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Transfers of wealth between former spouses incident to their divorce[1] take a variety of forms. For federal income tax purposes, two broad categories of transfers are significant: recurring cash payments, or "alimony," and lump-sum transfers of cash or other property, particularly appreciated property.

Two distinct but inextricably related regimes exist for taxing these transfers. Under the first regime, recurring cash payments from husband to wife[2] are deductible by the husband and constitute income to the wife, but only if the payments discharge the husband's marital obligation to support his wife.[3] Under the second regime, the lump-sum transfer of appreciated property from husband to wife results in a taxable gain to the husband and a "stepped-up" (fair market value) basis to the wife, but again only where the transfer is in the nature of support.[4] Transfers in the nature of support may be contrasted with the husband's relinquishment of his *wife's* property. Although this contrast is often helpful, it is not self-evident, and perhaps not even correct, that a transfer in the nature of support is necessarily the converse of a relinquishment of the wife's property. Yet, the mutual exclusivity of such transfers is the linchpin of decision making in this area of tax law.[5]

The often attenuated distinction between a wife's right to support from her husband and her property rights in the marital wealth causes excessive uncertainty of tax consequences. Variations in state laws defining the wife's property rights exacerbate the problem, leading to the danger of

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1. For purposes of this article, the phrase "transfers incident to divorce" refers to the total settlement of marital wealth (including ongoing obligations financed by future earnings) decided upon (either by agreement or decree) as terms of the divorce. The remarks in this article are generally applicable to transfers incident to less permanent conjugal interruptions as well. *See* I.R.C. § 71(a)(2), (3).

2. For convenience, throughout this article the transferring spouse will be the husband and the receiving spouse the wife. *See* I.R.C. § 7701(a)(17).

3. I.R.C. §§ 71, 215. *See* text accompanying notes 39–41 *infra*.

4. United States v. Davis, 370 U.S. 65 (1962). *See* text accompanying notes 62–63 *infra*. This "support" nomenclature may evoke disagreement over the precise holding in *Davis* and its relationship with the treatment of recurring payments. The text accompanying note 98 *infra* develops more elaborately what is expressed only as a conclusion here.

5. *See* text accompanying notes 39–41 and 62–63 *infra*.

discriminatory taxation. Not surprisingly, then, the rule in *United States v. Davis*[6] that the transfer of appreciated property can generate taxable gain to the husband has suffered wide and harsh criticism.[7] Proposals for remedial legislation are numerous.[8] Curiously, critics have relatively seldom discussed the effect of the support-versus-property distinction on the treatment of periodic cash payments;[9] curious because periodic cash payments are a common means of settling marital wealth. One surmises that taxpayers and the revenue are affected more by this regime of taxation than by the rule on transfers of appreciated property.[10] Moreover, the regimes, though separate, are so functionally interrelated under present law that revision of one will necessarily alter the role and integrity of the other.

Given the outpouring of proposals to overrule *Davis,* congressional action in the reasonably near future is not unlikely. The intent of this article is to inspire a review of the entire area of wealth transfers incident to divorce; to take the scope of review beyond fixation on *Davis,* with the view of integrating the present regimes in a scheme that is less dependent on the subtle and often invisible distinction between support and property rights. The article discusses first, the purpose of the rules governing periodic cash payments; second, the evolution of the rule on transfers of appreciated property; third, an assessment of the need for reform; and fourth, a proposal for unified treatment of all marital wealth transfers, influenced primarily by the objective of allocating income and the attendant tax liability simply and equitably between husband and wife.

TREATMENT OF ALIMONY PAYMENTS

The present statutory pattern for taxing alimony payments was enacted in 1942.[11] The original objectives of this scheme, though not its mechanics, remain useful as guides for current reform. To understand these objectives, a brief review of prior law is in order.

Law Before the Revenue Act of 1942

Before 1942, periodic cash payments of alimony were neither deducti-

6. 370 U.S. 65 (1962).
7. *See* note 89 *infra.*
8. *See* note 127 *infra.*
9. *See* note 129 *infra.*
10. The Internal Revenue Service estimated that over 461,000 taxpayers claimed deductions for alimony in excess of one billion dollars in 1975. U.S. DEP'T OF TREASURY, STATISTICS OF INCOME, INDIVIDUAL INCOME TAX RETURNS 55 (1975). More recent figures apparently are not available.
11. Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 816-18 (now I.R.C. §§ 71, 72(k), 215, 682).

ble by the husband nor includible in the wife's income.[12] The Code[13] simply did not provide for a deduction and the Supreme Court ruled that the receipt of alimony is not an accession to income.[14] Thus, alimony payments were treated the same as the cost of supporting a spouse during marriage, of tax significance to neither spouse. As a result, husbands were subject to taxation not only on the income they retained, but also on that which was paid over as alimony. Progressive tax rates aggravated the hardship. In extreme cases alimony payments left the husband with insufficient income to pay the tax.[15] One of the purposes of the alimony provisions in the Revenue Act of 1942 was to alleviate this inequity.[16]

If instead of making direct alimony payments, the husband transferred income-producing property to a trust for his wife's benefit, a slightly different issue arose. According to a series of Supreme Court decisions beginning with *Douglas v. Willcuts*,[17] the income of such "alimony trusts" was taxable to the husband unless the arrangement worked a complete discharge of his duty to support his wife. The theory was that application of trust income against a continuing support obligation is tantamount to receipt of the income by the husband followed by payment to the wife.[18]

The principle that a taxpayer realizes income when his debts are paid by a third party is unassailable, but why its application in the alimony trust area was limited to situations where the support obligation survived divorce merits analysis. In *Helvering v. Fuller*,[19] the only Supreme Court case finding that the alimony trust completely extinguished the husband's duty of support under state law, the Court reasoned that such a transfer should be treated the same as an outright transfer of the corpus in full satisfaction of the support obligation. In each instance, the argument went, the wife, as a creditor who has accepted a property interest in release of her claim, is responsible for tax on the income from the property. In his dissent,[20] Mr. Justice Reed maintained that whether the support obligation survives divorce should be irrelevant. Even where the alimony trust extinguishes the support duty, he argued, creation of the trust is a

12. Gould v. Gould, 245 U.S. 151 (1917).
13. All such references are to the Internal Revenue Code in effect at the relevant time.
14. Gould v. Gould, 245 U.S. 151 (1917).
15. *Hearings Before House Comm. on Ways and Means on Revenue Revision of 1942*, 77th Cong., 2d Sess. 92 (1942) (statement of Randolph Paul).
16. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 71–72 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 83 (1942).
17. 296 U.S. 1 (1935). Subsequent cases were Helvering v. Leonard, 310 U.S. 80 (1940); Helvering v. Fuller, 310 U.S. 69 (1940); Helvering v. Fitch, 309 U.S. 149 (1940).
18. *Cf.* Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929) (employer's payment of employee's income taxes is income to employee).
19. 310 U.S. 69 (1940).
20. *Id.* at 76.

prior appropriation of future income to discharge that duty. Analogizing a transfer in trust which extinguishes the husband's duty to an outright transfer of corpus (income taxable to the wife) was, in his opinion, no more compelling than equating the transfer in trust with a retention of corpus by the husband and use of the income to support his wife (income taxable to the husband).

The Court and Mr. Justice Reed were struggling subliminally with a familiar issue in taxation, one whose implications are just beneath the surface in the treatment of transfers incident to divorce: who is the owner of property and hence the party responsible for the tax on income from the property?[21] Mr. Justice Reed could understandably object to entirely relieving Mr. Fuller of tax liability on the transaction. But to tax Mr. Fuller indefinitely on income from property he no longer owned is repugnant to the general principle that one who owns property must pay the tax on its income.[22] If state law provides that a transfer of property to an alimony trust extinguishes the husband's duty to support his wife, the appropriate exaction, if any, is to tax the husband only on the gain inherent in the property at the time of the transfer, rather than on the continuing stream of income generated from the property. The Supreme Court sanctioned this approach in a related context twenty years later in *Davis*,[23] but no hint of it can be found in the alimony trust cases.[24]

21. *See* Harrison v. Schaffner, 312 U.S. 579 (1941); Helvering v. Horst, 311 U.S. 112 (1940); Blair v. Commissioner, 300 U.S. 5 (1937).

22. The cases cited in note 21 *supra* are part of the assignment of income doctrine, which holds that the owner of property is the person responsible for tax on income from the property, even if someone else receives the income. *See* Lyon & Eustice, *Assignment of Income: Fruit and Tree as Irrigated by the P.G. Lake Case*, 17 TAX L. REV. 295 (1962). Although the government did not specifically raise the issue in *Fuller*, the Court questioned, but declined to rule, whether the husband had retained sufficient control over the trust to be regarded as the continuing owner of the corpus under Helvering v. Clifford, 309 U.S. 331 (1940). 310 U.S. at 76. The dissent was similarly troubled. 310 U.S. at 79. *Clifford* was the precursor of the present grantor trust rules, I.R.C. §§ 671–678, which now prescribe exclusive conditions that result in the treatment of a grantor as the owner of property in trust and consequently taxable on income from the property. The grantor trust rules do not operate to tax the husband on income from an alimony trust. I.R.C. § 682(a). *See* note 38 *infra*.

23. United States v. Davis, 370 U.S. 65 (1962). *See* text accompanying notes 60–62 *infra*.

24. In Mesta v. Commissioner, 42 B.T.A. 933 (1940), *rev'd*, 123 F.2d 986 (3d Cir. 1941), *cert. denied*, 316 U.S. 695 (1942), where the husband transferred appreciated securities directly to his wife in satisfaction of his support obligation, the government asserted that the husband realized a taxable gain on the transfer. The Board distinguished dictum in *Fuller* that supported the government on the ground that *Fuller* involved taxation of the wife, not the husband. *See* text accompanying note 54 *infra*. It wasn't until later that the unavoidable relationship between the alimony trust cases and direct transfers crystallized. Spruance v. Commissioner, 60 T.C. 141 (1973), *aff'd mem.*, 505 F.2d 731 (3d Cir. 1974). In *Spruance*, where the husband transferred appreciated securities to an irrevocable alimony trust for the exclusive benefit of his former wife and children, the government conceded, to the detriment of the revenue, that the transfer was a taxable event under *Davis*.

In any event, determining whether creation of an alimony trust extinguished the husband's support obligation was chancy business. A function of state law and the terms of the divorce papers, this "finality rule," as Mr. Justice Reed styled it,[25] turned on whether the divorce court had ongoing authority to modify the husband's obligation if future circumstances warranted. If so, the support duty survived divorce and the husband was taxable on income from the alimony trust; if not, the wife was taxable. Under the finality rule, results varied with state law, not to mention the effect of language employed in the divorce papers.[26] To produce uniformity of results, Congress abolished the finality rule, making it no longer relevant for tax purposes whether the husband's support duty survives divorce. Uniformity was the second major purpose of the Revenue Act of 1942's alimony provisions.[27]

Congressional dissatisfaction with the vagaries of the finality rule in 1942 is an ironic reminder of the faults in the present system. The same genre of criteria which then determined whether the husband's support duty survived divorce now determine whether a transfer of wealth incident to divorce is in the nature of support, a finding that controls the treatment of periodic cash payments as well as one-time transfers of property.[28] To repair the present system, Congress would do well to harken to its objectives in 1942: to tax income to the recipient and to minimize the effect of state law. These goals remain significantly unmet.

Present Law and Its Intended Purpose

The provisions enacted in 1942 are chiefly embodied in sections 71 and 215 of the Code.[29] In general, section 71 provides that periodic payments which the divorce papers impose on the husband in recognition of his marital duty of support are includible in the wife's income.[30] Section 215

25. Helvering v. Fuller, 310 U.S. 69, 78 (1940).

26. *See generally* R. PAUL, STUDIES IN FEDERAL TAXATION 243–95 (3d series 1940); Gornick, *Alimony and the Income Tax,* 29 CORNELL L. Q. 28 (1943).

