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LEGISLATIVE NOTE

FEDERAL INCOME TAX CONSEQUENCES OF APPRECIATED PROPERTY TRANSFERS UNDER THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT

Under prior Illinois law, the common law principles of ownership by title,\textsuperscript{1} alimony\textsuperscript{2} and fault\textsuperscript{3} governed the adjudication of property rights in divorce proceedings. Property was distributed in accordance with the manner in which title to the property was held by the divorcing parties. The wife was entitled only to alimony\textsuperscript{4} and had no rights in any property held by the husband unless she could prove an equitable interest in that property\textsuperscript{5} or unless compelling circumstances mandated that the property be transferred to her as a form of alimony in gross.\textsuperscript{6} Absent these equitable or compelling circumstances the court had no authority to allocate any separate property to the non-title holding spouse.\textsuperscript{7} Moreover, the trial court

\textsuperscript{1} ILL. REV. STAT. ch. 40, §§ 18, 19 (1975).
\textsuperscript{2} Id. § 18. Alimony means the "sustenance or support of the wife by her divorced husband and stems from the common law right of the wife to support by her husband." BLACK'S LAW DICTIONARY 97 (Rev. 4th ed. 1968).
\textsuperscript{3} ILL. REV. STAT. ch. 40, § 1 (1975).
\textsuperscript{4} Id. § 19.
\textsuperscript{5} Id. § 18. This section provides:
Whenever a divorce is granted, if it shall appear to the court that either party holds title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.
\textsuperscript{6} Id. § 19. Section 19, paragraph one provides:
When a divorce is decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just and, in all cases, including default cases, the court shall make inquiry with respect to children of the parties, if any, and shall make such order touching the care, custody, support and education of the minor children of the parties or any of them, as shall be deemed proper and for the benefit of the children. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed . . . in gross or by installments as settlements in lieu of alimony, as the court deems equitable. [emphasis added].
"Alimony in gross," defined as alimony in a lump sum, is in the nature of a property settlement. BLACK'S LAW DICTIONARY 97 (Rev. 4th ed. 1968).
\textsuperscript{7} See Debrey v. Debrey, 132 Ill. App.2d 1072, 270 N.E.2d 43 (1971). In the absence of statutory authority to compel the transfer of property the court cannot rely on any general
considered fault on the part of the defendant as a factor in its calculation of alimony. Such considerations often resulted in disproportionate alimony settlements so flagrant as to be characterized as "blackmail, intimidation and coercion." 

In response to these and similar problems, the Illinois General Assembly recently passed the Illinois Marriage and Dissolution of Marriage Act, a bill which significantly reforms Illinois' domestic relations law. The Act has specifically eliminated the consideration

power of equity. 132 Ill. App.2d at 1074. 270 N.E.2d at 44. The equitable interest that one spouse has in the title holding spouse was not established by the marital relationship alone. Under Section 18 the spouse must show a contribution such as money or services which enhanced the value of the property. Everett v. Everett, 25 Ill.2d 342, 347, 185 N.E.2d 201, 205 (1962).

8. ILL. REV. STAT. ch. 40, § 1 (1975). The statute listed causes such as impotence, desertion, habitual drunkenness, and conviction of a felony.

9. M. Auerbach, Overview of the Illinois Marriage and Dissolution of Marriage Act, in NEW DIVORCE LAW I-6 (ILL. Inst. for CLE, 1978) [hereinafter cited as Overview]. For example, if the spouse holding title to property, usually the husband, was shown to be personally at fault he was essentially coerced by court decree into a larger property settlement without proof of a "special equity" in his property. If the non-title holding spouse, usually the wife, was shown to be at fault, she was penalized by receiving less alimony or property than she actually needed for support.

10. The general intent of the Act is to preserve the integrity of marriage, safeguard family relations and eliminate abuse and acrimony from the divorce proceedings. ILL. REV. STAT. ch. 40, § 102(1) to (6) (1977).

In response to the drastic increase in divorce and the mounting public dissatisfaction with the abuses of divorce procedures, the Illinois Legislature, on numerous occasions, proposed various no-fault divorce bills. All were defeated. The Illinois Legislature is philosophically opposed to facilitating divorces. The General Assembly, as a matter of public policy, has determined that the preservation of the integrity of marriage outweighs the choice of easier dissolutions of marriage. This Act was conceived as "a breaking mechanism to discourage hastily conceived dissolutions of marriage." Overview, supra note 9, at 1-12.

11. ILL. REV. STAT. ch. 40, § 101 (1977). The bill was introduced on April 7, 1977 by Senators Guidice, Hynes, Carroll, Daley, Chew, Clewis, Joyce, Glass, Weaver, Mitchler, Rupp, D'Arco, Bubbee, Rock, Newhouse, and Shapiro. It passed the House with a vote of 97 to 52 on June 23, 1977, and the Senate on May 19, 1977 with a vote of 45 to 3. The Act became effective on October 1, 1977 and applied to all pending actions with respect to issues on which a judgment had not been entered as of the effective date. Id. § 801(b).

12. The most significant acts repealed by Section 901 on October 1, 1977 were:

(a) "An Act to revise the law in relation to marriages," approved February 27, 1874, as amended. (ILL. REV. STAT., ch. 89, §§ 1-17(a)).

(b) "An Act to establish the validity of marriages contracted, wherein one or both of the parties were slaves at the time, and to establish the legitimacy of their offspring as to the right to inherit property," approved May 15, 1891. (ILL. REV. STAT. ch. 89, § 8).


(d) "An Act to revise the law in relation to divorce," approved March 10, 1874, as amended. (ILL. REV. STAT. ch. 40, §§ 1-21.4).

(e) "An Act in relation to married men and women," approved May 17, 1877, as amended (ILL. REV. STAT. ch. 68 §§ 22-33).
of marital fault in the adjudication of property rights incident to the legal dissolution of marriage. In so doing, the legislature contemplated that a "faultless" property distribution would reduce the economic coercion which often accompanies interspousal negotiations in a divorce proceeding. In addition, the legislature intended to treat these property distributions in a manner similar to the dissolution of a commercial partnership where neither partner is penalized for excesses of personal conduct.

This reformulation of the principles underlying property distribution represents the Act's most significant departure from previous domestic relations law. To accomplish this reformulation the Act has created a new res in Illinois called "marital property," which, for purposes of the Act, is defined as "all property acquired by either spouse subsequent to the marriage . . . " excepting certain non-marital property. Marital property is to be divided in "just proportions" considering all relevant factors including each spouse's respective contribution.

