

Winter 1979

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Recommended Citation

Marjorie Wholey Haines, *Tax Consequences of Interspousal Property Transfers Pursuant to a Missouri Dissolution*, 44 MO. L. REV. (1979)

Available at: <https://scholarship.law.missouri.edu/mlr/vol44/iss1/9>

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TAX CONSEQUENCES OF INTERSPOUSAL PROPERTY TRANSFERS PURSUANT TO A MISSOURI DISSOLUTION

I. INTRODUCTION

The property settlement pursuant to divorce often involves the transfer of property from one spouse to the other. Such a transfer may be made in lieu of periodic alimony or support payments. Alternatively, the transfer may be made to effect an actual division of property owned legally or equitably by both spouses. In the case of the transfer of appreciated property—that with a fair market value at time of transfer greater than its basis—the tax consequences to either spouse can vary greatly, depending on the character of the transfer.

Section 1002 of the Internal Revenue Code (I.R.C.) requires recognition of the gain from the sale or other disposition of property. The amount of gain is determined by the excess of the amount realized upon disposition over the adjusted basis of the property (I.R.C. section 1011). The Internal Revenue Service has taxed as a capital gain (I.R.C. section 1221) the increase in value of appreciated property which is transferred by one spouse to the other if the primary motivation for the transfer was the fulfillment of an alimony or support obligation. The Service's theory is that although the transferor receives no money in exchange for the transfer under a property settlement, he does receive a release of the alimony or support obligation in consideration for the transfer. This constitutes an exchange of property, and the transferor therefore receives the full economic benefit of the appreciated value of the property and must recognize the amount of appreciation as a capital gain. However, if the motivation for the transfer is the division of jointly-owned property, the Service does not tax the increase in value as a capital gain. The theory is that such a transfer merely sets aside to each spouse what he or she already owns. Thus, there is no disposition under I.R.C. section 1001(a) and therefore no taxable event.

The Missouri Divorce Reform Act,¹ which became effective on January 1, 1974, requires the court to divide the spouses' property in the event of divorce. This comment will consider the character of interspousal transfers of property pursuant to a dissolution decree under the new Act.²

1. RSMo §§ 452.300-.415 (Supp. 1975).

2. This comment will discuss only transfers of separately titled property deemed to be marital property under the Missouri Divorce Reform Act. There are related issues which will confront attorneys dealing with marriage dissolution and the subsequent tax problems. Among these are 1) the presumption that title indicates ownership; 2) the presumption that contribution to the acquisition of

If such a transfer is made to fulfill a support obligation the transferor can expect to recognize as a capital gain the amount the property has appreciated. On the other hand, if the transfer is made to divide co-owned property, *i.e.*, each spouse acquires separate title to property in which he or she already has an ownership interest, there will be no recognition of a capital gain at the time of transfer.

II. PROPERTY LAW IN COMMON LAW AND COMMUNITY PROPERTY JURISDICTIONS

Two separate systems of property tax exist in the United States: the common law system and the community property system. The tax consequences of property transfers upon dissolution of marriage depend on whether the spouses are subject to the law of a common law jurisdiction or a community property jurisdiction. Because it is arguable that Missouri's Divorce Reform Act incorporates characteristics of both common law and community property law, it is necessary to explore the nature of the spouses' property rights in each type of jurisdiction prior to a discussion of the tax consequences of a property transfer.

A. *The Common Law Property System*

In a common law jurisdiction³ the spouses may hold property jointly or each spouse may hold his or her own property alone, or separately.⁴ If the spouses choose, they may title the property acquired during the marriage in both their names as joint tenants, as tenants by the entirety, or as tenants in common. Property acquired during the marriage also may be titled solely in the name of one spouse. Property acquired prior to marriage may be maintained as the separate property of the spouse who

property must be monetary, which makes it difficult for the non-wage earning spouse to prove that he gave a portion of the consideration to acquire property titled in the name of the wage earning spouse by contribution to the development of the family resources; 3) the fact that the major cases in this area involved transfers from the husband to the wife where there is a legally recognized duty to support the wife (query whether a transfer from the wife to the husband in the absence of a legal duty to support would case a different result); and 4) the presumption of the tax law that the wife need recognize no gain on the transfer of her marital rights to the husband, even though her basis in those rights is zero and her gain is actually the full fair market value of the marital rights (held to be equal to the fair market value of the property received in exchange there for). See note 23 *infra*.

3. These include all states except Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, which are community property jurisdictions.

4. Prior to the passage of the Married Women's Property Acts, a woman did not have the right to maintain a separate estate. The situation prior to the emancipation of women will not be considered. See RSMo §§ 451.250-.300 (1969).

acquired it, or it may be transferred to one of the forms of joint ownership.⁵

In the absence of statutory modification, upon divorce in a common law jurisdiction each spouse retains his or her own separately-titled property, regardless of when it was acquired. A tenancy by the entireties or joint tenancy becomes a tenancy in common, which is then subject to a partition suit. Alimony is commonly awarded to the wife. If there is statutory authority, the court may order the transfer of part of the husband's property to the wife instead of, or in addition to, a requirement that he make periodic alimony payments.⁶

In a common law state, if there is a transfer of separately-titled property pursuant to divorce, the Service will require recognition of the appreciation as a capital gain, regardless of whether the property was acquired prior to or during the marriage. The transferee is deemed to have no ownership rights in the separate property of the transferor, and thus the transfer must have been made in satisfaction of a marital obligation such as support, or in lieu of dower or a statutory forced share. By satisfying the obligation with the transfer of appreciated property, the transferor utilizes the fair market value of the property and there is a disposition within the meaning of I.R.C. section 1001. The same analysis applies to an uneven division of the jointly held property because it is presumed that each spouse is entitled to half of the property. If there is no transfer of separate property, or if the jointly-titled property is divided equally, no disposition occurs; each spouse retains his or her own property with no immediate tax consequences.

B. *The Community Property System*

The property law in the eight community property states⁷ provides that each spouse can maintain as a separate estate all the property which he acquired before the marriage. The property acquired during the marriage is generally held to be community property, which belongs equally to both spouses, no matter how it is titled. In the event of divorce, each spouse retains his separate property, and the community property is divided between the spouses.⁸

5. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 224-25 (1968) (presumptions and rules of law and equity regarding interspousal transfers).

