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Tax Aspects of Marriage Dissolution under North Dakota Law

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TAX ASPECTS OF MARRIAGE DISSOLUTION UNDER NORTH DAKOTA LAW

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I. INTRODUCTION

Before the dissolution of most marriages of some duration the parties will have acquired property and raised children. Upon the dissolution of the marriage there must be a division of the property, provisions made for the custody and support of the children, and a determination of the obligations to pay alimony and child support.

In most divorces involving lower or middle income couples, very little attention is given to the income tax implications of the division of property and the obligation of support. In divorces involving wealthy people the tax implications are crucial, and too often overlooked until too late. All property settlement agreements involving alimony, child custody and support, and the division of property should be reviewed to determine the tax implications before the agreement becomes part of the final divorce decree.

Contested divorce cases in which the division of property, the

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custody of children, the obligation of support, and the amount and duration of alimony are in question require that the income tax ramifications of these questions be presented at the trial level. The North Dakota Supreme Court has specifically noted that it will not speculate as to the income tax consequences of the lower court's judgment on appeal, unless the tax effects of the judgment are presented to the lower court.[1] Often it is impossible to know the tax effect of the lower court's decision until it is entered. Once the judgment is entered, a motion to reconsider may be in order both to present the income tax effects of the judgment to the lower court, and to preserve the matter so the tax implications may be considered by the supreme court on appeal.

As the United States Supreme Court has stated, applicable state law must be examined to determine the rights, duties, and obligations of the parties to each other for support and maintenance.[2] Thus, when examining the tax implications of the division of property and the award of alimony in North Dakota, a general review of North Dakota law governing the award of property and alimony is in order.

Under North Dakota law the husband has a duty to support his wife out of his property and his labor.[3] The wife must support the husband out of her separate property when the husband has not deserted her, or when he has no separate property and he is unable from infirmity to support himself.[4] Except for this support obligation, neither the husband nor the wife have an interest in the property of the other.[5] In *Bellon v. Bellon*[6] the North Dakota Supreme Court stated that section 14-07-04 of the North Dakota Century Code abolished all marital property interests.[7]

In *Hagert v. Hagert*[8] the North Dakota Supreme Court held that section 4077 of the Code of 1905, which is identical to section 14-07-03 of the North Dakota Century Code, imposed a duty upon the husband and wife to support each other and created an inchoate interest in each parties' property to satisfy that support obligation.[9] Furthermore, the support obligation may be imposed on the other spouse's separate property by the court in a decree of divorce or

1. Keig v. Keig, 270 N.W.2d 558 (N.D. 1978).
2. United States v. Davis, 370 U.S. 65, 70 (1962).
3. N.D. CENT. CODE § 14-07-03 (1971).
4. *Id.*
5. N.D. CENT. CODE § 14-07-04 (1971).
6. 237 N.W.2d 163 (N.D. 1976).
7. Bellon v. Bellon, 237 N.W.2d 163, 165 (N.D. 1976).
8. 22 N.D. 290, 133 N.W. 1035 (1911). *Hagert* did not involve an action for divorce. Rather it involved an action in which the destitute and informed husband was suing the wealthy wife for support. The court ordered the wife to support the husband. *Id.* at 302, 133 N.W. at 1040.
9. Hagert v. Hagert, 22 N.D. 290, 301, 133 N.W. 1035, 1040 (1911).

order for support. Stated differently, the husband and wife each have a conditional interest in the property of the other to the extent necessary for their support, but neither spouse has any further interest in the other spouse's property. This inchoate interest in the property of the other spouse because of the marital duty of support continues until the marriage is terminated by a decree of divorce.[10]

It appears that the provisions of chapter 14-07 of the North Dakota Century Code are *not* a part of the divorce laws in North Dakota.[11] Upon the termination of the marriage by divorce, the obligation of support imposed by section 14-07-03 of the North Dakota Century Code is terminated and section 14-05-24 of the North Dakota Century Code,[12] as expanded by the *Ruff-Fisher*[13]

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10. *See* Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976); Beaton v. Beaton, 99 N.W.2d 92 (N.D. 1959); Hodous v. Hodous, 76 N.D. 392, 36 N.W.2d 554 (1949).

In *Hodous* the court relied on section 14-07-03 of the Revised Code of North Dakota (identical to the present section 14-07-03 of the North Dakota Century Code) to impose an obligation of temporary alimony upon the husband during a divorce action and implied that the duty of support continued during the divorce action. 76 N.D. at 398, 36 N.W.2d at 558.

In *Beaton*, an action in which no divorce was granted, the court commented on the same section of the Revised Code and held that the lower court did not create a liability, but in fact continued the husband's liability under that section because the marriage had not been terminated. 99 N.W.2d at 93-94.

In *Bingert*, the court discussed whether the duty to pay alimony is a continuation of the duty to pay support and noted as follows:

> We believe, however, that the right to support of one spouse by the other during marriage is, as defined by our statutes and interpreted by our cases, a right which is entirely independent of the right of one spouse to alimony, to be paid by the other, after the marriage is ended. Any attempt to integrate the one into the other, we believe, will only lead to confusion.
>
> We believe that the trend in modern domestic-relations law is to treat alimony as a method of rehabilitating the party disadvantaged by the divorce. This seems to be the basis of the Uniform Marriage and Divorce Act, adopted in at least four States, not including North Dakota.

247 N.W.2d at 468-69.

11. Generally chapter 14-07 of the North Dakota Century Code dates back to Dakota Territorial Law as it was first found in the Dakota Civil Code of 1877. In Keig v. Keig, 270 N.W.2d 558 (N.D. 1978), the North Dakota Supreme Court stated that section 14-07-08 is *not* part of our divorce law. *Id.* at 560. Furthermore, in Bellon v. Bellon, 237 N.W.2d 163 (N.D. 1976), the court stated that section 14-07-04 is not part of our divorce law. *Id.* at 164.

In *Keig* the court found that existing case law and section 14-05-24 govern the parties' rights in the disposition of property and their obligations of support to one another upon a dissolution of marriage. 270 N.W.2d at 560.

12. Section 14-05-24 of the North Dakota Century Code provides as follows:

> When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.

N.D. CENT. CODE § 14-05-24 (1971).

13. In Ruff v. Ruff, 78 N.D. 775, 52 N.W.2d 107 (1952), the court approved the following rules to determine the ability of the parties to pay *alimony* and to be applied in the *division of property*:

> In determining the *question of alimony* or *division of property* as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties

guidelines, governs the trial court in making an equitable division of the property and awarding alimony and child support. The obligation to provide support and alimony imposed under section 14-05-24 ends upon the death of the person receiving the alimony, the death of the person providing the support, or the happening of a contingency.[14]

During the marriage neither spouse has the right to claim part of the other spouse's estate since each spouse must survive the other in order to receive a share in the deceased spouse's estate. This is true whether the deceased spouse dies testate or intestate.[15] As the common-law concepts of dower and courtesy have been abolished,[16] neither spouse has rights which are subject to the laws of descent and distribution.

Having briefly analyzed a spouse's right in the property of the other because of marriage, this article will focus on the three most common problems which arise in every divorce involving property and children. These problems are the division of property, the award of alimony, and the obligation to provide child support by the custodial and noncustodial parent.

II. PROPERTY SETTLEMENTS

A. TRANSFERS OF APPRECIATED PROPERTY

The landmark case and the precedent established by that case which should be addressed in *every* divorce involving a division of property owned by one or both parties is *United States v. Davis.*[17] In

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> to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, *and whether accumulated or acquired before or after the marriage;* and from all such elements the court should determine the rights of the parties and all other matters pertaining to the case.

Id. at 784, 52 N.W.2d at 111, (quoting Holmes v. Holmes, 152 Neb. 556, 556, 41 N.W.2d 919, 920 (1950) (emphasis added)).

In Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966), the court expanded the above rules to include "such other matters as may be material." *Id.* at 847, in sylabus 7.

14. *See supra* note 12 for text of statute. In Haugeberg v. Haugeberg, 258 N.W.2d 657 (N.D. 1977), the court stated, "[t]he award of periodic alimony, as opposed to a lump sum alimony, permits either party to seek a modification of the judgment respecting alimony if conditions change." *Id.* at 665.

The dissent in *Haugeberg* stated the following: "Alimony (unless specifically ordered otherwise) ends when either party dies or the wife remarries." *Id.* at 668 (Vogel, J., dissenting).

15. N.D. CENT. CODE § 30.1-04-04 (1973).

16. N.D. CENT. CODE § 14-07-09 (1971); N.D. CENT. CODE § 30.1-04-13 (1973).

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

1954 Mr. Davis and his wife were divorced under the existing laws of Delaware. Pursuant to the divorce decree Mr. Davis transferred to his wife 1,000 shares of stock in E. I. DuPont de Nemours & Co. which he held solely in his name. Under the existing Delaware law, Mrs. Davis had certain statutory marital rights, including the right of dower, the right to inherit if she survived her husband, and the right upon divorce to receive alimony and part of her husband's property. Mrs. Davis accepted her husband's DuPont stock in full settlement and satisfaction of any and all claims and rights against her husband.