The Act retained an "Act to Revise the law in relationship to husband and wife" approved March 30, 1874 (and known as the Husband and Wife Act), with the exception of paragraph 8 which was expressly repealed.

13. ILL. REV. STAT. ch. 40, §§ 102(6) and 503(c) (1977).
14. Overview, supra note 9, at 1-8. See also Uniform Marriage and Divorce Act, (ULA), Vol. 9. (Master ed., 1973), Commissioner's Prefatory Note at 457 which states: The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. The Act authorizes the division upon dissolution, of the property acquired by either spouse during the marriage . . . as the primary means of providing for the future financial needs of the spouses . . .
16. Certain property acquired subsequent to the marriage is defined as non-marital property:
   (1) property acquired by gift, bequest, devise or descent;
   (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
   (3) property acquired by a spouse after a judgment of legal separation;
   (4) property excluded by valid agreement of the parties;
   (5) the increase in value of property acquired before the marriage; and
   (6) property acquired before the marriage.
Id. § 503(a)(1)-(6).
17. Id. § 503(c).
18. The statute lists certain factors to be considered by the court for the distribution of marital property in dissolution of marriage proceedings. These factors include:
As a result of this mandatory distribution of marital property, certain federal income tax questions inevitably arise concerning the realization of any taxable gain to either party. Since the Act is completely silent on the tax consequences of the property distribution provisions, this Note will examine the law concerning divisions of marital property, compare the Illinois statute with similar statutes in other jurisdictions and suggest that the most reasonable interpretation in light decisions in those jurisdictions is the "species of common ownership" criterion under which the gain on all transfers reflecting the transferee's contribution would be nontaxable.

**United States v. Davis: A Federal Criterion?**

Prior to the seminal *United States v. Davis* decision, the issue of whether any gain was realized pursuant to an appreciated property distribution received conflicting treatment. In earlier cases the Board of Tax Appeals held that the appreciation of property transferred to a spouse pursuant to a divorce settlement could not be taxed as a capital gain to the transferor for two fundamental reasons. First, and most importantly, there was no objective standard to value the marital rights received by the husband in exchange for his appreciated property. Second, even if such an amount were ascertainable, the transaction was held to be a nontaxable division of property, on the ground that to hold that "a man has realized taxable income by

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

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

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when 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 the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

*Id.* § 503(c)(1)-(10).


giving up a substantial portion of his property seems . . . unreasonable and not justified either under general law or under the revenue act."  

The Board was reversed by both the Second and Third Circuits\(^\text{22}\) which rejected the Board's arguments concerning the indeterminability of the gain by applying the rule of equivalence. Under this valuation concept it is presumed that the appreciation of property could be measured by assuming the relinquished marital rights to be equal in value to the transferred property.\(^\text{23}\) Both Circuits also rejected the Board's characterization of the transfer as a division of property and instead viewed the transaction as a required purchase of marital rights imposed upon the husband by the divorce decree. The husband's obligation to support his wife was satisfied by the transfer and therefore was to be considered a "sale" and taxed as such.\(^\text{24}\)

The Supreme Court resolved this conflict in *United States v. Davis*\(^\text{25}\) by characterizing the transfer of appreciated property upon divorce as a taxable event. In *Davis*, the taxpayer husband transferred 500 shares of appreciated stock\(^\text{26}\) to the wife "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever . . . ,"\(^\text{27}\) including, under Delaware law, the right of intestate succession,\(^\text{28}\) dower,\(^\text{29}\) and a share of the husband's property upon divorce.\(^\text{30}\)

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\(^{21}\) 42 B.T.A. at 941.


\(^{23}\) The court in *Mesta* concluded that "[t]he fair market value of the property or benefit received by [the husband] for the stock may be difficult to ascertain, but in the absence of any other value being shown . . . it is proper to take the fair market value." 123 F.2d at 988.

\(^{24}\) I.R.C. § 1001(a). The Sixth Circuit in Commissioner v. Marshman, 279 F.2d 27 (6th Cir. 1960), *cert. denied*, 364 U.S. 918 (1960), added to the conflict by adopting the position held by the Board of Tax Appeals. The court ruled that even though a property transfer might be a taxable event, the gain realized was indeterminable because of the impossibility of calculating the fair market value of the wife's marital rights. Section 1001(b) of the Internal Revenue Code requires that capital gains be measured by the fair market value of property received by the taxpayer, not by the fair market value of the transferred property. Fair market value is the price at which property would be exchanged by a willing buyer and seller. The court, in *Marshman*, held that a divorce proceeding did not conform to a fair market exchange. "A single transaction between a husband and wife made under the emotion, tension and practical necessities involved in a divorce proceeding does not comply with this rule." 279 F.2d at 32.

\(^{25}\) 370 U.S. 65 (1962).

\(^{26}\) The cost of the appreciated stock to the husband was $74,775.37. The fair market value at the time of transfer was $82,250.00. The issue to be decided was whether the husband realized a $7,474.63 taxable gain on the transfer. *Id.* at 67.

\(^{27}\) *Id.* at 66-67 (1962).


\(^{29}\) DEL. CODE tit. 12, § 502 (1974).

\(^{30}\) DEL. CODE tit. 13, § 1531 (1953) (current version DEL. CODE tit. 13, § 1527 (1974)).
In contrast to the previous Court of Appeals decisions, the arguments presented to the Supreme Court focused primarily upon the nature of the property transfer and not upon the lack of objective valuation for the gain. The Commissioner contended that the transfer was taxable to the husband at the time of transfer because the property was given in exchange for the release of the independent legal obligations of alimony and support. The taxpayer responded by first asserting that the transfer was a nontaxable division of property between co-owners, comparing the wife's interest in the stock to that of a wife in a community property jurisdiction. In evaluating the argument that the spouses should be considered co-owners, the Court referred to Delaware law for a proper characterization of the wife's interests in her husband's property both before and after the transfer.