6. RSMo §§ 452.010-.250 (1969). In Missouri there was no statutory authority for a court to order the husband to transfer some of his separate estate to the wife as part of a property division. This is a significant difference between the old and new Missouri laws. Cases decided before 1974 have little relevance on the issue of property division. See H. CLARK, *supra* note 5, at 420-52, for a general discussion of alimony and property division in common law jurisdictions.

7. See note 3 *supra*.

8. Although it is commonly thought that the division of community property must be equal, this is not the case in Arizona and Texas. ARIZ. REV. ST.

There is no tax assessed if each *marital* asset (community property) is divided equally or if the total of all the marital assets is divided equally. The presumption of the Service is that each spouse receives what was his to begin with, *i. e.*, one-half of the marital property. If there is an unequal division of marital property or if separate property is exchanged, there is a potential for capital gain recognition. In these situations is is presumed that one spouse has sold his or her property to the other, qualifying the transfer as a disposition under I.R.C. section 1001.

C. *The Deferred Community Property System*

There is now a third type of system,⁹ which might be called "deferred community property," in a few states formerly considered to be common law jurisdictions. Prior to the initiation of an action for dissolution, deferred community property theory is similar to common law theory; during the marriage each spouse controls his or her separately-titled property and together the spouses control the jointly-titled property. In a common law jurisdiction, a spouse has no ownership interest in property acquired during the marriage but titled in the name of the other spouse. However, at the dissolution of marriage, deferred community property theory resembles the property law in the community property states. In a deferred community property jurisdiction, upon the filing of a petition for dissolution an ownership interest in separately-titled property acquired during the marriage vests in the nontitled spouse. Such property is "marital property." Upon dissolution, either the court or the spouses in a property settlement agreement will divide what is marital property in a manner provided by law. Equal division between the spouses is not required. This is similar to property division in some community property states.¹⁰ The system differs from those in common law jurisdictions in which courts have statutory authority to award some of the husband's property to the wife as part of his alimony obligation. In a deferred community jurisdiction, the property division is mandatory and does not depend on the wife's need for support; each spouse has an absolute right to the division of property.

Deferred community property theory is a hybrid of common law and community property theories. The common law theory of management

§ 25-318 (West 1976); TEX. FAM. CODE ANN. § 3.63 (Vernon 1975). An equal division is mandatory in Louisiana and New Mexico. LA. CIV. CODE ANN. arts. 155, 159, 2406 (West 1971 & Supp. 1978); N.M. STAT. ANN. § 22-7-6 (Supp. 1975). Idaho permits unequal division in favor of the innocent spouse in some circumstances, *e.g.*, adultery or extreme cruelty. IDAHO CODE § 32-712 (Supp. 1977). See W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 514-16 (2d ed. 1971).

9. Rev. Rul. 74-347, 1974-2 C.B. 26, 27, mentions three theories under which property can be divided: community property theory, common law theory, and separate property theory. See also Rev. Rul. 74-347, 1974-2 C.B. 26, 27, which states that "the common law theory of management is similar to community property law."

10. See note 8 *supra*.

and control of property governs up to the beginning of the dissolution proceeding; from that point on, community property theory controls. In states recognized as deferred community property jurisdictions, the tax consequences of transfers of marital property pursuant to a divorce decree are the same as in a community property state. If the property acquired during the marriage is divided between the spouses equally, it is presumed that no disposition occurs; the transferor does not recognize the appreciation of the transferred property as a capital gain. However, if there is an unequal division of marital property, there is the potential for capital gain recognition by the transferor, as under community property law.

Colorado and Oklahoma became deferred community property jurisdictions through the development of case law. In addition, in 1971 the Colorado legislature adopted the Uniform Marriage and Divorce Act.¹¹ Missouri adopted a slightly modified version of the Uniform Act in 1974.¹² In jurisdictions like Missouri, formerly common law jurisdictions for purposes of division of property at divorce, the passage of the Uniform Act has significantly changed the property rights of spouses at the time of dissolution. Whether passage of the Uniform Act has made Missouri a deferred community property jurisdiction for tax purposes will be examined below.

III. DEVELOPMENT OF THE TAX LAW

To evaluate the tax consequences for a Missouri resident involved in a property settlement upon dissolution of marriage after 1974, it is necessary to review the situations in which the Service has taxed similar transfers in other jurisdictions. It is also necessary to understand the cases which, for the purpose of property division upon dissolution of marriage, marked some states as common law jurisdictions and others, including Colorado and Oklahoma, as deferred community property states. The cases are examined in chronological order. Following this examination, Missouri law will be compared to these jurisdictions.

Until 1960 there was no discord among the appellate courts concerning the tax consequences of property transfers at divorce in common law jurisdictions. The Third Circuit held in 1941 that if separate property of the husband was transferred by him to the wife in fulfillment of an obligation to support her, the husband realized a capital gain.¹³ The court held that the amount of gain was to be determined by the excess of the fair market value of the property at the date of the transfer over the basis of the property. A similar decision was reached by the Second Circuit in 1942.¹⁴

11. COLO. REV. STAT. §§ 14-2-101 to 14-2-113, 14-10-101 to 14-10-133 (1973 & Supp. 1976).

12. RSMo §§ 452.300-.415 (Supp. 1975).

13. *Commissioner v. Mesta*, 123 F.2d 986 (3d Cir. 1941) (the wife released her alimony and dower rights under Pennsylvania law).

14. *Commissioner v. Halliwell*, 137 F.2d 642 (2d Cir. 1942). Under Connecticut law, an agreement reached by the spouses and the findings of the

In 1960, however, the Sixth Circuit held that, although a gain had occurred, it was not possible to ascertain the amount of the gain.¹⁵ The court said that the language of I.R.C. section 1001(b) required that the gain be determined by the fair market value of the *property received*, *i.e.*, the release of the spouse's right to support,¹⁶ less the basis of the property transferred, not by the fair market value of the *property transferred* less the basis of the property transferred. The court said that it was not possible to determine the fair market value of the spouse's right to support and thus no tax could be assessed. In view of the disagreement among the circuits and the Court of Claims, the Supreme Court agreed to hear *United States v. Davis*.¹⁷

Davis arose out of a Delaware divorce action. The husband transferred to his wife certain separately-titled shares of stock pursuant to a property settlement prior to divorce.¹⁸ In return, the wife released all claims against the husband. The husband was assessed a capital gain on the appreciation of the stock. The Supreme Court rejected the husband's argument that "the present disposition is comparable to a nontaxable division of property between two co-owners."¹⁹ The Court said that the inchoate rights of the wife in the separately-titled property of the husband did not reach the level of co-ownership under Delaware law. The wife could not manage or dispose of the property, her rights were not descendible, she had to survive the husband in order to share in his estate, and she shared in the property upon divorce only to the extent that the court deemed reasonable.²⁰ Finding that the Delaware dissolution statute "seems only to place a burden on the husband's property rather than to make the wife a part owner thereof,"²¹ the Court went on to hold that the amount of gain realized by the husband was ascertainable because "the values 'of the two properties exchanged in an arms-length transaction are equal in fact, or are presumed to be equal.'"²² In other words, the gain was to be determined by the

divorce court indicated that the property was transferred "as alimony and in full of his obligation for the support of said minor child").