The Internal Revenue Service determined that a "taxable event" occurred when Mr. Davis transferred his shares of DuPont stock to Mrs. Davis in satisfaction of her statutory marital rights. The Service ruled that Mr. Davis had realized a long-term capital gain of $7,474.63, which was the difference between Mr. Davis' basis in the DuPont stock and its fair market value at the time of transfer. Mr. Davis argued that the transfer of the stock to his wife was comparable to a "non-taxable" division of property between co-owners.

In rejecting his argument and upholding the Service, the Court held as follows:

> The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest — passive or active — over the management or disposition of her husband's personal property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems "reasonable." . . . What is "reasonable" might be ascertained independent of the extent of the husband's property by such criteria as the 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. . . .
>
> Delaware seems only to *place* a burden on *the husband's* property rather than to make *the wife a part owner* thereof. In the present context the rights of succession and reasonable share do not differ significantly from the

> husband's obligations of support and alimony. *They all partake more of a personal liability to the husband than a property interest of the wife.* The effectuation of these marital rights may ultimately result in the ownership of some of the husband's property as it did here, but certainly this happenstance does not equate the transaction with a *division of property by co-owners.*[18]

The Court went on to find that Mr. Davis received something of value when his wife waived her inchoate marital rights and right to receive alimony in exchange for the 1,000 shares of stock, and that the value of her marital rights was equal to the fair market value of the stock transferred.[19] Therefore, the transfer of his stock to her for a release of her inchoate marital rights gave rise to a taxable event.

It is the writer's opinion that *Davis* applies to all transfers of appreciated property by one spouse to the other pursuant to a property settlement or a decree of divorce under North Dakota law. The previous review of North Dakota law as it relates to the property rights of a husband and a wife establishes that neither party has any marital property rights.[20] Further, whatever interest each may have in the property of the other is at best an "inchoate interest" which arises only when an action for support or divorce commences.[21] Furthermore, neither spouse has an active or passive interest in the management or disposition of the other spouse's personal or real property during the marriage.[22] North Dakota has abolished the common-law concepts of dower and curtesy,[23] and each spouse must survive the other in order to share in the testate or intestate distribution of his or her mate. Upon the dissolution of the marriage, the division of property and award of alimony are based upon what is reasonable in light of the *Ruff-Fischer* guidelines. Thus, it appears that *Davis* applies to transfers of appreciated property made pursuant to a divorce under North Dakota law.

Although no reported federal cases have applied *Davis* to North Dakota law, in *Wallace v. United States,*[24] the Eighth Circuit Court of Appeals applied *Davis* when it reviewed a division of property pursuant to a divorce granted under Iowa law which is

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18. *Id.* at 70 (emphasis added).
19. *Id.* at 72.
20. *See supra* notes 5, 6, 7 and text referenced thereto for a discussion of North Dakota law.
21. *See supra* notes 8 and 9 and text referenced thereto.
22. *See supra* notes 6 and 7 and text referenced thereto.
23. N.D. CENT. CODE § 14-07-09 (1971); N.D. CENT. CODE § 30.1-04-13 (1976).
24. 439 F.2d 757 (8th Cir. 1971) *aff'g* 309 F. Supp. 748 (S.D. Iowa 1970).

similar to North Dakota's law. In *Wallace* the husband transferred appreciated stock held in his name to his wife and in exchange for the stock she waived her right to receive additional property and her right to receive alimony. Mr. Wallace argued, as Mr. Davis did, that the transfer of property incident to the divorce constituted a division of property between "equitable co-owners" rather than a transfer of his property in exchange for the release of his marital obligations.

The Eighth Circuit Court of Appeals, in affirming the district court, which had found the transfer of the appreciated stock a taxable event, reviewed the law of Iowa and found that it, like the law of Delaware, granted the wife no interest, either active or passive, in her husband's personal or real property prior to the entry of the divorce decree.[25] Furthermore, the rights of a wife in Iowa closely paralleled those of a wife in Delaware in that she only possessed inchoate rights in her husband's property.[26]

Lest the reader feel that the Tax Court may be a better forum for a client who has transferred substantially appreciated property to a spouse in return for a relinquishment of the spouse's rights to further property or alimony, the reader should be aware of the case entitled *Richard E. Wiles, Jr.*[27] Mr. Wiles transferred substantially appreciated stock to his wife pursuant to a property settlement agreement which provided that she received the stock in satisfaction of his support obligation and her right to present or future alimony. The Tax Court reviewed Kansas law and held that *Davis* applied to the transfer made pursuant to a divorce and which involved substantially appreciated property owned by the husband.[28]

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25. Wallace v. United States, 439 F.2d 757, 760 (8th Cir. 1971).

26. In *Wallace* the transfer of stock from the husband was made pursuant to Iowa Code section 598.14 which provided that "[w]hen a divorce is decreed, the court may make such order in relation to the children, property, parties and the maintenance of the parties as shall be right.

"Subsequent changes may be made by it in these respects when circumstances render them expedient." IOWA CODE § 598.14 (1950). 439 F.2d at 760.

27. 60 T.C. 56 (1973).

28. Richard E. Wiles, Jr., 60 T.C. 56, 61-62 (1973). In *Wiles*, the Tax Court reviewed Kansas Statutes Annotated section 60-1610(b) which provides as follows:

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

KAN. STAT. ANN. § 60-1610(b), (currently codified as KAN. STAT. ANN. § 60-1610(c) (Supp. 1979)). The Tax Court in commenting on this section noted the following:

> The statute itself clearly shows that whatever the nature of a spouse's interest in the marital property during the marriage, the value and extent of that interest cannot be

In light of *Davis, Wallace, Wiles,* and present North Dakota law, in the event there is a transfer of substantially appreciated property from one spouse to the other, pursuant to a property settlement or divorce decree in which the wife relinquishes all of her rights to any further award of property or alimony, that transfer would be a taxable event which would result in the realization and recognition of gain to the husband equal to the fair market value of the property transferred. The taxable gain recognized would be the fair market value of the property transferred at the date of the transfer less the actual or adjusted basis.

B. TRANSFERS OF PROPERTY INVOLVING A DIVISION OF PROPERTY DEEMED TO BE A DIVISION OF PROPERTY HELD AS "CO-OWNERS" OR "EQUITABLE CO-OWNERS"

A problem frequently faced by practitioners negotiating property settlements or by courts making divisions of property is the disposition of property acquired and maintained during the marriage through the joint earnings and efforts of the parties.

Collins v. Commissioner[29] involved the tax implications of a partial transfer of the husband's stock to his wife in settlement of all her property rights, including the right to receive alimony. The husband was the major stockholder of a corporation which had prospered greatly during the marriage. The United States Tax Court originally found that the transfer constituted a disposition of stock which gave rise to a taxable gain.[30]

After the Tax Court decision and prior to remand by the United States Supreme Court, the Oklahoma Supreme Court held that, under applicable Oklahoma law and for Oklahoma income tax purposes, the husband's transfer of stock to his wife was *not* a taxable event.[31] The transferred stock had substantially appreciated

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> ascertained until the marriage is terminated. For all we know, the determination of what is in the terms of the statute a just and reasonable division of property may depend on criteria such as the wife's age and health, her independent wealth and living style at the time of divorce. Notwithstanding Sec. 60-1610(b), it is still the law in Kansas that a wife must survive her partner in order to share in his intestate-estate. . . . Absent a Kansas decision flatly stating that a property settlement in Kansas is a division of property between *co-owners,* we are unwilling to so hold today.

60 T.C. at 61-62 (emphasis in original).

The foregoing considerations are the very same as those which lead the United States Supreme Court in *Davis* to a conclusion adverse to the taxpayer.

29. 46 T.C. 461 (1966), *aff'd,* 388 F.2d 353 (10th Cir. 1968), *vacated,* 393 U.S. 215, *rev'd,* 412 F.2d 211 (10th Cir. 1969).

30. Collins v. Commissioner, 46 T.C. 461 (1966), *aff'd,* 388 F.2d 353 (10th Cir. 1968).

31. Collins v. Oklahoma Tax Comm'n, 446 P.2d 290, 297 (Okla. 1968) (emphasis added). The Oklahoma Supreme Court reviewed Oklahoma law and found that property acquired jointly during

in value during the marriage. Part of the appreciation was due to the wife's substantial contributions to the well-being of the corporation. These contributions were recognized by the Oklahoma Supreme Court when it noted that the efforts of the wife during the marriage contributed substantially to the value of the stock, which gave her a "species of common ownership" or a "vested interest" in the stock even though the stock was held solely in the name of her husband.[32]

On remand from the United States Supreme Court, the Tenth Circuit Court of Appeals relied on the Oklahoma Supreme Court decision and held that the transfer of stock from the husband to his wife pursuant to the divorce decree operated "merely to finalize the extent of the wife's vested interest in the property she and her husband held under a 'species of common ownership.' "[33] Therefore, the transfer was not a taxable event, rather it was a division of property held under a "species of common ownership."

In *Imel v. United States*[34] the Tenth Circuit Court of Appeals reviewed the tax implications of a property settlement in which the husband transferred substantially appreciated stock to his wife in return for a relinquishment of all of her marital property rights, and her right to receive alimony. The Colorado law in question was similar to the Oklahoma law reviewed in *Collins*. In *Imel* the federal district court had certified three questions of law to the Supreme Court of Colorado for review[35] before it ruled on the taxable effect

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the marriage or which appreciated during the marriage was property in which there was a species of common ownership. *Id.* The Oklahoma statute provided as follows:

> As to such property, whether real or personal, as shall have been *acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties,* the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof.