Under Delaware law the wife had no active or passive interest in the management or disposition of her husband's property during the marriage. Upon dissolution of marriage she shared in the property only to the extent that the trial court deemed "reasonable." What constituted a reasonable share was determined by reference to the

31. See notes 22 & 24 and accompanying text supra.
32. The Court disposed of the valuation issue by rejecting the Marshman presumption that the rights received could not be objectively valued as equal to the property transferred. See note 24 and accompanying text supra. The Court adopted the rule of equivalence conceding that a divorce proceeding was not the best example of an arms length transaction. Nevertheless, the rule of equivalence was "more consistent with the general purpose and scheme of the taxing statutes to make a rough approximation of the gain realized . . . ." The taxable gain realized in such transactions would be as though the parties were dealing at arms length. 370 U.S. at 72. Despite the Court's adoption of the rule of equivalence, certain language in the opinion arguably leaves open the possibility that a lesser gain will be realized if the transferor can show the rights received to be clearly less than the fair market value of the property transferred. The Court stated: "It must be assumed, we think, that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged. There was no evidence to the contrary here . . . ." that the rights and property were not equal in value. Id. However, this interpretation is of yet unsubstantiated since in no case has a taxpayer successfully challenged the rule of equivalence on these grounds. SANDER & CUTMAN, TAX ASPECTS OF DIVORCE AND SEPARATION A-33, (1975).
33. The Court stated the issue in these terms: "[s]hould the economic gain be presently assessed against the taxpayer, or should this assessment await a subsequent transfer of the property by the wife." 370 U.S. at 68. This issue was raised by the ABA Committee on Domestic Relations Tax Problems, which in 1966, proposed that the gain or loss upon transfer of property in satisfaction of marital rights not be realized. Instead, the recipient spouse should assume the transferor's tax basis in the transferring property. This would assure and protect the revenue by making certain that the gain would not escape taxation altogether. The Davis Court rejected the postponement alternative and instead imposed the tax on the transferor. See Report of the Committee on Domestic Relations Tax Problems, 19 ABA Taxation Section 62, 63-65 (1966).
34. 370 U.S. at 69.
35. Id.
36. Id. at 70-71.
wife’s financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband. Moreover, the wife’s intestate rights in her husband’s property were dependent upon her surviving the husband.\textsuperscript{37}

The Court found the aggregation of these incidents of ownership to reflect “inchoate”\textsuperscript{38} rights in the property, not even remotely reaching the “dignity of co-ownership.”\textsuperscript{39} These inchoate interests were held to resemble the marital rights of support and alimony, and likewise were found to impose upon the husband a personal liability, rather than to create a property interest in the wife.\textsuperscript{40}

The taxpayer then contended that to draw a distinction between a wife’s interest in her husband’s property in a common law jurisdiction such as Delaware and a wife’s interest in a typical community property jurisdiction would be “a double sin.”\textsuperscript{41} Not only would such a differentiation depend upon “elusive and subtle casuistries which . . . possess no relevance for tax purposes”\textsuperscript{42} but it would also create a disparity between common law and community property jurisdictions that would conflict with Congressional policy of equality of tax treatment.\textsuperscript{43} In response, the Court conceded that its characterization of the transfer would permit differing tax treatments between common law and community property states. However, since Congress had not seen to alleviate this disparity in this particular area, the Court was prepared to let the disparity stand.\textsuperscript{44}

**MARITAL PROPERTY IN ILLINOIS: REJECTION OF THE FEDERAL CRITERION**

*Davis* has been *interpreted* as establishing *all* transfers of appreciated property in common law jurisdictions as taxable in the ab-

\textsuperscript{37} Id. at 70.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. The Court did not reject the taxpayer’s position as totally without merit. For that matter, the Court granted that it would not be completely illogical to consider “the shearing off of the wife’s rights in her husband’s property as a division of that property . . . .” The Court seemed to think, on balance, that the Commissioner’s position was more reasonable. 370 U.S. at 71. Some commentators have characterized this analysis as a balancing test, weighing the wife’s ownership rights against her marital rights. See Comment, *Federal Income Tax Treatment of Gains and Losses in Divorce and Separation Property Settlements*, 20 St. Louis U.L.J. 181, 184 (1975). In any event the Court was inclined to leave open the possibility that a property transfer could be considered a nontaxable event.

\textsuperscript{41} 370 U.S. at 69.
\textsuperscript{43} 370 U.S. at 70.
\textsuperscript{44} Id. at 71. See, e.g., Poe v. Seaborn, 282 U.S. 101 (1930).
The presence of three particular indicia of ownership: a right to a descendible share, a right to manage and dispose, and a right to more than a “just and reasonable” share. The Commissioner of Internal Revenue has adopted this position on numerous occasions. Indeed the Supreme Court in Davis indicated that it would not be bound by state “label or tags” in its interpretation of federal tax law. In a decision involving federal estate taxes, the Court indicated that where state trial court actions or legislative characterizations involving ownership rights impinge upon federal tax law, the federal court must independently examine those ownership rights relevant to the federal tax question. A federal court will be bound only by decisions of the state’s highest court involving only state law issues. All other state court decisions are merely to be given “proper regard.”

Since the Illinois Supreme Court, in Kujawinski v. Kujawinski, has characterized the wife’s rights in marital property, an independent federal interpretation of the rights would be neither needed nor justified. It is clear that the Act’s provisions do not apply in the event of death, nor during the duration of marriage. During the


46. See Imel v. United States, 523 F.2d 853, 856 (10th Cir. 1975); Collins v. Commissioner, 412 F.2d 211, 212 (10th Cir. 1969). The Commissioner in Imel argued that characterization of a transfer as taxable depends on whether the transaction was a division of property by co-owners or was a sale or exchange resulting in a capital gain under I.R.C. § 1001(c), and Int. Rev. Code of 1954, ch. 1, § 1002 (repealed by Pub. L. 94-455) 523 F.2d at 855. See also Swaim v. Commissioner, 50 T.C. 302 (1968), aff’d, 417 F.2d 353 (6th Cir. 1969), in which the Tax Court regarded Davis as providing the criteria for determining ownership and taxability.

47. 370 U.S. at 70.

48. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). The Supreme Court mandated that the Tax Court should not accept a state trial court’s determination concerning the eligibility of a trust for federal estate tax purposes. The Court held that where federal estate tax liability depends upon a characterization of a property interest under state law the Federal courts must make an independent examination of those property interests and apply what they consider to be appropriate state law. Id. at 465. Even though Bosch involved federal estate tax litigation it has been held to apply to federal income tax litigation as well. Dodge v. United States, 413 F.2d 1239 (5th Cir. 1969); Henley v. United States, 396 F.2d 956 (Ct. Cl. 1968); Henry W. Dodge, Jr., 27 T.C.M. (CCH) 1170 (1968).

49. Id. at 465.

50. Id.

51. 71 Ill.2d 563, 376 N.E.2d 1382 (1978).


53. Section 503(c) mandates the court to divide marital property only “in a proceeding for dissolution of marriage . . . , or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked
marriage the wife is unable to manage and control any marital property held in her husband's name. She has no alienable interest and her right to an intestate share will be contingent upon survival. She has no dower or statutory dower right in realty acquired during coverture. Her share in the marital property is vested only upon dissolution of marriage and recognized to the extent the trial court deems "just." This "inventory" of rights would seem not to reflect the indicia specified in Davis and accordingly would not reach the required "dignity of co-ownership" which would justify nontaxability.