15. *Commissioner v. Marshman*, 279 F.2d 27 (6th Cir. 1960) (under Ohio law).

16. *Id.* at 32. The property received by the husband was the release of the wife's rights to maintenance, support and a share in the husband's estate in the event of his death.

17. 370 U.S. 65 (1962).

18. *Id.* at 66. The case does not indicate whether the shares were acquired prior to or during the marriage.

19. *Id.* at 69.

20. *Id.* at 70. "[T]he wife shall be allowed out of her husband's real estate, personal estate, or both, such share as the court deems reasonable." DEL. LAWS, c. 221, §§ 15, 16 (1906-07) (currently codified at DEL. CODE ANN. tit. 13, § 1527(a) (1974)).

21. 370 U.S. at 70.

22. *Id.* at 70. *Philadelphia Park Amusement Park Co. v. United States*, 126 F. Supp. 184, 189 (Ct. Cl. 1954).

amount of the appreciation of the transferred property.²³ This rule prevailed in common law jurisdictions²⁴ until 1969 when the Tenth Circuit finally disposed of *Collins v. Commissioner*.²⁵

When the Tenth Circuit originally heard *Collins*,²⁶ that court followed *Davis* and imposed a deficiency on the husband following the transfer of shares of stock to his wife at the termination of their marriage. At the same time as he challenged the federal tax deficiency, Collins also challenged the Oklahoma state income tax deficiency imposed for the same reason. The United States Supreme Court agreed to hear the case but remanded²⁷ in light of the ruling of the Oklahoma Supreme Court that, under Oklahoma law, the wife has a species of common ownership in property acquired during the marriage but titled in the husband's name.²⁸ On remand the Tenth Circuit said: "Just as the Court in *Davis*, we seek to determine whether, under state law, the present transfer more nearly resembles a nontaxable division of property between co-owners, or whether it is a taxable transfer in exchange for the release of an independent obligation."²⁹ The court rejected the position of the Commissioner that *Davis* had established *federal* criteria to determine whether the wife's interest constituted co-ownership under state law.³⁰ The court stated that there was no need to search the state law for indications of other factors because the Oklahoma Supreme Court had defined the nature of the wife's prop-

23. Rev. Rul. 67-221, 1967-2 C.B. 63, established the rule that the wife does not realize a gain on the property she transfers to her husband, *i. e.*, her rights to support. However, her basis in "her rights" is zero and theoretically her gain is easily ascertainable—the fair market value of the property received minus a zero basis. In view of the fact that all cases in this area involve a property transfer by the husband and a release of marital rights by the wife, there seems to be an inconsistent application of the requirement of recognition of a capital gain.

24. *Davis* has been followed in *McKinney v. Commissioner*, 64 T.C. 263 (1975) (a West Virginia divorce); *Wright v. Commissioner*, 62 T.C. 377 (1974) (a Wisconsin divorce); *Kraut v. United States*, 316 F. Supp. 740 (E.D. Wis. 1970) (a Wisconsin divorce). See also *King v. Commissioner*, 31 T.C. 108 (1958) (an Oregon divorce).

25. 412 F.2d 211 (10th Cir. 1969).

26. 388 F.2d 353 (10th Cir. 1968).

27. 393 U.S. 215 (1968).

28. *Collins v. Oklahoma Tax Comm'n*, 446 P.2d 290 (Okla. 1968). OKLA. STAT. ANN. tit. 12, § 1278 (Supp. 1977), 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 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.

29. 412 F.2d 211.

erty interest.³¹ *Collins* was the first recognition of the position which has been called deferred community property.³²

In 1971 the Eighth Circuit in *Wallace v. United States*³³ rejected the husband's contention that the transfer of stock incident to divorce in Iowa was a division of property between equitable co-owners.³⁴ The court found that under the Iowa divorce statute³⁵ "the property rights of the wife in Iowa [more] closely parallel those of a wife in Delaware [than those of a wife in Oklahoma], *i. e.*, she possesses only inchoate rights in her husband's property."³⁶ *Wallace* thus identified Iowa as a common law jurisdiction. This Eighth Circuit case must be considered in examining the Missouri position. There are two significant points. First, under the Missouri statute, most of the property involved in *Wallace* would be considered to be the separate property of the husband rather than marital property, because it was received by him as a gift from his parents.³⁷ Second, as will be discussed in part IV *infra*, Missouri law is distinguishable from Iowa and Delaware law.

In 1974 the Tenth Circuit again addressed the *Davis* issue in its consideration of a case arising under Kansas law.³⁸ The spouses in *Wiles v.*

31. 412 F.2d at 212.

32. In 1961, the Service had argued in *Swanson v. Wiseman* that the wife's basis in property transferred to her upon divorce was equal to the original acquisition cost of the property. The argument was that because Oklahoma recognizes that jointly acquired property belongs equally to both spouses, the wife received the property in the division of the marital property and not in fulfillment of a marital obligation owed to her by her husband, and therefore her basis was not increased to the fair market value as of the date of transfer. *Swanson v. Wiseman*, 61-1 U.S. Tax Cas. ¶ 9264 (W.D. Okla. 1961).

In 1970 and 1971 the Service disallowed alimony deductions to two Oklahoma taxpayers who argued unsuccessfully that payments to a former spouse were in fulfillment of marital obligations. The Service argued that the payments were in exchange for the marital property transferred to the husband from the wife, and that the husband was purchasing the wife's share of the marital property and thus no deduction was allowed for alimony. *Mills v. Commissioner*, 442 F.2d 1149 (10th Cir. 1971); *Jackson v. Commissioner*, 54 T.C. 125 (1970) (citing *Collins*). The Service took the opposite view and lost in *Nell Mills v. United States*, 67-2 U.S. Tax Cas. ¶ 9575 (N.D. Okla. 1967).