27. H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942). Alimony trust income is now taxable to the wife under I.R.C. §§ 71 or 682, regardless of whether the husband's support obligation is extinguished. *See* note 38 *infra.*

28. *See* H. CLARK, LAW OF DOMESTIC RELATIONS § 14.9, at 455 (1968), and compare with text accompanying notes 66–72 *infra.*

29. I.R.C. §§ 71, 215. The amendments were in the Revenue Act of 1942, Pub. L. No. 77–753, § 120, 56 Stat. 816–18 [codified in Int. Rev. Code of 1939, ch. 1, §§ 22(k) (now I.R.C. § 71), 23(u) (now I.R.C. §215), 171 (now I.R.C. §682), 22(b)(2) (now I.R.C. §72(k))].

30. Section 71 also applies to payments received pursuant to a written separation agreement and to a decree for separate maintenance or support. It reads as follows:

§ 71. Alimony and separate maintenance payments

(a) General rule.—

(1) Decree of divorce or separate maintenance.—If a wife is divorced or legally sepa-

grants a corresponding deduction to the husband.[31] Thus the general idea is to tax the husband only on that portion of his income which he retains and to tax the wife on the portion she receives. For this reason it is often said that the scheme works a kind of income splitting.

The committee reports establish that *income* is the intended touchstone

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rated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written separation agreement.—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(3) Decree for support.—If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

(b) Payments to support minor children.—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

(c) Principal sum paid in installments.—

(1) General rule.—For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where period for payment is more than 10 years.—If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

(d) Rule for husband in case of transferred property.—The husband's gross income does not include amounts received which, under subsection (a), are (1) includible in the gross income of the wife, and (2) attributable to transferred property.

I.R.C. §71.

31. In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment, if by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

I.R.C. § 215.

of the scheme. Congress was primarily concerned with the husband who must resort to a recurring stream of income to pay alimony.[32] Nonetheless, sections 71 and 215 apply without regard to the source of the alimony. The husband may deduct, and the wife must include, payments described in section 71 irrespective of how much income the husband has.[33] Furthermore, deductible alimony can in fact be paid out of capital and the committee reports say so expressly.[34]

Why Congress deviated from a strict income standard is not clear. Doing so was essential neither to effectuate income splitting nor to remove the uncertainty of dependence on state law, the stated reasons for the new rules. Statements in the committee reports alluding to payments from the husband's capital involve transfers of property to the wife which produce a flow of wealth consisting in part of the husband's capital.[35] The example used in the reports is a single premium annuity contract purchased by the husband and assigned to his wife.[36] The monthly annuity payments would have been partly a return of capital to the husband, but nonetheless are taxable in full to the wife.[37] Whatever reasons Congress had for this questionable "creation" of income, the mainstream of its thinking was to

32. The existing law does not tax alimony payments to the wife who receives them, nor does it allow the husband to take any deduction on account of alimony payments made by him. He is fully taxable on his entire net *income* even though a large portion of his *income* goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient *income* left after paying alimony to meet his income tax obligations.

The bill would correct this situation by taxing alimony and separate maintenance payments to the wife receiving them, and by relieving the husband from tax upon that portion of such payments which constitutes *income* to him under the present law.

H.R. REP. No. 2333, 77th Cong., 2d Sess. 46 (1942) (emphasis added). To the same effect is S. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942).

33. Deductions under § 215 do not generate a net operating loss that can be carried over as a deduction to other years. *See* I.R.C. § 172(a),(c),(d)(4). In the abstract, therefore, alimony provides a tax benefit only to the extent of the husband's income for the year of payment. However, income can be offset by alimony which is paid from preexisting property. The support requirement in § 71 attempts to prevent this, but does so imperfectly. *See* text accompanying note 42 *infra*.

34. H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942). S. REP. No. 1631, 77th Cong., 2d Sess. 84 (1942). The concern expressed here was with full inclusion to the wife regardless of the source of the payment, rather than deductibility to the husband. *See* Gallatin Welsh Trust v. Commissioner, 16 T.C. 1398 (1951), *aff'd sub nom.*, Girard Trust Corn Exch. Bank v. Commissioner, 194 F.2d 708 (3d Cir. 1952) (alimony paid from trust corpus taxable to wife); note 38 *infra*.

35. Although the statements are concerned primarily with property transfers, the precise language is slightly broader: "Thus, it matters not that such payments are attributable to property in trust, to life insurance, endowment or annuity contracts, or to any other interest in property, or are paid directly or indirectly by the obligor husband from his income or capital." H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 84 (1942); *accord*, Treas. Reg. § 1.71-1(c)(2) (1957). *See* note 38 *infra*.

36. H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 84 (1942).

37. *See* I.R.C. § 72(k).

split up the tax liability on the husband's income according to who received it.[38] Proof of this lies in the conditions in section 71.

The Support Requirement

By its terms, section 71 applies only to payments imposed on the husband "because of the marital or family relationship."[39] The Treasury

38. The Code specifically provides that both the income and capital elements of annuity payments under an annuity, endowment or life insurance contract are includible in the wife's income if the payments are described in § 71. I.R.C. § 72(k). The same applies to life insurance proceeds paid by reason of the insured's death. I.R.C. § 101(e). In both instances, the payments are neither includible in the husband's income, nor deductible to him. I.R.C. §§ 71(d), 215. These rules come into play only where the contract is transferred to, or assigned for the benefit of, the wife, i.e., where the wife is the contractual beneficiary. (A simpler example, uncomplicated by the distinction between income and capital, is a transfer of stock to the wife to discharge the husband's support obligation. The dividends are includible in the wife's income and are neither includible nor deductible to the husband.)

These rules are equally applicable, though considerably more complex, where the transfer to the wife is in trust. Regardless of whether the transfer extinguishes the husband's support duty under state law, the wife is taxable on the trust income as a beneficiary. Where the trust is created incident to the divorce or incorporated by reference in the divorce papers, the income is taxable to the wife under I.R.C. § 71(a) and excluded from the husband's income under I.R.C. § 71(d). Where the trust is completely independent of the divorce status, the income is taxable to the wife and excluded from the husband's income under I.R.C. § 682(a). *See* Treas. Reg. §§ 1.71-1(c)(3) (1957), 1.682(a)-1(a)(2) (1957). In neither instance is the husband entitled to a deduction. I.R.C. § 215. Important differences exist, however, in the treatment of the wife under § 71 and § 682(a). For example, under the latter, but not the former, the wife's income cannot exceed the trust's income; capital flows through to the wife tax-free. *See* Treas. Reg. § 1.682(a)-1(a)(2) (1957). Other issues are whether § 71 overrides various general rules which § 682 accommodates, such as the exclusion from income under I.R.C. § 103 for interest on government obligations. *See* Ellis v. United States. 416 F.2d 894 (6th Cir. 1969).

The discussion here is intentionally superficial and studiously avoids the hairsplitting details. For a thorough analysis of alimony payments attributable to transferred property, see Peschel, *Income Taxation of Alimony Payments Attributable to Transferred Property: Congressional Confusion*, 44 TUL. L. REV. 223 (1970); Del Cotto, *The Alimony Trust: Its Relationship with Subchapter J; The Right to Amortize Basis*, 33 TAX L. REV. 577 (1978). All of this is raised here merely to show that no theme emerges to explain why Congress chose a few specific divorce transactions in which to obliterate the distinction between income and capital. If the desire was to tax the wife on every accession, why does § 682 protect the wife from taxation on the husband's capital? Moreover, why was nothing done to make the wife taxable on a lump sum transfer in satisfaction of her support rights? *See* United States v. Davis, 370 U.S. 65, 73 n.7 (1962). Random departures from the income standard should not impair recognition of income splitting as the key to alimony taxation. *But cf.* Luckenbach v. Pedrick, 214 F.2d 914 (2d Cir. 1954) (wife taxable on alimony paid by husband's father); Neeman v. Commissioner, 26 T.C. 864 (1956), *aff'd per curiam*, 255 F.2d 841 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958) (wife taxable on alimony despite fact that source was husband's tax exempt income); Gallatin Welsh Trust v. Commissioner, 16 T.C. 1398 (1951), *aff'd sub nom.*, Girard Trust Corn Exch. Bank v. Commissioner, 194 F.2d 708 (3d Cir. 1952) (alimony paid from trust corpus taxable to wife).

39. I.R.C. § 71(a)(1),(2). Section 71(a)(3), which covers payments under a decree for support, literally applies to payments for "support or maintenance," without mentioning the marital or family relationship. I.R.C. § 71(a)(3). This provision was introduced by the Senate in the 1954 recodification and nothing in its report suggests that the omission of the phrase is significant. *See* S. REP. No. 1622, 83d Cong., 2d Sess. 10-11, 170-71 (1954).

Regulations elaborate by confining the scope of section 71 to payments made "because of the family or marital relationship in recognition of the general obligation to support."[40] The regulations illustrate by excluding from section 71 repayment of a previous loan from the wife. The origin of this so-called "support" requirement is in the committee reports accompanying the Revenue Act of 1942:[41]

> This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument or decree. This section does not apply to that part of any periodic payment attributable to any interest in the property so transferred, which interest originally belonged to the wife, unless she received it from her husband in contemplation of or as an incident to the divorce or separation without adequate and full consideration in money or money's worth, other than the release of the husband or his property from marital obligations.

Writers have wondered whether the support requirement is merely a gloss on the "marital or family relationship" language or an attempt to differentiate deflections of income from divisions of capital.[42] It probably is both, for both explanations say the same thing. Take the situation in the report quoted above where the husband transfers to the wife property that originally belonged to her. One hardly can say that the husband is supporting the wife by conveying to her that which she already owned independently of the marital relationship. But what does this have to do with income tax consequences? The support requirement simply tries to assure, in a very crude manner, that income cannot be shifted where income does not exist. The presence of a payment in the nature of support signals the shifting of income from husband to wife, or obversely, the absence of a division of preexisting capital. The wife's receipt of support is to be distinguished from an extraction of her property, the previous accession to which has already been subjected to normal rules of income taxation.

To explain the requirement as a means of distinguishing divisions of income and capital is to restate the same idea in different words. Either explanation perceives the support requirement as a turnstile through which pass only those payments which effectuate the overriding policy of income splitting. This view does not perfectly explain the treatment of all

40. Treas. Reg. § 1.71–1(a)(4) (1957).

41. H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942); S. REP. No. 1631, 77th Cong., 2d Sess. 84 (1942).

42. *See* Harris, *The Federal Income Tax Treatment of Alimony Payments—The "Support" Requirement of the Regulations*, 22 HASTINGS L. J. 53, 57–60 (1970), and the authority discussed therein.

transfers of wealth incident to divorce,[43] but it does furnish a perspective of the support requirement that is consonant with the policy fostered by the 1942 legislation.[44]

The Periodic Requirement

Section 71 also requires that the payments be periodic. The legislative history gives no reason for this requirement. The Code does not define periodic, other than to say in section 71(c) that installment payments discharging a principal sum are not periodic. An exception to this rule is for installments payable over a period ending more than ten years after the divorce.[45] The regulations set out elaborate rules for determining whether payments are periodic.[46] Echoing section 71(c), they treat installment payments of a principal sum as periodic only if payable over a period ending more than ten years after the divorce, and then only to the extent of ten percent of the principal sum each year.[47] Payments which terminate within ten years of the divorce are not periodic.[48] Regardless of the period over which the payments are made, however, they are treated as periodic in full, if subject to certain contingencies.[49] These contingencies, which may be imposed either by the divorce papers or by state law, are the death of either spouse, remarriage of the wife or a change in the economic status of either spouse.

