the court shall consider "[t]he conduct of the parties during the marriage" in dividing the marital property, MO. REV. STAT. § 452.330.1(4) (Supp. 1973). Another, minor, difference between the property division of the Uniform Act and those of the Missouri law is that only the former list the "duration of the marriage" as a factor to be considered in dividing property. UNIFORM MARRIAGE AND DIVORCE ACT § 307(3).

10. For commentaries on the Uniform Act, see R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1969); Symposium, *The Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 531 (1973). The property provisions of the Missouri version of the Uniform Act are discussed in Fowler & Krauskopf, *Property Provisions*, 29 J. MO. B. 508 (1973).

11. Parts of the Uniform Act have been adopted in Arizona, Colorado, Kentucky, Nebraska, and Washington. Two of these states, Arizona and Washington, are community property states and the principal problem discussed in this Article—whether marital property provisions such as those of the Uniform Act are so similar to community property statutes that the community property tax rules will apply to transfers of appreciated property—should not arise there. The statutes are: ARIZ. REV. STAT. ANN. §§ 25-101 to -381 (Supp. 1973); Ch. 130, [1971] Colo. Laws 520; KY. REV. STAT. §§ 403.010-.350 (1972); No. 820, [1972] Neb. Laws 246; WASH. REV. CODE ANN. §§ 26.09.010-.290 (Supp. 1973). At least ten more common law states have statutes providing for a division of marital assets upon divorce. The statutes are cited in *Painter v. Painter*, 65 N.J. 196, —, 320 A.2d 484, 491 (1974).

12. See text accompanying notes 16-27 *infra*.

property¹³ (and, probably, other jointly owned property)¹⁴ are not. The unfortunate similarity between the Missouri marital property provisions and the usual definitions of community property gives some credibility to the argument that Missouri property divisions should be taxed in the same way as divisions of community property. As to alimony, the problem is that payments satisfying the formal requirements of section 71 of the Internal Revenue Code have sometimes been held not to qualify for taxation as alimony because they were intended as payments for the wife's property. Because they give the wife an interest in property that would otherwise be solely her husband's, the marital property provisions can be used to challenge the tax status of purported alimony payments, at least in cases where the husband receives the bulk of the marital property and the divorce decree or settlement agreement is ambiguous.¹⁵

I. TRANSFERS OF APPRECIATED PROPERTY IN CONNECTION WITH DIVORCE

A. *In General: Transfers of Appreciated Non-Community and Community Property*

The taxpayer in *United States v. Davis*¹⁶ transferred appreciated stock to his wife pursuant to a property settlement agreement executed in anticipation of divorce. In exchange for the stock the wife released her inchoate marital property rights under Delaware law. The Supreme Court rejected the taxpayer's argument that the transfer was non-taxable because it was comparable to a division of property between co-owners, observing that

the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest—passive or active—over the management or disposition of her husband's personal property

. . . Regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof.¹⁷

Having decided that the transfer in *Davis* was a taxable event, the

13. See text accompanying notes 28-37 *infra*.

14. See notes 28-32 *infra* and accompanying text.

15. See text accompanying notes 111-21 *infra*.

16. 370 U.S. 65 (1962).

17. *Id.* at 70.

Court held that the amount realized by the husband was the value of the wife's release of her marital rights,¹⁸ which, in the absence of evidence to the contrary, would be assumed to equal the value of the property given up in an arm's length bargain.¹⁹

Uncritical acceptance of the Supreme Court's view of the *Davis* transaction as an "exchange" in which the husband received "property"²⁰ in the form of the wife's release of her rights might suggest that Mrs. Davis had made a taxable exchange of those rights for the property received from her husband, but the administrative practice has consistently been to treat the transaction as non-taxable to the wife,²¹ who takes the property with a basis equal to its fair market value on the date of the transfer.²² One authority explains the non-taxability of the wife in a *Davis* transaction by saying that a wife's inchoate marital property rights "are rights which are disregarded for income tax purposes."²³ This position seems sound, although it con-

18. The rights in question consisted of the wife's right of intestate succession, her right to a share of the husband's property upon divorce, and, in the case of real property, dower. *Id.* at 66-67.

19. *Id.* at 71-73.

20. "Property" here means property within the meaning of INT. REV. CODE OF 1954, § 1001(b), which defines "amount realized" as "the sum of any money received plus the fair market value of the property (other than money) received."

21. See Rev. Rul. 67-221, 1967-2 CUM. BULL. 63. The administrative practice was noted by the Supreme Court in *Davis*, 370 U.S. at 73 n.7. See also Mildred F. Swaim, 50 T.C. 336 (1968), *aff'd*, 417 F.2d 358 (6th Cir. 1969).

22. Rev. Rul. 67-221, 1967-2 CUM. BULL. 63. See also *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812 (2d Cir. 1947). Under *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184 (Ct. Cl. 1954), the wife's basis is the value of the property she receives, not the value of what she gave up.

23. Schwartz, *Divorce and Taxes: New Aspects of the Davis Denouement*, 15 U.C.L.A.L. REV. 176, 181 (1967): "[T]he marital property rights relinquished are rights which are disregarded for income tax purposes—the property to which they relate is treated as solely the property of the husband." Professor Schwartz goes on to argue that the income tax is, in general, "a tax on the net increase in one's wealth as the result of his or her commercial, profit-seeking ventures. Neither marriage nor the division of the family's property is such." *Id.* at 182. For a variation on this theme, see Kilbourn, *Puzzling Problems in Property Settlements—The Tax Anatomy of Divorce*, 27 MO. L. REV. 354 (1962). Professor Kilbourn asks whether it is relevant, in determining whether a wife realizes income on receipt of property upon divorce, that she makes a practice of marrying and divorcing men in order to amass a fortune from property settlements. Perhaps it should be relevant, but the apparent desirability of taxing a wife who has lost her amateur standing does not refute the general rule that a wife's receipt of property in satisfaction of her marital rights is not taxable, and since this is so, it may follow that a wife's receipt of property in exchange for releasing her marital rights should also be non-taxable. The one situation in which a wife is taxed

flicts with the Supreme Court's rationale for holding that the taxpayer in *Davis* had realized an amount equal to the value of the stock he transferred to his wife. The Court answered the taxpayer's argument that the amount realized was indeterminable by accepting the taxpayer's view of the transaction as an "exchange" and assuming that the value of the wife's release of her rights in an arm's length transaction was equal to the value of the stock the husband transferred.²⁴ This explanation seems to attach too much importance to the wife's marital rights and the difficulty of valuing those rights.²⁵ A more sat-

on such a receipt of property is that of alimony, and in that case the husband receives a deduction for the payments. INT. REV. CODE OF 1954, §§ 71(d), 215. The effect of the alimony provisions is thus to shift the burden of taxation of part of the husband's income from him to the wife, rather than to tax both husband and wife on income that is received by him and transferred to her. If the wife in a *Davis* transaction were taxed, no corresponding deduction would be given the husband. For an argument for taxing Mrs. Davis, see Mullock, *Divorce & Taxes: Rev. Rul. 67-221*, 24 U. MIAMI L. REV. 736 (1969).

24. 370 U.S. at 71-73. It is worth noting that the Court engaged in this discussion of the transaction as an "exchange" primarily to answer the taxpayer's argument that he could not be taxed because the amount he had realized could not be determined. The more fundamental question—whether the transfer of appreciated property was a taxable event—was approached by the Court as a question of when the economic growth in the husband's stock was to be taxed. None of the reasons given by the Court for holding that the transfer in *Davis* was taxable turns upon the husband's receipt of "property" in any form. Although §§ 1001(a) and (b) of the Code seem to require that property be received for an "amount realized" to exist, Professor Kilbourn argues that the legislative history of those sections shows that the "fair market value of the property . . . received" language in § 1001(b) was intended to apply only to property-for-property exchanges, not to the case of "other disposition" of property. Kilbourn, *supra* note 23, at 380-83.

25. The wife's release of her marital rights cannot be entirely ignored in analyzing a *Davis* transaction, for the husband's receipt of the release of those rights may be what prevents characterization of the property transfer as a gift. But recognition that the wife's release of her rights shows that no gift has been made does not make valuation of the released rights important.

For an interesting case in which the court recognized the unique nature of a wife's marital rights, see *Fox v. United States*, 74-1 U.S. TAX CAS. ¶ 9358 (E.D. Pa. 1974). The taxpayer in *Fox* sought to deduct imputed interest on installment payments to his former wife. The Government argued that the wife's release of her inchoate marital rights was not a "sale or exchange of property" under § 483, so that the imputed interest provisions did not apply. The court held that the subject matter of marital property settlement agreements is "so unique" that § 483, which "was drafted in a commercial setting," should not apply. *Id.* Therefore, since the payments in question did not qualify for a deduction under § 71, no deduction was allowed.

The property settlement agreement in *Fox* expressly provided that the payments in question were to be made "without interest." Had a portion of the payments been expressly designated as interest, a deduction would undoubtedly have been allowed.

isfactory approach to the problem might be to say that the value of the transferred property is the amount realized by the husband, not because he has received "property" of equal value in exchange, but because he has used the property to discharge an obligation in an amount equal to the value of the property. That is, when a taxpayer uses property that cost him \$2000 to discharge an obligation to pay \$10,000, he is taxable on the \$8,000 difference not because he has received \$10,000 worth of "property" but because he has gotten \$10,000 worth of use out of his property in discharging an obligation in that amount.²⁶ If this explanation is correct, the amount realized

While § 483, which was in issue in *Fox*, applies only to cases involving the sale or exchange of property, § 163 is not so limited.

26. This certainly is the case where the husband's obligation is to pay a fixed sum. The result should not differ in cases where the husband's obligation is not liquidated, for the difference between a husband who is ordered to pay \$10,000 and who satisfies that obligation with \$10,000 worth of property and a husband who is ordered to transfer property worth \$10,000 is not sufficient to justify taxing the former but not the latter. But it is possible that when appreciated property is used to satisfy an obligation to pay a fixed sum the amount realized is the amount of the obligation rather than the value of the transferred property. See Aleda N. Hall, 9 T.C. 53 (1947), *acquiesced in*, 1947-2 CUM. BULL. 2. But see Barton, *Tax Aspects of Divorce and Property Settlement Agreements—The Davis, Gilmore and Patrick Cases*, U. So. CAL. 1964 TAX INSTR. 421, 428-29.

The "sale or exchange" necessary for characterization of the husband's gain on the transfer of appreciated property as capital can be found without viewing the husband as receiving "property." See, e.g., *Kenan v. Commissioner*, 114 F.2d 217 (2d Cir. 1940); Rev. Rul. 67-74, 1967-1 CUM. BULL. 194; Rev. Rul. 66-207, 1966-2 CUM. BULL. 243. The Government has not argued in the divorce cases that gain has been non-capital for lack of a sale or exchange.