33. 439 F.2d 757 (8th Cir.), *cert. denied*, 404 U.S. 831 (1971).

34. *Id.* at 759.

35. IOWA CODE ANN. § 598.21 (West 1970) (formerly § 598.14) provides: "When a dissolution of marriage is decreed, the court may make such order on relation to the children, property, parties and maintenance of the parties as shall be justified."

36. 439 F.2d at 760.

37. RSMo § 452.330.2(1) (Supp. 1975) excludes from marital property that which is acquired by gift, bequest, devise or descent. For a list of the property involved and its source, see *Wallace v. United States*, 309 F. Supp. 749, 755 (S.D. Iowa 1970).

38. KAN. STAT. ANN. § 60-1610 (1976) provides:

The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either

*United States*³⁹ had attempted an equal division of their combined property. To effectuate an equal division, the husband agreed to transfer some of his property to the wife because the value of his property exceeded hers. The opinion does not indicate how or when the transferred property was acquired. Although Kansas' dissolution statute is almost identical to the Oklahoma statute considered in *Collins*,⁴⁰ the court reached an opposite result and held that the transfer was taxable. The Kansas statute can be distinguished from the Oklahoma statute in that the Kansas trial court has the power to divide *any* property owned by either spouse *regardless of when it was acquired*. The Oklahoma statute allows division only of property acquired during the marriage. The Tenth Circuit looked to Kansas statutes and case law⁴¹ because there was no definitive Kansas Supreme Court decision in point.

*Imel v. United States*⁴² concerned the transfer of stock by the husband to the wife upon dissolution of marriage. *Imel* arose under the 1963 Colorado divorce statute,⁴³ but Colorado, like Missouri, subsequently enacted a version of the Uniform Marriage and Divorce Act.⁴⁴ The federal district

spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by division of the property in kind, or by setting the same or 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. . . . (emphasis added).

39. 499 F.2d 255 (10th Cir. 1974).

40. Compare the Oklahoma statute, *supra* note 28, with the Kansas statute, *supra* note 38.

41. *Folk v. Folk*, 203 Kan. 576, 455 P.2d 487 (1969); *Harrah v. Harrah*, 196 Kan. 142, 409 P.2d 1007 (1966).

42. 375 F. Supp. 1102 (D. Colo. 1974), *aff'd*, 523 F.2d 853 (10th Cir. 1975).

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

44. COLO. REV. STAT. § 14-10-113 (1971) provides:

(1) In a proceeding for dissolution of marriage . . . the court shall set apart to each spouse his property and shall divide the marital property 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.

court certified the questions of the wife's interest in separately-titled property of the husband acquired during the marriage to the Colorado Supreme Court.⁴⁵ That court stated that, under both the 1963 statute and the subsequently enacted Uniform Act, "at the time the divorce action was filed there vested in the wife her interest in the property in the name of the husband."⁴⁶ The Tenth Circuit later affirmed that such transfer in Colorado was a nontaxable division of co-owned property,⁴⁷ overruling an earlier decision.⁴⁸ *Imel's* importance is not only that it concerned the Uniform Act, but that the court concluded that the opinion of the *state* supreme court regarding the nontitled spouse's interest in separately-titled property was binding on the federal courts.

IV. THE SITUATION IN MISSOURI

The preceding examination of cases reveals the criteria that govern the tax consequences of interspousal transfers of property at dissolution. In deciding whether a jurisdiction is a common law or a deferred community property jurisdiction, federal courts examine three factors. The first is whether there is a state supreme court decision which defines the rights of the spouses in property acquired during the marriage. If no such decision exists, the state's property law is examined to see what rights it bestows on the spouses. If it is determined that these rights do not rise to the level of co-ownership, the state's dissolution statute is next examined to determine whether it has changed the property law to provide for co-ownership

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- (a) Property acquired by gift, bequest, devise or descent;
 - (b) Property acquired in exchange for property acquired prior to marriage or in exchange for property acquired by gift, bequest, devise, or descent;
 - (c) Property acquired after a decree of legal separation;
 - (d) Property excluded by a 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 marriage.
- (5) For purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree.

45. 375 F. Supp. at 1116.

46. *In Re Questions*, 517 P.2d 1331, 1332 (Colo. 1974).

47. *Imel v. United States*, 523 F.2d 453, 459 (10th Cir. 1975).

48. *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir. 1964).

of marital property. It is clear that the federal courts regard a decision by the state supreme court as controlling, and if there is such a decision, no examination of property and dissolution law will be conducted.⁴⁹ Because Missouri has no such supreme court decision, it is necessary to compare Missouri's property law and dissolution statute to those of the common law and deferred community property jurisdictions discussed above to assess the tax consequences for Missourians.

A. *Missouri Law Prior to 1974*

Prior to 1974, Missouri was a common law jurisdiction for tax purposes. Under Missouri's *property* law, it is clear that one spouse had no ownership rights in the property of the other, as was true in all examined jurisdictions. In Delaware, Iowa, Kansas, Colorado, and Oklahoma, as in Missouri, each spouse held his own property separately.⁵⁰ There was no right to share in the management of the other spouse's property.⁵¹ The estate of the nontitled spouse had no right to share in the property of the titled spouse unless the nontitled spouse survived.⁵² The only right given by Missouri property law was that of dower or forced share and this necessitated survival.

Missouri divorce law prior to 1974 gave no co-ownership rights to the nontitled spouse. Although alimony could be awarded to the wife,⁵³ there was no statutory power enabling the court to divide property or order property transferred from one spouse to the other, even to satisfy a support obligation imposed on the husband.⁵⁴ Each spouse retained his or her own separate property, *i.e.*, that which was titled in his or her own name, regardless of when it was acquired. Property held by the spouses as tenants by the entirety was converted at divorce into property held as tenants in common.⁵⁵ The spouses often entered into property settlement agreements in which they contracted for transfers of property, payment of alimony, child support and custody, and attorney's fees and tax treatment.⁵⁶ Because neither the property law nor the divorce law gave the nontitled spouse any interest in property acquired during the marriage, prior to 1974 the Missouri spouse would be treated like the petitioner in *Davis*.