OKLA. STAT. tit. 12, § 1278 (1979) (emphasis added).

32. 446 P.2d at 295.

33. Collins v. Commissioner, 412 F.2d 211, 212 (10th Cir. 1969).

34. 523 F.2d 853 (10th Cir. 1975).

35. In Re Questions Submitted by the United States District Court for the District of Colorado, 184 Colo. 1, 517 P.2d 1331 (1974). The questions are as follows:

> When under 1963 C.R.S. 46-1-5 [or under 1963 C.R.S. 46-1-13 as amended in 1971]
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> (a) a property settlement agreement is entered into providing for a transfer of property from husband to wife in acknowledgement of the wife's contribution to the accumulation of the marital estate, or,
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> (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, is the transfer a taxable event for purposes of federal income taxation?

of the husband's transfer. In answering the certified questions, the Supreme Court of Colorado held, in light of the facts presented, that the husband's transfer involved the transfer of property in which there existed a "species of common ownership," and, as such, the transfer resembled a division of property between co-owners.[36] As a result of this interpretation of Colorado law, the Tenth Circuit Court of Appeals ruled that there was no taxable event when the husband transferred the stock to his wife.[37]

Both *Collins* and *Imel* dealt with the transfer of property held solely in the husband's name that had substantially appreciated in value during the marriage, and to which the wife had contributed either to the increase in value or to the acquisition and appreciation of the marital estate as a whole. Further, both cases were decided after the Supreme Courts of Colorado and Oklahoma had held that the transfer was in recognition of a "species of common ownership" which the wife had in the marital estate because of her contributions to the appreciation in value of the property transferred or to the marital estate as a whole, and that a division of this property resembled a division of property between co-owners. Furthermore, in both cases the transfer was after the parties to the court-approved settlement agreement had recognized that the wife had "aided materially" in the accumulation of the family wealth; that the agreement was a "fair recognition" of the wife's participation in the accumulation of the family wealth; and that the property settlement made a "fair division" of the property so acquired.

The question then arises whether North Dakota law and the holdings of *Collins* and *Imel* can be applied to circumvent *Davis* in similar factual situations.

In *Haugeberg v. Haugeberg*[38] the North Dakota Supreme Court had occasion to review a property settlement that resulted from a dissolution of a marriage in which all of the parties' property was accumulated during the course of the marriage. At the time of their marriage, the parties were essentially without funds. During the

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Paraphrasing the language of controlling cases, the same question may be stated:

> Under the 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 the release of an independent obligation owed by him to the wife?

Id. at 3, 517 P.2d at 1331-32.

36. *Id.* at 9, 517 P.2d at 1335.
37. Imel v. United States, 523 F.2d 853, 857 (10th Cir. 1975).
38. 258 N.W.2d 657 (N.D. 1977).

course of their marriage neither party received any personal or real property by gift or inheritance.

In reviewing the division of property the supreme court reversed the lower court[39] and rejected the opportunity to hold that property acquired during the course of the marriage from the joint earnings and efforts of the parties should be divided equally. Rather, the court applied the *Ruff-Fisher* guidelines to make an equitable division of the property and remanded the case to the lower court for further disposition in light of its decision.

Although the issue was not before the court in *Haugeberg,* it appears that the North Dakota Supreme Court does not feel that property acquired during the course of the marriage from the joint earnings and effort of the parties should necessarily be divided equally. In *Hultberg v. Hultberg,*[40] the supreme court reversed a district court which had held that "[t]he property placed in joint tenancy becomes the property of those persons named in joint tenancy in equal shares regardless of contribution towards acquisition and maintenance of such joint tenancy property, and this rule is applied in determining interest ownership of the joint tenancy property herein. . . ."[41] The supreme court stated that the lower court "must make an equitable division of the property, but this does not necessarily require an equal division of the property, whether jointly held or otherwise."[42] In *Hultberg* the supreme court rejected the opportunity to hold that property acquired during the course of the marriage which is jointly owned or held as joint tenants must be divided equally and chose to rely on the *Ruff-Fisher* guidelines to equitably distribute the property.

There presently is little or no authority in North Dakota to sustain the propositions advanced in *Imel* that the filing of an action for divorce vests in the wife an interest in property acquired during the course of the marriage even though the property is in the husband's name; or that a transfer of some or all of the property from the husband to the wife in acknowledgement of the wife's contributions to the accumulation of the marital estate is made not in satisfaction of the husband's obligation of support, but rather in recognition of a "species of common ownership" each spouse has in the marital estate; or that such a transfer is a division of property between co-owners. The only support for such a proposition is found in the dissent in *Haugeberg* which states that when "making

39. Haugeberg v. Haugeberg, 258 N.W.2d 657, 662 (N.D. 1977).
40. 259 N.W.2d 41 (N.D. 1977).
41. Hultberg v. Hultberg, 259 N.W.2d 41, 44 (N.D. 1977).
42. *Id.*

property divisions. . . [the North Dakota Supreme Court] should consider property matters in divorce cases as we would consider property matters in dissolving a partnership."[43]

If it can be shown that during the course of the marriage the wife contributed to the accumulation of property and income, the court may be inclined toward an equal distribution of the property although it is separately owned by the husband.[44]

In light of *Haugeberg, Haberstroh, Hultberg,* and despite the strong dissent in these cases and others imploring the court to adopt the concept of an equal division of the marital property whether acquired before or during the marriage, it appears that the present North Dakota Supreme Court may be unwilling to embrace the "common or equitable ownership" concept, that property acquired by the parties during the marriage, or property acquired before the marriage which has substantially appreciated in value during the marriage because of the joint efforts and contributions of the parties, although held solely in the name of one of the parties, should be divided equally.

In summary, under present North Dakota law, *Davis* will apply where the husband transfers appreciated property, pursuant to a property settlement or court ordered property division, to his wife in return for a full relinquishment of his obligation to provide support and of her right to receive present or future alimony. *Davis* will also apply where there is a transfer of property held in the husband's name in addition to an award of alimony. In light of the application of *Davis* in *Wallace* and *Wiles* under laws that appear to be similar to North Dakota's, this writer has little reason to believe that the Federal District Court for North Dakota, the Eighth Circuit Court of Appeals or the United States Tax Court would rule differently. This is because there is no North Dakota Supreme Court decision applying the "equitable co-owners" theory to property which was acquired prior to or during the marriage, held in the name of one partner only, and which has appreciated in value due to the joint earnings and contributions of the partners during the marriage.

C. TRANSFERS OF JOINTLY-HELD PROPERTY

Under present law the division of property held in joint-

43. 258 N.W.2d at 667 (Vogel, J., dissenting).

44. *See* Haberstroh v. Haberstroh, 258 N.W.2d 669, 673 (N.D. 1977). The court in affirming an unequal division of farm property to the husband stated that the wife had left the farm and that since

tenancy is somewhat ambiguous. In the event that there is an *equal* division of joint-tenancy property there will be no adverse tax consequences to either party. In Revenue Ruling 56-437 the Internal Revenue Service stated the following:

> The conversion, for the purposes of eliminating a survivorship feature, of a joint tenancy in capital stock of a corporation into a tenancy in common is a nontaxable transaction for Federal income tax purposes. Likewise, the severance of a joint tenancy in stock of a corporation, under a partition action instituted under. . . [Colorado law] compelling partition and the issuance of two separate stock certificates in the names of each of the joint tenants, is a nontaxable transaction.[45]

Additionally, in light of *Davis,* the equal division of property held as co-owners, such as property held as tenants in common, results in no adverse tax consequences.

The practitioner, however, must confront the implications of the Service's position dealing with the *unequal* division of joint tenancy property on divorce. In Revenue Ruling 74-347 the Service reviewed the division of property on divorce in a state where the principles of *Davis* applied. The Service stated the following:

> A husband and wife were married in 1953 when each had approximately $600 in assets. Neither received an inheritance or gift of any significance during the marriage. Both husband and wife were employed throughout the marriage and their earnings were commingled so that is was impossible to determine whose earnings were used to purchase any given asset.
>
> In 1973, the wife was granted a divorce. The total assets owned by the husband and wife had a net fair market value of $110,000 at the time of the divorce. The jointly-owned property, that is, the property either purchased with earnings of both the husband and the wife or received by means of a completed gift, consisted of several assets having a combined net fair market value of $70,000. The husband's separately owned property had a

she had left she had not contributed to any property or income accumulation for a three-year period prior to the divorce. *Id.*

45. Rev. Rul. 56-437, 1956-2 C.B. 507.

> net fair market value of $40,000. The wife owned no property in her own capacity.
>
> The divorce decree awarded the wife jointly-owned property with a net fair market value of $55,000. The husband was awarded the remaining jointly-owned property which had a net fair market value of $15,000 and all of his separately-owned property with a net fair market value of $40,000. The adjusted basis of all jointly-owned property received by the wife was $29,500, but $4,000 of such adjusted basis was attributable to personal furniture with a net fair market value of $2,000.
>
> In addition to the property settlement, the divorce decree also granted the wife alimony and support for the minor children.[46]