An unresolved question under *Davis* involves the taxation of appreciated property transferred to the wife to induce her to give the husband a divorce. It is safe to say that the real reason for the willingness of some husbands to transfer substantial property to their wives is to free themselves from their wives rather than to free their property from their wives' marital rights. But property settlement agreements and divorce decrees typically ignore this aspect of the problem, although the lower court in *Davis* commented on it. *United States v. Davis*, 287 F.2d 168, 174 (Ct. Cl. 1961), *rev'd*, 370 U.S. 65 (1962). Even if it were shown that all or part of a property settlement was made in exchange for the husband's freedom, the transaction should be taxable to him, for one who uses the appreciated value of his property to free himself from an unsatisfactory spouse has realized that appreciation (in the sense of using it to obtain a benefit) as much as if he had used the appreciation to free his property from his wife's inchoate marital rights. Cf. *Matthews v. United States*, 425 F.2d 738 (Ct. Cl. 1970); Barton, *supra* at 446-47. To say that a property transfer in exchange for "freedom" should be non-taxable because the husband has not received "property" is to take the *Davis* Court's "exchange" argument altogether too seriously. But the case for taxing the wife on receipt of a property transfer may be stronger if it can be shown that she received the property as an inducement to giving her husband a divorce. In Lucille

would be the value of the transferred property even if the taxpayer could establish that the wife's release of her marital rights was worth less.²⁷

The *Davis* case does not mean that every receipt of property by a wife pursuant to a divorce decree or separation agreement subjects the husband to taxation on the property's appreciation, for *Davis* applies only when property is transferred from the husband to the wife. If the decree or agreement merely awards the wife her own property, no taxable transaction has taken place.²⁸ The non-taxable nature of

Howard, 54 T.C. 855 (1970), a \$40,000 payment to an ex-wife to induce her to release purported dower rights in property so that the husband could sell the property was held taxable to the ex-wife because she in fact had no dower rights.

27. In *Matthews v. United States*, 425 F.2d 738 (Ct. Cl. 1970), the taxpayer transferred approximately \$1,700,000 worth of property to her husband as part of a divorce settlement. The husband "possessed no marital rights of any value under Florida law." *Id.* at 750. The husband's right to an intestate share of the taxpayer's property would have been worth only about \$81,000 even if he and the taxpayer had not been divorced, and that right was terminated by the divorce. The Court of Claims nevertheless found that the taxpayer had received "significant benefits and advantages" under the settlement agreement, so that "the *Davis* assumption and presumption of equality in consideration must prevail." *Id.* at 754. The primary benefit obtained seems to have been the husband's agreement to raise no objection to the settlement.

28. MO. REV. STAT. § 452-330.1 (Supp. 1973) directs the court to "set apart to each spouse his property." The determination of what property belongs to each spouse can be a difficult problem. Frequently there will not even be any evidence to show who has "title" or who paid for the property. Even if it can be established that title to particular assets is in one or the other spouse, or both, as will be the case with realty or important intangible personal property such as stocks, bonds, and bank accounts, that title may not correspond to the spouses' understanding as to the identity of the "real owner" of those assets. "To penalize one of the spouses because most of the family's property is in the other's name at the time of divorce would ignore the 'realities of American family living.'" R. LEVY, *supra* note 10, at 165. If, for one reason or another, title to property does not correspond to its "real" ownership, the latter must be established to determine the extent to which there have in fact been "transfers." For example, in *David R. Pulliam*, 39 T.C. 883 (1963), *aff'd*, 329 F.2d 97 (10th Cir. 1964), the taxpayer argued that he should not be taxed on the transfer of appreciated real property to his wife pursuant to a divorce decree because the property already belonged to the wife. The court found that, although title to the property had been taken in the wife's name, the husband was taxable on its "transfer" to the wife because he had "paid for the property, managed it, controlled it, received all income from it, and treated it as his own." *Id.* at 885. Title had been taken in the wife's name to gain an additional "grain-growing allowance." *Id.* Cf. *Herbert A. Cook*, 23 CCH Tax Ct. Mem. 1405, 1409 (1964) (husband's possession of stock certificate and exercise of "dominion, control, voting rights, etc." did not establish that stock was his where he "exercised such control only as trustee for [his wife's] benefit, not in any individual capacity"). See also *Hornback v. United States*, 298 F. Supp. 977 (W.D. Mo. 1969) (wife taxable on "sale" to husband of her interest in real property owned as tenants by the entirety, even though husband paid for property). These

many divisions of community property may be explained as an applica-

problems arise less frequently under community property systems, since once it is established that an asset is community property it is not necessary to attribute ownership of that property to one spouse or the other, but taxpayers in community property states are faced with equally difficult problems of classifying assets as separate or community property, problems that bring into play complicated tracing rules and presumptions.

The problem of establishing ownership of jointly owned property has been resolved in the case of the estate tax by § 2040 of the Code, which provides for the inclusion in a decedent's gross estate of all property in which he had an interest as a joint tenant or tenant by the entirety, except to the extent the estate can show that the other joint owner furnished the property or the consideration for its purchase, or that the joint owners acquired the property by gift or inheritance, in which case only the value of the decedent's fractional interest is included.

The marital property provisions of the Missouri divorce law and the Uniform Act do not attempt to resolve this problem; indeed, they circumvent it by providing that marital property is to be awarded to one spouse or the other regardless of who has title to the property. The factors which the court is directed to consider seem, however, to reflect notions of ownership. To the extent that the court is directed to consider the economic circumstances of each spouse and the conduct of the parties during marriage, the marital property provisions may be read as authorizing a transfer of property to the spouse who, in the first case, most needs the property or who, in the second case, most deserves it. But the first factor, "contribution of each spouse to the acquisition of the marital property," seems to reflect the idea that the spouse who paid for the property is its owner. The direction to consider the "contribution of a spouse as homemaker" is consistent with both the "ownership" view and the "transfer" view; it is sometimes said, for example, that the wife as homemaker "contributes significantly to the family's economic welfare by making it possible for the husband to earn income and amass property during the marriage," R. LEVY, *supra* note 10, at 165-66, but the "contribution as homemaker" provision may also be regarded as directing a transfer of property to the wife as compensation for her years of service in the kitchen.

The tax cases do not, for the most part, inquire into the local law theories under which ownership of property may be found to be in the spouse who does not hold title. In Missouri, there seem to be five theories which could be used to show that the spouse who has title to property is not the owner. First, property to which title is held by one or both spouses may be deemed to belong to the spouse who furnished the consideration for the property under a resulting trust. *See, e.g., Hampton v. Niehaus*, 329 S.W.2d 794 (Mo. 1959); *Milligan v. Bing*, 341 Mo. 648, 108 S.W.2d 108 (1937). *See generally* A. SCOTT, *THE LAW OF TRUSTS* §§ 404-60 (3d ed. 1967) (and Missouri cases cited therein); Nelson, *Purchase-Money Resulting Trusts in Land in Missouri*, 33 MO. L. REV. 552 (1968). Secondly, it has been held that under the Married Women's Act, MO. REV. STAT. § 451.250 (1969), a husband who invests the wife's money in property to which title is taken jointly is a trustee for the wife unless she has consented to the transaction in writing. *Herzog v. Ross*, 358 Mo. 177, 213 S.W.2d 921 (1948); *Milligan v. Bing*, *supra*. Thirdly, an express oral trust in personalty will be enforced. A. SCOTT, *supra* §§ 39-52. Fourthly, property purchased by one spouse may be shown to have been the subject of an inter vivos gift to the other. *E.g., Kidd v. Kidd*, 216 S.W.2d 942 (Mo. Ct. App. 1949). Finally, if both husband and wife participate in a business venture, property may be shown to be the property of the joint venture, despite title's having been taken in some other fashion. *E.g., Donovan v. Griffith*, 215 Mo. 149, 114 S.W. 621 (1908).

tion of this principle; a wife's receipt of "her share" of the community property should be non-taxable because there has been no transfer of property from the husband. The clearest case is that in which the husband and wife each receives a one-half interest in each item of community property. It is also well-established that no taxable event takes place if each spouse receives one-half (or nearly one-half) of the value of the community property; thus, if the community property consists of \$100,000 worth of stock and \$100,000 worth of land and, upon divorce, the husband receives all the stock and the wife all the land, the transaction is a non-taxable "division" of the community property.²⁹ At first glance, this treatment seems wrong, for if the husband and wife each owned a one-half interest in the land and the stock before the division, the division appears to involve an exchange by the husband of his one-half interest in the land for his wife's one-half interest in the stock, and vice versa. Justification for non-taxability may be found in the nature of the spouses' ownership of community property.³⁰ Unlike the common law kinds of joint ownership, ownership of community property attaches to particular assets only upon the happening of some dramatic event, such as divorce or the death of a spouse, or a transfer of some of the property. At that time one-half of the property is regarded as belonging to each spouse. In the case of divorce, each spouse's ownership interest in the community property is identified with particular assets only when the property is divided, at which time (at least if the division is equal, or nearly so) each spouse is viewed as receiving property he has always owned. The basis of each community asset thus received is its basis to the community.³¹ While this explanation may account for the tax-free treatment of divisions of community property, it cannot apply to equal divisions of jointly owned non-community property, which also seem to be tax-free.³²

29. The case most often cited for the proposition that a division of community property is not a taxable event is *Frances R. Walz*, 32 B.T.A. 718 (1935). Under principles established in later cases, however, the division in *Walz* would have been taxable at least in part. Other cases holding that a division of community property was non-taxable are *Clifford H. Wren*, 24 CCH Tax Ct. Mem. 290 (1965); *Osceola Heard Davenport*, 12 CCH Tax Ct. Mem. 856 (1953); *Ann Y. Oliver*, 8 CCH Tax Ct. Mem. 403 (1949).

30. See *Schwartz*, *supra* note 23, at 194-95.

31. *Ann Y. Oliver*, 8 CCH Tax Ct. Mem. 403, 430 (1949).

32. *E.g.*, *Beth W. Corp. v. United States*, 350 F. Supp. 1190 (S.D. Fla. 1973) (*semble*), *aff'd mem.*, 481 F.2d 1401 (5th Cir.), *cert. denied*, 94 S. Ct. 1412 (1974);

Although an equal division of community property upon divorce is not a taxable event, a number of cases have held that community property divisions have involved taxable sales or exchanges. One well-established exception to the general rule of non-taxability involves a transfer by one spouse of some of his separate property in exchange for some of the other spouse's community property. For example, if the parties have \$100,000 worth of community property and, upon divorce, the husband receives all the community property and transfers \$50,000 worth of his separate property to the wife, the transaction is clearly a taxable exchange of \$50,000 worth of the husband's separate property for the wife's interest in the community property.³³ The same principles apply if the wife receives part of her share of the community property and exchanges the rest for some of the husband's separate property. Such a transaction is taxable at least in part;³⁴ the dif-

Cofield v. Koehler, 207 F. Supp. 73 (D. Kan. 1962); cf. Edith M. Gerlach, 55 T.C. 156 (1970), *acquiesced in*, 1971-1 CUM. BULL. 2 (holding division of jointly held property taxable, citing cases holding community property divisions taxable); Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6.