49. *Commissioner v. Bosch*, 387 U.S. 456 (1967); *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975); *Collins v. United States*, 412 F.2d 211 (10th Cir. 1969).

50. RSMo § 451.250 (1969).

51. H. CLARK, *supra* note 5, at 219-26.

52. RSMo §§ 474.160, .010 (1969).

53. RSMo § 452.070 (1969).

54. *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955); *Bishop v. Bishop*, 151 S.W.2d 553 (St. L. Mo. App. 1941).

55. *McIntyre v. McIntyre*, 377 S.W.2d 421 (Mo. 1964); *Allan v. Allan*, 364 S.W.2d 578 (Mo. 1963); *Reed v. Reed*, 516 S.W.2d 568 (Mo. App., D. St. L. 1974).

56. Comment, *Separation Agreements*, 21 MO. L. REV. 286 (1956).

B. *Missouri Law After Enactment of the
Divorce Reform Act*

Missouri property law regarding the interests of spouses has not changed since 1974. It continues to be similar to the property law of Delaware, Iowa, Kansas, Colorado, and Oklahoma. However, the property division sections of the Missouri Divorce Reform Act are a major departure from prior *divorce* law in Missouri.⁵⁷ In the five years the statute has been in effect, numerous cases on the division of property have come before the Missouri Court of Appeals.⁵⁸ However, none have directly addressed the

57. Section 452.330, RSMo (Supp. 1975) provides in part:

1. [T]he court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:

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

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

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

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

2. '[M]arital property' means all property acquired by either spouse subsequent to the marriage except:

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

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

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

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

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

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

4. The court's order as it affects distribution of marital property shall be a final order not subject to modification.

58. The opinions have not specified who had title to the property or which spouse gave the consideration for the property. If the property is found to be marital within the statutory definition, then it is subject to division. If the property is found not to be marital, it is set aside as the separate property of the appropriate spouse. The courts have not made further analysis of the ownership interests of the spouses.

Cain v. Cain, 536 S.W.2d 866 (Mo. App., D. Spr. 1976) does discuss these issues in characterizing contested property as marital or separate. The same issues are not discussed regarding two other pieces of property, titled solely in the hus-

issue of spouses' ownership rights in separately-titled property acquired during the marriage. Only one case has discussed the nature of the property rights of the spouses. In *Corder v. Corder*⁵⁹ the trial court failed to divide the marital property which was held by the spouses as tenants by the entirety. On appeal the husband challenged any division of this property other than on an equal basis on the ground that it would be an unconstitutional deprivation of property without due process.⁶⁰ In rejecting this claim, the court had this to say about the purpose of the new statute:

Public policy sought to be served by Section 452.330, supra, is multi-faceted and self-evident. Previously, the contributions of a wife regarding the accumulation of property during the marriage relation, either in the sense of direct financial contribution or in the sense of indirect contributions by her services as a homemaker, were largely ignored. Regarding property accumulated during the marriage relation and held in the husband's name alone, a wife, even though an innocent and injured party, upon the severance of the marriage had only the concept of alimony (subject to termination on remarriage of the wife or the death of the husband, or future reduction occasioned by the husband's diminished financial ability), tenuous at best, to which to turn. Regarding property accumulated during marriage and held by the husband and wife as tenants by the entirety, the respective contributions of the spouses, whether direct or indirect in nature were of no moment whatsoever, and their rights and interests in such property were regimented by operation of law. Upon termination of the marriage relation, fixing the rights and interests of a wife and husband in such property by operation of law, due to its inherent inflexibility, made it impossible to accommodate any consideration of what might be a just or fair division.

. . . .

A goal or evident purpose of the Dissolution of Marriage Act was to eliminate, or in any event minimize, many of the anachronistic vestiges which surrounded rights to property acquired during marriage in the event the marriage relation was severed. As opposed to the old order, the Dissolution of Marriage Act views the acquisition of "marital property" as a *partnership endeavor*, and it enunciates a standard for dividing such property which is flexible enough to weigh and balance the respective contributions of the

band's name, which were acquired during the marriage and thus were marital property.

The court in *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. App., D. St. L. 1975) divided \$260,000 of marital property with a discussion of the nature of only \$55,000 of this amount. The court in *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App., D. St. L. 1975) divided over \$197,000 worth of marital property. Again the issues discussed centered on a determination of whether various items of property were marital or separate.

spouses and to accommodate consideration of manifest justness and fairness.⁶¹

In view of the failure of the cases to specify the property rights of the spouses, it is necessary to examine the provisions of the Act to determine what rights are granted to the spouses and how the Act's provisions compare to those of the jurisdictions examined above.

A person filing a petition for dissolution in Missouri may also request an injunction to prevent the disposal of any property held by his spouse.⁶² This is the same procedure the Colorado court found to indicate the vesting of the spouses' interests in all property acquired during the marriage.⁶³ The right to the injunction is an exercise of control over the property consistent with the theory that absolute property rights vest in the nontitled spouse at the time the petition for dissolution is filed.

The Missouri statute also provides for a *mandatory* division of the spouses' property.⁶⁴ Although the court has discretion as to the amount of each share, the spouses have an absolute right to the division. This is also the rule in the deferred community property states of Colorado⁶⁵ and Oklahoma.⁶⁶ In Delaware and Iowa (both common law states) property division is discretionary with the court.⁶⁷ Although the Kansas statute provides for mandatory division, it also provides for the division of what would be nonmarital property in Missouri, *i.e.*, property acquired prior to marriage or by gift or devise.⁶⁸

Permissive division does not recognize a co-ownership theory; the absolute discretion of the court indicates that nontitled spouses have no absolute rights in separately-titled property acquired during marriage. The spouses have only those rights which the court may choose to award. On the other hand, the requirement of mandatory division is a recognition that nontitled spouses do have ownership rights in the marital property. Because action of the court is necessary to transfer title to the spouse who has an ownership interest but does not hold title, the statute *requires* that the court make a disposition of the property at dissolution. The Kansas statute, even though it requires a mandatory division, is distinguishable because of its provision for the division of nonmarital property. Even the true community property jurisdictions recognize no ownership right of the

61. *Id.* at 803-04 (emphasis added).

62. RSMo § 452.315.2(1) (Supp. 1975).

63. See text accompanying note 46 *supra*.

64. RSMo §§ 452.330.1, .330 (Supp. 1975); *L.F.H. v. R.L.H.*, 543 S.W.2d 520 (Mo. App., D. St. L. 1976); *Pendleton v. Pendleton*, 532 S.W.2d 905 (Mo. App., D. Spr. 1976).