The Commissioner relied on *Davis* and ruled that,

> since the wife's interest in her husband's separately-owned property was not the equivalent of co-ownership, the *unequal* division of jointly-owned property awarded the wife *constitutes a taxable exchange* of a *portion* of the husband's *jointly-owned property* for the wife's marital rights in the *husband's separately-owned property.*[47]

Furthermore, the husband realized a gain of $20,000 determined as follows:

Fair market value of jointly-owned property received by the wife	$55,000
One-half [fair market value] share of jointly-owned property (½ of $70,000)	35,000
Excess of jointly-owned property received by wife [gain to husband][48]	$20,000

In Revenue Ruling 74-347 all of the joint tenancy property held by the parties was lumped together. There was no breakdown of the property to determine if any piece of property's basis was in excess of the fair market value so that a normal sale of that piece of property would have resulted in a loss rather than a gain. The Tax

46. Rev. Rul. 74-347, 1974-2 C.B. 26-27.
47. *Id.* at 27 (emphasis added).
48. *Id.* at 27.

Court, in *Worthy W. McKinney v. Commissioner,*[49] commented on the application of Revenue Ruling 74-347 and noted the following:

> [In a divorce,] [n]either party can. . . have a net gain or loss by reason of the overall transaction settling their rights arising out of the marriage contract. Each party will, however, have a gain or loss as to specific items of property (as distinguished from inchoate rights) transferred pursuant to the divorce at a value which exceeds or is less than the cost basis of that item of property in the hands of the person transferring it. . . .[50]

The Tax Court noted that although the husband may realize a gain on the transfer to his wife of some property owned separately by him, he may recognize losses on items transferred which they owned jointly or on other items owned separately. The gain or loss must be figured on an item-by-item basis to determine the net gain or loss to the transferring spouse.

In light of Revenue Ruling 74-347 and *McKinney,* it appears that if there is an unequal division of joint tenancy property so that the husband retains his separate property and receives a lesser share of the joint tenancy property, he will realize a gain equal to the excess fair market value of the property received by the wife, reduced by one-half of the fair market value of the jointly held property. This gain may be reduced by losses he may have incurred in the transfer of other property with a basis exceeding the fair market value.

The question left unanswered is whether there is a realized gain when there is an unequal division of joint tenancy property if the wife received more than one-half of the jointly held property and the husband retained no separate property of his own. It is the writer's opinion that the husband would still realize a gain because of the presumption created in *Davis* that the value of the wife's marital rights is equal to the fair market value of the property received in the divorce.[51] Therefore, if she received more than half of the joint tenancy property she, in effect, would have released her marital rights in exchange for the excess joint tenancy property.

D. PROBLEMS WITH AND POSSIBLE SOLUTIONS TO THE TAX IMPLICATIONS OF THE TRANSFER OF PROPERTY ON DIVORCE

49. 64 T.C. 263 (1975).
50. Worthy W. McKinney v. Commissioner, 64 T.C. 263, 268 (1975).
51. 370 U.S. at 72.

One solution if the husband owns property separately is to place all of the husband's separately-held property into joint tenancy prior to the filing of the divorce action or during the divorce, and then divide the property equally, or to place that amount necessary to effect the proposed property settlement into joint tenancy and then divide it equally.[52] Pursuant to the property settlement or divorce decree, if the joint tenancy property were divided equally it would appear that there would be no adverse income tax consequences. It should be noted, however, that the timeliness of the creation of the joint tenancy might be challenged by the Service as a sham to avoid the implications of *Davis*. The advisability of such a transfer in light of the possibility of the death of one of the parties during the proceedings must also be recognized.

The classic settlement in which the wife is awarded the house that is normally owned in joint tenancy, all of the furniture, and the newer automobile will usually generate adverse tax consequences to the husband. This is especially true when the fair market value of the house exceeds the basis for the husband's transfer of his one-half of the house. Because the furniture and car may have a fair market value less than their basis, in light of *McKinney*, it is essential that there be a valuation of the furniture and car to reflect the fact that their fair market value is less than their basis. This will generate losses which the husband can use to offset the potential gain on the transfer of his interest in the house.

Another common practice which can give rise to adverse tax consequences occurs when the home is sold either during or after the divorce, and an agreement giving the wife a greater share of the sales proceeds is made. Normally if the parties' residence is sold while they are still married, the gain realized upon the sale will not be taxable if the sale proceeds are invested in another home of equal or greater value.[53] If, however, the husband vacates the home prior to the divorce or is ordered to leave the home so that the home is no longer his principal residence when it is sold, the husband may have lost his right to claim the home as his principal residence.

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52. The creation of joint tenancy interest will result in no gift tax consequences. *See* I.R.C. § 2515. In *Davis*, however, the Supreme Court implied that it would reject the concept of the gifting of substantially appreciated property from one spouse to the other and having an equitable distribution of the same during or prior to a divorce. The Court noted that it would not be fettered by the provisions of the state and gift tax law regarding the transfer of property from one spouse to the other during divorce proceedings or settlement negotiations. Rather the Court would look to the true nature of the transaction. 370 U.S. at 69. *See infra* note 130.

53. I.R.C. § 1034.

Furthermore, he may be subject to the realization and recognition of his share of the gain derived from the sale of the home.[54]

For example, assume the parties agree to an unequal distribution of the proceeds of the sale of a home which was jointly held. The distribution gives the wife 75 percent of the proceeds and the husband 25 percent of the proceeds. Further assume that before the home is sold and prior to the divorce or during the course of the divorce proceedings, the husband vacates the home or is ordered to leave the home and, as a result, he establishes a new residence. Further assume that the home in question has a basis of $25,000 and is sold for the sum of $75,000, which results in a gain of $50,000. In this situation if the wife were to receive 75 percent of the proceeds and the husband were to receive 25 percent of the proceeds, the wife would have a gain of $37,500 and the husband would have a gain of $12,500. If the husband has lost his right to claim the home as his principal place of residence, the $12,500 gain could not be deferred under section 1034 of the Internal Revenue Code in the event that he reinvested the money in a new home. In addition, because of the unequal distribution of the proceeds derived from the sale of the joint tenancy property, the husband may have a potential gain of $12,500 because his wife received a greater share of the proceeds as part of the property settlement.

As long as the wife remains in the home or is eligible to claim the home as her principal place of residence, any gain derived from the sale of the home or any proceeds derived as a result of an unequal distribution of the proceeds will not result in a taxable gain to her under section 1034. But the gain or derived proceeds must be invested within eighteen months in a new home that has a value equal to or greater than her basis in the old home.

E. OTHER TAX CONSIDERATIONS IN THE TRANSFER OF PROPERTY

The general principles which apply to the taxation of gains or losses on transfers of property also apply to a *Davis*-type transaction, or to a disproportionate transfer of joint tenancy interests, or to interests held as tenants in common. If a taxpayer transfers a capital asset as defined under section 1221 of the Internal Revenue Code, the tax imposed will be at capital gain rates.[55] Additionally, if a taxpayer transfers an asset used in his trade or business or held for the production of income or for

54. Treas. Reg. 1.1034-1(c)(3)(i), 25 Fed. Reg. 11910 (1960).
55. I.R.C. § 1221.

investment purposes, section 1231 permits capital gain treatment on all gains and treats all losses as ordinary losses.[56]

Where it appears that the husband will have to make a lump sum transfer of either appreciated real property or appreciated personal property, or both, to his wife as a result of the divorce, the transfer should be made after the divorce decree because section 1239 provides that any gain in a transfer between a husband and wife will be taxed at ordinary rates and no losses will be recognized on these transfers.[57] Therefore, if the transfer is made prior to the final decree of divorce, all gain which normally would be capital gain under *Davis* will be treated as ordinary income and subject to the full ordinary income tax rates. Further, any losses (whether ordinary or capital) which the taxpayer could have recognized because the fair market value of the property transferred was less than its basis will not be allowed.

Section 267 of the Code provides that any losses in a transaction between the husband and wife are prohibited.[58] The Tax Court, however, has rejected the Service's contention that to qualify as an ordinary loss under the Code,[59] the sale must be contemplated for profit rather than for personal reasons such as a divorce.[60] Therefore, the losses realized by the husband when he transfers property to his wife which has a basis that exceeds the fair market value will be recognized and deducted as ordinary losses if he held the property for less than one year. The losses will be capital losses if he held the property for more than one year, and if the sale of the transferred asset would have provided a deductible loss had there been no divorce.[61]

It may be possible to structure a loss in favor of the husband in situations that normally would be taxed as either a capital gain or ordinary income. This can be done by valuing the asset at an amount less than its basis and, after the divorce, conveying the asset to the wife in satisfaction of the husband's obligation imposed under the divorce decree, in other words, in full satisfaction of her property rights. The husband will receive either a capital loss or ordinary loss, and the wife will receive the property at the agreed fair market value with no adverse tax consequences. This technique might be applied if the husband holds certain common stocks in which he has a high basis, but the fair market value is down and the

56. I.R.C. § 1231.
57. I.R.C. § 1239.
58. I.R.C. § 267.
59. I.R.C. § 165(c).
60. *See* William E. Robertson, 55 T.C. 862, 865-66 (1971).
61. *Id. See also* Hultberg v. Hultberg, 259 N.W.2d 41 (N.D. 1977).

dividend yield is good. Another such possibility arises when the husband owns short term bonds or treasury bills nearing maturity. If the wife is agreeable, the husband could use this method and generate a loss to offset against potential gain inherent in other provisions of the property settlement or divorce decree.