However, the nontaxability interpretation cannot be substantiated either by a thorough analysis of the Davis decision itself or by subsequent litigation. The Davis Court itself acknowledged that a property settlement pursuant to a divorce may constitute a division of marital property as opposed to a taxable exchange. "Although admittedly such a view may permit different tax treatment among the several states, this Court in the past has not ignored the differing effects jurisdiction to dispose of the property . . . ." In any event the rights of the non-title holding spouse vest only upon the dissolution of the marriage. The Illinois Supreme Court stated that:

Operation of the term "marital property" under the Act is not triggered until the time of dissolution. . . . Marital property is defined "only for the purpose of division on dissolution of marriage or legal separation. No attempt is made to regulate the respective interests of the spouses in property during the existence of the marriage. Kujawinski v. Kujawinski, 71 Ill.2d 563, 572-73, 376 N.E.2d 1382, 1386 (1978).

The Illinois Supreme Court also has stated:

The Act does not purport to affect property interests during the marriage. The term "marital property" is a nomenclature devised to realize an equitable distribution of property upon termination of the marriage. . . . Section 503(b) does not prevent married persons from owning property separately during the marriage and disposing of it in any fashion that the property-owning spouse may choose. Kujawinski v. Kujawinski, 71 Ill.2d 563, 573, 376 N.E.2d 1382, 1386-87 (1978).

Plaintiff had contended that the Act would impair pre-existing contractual relationships. However, the court rejected such an interpretation, reiterating that the section merely classifies the aggregate property interests of the spouses for the purposes of equitably distributing the property. That which is classified as "marital property" is subject to distribution within those limitations set by transfers, assignments and conveyances of such property. . . . Section 503(b) does not require that each "marital property" interest be divided between the spouses or transferred in whole or in part to the nonowning spouse. We must presume that the "marital property" will be distributed pursuant to section 503(b) so as to avoid the impairment of any contractual obligations owed to third parties who are not parties to the dissolution proceeding.

Id. at 574, 376 N.E.2d at 1387.

55. ILL. REV. STAT. ch. 3, § 2-9 (1975). The wife has no inchoate dower rights in Illinois.
57. See notes 74-105 and accompanying text infra.
on the federal taxing scheme of substantive differences between community property and common law systems. "59 This statement seems particularly ironic since, in fact, the substantive differences between common law and community property systems at the time *Davis* was decided were few.60

In community property states, as well as common law states, the wife could not manage or dispose of marital property during the marriage61 nor make contracts binding on the community property.62 The husband's only restriction on management and control in community property states was a requirement that he obtain a joinder signature from the wife consenting to the conveyance of community realty.63 Moreover, little difference existed between community property and common law jurisdictions in recognizing the wife's right to a reasonable share of the community property upon divorce. In six of the eight community property states, a wife's share in the community property was subject to the same "just and reasonable" limitation as was present in *Davis*64 and is present in Illinois under the current Act.65 Of the three indicia mentioned in *Davis*, the only meaningful distinction between common law and community property is found in descendibility of interest. In seven of the eight community property states, the wife could either devise one-half of the community assets66 or let that one-half interest descend according to the local

59. 370 U.S. at 71.
63. Arizona, California, Idaho, New Mexico and Washington imposed joinder; Louisiana, Nevada and Texas did not.
64. See notes 116 & 117 and accompanying text infra.
laws of intestacy. No such right is recognized in Illinois or any other common law jurisdiction. If these rights were subject to an evaluation under the "federal criteria" used in Davis, the interest of a wife in a community property jurisdiction might conceivably be characterized as lacking co-ownership. Such a view would be inaccurate since the wife is unquestionably a co-owner in community property.

In summary, a comparison of the community property and common law jurisdictions indicates that the sole use of the three indicia to determine co-ownership is not wholly justifiable. Regardless of the interpretation that Davis established the indicia of nontaxability, it is questionable that Davis, in fact, relied solely on these factors. The Court did not impose these indicia upon Delaware law. Instead, state law was, by necessity, consulted to determine whether there were substantive incidents of ownership in the transferee spouse. This does not exclude the possibility of other indicia of co-ownership in a common law jurisdiction such as Illinois. In fact, the Tenth Circuit found none of the Davis indicia in subsequent decisions which characterized the wife's interests in marital property as a "species of common ownership" akin to co-ownership. Under such a characterization the transfer of property was considered nontaxable.

THE SPECIES OF COMMON OWNERSHIP CRITERION

Because Davis indicated that co-ownership of marital property, exemplified by the rights of transferee spouses in community property jurisdictions, was necessary for a nontaxable division of marital property, taxpayers in common law jurisdictions naturally sought to analogize their interests in marital property to those within community property jurisdictions and thereby avoid the Davis results.

67. Local property laws will dictate a presumption of either joint tenancy or tenancy in common with her husband. If the interest is characterized to be joint, as in California, Idaho, Nevada, New Mexico, or Washington, then the failure to devise will result in the husband taking her one-half interest as surviving joint tenant. If the interest is one akin to tenancy in common then the issue or descendants receive the half.

68. In Illinois the transferee spouses' rights in marital property do not apply in the event of death. See note 52 supra.

69. Poe v. Seaborn, 282 U.S. 101 (1930). Poe holds that lack of power to manage, control or dispose of the community property is not dispositive of her vested one-half interest in that property. 282 U.S. at 111-13.

70. See notes 74-105 and accompanying text infra.


73. This line of argument was first developed in the Tenth Circuit in Swanson v. Wiseman, 61-1 U.S. TAX CAS. (CCH) ¶ 9264 (W.D. Okla. 1961), where a federal district court held, with
Perhaps the most successful example of characterizing common law property as including attributes of community property involved a controversial series of cases termed the “Collins cases.” These


75. Collins v. Commissioner, 46 T.C. 461 (1966), aff’d, 388 F.2d 353 (10th Cir. 1968), vacated and remanded per curiam, 393 U.S. 215 (1968), rev’d on remand, 412 F.2d 211 (10th Cir. 1969); Collins v. Oklahoma Tax Comm’r, 446 P.2d 290 (Okla. 1968).