In Rev. Rul. 74-347, *supra*, the Service takes the position that the award to the wife of more than one-half of the property owned jointly by the spouses is a taxable "exchange" of the excess for the wife's marital rights. The basis of the excess property is determined by multiplying the basis of all the jointly owned property received by the wife by a fraction, the numerator of which is the value of the "excess" jointly owned property transferred and the denominator of which is the value of all jointly owned property transferred. In order to prevent giving tax effect to depreciation in personal assets, the basis of jointly owned property in this formula is reduced to the fair market value of the property in the case of property whose basis exceeds its value.

If placing property in the joint names of the husband and wife will not encourage the divorce court to give the wife more property than it would if all the property were in the husband's name—and this should be the case in Missouri, where the statute directs the court to disregard title—joint ownership is best for temporary marriages, since one-half the property can be transferred tax-free under this Revenue Ruling.

The tax-free nature of divisions of property held as joint tenants or as tenants by the entirety is inconsistent with the estate and gift tax treatment of such property, particularly real property. Under the estate tax, joint property is usually included in the estate of the spouse who paid for it, and the other spouse's interest is disregarded. INT. REV. CODE OF 1954, § 2040. The creation of a joint tenancy in real property is disregarded for gift tax purposes, unless the parties elect otherwise. *Id.* § 2515(a). Thus, under the estate and gift taxes, realty purchased by the husband is treated as his property regardless of title's having been taken jointly.

33. Jessie Lee Edwards, 22 T.C. 65, 70 (1954) (transaction in which husband received nearly all of community property, in exchange for note and borrowed cash, held to be "virtual sale of [wife's] interest in certain of the community assets for a consideration").

34. Royce L. Showalter, 33 CCH Tax Ct. Mem. 192 (1974); Jean L. May, 33 CCH Tax Ct. Mem. 256 (1974); Grant R. Bishop, 55 T.C. 720 (1971), *acquiesced*

ficuity lies in determining which part of the community property has been exchanged for separate property and which part has been divided. Suppose, for example, that the parties own \$100,000 worth of community property and that the wife receives \$40,000 worth of the community property and \$10,000 worth of the husband's separate property. It is evident that this transaction is a taxable exchange of \$10,000 worth of the husband's separate property for \$10,000 worth of the wife's share of the community property. The wife's amount realized is clearly \$10,000, but what is her basis in the community property she "sold?" To answer this question, one must decide which \$10,000 worth of community property was sold. The cases do not furnish much guidance on this point.³⁵ A reasonable allocation by the parties of the purchase price to particular items of community property will probably be respected, not because there is any strong reason for doing so but because there is no good reason for doing anything else.³⁶ One Tax Court case holds that the transfer of some separate property in connection with a community property division makes the entire transaction taxable;³⁷ this seems questionable.

in, 1971-2 CUM. BULL. 1; Maurine DeWolfe Brown, 12 CCH Tax Ct. Mem. 948 (1953).

35. In Royce L. Showalter, 33 CCH Tax Ct. Mem. 192 (1974), the wife received a \$10,000 note from her husband in connection with a division of community property. The Tax Court held that the wife had sold to her husband her interest in the accounts receivable of the husband's medical practice. The face amount of the accounts receivable was \$10,910.40; one-half this amount was determined to be the wife's amount realized (and therefore, since the receivables had a zero basis, her gain). The taxpayer argued that the Commissioner had not shown that the \$10,000 note was payment for the receivables, but the court, noting that the taxpayer had offered no evidence to support any other position, held that the taxpayer had sold her interest in the receivables. Perhaps the similarity in amount between the note and the receivables was what convinced the court that the receivables, rather than something else, had been sold. Since gain was assessed on only one-half the receivables, the *Showalter* opinion leaves \$4544.80 of the note unaccounted for.

36. The interests of the husband and wife in determining which property has been sold in a case like *Showalter* are not identical, for the husband will ordinarily want the payment attributed to low-basis property (to increase his basis) while the wife will prefer to attribute the payment to high-basis property (to reduce or eliminate her gain). There may, therefore, be some reason to accept an allocation reached in arm's length bargaining. The situation is similar in principle to that in which part of the purchase price of a going business is allocated to the seller's covenant not to compete. *See, e.g., Commissioner v. Danielson*, 378 F.2d 771 (3d Cir. 1967); *J. Leonard Schmitz*, 51 T.C. 306 (1968). *But see Enid P. Mirsky*, 56 T.C. 664 (1971), *acquiesced in*, 1972-2 CUM. BULL. 2; *Edith M. Gerlach*, 55 T.C. 156 (1970), *acquiesced in*, 1971-1 CUM. BULL. 2 (principles of covenant-not-to-compete cases inapplicable to cases involving classification of periodic payments as alimony or property settlement).

37. *C.C. Rouse*, 6 T.C. 908 (1946), *aff'd*, 159 F.2d 706 (5th Cir. 1947).

Whether a division of community property can be taxable even if no separate property is exchanged is not clear. The courts have consistently said that the general rule of non-taxability applies where the parties divide the property "equally" or at least "attempt . . . in good faith to achieve an equal division."³⁸ These statements necessarily imply that an unequal division is taxable, although why this should be so is uncertain. If the laws of the jurisdiction involved provide that the wife is to receive a "just" share of the community property upon divorce, the division of the property should be tax-free even if for some reason a "just" share is more or less than one-half.³⁹ A number of cases have said that the taxability of a community property division turns upon whether the parties' "intent" was to make a taxable "bargain and sale" rather than a tax-free "division."⁴⁰ One case has even

38. *Id.* at 913 ("If there were simply a division of the community estate, as petitioner contends, the property would have been equally divided, or at least an attempt would have been made in good faith to achieve an equal division"). See, e.g., Clifford H. Wren, 24 CCH Tax Ct. Mem. 290, 293 (1965) ("where the facts indicated that the parties divided the community property equally, or at least made an honest effort to divide the property equally depending upon its value, this Court has held that such agreement does not constitute a taxable transaction"); Jessie Lee Edwards, 22 T.C. 65, 69 (1954) ("This transaction . . . was [not] an out and out division of the community property with the wife and husband each taking certain items in kind and of an approximately equal value"); Ann Y. Oliver, 8 CCH Tax Ct. Mem. 403, 430 (1949) ("Nothing suggests the idea that the property was not divided as equally as possible"). *But cf.* Frances R. Walz, 32 B.T.A. 718, 720 (1935) ("Even if, in the division of property between husband and wife when the marriage is dissolved, the husband gets the worst end of the bargain . . . the husband could not claim a deductible loss").

39. See, e.g., TEX. FAMILY CODE § 3.63 (1971):

In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

In a true community property jurisdiction, the provision for each spouse's testamentary disposition of one-half the community property may support an argument that each spouse's vested interest in the property is one-half, even if the provisions relating to divorce provide for a "just" division. But if non-community property states such as Missouri are held to be subject to the community property tax rules because of provisions for just divisions of "marital property," there would be no reasonable basis for arguing that the wife's "vested" interest is one-half rather than whatever she in fact is awarded.

40. Clifford H. Wren, 24 CCH Tax Ct. Mem. 290, 293 (1965) ("Nowhere in the agreement do we find words indicating that a 'sale' or 'purchase' was contemplated by the parties"); Osceola Heard Davenport, 12 CCH Tax Ct. Mem. 856, 857 (1953) ("The intent of the parties will aid us in determining whether there was a sale or a division of community property. . . . [C]ertain statements . . . unequivocally express the parties' intent as of the time they made the division of the property"). *Contra*, Jessie Lee Edwards, 22 T.C. 65, 68 (1954) ("We think the transaction before us differs

described tax-free divisions as "amicable," suggesting that taxability depends upon the ferocity with which the spouses bargain.⁴¹ The Tax Court once held a community property division taxable because it was agreed to by the parties rather than imposed upon them by the court,⁴² a holding that is clearly wrong, for the case most often cited for the proposition that community property divisions are tax-free involved a settlement agreement.⁴³ An unequal division of community property may be taxable in part if it can be shown that the husband transferred some of his interest in the property to the wife in exchange for the release of her support rights.⁴⁴

Neither the rules governing the tax treatment of transfers of appreciated non-community property nor those concerning the tax treatment of community property divisions are entirely satisfactory. The effect of the *Davis* case in non-community property jurisdictions is to tax the husband on a transaction that deprives him of property, a somewhat odd result.⁴⁵ Taxpayers in community property jurisdic-

from a mere division or partition of the community property, and this is true despite the language used in the settlement agreement and the avoidance, whether calculated or not, of the usual verbiage connoting a sale").

41. *Osceola Heard Davenport*, 12 CCH Tax Ct. Mem. 856, 858 (1953): "From the record as a whole we can only conclude that petitioner and her former husband did not bargain and sell the community property between themselves, but amicably divided it by a separation agreement and divorce."

42. *C.C. Rouse*, 6 T.C. 908, 913 (1946), *aff'd*, 159 F.2d 706 (5th Cir. 1947):

The facts disclose that the agreement was voluntarily entered into by the parties, that the agreement expressly provided that its validity should not depend on court action, and that the only reference which the divorce decree made to the property settlement was to observe that it had been made and that "this Decree does not impair, affect, nor modify said agreement." We are therefore unable to conclude that the transaction between petitioner and his then wife constituted a partition of their community property by order of the divorce court. To the contrary, it appears that the parties to the agreement chose to settle their property rights by bargain and sale rather than by partition or division.

43. *Frances R. Walz*, 32 B.T.A. 718 (1935).

44. *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964); *Harry L. Swaim*, 50 T.C. 302 (1968). *Davis* involved the release of inchoate marital property rights rather than support rights, but this difference is without significance. Indeed, the Supreme Court in *Davis* supported its holding that the marital property rights in question were unlike the wife's rights in a community property jurisdiction by noting that Mrs. Davis' rights "do not differ significantly from the husband's obligation of support and alimony." 370 U.S. at 70.

45. In one of the earliest cases dealing with the *Davis* problem, the Board of Tax Appeals observed: "To hold that a man has realized income by giving up a substantial portion of his property seems to us unreasonable . . ." *L.W. Mesta*, 42 B.T.A. 933, 941 (1940), *rev'd*, 123 F.2d 986 (3d Cir. 1941).

tions at least have the opportunity to sort out their marital property without paying a tax, but if they stray from the clearly tax-free transaction—an equal division of community property unaccompanied by transfers of separate property—they run the risk that their transaction also may be taxable, to an extent that is difficult to predict.⁴⁶ Missouri taxpayers and their advisers have an added burden, for, in addition to one or the other of the aforementioned problems, they cannot even be certain whether the community property rules or the non-community property rules apply to divisions of “marital property” under the new Missouri divorce law.

B. *Is Missouri a Community Property State?*

At first glance, the suggestion that the marital property provisions of the Missouri divorce law may make Missouri a “community property state,” even for the limited purpose of taxing dispositions of property upon divorce, seems absurd. Although the divorce law’s definition of “marital property” is similar to the usual definitions of community property,⁴⁷ the marital property provisions have no effect outside the context of divorce.⁴⁸ The new law does not affect each spouse’s right to control his own property and to dispose of it during life or at death.