If the property transferred by the husband is appreciated, tangible, personal property which has been depreciated, the recapture provisions of section 1245[62] apply. These provisions tax gain realized as ordinary income to the extent of depreciation taken up to the asset's original basis. In addition, the recapture provisions of section 1250[63] govern the taxability of gain realized on the transfer of real property which has a fair market value in excess of its basis. The gain realized is treated as ordinary income equal to the difference between the depreciation allowed under the straight line method of depreciation and the excess depreciation taken under an accelerated method of depreciation.

If the husband transfers an item of tangible, personal property which has been used in his trade or business and he has taken investment credit on that property, section 47[64] imposes a recapture of some or all of the investment credit depending upon the period of time the husband has held the asset.

In the unlikely event the husband was required to transfer part or all of his interest in a partnership, the transfer may involve the imposition of tax at the ordinary rates upon the value of appreciated inventory or accounts receivable held by the partnership.[65]

If the husband and wife do not come to an agreement on the fair market value of the assets transferred which have a potential recapture of depreciation under sections 1245 and 1250, the Service has the power to impute a fair market value based upon the actual fair market value of the assets transferred. Thus, if a transfer of appreciated, tangible, personal property; intangible, personal property, such as stocks and bonds; or appreciated real estate from the husband to the spouse in full satisfaction of her marital property rights is contemplated, it is imperative that the parties set forth in the separation agreement or recite in the divorce decree the agreed fair market value of the items to be transferred. Because both parties will usually be represented by counsel who have been involved in extensive negotiations during the proceedings, it will be

62. I.R.C. § 1245.
63. I.R.C. § 1250.
64. I.R.C. § 47.
65. I.R.C. § 751.

presumed that the parties are dealing at arms-length in establishing value. Thus, the agreed value should withstand challenge by the Service.

Rather than transfer property to the wife directly, the husband may choose to sell the appreciated property to a third party under an installment contract and report the income as the installment payments are made under the contract. The part of the gain realized may be treated as ordinary income in light of the recapture provisions of sections 1245 and 1250, and the balance of the gain would be subject to favorable capital gain treatment. The husband might then agree to pay an amount as alimony equal to the installment payments received. Thus, he could recognize the payments received under the contract and offset them by a corresponding deduction for the alimony payments. If such a course is chosen, the husband should not sell the real property and then assign his rights under the installment contract to the wife. This will result in an immediate realization and recognition of all the gain under the installment contract even though the payments due under the contract run for several years.[66] The husband may pledge the installment contract as security for his obligation to pay periodic alimony. If this course is chosen, care must be taken to insure the actual receipt of the installment payments under the contract and the actual payment of the periodic alimony. This will assure the husband of his right to report the income received under the contract on the installment basis and to deduct alimony payments.

F. POSSIBLE AVENUES AROUND DAVIS

The application of *Davis* can be avoided if the husband makes a lump sum cash payment to the wife in return for a full relinquishment of her property rights and her present and future right to receive alimony.[67] In addition, *Davis* can be avoided if the husband agrees to pay a principal sum which can be actuarially determined over a period of ten years or more, or over a shorter period if the payments are subject to termination upon the death of either party, remarriage of the wife, or a substantial change in the economic circumstances of the husband.[68]

Rather than an outright transfer to the wife of appreciated

66. I.R.C. § 453(d)(1). *See also* Swaim v. Commissioner, 417 F.2d 353 (6th Cir. 1969), *aff'g* 50 T.C. 302 (1968).
67. I.R.C. § 71(b).
68. I.R.C. § 71(c)(2).

property held solely in the husband's name or an unequal division of jointly-owned property, one possibility, if the property has appreciated in value, is to borrow against the property or refinance the property if it is subject to an existing mortgage. The proceeds derived could be given to the wife in lieu of a lump sum property award. The husband could retain his separate property or receive his wife's joint interest, and upon his sale of the property he would realize a gain of the purchase price over his basis. The husband would then have time to plan for the gain he might realize upon the sale and perhaps generate a loss to offset the gain to be realized upon the sale of the property or at least assure a source of money to pay the additional tax due as a result of the gain.

III. ALIMONY

The Internal Revenue Code requires the wife to include as ordinary income those periodic payments she receives after a decree of divorce or a decree of separate maintenance.[69] The periodic payments must discharge a legal obligation imposed upon the husband or incurred by him because of the marital or family relationship pursuant to a court order, or decree of divorce, or a written separation agreement.[70] If the husband's payment qualifies under section 71(a) or (c) as a periodic payment which is includable in the gross income of the wife, the husband is generally entitled to deduct the amount paid from his gross income.[71]

The payments under section 71 apply only to payments made because of the family or marital relationship and in recognition of the general obligation of support which is made specific by a court decree, instrument, or agreement. Thus, a lump sum payment or payments which constitute the repayment of a bona fide loan previously made by the wife, do not come within the purview of section 71(a) or (c).[72]

Because alimony payments are now deductible from the gross income of the obligor, many individuals who do not itemize deductions and file a 1040-A tax return can now deduct alimony payments. This means that even in the low-income or middle-class divorces, it may be wise from the tax planning standpoint to have the husband pay alimony rather than additional child support.

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69. I.R.C. § 71 (a) & (c).
70. Treas. Reg. 1.71-1(b)(2) & (3), 25 Fed. Reg. 11402 (1960).
71. I.R.C. § 215.
72. Treas. Reg. 1.71-1(b)(4), 25 Fed. Reg. 11402 (1960).

As has been previously discussed, a recurring problem in a divorce is the disposition of the family home. Depending on whether the home is held in joint tenancy, tenancy in common, or sole ownership in either the husband or wife, the possible dispositions of the home can result in different tax consequences. A creative application of the requirement to pay alimony for a certain period of time to assist in the payment of principal, interest, taxes, and insurance can be used to meet the parties' desire to maintain the home for the wife and children for that period of time. The time period can run until the occurrence of a contingency such as the sale of the home, the children attaining majority, the satisfaction of the underlying mortgage, the death of either party, or the remarriage of the wife.

Assume the parties own a home as joint tenants, and the home is subject to a mortgage which obligates both parties. Rather than sell the home immediately, the parties can continue to own it as joint tenants and agree that the wife is to pay the mortgage from her alimony. All of the alimony would be income to the wife, but because she would pay all the interest on the mortgage, she would have a corresponding deduction.[73] The husband could agree to pay part of or all of the taxes and deduct those payments.[74]

If the divorce decree or the property separation agreement provided that the wife was to receive support money without specifically designating the nature of the support, for instance, alimony or child support, and she was required to use that support money to pay all of the principal and interest payments on the mortgage which was in both parties' names, one-half of the payments made toward the principal and interest would be deemed to be alimony income to the wife under section 71.[75] This would result in unexpected alimony income to the wife. As such, in the event the parties own real property as tenants in common, and a portion of the husband's support payments are allocated toward the payment of principal, interest, taxes, and insurance on the property, one-half will be deemed alimony provided the husband is required to make the payments for more than ten years from the date of decree, or if his obligation to make the payments is deemed periodic.[76]

Assume the home is owned solely by the husband, and he is solely responsible for the payment of the principal and interest,

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73. I.R.C. § 163.
74. I.R.C. § 164.
75. Rev. Rul. 67-420, 1967-2 C.B. 63.
76. *Id.*

taxes, and insurance. If the wife is allowed to continue to live in the home rent-free until the home is sold or otherwise disposed of, all payments made by the husband are not deductible by him as alimony.[77] He will still be allowed to deduct his interest payments and taxes.

In the event the practitioner is handling the disposition of the parties' home which is owned as joint tenants, and the economics of the divorce make it appear that the husband will have to continue paying the principal and interest on the mortgage, the taxes, and the insurance, the best tax plan may be the following:

1. Have the parties stipulate to the fair market value of the property.

2. As to any equity in the property, reach an agreement on how to divide this equity when the home is sold. Consider a fifty-fifty division, all to one or the other, or some other disproportionate division remembering the implication of *Davis* and Revenue Ruling 74-347.

3. Prior to the final decree of divorce, convey the property to the parties as tenants in common and sever the joint tenancy. Have each party agree to be responsible for the payment of one-half of the mortgage, taxes, and insurance.

4. In the divorce decree, require the husband to pay the wife alimony equal to one-half of the principal and interest, taxes, and insurance necessary to maintain the home. Have the husband continue to pay his share of the principal, interest, taxes, and insurance necessary to maintain his one-half interest in the home, and further require that the wife pay one-half of the principal, interest, taxes, and insurance to maintain her one-half interest in the home.

5. Designate the husband's payments to the wife as alimony which is subject to termination in the event of the happening of a contingency such as his or her death, her remarriage, or the inability of the husband to continue making the payments because of a change in his economic circumstances.[78]

Under this arrangement, the following tax consequences should result:

1. All payments made by the husband to the wife should be deductible as alimony.

2. The payments made by the husband toward his one-half of the interest and taxes will be deductible because of his ownership of one-half of the home.[79]

77. James Park Bradley, 30 T.C. 701, 707 (1958).
78. Treas. Reg. 1.71-1(d)(3)(i)(a), 25 Fed. Reg. 11402 (1960).
79. I.R.C. §§ 163-64.