These rather complicated provisions may be reduced to a simple test, subject to a single qualification. If contingencies make the total amount to be paid theoretically unascertainable at the time of the divorce, the payments are periodic. If the amount is ascertainable and is payable over a period ending more than ten years after divorce, the payments are periodic up to ten percent of the total amount each year.[50] No other payments are periodic.

Why should the ability to ascertain how much the wife will receive govern tax consequences? Like the support requirement, the periodic requirement can be viewed as a roundabout method of limiting section 71 to a shifting of income. If the amount is fixed, regardless of what the future

43. *See id.* at 59; note 38 *supra*.

44. *See* Warnack v. Commissioner, 71 T.C. 541, 550–51 (1979) (adopting an income-splitting approach to the support requirement).

45. I.R.C. § 71(c), text quoted at note 30 *supra*.

46. Treas. Reg. § 1.71-1 (d) (1957).

47. Treas. Reg. § 1.71-1 (d) (1), (2), (5) ex. (4) (1957).

48. Treas. Reg. § 1.71-1 (d) (3), (5) ex. (3) (1957).

49. Treas. Reg. § 1.71-1 (d) (3), (4), (5) ex. (1) & (2) (1957).

50. The amount is ascertainable if a total sum is stated or can be computed. Warnack v. Commissioner, 71 T.C. 541 (1979); *cf.* Treas. Reg. § 1.71-1 (d) (3) (ii) (b), 1 (d) (5) ex. (3) (1957). *But see* Myers v. Commissioner, 212 F.2d 448 (9th Cir. 1954).

holds—death, remarriage, loss of employment, impoverishment or other contingencies which affect ability to pay or need—one is nearly compelled to conclude that the wife's award is an agreed-upon share of present marital wealth. Husbands cannot agree to, wives cannot reasonably expect and courts generally do not demand, a no-strings obligation which present marital wealth cannot adequately finance. The attachment of income-sensitive strings to the husband's obligation suggests that he will look to future income to meet it. Section 71(c)(2),[51] which treats installment payments of a fixed sum as periodic, is not inconsistent with this perception. Rather, it reflects a presumption, or at least a compromise based on suspicion, that payments stretching over ten years are more likely to come from income than capital.

Admittedly, this analysis is not perfect. For example, remarriage of the wife may affect her need for continued support, but has nothing to do with the husband's income. Nevertheless, viewing the periodic requirement as a guardian of the income-splitting policy is the most plausible explanation for its existence.[52]

Perhaps divining a grand purpose behind sections 71 and 215 attributes false intent to Congress. But in view of the stated purpose to tax income to the receiving spouse, one has difficulty believing Congress was desultory in selecting the statutory language. And if the objective of this regime is to achieve income splitting, with minimal dependence on state law, its focus has been blurred through gradual subjugation to the technicalities of section 71, particularly the support requirement.[53]

TREATMENT OF PROPERTY TRANSFERS

Two early decisions of the Board of Tax Appeals held that a husband does not realize taxable gain on the transfer of appreciated property to his wife as part of a divorce settlement.[54] In each case the wife accepted securities in complete discharge of her right to support and whatever rights she may have had in the husband's property. The decisions rested on alternative grounds: one, that rights released by the wife could not be valued; and two, that the transfer was a nontaxable division of property.

51. I.R.C. § 71 (c) (2), text quoted at note 30 *supra*.

52. Note, *Alimony Taxation—The Contingency Doctrine Challenged*, 9 HARV. J. LEGIS. 156, 160 (1971). One writer suggests that the periodic requirement properly prevents the bunching of income and deductions to the wife and husband, respectively, that would obtain if § 71 did not require periodic payments. Peschel, *supra* note 38, at 227. *See* note 33 *supra*.

53. *See* text accompanying notes 98–105 and 109–15 *infra*.

54. Halliwell v. Commissoner, 44 B.T.A. 740 (1941), *rev'd per curiam*, 131 F.2d 642 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); Mesta v. Commissioner, 42 B.T.A. 933 (1940), *rev'd*, 123 F.2d 986 (3d Cir. 1941), *cert. denied*, 316 U.S. 695 (1942).

Both cases were reversed. In *Commissioner v. Mesta,*[55] the Third Circuit likened the transfer to an appropriation by the husband of the gain inherent in the securities, and peremptorily rejected the division of property argument. The Second Circuit followed suit in *Commissioner v. Halliwell.*[56] Neither opinion analyzed in any detail the precise nature of the rights surrendered by the wife.[57]

For the next twenty years the rule was settled that when a husband transferred appreciated property to his wife to satisfy his support obligation, he realized a taxable gain measured by the excess of the value of the property over his basis in the property.[58] Then the Sixth Circuit rejected the notion that the rights surrendered by the wife can be presumed equal in value to the property transferred by the husband.[59] The Court of Claims did the same shortly afterward, prompting review by the Supreme Court in *United States v. Davis.*[60]

In *Davis,* the husband agreed to make monthly support payments and also transferred appreciated securities to obtain the release of whatever rights Mrs. Davis had arising out of the marital relationship. Against the government's assertion that he realized a gain on the transfer, Mr. Davis countered that the transfer was a nontaxable division of property, and alternatively, that even if the transfer was taxable, his gain could not be measured. On the second point, the Court reversed, holding that the rights surrendered by Mrs. Davis must be presumed equal in value to the securities.[61] Before reaching that issue, however, the Court had to find that the transfer was a taxable event.

55. 123 F.2d 986 (3d Cir. 1941). The court relied on Helvering v. Horst, 311 U.S. 112 (1940), which held that a taxpayer who owned bonds, and had given only the interest coupons to his son, realized the benefit of the interest, and therefore was taxable on the interest, even though it was paid directly to his son. *See* notes 21 & 22 *supra*. On the valuation question, the court equated the value of the rights released by the wife with the value of the securities she received.

56. 131 F.2d 642 (2d Cir. 1942).

57. In response to the taxpayer's attempt in *Halliwell* to distinguish *Mesta*, the Second Circuit observed that Mrs. Halliwell had no present property rights in the securities under Connecticut law, rather that she accepted the securities in lieu of support. 131 F.2d at 643.

58. *E.g.*, Marshman v. Commissioner, 31 T.C. 269 (1958), *rev'd*, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960); King v. Commissioner, 31 T.C. 108 (1958); Estate of Stouffer v. Commissioner, 30 T.C. 1244 (1958), *rev'd sub nom.*, Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960); Patino v. Commissioner, 13 T.C. 816 (1949), *aff'd*. 186 F.2d 962 (4th Cir. 1950); Hall v. Commissioner, 9 T.C. 53 (1947). If the parties assigned a value to the property in the divorce negotiations, that value was used to measure the husband's gain. *Estate of Stouffer, supra; Patino, supra; Hall, supra.*

59. Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960).

60. United States v. Davis, 370 U.S. 65 (1962), *rev'g*, 287 F.2d 168 (Ct. Cl. 1961).

61. *Id.* at 72. The Court also stated in dictum that the value of the securities determined the wife's basis in them. *Id.* at 73. The Tax Court had held the same previously in Marshman v. Commissioner, 31 T.C. 269 (1958), *rev'd*, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960); *accord*, Rev. Rul. 67–221, 1967–2 C.B. 63 (also confirming that the wife does not realize income in a *Davis* transaction).

When co-owners of property partition their interests, neither realizes a gain for tax purposes and the basis in the property remains the same (part of it carries over to each party). Mr. Davis equated that situation with the transfer of securities to his wife, which demanded the premise that she was a co-owner. The Court rejected that premise:

> 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. . . .
>
> This is not to say it would be completely illogical to consider the shearing off of the wife's rights in her husband's property as a division of that property, but we believe the contrary to be the more reasonable construction. 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. In the present context the rights of succession and reasonable share do not differ significantly from the husband's obligations of support and alimony. They all partake more of a personal liability of the husband than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband's property as it did here, but certainly this happenstance does not equate the transaction with a division of property by co-owners.[62]

Instead of merely relinquishing to Mrs. Davis *her* property, Mr. Davis used *his* property to satisfy his support obligation. Once that premise is met, taxing the husband is in accord with the principle that satisfaction of an obligation with appreciated property results in a taxable gain.[63]

Thus the treatment of property transfers incident to divorce turns on the nature of the wife's marital rights under state law. Under Delaware law Mrs. Davis was entitled upon divorce to whatever share of her husband's property the divorce court deemed reasonable.[64] Similar statutes are in force in other states, yet in some cases wives whose substantive property rights seem indistinguishable from Mrs. Davis' have been treated as co-owners.[65] As in the treatment of periodic alimony payments, the distinction between support rights and property rights plays a predominant role in the treatment of one-time property transfers incident to divorce.

62. 370 U.S. at 70–71. The specific provisions which the Court was construing are I.R.C. §§ 61(a) and 1001, which subject to taxation "gains derived from dealings in property" and measure them by the excess of the fair market value of property received (release of the wife's marital rights) over the adjusted basis of the property disposed of (the securities).

63. *See* Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940).

64. DEL. CODE ANN. tit. 13, § 1531 (1953) (current version at DEL. CODE ANN. tit. 13, § 1527 (1974)).

65. *See* text accompanying notes 73–95 *infra*.

ASSESSMENT OF THE NEED FOR REFORM

A system of taxation of transfers incident to divorce—periodic alimony payments and one-time conveyances of property—should have among its goals certainty, uniformity and simplicity. The government's position is close to a stakeholder; aside from differences in timing and rates, a tax benefit to the husband is usually matched by a countervailing tax cost to the wife, and vice versa. Given this neutrality (at least theoretically),[66] strict adherence to analogical reasoning can be relaxed to attain desirable goals so long as the results are generally acceptable. Consideration will now be given to various aspects of the present system which frustrate these goals.

Support versus Property Rights—in General

As discussed earlier, whether a transfer of wealth discharges the wife's right to support, as opposed to satisfying her property rights, determines the consequences of periodic payments and one-time property transfers. To recapitulate somewhat simplistically, the basic purpose of the distinction between support and property rights is to separate situations where the husband is either deflecting income (periodic alimony payments) or using previously untaxed gain to satisfy an obligation (*Davis*), from situations where husband and wife are dividing their property. The former produce tax consequences; the latter do not.

If the distinction is clear, the results are certain. For example, suppose that husband and wife own no property when they marry. During the marriage each is employed outside the home and earns equal compensation. All their earnings are invested in a single parcel of real estate, which they hold as tenants in common. There is no other present marital wealth. When they divorce, he takes half the parcel and she takes the other half. In addition, the husband agrees to pay five hundred dollars a month alimony until the wife remarries. The law of their state gives the wife a right to support, but does not give either spouse a right upon divorce to a share

66. The spouse who deducts alimony is not required to identify the recipient on his or her tax return, nor presumably to file an information return describing the payments. *See* I.R.C. § 6041(a). The temptation to overstate alimony deductions and understate alimony income is undeniable. *See* Kuntz, *Simplification of the Definition of Periodic Payments in Internal Revenue Code Section 71*, 47 CIN. L. REV. 213, 220 (1978); STATISTICS OF INCOME, *supra* note 10, at 22, 55. Also, there is a suspicion of substantial noncompliance with *Davis*. PERSONAL INCOME COMMITTEE, TAX SECTION, NEW YORK STATE BAR ASSOCIATION, REPORT ON THE DAVIS RULE REGARDING PROPERTY SETTLEMENTS IN DIVORCE OR SEPARATION (June 1978). *See, e.g.*, Spruance v. Commissioner, 60 T.C. 141 (1973), *aff'd mem.*, 505 F.2d 731 (3d Cir. 1974) (trust for wife's benefit obtained stepped-up fair market value basis despite fact that husband's failure to report gain on transfer was barred by statute of limitations).

of the other's property. The splitting of real estate is a nontaxable division of property and the monthly payments are deductible to the husband and income to the wife.