46. Professor Schwartz observes that “one has some difficulty differentiating” the facts of *Frances R. Walz*, 32 B.T.A. 718 (1935) (holding a community property division non-taxable), from the facts of *Jessie Lee Edwards*, 22 T.C. 65 (1954) (holding a similar division taxable). Schwartz, *supra* note 23, at 185.

47. Compare the Missouri definition of marital property, MO. REV. STAT. § 452.330.2 (Supp. 1973), with the following provisions of the Texas Family Code (1971):

§ 3.63. Division of Property

In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

§ 5.01. Marital Property Characterized

(a) A spouse’s separate property consists of:

- (1) the property owned or claimed by the spouse before marriage,
- (2) the property acquired by the spouse during marriage by gift, devise, or descent, and
- (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

§ 5.02. Presumption

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

48. See MO. REV. STAT. § 452.330.2 (Supp. 1973).

Since this is so, the marital property provisions can be viewed as directing, in a somewhat roundabout way, the transfer of property from one spouse to the other, rather than the division of jointly owned property.⁴⁹ While there is much to be said for this view, there is some case authority for treating property transfers under statutes no more similar to community property statutes than Missouri's as non-taxable divisions. The possibility that dispositions of Missouri marital property will be held to be non-taxable must, therefore, be taken seriously.

The blurring of the distinction between the community property and common law systems of ownership began with *Swanson v. Wiseman*,⁵⁰ in which a federal district court held, with little analysis, that a distribution of appreciated stock to a wife pursuant to an Oklahoma divorce decree was part of a non-taxable division of property between co-owners. Five years after *Swanson* another Oklahoma divorce case reached the Tax Court, which held in *George F. Collins, Jr.*⁵¹ (*Collins*

49. Cf. Fowler & Krauskopf, *supra* note 10.

50. 61-1 U.S. Tax Cas. ¶ 9264 (W.D. Okla. 1961).

The statute authorizing the property provisions of the divorce decree in *Swanson* was OKLA. STAT. ANN. tit. 12, § 1278 (1951), which provided:

When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper.

Although the Government's position in *Swanson* was that the division was tax-free, the Government has consistently sought taxable treatment in later cases. In Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6, the Service stated that property is co-owned where "state property law is found to be similar to community property law," citing the *Collins* cases.

51. 46 T.C. 461 (1966), *aff'd*, 388 F.2d 353 (10th Cir.), *vacated and remanded*, 393 U.S. 215 (1968), *rev'd*, 412 F.2d 211 (10th Cir. 1969).

The relevant state statute was OKLA. STAT. ANN. tit. 12, § 1278 (1961), which is identical to that quoted in note 50 *supra*.

I) that an Oklahoma wife's "general interest in all property acquired . . . during the marriage"⁵² did not prevent taxation of a transfer of appreciated stock to her. The Oklahoma wife was said to have no "vested" interest in the property and to have "no right to a particular item of the . . . property."⁵³ In *Collins v. Commissioner*⁵⁴ (*Collins II*) the Court of Appeals for the Tenth Circuit affirmed. Finding that such "traditional elements of co-ownership" as "descendible interest, right to control and disposition of property and vested interest" were lacking, the court held that *Davis* required taxation of the transfer.⁵⁵

Nine months after the decision in *Collins II*, the Oklahoma Supreme Court ruled in *Collins v. Oklahoma Tax Commission*⁵⁶ that the transfer which the Tax Court and Tenth Circuit had held taxable in *Collins I* and *Collins II* was a non-taxable division for purposes of the Oklahoma income tax. The court described the wife's interest in property "acquired during married life as the result of industry, economy and busi-

52. 46 T.C. at 474. Unlike the Missouri wife, who acquires an interest in marital property simply by being married, the Oklahoma wife must contribute her "efforts, industry, or skills" to the acquisition or enhancement of the property to have an interest. Her services need not be performed outside the home, but they have to go beyond "those of an ordinary housewife." Ernest H. Mills, 54 T.C. 608, 617 (1970), *aff'd*, 442 F.2d 1149 (10th Cir. 1971). While this difference is important in determining whether a particular wife has an interest in the property acquired during the marriage, it seems irrelevant in deciding whether her interest, once acquired, is "vested."

53. 46 T.C. at 474. This characteristic of Oklahoma law does not support the Tax Court's holding, since wives in community property states do not have a right to particular items of community property.

54. 388 F.2d 353 (10th Cir.), *vacated and remanded*, 393 U.S. 215 (1968), *rev'd*, 412 F.2d 211 (10th Cir. 1969).

55. *Id.* at 357-58. The same court had previously held in *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir. 1964), that *Davis* applied to property transfers under Colorado law. In *Collins II* the Tenth Circuit found it "difficult . . . to see any distinction between Oklahoma and Colorado law sufficient to justify a different characterization of the property division." 388 F.2d at 357. In *Collins v. Oklahoma Tax Comm'n*, 446 P.2d 290, 296-97 (Okla. 1968), however, the Oklahoma Supreme Court found an "obvious disparity" between Colorado and Oklahoma law. The differences were said to be first, that under Colorado law an award to the wife "is dependent upon extent of her contribution, respective financial condition of the parties, their conduct, probable future earnings and other pertinent circumstances," and secondly, that "all matters of alimony and property division are within the discretion of the trial court under Colorado Law." *Id.* at 297. It is difficult to see how these differences justify characterization of the Oklahoma wife's interest as more vested than that of the Colorado wife. See note 74 *infra*.

56. 446 P.2d 290 (Okla. 1968). *But see* *Sanditen v. Sanditen*, 496 P.2d 365 (Okla. 1972), discussed in text accompanying notes 71-74 *infra*.

ness ability" as being "similar in conception to community property."⁵⁷ The United States Supreme Court then granted certiorari in *Collins II* and vacated the court of appeals' judgment, remanding for further consideration in light of the Oklahoma state court decision.⁵⁸ On remand, the Tenth Circuit held⁵⁹ (*Collins III*) that the transfer was, after all, a non-taxable division. The court rejected the Government's invitation to disregard state labels and to inquire into the nature of the Oklahoma wife's "ownership," ruling that the Oklahoma Supreme Court's description of the wife as a "part owner" made it unnecessary "to search state law for indications of other factors that might signify the nature of the wife's property interest."⁶⁰

A Colorado statute similar to the Oklahoma statutes involved in *Swanson* and the *Collins* cases has also been held to give the wife a "vested" interest in the property of the marriage. Although the Tenth Circuit had held in *Pulliam v. Commissioner*⁶¹ that *Davis* made Colorado property divisions taxable, a federal district court in *Imel v. United States*⁶² was sufficiently impressed by *Collins III* and the simi-

57. 446 P.2d at 295.

58. 393 U.S. 215 (1968).

59. 412 F.2d 211 (10th Cir. 1969).

60. *Id.* at 212.

61. 329 F.2d 97 (10th Cir. 1964). The statute involved was COLO. REV. STAT. ANN. § 46-1-5 (1953), which provided:

At all times after the filing of a complaint in an action for divorce, the court in term time, or the judge thereof in vacation, may make such order for the care and custody of the minor children of the parties as the circumstances of the case may warrant, and such court or judge may grant alimony and counsel fees pendente lite to the wife. When a divorce has been granted the court may make such order and decree providing for the payment of alimony and maintenance of the wife and minor children or either of them as may be reasonable and just, and may require security to be given for the payment of such alimony, or enforce the payment thereof by execution or imprisonment, or may decree a division of property. The remarriage of the former wife shall relieve the former husband from further payment of alimony to her, but such remarriage shall not relieve the former husband from the provisions of any judgment or decree or order providing for the support of any minor children.

62. 73-2 U.S. TAX CAS. ¶ 9617 (D. Colo. 1973). The *Imel* opinion is, to say the least, confusing. The court at one point described the Colorado wife's interest as "inchoate." Since, under *Davis*, the issue in these cases is whether the wife's interest is "inchoate" rather than "vested," this finding seems to require a holding that the transfer was taxable. The court apparently felt that the Tax Court's decision in *Irving J. Hayutin*, 31 CCH Tax Ct. Mem. 509 (1972), supported its holding, although *Hayutin* in fact held that a wife's interest under Colorado law did not amount to co-ownership. The *Imel* court seems to have attached considerable importance to the provision in the Colorado statute for awarding the property in such proportions "as may be fair and

larity between the Colorado⁶³ and Oklahoma statutes concerning disposition of property upon divorce to certify the question of the taxability of a transfer of property under a settlement agreement to the Colorado Supreme Court. That court declined to answer the district court's certified question directly, noting that it was "probably not proper" to resolve a question of federal taxation.⁶⁴ The Colorado court did, however, endeavor to explain the nature of the Colorado wife's interest in her husband's property. The wife's rights were said to be "completely inchoate" until a divorce action was begun, and to "vest" at that time.⁶⁵ This "vesting" seems to consist of the wife's obtaining the right to prevent the husband from disposing of the property after the divorce action is initiated.⁶⁶ The ability of a wife to prevent her husband from giving away the marital property during divorce proceedings hardly seems a sufficient basis for distinguishing *Davis*.

equitable," since it italicized that phrase in quoting the statute. But a provision for giving the wife a "fair and equitable" share of the property does not in any way support a holding that *Davis* is inapplicable, for, while several community property states do have similar provisions, the Delaware statute examined by the Supreme Court in *Davis* provided that the wife should be given a "reasonable" share of the property.

63. The statute involved in *Imel* was COLO. REV. STAT. ANN. § 46-1-5 (1963), which read as follows:

(1)(a) At all times after the filing of a complaint, whether before or after the issuance of a divorce decree, the court may make such orders, if any, as the circumstances of the case may warrant for:

- (b) Custody of minor children;
- (c) Care and support of children dependent upon the parent or parents for support;
- (d) Alimony;
- (e) Suit money, court costs, and attorney fees; and
- (f) Any other matters (except division of property) in controversy between the parties.

(2) At the time of the issuance of a divorce decree, or at some reasonable time thereafter as may be set by the court at the time of the issuance of said divorce decree, on application of either party, the court may make such orders, if any, as the circumstances of the case may warrant relative to division of property, in such proportions as may be fair and equitable.

The court's opinion does not indicate that it perceived any significant difference between this statute and the one under which *Pulliam* was decided.

64. *In re* Questions Submitted by United States Dist. Court, 517 P.2d 1331, 1334 (Colo. 1974).

65. *Id.* at 1335.

66. *Id.* The court described the rights of the wife as becoming, upon the filing of the divorce action, "analogous to those of a wife who can establish a resulting trust," *id.*, and said that "[u]pon the filing of the action the court may protect this vested interest of the wife pending the division order, even though the property to be transferred to her has not yet been determined." *Id.*

Since the Colorado wife is not a "co-owner" of her husband's property even in theory until a divorce action is begun, Colorado seems clearly not to have a community property system in any meaningful sense of the term. In explaining its conclusion that a Delaware wife's rights were "inchoate" and less than "co-ownership," the Supreme Court in *Davis* examined the wife's rights as they existed throughout the marriage, not during the divorce proceedings.⁶⁷ Nevertheless, the district court in *Imel* held that, in view of the Colorado Supreme Court's description of Mrs. Imel's rights as "vested," the transfers involved in that case were not taxable.⁶⁸

The reasoning of the *Collins III* and *Imel* opinions is not persuasive. The willingness of the Tenth Circuit and the Colorado District Court to give controlling effect to the state courts' descriptions of the wife's rights as vested is inconsistent with *Davis*⁶⁹ and with the Supreme Court's explanations of the effect to be given state law in federal tax cases.⁷⁰ Furthermore, the Oklahoma Supreme Court has qualified its description of the wife's interest as "similar in conception to community property," saying in *Sanditen v. Sanditen*⁷¹ that a "wife does not

67. 370 U.S. at 70:

The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest—passive or active—over the management or disposition of her husband's personal property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems "reasonable."