65. *In re Questions*, 517 P.2d 1331 (Colo. 1974); *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946).

66. *West v. West*, 268 P.2d 250 (Okla. 1954); *Van Horn v. Van Horn*, 119 P.2d 825 (Okla. 1941).

67. See *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946).

68. KAN. STAT. ANN. § 60-1610 (1976).

nontitled spouse in nonmarital property. Thus, a division of such property could only be to satisfy an obligation of support; the nontitled spouse, even under community property theory, cannot have any ownership rights therein.

The court order regarding property division in Missouri is final and not subject to modification.⁶⁹ This is recognition of a co-ownership theory; changing factors which may be relevant in a decision to increase or decrease maintenance or child support are not relevant to a decision as to what the parties own individually at the time of dissolution. Thus, once the ownership interests of the spouses are determined at the time of dissolution, subsequent conditions are irrelevant, and modification of the property division would be unnecessary.

A consideration which could be said to militate against the absolute ownership theory in Missouri is the dissolution statute's listing of factors to be considered by the court in dividing marital property.⁷⁰ The use of such factors could indicate that ownership is not absolute but depends on the court's assessment of the parties' needs. However, the argument can be made that use of these factors does not mean that ownership does not exist but merely helps the court determine what portion of the marital property each spouse owns. It has also been held⁷¹ that the fact that the case law of Delaware,⁷² Iowa,⁷³ and Kansas⁷⁴ require the use of such factors weighs against joint ownership, but Colorado⁷⁵ and Oklahoma⁷⁶ also consider such factors in dividing marital property and this use did not defeat a joint ownership theory in those states.⁷⁷ In addition, two community property

69. RSMo § 452.330.4 (Supp. 1975).

70. See note 57 *supra*; Cornell v. Cornell, 550 S.W.2d 823 (Mo. App., D. Spr. 1977); Schulte v. Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977); *In re the Marriage of B. K. S.*, 535 S.W.2d 534 (Mo. App., D.K.C. 1976); Vanet v. Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976).

71. Wiles v. United States, 499 F.2d 255, 257 (10th Cir. 1974); Wallace v. United States, 439 F.2d 757, 760 (8th Cir. 1971); 309 F. Supp. 748, 759 (S.D. Iowa 1970). These cases are based on United States v. Davis, 370 U.S. 65, 70 (1960).

72. Beres v. Beres, 52 Del. 133, 154 A.2d 384 (1959).

73. Pfab v. Pfab, 132 N.W.2d 483 (Iowa 1965); Rider v. Rider, 105 N.W.2d 508 (Iowa 1960); Dillavou v. Dillavou, 17 N.W.2d 393 (Iowa 1945); Twombly v. Twombly, 287 N.W. 841 (Iowa 1939).

74. Folk v. Folk, 203 Kan. 576, 455 P.2d 487 (1969); Harrah v. Harrah, 196 Kan. 142, 409 P.2d 1007 (1966); Mann v. Mann, 136 Kan. 331, 15 P.2d 478 (1932).

75. Kraus v. Kraus, 159 Colo. 331, 411 P.2d 240 (1966); Nunemacher v. Nunemacher, 132 Colo. 300, 287 P.2d 663 (1955).

76. Marcus v. Marcus, 214 P.2d 899 (Okla. 1950); Van Horn v. Van Horn, 119 P.2d 825 (Okla. 1941); Dresser v. Dresser, 22 P.2d 1012 (Okla. 1933); Tobin v. Tobin, 89 Okla. 12, 213 P. 884 (1923).

77. *In re United States*, 528 F.2d 853 (10th Cir. 1975); Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969). Although neither opinion refers specifically

states which recognize ownership by both spouses of all community property permit the unequal division of the property upon divorce based on similar factors.⁷⁸

The Missouri Act also distinguishes between maintenance and property division. A property transfer pursuant to a finding that maintenance is required is clearly a transfer in exchange for the release of a support obligation; these transfers are covered by a separate statutory provision.⁷⁹ However, even if there is no showing of need for maintenance, the court is required by the property division section to divide the marital property. Confusion has arisen in this area because the court order transferring the property often fails to specify under which section of the statute the transfer is being made. Such confusion, however, does not defeat the fact that an order for property division does not depend on any provision concerning the award of maintenance.

An element often utilized to determine the ownership of property is the source of the consideration. If both parties contribute to the acquisition of the property, the court may find that joint ownership exists even if the property is titled in the name of only one party. This concept is embodied in the "resulting trust" which Missouri courts will raise under certain conditions in favor of a contributing spouse.⁸⁰ Section 452.315.1(1), RSMo (Supp. 1975) clearly states that in addition to monetary contributions toward the acquisition of marital property, the court will consider non-monetary contributions in determining the percentage of ownership of each spouse in such property.⁸¹ In *In re Marriage of Cornell*, a case involving a wage-earner husband and a homemaker wife, the court said: "we find no disparity in the contribution of [the husband] as the bread winner and [the wife] as mother and homemaker."⁸² If this new definition of consideration is used, co-ownership of marital property could exist in Missouri even under traditional concepts. Indeed, the Colorado court analogized the property interest of a nontitled, contributing spouse under the dissolution act to the interest found under the resulting trust theory.⁸³ Thus Missouri property law supports the dissolution statute's recognition that equitable interests rather than bare legal title are the primary indicators of ownership.

to this point, the decisions reached are only possible if the use of factors by courts in dividing property does not defeat the common ownership of the spouses.

78. ARIZ. REV. STAT. § 25-318 (1973); TEX. FAM. CODE ANN. § 3.63 (Ver-non 1975).

79. RSMo § 452.335 (Supp. 1975).

80. Nelson, *Purchase Money Resulting Trusts in Land in Missouri*, 33 MO. L. REV. 552 (1968).

81. See *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971) (court explicitly recognized the nonmonetary contribution of the husband to the wife's property).

82. 559 S.W.2d 823, 827 (Mo. App. 44th Spp. 1977).

83. *In re Questions*, 517 P.2d 1331, 1335 (Colo. 1974).