In Collins v. Commissioner, 388 F.2d 353 (10th Cir. 1968) [hereinafter cited as Collins I], the court concluded that the wife had no vested property rights in the jointly acquired property prior to the divorce decree. The court reasoned that upon divorce the wife received only a discretionary “just and reasonable” share which was based on factors unrelated to her contribution in property. Id. at 354. These factors included the spouse’s needs, her station in life, and the cost of educating the children. The court considered those factors although it recognized ample Oklahoma precedent to the contrary, holding “that in dividing the jointly acquired property the court is not to take into consideration the need of the parties but solely the manner in which the property was acquired and the actions of both parties in accumulating an estate and retaining an estate.” [emphasis added]. Id. at 356. See, e.g., West v. West, 268 P.2d 250 (Okla. 1954); Hill v. Hill, 197 Okla. 697, 174 P.2d 232 (1946); Tobin v. Tobin, 89 Okla. 12, 213 P. 884 (1923); Thompson v. Thompson, 70 Okla. 207, 173 P. 1037 (1918). The Collins I court also noted that the Tobin case clearly set out the factors to be considered by a court in making the division of property. A court must "take into consideration the efforts of the respective parties during their married lives. . . . If it should develop . . . that the accumulations have been due to [the wife’s] economy, industry, frugality and sturdy virtues, which have been a stay to the home and the constant guard of the accumulations and at the same time it should develop that the husband has not been frugal, . . . it would not be equitable to the wife, under these circumstances, that the husband should be given half of their property." Collins I at 356 n.6. Moreover, the court held the presence or absence of the Davis factors to conclusively distinguish a marital division in satisfaction of a legal obligation from a division between co-owners. Accordingly, the transfer was held to be taxable. Id. at 357-58.

Undaunted, the taxpayer, in Collins v. Oklahoma Tax Comm’r 446 P.2d 290 (Okla. 1968) [Collins II], brought a state tax refund action in the Oklahoma Supreme Court. The Oklahoma court found the Tenth Circuit’s interpretation of Oklahoma’s divorce law to be incorrect, holding that the wife possessed the rights of a co-owner under state law. Id. at 295.
cases involved a transfer of appreciated property under the Oklahoma divorce statute which required the court to make a “just and reasonable” division between the parties of any jointly acquired property, a requirement nearly identical to Illinois law under the new Act.

The taxpayer contended that both he and his former wife held a vested interest in their jointly acquired property even though title was held in his name alone. The wife had made valuable contributions of money and effort to the taxpayer’s business. The subsequent transfer of property pursuant to a settlement agreement was therefore argued to be a nontaxable division of co-owned property and separate from transfer based on the husband’s obligations of support and maintenance. Based on the Oklahoma Supreme Court’s characterization of the wife’s interest in marital property as vesting at the time of filing the divorce, the Tenth Circuit found the property transfer to “merely . . . finalize the extent of the wife’s vested interest in property . . . held under ‘a species of common ownership’.”

After Collins II, the taxpayer appealed the Collins I decision to the United States Supreme Court. The Supreme Court remanded the decision to the Tenth Circuit in light of the Oklahoma Supreme Court’s interpretation of the statute. Collins v. Commissioner, 393 U.S. 215 (1968) (per curiam) [Collins III]. The entire opinion reads:

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals for further consideration in light of the opinion of the Supreme Court of Oklahoma in [Collins II].

On remand, the Tenth Circuit in Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969) [Collins IV], reversed its prior holding in Collins I.

76. OKLA. STAT. ANN. tit. 12, § 1278 (1961). Oklahoma incorporated a marital property concept in this statute the text of which provides:

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.

[emphasis added].

77. Id.

78. Id. Jointly acquired property has been defined in a Tax Court case as “a property right created by divorce statutes in both spouses to property or the enhancement in the value of property brought about by the joint industry of the husband and wife during their marriage.” Wiles v. Commissioner, 60 T.C. 56, 65 (1973) (dissenting opinion).

79. ILL. REV. STAT. ch. 40, § 503(c) (1977). Oklahoma uses the term jointly acquired property. Illinois uses the term marital property.

80. Collins II, 446 F.2d at 292-93. The wife, in fact, contributed $10,000 toward the marital property plus playing an active role in the business itself.

81. Collins I, 388 F.2d at 355. The court agreed that all of the Oklahoma cases presented by the taxpayer as precedent indicate “that the division is of jointly owned property and is to be considered separate from the husband’s obligations of alimony and support and maintenance.” Id. at 355.

82. Collins IV, 412 F.2d at 212.
The Tenth Circuit affirmed this position even though Oklahoma law did not give the wife the traditional elements of co-ownership in the marital property such as descendible interest, right to control and manage, and a right to disposition. The court expressly rejected the interpretation that Davis created a conclusive federal criterion for determining co-ownership, indicating that the decision had merely discussed certain general characteristics of co-ownership in an attempt to determine whether the wife possessed the rights of a co-owner under state law.

In light of the Oklahoma Supreme Court's characterization of the wife's interest as similar to community property the court found "no need to search state law for . . . other factors that might signify the nature of the wife's property interest." The wife was found to have a vested interest in that property, unaffected by fault and exercisable by the wife upon dissolution of the marriage. Therefore the transaction was considered a nontaxable division of property between co-owners.

The method of analysis in Collins IV subsequently was affirmed by the Tenth Circuit under similar circumstances in Imel v. United

83. Collins I, 388 F.2d 357-58.
84. "[N]either the actual investiture of title, a right to make present disposition of property, nor absence of a descendible interest" were held to be controlling. Collins II, 446 P.2d at 297. Moreover the court in Collins II further distinguished the Federal court's interpretation of Oklahoma law on the ground that Oklahoma placed a mandatory duty upon the trial court to divide the jointly acquired property. Id. at 295. Del. Code Ann. tit. 13, § 1527(a) (1975) provides the spouse a reasonable share in the other spouse's property only upon a separate suit. Whereas Okla. Stat. Ann. tit. 12, § 1278 (1961) mandates that the court must make a just and reasonable division in all divorce proceedings.
85. Collins IV, 412 F.2d at 212. The Commissioner, however, contended that the Davis factors are established federal criteria that must be met before the rights conferred by state law can be said to constitute co-ownership.
86. Collins II, 446 P.2d at 295.
87. Collins IV, 412 F.2d at 212.
89. This characterization is almost identical to the Illinois Supreme Court's description of marital property as becoming "subject to distribution upon termination of the marriage." Kujawinski v. Kujawinski, 71 Ill.2d 563, 575, 376 N.E.2d 1382, 1387 (1978).
90. Collins IV, 412 F.2d at 212.
91. However, in Wiles v. Comm'n, 499 F.2d 255 (10th Cir. 1974), the court, interpreting the Kansas division of property statute, found no "species of common ownership," even though the Oklahoma statute in Collins was practically identical to the Kansas law. Id. at 258, 259. Since there was no Kansas decision specifically defining the nature and extent of ownership, the court, like the Davis court, used its own analysis of the rights awarded the transferee spouse. In Kansas the wife had a right to intestate succession only if she survived her husband. Kan. Stat. Ann. § 59-504 (1964), and was entitled to one-half of all her deceased husband's realty only if the husband sold the property without her consent. Kan. Stat. Ann. § 59-505 (1964). The court found these rights "to possess some elements of a property interest," but were no
States. Under Colorado law, the wife's rights included the right to a "fair and equitable share" upon divorce of all "marital property," the share being determined in the court's discretion using such factors as contribution to the accumulation of the estate and, in contrast to Oklahoma law, the financial needs and the financial conditions of both parties. Nevertheless, the Imel court found the presence of two factors evidencing a species of common ownership which operated to make the marital distribution a nontaxable event according to Colorado law.