3. The wife will realize income of the alimony received but will have a deduction because of her payment of one-half of the interest and taxes.[80]

Since neither party may deduct the insurance premium paid, the husband might be required to pay additional alimony to cover the wife's share of the insurance payments. This would result in additional income to the wife and an increased deduction to the husband. This would be advantageous if the husband was in a high tax bracket and the wife was in a low tax bracket.

Payments received by the wife for support of the minor children of the husband are not taxable as alimony.[81] If, however, there is no designation of the nature of the support and maintenance payments in the separation agreement or decree of divorce, all payments made to the wife are deemed alimony.

In *Commissioner v. Lester*[82] the Supreme Court held that because no designation was made in the divorce decree or separation agreement concerning the nature of the payments made by the husband to the wife (there was no breakdown as to what portion of the payments was for child support and what portion of the payments was for alimony), the entire payment was deemed to be alimony.[83] Thus, the failure to designate the nature of the payments to be received by the wife as alimony or child support, will result in the entire payment being deemed alimony.

Frequently the parties have acquired many income-producing assets during the course of the marriage. Rather than effect a disposition or division of these assets, the parties can agree that the husband should retain ownership because of his managerial abilities. In return the husband can agree to pay his wife alimony, child support, and a lump sum of money. Any payment which is a true lump-sum payment will result in no alimony deduction for the husband and no income tax consequences to the wife because the payment will not be deemed a periodic support payment.[84]

Where the husband agrees to pay a lump sum of money in installments to discharge his wife's marital property rights, the Internal Revenue Code provides that as the payments are made, they will be deductible as alimony if they are made over a period of more than ten years.[85] The yearly deduction allowed is ten percent

80. *Id.*
81. I.R.C. § 71(b).
82. Commissioner v. Lester, 366 U.S. 299 (1961).
83. *Id.* at 306.
84. I.R.C. § 71(c).
85. I.R.C. § 71(c)(2).

of the total principal sum to be paid.[86] There may be no prepayment of future installments, but payment of delinquent installments for prior taxable years may be paid in a lump sum,[87] and the payments are fully deductible to the husband and income to the wife. This gives rise to an opportunity for some tax planning in the event the soon-to-be-divorced parties are cooperative.

Assume the husband holds certain investments in real estate which if sold would result in a capital gain, but because of market conditions it is not possible to sell or refinance the property at the time of the divorce to generate cash to provide the wife with a lump sum payment. Further assume that, as a result of the divorce, the husband is obligated to pay his wife the sum of $100,000 over ten years and one day at $10,000 a year. Further assume that after the divorce the wife purchases from the husband an apartment building which generates substantial paper losses for a minimal down payment and the obligation to pay the sum of $100,000 at six percent (6%) interest in equal installments.

As each periodic alimony payment becomes due the husband would write his wife a check for the amount due and she would write him a check for installment payment due under the note. The husband would deduct his alimony payment and the wife would realize the alimony income. Some of the alimony income recognized by the wife would be sheltered by the losses generated by the excess depreciation from the rental property. The income received by the husband upon the wife's payments could be reported on the installment basis and taxed at favorable capital gain rates.[88] Of course the interest payments received would be ordinary income to the husband.

Another planning opportunity requires the husband to become intentionally delinquent on his alimony payments for several years. The delinquency is in anticipation of the recognition of a capital gain resulting from the sale of an investment which cannot be sold at the time of the divorce. Upon the sale of the investment, the husband would realize and recognize capital gains. Only forty percent of the money realized would be included in his ordinary income. He could then pay his wife the alimony arrearages from the gain realized and deduct the entire delinquent alimony payment.

The payment of alimony rather than additional child support may actually be beneficial to the husband. Assume that the parties

86. *Id.*
87. Treas. Reg. 1.71(d)(2), 25 Fed. Reg. 11402 (1960).
88. I.R.C. §§ 1001, 453.

have two children and it appears he would have to pay the sum of $250 a month per child or $500 as child support. If the husband is in the fifty percent tax bracket, it would be better for him to pay his wife $3,000 a year as alimony and $1,500 a year for each child as support. The wife should pay little or no income tax on the $3,000 received as alimony and, of course, would pay no tax on the child support. Of course the wife would have to pay taxes on the alimony she received if she had additional income from self-employment or outside sources. The husband could deduct all of the alimony paid and, assuming he claimed the children as dependents for tax purposes receiving $1,000 exemption for each, he would have an income tax savings of $2,500. Assuming this arrangement was made, the husband still would have an actual cash expenditure of $6,000, but because of the $2,500 income tax savings, he could use $2,500 which ordinarily would have gone to pay taxes to apply toward his $6,000 obligation.

In addition to the "ten-year installment rule," a principal sum awarded under a divorce decree or separation agreement which is to be paid in installments over a period ending *ten years or less* from the date of the decree or agreement will be deemed installment payments in discharge of a principal sum if certain conditions are met. These conditions are that the payments are subject to termination upon the happening of *one or more* of the following contingencies: the death of either spouse; the remarriage of the wife; or a change in the economic status of either spouse; *and*, the payments are in the nature of alimony or an allowance for support which arises out of the marital obligation.[89] The contingencies of the death of either party, the remarriage of the wife, or a change in the economic status of either spouse *may be* recited in the divorce decree, separation agreement, property settlement agreement, or *imposed by local law.*[90]

Because of the "*contingencies exceptions*" to the ten-year rule governing periodic payments, if the husband is required to pay support periodically to his wife for a period which is less than ten years, as when the husband is required to pay the sum of $100,000 in installments of $20,000 a year for five years, the payments made will be deemed alimony. Of course the husband's obligation to make these periodic payments must arise out of his support obligation and must be subject to termination because of the death of either party, the remarriage of the wife, or a change in the

89. Treas. Reg. 1.71-1(d)(3), 25 Fed. Reg. 11402 (1960).
90. Treas. Reg. 1.71-1(d)(3)(ii)(a), 25 Fed. Reg. 11402 (1960).

economic status of either party. Thus, if the husband is to pay a lump sum of support over a period which is less than ten years, good practice dictates that the settlement agreement or divorce decree provide that the payments terminate upon the happening of one of these contingencies. Further, the divorce decree or settlement agreement should provide that the payments are made as a part of the husband's support obligation to the wife arising out of the marital relationship.

If the happening of a contingency such as death, remarriage, or a change of economic circumstances will result in the termination of the husband's support obligation to his former spouse under state law, the periodic support payments of a principal sum over a period of less than ten years will still be deemed alimony. This is true even if the separation agreement or divorce decree fails to specify the contingencies which would terminate the husband's obligation to pay alimony.[91]

Assume a North Dakota divorce in which the husband was required to pay his wife support equal to the sum of $100,000 over a period of five years in five equal payments, but the separation agreement or decree of divorce failed to provide that the payments were to cease in the event of death of either party, remarriage of the wife, or a change in the economic status of the parties.

North Dakota law imposes these "contingencies" since it provides that the husband's support obligation to his wife terminates upon the death of either party, the remarriage of the wife, or a change in the economic circumstances of either party.[92] In *Haugeberg v. Haugeberg,*[93] the dissent commented on the general law of North Dakota and noted that alimony (unless specifically ordered) ends when either party dies or the wife remarries.[94] Further, statutory law provides that if the economic conditions of the parties change, either party may seek a modification of alimony and unless otherwise ordered, alimony ends upon death.[95] If the district court retains its jurisdiction to determine alimony at a future date, or if it makes an initial award of alimony, the matter of alimony is subject to modification should the economic status of either party change.[96]

If the wife will receive a lump sum to be paid in installments

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91. *Id.*
92. *See infra* notes 93-95 and text referenced thereto.
93. 258 N.W.2d 657 (N.D. 1977).
94. *Id.* at 668. (Vogel, J., dissenting). *See, e.g.*, Wiederanders v. Wiederanders, 187 N.W.2d 74 (N.D. 1971); Stoutland v. Stoutland, 103 N.W.2d 286 (N.D. 1960).
95. N.D. CENT. CODE § 14-05-24 (1971).
96. *Id.*

over a period less than ten years, the payments must be in the nature of alimony or support in addition to the possibility of termination upon the happening of one of the "contingencies" reflected in the separation agreement, divorce decree, or imposed by local law. It is not sufficient to provide a lump sum of money which is to be paid on an installment basis over a period less than ten years even though the payment is subject to termination upon the happening of a contingency. It must be specifically recognized that the sum of money to be paid each month is designated for the support of the wife, and that the payment is made because of the husband's obligation to provide support to the wife. Of course, in light of *Becker,* this leaves the husband open to a request for additional alimony if the wife's economic circumstances change materially.

