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NOTE

FEDERAL TAXATION OF DIVORCE PROPERTY SETTLEMENTS AND THE AMIABLE FICTIONS OF STATE LAW

A property settlement\(^1\) pursuant to a divorce or dissolution of marriage may have substantial federal income tax consequences\(^2\) for husbands in common law property jurisdictions.\(^3\) Since *United States v. Davis*\(^4\) the transfer of appreciated property from a husband to his wife at the end of their marriage has constituted a taxable event for the husband.\(^5\) Although the *Davis* decision has been criticized,\(^6\) it is still the law of the land.\(^7\) A recent

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\(^1\) It is immaterial whether the "settlement" is the product of an agreement between the spouses or an apportionment of property made solely by the court. The federal income tax consequences in either case would be identical. Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964).

\(^2\) In two such recent cases the total amount of taxes in controversy exceeded $200,000. Wiles v. Commissioner, 499 F.2d 255, 257 (10th Cir. 1974); Imel v. United States, 375 F. Supp. 1102, 1103 (D. Colo. 1974).


\(^5\) *See* note 12 *infra*.


\(^7\) The *Davis* rule has generally been expanded by the lower courts. *See*, e.g., Pulliam v. Commissioner, 329 F.2d 97 (10th Cir. 1964). The most recent Revenue Ruling on the subject is based on *Davis*. Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6.

\(^8\) The opinion of the Colorado Supreme Court is *In re Questions submitted by United States Dist. Ct.*, 517 P.2d 1331 (Colo. 1974), hereinafter referred to as *Imel*. The Colorado Supreme Court rendered that opinion in response to a question concerning Colorado law submitted by the United States District Court for the District of Colorado which arose out of the case it was considering, *Imel* v. United States, 375 F. Supp. 1102 (D. Colo. 1974). The question was:

Under Colorado law, is such a transfer [by a husband pursuant to a divorce property settlement] a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners [and therefore not taxable to the husband], 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 [and therefore taxable under *Davis*]?
Colorado case, *Imel v. United States*, and Oklahoma cases upon which *Imel* relies have attempted, through interpretations of state law, to avoid the *Davis* rule and thereby benefit resident taxpayers. This note will discuss the merits of these attempts to sidestep *Davis*.

I. *Davis v. United States*

In *Davis* a Delaware husband transferred appreciated stock to his wife pursuant to a divorce settlement "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever," including her rights under Delaware law to dower, intestate succession, and to share in a portion of her husband's property upon divorce. The husband argued that under Delaware law his wife's above-mentioned marital rights were such that she was, in effect, a co-owner of his property, so that as a result of the property settlement there was a nontaxable division of property between him and his wife as co-owners, rather than a taxable transfer to his wife of appreciated property owned solely by him. The government argued that a Delaware wife's marital rights did not give her an interest in her husband's property, but merely imposed upon him certain personal obligations.

On review the Supreme Court held that while a Delaware wife might have some interest in the property of her husband, the interest was an inchoate one which did not remotely reach the dignity of co-ownership. In support of its opinion the Court cited her inability to manage or dispose of her husband's property, the lack of descendability of her interest, the requirement that she survive him to share in his intestate estate, and the fact that her share of his property upon divorce depended upon the discretion of the court. Therefore, the Court concluded that

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8 The Oklahoma cases followed by the Colorado Supreme Court are discussed in text accompanying notes 80-106 infra.

9 Language from the agreement quoted in 370 U.S. at 67.
Regardless of the tags, Delaware seems only to place a burden on the husband’s property rather than to make the wife a part owner thereof. . . . The rights of succession and reasonable share at divorce do not differ significantly from the husband’s obligations of support and alimony. They all partake more of a personal liability of the husband than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband’s property . . . but certainly this happenstance does not equate the transaction with a division of property by co-owners.\textsuperscript{11}

Consequently, the husband realized a taxable gain upon this disposition of appreciated property.\textsuperscript{12}

\textit{Davis}, then, requires that state law be examined to determine the property rights of spouses\textsuperscript{13} within the state. The state-created property right must then be measured against the “federal criteria”\textsuperscript{14}—the wife’s power to dispose of or manage her interest, the descendability of the interest, whether she must survive her husband to receive it, and whether the size of the interest is within the discretion of the court—to determine if the wife’s interest reaches the dignity of co-ownership so that the transaction is a nontaxable one.