It is clear that, regarding ownership rights granted to the spouses at the time of divorce, Missouri's Divorce Reform Act more closely resembles the statutes of Colorado and Oklahoma than those of Delaware, Iowa, or Kansas. An injunction is available to protect the spouses' rights in the marital property, division of the property is mandatory and not subject to modification, a distinct maintenance section exists, and the nonmonetary contribution of a spouse is regarded as consideration. All these provisions indicate that the rights of the nontitled spouse in marital property are not inchoate as in Delaware but constitute a species of common ownership.

Although courts have examined both the state property law and the dissolution law in defining the rights of the spouses in marital property at time of dissolution, it is urged that such rights should be determined in Missouri solely by reference to the dissolution law. Missouri's dissolution statute, by its own terms, changes the property rights of the parties at time of dissolution. When a petition for divorce is filed, the dissolution law supersedes the property law as between the spouses. Thus, when property is transferred pursuant to a dissolution decree the definition of the ownership interests in that property should also come from the dissolution statute.

V. EQUAL DIVISION OF MARITAL PROPERTY

Even though the government recognizes that each spouse has an ownership interest in certain property, there will be a taxable event if at dissolution one spouse transfers to the other more than his or her own interest. The only tax free division of jointly-owned property at dissolution is an *equal* division between the spouses.⁸⁴ In community property and deferred community property cases in which the Service has recognized that the nontitled spouse has an ownership interest in *separately-titled* property, it has insisted that such property be *equally* divided to avoid present tax liability.⁸⁵ This equal division requirement is based on the community property doctrine of co-equal ownership between the spouses.

If the titled spouse transfers more than one-half of the marital property to the nontitled spouse, the Service will contend that the transferor sold a portion of his marital property to the other spouse in exchange for a release of marital rights. A strong argument can be made, especially in Missouri, that the Service's position is not always correct. The equal division requirement assumes that each spouse has a one-half interest in the marital property at the time of dissolution. This may not be the case. The Missouri trial court is empowered to divide marital property between the spouses as the court deems just, considering, among other things, the relative contributions of each spouse. It therefore can be said that the

84. Rev. Rul. 74-347, 1974-2 C.B. 26.

85. *Garant v. Commissioner*, 64 T.C. 959 (1975); *Coffield v. Koehler*, 207 F. Supp. 73 (D. Kan. 1962).

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ownership interest of each spouse at the time of dissolution is that decreed by the court, and that such interest might not and probably would not be exactly one-half. It is questionable whether the Service will accept this argument in light of its insistence on absolute equal division of marital property to avoid recognition by the transferor of a capital gain on the appreciation of the property transferred in excess of one-half.

In a common law jurisdiction such as Delaware, it is usually found that the husband has purchased the release of his marital obligations by transferring property to his wife. However, the Missouri statute recognizes that either spouse can have marital obligations to the other, so either spouse taking a lesser share would be presumed to have sold to the other part of his or her property in exchange for a release of the other's marital rights.

If a spouse transfers some or all of his or her *marital* property to the other in exchange for *separate* property, whether in kind or in cash, the transfer is considered a sale. In both of these situations a capital gain must be recognized if the transferred property has appreciated in value. Where it is determined that payments are made over a period of years to a spouse who gave up co-owned property, no deduction for periodic maintenance payments will be allowed to the purchaser-spouse under I.R.C. section 215; the seller-spouse, however, will recognize only capital gain income rather than ordinary income under I.R.C. section 71.⁸⁶

A problem in property settlement may arise in the case of a small business which cannot be divided between the spouses without certain damage to the business. A practical solution would be to have one spouse retain or have transferred to him or her the full interest in the business and pay a sum of money to the other. As an example, assume that the only property owned by the spouses is a small business worth \$100,000 with a basis of \$70,000. If the business is jointly-titled and both spouses have participated in the acquisition and development of the business, it would clearly be co-owned with each spouse having a \$50,000 interest and a \$35,000 basis. If the wife's interest is transferred to the husband at dissolution and he pays the wife \$50,000 over a period of years, the wife must recognize a \$15,000 capital gain. The husband cannot deduct the payments under section 215. This is considered a sale of property and section 215 is inapplicable because it applies only if periodic payments are made in fulfillment of marital obligations.⁸⁷ In Missouri this tax treatment presently applies only if the business is held in a form of joint tenancy.

If the business is titled solely in the husband's name but was acquired and developed during the marriage, under Missouri law it is marital prop-

86. I.R.C. § 215 generally allows a spouse to deduct amounts paid to a former spouse if the payments are in the nature of periodic alimony. I.R.C. § 71 requires that periodic payments made by a spouse to a former spouse be included as ordinary income of the recipient.

87. *Mills v. Commissioner*, 442 F.2d 1149 (10th Cir. 1971). See note 32 *supra*.
<https://scholarship.law.missouri.edu/mlr/vol44/iss1/9>

erty. If the court divides the marital property and allocates the business to the husband and orders him to pay the wife \$50,000 over a period of years, two different tax treatments can result depending on whether the Service recognizes marital property in Missouri as deferred community property. If the Service does recognize that marital property is in effect co-owned property, there would be a sale by the wife to the husband of her interest in the business. The wife would recognize a \$15,000 capital gain and the husband would not be able to deduct the payments under section 215. This is the same result as occurs with jointly-owned property. However, if the Service does not recognize the concept of marital property, there would not be a sale, but rather a release to the husband of the wife's marital rights in exchange for \$50,000. The payments would be deductible by the husband as alimony payments under section 215; the wife would recognize the amount of the payments as ordinary income under section 71. This situation would result in increased income to the wife, and a large deduction to the husband.

VI. PRACTICAL CONSIDERATIONS

Potential tax liability concerning marital property in Missouri arises at the time of dissolution in either of two situations: if separately-titled appreciated property is transferred pursuant to a dissolution, or if a sum of money is paid and marital property is retained by one of the spouses. The parties should negotiate the property settlement giving full consideration to the tax consequences. The transferor of marital property will want the transfer to be considered a nontaxable division of co-owned property. If so, the transferor will not recognize a capital gain on the transfer, but the transferee will take the property with the transferor's basis. The transferee, on the other hand, will want the transfer to be considered a taxable exchange in fulfillment of the transferor's marital obligations. In this situation the transferor would recognize a capital gain on the disposition, and the transferee would take the property with a stepped-up basis equal to the fair market value of the property at the time of transfer. Thus, the transferee's potential capital gain on subsequent disposition is reduced.