The occasion may arise in which the practitioner representing the wife wants to be absolutely sure that the payment she receives will be non-periodic in order to avoid taxation to her upon receipt of the payment. In order to insure that the payments she receives will be deemed non-periodic and in discharge of the principal sum, the payments should be paid over a period less than ten years. Additionally, the payments should be contractual in nature with a specific recital in the agreement or decree that the payments are in lieu of the right to a property settlement and alimony, and that they are not made because of the husband's obligation of support. Furthermore, it would be wise to specify that the payments are an obligation imposed upon the husband's estate, and if the wife dies the payments must be made to her heirs or estate. Under North Dakota law, if the payments to the wife arise under a contract and not because of the husband's obligation of support, the amount of the payments due under the contract cannot be modified.[97]

If the practitioner is attempting to establish the contractual nature of the payments, care must be taken in the draftsmanship of the separation agreement or decree of divorce. Care must be used because if either document provides that the payments are made as part of the husband's support or alimony obligation, the payments may be deemed alimony. Thus under state law the court would have the power to modify or terminate the payment in light of a change in the economic circumstances of the parties.[98]

If the parties agree that the principal sum shall be paid over a period of more than ten years, it is important to establish when the

97. Sinkler v. Sinkler, 49 N.D. 1144, 194 N.W. 817 (1923).
98. Kack v. Kack, 169 N.W.2d 111 (N.D. 1969).

installment payments commence and when they expire.[99] Care must be taken to establish that the payments continue for at least 121 months. The date to begin computation of the ten year period is that date of the divorce decree or the date of the written separation agreement which gives rise to the obligation to make the periodic payments over a period of more than ten years.

IV. MISCELLANEOUS ALIMONY QUESTIONS

A. LIFE INSURANCE PREMIUMS

In many divorce cases the parties seek to insure a source of payment of money due the spouse under the decree in the event of the death of the husband. Many practitioners require that the husband have an insurance policy, with the proceeds payable to the wife to satisfy his obligations under the decree in the event of his death. Often the husband wants to deduct the sum required to pay the annual premiums to maintain the insurance. Generally, the husband may only deduct the insurance premiums paid pursuant to a divorce decree or separation agreement if he names the wife as the irrevocable beneficiary and divests himself of all ownership and control of the policy through an absolute assignment of the policy to her.[100] If such steps are taken he will have an alimony deduction and she will have to include the premiums paid as income. If the husband fails to assign ownership of the policy to his wife, yet pays all of the premiums and has named her as the beneficiary, he will not be afforded a deduction.

If the husband places a condition upon the assignment of the policy to his wife; places a contingency upon her right to be the beneficiary under the policy; reserves the right to later own the policy; or reserves the right to designate beneficiaries in the event she predeceases him; he may not claim the payment of premiums as alimony, even though he has assigned the policy to her and has named her as beneficiary.[101] Additionally, in light of *Davis,* if the policy transfer to the wife has a cash value, the husband will realize a gain equal to the cash value of the policy less the amount of the premiums paid during the length of the policy which went toward

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99. Joslin Sr. v. Commissioner, 52 T.C. 231 (1969), *aff'd.*, 424 F.2d 1223 (7th Cir. 1970). In *Joslin,* the husband was denied an alimony deduction even though the payments qualified as alimony because the payments were not payable over a period of ten years. The obligation to make the payments dated from the divorce decree and not the earlier settlement agreement.

100. I.R.C. Pub. No. 17.

101. Robert L. Montgomery, Jr., ¶ 54, 185 T.C.M. (P-H); Lois A. Cole, ¶ 71, 074 T.C.M. (P-H); William J. Gardner v. Comm'r, 14 T.C. 1445, (1950), *aff'd,* 191 F.2d 857 (6th Cir. 1951).

the purchase of the insurance protection. That portion of the gain attributed to the accumulated interest will be taxed as ordinary income. Therefore if the husband contemplates the transfer of the ownership of a whole-life policy to his wife pursuant to the divorce, all of the cash value of the policy should be withdrawn prior to the assignment to avoid unexpected taxable gain.

B. MEDICAL BILLS

Generally a husband's payment of the wife's medical and dental expenses pursuant to a divorce decree or separation agreement will be includable in the wife's gross income and deductible by the husband as alimony if the following conditions are met:

1. No principal sum is specified in the decree or agreement, therefore he pays all incurred medical bills; or,

2. If a specific yearly amount is established and that amount is to be paid over a period greater than ten years, or the payment of the specific sum is subject to a contingency such as the death of either party, the remarriage of the wife, or change in economic status of either spouse.[102]

If the decree or separation agreement provides that the husband will pay his wife's dental or medical bills incurred prior to the divorce, and following the divorce the husband pays those bills, he is afforded no alimony deduction because the payment is deemed a lump-sum payment rather than a periodic payment.[103] Additionally he will lose his normal medical and drug-expense deductions since, because the parties are divorced, the payments are not made for his dependent.[104]

If there are substantial outstanding medical bills incurred by the wife prior to the divorce which it appears that the husband is going to be obligated to pay, it is recommended that the husband pay the bills prior to the entry of the divorce decree. As long as the payment is made while the parties are still married, the husband will be allowed to deduct the medical expenses on his personal tax return as a regular medical expense deduction.[105]

C. LEGAL FEES

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102. Rev. Rul. 62-106, 1962-2 C.B. 21.
103. Aline S. Fisher, ¶ 56, 098 T.C.M. (P-H).
104. I.R.C. § 213.
105. *Id.*

In *United States v. Gilmore,*[106] the Supreme Court rejected a husband's claim that he was entitled to deduct a portion of his legal expenses attributed to resisting his wife's claims for property and alimony. The Court held that such expenses were better characterized as personal or family expenses because the wife's claims stem from the marital relationship and not from income-producing activity.[107]

Following *Gilmore,* in *United States v. Patrick,*[108] the Court held that no deduction was available to the husband for legal fees expended in connection with a settlement agreement negotiated to protect his publishing company from his wife's claims arising during the divorce.[109] In the event the court orders the husband to pay the wife's attorney's fees, he cannot deduct the sums paid.[110]

Legal expenses incurred and paid for by the wife for services to her in connection with the divorce or separation are deductible to the extent that they are attributed to the production or collection of amounts includable in gross income as alimony payments.[111] Since the wife is allowed this deduction, it is recommended that the husband pay additional alimony for a period to equal the amount of legal fees he normally would have to pay on her behalf and then provide that the wife pay her own legal fees. The wife would recognize some additional alimony income but should get a corresponding deduction for the legal fees she paid.

It is important that the attorney for the wife segregate his charges into three areas: fees attributed to the securing of taxable alimony; fees attributed to the securing of non-taxable property settlement; and fees attributed to securing child support. If there is a failure by the wife's attorney to designate fees, the Service has the power to determine what portion of her legal fees are attributed to the securing of alimony, a non-taxable property settlement, and child support.[112]

The preparation of the statement for attorney's fees sent to the husband should also specify what portion of the incurred fees relate to the various services performed in conjunction with the divorce. If the statement prepared by the husband's attorney segregates on a time allocated basis the time required for the resolution of tax

106. 372 U.S. 39 (1963).
107. United States v. Gilmore, 372 U.S. 39, 51-52 (1963).
108. 372 U.S. 53 (1963).
109. United States v. Patrick, 372 U.S. 53, 77 (1963).
110. United States v. Davis, 370 U.S. 65, 74-75 (1962). *See also* Arthur B. Baer v. Commissioner, 16 T.C. 1418 (1951) *aff'd on issue of non-deductibility of legal fees,* 196 F.2d 646 (8th Cir. 1952).
111. Jane U. Elliott v. Commissioner, 40 T.C. 304 (1963). *See also* Hazel Porter, ¶ 66, 079 T.C.M. (P-H), *aff'd,* 388 F.2d 670 (6th Cir. 1968).
112. Marcelle H. Howard, ¶ 75, 170 T.C.M. (P-H).

problems arising in the divorce, the difficulty of the tax questions presented, the amount of taxes involved, the fees attributed to a resolution of the tax problem, and further sets forth the fees charged for the non-tax aspects of the divorce, the portion of the fees incurred for the tax advice will be deductible.[113] Thus, it is very important that both attorneys in a divorce action keep accurate records of the portion of their time and fees which relate to the tax implications of the divorce.

D. ALIMONY TRUSTS

Generally speaking, if a trust is created with the purpose of making payments to a divorced or separated wife, all payments made from it, whether from trust corpus or income, are includable in her income as ordinary income.[114]

If the husband transfers appreciated property to the alimony trust with a corresponding release of the wife's right to receive future alimony and in settlement of her property rights, *Davis* will apply and the husband will realize a gain upon the transfer of the appreciated property.