On the basis of the \textit{Davis} test, property settlements in community property jurisdictions, where a wife is a co-owner are

\textsuperscript{11} \textit{Id.} at 70.

\textsuperscript{12} The Court reasoned that by its inclusive definition of income, \textit{i.e.,} “all income from whatever source derived, including . . . [g]ains derived from dealings in property . . . .” \textit{[INT. REV. CODE OF 1954, 61(a)(3)]}. Congress intended the economic growth of the stock transferred here to be taxed. The gain to be taxed is the “excess of the amount realized therefrom over the adjusted basis” of the stock. \textit{INT. REV. CODE OF 1954, \textsection 1001(a)}. The “amount realized” is “the sum of any money received plus the fair market value of the property (other than money) received.” \textit{INT. REV. CODE OF 1954, \textsection 1001(b)}. In divorce property settlements the “property . . . received” is the release of the wife’s marital rights. The Court ruled that the fair market value of the rights released by the wife could be determined—in an arm’s length transaction such as this, the wife’s marital rights may be presumed to be equal to the fair market value of the property given her by the husband. 370 U.S. at 72, 73, \textit{rev’d} 287 F.2d 168 (Ct. Cl. 1961) which had held, following \textit{Commissioner v. Marshman}, 279 F.2d 27 (6th Cir.), \textit{cert. denied}, 364 U.S. 918 (1960), that it was impossible to presume that the wife’s rights were equal in value to the property transferred by the husband for their release.

\textsuperscript{13} Nowhere in \textit{Davis} is this requirement expressly stated. That state law be consulted is implicit throughout the Court’s lengthy discussion of Delaware law. Moreover, \textit{Davis} has also been construed as requiring a determination of state law with respect to the property rights of a wife. \textit{See, e.g., Wiles v. Commissioner}, 499 F.2d 255, 257 (10th Cir. 1974).

generally nontaxable. The same is apparently true in common law property states where there is an equal division of property which is jointly acquired, either by gift or by commingling of earnings in the acquisition of property. However, in common law jurisdictions a transfer by a husband to a spouse who has not commingled her earnings with his in jointly acquiring property would normally be taxed under the Davis rationale. The exception to this rule has been created by Imel and related cases. An understanding of the marital relation and marital property rights, both past and present, is helpful in considering Imel.

II. THE COMMON LAW MARITAL RELATIONSHIP

A. Early Common Law

The concept that marriage suspended the legal existence of a wife and merged it with that of her husband had its roots in English common law. Because of this merger, marriage had severe effects upon a wife’s property rights. Her tangible personality acquired before or during the marriage became her husband’s; her husband became entitled to the use, enjoyment, rents, and profits of her realty until birth of issue; after birth of issue he acquired a life estate in her realty as tenant by the courtesy which, unlike tenancy by the marital right, survived her

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15 At least when there is an equal division of community property. Frances R. Walz, 32 B.T.A. 718 (1935). Of course, the situation may be more complex, as when an unequal division of community property is made. See Hjorth, supra note 3, at 252.
16 Rev. Rul. 74-347, 1974 INT. REV. BULL. No. 29, at 6. The ruling is discussed by Hjorth, supra note 3, at 253.
17 See, e.g., Hayutin v. Commissioner, 508 F.2d 462 (10th Cir. 1975) where the wife contributed her earnings for a few of their first years of marriage, stopped working, and then made no more contributions to acquire any of the property which was the subject of the property settlement. That case did not consider Rev. Rul. 74-347, but it does illustrate one of many situations in which the Ruling would fail to give favorable tax treatment to a husband in a common law property jurisdiction.
18 This was not the case in many other cultures, e.g., Egyptian and certain American Indian societies. Crozier, Marital Support, 15 BOSTON U.L. REV. 28, 29 (1935). Nor was it true in early Saxon, Scottish, Welsh, or Civil law. Johnston, Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality, 47 N.Y.U.L. REV. 1033, 1044 (1972).
19 See W. TIFFANY, PERSONS AND DOMESTIC RELATIONS 124 (3d ed. R. Cooley 1921), and Johnston, supra note 18, at 1045-46.
20 1 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN §§ 206-38 (1873).
21 This tenancy "by the marital right," or jure, uxorius, attached to realty of the wife acquired before or during the marriage. 1 AMERICAN LAW OF PROPERTY § 5.50 (A.J. Casner ed. 1952).
22 Id. at § 5.57.
death. Moreover, the husband owned his wife's earnings, and she could not contract, sue, or be sued on her own behalf.