First, a decision by the Colorado Supreme Court was rendered describing the nature of the wife's rights. Pursuant to a Colorado pro-

more than "inchoate rights contingent upon the wife's survival." 499 F.2d at 257. Moreover, the wife's right to receive a just and reasonable share of all property owned by the spouses, whether owned jointly or separately, was considered inconsistent with the idea of co-owned property because her share was determined at the discretion of the court. In Kansas, the trial court divides the property considering these factors: the source of the property, the contribution of each party, earning capacity, fault, needs, age and length of marriage. Id. at 257, 258. The court concluded that "if the wife were a co-owner in Kansas, her interest in the property to be divided would be based on more than a right to a 'just and equitable' share therein." Id. at 258. The statute involved, KAN. STAT. ANN. § 60-1610(c) (1976), provided for the division of property in this manner:

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 the 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. [emphasis added].

92. 523 F.2d 853 (10th Cir. 1975).
93. The statute in effect at the time of the divorce proceedings was COLO. REV. STAT. § 46-1-5 (1963). It provided that "the court may make such orders, if any, as the circumstances of the case may warrant relative to a division of property, in such proportions as may be fair and equitable." Colorado adopted the concept of marital property or "joint accumulations" by judicial decision. See, e.g., Kalcevic v. Kalcevic, 156 Colo. 151, 397 P.2d 483 (1964). The state codified the concept in COLO. REV. STAT. § 14-10-113 (1973), a statute almost identical to Illinois' new law. The Colorado disposition of property section provides:

(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 jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property, 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. [emphasis added]. COLO. REV. STAT. § 14-10-113 (1973).
cedural rule, the *Imel* court had the question of the wife's rights certified by the Colorado Supreme Court. The Colorado court held that the wife's rights in any jointly accumulated "marital property" to be entirely separate from the husband's personal obligations of alimony or support. During the marriage the husband's property remained free from any vested interest of the wife, and he remained free to dispose of the property as he chose. The actual vesting of property rights in the wife was limited to the "situation in which a divorce action has been filed, the court has jurisdiction over the parties and the subject matter, and the case proceeds to both a decree of divorce and a division of property." Prior to the dissolution action, those rights were found by the state supreme court to be completely inchoate, but only in the sense that prior to the division the property to be transferred to the wife has not yet been determined. Upon filing of the action the court may protect this vested interest pending the division order.

Second, the certification was specifically limited to property transfers made in recognition of the wife's contribution to the accumulation of the marital estate. During the marriage, the wife had made substantial contributions to the accumulation of property and the parties explicitly agreed that the family estate resulted from those

95. In Re Questions Submitted By United States Dist. Ct., 517 P.2d 1331 (Colo. 1974). The questions posed by the District Court for the Colorado Supreme Court were: "When under 1963 C.R.S. 46-1-5 [or under 1963 C.R.S. 46-1-13 as amended in 1971]. . . " is the transfer a taxable event for purposes of federal income taxation? The court listed these particular circumstances:

(a) a property settlement agreement is entered into providing for a transfer of property from husband to wife in acknowledgment of the wife's contribution to the accumulation of the marital estate, or, (b) a decree of the divorce court requires such transfer because of the wife's contributions to the accumulation of the family estate, and, (c) the transfer is not made in satisfaction of the husband's obligation for support.

Id. The court phrased the question in this manner:

Under Colorado law is such a transfer a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners, or does the transfer more closely resemble a conveyance by the husband for a release of an independent obligation owed by him to the wife?

Id. at 1332.
96. Id. at 1335-36.
97. Id. at 1334-35.
98. Id. at 1335.
99. Id.
100. Id.
101. Id.
102. Id. at 1333.
joint efforts.\textsuperscript{103} As in Collins IV, the Tenth Circuit, refusing to examine state law beyond the certification and contribution issues,\textsuperscript{104} held that the Colorado Supreme Court had conclusively defined the rights and interests of the parties in the marital property under Colorado property law.\textsuperscript{105}

**MARITAL PROPERTY IN ILLINOIS: A SPECIES OF COMMON OWNERSHIP?**

To determine if marital property in Illinois can be considered a species of common ownership, a comparison need only be made of the similarity of the Illinois Act with the property law of the traditional community property states, the common law states adopting statutes similar to community property statutes\textsuperscript{106} and the precedent construing such law.\textsuperscript{107} The Illinois Act, although not a community

\textsuperscript{103} 523 F.2d at 857. This may be the most significant legacy of Imel. The court stated that "[u]nder the findings of both the state and federal courts the wife materially aided the accumulation of the family wealth and the settlement agreement was a fair division of the property." Id. The district court also observed that "under Colorado law an equitable award of money or property to the wife is dependent upon [the] extent of her contribution...." 375 F. Supp. 1102, 1105 (D. Colo. 1973). Certain commentators have termed this principle the "contribution concept." See Comment, New Approach to the Transfer of Appreciated Property Pursuant to Divorce, 25 CATH. U.L. REV. 616 (1976). Other commentators have termed such a principle the "marital partnership approach." The foundation of such a principle is the assumption that marriage is a conjugal partnership the success of which depends upon the efforts of both spouses. See Comment, The Federal Income Tax Consequences of Property Settlements in Common Law States and Under the Uniform Marriage and Divorce Act: A Proposal, 29 MAINE L. REV. 73 (1977).

\textsuperscript{104} However, the Tenth Circuit did criticize the district court's phrasing of the certification questions. The court observed that the federal district court should not have forced the state court to decide whether the transaction was a taxable event because such a determination was beyond the scope of state authority. Rather, it should have framed the question so as to only require a determination of state law. 523 F.2d at 857.

\textsuperscript{105} 523 F.2d at 857.