68. *Imel v. United States*, 74-1 U.S. TAX CAS. ¶ 9459 (D. Colo. 1974).

69. See note 67 *supra*.

70. In *Burnet v. Harmel*, 287 U.S. 103 (1932), the Court held that a lease of oil and gas interests was not a "sale" for purposes of federal taxation even though, under the law of Texas, the lessee became the "owner" of the interest. The Court described the relationship between state and federal law in the following terms: "The state law creates legal interests but the federal statute determines when and how they shall be taxed." *Id.* at 110. The Court later said much the same thing in *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940): "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." The *Collins III* and *Imel* courts, instead of inquiring into the nature of the rights created by state law, in effect let the states control a question of federal taxation simply by describing the wife's rights as "vested." This characterization was no more entitled to controlling effect than was the Texas law's description of the oil and gas lessee as an "owner" in *Harmel*. See Swihart, *Federal Taxation of New Mexico Community Property*, 3 NAT. RESOURCES J. 104, 160-64 (1963).

71. 496 P.2d 365 (Okla. 1972). The plaintiff in *Sanditen* was a wife who sought to set aside her husband's gratuitous transfer of jointly acquired property. The wife's

have joint ownership in jointly acquired property . . . for if she did that would return this jurisdiction to a community property state which was repealed by the legislature in 1949."⁷² Now that even the Oklahoma Supreme Court does not regard the wife's interest as "vested" (at least before a divorce action is begun), it may be doubted that *Collins III* is still the law, even in the Tenth Circuit.⁷³

Swanson, *Collins III*, and *Imel* could be used to support an argument that property divisions under the Missouri divorce law are tax-free, for the Oklahoma and Colorado statutes involved in those cases do not differ in any material way from the Missouri marital property provisions.⁷⁴ But other courts have reached a different conclusion un-

interest was said not to "vest" until a divorce action was begun, although in *Collins v. Oklahoma Tax Commission* the same court had said that the wife's vested interest "is exercisable by the wife at any time during marriage, even though she is not entitled to divorce." 446 P.2d at 297.

72. 496 P.2d at 367. See also *McDaniel v. Oklahoma Tax Comm'n*, 499 P.2d 1391, 1393 (Okla. 1972) (holding that a transfer of jointly acquired property from husband to wife was subject to Oklahoma gift tax because wife's interest was not vested. The court said of *Collins*: "We made several pronouncements in *Collins* not necessary to reach the result reached").

73. In *Wiles v. Commissioner*, 74-2 U.S. TAX CAS. ¶ 9530 (10th Cir. 1974), the Tenth Circuit, after describing the *Collins* cases, said that "the Oklahoma position is still troublesome." The court described the Oklahoma law as "in a state of flux," citing *Sanditen* and *McDaniel v. Oklahoma Tax Comm'n*, 499 P.2d 1391 (Okla. 1972).

74. Despite the similarities, the law of Oklahoma, at least, may differ sufficiently from Missouri law to support an argument that cases involving transfers of property under Missouri law are distinguishable from *Collins III*, although the distinctions are rather weak. For one thing, the rights of an Oklahoma wife in jointly acquired property are not completely cut off if she dies before her husband; if the couple has no children and if the wife dies intestate (or the husband elects to take against the will), one-half of the jointly acquired property remaining at the husband's death goes to the wife's heirs, provided the husband dies intestate. OKLA. STAT. ANN. tit. 84, § 213 (1970); see *Payne's Heirs v. Seay*, 478 P.2d 889 (Okla. 1970); *In re Laug's Estate*, 189 Okla. 516, 118 P.2d 228 (1941). The Tenth Circuit held in *Collins II* that § 213 did not affect the *Davis* issue, since it was "not a rule of property but . . . solely a rule of descent and distribution." 388 F.2d at 356. Furthermore, divisions of jointly acquired Oklahoma property are made without regard to the wife's need, e.g., *Collins v. Commissioner*, 388 F.2d 353, 356 (10th Cir.), *vacated and remanded*, 393 U.S. 215 (1968), while in Missouri the wife's need is one of several factors to be considered in determining a "just" division of the marital property, MO. REV. STAT. § 452.330.1(3) (Supp. 1973). In *Davis* the Supreme Court seems to have regarded the necessity of considering the wife's need as a factor supporting characterization of her rights as inchoate. 370 U.S. at 70. See also *Richard E. Wiles, Jr.*, 60 T.C. 56 (1973), *acquiesced in*, 1973 INT. REV. BULL. No. 39, at 6, *aff'd*, 74-2 U.S. TAX CAS. ¶ 9530 (10th Cir. 1974). In at least one community property state, Washington, the wife's need is expressly made a factor to be considered by the court in making a "just and equitable" division of the parties' community and non-community property. WASH. REV. CODE

der nearly identical statutes. In *Wallace v. United States*⁷⁵ a federal district court held that an Iowa statute giving a divorced wife the right to share in the property to such extent "as shall be right"⁷⁶ did not give the wife "significant meaningful attributes of ownership."⁷⁷ Finding the Iowa law "indistinguishable in any meaningful way" from the Delaware law examined by the Supreme Court in *Davis*, the *Wallace* court held that the transfer in question was taxable. *Collins III* was said to be "incorrectly decided, or at least distinguishable."⁷⁸ The Eighth Circuit, in affirming, approved most of the district court's reasoning, although the appellate court refrained from expressing disagreement with *Collins III*, finding that case "clearly distinguishable on its facts."⁷⁹

The Oklahoma law analyzed in the *Collins* cases is similar to the law of Kansas, from which the Oklahoma law was derived.⁸⁰ In *Richard E. Wiles, Jr.*⁸¹ the Tax Court held that, notwithstanding some lan-

ANN. § 26.09.080 (Supp. 1973). In view of this provision, it is hard to see how the "needs of the wife" factor can be used to distinguish community property from non-community property jurisdictions.

75. 309 F. Supp. 748 (S.D. Iowa 1970), *aff'd*, 439 F.2d 757 (8th Cir. 1971).

76. IOWA CODE ANN. § 598.14 (1950):

When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right.

Subsequent changes may be made by it in these respects when circumstances render them expedient.

77. 309 F. Supp. at 761.

78. *Id.* at 760.

79. 439 F.2d at 760. The most significant distinction seems to be that the Oklahoma wife has a right to share in the jointly acquired property irrespective of her needs, while the Iowa wife does not. See note 74 *supra*.

80. See *Collins v. Commissioner*, 388 F.2d 353, 357 n.9 (10th Cir.), *vacated and remanded*, 393 U.S. 215 (1968). The statute in question was KAN. STAT. ANN. § 60-1610(b) (1967):

Division of Property. The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

81. 60 T.C. 56 (1973), *acquiesced in*, 1973 INT. REV. BULL. No. 39, at 6 (reviewed by the court, with three dissents), *aff'd*, 74-2 U.S. TAX CAS. ¶ 9530 (10th Cir. 1974).

Although the Tax Court had held in *Collins I* that the Oklahoma wife's interest in jointly acquired property was not "vested" for purposes of taxing the husband upon the transfer of appreciated property to the wife, it described the Oklahoma wife's interest as "vested" in two cases in which the issue was classification of payments by a husband

guage in the Kansas cases describing the wife's interest as a property right, a transfer of appreciated property under the Kansas statute was taxable.⁸² Like the Eighth Circuit in *Wallace*, the Tax Court purported to distinguish *Collins III*.⁸³ Much of the *Wiles* opinion can, however, be read as disapproving the reasoning of *Collins III*: the Tax Court said that, in cases not appealable to the Tenth Circuit, it would not be bound by "mere 'tags' of State law;"⁸⁴ it expressed its continuing belief in the soundness of the reasoning of *Collins I*;⁸⁵ and it noted that the Oklahoma Supreme Court had held, in cases decided after *Collins III*, that the Oklahoma wife's interest in jointly acquired property was not an ownership interest.⁸⁶ *Wiles* was affirmed by the Tenth Circuit, which, like the Tax Court, purported to distinguish *Collins III*.⁸⁷

as alimony or as a property settlement. Lewis B. Jackson, Jr., 54 T.C. 125 (1970); Ernest H. Mills, 54 T.C. 608 (1970), *aff'd*, 442 F.2d 1149 (10th Cir. 1971). See also *West v. United States*, 332 F. Supp. 1102 (S.D. Tex. 1971), *aff'd*, 477 F.2d 563 (5th Cir. 1973); Irving J. Hayutin, 31 CCH Tax Ct. Mem. 509 (1972). The issue in the alimony cases may be whether the wife has an interest, rather than whether she has a vested interest. See text accompanying notes 112-21 *infra*. Still, the failure of the courts in the appreciated property cases to cite the alimony cases is, like the incident of the dog in the nighttime, curious.

82. 60 T.C. at 61-63. See also *id.* at 64 (Goffe, J., dissenting).

83. The court said that it doubted whether *Collins III* was even analogous, since under the Kansas statute the wife could be awarded some of the husband's separate property as well as jointly acquired property. This is an unconvincing argument. It is difficult to see how a provision for divesting the husband of his separate property makes the wife's interest in the jointly acquired property any less "vested" than it would have been in the absence of such a provision. See WASH. REV. CODE ANN. § 26.09.080 (Supp. 1973) (providing for an award of separate as well as community property to the wife).

84. 60 T.C. at 63 n.4.

85. *Id.* at 63.

86. *Id.* at 62. See text accompanying notes 56-60 *supra*.

87. 74-2 U.S. Tax Cas. ¶ 9530 (10th Cir. 1974).

The court's holding that the Kansas wife's interest in marital property is not "vested" seems to have been based primarily on the court's belief that a wife whose interest amounted to co-ownership would have a right to something more than a "just and equitable" share of the property upon divorce. This position is simply wrong. Several community property states have similar provisions. See notes 47 & 63 *supra*. The Oklahoma law involved in the *Collins* cases provided for the award of a "just and reasonable" division of jointly acquired property; no rational distinction between this provision and the law of Kansas can be based upon the language of the statutes. It is unfortunate that the Tenth Circuit chose to "distinguish" *Collins III* rather than overrule it, for as long as that case remains on the books taxpayers can be expected to persist in arguing that property transfers in states with statutes similar to Oklahoma's are tax-free.