But rarely are the facts so easy. Spouses may bring unequal wealth to the marriage. They may contribute in different amounts and different ways to marital wealth during marriage. Title ownership of property may not exist or may bear no relationship to actual contribution. State laws may confer equal property rights or give courts the power to shuffle property between spouses depending upon what is reasonable, what the wife needs, what the husband is able to give, relative contributions, the grounds for divorce or various combinations of the foregoing. State courts may vary in their interpretation of such laws. The divorce papers may be ambiguous as to the legal nature of a particular transfer. Consequently, the distinction between support and property rights can be hopelessly muddled, resulting in an unwarranted amount of litigation.[67] Moreover, in the difficult cases, one must strain to find any real content in the distinction.

When defining a payment in the nature of support, one thinks of the principal historical function of alimony, to maintain the approximate standard of living which the wife enjoyed during marriage.[68] But courts also use alimony to achieve other purposes, such as supporting children and penalizing fault.[69] And in determining alimony, they use some criteria which are not necessarily related to support.[70] The realm of factors includes the husband's ability to pay, the wife's needs, who is at fault, the age and health of the parties, how much property they own and whether the wife contributed to its accumulation, the length of the marriage and the parties' other financial responsibilities.[71]

In the abstract, most of these factors are sufficiently related to the notion of marital support to provide a workable basis for distinguishing a division of property. But if the wife's "property" is not clearly earmarked by record ownership, community property laws or other means, how is it to be defined? The distinction from support would remain acceptably clear if in defining property rights, courts confined themselves to factors bearing on equitable ownership, such as how the property was originally acquired, how it was used and who supplied the purchase

67. The following is from a recent report on the Tax Court's overload: "Divorce issues also crop up with numbing regularity. Alimony payments normally are deductible by the payer and taxable to the recipient, and the judges often have to decide whether payments are alimony or part of a property settlement and thus nondeductible." Wall St. J., April 14, 1980, at 37, col. 3.

68. *See* H. CLARK, LAW OF DOMESTIC RELATIONS, §§ 14.1, 14.5, at 441–42 (1968).

69. *Id.* §§ 14.1, at 421–22, 14.5, at 441.

70. *Id.* § 14.5, at 441.

71. *Id.* § 14.5, at 443–47.

money. However, courts do not so confine themselves, and instead resort to the same factors that are relevant to setting alimony.[72] The resulting overlap clouds the distinction between support and property rights, and in the process causes unwarranted uncertainty and arbitrariness in tax consequences. The Tenth Circuit's applications of *Davis* illustrate.

Support versus Property Rights—One-Time Transfers

In *Pulliam v. Commissoner*,[73] the wife had entered the marriage with no property and had not worked outside the home. The husband transferred real estate to her pursuant to a court-ordered property settlement. The settlement took into account several factors, including the financial condition of the parties, the husband's support duty and earning capacity, and whether the wife brought any property into the marriage.[74] With little analysis, the court concluded that Colorado law did not confer on the wife rights of ownership in her husband's property and held the transfer was taxable under *Davis*.

In *Collins v. Commissioner*,[75] the wife brought relatively little property to the marriage, but had assisted her husband in entertaining business associates during the marriage. Under the property settlement agreement, she received substantial monthly alimony payments and stock in a family business which the husband had inherited.[76] The award took into account the length of the marriage, the wife's accustomed standard of living, her

72. *Id.* § 14.8, at 450–51. Factors bearing on equitable ownership, particularly the wife's contribution to the accumulation of marital wealth, relate more logically to property rights than to support. But the courts refer to such factors for either purpose. *See* text accompanying note 71 *supra*.

73. 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964).

74. The court was empowered to decree the settlement under COLO. REV. STAT. § 46–1–5 (1953) (current version at COLO. REV. STAT. § 14–10–113 (1973)), which stated simply that the court "may decree a division of property."

75. 388 F.2d 353 (10th Cir. 1968), *aff'g*, 46 T.C. 461 (1966).

76. The statutory authority for the settlement is as follows:

> 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.

OKLA. STAT. ANN. tit. 12, § 1278 (West 1961) (current version at OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1980)).

contribution to the success of the business and the husband's wherewithal. The court reviewed Oklahoma law, finding that the authority for such settlements considered the wife's needs as well as attributes of equitable ownership, and ultimately concluded that Mrs. Collins possessed no such property rights that would preclude application of *Davis*. The same issue arose with respect to the husband's state income tax liability. The Supreme Court of Oklahoma decided that Mrs. Collins did in fact have a vested right in her husband's property under Oklahoma law, and therefore that *Davis* was distinguishable.[77] The United States Supreme Court then vacated and remanded the Tenth Circuit's decision for reconsideration[78] and Mr. Collins ultimately prevailed.[79]

Next came *Wiles v. Commissioner*.[80] There, pursuant to a property settlement agreement, the wife retained her separately owned property and also received $550,000 worth of securities owned by her husband to effect an equal split of the total marital wealth.[81] The facts stated cryptically that the marital wealth included "substantial assets which were either brought into their marriage or acquired by their joint efforts."[82] No alimony payments were provided. The court observed that under Kansas law, a wife's rights upon divorce in her husband's property depend on the source of the property, relative contributions, earning capacity, fault, needs, ages and length of marriage. It held that Kansas wives are not vested co-owners of their husbands' property and applied *Davis*.

Finally there is *Imel v. United States*.[83] The wife had materially contributed to the success of various family businesses and investments, most of which were owned by the husband. The property settlement gave her a half interest in these properties (stocks, real estate and equipment), represented by a fifty percent stock interest in certain corporations. No provision was made for alimony. After reviewing *Pulliam*, *Collins*, and *Wiles*, the district court admitted difficulty in defining the exact nature of Mrs. Imel's interest under Colorado law, but opined that it was similar to the

77. Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968).
78. Collins v. Commissioner, 393 U.S. 215 (1968).
79. Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969).
80. 499 F.2d 255 (10th Cir.), *cert. denied*, 419 U.S. 996 (1974) (affirming 60 T.C. 56 (1973)).
81. Authority for the property settlement is as follows:

> 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.

KAN. STAT. ANN. § 60–1610 (b) (1971) (current version at KAN. STAT. ANN. § 60–1610 (c) (Supp. 1979)).

82. 60 T.C. at 56, 57 (1973).
83. 523 F.2d 853 (10th Cir. 1975).

"species of common ownership" under Oklahoma law recognized by the Tenth Circuit in *Collins*.[84] To remove doubt, it certified the issue to the Colorado Supreme Court. That court interpreted Colorado law[85] as giving the wife a species of common ownership in her husband's property which vested upon the filing of the divorce action.[86] The district court then held for Mr. Imel and was affirmed by the Tenth Circuit.[87]

These cases, and others, involving the judiciary's travails since *Davis* with the distinction between support and property rights are analyzed elsewhere.[88] They are raised here merely to illustrate the welter which the

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84. 375 F. Supp. 1102, 1113 (D. Colo. 1973).

85. "[T]he 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." COLO. REV. STAT. § 46-1-5 (1963) (current version at COLO. REV. STAT. § 14-10-113 (1973)). The text had changed since *Pulliam*. Compare note 74 *supra*. The current version reads as follows:

> Disposition of property. (1) In a proceeding for dissolution of marriage or for legal separation or a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdicion 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, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:
>
> (a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
>
> (b) The value of the property set apart to each spouse;
>
> (c) 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
>
> (d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.
>
> (2) For purposes of this article only, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> (a) Property acquired by gift, bequest, devise, or descent;
>
> (b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation; and
>
> (d) Property excluded by valid agreement of the parties.
>
> (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 co-ownership 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) of this section.
>
> (4) An asset of a spouse acquired prior to the marriage or in accordance with subsection (2)(a) or (2)(b) of this section shall be considered as marital property, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.

COLO. REV. STAT. § 14-10-113 (1973).

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

87. Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1974) (supplemental opinion), *aff'd*, 523 F.2d 853 (10th Cir. 1975).

88. *See, e.g.*, Note, *The Federal Income Tax Consequences of Property Settlements in Common Law States and Under the Uniform Marriage and Divorce Act: A Proposal*, 29 ME. L. REV. 73

decision making has fallen into. In *Pulliam,* the wife did not contribute significantly to the accumulation of marital wealth, nor did she receive alimony. Thus it seems reasonable to regard her receipt of the husband's property as performing a support function. In *Collins* and *Imel,* the wives did assist their husbands' business activities, which lends credence to the notion that their receipt of property was some kind of a division of equitable ownership. Mrs. Collins' additional receipt of substantial alimony payments buttresses that view. But Mrs. Imel did not receive alimony. Was she therefore unentitled to support, or did her substantial "property" rights simply remove her need for support? Present Colorado law compels its courts to consider the wife's economic circumstances in determining her share of the marital property and allows alimony only if the property is insufficient to meet her needs.[89] But the amount of the property division is within the court's discretion,[90] which in reality permits the court to secure the wife's support either through the husband's property or through alimony.[91]

The wife in *Wiles* apparently owned substantial assets before marriage and played some role in the accumulation of marital wealth.[92] Like Mrs. Imel, she was not awarded alimony. Yet despite the general similarity of the Kansas and Colorado statutes,[93] her receipt of over one half million dollars of her husband's property was deemed akin to support. Aside from the difficulty of reconciling *Wiles* and *Imel,* it seems unreasonable that a woman of apparent business acumen, and already possessed of substantial property of her own, needed such a large share of her husband's property solely to assure her support. Unreasonable, that is, unless the notion of support embraces some of the considerations which relate more logically to equitable property rights. Once again the distinction is blurred.

(1977); Note, *Should Federal Income Tax Consequences of Divorce Depend on State Property Law?,* 49 So. CAL. L. REV. 1401 (1976). For an exhaustive list of citations to commentary on *Davis* and its implications, see *id.* at 1405–07. Recent applications of *Davis* are in Bosch v. United States, 590 F.2d 165 (5th Cir. 1979) (*Davis* distinguished where wife's interest in husband's real estate represented her "special equity" under Florida law); Forbes v. United States, 472 F. Supp. 840 (D. Mass. 1979) (*Davis* applied where wife's interest in residence held as tenancy by entireties did not rise to dignity of property rights under Massachusetts law).

89. *Compare* COLO. REV. STAT. § 14–10–113 (1973), *quoted* note 85 *supra, with* COLO. REV. STAT. § 14–10–114 (1973).

90. COLO. REV. STAT. § 14–10–113 (1973), *quoted* note 85 *supra,* calling for a division "in such proportions as the court deems just." *See, e.g., In re* Graham, 574 P.2d 75 (Colo. 1978).

91. The Colorado Supreme Court must have been concerned about this, for it specifically pointed out that Mrs. Imel's waiver of alimony was unrelated to the property settlement, and not to be regarded as consideration for the settlement. *In re* Questions Submitted by United States Dist. Ct., 517 P.2d 1331, 1335–36 (Colo. 1974). In view of the realities of negotiations between the parties, the court's statement strains credulity.