While marriage gave a husband a substantial interest in the property of his wife, the reverse was not true. His wife acquired no vested interest in his property until his death, at which time she was entitled to dower and/or an intestate share of her husband's personalty.

And for all her proprietary sacrifices, what did a wife receive from her husband at common law? Besides dower and intestate succession, a wife was entitled to be supported by her husband. The total marital relationship—with a wife losing her property and the right to her own labor but acquiring her husband's legal obligation of support—has been unattractively, but perhaps accurately described some 40 years ago as follows:

Such a situation can be explained on the theory that one of the parties has an original right to the other's labor [and property] without having to pay for it; although in no other department of life has anyone had such an ownership since the abolition of slavery. Clearly, however, that economic relationship is the economic relationship between an owner and his property rather than that between two free persons. The financial plan of marriage law was founded upon the economic relationship of owner [the husband] and property [the wife].

B. Modern Marital Rights in Colorado

In the last 100 years there has been considerable change in the rights and status of married women in Colorado. Property of all types acquired by a woman prior to her marriage, including

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23 W. Tiffany, supra note 19, at § 48.
24 J. Bishop, supra note 20, at §§ 39, 44.
25 1 American Law of Property, supra note 21, at 735. At common law, dower was a life estate in one-third of the lands of which a husband had been seized at any time during coverture. This interest vested only at the death of the husband, yet was protected throughout the marriage since a wife must have joined in any conveyance by her husband else her dower attached to such property at her husband's death. See generally id. §§ 5.1-5.49.
26 2 F. Pollock & F. Maitland, The History of English Law 402 (2d ed. 1923); W. Tiffany, supra note 19, at 144-45.
27 Dower and intestate succession were rights of the Delaware wife discussed in Davis. The third interest of the wife, her right to a reasonable share of her husband's property upon divorce, did not exist at common law. See note 61 infra.
28 Crozier, supra note 18, at 28. Ms. Crozier, no doubt Miss or Mrs. Crozier in 1935, was specifically criticizing the old common law rule that a husband owned his wife's labor and earnings, but the language also describes the entire early common law marital relation.
the rents and profits therefrom, and any property she receives by
descent, devise, or gift now remains her separate property after
her marriage, subject only to her disposal and her debts.\textsuperscript{29} She
may sue or be sued in her own right.\textsuperscript{30} She is entitled to earnings
from her own business or employment,\textsuperscript{31} and may make her own
contracts.\textsuperscript{32} In addition, a wife in Colorado, just as in all common
law property jurisdictions,\textsuperscript{33} still retains her right to be supported
by her husband.\textsuperscript{34}

Lest it seem that a Colorado wife has the best of both old and
new worlds,\textsuperscript{35} namely the right to own her own property as well
as the right to demand support from her husband, consider a wife
in a community property jurisdiction.\textsuperscript{36} Spouses in community
property states are viewed as equal partners with a vested one-
half interest in all the wealth acquired by the efforts of either.\textsuperscript{37}
Since both spouses are deemed to contribute equally, a com-

munity property wife is a one-half owner of such property despite
the fact that she may produce less income than her husband, or
no income at all. Community property husbands are also required
to support their wives.\textsuperscript{38} In contrast, “with a possible exception
or two,”\textsuperscript{39} a Colorado wife has no vested interest in the property