Missouri taxpayers for whom such treatment is advantageous can be expected to argue that divisions of Missouri marital property are tax-free, citing *Collins III* and *Imel*. But the better view is that Missouri marital property divisions are taxable. All the reasons given by the Supreme Court in *Davis* for holding that Delaware law gave the wife no rights comparable to the rights of a wife in a community property state apply with equal force in Missouri. The most significant right of the wife in community property jurisdictions—that of disposing of one-half the community property by will if she predeceases her husband⁸⁸—has no parallel in Missouri. A wife who can dispose of one-half the marital property by will can more reasonably be regarded as a part owner of that property than can the Missouri wife, whose “marital property” rights mean nothing if she is not divorced or separated. Furthermore, the wife in a community property state has, at least in theory, a modest amount of protection against her husband’s dissipating the community property (for example, by spending it on “dissolute women”).⁸⁹ The Missouri marital property provisions afford no comparable protection. The Missouri provisions do give the wife something more than she had at common law, but rights are not “vested” merely because they are new.⁹⁰

The process of deciding whether a marital property statute gives a wife an ownership interest by comparing the wife’s rights under the statute with the rights of wives in community property states is not entirely satisfactory. The trouble with the process is that community property jurisdictions do not necessarily give wives rights much more

88. *But see* note 92 *infra* (concerning the law of New Mexico).

89. *See* W. DE FUNIAK & M. VAUGHAN, PRINCIPLES OF COMMUNITY PROPERTY § 120 (2d ed. 1971).

90. *Cf.* George F. Collins, Jr., 46 T.C. 461, 465 (1966), *aff’d*, 388 F.2d 353 (10th Cir.), *vacated and remanded*, 393 U.S. 215 (1968), *rev’d*, 412 F.2d 211 (10th Cir. 1969). Missouri marital property differs from community property in the way in which the wife’s rights are acquired, for whether property is community property depends upon the law of the jurisdiction of the parties’ domicile at the time the property was acquired, *e.g.*, Estate of Jeanne Lepoutre, 62 T.C. 84 (1974), while the Missouri marital property provisions apply to all the property of the spouses, wherever acquired. A wife can, therefore, acquire rights to marital property simply by moving to Missouri. *Cf.* ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1973) (for purposes of disposing of property on divorce, property acquired by either spouse outside of Arizona is deemed to be community property if it would have been community property if acquired in Arizona). Marital property is in this respect similar to California “quasi community property,” which is treated for federal tax purposes as separate property. *See* Schwartz, *supra* note 23, at 184.

substantial than the rights of wives in common law jurisdictions. New Mexico, which has long been treated as a community property state for federal income tax purposes,⁹¹ did not until recently give a wife who predeceases her husband the right to dispose of any of the community property by will.⁹² The wife's right to prevent her husband from dissipating the community property may, as a practical matter, be largely offset by the traditional view of the husband as the "manager of the community," with the right to dispose of the property as he sees fit.⁹³ This lack of significant differences between the community property jurisdictions (particularly New Mexico) and other states suggests that the wife is treated as a co-owner of community property more because the states have said she is a co-owner than because they have given her any real ownership rights.⁹⁴ If this is so, the tax-free nature of community property divisions is an historical anomaly, which should be confined to the eight traditional community property states.⁹⁵

91. See generally Swihart, *supra* note 70, at 150-69.

92. See *Hernandez v. Becker*, 54 F.2d 542 (10th Cir. 1931). See generally 1 A. WINARD, LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS 308 (1968); Swihart, *supra* note 70. The New Mexico law was changed in 1973 to give the wife the same interest as her husband in the community property. N.M. STAT. ANN. § 29-1-9 (Supp. 1973).

93. See W. DE FUNIAK & M. VAUGHAN, *supra* note 89, at § 113 *et seq.* The new Texas Family Code provides that "each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single." TEX. FAMILY CODE art. 5.22 (1973).

94. Compare de Funiak and Vaughan, who, in arguing that the Spanish community property system from which the American community property systems were derived gave the wife "an equal and present ownership of half of the community property," rely on statements of various authorities to the effect that the wife was an "owner," rather than on any showing of substantial ownership rights in the wife. W. DE FUNIAK & M. VAUGHAN, *supra* note 89, at §§ 96, 97. For an analysis of the history of federal taxation of community property, see Swihart, *supra* note 70.

95. In the early 1940's, several states adopted "community property" laws in order to obtain the tax advantages of community property for their citizens. In *Commissioner v. Harmon*, 323 U.S. 44 (1944), the Supreme Court passed up the opportunity to reappraise the issue of the validity of the tax treatment of community property, "distinguishing" the new Oklahoma law from other community property systems on the ground that the Oklahoma law applied only to spouses who so elected. The Bureau of Internal Revenue then ruled that new "mandatory" community property systems would permit income-splitting. See I.T. 3782, 1946-1 CUM. BULL. 84. The repeal of the new community property laws following the enactment of the joint return provisions in the Revenue Act of 1948, see ch. 168, §§ 301, 303, 62 Stat. 110 (now INT. REV. CODE OF 1954, §§ 2, 6013), laid to rest the possibility that the courts might deny community property tax treatment to a "community property" system enacted to obtain tax benefits. See Swihart, *supra* note 70, at 124-25. It is clear that, unlike the com-

On balance, there are several reasons for thinking that, if the question is litigated, Missouri marital property divisions will be held to be taxable. First, the Eighth Circuit, which is likely to be the first court of appeals to deal with the issue, has held transfers under the law of Iowa, which does not differ materially from the Missouri law, to be taxable. Secondly, the opinions in *Wallace* and *Wiles* are considerably more persuasive than those in *Swanson*, *Collins III*, and *Imel*. Finally, the Tenth Circuit will soon have a chance to reconsider *Collins III*,⁹⁰ and there is reason to hope that it will overrule its unfortunate holding in that case.⁹⁷

II. ALIMONY

The tax advantages of income-splitting between husband and wife can survive divorce. Payments described in sections 71(a) and (c), which will be referred to as "alimony,"⁹⁸ are deductible by the husband⁹⁹ and taxable to the wife.¹⁰⁰ If, as is frequently the case, the wife is in a lower tax bracket than the husband, treatment of payments by the husband to the wife as alimony can benefit both parties.¹⁰¹

Payments must satisfy two kinds of requirements to be deductible as alimony. First, the payments must meet the formal requirements of section 71. For example, they must be "periodic" (or, if in discharge of a principal sum, the period of payment must exceed

munity property experiments of the 1940's, potential tax benefits played no part in the drafting of the Uniform Divorce Act or the new Missouri law. Nowhere in the voluminous literature on either of these statutes is there any indication that the tax effects of their adoption were considered by anyone.

96. The Government has appealed *Imel* to the Tenth Circuit. See 6 P-H 1974 FED. TAXES ¶ 61,004 (announcement of appeal).

97. See text accompanying notes 69-72 *supra*. Unfortunately, the Tenth Circuit has passed up one opportunity to overrule *Collins III*, choosing instead to "distinguish" that case on rather tenuous grounds. See *Wiles v. Commissioner*, 74-2 U.S. TAX CAS. ¶ 9530 (10th Cir. 1974), discussed in note 87 *supra*.

98. Although § 71 is entitled "Alimony and Separate Maintenance Payments," that section does not itself use the term "alimony." "Alimony" will be used in this Article to mean "payments deductible under section 215," while periodic payments under the Missouri divorce law will be called "maintenance."

99. INT. REV. CODE OF 1954, § 215. Payments under an alimony trust which are includible in the wife's income under § 682 are also deductible under § 215.

100. *Id.* § 71. See also *id.* § 682 (treatment of payments under an alimony trust).

101. The husband's tax savings may be passed on to the wife in the form of higher alimony payments than she would receive if the husband were not able to deduct the payments.

ten years),¹⁰² they must not be characterized as child support payments in the decree or separation agreement,¹⁰³ and they must be received after a decree of divorce or separate maintenance, or under a written separation agreement or decree for support.¹⁰⁴ Secondly, the payments must be "for support."¹⁰⁵ The "support" requirement means, among other things, that divorced or separated spouses cannot disguise payments made for purposes unrelated to the wife's support—such as the repayment of a loan¹⁰⁶ or the purchase price of the wife's property—as deductible alimony. The distinction between periodic payments for "support" and other periodic payments has been the subject of an astonishing amount of litigation. The marital property provisions of the new Missouri divorce law should not interfere with qualification of payments under the formal requirements of section 71, which are largely independent of local law, but the "support" requirement is another story. Under the old law, periodic payments to a wife who had no property of her own would normally satisfy the "support" requirement, for there was nothing the payments could be for but "support."¹⁰⁷ Under the new law, however, there will be cases in which

102. INT. REV. CODE OF 1954, §§ 71(a), 71(c)(2). If payments are part of a principal sum payable over a period of more than ten years, payments are treated as periodic only to the extent of up to 10% of the principal sum each year. *Id.* § 71(c)(2).

103. *Id.* § 71(b). The requirement that the terms of the decree fix part of a payment as child support has been strictly construed. The leading case is *Commissioner v. Lester*, 366 U.S. 299 (1961).

104. INT. REV. CODE OF 1954, §§ 71(a)(1)-(3).

105. Treas. Reg. § 1.71-1(b)(4) (1957) provides that payments must be made "because of the family or marital relationship in recognition of the general obligation to support which is made specific by the decree, instrument, or agreement" to qualify as alimony. This language is derived from the legislative history of the alimony provisions; the statute itself does not refer to "support." For an analysis of the origins and meaning of the support requirement, see Harris, *The Federal Income Tax Treatment of Alimony Payments—The "Support" Requirement of the Regulations*, 22 HASTINGS L.J. 53 (1970).

106. Treas. Reg. § 1.71-1(b)(4) (1957).

107. See, e.g., *Marion R. Hesse*, 60 T.C. 685 (1973) (holding payment to be alimony primarily because wife had no community property or other claims to property, other than certain claims of doubtful value). However, a number of courts have dealt with the "alimony versus property settlement" issue without considering the nature and extent of the wife's property interests. In effect, these decisions treat payments as "for property" if the amount of the payment is determined by the amount of property available for distribution, even if all of that property belonged to the husband. See, e.g., *Lambros v. Commissioner*, 459 F.2d 69 (6th Cir. 1972) (principal amount of payments approximately one-half value of property accumulated by parties; divorce decree referred to an "equitable division" of the property); cf. *McCombs v. Commissioner*, 397 F.2d 4 (10th Cir. 1968).

it can be argued that periodic payments purporting to be alimony were intended to be the purchase price of the wife's interest in the marital property. Whether a showing that periodic payments were so intended will prevent alimony treatment is uncertain.