92. *See* text accompanying note 82 *supra.*

93. Compare notes 81 & 85 *supra.*

These decisions, and the state law they apply, demonstrate that in arriving at a settlement of marital wealth, the parties and the divorce court will not close their eyes to any factor that militates in favor of financial relief for the wife. The settlement, whatever form it takes, reflects an amalgam of considerations that frequently do not fall nicely on either side of a line separating support rights and property rights. Yet for tax purposes, the federal courts are forced to draw the line and pick a side.[94]

The discriminating effect of state law is magnified when state courts are called upon to decide issues which render the determination of federal tax consequences little more than a ministerial act. State court pronouncements in *Collins* and *Imel*[95] that the wife's interest in her husband's property vested upon divorce as a species of common ownership seemingly affected nothing but tax consequences.[96] Characterization of the wife's undisputed right as a property interest merely pinned on a label that neatly avoided unfavorable tax consequences to the husband. Deferring to state government the ultimate power to determine the federal income tax consequences to its residents, through action which doesn't otherwise alter their substantive rights and duties, is an undesirable practice.[97]

It may seem that discussing the applicability of *Davis* in terms of

94. A few cases divide recurring cash payments into two components, one attributable to support and the other to property rights. *See, e.g.*, Hayutin v. Commissioner, 508 F.2d 462 (10th Cir. 1974); Bishop v. Commissioner, 55 T.C. 720 (1971), *acq.*, 1971-2 C.B. 1.

95. Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968); *In re* Questions Submitted by United States Dist. Ct., 517 P.2d 1331 (Colo. 1974). These determinations of the rights of parties under state law are binding on the federal courts for tax purposes. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) (decision of highest state court is conclusive, lower state court decisions given proper regard). *See generally* Note, 29 ME. L. REV. 73, 95–103 (1977).

96. In *Imel*, the state court was careful to point out that its decision placed no new burdens on the husband's property except for those which vest upon the filing of a divorce action. *In re* Questions Submitted by United States Dist. Ct., 517 P.2d 1331, 1334–35 (Colo. 1974). The state court in *Collins* went beyond, stating that the wife's interest in marital property may be exercised at any time during the marriage, irrespective of divorce. Collins v. Oklahoma Tax Comm'n, 446 P.2d 290, 297 (Okla. 1968). However, in Sanditen v. Sanditen, 496 P.2d 365 (Okla. 1972), the Oklahoma Supreme Court backed away from this language, holding that the property rights adjudicated in *Collins* vested only by reason of the divorce action.

Characterization of the wife's interest as a property right, as opposed to alimony, does eliminate certain methods of enforcing compliance and judicial power to modify the award if future circumstances warrant—features that do not apply to a division of property. But the loss of these rights is insignificant in the context of one-time transfers; there is no future compliance to enforce, and lump sum alimony (whether payable at once or in installments) is not modifiable in any event. *See* H. CLARK, *supra* note 68, §§ 14.8, at 449, 14.9, at 455. Characterization of periodic payments as a property division may, however, result in the loss of otherwise available enforcement procedures. *See id.* § 14.8, at 449. But that change alone falls short of justifying different tax consequences.

97. The government's position which was rejected in *Imel* was that a question of federal taxation was improperly deferred to the Supreme Court of Colorado. Imel v. United States, 523 F.2d 853, 855 (10th Cir. 1975). Often, however, state income tax liability is also involved. *E.g.*, Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968).

whether the wife's receipt is an extraction of her property or, conversely, in the nature of support misses the point; that *Davis* distinguished property divisions, not from transfers in the nature of support, but rather from compensation for the wife's inchoate property. But that is overanalysis. The language in *Davis* evinces an understanding that the inchoate rights conferred upon wives by Delaware law were not meaningfully different from the right to support.[98] Even conceding a technical distinction under state law, the holding in *Davis* demonstrates the irrelevance of such a distinction to federal income tax consequences. The fundamental issue in cases like *Davis* is simply whether the wife's rights in the wealth she receives incident to divorce are the equivalent of property rights under state law. If they are, a nontaxable division of property has occurred. If they are not, the husband has transferred his property to satisfy an obligation, which is a taxable event. For federal income tax purposes, which of these two situations obtains is the only point of identifying the nature of the wife's rights under state law. Further subcategorization of nonproperty rights is uncalled for by *Davis,* and produces needless confusion. The nomenclature used in this article—support-versus-property rights—was chosen not to show that such a formula produces rational results (indeed, quite the contrary), but rather to emphasize that deciding a case like *Davis* should involve the same methodology as deciding whether recurring cash payments are taxable to the husband or to the wife. The only real difference is in the form and timing of the wealth transfer.

Support versus Property Rights—Periodic Payments

Section 71 applies only to periodic payments in the nature of support, not to extractions by the wife of her property.[99] Where clear evidence of property rights, such as record ownership or community property, is not present, analysis of whether a payment is for support should focus on the nature of the wife's rights under state law—the same analysis used in cases like *Davis.*[100] If state law does not give the wife property rights, by

98. See the quotation in the text accompanying note 62 *supra.* Mrs. Davis' inchoate rights were dower (only in real estate), intestate succession and a reasonable share of her husband's property upon divorce. See *Davis,* 370 U.S. at 66.

99. *See* text accompanying notes 39–41 *supra.*

100. Four recent decisions adopt this approach. Mann v. Commissioner, 74 T.C. No. 92 (1980), held that a wife who materially contributed to the success of her husband's business acquired a "special equity" in his property under Florida law. Thus the husband's payment of $150,000 in annual installments of $7,500 (periodic under § 71(c)(2)) was not deductible. In Gammill v. Commissioner, 73 T.C. 921 (1980), the wife, who contributed to the marriage only as a homemaker, acquired a "species of common ownership" in her husband's property under Oklahoma law. Her receipt of $250,000 in annual installments of $12,500 (periodic under § 71(c)(2)) was, therefore, neither income to her nor deductible by him. Annual payments of $4,000 (periodic under § 71(c)(2)) that were

process of elimination the conclusion that payments are for support seems logically inescapable, and vice versa. Nonetheless, several cases have ignored state law,[101] looking instead to the surrounding facts and circumstances to determine whether the payments are for support.[102] Factors indicative of a property settlement include the absence of contingencies, the

labeled "alimony" were treated as part of a property settlement in Widmer v. Commissioner, 75 T.C. No. 35 (1980), because under Indiana law alimony can be used to achieve support, a property settlement, or both. The court was persuaded from the facts and circumstances that the parties had intended to effect only a property settlement. Schottenstein v. Commissioner, 75 T.C. No. 39 (1980), is the most striking example of this approach, and persuasive evidence that the operation of the support-versus-property distinction is sorely lacking in consistency and clarity. Annual payments of $12,000 (periodic under § 71(c)(2)) were taxable to the wife because she had no property rights under Ohio law, despite the fact that the court was convinced that the parties intended the payments to be a property settlement. Compare this result with the text accompanying notes 101–03 *infra*.

101. Some cases point to the legislative history of the Revenue Act of 1942 (*see* text accompanying notes 25–27 *supra*) to justify resolving § 71's support issue without regard to state law. Bernatschke v. United States, 364 F.2d 400, 408 n.9 (Ct. Cl. 1966); Taylor v. Campbell, 335 F.2d 841, 845–46 (5th Cir. 1964); Bardwell v. Commissioner, 318 F.2d 786, 789 (10th Cir. 1963); Bishop v. Commissioner, 55 T.C. 720 (1971). *Contra*, Hayutin v. Commissioner, 508 F.2d 462 (10th Cir. 1974); Mills v. Commissioner, 442 F.2d 1149 (10th Cir. 1971); Mann v. Commissioner, 74 T.C. No. 92 (1980); Gammill v. Commissioner, 73 T.C. 921 (1980); Widmer v. Commissioner, 75 T.C. No. 35 (1980). The effort to give § 71 national consistency is laudable. But so long as it depends on the marital obligation of support, which undeniably is a creature of state law, ignoring state law by fiat just adds to the confusion. Moreover, congressional dissatisfaction in 1942 with the effect of varying standards under state law on the tax treatment of alimony concerned whether the husband's support duty survived divorce, not the definition of support. These issues are related, *see* text accompanying note 28 *supra*, but not exactly the same.

The Tenth Circuit's decisions in this area are reminiscent of its applications of *Davis*. *Compare* Mills v. Commissioner, 442 F.2d 1149 (10th Cir. 1971) (periodic cash payments to the wife, who had contributed to the accumulation of marital wealth, were treated as a division of property under Oklahoma law), *with* Hayutin v. Commissioner, 508 F.2d 452 (10th Cir. 1974) (periodic payments to the wife, who also made some contribution, were treated as support under Colorado law (except to the extent attributable to property of which the wife was record owner)). In *Mills*, the court relied on Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968), whereas in *Hayutin*, it followed state law, but dismissed *In Re* Questions Submitted by United States Dist. Ct., 517 P.2d 1331 (Colo. 1974), as not controlling. *See* notes 77, 86 & 95 and accompanying text *supra*.

102. Lambros v. Commissioner, 459 F.2d 69 (6th Cir. 1972), *aff'g*, 30 T.C.M. 585 (1971), is a good example. The wife had worked with her husband during the early years of her marriage. Total marital wealth was valued at $312,000 at the time of divorce, most of which appeared to be owned by the husband. The divorce court ordered that $150,000 be paid to the wife as an "equitable distribution of property," of which $100,000 took the form of periodic cash payments. Against the husband's claim that the periodic payments were deductible under I.R.C. § 215, it was held that the payments were part of a property settlement and not support. The opinions did not analyze Ohio law, which allows such alimony as the divorce court deems reasonable, payable either in money or property, taking into account a list of factors, some of which sound of support and some equitable ownership. OHIO REV. CODE ANN. (Page) § 3105.18 (1980). Ohio law does not elsewhere authorize a division of property. The Sixth Circuit relied on the lack of reference in the divorce decree to the husband's ability to pay or the wife's needs. But it's a long leap from there to the finding that the wife owned rights in her husband's property, especially in view of the Ohio statute. *Cf.* Schottenstein v. Commissioner, 75 T.C. No. 39 (1980) (discussed at note 100 *supra*).

presence of other contingent payments, lack of need and the parties' intent.[103]

The anomaly is that the definition of support has no content without reference to the state law which creates it, and which distinguishes it from rights of ownership in property. Regardless of whether the search is for support or for property, proper analysis inevitably leads to an examination of state property law. State laws on this subject are vague enough in themselves.[104] So long as section 71 retains the support requirement, sporadic acceptance of a federal standard of support will only add another layer of uncertainty. Notwithstanding the firmness of conviction found in some judicial opinions, what is often portrayed as a well ordered universe consisting of two clearly marked territories in reality can be overlapping provinces of uncertain borders—the same confused state of affairs that attends resolution of cases like *Davis*. That probably explains the increasing tendency of courts to characterize recurring payments in a manner that produces the tax results which the parties mutually intended.[105]

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103. The realm of factors bearing on the support-versus-property issue in the context of periodic payments are analyzed in Harris, *supra* note 42, at 60–79.

104. An example of the chameleonic nature of state law characterizations of a wife's rights is in this quotation of Indiana law from Widmer v. Commissioner, 75 T.C. No. 35 (1980) (discussed at note 100 *supra*):

> Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the *property rights* of the parties. It does not include future support for the wife, nor is it intended as a medium for financial compensation for injured sensitivities during marriage. The primary factor in fixing the alimony is the existing property of the parties. However, other facts which the court may consider are the source of the property, *the income of the parties* and the nature of the abuse inflicted upon the wife,—particularly if that abuse affected the earning capacity of the wife and would have been a basis for an action in damages except for the fact of the marriage. Shula v. Shula, 235 Ind. 210, 214–15, 132 N.E.2d 612, 614 (1956) (emphasis added).

105. Warnack v. Commissioner, 71 T.C. 541 (1979), illustrates this tendency. In their agreement, the parties, both of whom were represented by counsel, placed values on their community property which aggregated $790,000. The wife received property worth only $140,000 on the basis of these values, but received periodic cash payments totalling $257,000 to make up the difference. Although the parties provided in their agreement that the husband would deduct and the wife would include such payments in income, she reneged, maintaining that the payments represented the balance of her interest in the community property. The court was persuaded by testimony that despite the agreed-upon values, stock in a certain corporation that the husband retained and that had been valued at $276,000 was actually worth minus $369,000. Acceptance of this testimony permitted a finding that the wife received at least her half of the community property and, therefore, that by process of elimination the periodic payments must have been for support. The court's willingness to believe that the parties erred by such a huge margin in valuing this stock was largely attributable to its desire to make the wife live up to the tax consequences she negotiated. *But cf.* Schottenstein v. Commissioner, 75 T.C. No. 39 (1980) (discussed at note 100 *supra*).