\begin{itemize}
  \item \textsuperscript{29} COLO. REV. STAT. ANN. § 14-2-201 (1973).
  \item \textsuperscript{30} Id. § 14-2-202.
  \item \textsuperscript{31} Id. § 14-2-203.
  \item \textsuperscript{32} Id. § 14-2-208.
  \item \textsuperscript{33} Phipps, Marital Property Interests, 27 ROCKY Mtn. L. Rev. 180, 184 (1955).
  \item \textsuperscript{34} COLO. REV. STAT. ANN. § 14-6-101 (1973) provides that failure to support and main-
tain a wife, and children under 16 years of age, is a felony. This statute is viewed as
enforcing, not creating a husband’s duty of support. Kilpatrick v. People, 64 Colo. 209,
170 P. 956 (1918). A wife’s right to support seems to be better protected today than at
common law, which provided no direct action to enforce a husband’s duty of support.
Phipps, supra note 33, at 185 n.18. Now the Revised Uniform Reciprocal Enforcement of
Support Act, COLO. REV. STAT. ANN. §§ 14-5-101 to -143 (1973) provides a civil in addition
to the criminal remedy for nonsupport. See Conrad v. McClearn, 166 Colo. 568, 445 P.2d
222 (1968).
  \item \textsuperscript{35} For an excellent comparison of the status and rights of wives in the United States
and those in other countries see Glendon, Matrimonial Property: A Comparative Study
  \item \textsuperscript{36} Very briefly, a community property jurisdiction is one in which the property “the
husband and wife have is common property, that is, it belongs to both by halves.” W. De
Funiak & M. Vaughn, Principles of Community Property § 1, at 1 (2d ed. 1971)
[hereinafter cited as De Funiak].
  \item \textsuperscript{37} Id. § 1, at 2.
  \item \textsuperscript{38} Id. § 133, at 328 & n.10.
  \item \textsuperscript{39} In re Questions Submitted By United States Dist. Ct., 517 P.2d 1331, 1335 (Colo.
1974) (Imel).
\end{itemize}
of her husband. Thus, for the great number of wives who do not have separate property of their own, or who, because they earn less than their husbands, have less property than their husbands, the marriage partnership is one in which they are the junior partner.

Perhaps the central feature of Colorado marital law is that a husband has separate property, free of any interests of his wife. Yet there are at least three restrictions in favor of a wife which limit a Colorado husband’s rights in his separate property. They are his wife’s rights to 1) support, 2) intestate succession, and 3) a share of her husband’s property upon divorce. As will be seen from the following discussion, and from the opinions of the Colorado Supreme Court, none of these interests make a wife in any way a co-owner in the separate property of her husband.

1. Right of Election and Intestate Succession

In Colorado a wife has the right of intestate succession. Prior to the adoption of the Colorado Probate Code the precise nature of a wife’s right to inherit the property of her husband, and her right to elect against his will, was somewhat unclear. While these rights give her some interest in the property of her husband, the interest can be defeated by her husband. By conveying his property prior to his death, he could leave her with nothing. This is illustrated by an excerpt from Richard v. James, where a...

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4 In addition a wife also has an interest in the couple’s homestead in that it may not be conveyed solely by the husband. COLO. REV. STAT. ANN. § 38-35-118 (1973). Dower and curtesy have been abolished by statute in Colorado. Id. § 15-11-113.

4 Subsumed in the category of support are a wife’s statutory rights to maintenance (alimony) and child support. Id. §§ 14-10-114 to -115. Only intestate succession and the right to a share upon divorce will be discussed here. Regarding the taxation of the husband’s personal obligations of support see Graves, supra note 3.


4 COLO. REV. STAT. ANN. § 15-11-102(1) (1973) provides that the intestate share of a surviving husband or wife is:

(a) If there is no surviving issue of the decedent, the entire intestate estate;
(b) If there are surviving issue all of whom are issue of the surviving spouse also, the first twenty-five thousand dollars, plus one-half of the balance of the intestate estate;
(c) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.


4 The surviving spouse’s right to elect is now id. §§ 15-11-201 to -202.

4 133 Colo. 180, 292 P.2d 977 (1956) (en banc).
widow attempted to set aside her husband’s transfer of most of his property into a trust less than a month before his death:

There no longer remains a question of doubt of the power of a husband to convey his property during his lifetime to whomsoever he sees fit; even though it has the effect of depriving the wife of all right to inherit any part thereof, provided the transaction is bona fide and not merely colorable. This is true even though the express purpose of the conveyor is to deprive another of his right of inheritance. If the deed is genuine it cannot be said to be invalid.47

If the conveyance is fraudulent, or “colorable,” a Colorado wife may have some chance of setting it aside. Yet Richard v. James shows that the express purpose of depriving a wife of her right of inheritance does not make a conveyance fraudulent.48 Neither does the fact he may have reserved a life estate, or some other interest or powers.50 Plainly, it is difficult to characterize a husband’s transfer as fraudulent.