\textsuperscript{106} The other jurisdictions which have adopted similar Dissolution of Marriage Acts are: Colorado, COLO. REV. STAT. §§ 14-10-101 to 10-133, effective 1972; Kentucky, KY. REV. STAT. §§ 403.010-.350, effective 1972; Maine, ME. REV. STAT. tit. 19, §§ 661-752, effective 1972; Missouri, MO. ANN. STAT. § 452.075-.415 (Vernon's), effective 1973; and Montana, MONT. REV. CODE ANN. §§ 48-301 to 411, effective 1976.

\textsuperscript{107} When Illinois adopts a statute which has been adopted by other jurisdictions it is presumed that Illinois adopts the statutory constructions of those statutes as well. Overview, supra note 9, at 1-2, citing Ballance v. Rankin, 12 Ill. 420 (1851). See also Illinois Power Co. v. Miller, 11 Ill. App.2d 296, 137 N.E.2d 78 (3d Dist. 1956) (Illinois adopted the construction given by the courts of other states to their declaratory judgment statutes including the Uniform Declaratory Judgment Act; Illinois' declaratory judgment act was adopted from the statute of those states); Cook v. Dove, 32 Ill.2d 109, 203 N.E.2d 892 (1965) (Illinois adopted the statutory constructions of the New York statutory inheritance tax provisions from New York in support of the Illinois statute which was patterned after the New York statute). All the above were cited in Overview, supra note 9, at 1-2.
First, Illinois has incorporated the rationale of community property by creating a separate class of property, a separate res,\(^{108}\) for divorce purposes consisting of all property acquired by the efforts of either spouse during marriage.\(^ {109}\) If a common law state provides this new res, as does Illinois, it can be argued that the wife is granted a property interest upon divorce similar to the property interest granted a wife under community property laws.\(^ {110}\)

Second, marital property and community property both incorporate the partnership theory of marriage\(^ {111}\) which assumes the marriage to be a conjugal partnership the success of which depends upon the efforts of both husband and wife.\(^ {112}\) Both parties contribute to the marital community’s prosperity\(^ {113}\) and are entitled to rights in any

\(^{108}\) “Marital property” is a species of common ownership created by divorce law. Ownership interests, normally created by property law, can also be created by divorce statutes. See Richard E. Wiles, Jr., 60 T.C. 56, 65 (1973) (Goffe, J., dissenting). See also De Funiak, A Review in Brief of Principles of Community Property, 32 Ky. L.J. 63 (1943).


\(^{110}\) This would meet the Revenue Ruling’s test of co-ownership for tax purposes. Rev. Rul. 74-347, 1974-2 C.B. 26. The Ruling provides that “property may be co-owned where (1) title to it is taken jointly under State property law, (2) the State is a community property law State, or (3) State property law is found to be similar to community property law.” Inclusion of (3) indicates that the Service recognizes that certain states have created a property interest in marital property similar to what exists in community property states. Id. at 27.

\(^{111}\) Kujawinski v. Kujawinski, 71 Ill.2d 563, 576, 376 N.E.2d 1382, 1388 (1978). The court considered the primary legislative objective to be the creation of “a system of property division upon dissolution . . . that is more equitable than which previously existed in this state.” Id. The court continued:

[By giving both spouses an interest in “marital property” upon dissolution of marriage, the legislature sought to award economic credit in the distribution of property for indirect or domestic contributions to the accumulation of property and sought to replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of marital property and assets.]

Id.

\(^{112}\) 4A R. Powel & P. Rohan, supra note 109, at \# 624.4. See also Uniform Marriage and Divorce Act (ULA), Vol. 9 (Master ed. 1973), prefatory note at 457.

\(^{113}\) “[W]ith respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution.” W. DeFuniak & M. Vaughn, Principles Of Community Property \# 1 at 2-3.

"[T]he policy of community property was to establish equality between husband and wife in the area of property rights in marital property acquisition, in recognition of and to give effect to the fundamental equality between the spouses based on the
marital property upon dissolution of that marriage. Illinois, as well as Oklahoma and Colorado, recognizes the wife's "partnership interest" in the marital assets by providing that the court can base the spouse's share of marital property on his or her respective contributions.\textsuperscript{114} And under both community property and marital property systems the wife's contributions can be in the form of actual economic contributions outside the home or solely based on services performed as a housewife.\textsuperscript{115}

The third indication that the Illinois Act has adopted the community property philosophy in its distribution provision is that the transferee spouse shares in the marital property as the divorce court deems "just and reasonable." Illinois shares this requirement with Oklahoma and Colorado as well as with a majority of the community property states. Although limiting the wife's share upon divorce to a discretionary "just and reasonable" portion was considered a factor indicating lack of co-ownership in \textit{Davis}, the specific rights of co-ownership recognized in community property jurisdictions indicate otherwise. Six of the eight community property states provide that the community property should be divided as is just and right\textsuperscript{116} or just and equitable.\textsuperscript{117} Only in California and Louisiana is the strict rule of equality of division followed.\textsuperscript{118}

\textit{Id.} \S 11.1 at 24. [emphasis added].

\textsuperscript{114} ILL. REV. STAT. ch. 40, \S 503(c)(1) (1977).

\textsuperscript{115} The Illinois Act also allows "contribution of the spouse as a homemaker or to the family unit." \textit{Id.} See also \textit{4 A R. POWELL \\sp u p r a note 109 at \S 24.4. Other jurisdictions recognizing contribution of the spouse as a homemaker in property distribution include Colorado, Delaware, District of Columbia, Indiana, Kentucky, Maine, Missouri and Montana.

\textsuperscript{116} \textit{A R I Z. REV. STAT.} \S 25-318 (1975). Section 25-318 was amended in 1977 and provides that the court "shall divide property held in common equitably—though not necessarily in kind, without regard to marital misconduct." \textit{T E X. F AM. C O D E A N N. tit. 1, \S 3.63 (V er n o n 1975).

\textsuperscript{117} \textit{N E V. REV. STAT.} \S 125.150 (1975); \textit{W A S H. R E V. C O D E A N N.} \S 26.09.080 (Supp. 1976); Idaho allows for a "just" division. \textit{I D A H O C O D E} \S 32-712 (Supp. 1977). New Mexico allows an unequal division based on other discretionary factors. \textit{N. M. S T A T. A N N.} \S 22-7-6 (Supp. 1975).