Throughout the income tax treatment of transfers incident to divorce lies evidence that Congress intended to give spouses the power to eliminate uncertainty by allocating the tax burden between themselves by agreement. *See* I.R.C. § 152(e) (2) (spouses can choose who is entitled to dependency exemption for children); I.R.C. § 71 (b) and Commissioner v. Lester, 366 U.S. 299 (1961) (allowing spouses to decide who is taxable on child support). *See also* Gammill v. Commissioner, 73 T.C. 921

In conclusion, the problems engendered by attempting to distinguish support and property rights are ubiquitous. Statutes authorizing an equitable division of the husband's property are in force nearly everywhere.[106] The same is true of alimony.[107] These problems might be tolerable if the distinction served an important policy. But it doesn't. Rather, it emanates from general rules of taxation[108] which, though justifiable generally, do not further a purpose worthy of the unavoidable confusion they cause in the treatment of wealth transfers incident to divorce. Acceptable results can be achieved by other means.

Periodic Payments

Discussion above explains section 71's requirement of periodic payments as an attempt to confine the shifting of income tax liability from husband to wife to situations where income is actually shifted.[109] Payments that satisfy the periodic requirement are usually of an indeterminable total amount,[110] and in that sense are akin to support payments, which in theory vary in amount with the economic status of the parties at any particular time. The contingencies which make a payment periodic—death, remarriage or change in economic status—also indicate that it is in the nature of support.[111]

Two observations come to mind. If the periodic requirement significantly duplicates the support requirement, why is it necessary?[112] And if

(1980), where in rejecting the husband's argument that §483 applied to periodic payments found to be part of a property settlement, the court cited *Lester* for the broad proposition that "parties to the divorce agreement may for tax purposes act as their best interest dictates." This notion of elective tax treatment may make sense in a particular case, but an overly tolerant judicial attitude toward the requirements of § 71 tends to confuse their application in other cases.

106. One source reported that all but seven common law states have "equitable division" statutes, those which give one spouse a claim against the other's property in a divorce action. National Law Journal, Feb. 25, 1980, at 7, col. 1. A catalogue of the statutes appears in Note, 49 SO. CAL. L. REV. 1401, 1419–23 (1976).

107. Only four states do not have alimony statutes. H. CLARK, *supra* note 68, § 14.1, at 421 n.12.

108. *See* text accompanying notes 18, 42–44 and 63 *supra*.

109. *See* text accompanying notes 50–52 *supra*.

110. *See* text accompanying notes 49–50 *supra*.

111. *See* Warnack v. Commissioner, 71 T.C. 541, 550 (1979) (stating that payments in the nature of support are "probably periodic"); *e.g.*, Lambros v. Commissioner, 30 T.C.M. 585, 587–88 (1971), *aff'd*, 459 F.2d 69 (6th Cir. 1972) (pointing to absence of death or remarriage contingency as one of the "earmarks of an out-and-out division of property"); Bernatschke v. United States, 364 F.2d 400 (Ct. Cl. 1966).

112. The duplication is built into Treas. Reg. § 1.71–1 (d) (3) (1957), which in defining "periodic" with respect to payments which terminate less than 10 years after the divorce requires that they be in the nature of support. Examples of a finding that payments that are part of a property settlement destroy the periodicity requirement as well as the independent support requirement are Crouser v.

its main function is to assure income splitting, why choose so indirect a device? The naked fact that a transfer of wealth incident to divorce is consummated in installments has no intrinsic value, apart from the attempt to isolate deflections of income. If requiring periodic payments causes problems, it should be eliminated in favor of other ways to effectuate section 71's purpose.

And it does cause problems. The following are illustrative. There is too much litigation on the undeserving issue of whether payments are due more than ten years after the divorce (and therefore periodic under section 71(c)(2)).[113] Furnishing living accommodations for the wife can involve a transfer of real wealth that arguably should generate a tax benefit to the husband, but fails because the conveyance is a single event.[114] Furthermore, reference to state law is often necessary to determine whether payments are subject to a contingency, and consequently periodic.[115]

Commissioner, 73 T.C. 1113 (1980) (weekly payments of $125 until $19,000 principal sum of debts paid off treated as property settlement because not subject to contingency of modification under Ohio law); Martin v. Commissioner, 73 T.C. 255 (1979) (payments of $12,500 per year for two years treated as property settlement because one, partly for wife's attorney fees, which is not ongoing support, and two, wife had "some property rights").

Cases exist in which payments not subject to contingencies are deemed periodic under I.R.C. § 71 (c) (2), but nonetheless fail to satisfy the support requirement. *E.g.*, Lambros v. Commissioner, 459 F.2d 69 (6th Cir. 1972); Mills v. Commissioner, 442 F.2d 1149 (10th Cir. 1971); Bernatschke v. United States, 364 F.2d 400 (Ct. Cl. 1966); Gammill v. Commissioner, 73 T.C. 921 (1980); Mann v. Commissioner, 74 T.C. No. 92 (1980); Westbrook v. Commissioner, 74 T.C. No. 101 (1980); Widmer v. Commissioner, 75 T.C. No. 35 (1980).

113. *E.g.*, Estate of Spicknall v. Commissioner, 285 F.2d 561 (8th Cir. 1961); Wright v. Commissioner, 62 T.C. 377 (1974), *aff'd*, 543 F.2d 593 (7th Cir. 1976); Joslin v. Commissioner, 52 T.C. 231 (1969), *aff'd*, 424 F.2d 1223 (7th Cir. 1970). Even such a mechanical issue as this one, which arises under I.R.C. § 71(c) (2), is not totally independent of state law; whether the payments are legally grounded in the decree, or some earlier document (stipulation, temporary order, or separation agreement) can control whether they satisfy the ten-year rule. Courts even consider the parties' intent, which would seem entirely irrelevant to whether ten years have elapsed. *E.g.*, Warnack v. Commissioner, 71 T.C. 541 (1979); Derickson v. Commissioner, 35 T.C.M. 1325 (1976).

114. *See* Pappenheimer v. Allen, 164 F.2d 428 (5th Cir. 1947), where the husband was denied a deduction for the rental value of a house in which the wife was permitted to live. Section 71(d) was an alternative ground for the disallowance. Another example is where the husband purchases a residence for the wife and is denied a deduction for the mortgage payments because the wife's receipt is unitary, notwithstanding the periodic receipts of the mortgagee. Van Orman v. Commissioner, 418 F.2d 170 (7th Cir. 1969); Lounsbury v. Commissioner, 321 F.2d 925 (9th Cir. 1963). *See generally* Note, *Alimony Taxation of Indirect Benefits: A Critique and a Proposal*, 66 COLUM. L. REV. 1118, 1125–32, 1138–44 (1966).

115. *See* text accompanying note 49 *supra*. The "contingency doctrine" has been criticized for its inescapable reliance on state law. Note, 9 HARV. J. LEGIS. 156, 166–70 (1971). *E.g.*, Crouser v. Commissioner, 73 T.C. 1113 (1980). Aside from that, the nearly uniform rule of state law that support payments may be modified upon a showing that the economic status of the parties has changed moots the issue significantly, once again proving the support-versus-property distinction to be the determinative factor. *See* H. CLARK, *supra* note 68, § 14.9, at 452–54; *e.g.*, Appling v. Commissioner, 39 T.C.M. 50 (1979).

Other Considerations

The combined effect of making the tax consequences of wealth transfers incident to divorce depend on whether the transfer is in the nature of support, and in the case of recurring cash transfers, whether they are periodic, is needlessly complex. Wholly apart from the issues of support and periodicity, merely determining the amount of gain or loss and basis of property received in a property division where ownership is not disputed, i.e., where the line between support and property is clear, can be very complicated.[116] Spouses represented by lawyers who are not thoroughly

116. Where the spouses divide jointly owned property (either community property in a community property state or jointly owned property in a common law state) in substantially equal portions (asset by asset or in the aggregate), the transaction is nontaxable and the basis in the property remains the same. *E.g.*, Walz v. Commissioner, 32 B.T.A. 718 (1935); Rev. Rul. 76-83, 1976-1 C.B. 213; Rev. Rul. 56-437, 1956-2 C.B. 507. (What appears to be jointly owned property in the traditional property law sense, however, may be something else. *See* Forbes v. United States, 472 F. Supp. 840 (D. Mass. 1979) (wife's interest in residence held as tenancy by entireties treated under Massachusetts law as inchoate rights not rising to dignity of property rights); Miller v. Commissioner, 32 T.C.M. 570 (1973) (denying wife's property rights in real estate titled in joint names on ground that wife had not contributed to acquisition).)

Where one spouse surrenders his or her interest in the *jointly owned property* in exchange for the *separately owned property* of the other spouse (or for release of the wife's support rights), the first spouse has engaged in a taxable exchange (gain or loss recognized under § 1001 and § 1012 cost basis). *E.g.*, Rouse v. Commissioner, 159 F.2d 706 (5th Cir. 1947); Edwards v. Commissioner, 22 T.C. 65 (1954); Rev. Rul. 74-347, 1974-2 C.B. 26. It is in this circumstance, where the first spouse is the wife, that despite the transfer of periodic payments from husband to wife, § 71 does not apply and the wife has engaged in a taxable sale. The second spouse has one of three possible tax consequences, depending on the type of consideration given for the first spouse's interest in the jointly owned property: first, if the consideration is cash, the second spouse has simply engaged in a purchase (§1012 cost basis); second, if the consideration is property other than cash, the second spouse has engaged in a taxable exchange (gain or loss recognized under § 1001 and § 1012 cost basis); and third, if the consideration is the release of the wife's right to support, the second spouse (the wife) has no immediate tax consequences (no income under § 71, no gain recognized under § 1001, and a basis equal to the fair market value of the property received). United States v. Davis, 370 U.S. 65, 73 n.7 (1962); Rev. Rul. 67-221, 1967-2 C.B. 63. Furthermore, more than one of these three types of consideration can be combined.

Finally, the rules described in each of the preceding paragraphs are combined in a case where the first spouse does not entirely surrender his or her interest in the jointly owned property, but receives less than substantially half. There the first spouse recognizes gain or loss realized on the exchange in proportion to the relative amount of consideration received from the second spouse that consists of the second spouse's separately owned property. Carrieres v. Commissioner, 64 T.C. 959 (1975), *aff'd per curiam*, 552 F.2d 1350 (9th Cir. 1977). Although *Carrieres* did not decide the consequences to the second spouse, it follows that to the extent the second spouse used his or her separate property as consideration for part of the first spouse's interest in the jointly owned property, the second spouse should have the results described in the preceding paragraph. And to the extent the second spouse used his or her interest in other jointly owned property as consideration, the results in the first paragraph should obtain.