Since the husband is not taxed on the income from the trust paid to the wife, he has no deduction for alimony payments because the trust is making the actual payments and he is not.[115]

If part of the payments from the trust to the wife are made as child support, that portion of the payments made as child support will not be taxable to the wife but will be taxable to the husband because of his obligation to support his children.[116]

If prior to a divorce or written separation agreement the husband had created a trust for the benefit of his wife and pursuant to the written separation agreement or decree of divorce she is given the trust *in full satisfaction* of his obligation of support and his obligation to provide alimony, the trust will be deemed an alimony trust and all payments received by the wife will be ordinary income[117] whether the source of the payments is from trust income or corpus. If the wife receives alimony and a property settlement *in addition to* the previously created trust, the distributions from the trust will be treated as ordinary income (or capital gain income

113. Rev. Rul. 72-545, 1972-2 C.B. 179.
114. I.R.C. § 71(a) & Treas. Reg. 1.682(a)-(1)(a)(2), 25 Fed. Reg. 11814 (1960).
115. I.R.C. § 682(a).
116. I.R.C. § § 71(b), 682(a). Treas. Reg. 1.682-(a)(1), 25 Fed. Reg. 11814 (1960).
117. *See supra* note 76.

depending upon its source) and distribution from the trust corpus will not be taxed.[118]

V. CHILD SUPPORT

All payments made under the decree of divorce or separation which are to be made as child support should be specifically designated. A failure to designate which portion of the support payments made to the wife is child support and which is alimony will result in her having to include all of the support money received as alimony.[119]

In divorce decrees or written separation agreements involving children, it should be stipulated which parent is entitled to claim the children as dependents for tax purposes because each dependent will result in a $1,000 exemption to the parent claiming the exemption[120] for federal income tax purposes and a $750 exemption for North Dakota income tax purposes.[121] Problems arise when the divorce decree or separation agreement fails to provide which parent may claim the child or children as dependents for income tax purposes. The parent having any child in his or her custody for one-half or more of the year is entitled to claim the child as a dependent for exemption purposes.[122] The non-custodial parent will be entitled to claim the child as a dependent if he provides $600 a year toward the child's support and the decree of divorce or separation agreement provides that he shall be entitled to claim the child as a dependent. Additionally, if the non-custodial parent contributes $1,200 a year toward the support of the child, or toward the support of all the children in the care and control of the custodial parent, the non-custodial parent has the right to claim the child or all of the children as dependents. If, however, the custodial parent establishes by a clear preponderance of the evidence that he has provided for more support for the child or children than the non-custodial parent, the custodial parent has the right to claim the child or all of the children as dependents.[123] In the event the divorce decree or separation agreement fails to provide who shall have the right to claim the child or children as dependents, the parent

118. *See supra* note 76.
119. *See supra* notes 81 & 82 and accompanying text.
120. I.R.C. § 151 presently allows a $1,000 exemption for each dependent of the taxpayer.
121. N.D. CENT. CODE § 57-38-01.2 (Supp. 1979).
122. I.R.C. § 152(e).
123. Treas. Reg. § 1.152-4(d)(2), 36 Fed. Reg. 5337 (1971).

intending to claim the child or children as a dependent may request an itemized statement of expenditures which the other parent feels he has contributed by way of support. Along with this request the parent must notify the other of his intention to claim the child as an exemption and include with this notice an itemized statement of the support he feels he has furnished for the child or children during the year.[124]

The parties can stipulate in writing after the divorce decree who may claim the children as exemptions. This agreement can be made after the close of the taxable year in which the exemptions were claimed as long as the statute of limitations has not run on the taxable year of the party claiming the exemption.[125] A copy of this agreement should be attached to the taxpayer's return if he is the non-custodial parent claiming the exemption.[126]

In addition to the monthly payments required to be paid as child support, the non-custodial parent who pays for hospital or dental insurance premiums; medical, dental, or hospital expenses; education, recreation, or transportation expenses; or provides additional food, shelter or clothing for the children will be given credit toward the $600 or $1,200 support requirement.[127]

In the event the non-custodial parent is required to pay at least $600 per child and is granted the right to claim the children as dependents for tax purposes in the divorce decree, the custodial parent who pays medical expenses or contributes toward medical insurance on behalf of the children will be denied the right to deduct those expenses as medical expense deductions.[128] Furthermore, if the non-custodial parent is granted the right to claim the children as dependents for tax purposes and is further obligated to contribute the sum of $600 a year per child as support, the non-custodial parent may deduct the amounts paid for medical and dental expenses, drug expense, and insurance premiums for medical, dental and hospital insurance paid on behalf of the children.[129]

In today's society a major expense for working parents is day care or babysitting expenses incurred for the care of pre-school children. These expenses are usually incurred so the custodial parent can remain gainfully employed. Presently a divorced or separated parent is eligible for a tax credit for the care of a child

124. Treas. Reg. § 1.152-4(e), 36 Fed. Reg. 5337 (1971).
125. Rev. Rul. 70-73, 1970-1 C.B. 29.
126. Treas. Reg. § 1.152-4(d)(2), 36 Fed. Reg. 5337 (1971).
127. Treas. Reg. § 1.152-4(e)(3)(vi), 36 Fed. Reg. 5337 (1971).
128. Jennie S. Meshulam, ¶ 76, 111 T.C.M. (P-H).

who is under fifteen years old or who is incapable of self care *even if the parent is not entitled to a dependency exemption* for the child under section 152.[130] The parent is entitled to the credit so long as he or she has custody of the child for a longer period during the year than the other parent. The credit is equal to twenty percent of the parent's employment-related child-care expenses up to $2,000 for one child and $4,000 for two or more children. This results in a maximum tax credit of $400 for one child and $800 for two or more children.

VI. ESTATE AND GIFT TAX CONSEQUENCES

A. GIFT TAX

When a husband and wife have provided in writing for certain transfers or releases of marital and other property rights, and the transfers are either in settlement of the marital or other property rights, or are made to provide for reasonable support for the children of the marriage, the transfers will be deemed to have been made for full and adequate consideration, and no taxable gift will result if a divorce is obtained within two years after the written agreement.[131] A failure to obtain the divorce decree within two years of the written agreement may result in the transfers being deemed gifts even though a divorce is obtained after the expiration of the two-year period. Accordingly, it is wise to avoid transfers under a written agreement if the divorce litigation may take longer than two years.

B. ESTATE TAX

If, pursuant to a divorce decree, the husband is obligated to pay child support and alimony to his wife until her remarriage or her, not his, death and he dies before the remarriage or death of his wife and before the child support obligation has terminated, his estate will be allowed a deduction for the commuted value of the payments due the wife for future alimony and future child support.[132] The husband's estate is afforded this deduction because of the obligation imposed upon him by the divorce decree to pay

130. I.R.C. § 44A (f) (5).
131. I.R.C. § 2516.
132. I.R.C. § 2053 (a) (1), (3) (4). *See* Estate of Donald Elbert Lester, Sr., 57 T.C. 503 (1972).

alimony and child support.[133] The actual deduction allowed the husband's estate is computed through the use of actuarial and remarriage tables in light of the former wife's age at the time of her former husband's death, and the nature and duration of the obligation to provide alimony and child support imposed under the divorce decree.[134]

In the event the alimony is subject to termination upon the wife's death or remarriage and she either remarries or dies before the former husband's final estate tax return is filed, his estate will only be allowed to deduct the actual alimony payments made during the administration of his estate and not the commuted value of the alimony payments imposed upon the estate at the time of his death.[135]

In the event the divorce decree obligates the husband to maintain life insurance on his life payable to his wife, the proceeds paid to her upon his death will be includable in and deductible from his estate because of the obligation imposed upon him to provide life insurance coverage payable to his wife.[136]

An estate deduction will not be allowed based upon an obligation imposed on the husband's estate because his ex-wife or present wife had relinquished or promised to relinquish her right to a statutorily created estate or to her marital rights in the decedent's property or estate.[137] If, however, the obligation imposed upon the estate is imposed because the former wife gave up her right to a support obligation imposed upon the husband by virtue of a written agreement or state law, the estate will be afforded a deduction to the extent of the obligation.[138]

If the husband creates and funds a trust for the support of his minor children and reserves the power to amend or revoke the trust either by himself or in conjunction with his ex-wife, the value of the trust will be includable in his estate only to the extent its value exceeds the prospective value of the children's support rights.[139]

If a deduction for the estate is sought because of the obligation imposed upon the decedent pursuant to a written agreement to waive the right to support, or because of the obligation to pay alimony and child support imposed upon the decedent with a

133. Estate of Donald Elbert Lester, Sr., 57 T.C. 503 (1972).
134. Rev. Rul. 71-67, 1971-1 C.B. 271.
135. Estate of Chesterton v. United States, 551 F.2d 278 (Ct. Cl. 1977).
136. Estate of William E. Robertson, 63 T.C. 717 (1975).
137. I.R.C. § 2043(b).
138. Sherman v. United States, 462 F.2d 577 (5th Cir. 1972); In Re Estate of Davis, 440 F.2d 896 (3rd Cir. 1971).
139. Chase National Bank v. Commissioner, 225 F.2d 621 (8th Cir. 1955), *aff'd* 19 T.C. 672; Estate of Robert M. McKeon, 25 T.C. 697 (1956).

decree of divorce, or because of the creation of a trust for the support of his children over which the decedent retains certain powers of control, the claim should be timely filed with the probate court or the personal representative to keep the deduction.[140]

VII. CONCLUSION

As can be seen from the foregoing, even the most amicable divorce involves income tax ramifications to both parties which must be addressed and made known to the parties.

Too often the parties and their attorneys turn a divorce into an opportunity for gladitorial combat and lose sight of income tax considerations regarding the division of property, the obligation to pay alimony, and the obligation to pay child support.

Considering the potential adverse tax consequences inherent in all divorces, counsel for both parties must strive to work together to achieve the best overall settlement of the dissolution of the marriage with true regard for the income tax consequences to both parties. This requires a consideration of the parties' earning ability, present and future income tax brackets, and ability to pay the income taxes which might arise as a result of the proposed property division, alimony payments, and child support.

140. Rev. Rul. 60-247, 1960-2 C.B. 272.