The right of election given a surviving spouse under the Colorado Probate Code greatly enhances a wife’s right of inheritance. The prior statute merely granted the right to elect, despite the provisions of his will, to take one-half of the property owned by a husband at his death. Under case law such as James this was an empty right if he had made substantial inter vivos transfers, leaving little from which to take one-half.52 Under the Code, however, a wife may elect to take one-half of her husband’s “augmented estate.”54 This estate includes not only property held by a husband at death, but also the value of property transferred by him at any time during the marriage to someone other than his wife.

47 Id. at 184, 292 P.2d at 979. This case and this topic in general are carefully discussed in Rea, Election to Take the Statutory Share, 29 ROCKY MTN. L. REV. 506, 531 (1957) and Scott, The Revocable Trust and the Surviving Spouse’s Statutory Share in Colorado, 36 Colo. L. Rev. 464, 466 & n.8 (1964).
48 The Colorado cases speak of a husband “defrauding” his wife by a conveyance. But the term “fraud” has been generally used to define only the extreme situation in which the husband executes a deed which is in truth a sham and is not intended as a conveyance at all, i.e., a “colorable” deed. See Rea, supra note 47, at 525, 529.
49 See Scott, supra note 47, at 471.
54 Id. § 15-11-202, which defines the estate.
without full consideration and in which transfer he retained a right of possession, enjoyment, or income from the property; a power to revoke, consume, invade, or dispose for his own benefit; or whereby he held with another with a right of survivorship; or where transfer was made without any of the above but within 2 years of death to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000. By exercising her right to elect one-half of the aforementioned estate a wife may effectively set aside transfers by her husband which, prior to the adoption of the Code, would have defeated her right to inherit his property.

Much of the pre-Code case law is overruled. However, as to transfers in which a husband retained no interest nor power, and which were made more than 2 years prior to death, a wife would have to rely on pre-Code case law to vindicate her right to inherit such property. Those cases offer very little remedy.

A Colorado wife, then, is granted only a limited interest in her husband's separate property by virtue of her right of intestate succession. The most significant feature about this right is that in Colorado, as in all common law property states, a wife must actually survive her husband in order to become vested with her share of his intestate estate. This right is a mere expectancy; should she predecease her husband, her right of intestate succession is lost and does not pass to her heirs. On the other hand, a cardinal principle of community property jurisdictions is that a wife's one-half interest in the community property passes to her heirs if she predeceases her husband. Moreover, a Colorado wife's right to elect against her husband's will is also a personal

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55 Id.
56 See Schmidt, supra note 52, at 145-46.
57 COLO. REV. STAT. ANN. § 15-11-102 (1973) grants an intestate share only to a surviving spouse. Section 15-11-104 even requires that a spouse must survive the deceased spouse by 120 hours, else he or she is deemed to have predeceased the decedent and the decedent's property passes to other heirs.
58 A community property wife's interest is especially significant where she has made few financial contributions. She has a vested one-half interest in what would be, in a common law state, the separate property of her husband.
59 DE FUNIAK § 1, at 2:
The community property system is marked by two essential characteristics: (1) the transmissibility of the wife's interests to her heirs, so that if the wife dies first, her heirs take the share to which she would have been entitled if she had survived; and (2) during the existence of the marital relationship the spouses are . . . joint owners, or partners . . .
right which disappears if unexercised prior to her death, and does not pass to her heirs.60

2. Right to Property at Dissolution

A wife's right to a share of the property of her husband upon divorce was unknown to the common law and is of statutory origin.61 In the past such Colorado statutes have consistently been interpreted as not vesting in a wife any interest in her husband's property until the court actually orders the division. However, it appears that she might prevent or set aside fraudulent conveyances intended to defeat her right to a division of property analogous to her remedy with regard to inheritance.62

It is apparent that in Colorado the absence of any significant interest of a wife in her husband's property during their marriage is not cured by her statutory right to a share of his property upon divorce. Her share, besides being undetermined, may be soundly and entirely defeated prior to the decree because it is an expectancy, not a property right. In Todd v. Todd63 the Colorado Supreme Court held that the husband's trustee in bankruptcy could defeat the wife's statutory right to share in the property of her husband when the date of bankruptcy occurred after an interlocutory decree had given her possession of the property, after the final decree of divorce, and after the hearing concerning division of property, but before the court had made an order actually awarding her a share of her husband's property. Obviously, her right to a share at divorce was not such that it gave her any protectible interest prior to the actual award of her husband's property. Her expectancy was defeated because "[d]ivision of