To illustrate *Carrieres*, consider this example: H and W have $100 of community property, consisting of stock worth $20, bonds worth $30 and real estate worth $50. The couple's adjusted basis in each of these classes of property is $10 less than value, so that the aggregate basis is $70. Upon divorce, W takes the stock and H takes the bonds and real estate. To make up the difference, H skilled in the tax law easily can have an erroneous impression of the tax consequences of their settlement. Even if the bar had perfect knowledge, the complexity of the system demands an allocation of resources to di-

transfers to W $30 of his separate property. Assume, for simplicity, that W is not in need of ongoing support and is not entitled to it under state law. *Carrieres* indicates that W retains the adjusted basis in the stock of $10, and that of the $10 gain W realized on the exchange [one half of (($50 plus $30) minus ($40 plus $20))], she must recognize $7.50, which is the following percentage of $10:

$$\frac{\$30}{\$40} = \frac{\text{H's separate property}}{\text{total consideration for W's interest in bonds and real estate}} = 75\%$$

H should have the same basis in $50 worth of the bonds and real estate as the couple had prior to divorce because he has merely retained his original $40 interest and has acquired an additional $10 from W in exchange for his $10 interest in the stock. The remaining $30 worth of bonds and real estate have come his way in a taxable transaction. If the $30 separate property he used as consideration is cash, he has simply made a purchase; but if property other than cash, he has engaged in a taxable exchange. In either event he will have a cost basis of $30 plus the same basis as before in the remaining $50 worth of property. But the amount of this basis depends on which property H is deemed to have acquired in exchange for his interest in the stock, and consequently in which he retains the old basis. Is it $10 of bonds, $10 of real estate, or some portion of each? *Carrieres*, 64 T.C. at 966, does not answer this question, stating only that "allocation" problems can arise where the facts do not make clear which jointly owned assets are being sold for separate property and which are exchanged for other jointly owned property. (In *Carrieres*, the wife gave up her interest in only one community property asset.) The opinion is concerned at that point not with how to determine H's basis, but how to compute W's recognized gain. However, the very rule which the court announced seems to obviate tracing which assets are sold for separate property and which are exchanged for other jointly owned property by resorting to an apportionment approach. Why this approach must change merely because the wife surrenders her interest in more than one of the jointly owned assets is not clear. Nor does there appear any reason for not using an apportionment approach to determine H's basis. Since he purchased 75% of W's interest, he should carry over the old basis in the other 25% ($7.50), which would give him a total basis of $67.50. [Contrast this apportionment result with an approach which allocates the $30 purchase first to the real estate (total basis of $66.67), or alternatively, first to the bonds (total basis of $68).] If apportionment is used to determine the amount of gain recognized by the wife, it would seem asymmetrical to use a different approach to determine H's basis. Such an inconsistency has to confer an unjustified windfall on either the government or one of the spouses at the expense of one or both of the others. Assigning a basis of $67.50 to H results in an aggregate basis to both parties of $77.50 after the divorce, which, logically, is greater than the aggregate basis before divorce ($70) by the amount of gain recognized by W ($7.50). Examining the consequences on an individual basis, however, reveals that of the $30 of gain potential existing before divorce, $7.50 has been taxed to W, $10 remains to be taxed to her when she sells the stock and $12.50 remains to be taxed to H when he sells the bonds and real estate. This shifting of tax liability from H to W is not an indictment of *Carrieres*, rather just an arbitrary consequence of the rule stated in the first paragraph, upon which *Carrieres* builds, that in an equal division each spouse keeps the same basis in whatever property he or she ends up with.

To be sure, though, the court's point about "allocation" portends knotty problems where some of the assets would generate capital gain and others ordinary income. Further complication would be added if some of the assets would generate a loss; capital losses are of limited deductibility and some losses are simply not allowed at all. *See* I.R.C. §§ 1211(b), 165(c), 267; Siewart v. Commissioner, 72 T.C. 326 (1979). Other provisions capable of magnifying the complexity are I.R.C. §§ 453(e), 453(g) & 1239 (*see* DeYoe v. Commissioner, 66 T.C. 904 (1976)).

An appreciation of the enormous potential for error comes into even sharper focus when all of this complexity is compounded by the presence of a right to support and the uncertain distinction between support and property rights. These rules are hardly worth the morass of permutations that they make possible.

vorce tax planning that is difficult to justify, and perhaps unfair for taxpayers to bear. The regularity with which large numbers of taxpayers transfer wealth incident to divorce presents a compelling case for simplicity.

Furthermore, the tax law has always strived to treat taxpayers alike, regardless of where they happen to live.[117] The annals of federal taxation do reveal periods in which variations in state laws have forced the imposition of disparate tax consequences on similarly situated taxpayers,[118] but Congress usually intervened with legislation to equalize the treatment.[119] In *Davis,* the Court agreed that its holding permitted different treatment among common law and community property states, but refused to step in where Congress had not.[120] Congress should do so now, to bring about national uniformity and to discourage the enactment of state laws (or interpretation of them) designed primarily to secure federal tax advantages for divorcees.

The present regimes for taxing transfers of wealth incident to divorce have been in place for nearly forty years. Congressional intent to rid the system's dependence on state law has not been carried out. Indeed, dependence on state law, with all the uncertainty and arbitrariness it can occasion, is inextricably built into the present regimes. Acceptable tax consequences can be achieved, and with much greater simplicity, through alternative rules which more directly implement the underlying policy of allocating income tax liability according to how the income is divided. The next time Congress addresses itself to taxation of the individual, it should seriously consider revamping the treatment of wealth transfers incident to divorce.

PROPOSAL

Prior discussion points to the support-versus-property issue as the main source of trouble in the present system. The significance of the distinction under state law between support and property rights should be entirely

117. Lyeth v. Hoey, 305 U.S. 188 (1938).

118. *See* Poe v. Seaborn, 282 U.S. 101 (1930) (upholding division of tax liability on husband's salary in community property state); text accompanying notes 17–26 *supra* (explaining that taxation of alimony trust income depended on whether husband's support obligation survived divorce under state law).

119. Revenue Act of 1948, ch. 168, §§ 301, 303, 62 Stat. 110 (now I.R.C. §§ 1(a), 6013) (allowing functional equivalent of community property through joint return of husband and wife); Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816–18 (now I.R.C. §§ 71, 72(k), 215, 682) (taxing alimony trust income to wife without regard to survival of support obligation under state law).

120. 370 U.S. at 71. One writer suggests that unequal treatment of taxpayers under the rule in *Davis* is an unconstitutional application of the Code. Note, 49 So. CAL. L. REV. 1401, 1431 (1976).

eliminated. That alone, however, tells little about how wealth transfers incident to divorce should be taxed, if at all.

Federal indicia of property rights could be established and used to isolate those transfers which should not be taxed. For example, the concept of "property" could be limited to interests which confer the unburdened right to manage and to transfer the property, in any manner and at any time.[121] That at least would emasculate state judicial power to decree relatively flimsy marital rights the equivalent of property ownership.[122] But it might encourage the enactment of state laws that expand marital rights to comport with federal criteria of property ownership. Such laws are more appropriately influenced by considerations of marriage and divorce, apart from tax consequences. Furthermore, federal criteria would guarantee continuing dependence on state law to determine whether they are satisfied.

An equally tenable position is that the settlement of marital wealth upon divorce should not occasion any income tax consequences. Since 1948 the tax law generally has treated husband and wife as a taxpaying unit.[123] Uncompensated transfers between spouses have no income tax significance.[124] For example, a wife is not taxable during marriage on that portion of her husband's salary that is applied to her support.[125] Nor is there any authority indicating that the husband is taxable on the appreciation in property he transfers to his wife during marriage to assure her support.[126] It is not readily apparent that these results should change solely because the transfer is incident to divorce.

The rule in *Davis* stems from the general principle that liquidation of a debt with appreciated property should be treated the same as a sale of the property and application of the proceeds against the debt. But the debt—

121. *See generally* Note, 29 ME. L. REV. 73, 82–87 (1977).

122. *See* text accompanying note 95–97 *supra.*

123. Revenue Act of 1948, ch. 168, §§ 301, 303, 62 Stat. 110 (now I.R.C. §§ 1(a), 6013). These provisions, known as the joint return privilege, allow husband and wife to combine their income for purposes of computing tax liability. Technically, however, husband and wife are separate taxpayers, even when filing jointly. *See, e.g.*, I.R.C. §§ 116, 1244.

124. Uncompensated transfers are those where the receiving spouse provides no consideration. The recipient is not subjected to income tax, either because the transfer is in the nature of support or is a gift. I.R.C. § 102. The transferor may have gift tax consequences. *See* I.R.C. §§ 2515, 2515A, 2523. A compensated transfer between spouses, such as a sale or exchange, however, is treated the same as if between strangers. *E.g.*, Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975). Under certain circumstances, a sale between spouses is treated less favorably than one between strangers. *See* I.R.C. §§ 267, 453(e), 453(g), 1239.

125. *See generally* Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform,* 80 HARV. L. REV. 925, 946–47, 976–77 (1967); Bittker, *Federal Income Taxation and the Family,* 27 STAN. L. REV. 1389, 1420–22 (1975).

126. The theory of *Davis* is conceivably applicable to this situation, but the government wisely has refrained from making this argument.

the marital obligation of support—exists during marriage as well. Transfers incident to divorce are remnants of marital life that survive divorce; perhaps present law attaches too much significance to divorce. Beyond that, the husband who transfers property in satisfaction of his support obligation receives nothing in exchange with which to pay the tax. Also, some suspect a widespread lack of compliance with *Davis*. These reasons have prompted calls from several quarters for legislative overruling of *Davis*, usually on the theory that a divorce settlement is like a termination of a partnership, which generally is a nontaxable event.[127]

As emphasized throughout, however, overruling *Davis* would be good, but not enough. The treatment of alimony payments must also be addressed. There is a choice here too, which is not made merely by eliminating the state law distinction between support and property rights, and that choice is easy. The husband's support is not taxed to the wife during marriage, but it must be afterward. Otherwise husbands will be pressed beyond their resources by the combination of income tax and alimony—one of the major reasons for the 1942 enactment.[128] Other proposals for reform of section 71 focus, rightly so, on the support requirement and the effect of contingencies.[129] The most common theme is a presumption that payments in excess of ten years are taxable to the wife, unless the parties elect otherwise. These ideas are good, but their attempt to achieve income splitting can be realized more directly.

The time has come for specifics. This proposal divides transfers incident to divorce into two categories: one, transfers of wealth owned by the parties at the time of divorce, regardless of how the wealth was acquired

127. Proposals to overrule *Davis* by statute and provide for nonrecognition of gain or loss and carryover basis on one-time transfers are in Committee on Domestic Relations Tax Problems, REPORT, ABA BULL. OF THE SECTION OF TAXATION, 62, 63–66, (July 1966); REPORT ON THE DAVIS RULE REGARDING PROPERTY SETTLEMENTS IN DIVORCE OR SEPARATION, *supra* note 66; TREASURY DEP'T, TAX REFORM STUDIES AND PROPOSALS, 91st Cong., 1st Sess. 343 (1969); Note, 49 SO. CAL. L. REV. 1401, 1438–39 (1976) (citation to numerous other proposals at 1406–07). Different approaches are in Note, 29 ME. L. REV. 73, 91–103 (1977) (recognition of gain or loss only to extent division is unequal); Hjorth, *Community Property Marital Settlements: The Problem and a Proposal*, 50 WASH. L. REV. 231, 264–74 (1974) (in community property state, gain recognized to extent of cash received; imbalance of division treated as sale for separate property or release of marital obligation).

128. *See* text accompanying notes 12–16 *supra*. The husband's compelling need for tax relief obscures the fundamental issue of who ought to be taxable on the portion of the husband's income which the wife consumes. Taxing the husband, the practice in this country until 1942, is not entirely illogical. *See generally* Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 976–77 (1967). But it is entirely impractical.

129. ABA REPORT, *supra* note 127, at 62–63 (presumption that payments over ten years are for support); Harris, *supra* note 42, at 82–84 (presumption that contingent payments and payments over ten years are for support); Note, *supra* note 52, at 168–70 (elimination of contingency rule; presumption that payments over ten years are for support); Kuntz, *supra* note 66, at 222–23 (elimination of support requirement; payments deductible to husband and includible to wife if parties so elect).

and which spouse is the record or legal owner; and two, all other transfers.