One kind of case in which maintenance payments under the new Missouri divorce law should clearly be held to be taxable as alimony is that in which the parties have little or no marital property. In such a case, maintenance payments should qualify as alimony (assuming the formal requirements of section 71 are satisfied), since there is no property for which the payments could be consideration. The maintenance provisions of the new divorce law do represent a change in the theory underlying payments to the wife, for under prior law alimony was regarded as payment for the wife's loss of the support she would have received had divorce not occurred, while maintenance under the new law is "for support" in the sense that the payments are for the purpose of supporting the wife.¹⁰⁸ This change should raise no tax problems, for payments "for support" in either of these senses can qualify as alimony under section 71.¹⁰⁹ Similarly, if there is marital property but all (or at least a "just" share) of it is awarded to the wife, maintenance payments should be "for support" because there is nothing else they could be for.¹¹⁰ The difficult cases will be those in which the husband receives all or most of the marital property and makes periodic payments to the wife. Suppose, for example, that parties who have substantial marital property decide, instead of dividing the property more or less equally, to let the husband keep all the marital property and to provide for maintenance payments to the wife, perhaps in the hope that the payments will be taxed as alimony. Such an arrangement is probably permissible as a matter of Missouri law,¹¹¹ but there is some doubt that it will achieve the desired tax result.

108. See Ruhland, *Maintenance and Support*, 29 J. Mo. B. 516 (1973).

109. Indeed, payments can be "for support" even if local law does not require a husband to support his wife after divorce. For discussion of the "support" requirement, see *Taylor v. Campbell*, 335 F.2d 841 (5th Cir. 1964); *Ruth E. Kern*, 55 T.C. 405 (1970); *William M. Joslin, Sr.*, 52 T.C. 231 (1969), *aff'd*, 424 F.2d 1223 (7th Cir. 1970); *Blanche Curtis Newbury*, 46 T.C. 690 (1966), *acquiesced in*, 1970-2 CUM. BULL. xx; *Thomas E. Hogg*, 13 T.C. 361 (1949), *acquiesced in*, 1970-2 CUM. BULL. xx.

110. See, e.g., *William M. Joslin, Sr.*, 52 T.C. 231 (1969), *aff'd*, 424 F.2d 1223 (7th Cir. 1970); *Wilma Thompson*, 50 T.C. 522 (1968); *William F. Hagenloch*, 26 CCH Tax Ct. Mem. 722 (1967).

111. The Commissioners' Note to § 308, the maintenance provision of the Uniform Act, from which the Missouri law was derived, states that "[t]he dual intention of this

The argument against alimony treatment of periodic payments in a case where the husband receives all or most of the marital property would run as follows: The marital property provisions give the wife an interest in property; therefore, the wife who emerges from divorce proceedings with little or no property must have sold her interest to her husband, and the periodic payments she receives are not for her "support" but for her property. The soundness of this argument in cases where the wife's only interest in property is that given her by the new Missouri divorce law is the subject of the remainder of this Article.

The relationship between the alimony problem and the problem of whether the marital property provisions give the wife a "vested" or "ownership" interest is unclear. If the marital property provisions are held to give the wife an interest similar to the wife's interest in community property, it will be hard to argue for alimony treatment in cases where the husband receives all the marital property, for it is well-established that payments for the wife's share of community property are not alimony.¹¹² But it does not necessarily follow that characterization of the wife's interest as "inchoate" or as "less than ownership" will avoid this problem. Under *Davis* the inquiry in cases involving transfers of appreciated property is whether the wife's rights were "vested" or "inchoate," but in the alimony cases the inquiry may simply be whether the wife had an interest in the property, not whether she had a vested interest. There is some support for the position that payments for the release of a wife's inchoate interest in her husband's

section and [the marital property section] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose . . . may an award of maintenance be ordered." Despite this clear indication of a preference for property awards over maintenance, the law does not explicitly prohibit a settlement awarding maintenance while leaving the husband with most of the marital property. Such a settlement could hardly be held to be "unconscionable" merely because the parties do not share the Uniform Commissioners' preference for property settlements. There may even be cases in which the apparent policy objectives underlying the Uniform Act's preference for property divisions may be better served by an award of maintenance than by a division of marital property. Suppose, for example, that the bulk of the marital property consists of stock in a closely held corporation in which the husband, but not the wife, plays an active role. An award of some of this stock to the wife would set the stage for many years of business disputes between the divorced spouses, and would probably be less satisfactory, as a matter of avoiding future strife between the spouses, than an award of maintenance.

112. Treas. Reg. § 1.71-1(c)(4) (1957); see Grant R. Bishop, 55 T.C. 720 (1971), *acquiesced in*, 1971-2 CUM. BULL. 1; cf. Rev. Rul. 69-471, 1969-2 CUM. BULL. 10.

property are not alimony. In *Bernatschke v. United States*¹¹³ the Court of Claims held that annuity payments received by a wife were not alimony because the payments were intended by the parties to be compensation for the extinguishment of the wife's "dower"¹¹⁴ rights in her husband's income-producing property. Apparently, neither of the parties in *Bernatschke* argued that payments for the release of dower or similar rights could be alimony; instead, the parties seem to have focused solely on the factual question of whether the payments were for the release of dower rights. If *Bernatschke* is correct, payments for the wife's release of her right to Missouri marital property may well not be alimony, even if the wife's interest in marital property is "inchoate."¹¹⁵

Although *Bernatschke* is the only case actually to hold that payments for the release of inchoate marital property rights were not alimony, several cases have described the payments that do not qualify for alimony treatment in terms broad enough to include payments like those in *Bernatschke*. For example, in *Ernest H. Mills*¹¹⁶ the Tax Court stated the rule denying alimony treatment to property settlement payments as follows:

It is well settled that where, upon divorce or separation, there is a division of property or where a husband makes payments in satisfaction of the property rights of the wife, the amounts received by his wife are capital in nature and neither includable in her gross income under section 71 nor deductible by the husband under section 215.¹¹⁷

This formulation of the distinction between alimony and property settlement payments does not seem to require the wife's rights to be vested for payments for the release of those rights to be something other than alimony. The *Mills* court did go on to describe the wife's interest in the property (under Oklahoma law) as "vested," but noth-

113. 364 F.2d 400 (Ct. Cl. 1966).

114. Although the *Bernatschke* court referred to the rights in question as "dower," they actually consisted of the wife's right to one-third of the husband's estate upon his death. *Id.* at 406 n.6.

115. It is arguable that, even if payments for an inchoate interest in property can sometimes be a property settlement rather than alimony, payments for future inchoate interests such as the "dower" rights in *Bernatschke* should not be treated as a property settlement because of the difficulty of valuing the interests. See Marion R. Hesse, 60 T.C. 685 (1973) (\$500,000 settlement held to be for support because any future rights wife had in husband's property "were speculative and of no significant value").

116. 54 T.C. 608 (1970), *aff'd*, 442 F.2d 1149 (10th Cir. 1971). See also Lewis B. Jackson, Jr., 54 T.C. 125 (1971).

117. 54 T.C. at 615.

ing in the opinion suggests that the court would have allowed alimony treatment if it had viewed those rights as inchoate. The Tax Court's failure to cite the alimony cases when it dealt with the *Davis* issue in *Wiles* may suggest that it does not view the alimony cases as turning upon whether the wife's rights were vested. However, the Tax Court held in *Irving J. Hayutin*,¹¹⁸ a memorandum decision, that periodic payments were partially alimony because the wife's rights under Colorado law were no more extensive than the rights of the taxpayer's wife in *Davis*. The *Hayutin* opinion does not explain why payments relating to inchoate property rights are any less "property settlement" payments than payments for vested rights. The court simply said, after concluding that the wife's interest did not amount to "co-ownership," that the payments in question were "obviously" not payments for property, "since her interests did not rise to the level of property rights."¹¹⁹

Both *Bernatschke* and *Hayutin* treated the question of the alimony status of payments for a wife's inchoate rights in her husband's property on an "all or nothing" basis; thus, *Bernatschke* held that payments for the release of inchoate property rights were necessarily "property settlement" payments, while *Hayutin* held that such payments were necessarily not "property settlement" payments.¹²⁰ But the ultimate

118. 31 CCH Tax Ct. Mem. 509 (1972). Another case involving a property settlement under Colorado law is *Elbert G. Sharp*, 31 CCH Tax Ct. Mem. 795 (1971). In *Sharp* the court held the payments in question to be a property settlement without analysis of the nature of the Colorado wife's interest in her husband's property. The court noted that "the relevant Colorado law only serves to further enforce our view that none of these payments must per se be considered support payments." *Id.* at 798.

119. 31 CCH Tax Ct. Mem. at 568. See also *William C. Wright*, 62 T.C. — (1974), in which the Tax Court rejected a wife's argument that payments for her inchoate interest in her husband's property under Wis. STAT. ANN. § 247.26 (1967) were a property settlement rather than alimony. The court, citing *Davis* for the proposition that the wife's rights were inchoate, said that the wife "did not . . . give up anything that is recognized as supporting a division of property." This language seems to suggest that payments in exchange for "inchoate" property rights can never be a "property settlement," but the court went on to "distinguish" *Bernatschke* on the ground that the parties in *Bernatschke* considered the wife's inchoate rights in determining a settlement, while the parties in *Wright* considered the wife's need for support and spoke of the payments as "in lieu of alimony."

120. The *Hayutin* court held that the payments in question were not alimony to the extent they were for the wife's "actual ownership rights" in property received by the husband. Allocation of the payments between alimony and property settlement was accomplished by holding that \$500 per month (the amount of temporary alimony paid before execution of the settlement agreement) was alimony, and that the remainder was for property. Such interim payments have often been used as evidence of the wife's needs in cases where a dual-purpose payment must be treated as alimony in part.

issue in the alimony cases is whether the payments in question are "for support" of the wife, and it is questionable whether a rule that payments for the release of inchoate marital property rights are in all cases either for support or not for support is sound. In Missouri the economic position of the wife is one of several factors to be used in determining the portion of the marital property to which she is entitled. If, in a particular case, a Missouri wife would be entitled to a substantial award of marital property primarily because of her need for support, it should follow that periodic payments in lieu of such an award of marital property should also be regarded as for the wife's support, and thus as alimony. If, on the other hand, a particular Missouri wife would be entitled to a large share of the marital property because most of that property was purchased with her money, periodic payments in lieu of an award of that property should be treated as the purchase price of the property, not as support. If this analysis is correct, the question whether periodic payments in lieu of an award of marital property are alimony should be approached on a case-by-case basis, and a finding that periodic payments were a substitute for an award of marital property should not settle the alimony question one way or the other. Indeed, the marital property provisions may be regarded as completely irrelevant in the context of classifying periodic payments as alimony. Since a showing that a particular wife has a claim to a share of marital property should not resolve the alimony question, the courts may well ignore the marital property rights altogether and resolve alimony cases by the usual method of determining whether the terms of the agreement or decree, the circumstances of the parties, and the history of settlement negotiations show that all or part of the periodic payments were made to support the wife.¹²¹

Careful planning of settlement agreements can probably assure either alimony or non-alimony treatment of payments to the wife, even though the tax treatment of payments for the wife's interest in marital property is uncertain. If it is desired that payments not be taxed as

E.g., Grant R. Bishop, 55 T.C. 720, 728 (1971), *acquiesced in*, 1971-2 CUM. BULL. 1; Thomas E. Hogg, 13 T.C. 361, 367 (1949), *acquiesced in*, 1970-2 CUM. BULL. XX.