If the marital property is not transferred because division of the property is impractical, the spouse who retains the property and pays the other for his or her share receives an advantage if the payments are considered to be in fulfillment of marital obligations. Such payments are deductible under I.R.C. section 215; however, the spouse receiving such payments must include them as ordinary income under I.R.C. section 71. If payments are considered to be made to purchase the recipient's share of the marital property, no deduction is allowed to the purchaser-spouse, but the seller-spouse must recognize only a capital gain and not ordinary income.

Because there is no Missouri Supreme Court decision on the nature of the spouses' rights in separately-titled property, attorneys for the parties should develop evidence in the dissolution suit to support a later tax claim.

All facts relating to the acquisition of property and the reasons for property transfers will be relevant to the tax claim. The attorney may choose to exercise a spouse's right under RSMo section 452.315.2(1) (Supp. 1975) to request an injunction to prevent disposition of any marital property. This may tend to establish the vesting of the nontitled spouse's interest in the property. The attorney may allege in the pleadings and request the court to include in the decree whether the transfer is for the maintenance of the transferee-spouse or is for property division.⁸⁸ In an uncontested dissolution, the attorneys should take care to draft the decree and property settlement to support the negotiated result. This evidentiary foundation will probably not bind the Service, but may prove helpful if the tax question arises at a later date.

Although unlikely, it is possible that the Missouri Supreme Court will define the spouses' rights in separately-titled property acquired during the marriage. Missouri has no certification procedure whereby the supreme court could be asked by the federal court to decide the matter. A declaratory judgment in state court is also not feasible because there would be no controversy between the parties; the controversy would be between a spouse and the Internal Revenue Service and not between the two spouses. However, there are two situations in which it may be possible to challenge the Missouri Department of Revenue in a manner which would raise the issue for decision by the Missouri court. One spouse could refuse to pay sales tax upon the transfer of title to a motor vehicle or mobile home pursuant to a property settlement.⁸⁹ A Missouri taxpayer also could get a determination of the spouses' property rights by refusing to use the federal adjusted gross income as the starting point in computing his or her state income taxes.⁹⁰ The taxpayer would argue that the federal adjusted gross income was inflated by the gain figure resulting from property transferred at dissolution, which under state law was transferred in a division of property and was not sold to the other spouse in exchange for a release of marital rights. However, the Missouri court may refuse to decide this issue if it finds that Missouri accepts adjusted gross income as defined under federal tax law. A spouse might ask the trial court to include in its divorce decree a definition of his ownership rights in the transferred property. In *Roberts v. Roberts*⁹¹ the court of appeals said that the trial court had the power to designate in its order the spouse who would be entitled to the

88. See Fowler & Krauskopf, *Property Provisions*, 29 J. MO. B. 508, 514 (1973). The petition should include a description of the property, status as either separate or marital property, the source and date of acquisition, evidence regarding the intentions of the parties regarding the property during the marriage, the use of the property during the marriage, the control of the property during the marriage, and the nature and source of the consideration given for the property.

89. RSMo § 144.070 (1969).

90. <https://scholarship.law.missouri.edu/mlr/vol44/iss1/90>

91. RSMo § 143.121.1 (1969).

91. 553 S.W.2d 305 (Mo. App., D. St. L. 1977).

dependency exemption for the children.⁹² The court said that this was "another factor in the financial relationship between the parties. The Missouri Divorce Reform Act contemplates courts having jurisdiction over such matters in order to promote an orderly disposition of the financial relationship."⁹³ If the trial court included such a definition in its dissolution decree, this may be a basis for a review of the issue at the appellate level.

VII. THE AMERICAN BAR ASSOCIATION PROPOSAL FOR UNIFORM TAX TREATMENT

The Family Law Section of the American Bar Association has proposed that the tax code be amended to characterize as tax free transfers between spouses at the time of divorce regardless of jurisdiction.⁹⁴ There are three advantages to this proposal: it promotes uniformity and clarity of the law; it supports the partnership concept of marriage contained in the Uniform Marriage and Divorce Act; and it permits tax deferral until final disposition of the property by either spouse. With knowledge of the tax consequences, the spouses and their attorneys would be able to reach settlements at divorce which provide for the most equitable division of the spouses' property.

VIII. CONCLUSION

Prior to the adoption of Missouri's new dissolution act, and the affirmation of *Imel* by the Tenth Circuit, it was argued that cases in Missouri should follow *Wallace* and hold that a transfer of property at time of divorce was a taxable exchange for the release of marital rights.⁹⁵ A recent case in Missouri appellate courts indicates an understanding of the changed function of the division of marital property in accordance with the rationale of the Uniform Marriage and Divorce Act.⁹⁶ It is recognized that marriage is a partnership with both spouses having ownership interest in the property accumulated during the marriage.⁹⁷ In many cases the factors used by the courts to divide the marital property indicate that the transfers were to divide co-owned property.⁹⁸ However, there are also cases

92. *Id.* at 306-07; I.R.C. § 152(e)(2)(A).

93. 553 S.W.2d at 307.

94. ABA FAMILY LAW SECTION COMMITTEE FOR LIASON WITH SECTION OF TAXATION, ANNUAL REPORT (July 10, 1975).

95. Gunn, *The Federal Income Tax Effects of the Missouri Version of the Uniform Divorce Act*, 1974 WASH. U. L. Q. 227.

96. Corder v. Corder, 546 S.W.2d 798 (Mo. App., D.K.C. 1977).

97. *In re Marriage of Neubern*, 535 S.W.2d 499 (Mo. App., D. St. L. 1976).

98. *Carity v. Carity*, 536 S.W.2d 866 (Mo. App., D. St. L. 1976); *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. App., D. St. L. 1975).

in which the transfers appear to be as much to provide for the financial independence of the transferee as to divide the marital assets.⁹⁹

The Missouri courts should specify in their orders and opinions the source of consideration given for property and the state of title, the nature of the spouses' property rights, and the reasons for the transfer of marital property. This would enable spouses to prepare for the tax consequences of property transfers.

The Internal Revenue Service should recognize that the rights in separately-titled property acquired during the marriage of spouses in Missouri are the same as those of spouses in Colorado and Oklahoma. Missouri is now operating as a deferred community property state for purposes of dissolution and its residents should be taxed accordingly.

MARJORIE WHOLEY HAINES

99. *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. App., D. Spr. 1977); *Ledbetter v. Ledbetter*, 547 S.W.2d 214 (Mo. App., D. St. L. 1977).