Transfers of Existing Marital Wealth

This category of transfers encompasses the settlement of all wealth, of whatever form, owned by the parties at divorce, including property that one spouse owned before marriage or received as a gift from third parties during marriage. The division of this wealth, in kind, whether equal or unequal, should not be taxable to either spouse. The basis in the property should carry over to the receiving spouse, asset by asset. If a particular asset is divided, its basis can be allocated between the parties in proportion to the value of the share each party takes. Taxation of the appreciation in this wealth would be deferred until the receiving spouse disposes of it.

This scheme is open to the customary criticisms, none of which, on balance, are terribly distressing. Some would view the transfer to a spouse of separately owned property (especially if brought into marriage) as a clear case for taxation. Present law allows deferral where the aggregate of jointly owned or community property is split evenly, without regard to the composition of each share.[130] Only an undue respect for academic orderliness warrants immediate taxation where separately owned property is surrendered for a larger piece of the marital pie.

A corollary is that unequal divisions of existing marital wealth are no less entitled to deferral than equal divisions. Technicalities of ownership aside, one must presume that when all is said and done, in most cases adversaries represented by counsel walk away from divorce with approximately what they deserve, whatever the legal nature of their claims may be. That largely explains the recent willingness of courts to relax (some might say abandon) the traditional definition of "property" if doing so softens the impact of federal tax law on the settlement of marital wealth.[131] Imposing tax consequences on one spouse or the other because

130. *See* note 116 *supra*.

131. In the one-time transfer cases where the husband successfully argued that *Davis* was distinguishable because the wife was extracting her "property," the perfect overlap of what the recipient got in the settlement and what was deemed her "property" is more than coincidence. This is especially true where there was no outward evidence of record or legal ownership prior to divorce and the recipient was awarded substantially more or substantially less than half the marital wealth. *See* text accompanying notes 73–93 *supra*.

In the periodic payment cases where the wife successfully argued that the payments represented compensation for her "property" (or the husband unsuccessfully argued to the contrary), the failure of courts to suggest that, although § 71 does not apply, the wife has engaged in a taxable sale of such "property" is similarly peculiar. *See, e.g.*, the cases discussed in note 100 *supra*. If the existence of "property" rights prevented application of § 71, some taxable gain to the wife seems logically unathe settlement has the appearance of numerical imbalance is a needless and very confusing fiction.[132] For taxpayers inadequately represented, a general rule of nonrecognition at least has the virtue of minimizing surprises.

Another complaint is that deferral is illusory if the receiving spouse holds the property until death.[133] But that is not an indictment of deferral, rather of the policy choice to reduce the tax cost of death. Particular transactions, otherwise worthy of deferral, should not be denied because of the eventual cleansing effect of death.

A strict carryover basis rule would mean that assets taken by the respective spouses would carry uneven tax liabilities, even where the division is equal, unless the bases in the shares were also equal. Providing an election to allocate basis among the assets would alleviate the disparity. Such an election could facilitate an acceptable division that otherwise would unfairly burden one of the parties, such as the husband taking low basis stock in a family business and the wife receiving an approximately equal amount of high basis property. If the rules are to be rewritten, however, they should be simple, uncomplicated by qualifications and exceptions with potential for disagreement. Spouses with difficult issues to negotiate probably are well advised and can resort to other provisions to "equalize" their shares. A strict carryover basis rule is preferable.

A general rule of nonrecognition of gain or loss and carryover basis would function smoothly in community property states as well as common law states. Contrary to what may be a popular view, the tax consequences of property divisions in community property states involve nearly the same level of complexity that arises in common law states.[134] A simpler rule should be welcome everywhere.

Carryover basis has the added benefit of eliminating a tax on "capital" where certain types of income-producing property are transferred to the wife. For example, a wife is now fully taxable on annuity payments under a policy purchased for her by the husband, even though part of the payments represent the husband's cost.[135] A carryover of his cost would en-

voidable unless the source of the periodic payments is other jointly owned property, which in most cases is factually unlikely. *See* note 116 *supra*.

132. For a discussion of the myriad variations, see note 116 *supra;* Hjorth, *supra* note 127, at 239–50.

133. Inherited property has a basis equal to its fair market value at the date of the decedent's death. I.R.C. § 1014. Congress experimented briefly with a carryover basis rule, now defunct. I.R.C. § 1023 (repealed by Crude Oil Windfall Profit Tax Act of 1980, § 401, 94 Stat. 299 (1980)).

134. *See* Hjorth, *supra* note 127, at 274–75; Furgatch v. Commissioner, 74 T.C. No. 87 (1980); Westbrook v. Commissioner, 74 T.C. No. 101 (1980); Warnack v. Commissioner, 71 T.C. 541 (1979); Carrieres v. Commissioner, 64 T.C. 959 (1975), *aff'd per curiam*, 552 F.2d 1350 (9th Cir. 1977) (discussed at note 116 *supra*).

135. *See* note 38 and text accompanying notes 35–38 *supra*.

able the wife to exclude from income the same portion of the payments which the husband would exclude were he the recipient.[136]

Transfers Not Out of Existing Marital Wealth

This second category of transfers corresponds roughly with payments now described in section 71, but with important modifications. First, this category would not encompass income from property which the husband transferred to the wife, outright or in trust. Such receipts would be taxable to the wife according to general rules applicable to property owners and trust beneficiaries.[137] Second, there would be no requirement that the transfer be in the nature of support, nor that it be periodic (as that term is now known).

What that leaves, simply, are all transfers from husband to wife that are incident to divorce, except those coming from the pool of marital wealth in existence at the time of divorce. Almost always, these transfers would be recurring cash payments—what the divorce court likely would call alimony, support or maintenance. Such payments would be deductible to the husband and ordinary income to the wife, limited, however, to the husband's gross income for the year of the transfer.[138]

Confining this regime to transfers not out of existing marital wealth assures that it would perform only an income-splitting function. To be sure, future receipts of the husband wouldn't necessarily be income, but limiting the tax consequences of the transfer to the husband's gross income guarantees that the rule would not transcend its narrow purpose—to shift tax liability only to the extent the husband must turn over his income to the wife.[139]

Assuming this approach has merit, one might be tempted to give it further precision. The husband could be treated as a conduit, allowing the wife to report an aliquot portion of her receipt as having the same character as the husband's overall receipts (ordinary income, capital gain, tax-exempt interest, etc.), instead of all as ordinary income. The character of payments from a trust to a beneficiary pass through in this way.[140] Aside from the merits, the quest for simplicity is sufficient reason to reject the idea. Former spouses often are not on the best of terms; the system should not depend on open lines of communication between them.

136. Conforming amendments to present law are outlined in Peschel, *supra* note 38, at 249–50.

137. *See id.;* I.R.C. §§ 652, 662, 682.

138. Child support payments would remain taxable to the husband. *See* I.R.C. § 71(b).

139. See note 33 *supra* regarding limitations already imposed on the tax benefit generated by alimony deductions.

140. I.R.C. §§ 652(b), 662(b).

Overlap

Circumstances could arise making it difficult to determine whether a transfer was out of marital wealth in existence at divorce. (Uncertainty as to the source of wealth transfers is the essence of problems in the present system.) For example, recurring cash payments could be from salary, from income on, or proceeds from a subsequent sale of, the husband's share of marital wealth, or from that part of his share which consisted of cash. Tracing would not be desirable, nor would it have much point. A solution would be to classify a cash transfer as out of existing wealth only where the divorce papers indicate that is what the wife is taking. Admittedly, that may be ambiguous, but the problem seems relatively small. It arises only with cash (other assets are identifiable) and becomes moot once the wife has received as much cash as was on hand at divorce. Moreover, the bias should be in favor of shifting the tax liability on recurring payments. The wife's ability at divorce to extract existing wealth tax-free suggests strongly that future payments come from the husband's future receipts.

Another problem is where a particular asset (such as a residence, annuity, or insurance policy) is purchased for the wife specifically to fulfill the terms of the settlement. Such property could be treated as existing marital wealth if purchased within a prescribed period of proximity to the divorce, or in accordance with the divorce papers. A more difficult issue concerns the consequences of continuing payments by the husband to fund the purchase, such as home mortgage payments or insurance premiums. Such payments should be deductible to the husband and income to the wife only if the source of the payments is not existing marital wealth, and if they confer a present benefit on the wife. Whether the source of the payments is existing marital wealth presents an identification problem similar to that discussed above. For the same reason, here again the bias should be in favor of finding that the payments do not come from marital wealth in existence at divorce. The wife's argument, for example, that the husband's mortgage payments represent her share of the marital wealth belies her failure to obtain the share outright. The husband may wish to postpone diminution of his wealth, but if the resources for an immediate transfer are present at the time of divorce, the wife should demand what is hers immediately. If the resources are not then available, there is reason to suspect that the wife's argument is specious.

Whether recurring payments that do not go directly to the wife, such as mortgage payments and insurance premiums, confer a present benefit on her sufficient to warrant taxation has troubled the courts for years.[141] This

141. *E.g.*, Stevens v. Commissioner, 439 F.2d 69 (2d Cir. 1971); Seligmann v. Commissioner.

is not the place to rehash those issues, other than to express agreement with complaints that the courts often have failed to perceive the economic benefit that inures to the wife when a husband provides living accommodations or protection against death.[142]

Revenue Effect

Although one can only speculate, the revenue effect of this proposal is probably very small.[143] Gain of the type recognized in *Davis* probably goes unreported in the vast majority of cases, either through ignorance or reporting positions of varying legitimacy. The loss of this revenue would be insubstantial. Moreover, universal application of a carryover basis rule would generate more future revenue than the present system by foreclosing the claim to a stepped-up basis by wives in the position of Mrs. Davis.

Revenue loss caused by shifting tax liability on virtually all recurring cash payments to wives, who usually are in lower tax brackets, would be greater, but again relatively insubstantial. Indeed, the amount lost may be more than offset by the inability of wives under this proposal to take the reporting position that recurring payments (doubtless claimed as a deduction by the husband) are nontaxable installments of their property rights.

Hardship

This proposal places a premium on hard and fast rules, possibly at the expense of what some would view as fairness. In many situations the wife's overall tax burden would be minimized by taking as much of the property owned by the parties as is possible, and relying less on future payments. A variety of circumstances could make such a settlement imprudent or difficult to attain: the husband may not cooperate; the property may be insufficient or not lend itself to such a division; local law or custom may prohibit or frown on such a division; or the wife's (and the children's) well-being may be more secure with a larger ongoing income. Furthermore, if the wife does receive substantial future payments, she no longer would have the argument that they are nontaxable installments of her property rights.

But the compensating benefits are more impressive. In those cases where a partition of existing wealth is not practical, for example where

207 F.2d 489 (7th Cir. 1953); Wright v. Commissioner, 62 T.C. 377 (1974); Brodersen v. Commissioner, 57 T.C. 412 (1971); Taylor v. Commissioner, 45 T.C. 120 (1965); Bradley v. Commissioner, 30 T.C. 701 (1958).

142. *See* Note, *supra* note 114.

143. *See* notes 10 & 66 and accompanying text *supra*.

most of the wealth is tied up in a business managed by the husband, the wife can negotiate for increased future payments to compensate for her increased tax burden. Spouses in such situations are likely to be well advised. The tax law should not sacrifice the general need for clarity to accommodate the interests of a relatively few taxpayers who are best able to protect those interests themselves.

Inevitably cases would arise in which this proposal would appear to penalize one party or the other. They arise under present law as well. A workable formula, pleasing to everyone, is unattainable; an attempt to find it would be fatuous. In most cases, the results of a given settlement under this proposal would not differ significantly from the results under present law. But the sorely needed certainty and uniformity in the treatment of transfers incident to divorce would be much improved. Parties at least could negotiate their differences with predictable consequences. And when the courts must step in, they could treat taxpayers evenly, wherever they live.