121. The approach suggested here will lead to different results from the approach of the court in *Hayutin* only in cases in which the wife is entitled to some of the marital property in her husband's name for reasons other than her need for support. In *Hayutin* only payments for property in the wife's name were treated as property settlement payments; the court would apparently have treated all of the periodic payments as alimony if no transfer of property from the wife to the husband had occurred.

alimony, they can simply be made non-periodic. If alimony treatment is desired, an agreement loaded with the kinds of provisions the courts have used to support holdings that payments were not for property may suffice. Because of the danger that payments for marital property may not qualify as alimony, the agreement should be drafted to support an argument that the payments involved are not for marital property. Although it is sometimes said that classification of payments as "alimony" or "for property" depends upon the "substance" of the transaction,¹²² most of the factors used by the courts to classify payments are within the control of the parties, and many of them are purely formal.¹²³ If the parties refrain from making calculations based upon the amount of marital property available for distribution,¹²⁴ if the agreement provides for payments that are clearly "maintenance" under Missouri law,¹²⁵ if property settlement payments are provided for separately,¹²⁶ if payments are to cease upon the death of either spouse or the wife's remarriage,¹²⁷ and if provision is made for increasing the payments if the wife's needs increase,¹²⁸ alimony treatment will probably follow, even though the husband retains most of the marital property.

The cases suggest several possible answers to the argument that payments received by a wife must be for her share of property if she

122. *E.g.*, *Bernatschke v. United States*, 364 F.2d 400 (Ct. Cl. 1966).

123. For discussions of these factors, see J. TAGGART, *SOME TAX ASPECTS OF SEPARATION AND DIVORCE* 37-54 (1973); Harris, *supra* note 105.

124. *E.g.*, *Lambros v. Commissioner*, 459 F.2d 69 (6th Cir. 1972); *McCombs v. Commissioner*, 397 F.2d 4 (10th Cir. 1968).

125. It is frequently said that characterization of payments in the decree or settlement agreement is not controlling. *E.g.*, *Taylor v. Campbell*, 335 F.2d 841 (5th Cir. 1964); *Bardwell v. Commissioner*, 318 F.2d 786 (10th Cir. 1963); *Lewis B. Jackson, Jr.*, 54 T.C. 125 (1970); *Blanche Curtis Newbury*, 46 T.C. 690 (1966), *acquiesced in*, 1970-2 CUM. BULL. xx; *Ann Hairston Ryker*, 33 T.C. 924 (1960). Nevertheless, the use of such terms as "alimony," "support," or "property settlement" in decrees or agreements has been used as evidence of the intent of the parties. *E.g.*, *Lambros v. Commissioner*, 459 F.2d 69 (6th Cir. 1972); *Campbell v. Lake*, 220 F.2d 341 (5th Cir. 1955); *Helen L. Hilgemeier*, 42 T.C. 496 (1964); *Corinne Pope Thompson*, 22 T.C. 275 (1954), *acquiesced in*, 1954-2 CUM. BULL. 6.

126. *E.g.*, *Taylor v. Campbell*, 335 F.2d 841 (5th Cir. 1964); *Robert I. Martin*, 31 CCH Tax Ct. Mem. 1219 (1972); *Joseph S. Freeland*, 19 CCH Tax Ct. Mem. 1460 (1960); *Julia Nathan*, 19 T.C. 865 (1953); *cf.* *Jerome A. Blate*, 34 T.C. 121 (1960), *acquiesced in*, 1961-2 CUM. BULL. 4.

127. *E.g.*, *Brantley L. Watkins*, 53 T.C. 349 (1969), *acquiesced in*, 1970-2 CUM. BULL. xxi; *Wilma Thompson*, 50 T.C. 522 (1968); *Ernest L. Veverka*, 29 CCH Tax Ct. Mem. 1496 (1970); *Corinne Pope Thompson*, 22 T.C. 275 (1954), *acquiesced in*, 1954-2 CUM. BULL. 6.

gave up that share. It is sometimes said, for example, that a wife may waive her claim to property and receive alimony instead.¹²⁹ Thus, although payments "for" the wife's property are not alimony, payments "in lieu of" her claiming her property can be alimony. This is an extremely fine distinction, upon which not too much reliance should be placed; most of the cases in which the "waiver" theory is found are cases in which the wife was held not to have waived her claim to property. Many cases have said that alimony treatment depends upon the intent of the parties, with intent being determined not only from the language of the agreement but also from the testimony of the parties¹³⁰ and their lawyers.¹³¹ The emphasis on intent may mean that a showing that the parties' primary concern in negotiating a settlement was the wife's financial situation will lead to a finding that payments are alimony.¹³² Some courts have even considered the intended tax consequences of an agreement as evidence of the payments' being alimony.¹³³ Although an agreement that payments are to be taxed a certain way will not necessarily achieve the desired result, it may at least tend to restrain the parties from treating payments inconsistently on their returns, a practice that is undoubtedly a major cause of the extraordinary volume of litigation on the alimony issue.¹³⁴ If some good non-tax reasons for awarding the husband the bulk of the marital property can be found, those reasons should be set forth in the decree. The wife's only right in marital property is to receive a "just" share, and a showing that the wife has received all the marital property to which she was entitled should leave no room for an argument that she sold part of her interest to the husband in exchange for purported alimony payments.¹³⁵ Unfortunately, the best way to es-

128. *E.g.*, Jerome A. Blate, 34 T.C. 121 (1960), *acquiesced in*, 1961-2 CUM. BULL. 4.

129. *E.g.*, *Bardwell v. Commissioner*, 318 F.2d 786 (10th Cir. 1963); *West v. United States*, 332 F. Supp. 1102 (S.D. Tex. 1971); *Grant R. Bishop*, 55 T.C. 720 (1971), *acquiesced in*, 1971-2 CUM. BULL. 1.

130. *E.g.*, *Bardwell v. Commissioner*, 318 F.2d 786 (10th Cir. 1963); *Floyd H. Brown*, 16 T.C. 623 (1951), *acquiesced in*, 1951-2 CUM. BULL. 2.

131. *E.g.*, *Elbert G. Sharp*, 31 CCH Tax Ct. Mem. 795 (1972); *Thomas E. Hogg*, 13 T.C. 361 (1949), *acquiesced in*, 1970-2 CUM. BULL. xx.

132. Thus, in *Bernatschke* the court noted that the amount of the payments was determined without consideration of the wife's income, and that the payments were not sufficient to maintain her standard of living at the pre-divorce level. 364 F.2d at 408.

133. *E.g.*, *Ann Hairston Ryker*, 33 T.C. 924 (1960). *But see Ben C. Land*, 61 T.C. 675 (1974).

134. *See cases cited note 125 supra*.

135. In *Grant R. Bishop*, 55 T.C. 720, 727 (1971), *acquiesced in*, 1971-2 CUM.

tablish that the wife is not entitled to a large share of the marital property is to establish that her needs are small, a showing that also tends to undermine a claim that periodic payments are intended as support.

III. CONCLUSION

The client seeking advice concerning the tax consequences of a property settlement or alimony payment is likely to feel, with some justification, that he has asked a "simple question." It is outrageous that there will often be no "simple answer." In both the appreciated property cases and the alimony cases the issue is usually whether the tax will be paid by the husband or by the wife,¹³⁶ with the Government being in the position of a stakeholder, whose interest is primarily to avoid being whipsawed. Since this is so, and since the tax burdens of payments related to divorce will often be the subject of negotiation between the parties, it is more important that the tax rules be clearly understood and that the tax consequences of proposed transfers be consistently predictable than that any particular rule be followed. But as long as the tax consequences of divorce-related payments are tied as closely to local law as is the case today, uncertainty is unavoidable, and innovations in local law, such as Missouri's, will necessarily have unpredictable tax consequences. For these reasons, proposals for legislative reform deserve serious consideration.

The American Bar Association's proposal to change the rule of the *Davis* case by statute¹³⁷ is commendable. It is safe to say that income from *Davis*-type transfers is very often unreported. Most laymen, and a good many lawyers, would never suspect that the transfer of property from a husband to his wife could subject the husband to taxation. The tax treatment of transactions engaged in by millions should, to the greatest extent possible, correspond to the parties' expectations. Furthermore, the ABA proposal would eliminate an unjustifiable differ-

BULL. 1, the husband made this argument but lost because he failed to convince the court that his wife was not entitled to a substantial share of the community property.

136. If the wife does not sell the property she receives, or if gain on the sale is not taxed (under § 1034, for example), gain may go untaxed forever because of the stepped-up-basis-at-death provisions. Professor Schwartz suggests that this may be the stumbling block to the enactment of the ABA proposal. Schwartz, *supra* note 23, at 199.

137. *Report of the Committee on Domestic Relations Tax Problems*, 19 BULL. OF ABA SECTION OF TAXATION 62, 63 (1966).

ence between the tax treatment of residents of common law states and that of residents of community property states.

The ABA would also change the definition of alimony, although only in the case of payments that are periodic under the ten-year rule of section 71(c)(2).¹³⁸ Such payments would be treated as "for support" (and therefore as alimony) unless the parties expressly provide in the decree of agreement that the payments are "for the purchase of property rights." In the case of payments that are periodic only under section 71(c)(2), this proposal should eliminate some of the uncertainty caused by the "support" requirement, although it would be unduly optimistic to expect that litigation would be much reduced.¹³⁹ The American Law Institute¹⁴⁰ would go even further than the ABA, eliminating the support requirement entirely. The ALI proposal would resolve the question whether payments for "marital property" under statutes like Missouri's can qualify as alimony, for the ALI proposal would tax as alimony all periodic payments except those that are "independent of the marriage."¹⁴¹ While payments for property actually owned by the wife would seem not to be alimony even under the ALI's definition, payments for property in which the wife's only interest arises from her marital status should qualify.¹⁴²

138. *ABA Report, supra* note 137, at 62.

139. For one thing, the proposal would not affect periodic payments not described in § 71(c)(2). Furthermore, the proposal is similar to § 71(b), which provides that payments which the terms of the decree, instrument, or agreement "fix" as child support payments are not alimony. Despite the apparent simplicity of § 71(b), and despite the literalness with which that section was construed in *Commissioner v. Lester*, 366 U.S. 299 (1961), there is an enormous amount of litigation over whether payments are child support. The continuing flood of litigation on the child support issue is probably a symptom of the hostility sometimes found between ex-spouses rather than of any uncertainty as to what the law is. But if litigation cannot be eliminated by legislative reform, such reform may at least make the courts' task easier.

140. ALI FED. INCOME TAX STAT. § X127 (Feb. 1954 Draft).

141. *Id.* § X127, Comment.

142. These proposals are somewhat similar to § 2516, which, in the case of the gift tax, substitutes a simple, arbitrary rule for the case law complexities created by the Supreme Court in *Harris v. Commissioner*, 340 U.S. 106 (1950).

WASHINGTON UNIVERSITY LAW QUARTERLY

Member, National Conference of Law Reviews

VOLUME 1974

NUMBER 2

Edited by the Undergraduates of Washington University School of Law, St. Louis.
Published during winter, spring, summer and fall, with one special issue published each
May by Washington University, St. Louis Missouri.

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