60 This was true of the pre-Code right as construed by the Colorado courts. See Gallup v. Rule, 81 Colo. 335, 255 P. 463 (1927) and Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (1912). The present Code expressly states that the election is a right which may be exercised only during the lifetime of the surviving spouse. Colo. Rev. Stat. Ann. § 15-11-203 (1973). Should it not be exercised, a wife who had received nothing under the will would leave nothing therefrom to her heirs, and they would be unable to exercise the right for her.
61 2 J. BISHOP, NEW COMMENTARIES ON THE LAW OF MARRIAGE, DIVORCE, AND SEPARATION §§ 1117, 1139 (1891).
62 See, e.g., Zingone v. Zingone, 136 Colo. 39, 314 P.2d 304 (1957), wherein the Colorado Supreme Court reversed and remanded a dismissal of a wife's counterclaim against her husband's parents to recover the house he had conveyed to them. The court said the wife was in a position similar to that of a creditor whose debtor had fraudulently conveyed property, or a wife whose husband had conveyed property to defraud his wife of her right to support and maintenance.
63 133 Colo. 1, 291 P.2d 386 (1956).
property, [and] property settlements . . . are within the sound discretion of the trial court and no rights vest until the matters involved are determined."

Similarly, Du Bois v. First National Bank held that a wife who has been awarded a one-third interest in certain realty of her husband must take that interest subject to a mortgage given by her husband after their marriage but prior to her action for divorce. Consequently, the interest awarded could be foreclosed by the mortgagee. The court stated that the bank's knowledge of their marital problems did not apprise it of the fact that she would obtain a decree of divorce and an interest in her husband's property, and that even "if the bank could foresee such an end to their unhappiness, its lien on the property, taken in good faith, would not be subordinate to the purchaser's title which she subsequently secured." It can be concluded that a wife's right to a share at divorce does not give her an interest which is safe from an encumbrance created by her husband, even one created after their marriage.

Finally, in Dickinson v. Dickinson a wife, suing to set aside a fraudulently induced property settlement, was awarded one-half of her husband's net worth at the time of their divorce, less the amount already received pursuant to the agreement. Her action was not to annul the decree so that the court might make an equitable division of property. Instead, her argument rested solely upon the contention that she was entitled, by virtue of their marital relationship, to one-half of the property owned by her husband at the time of the divorce. In reversing, the court held that her counsel's contention that she is entitled to a share of the defendant's property, solely because it was acquired by the defendant during the period the marriage relation existed between them, without regard to the divorce proceedings. . . . is not tenable. The property acquired by the defendant during the period he was married to plaintiff belonged to him. Plaintiff had no such interest in this property as would invest her with the right to maintain an action, the sole purpose of which was to secure any part of it, either during coverture or after the

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44 Id. at 5, 291 P.2d at 387 (emphasis added).
43 Colo. 400, 96 P. 169 (1908).
45 Id. at 404, 96 P. at 170. The court also found that Mrs. DuBois had failed to prove fraud in the transaction.
46 50 Colo. 232, 114 P. 652 (1911).
marriage relation had been dissolved. . . . [T]he judgment . . .
must be reversed, and the cause remanded, with directions to
dismiss. . . .

All of this is not to say that a wife is not entitled to a share
of her husband’s property upon divorce. That is not the question.
The issue is the nature of her right to receive such a share.
Colorado, and other common law property states, have chosen to
make that right an equitable one which does not vest in her any
interest in her husband’s property. Nor, absent fraud, may she
prevent her husband from conveying or encumbering any of his
separate property. It apparently has never even been suggested
in Colorado that her right is descendible so that it would go to
her heirs should she predecease her husband. Instead of a system
of community property wherein each spouse is entitled to one-
half of the community property at the dissolution of the mar-
riage,69 Colorado’s system allows a husband to retain his separate
property subject to an equitable share for his wife upon dissolu-
tion. In determining how much of her husband’s property a wife
should receive, Colorado courts have, pursuant to the various
statutes,70 traditionally considered

whether the property was acquired before or after marriage, the
efforts and attitudes of the parties towards its accumulation, the
respective ages and earning abilities of the parties, the conduct
of the parties during the marriage, the duration of the marriage, their
stations in life, their health and physical condition, the necessities
of the parties, their financial condition, and all other relevant cir-
cumstances.71