\textsuperscript{118} \textit{C A L. C I V. C O D E} \S 4800(a) (West Cum. Supp. 1978); \textit{L A. C I V. C O D E A N N. A rt. 2406 ( West 1971). The author of the Act distinguishes Illinois' new marital property system from community property in that the marital property system "does not mandate an equal division of marital property (although in many cases it may be appropriate to do so). . . ." Moreover, the equitable apportionment of property system affords the court a greater latitude in awarding property than that conferred upon the court under the rigid rules obtaining in a community property system where an equal division of property is mandated regardless of the equities in a given case. The court in an equitable distribution system is invested with the broad discretion necessary to achieve just and equitable results in all cases.
The foregoing analysis of these similarities reveals that the income tax treatment of transfers in the marital property jurisdiction of Illinois should be governed by the same rationale as is used in the taxation of community property transfers. In community property states, all transfers of appreciated property made to effectuate an equal division of the fair market value are considered a division of co-owned property and deemed nontaxable. If the transfer involves an unequal division of the community property, gain to the transferor will result as an unequal division is presumed to be a transfer in satisfaction of a personal marital obligation. This analysis applies to those community property jurisdictions which allow the trial court discretion in the distribution of the property. Those community property states which mandate a one-half distribution would therefore have a nontaxable distribution. An equal division of property in Illinois should therefore be considered nontaxable as well.

The Internal Revenue Service has applied a similar analysis to the unequal division of jointly held property pursuant to a dissolution action in noncommunity property states. The Service has determined that an unequal division of appreciated property constitutes realization of taxable gain. The total appreciation will be allocated pro rata between the property transferred in recognition of contribution and the property transferred in recognition of a personal obligation. In effect, the transferor in a common law jurisdiction should be taxed on any appreciation allocated to that portion of property transferred for alimony or support purposes.

Auerbach, Property Rights and Maintenance Under the Illinois and Dissolution of Marriage Act, in NEW DIVORCE LAW 5-2 (Ill. Inst. for CLE, 1978). However, this so-called “discretionary latitude” is not a function peculiar to “marital property systems” alone.

120. The nontaxable nature of the division of jointly held property has been implicitly adopted in community property states if there is an equal division of the “community.” Osceola H. Davenport, 12 T.C.M. 856, 53,259 P-H Memo T.C. (1953).
121. Gain is recognized where the community division is unequal. C.C. Rouse, 6 T.C. 908 (1946), aff’d, 159 F.2d 706 (5th Cir. 1947).
122. See notes 116 and 117 supra.
123. See note 118 supra.
125. Id.
126. Id.
127. For example, assume an Illinois couple has marital property with a fair market value of $70,000. The dissolution decree awards the wife $55,000 of the marital property and the husband $15,000 plus all of his separately owned property. This unequal division of jointly owned
Therefore, any division of property in Illinois specifically made in recognition of the spouse's contribution, as was true in *Imel* and *Collins IV*, should properly be considered nontaxable regardless of whether the division is equal or not. However, if an Illinois trial court specifically bases the wife's share of marital property upon such factors as need or earning capacity, the transfer could be considered an exchange in satisfaction of a personal obligation and therefore taxable under *Davis*.  

**CONCLUSION**

*United States v. Davis* held that where in a common law state a wife's marital rights in the husband's property are limited to rights of dower, intestate share and a reasonable share upon divorce, a transfer of appreciated property by the husband to the wife at divorce is taxable to the husband. The Court held these rights to closely resemble the wife's common law rights of alimony and support. As such the transfer was considered a taxable exchange for the release of a personal obligation rather than a nontaxable division of co-owned property.

The Commissioner of Internal Revenue has interpreted the *Davis* indicia of ownership as a federal criterion of marital rights that the wife must possess in the husband's property to be considered a co-

property would be considered a taxable exchange as to only a portion of the husband's marital obligations, that is, that portion reflecting the wife's share presumed to be one-half of the total value of the property, or $35,000. Therefore the amount transferred by the husband considered to be in exchange for his marital obligations would be $20,000 (wife's award of $55,000 less wife's statutorily defined share of $35,000). The husband will be taxed on any appreciation proportionally allocated to the $20,000.

128. ILL. REV. STAT. ch. 40, § 503(c)(1)-(10); See also COLO. REV. STAT. § 14-10-113 (1)(a)-(d) (1973).

129. 523 F.2d at 857. See note 103 supra and accompanying text.

130. It must be remembered that the certification questions submitted to the Colorado Supreme Court in In re Questions Submitted By the United States Dist. Ct., 184 Colo. 1, 517 P.2d 1331 (1974), involved only transfers in recognition of a wife's contributions. The certification granted "a species of common ownership" only to those transfers made in recognition of such a contribution. See note 95 supra.

In *Collins II*, the Oklahoma Supreme Court based its opinion, in part, on the fact that the wife had made valuable contributions toward the success and growth of the taxpayer's business. 446 P.2d at 292. In *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir.), cert. denied, 379 U.S. 836 (1964), the court held a property transfer to be taxable because the wife "performed the usual duties of a housewife, and performed no other tasks to specifically assist in the accumulation of property, and brought no property into the marriage." 329 F.2d at 98. See also *Wallace v. United States*, 309 F. Supp. 748, 761, (S.D. Iowa 1970), aff'd, 439 F.2d 757 (8th Cir.), cert. denied, 404 U.S. 831 (1971); Ernest H. Mills, 54 T.C. 608 (1970), aff'd, 442 F.2d 1149 (10th Cir. 1971).
owner for federal income tax purposes. As in traditional common law states, an Illinois wife under the Act cannot manage, control or dispose of property held in her husband's name, nor does she have a descendible interest in his property. Under the Commissioner's interpretation of Davis these rights would not reach the dignity of co-ownership. However, an analysis of Davis indicates that the indicia of ownership are not the exclusive standard for determining co-ownership. Neither the right to manage, control or dispose nor the right to more than a reasonable share were characteristic of co-ownership in community property jurisdictions at the time Davis was decided. The courts are free to rely on other factors in determining co-ownership.

An alternative analysis was provided by the Tenth Circuit in the Collins IV and Imel decisions. The court gave great emphasis to the state law characterization of the wife's marital rights. In both cases the state supreme court defined the wife's rights as a "species of common ownership." And in both instances the transfer was made in recognition of the wife's contributions to the marital community. Under such analysis the transfers were held to be nontaxable. It should be noted that Section 503 of the Illinois Act is substantially identical to the statute in question in Colorado. As in Colorado, as well as the community property jurisdictions, Illinois has recognized the concept of a marital partnership by creating a class of marital property, and by granting the trial court the discretion to divide this property between the parties on the basis of their respective contributions. Therefore, any transfer of appreciated property made to effect a division of marital assets in recognition of contribution should not be taxable in Illinois. However, a transfer in recognition of the wife's needs or financial condition made to satisfy the functions of alimony should be considered taxable.

Anthony J. Ceravolo