As to the efforts of a wife in the accumulation of property by
her husband,72 courts have often considered her contribution as a
housewife in making an equitable division.73 Naturally, where a
wife has participated in the operation of a joint business with her

69 Id. at 235, 114 P. at 653.
70 Again, a community property wife’s right to one-half of the community property is
most significant, in comparison to that of her common law counterpart, when the wife
makes only small financial contributions to the community property. In that situation,
she would have a vested one-half interest in property which in a common law state, would
be the separate property of her husband.
71 Colorado’s old statute provided that property be divided “in such proportions as
may be fair and equitable.” Ch. 37, § 6, [1958] Colo. Sess. Laws 223.
73 Of course, property acquired by a wife with her own funds is her own separate
property.
husband or contributed similar nondomestic efforts, that too will be considered by the court.\textsuperscript{74} In all cases the division is within the sound discretion of the trial court.\textsuperscript{75}

The Tenth Circuit considered the nature of a wife’s property rights in Colorado, and whether a husband should be taxed on his transfer of appreciated property to her upon divorce, in \textit{Pulliam v. Commissioner}.\textsuperscript{76} It noted that “[u]nder Colorado law the wife’s rights during marriage do not vest in her an ownership of any part of the husband’s property.”\textsuperscript{77} And because “the wife’s interests are very similar to those in Delaware considered in United States v. Davis,”\textsuperscript{78} it held that the transfer pursuant to the divorce decree was a taxable event for the husband.

Now, some 12 years later, the Colorado Supreme Court has held in \textit{Imel} that there is an exception to the rule stated in \textit{Pulliam} that a Colorado wife has no vested interest in the property of her husband during the marriage. The exception is that “vesting takes place at the time of the filing of the divorce action.”\textsuperscript{79} In creating that exception, the court followed the philosophy of the Oklahoma Supreme Court expressed in \textit{Collins v. Oklahoma Tax Commission}\textsuperscript{80} and modified in \textit{Sanditen v. Sanditen}.\textsuperscript{81}

In \textit{Collins v. Commissioner},\textsuperscript{82} called \textit{Collins I}, the Tenth Circuit, relying on its decision in \textit{Pulliam}, held that an Oklahoma husband was taxable in a divorce property settlement. The husband had argued that the Oklahoma property division statute, by commanding a court to make a division of jointly acquired property,\textsuperscript{83} thereby vested an interest in each spouse in such property.

\textsuperscript{74} See, e.g., Bell v. Bell, 156 Colo. 513, 400 P.2d 440 (1965). Also, where a wife is jointly operating a business with her husband and is contributing her own funds, she is a joint tenant although title is in her husband’s name. Therefore, at divorce she is entitled to her share as a joint tenant and “not claiming in the capacity of [a] wife.” Wigton v. Wigton, 73 Colo. 337, 341, 216 P. 1055, 1057 (1923). This is distinguishable from the facts in \textit{Imel}, where Mrs. Imel contributed her efforts to her husband’s business, but not her own funds. For that reason \textit{Imel} more closely resembles \textit{Bell}.


\textsuperscript{76} 329 F.2d 97 (10th Cir. 1964).

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 99.

\textsuperscript{79} 517 P.2d at 1333.

\textsuperscript{80} 446 P.2d 290 (Okla. 1968).

\textsuperscript{81} 496 P.2d 355 (Okla. 1972).

\textsuperscript{82} 388 F.2d 353 (10th Cir. 1968).

\textsuperscript{83} The statute, \textsc{Okla. Stat. Ann.} tit. 12, § 1278 (1961) provides that as to property
Acknowledging that *Davis* required an examination of state law, the Tenth Circuit could find no difference between Oklahoma and Colorado law sufficient to compel a result opposite that reached in *Pulliam*. The wife's right to a share of her husband's property, where such was jointly acquired, vested no interest in her during the marriage, notwithstanding the language of some early Oklahoma cases. This right was not descendible, its quantum was within the discretion of the court, and it gave her no right to manage or dispose of the property in question. As in Colorado, a wife's right to a share in Oklahoma failed the *Davis* tests.

Neither did the Tenth Circuit find that the other right of an Oklahoma wife, that of intestate succession, made her a co-owner. As in Colorado, an Oklahoma wife must survive her husband to receive her intestate share, and should she predecease him, her right of intestate succession would not pass to her heirs.

"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..." Jointly acquired property is not defined in the statute, but from the cases it is clear that where a wife performs only domestic duties she is contributing to the acquisition of property, so that most property acquired during the marriage would be jointly acquired. See Note, *Domestic Relations: Relevant Factors in the Division of Jointly Acquired Property*, 23 Okla. L. Rev. 288, 289 (1970).

The Tenth Circuit had some difficulty with *Davis v. Davis*, 61 Okla. 275, 161 P. 190 (1916) which stated that a wife did have a vested interest in her husband's property. A careful reading of that case shows that the court meant that a wife's statutory right to have a division of property, wherein she might get some interest, was a vested right which could not be defeated by her misconduct. This is a much flimsier right than a vested interest in property and could be called a vested right in an expectancy.

Citing *Jones v. Farris*, 180 Okla. 341, 69 P.2d 344 (1937) wherein the Oklahoma Supreme Court held that the mandatory division of property section of the divorce statute did not vest in a wife a right in jointly acquired property which would pass to her heirs upon her death.

Consequently, the language of *Thompson v. Thompson*, 70 Okla. 207, 173 P. 1037 (1918) labeling jointly acquired property as being similar to community property fails to make a wife a co-owner under the *Davis* tests.

Oklahoma has a peculiar statute which gives a wife a greater right of intestate succession than does Colorado or other common law property states. *Okla. Stat. Ann.* tit. 84, § 213 (1970):

Second... Provided, that in all cases where the property is acquired by the joint industry of husband and wife during coverture, and there is no issue, the whole estate shall go to the survivor, at whose death, if any of the said property remain, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation. (Emphasis added).

Under this statute a wife's heirs might receive her share of jointly acquired property
Shortly after Collins I the Oklahoma Supreme Court was called upon to determine Mr. Collins' tax liability on the same property settlement, this time under an Oklahoma tax statute very similar to section 1001 of the Internal Revenue Code. Referred to as Collins II, the issues were identical to those considered by the Tenth Circuit in Collins I. While the Oklahoma Supreme Court decided the husband's liability only under the state statute, it clearly rejected the reasoning of the Tenth Circuit regarding the similar federal statute and concluded that the Oklahoma statute providing for a mandatory division of jointly acquired property gave a wife a vested property interest therein.

The court relied upon Davis v. Davis for the proposition that a wife has a vested interest in jointly acquired property. Yet that case held only that the wife's statutory right to a share upon divorce is not forfeited because she was at fault in the divorce action. Citing Williams v. Williams, the Collins II court stressed that the kind of property which may be divided at divorce, jointly acquired property, is not subject to the discretion of the court. However, the kind of discretion which United States v. Davis implied was inconsistent with the notion that a wife was a co-owner was the court's discretion to make a "reasonable" division of property. Collins II based its conclusion that an Okla-

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Even when she predeceases her husband. This does not mean, however, that an Oklahoma wife, just as a community property wife, has a vested interest in such property which would always pass to her heirs even when she predeceases her husband. The surviving husband's dissipation of the jointly acquired property, or his remarriage, could leave her heirs with nothing. Consequently, the Oklahoma Supreme Court has said this statutory rule is not a rule of property but a rule of descent and distribution. Essex v. Washington, 198 Okla. 145, 176 P.2d 476 (1946).

* Collins II contains little discussion of intestate succession. The court acknowledged that the statute governing intestate succession was a rule of descent and distribution, not of property. Id. at 296. See note 87 supra.
* 61 Okla. 275, 278, 161 P. 190, 193 (1916).
* See note 84 supra.
* 428 P.2d 218 (Okla. 1967).
* 370 U.S. at 70. The Oklahoma divorce statute, like Delaware's, empowers the court to "make such division between the parties respectively as may appear just and reasonable ..." Okla. Stat. Ann. tit. 12, § 1278 (1961). Also to distinguish the facts in Davis, the Collins II court stated, in dictum, that factors traditionally considered by divorce courts, such as the financial needs of the spouses, were not to be considered in Oklahoma. Only the actual efforts and money contributed by the parties should be considered. Presumably, it might then be said that the court was not actually exercising any discretion at all in dividing property. 446 P.2d at 296-97. Ignoring financial need has been criticized as
homa wife's interest was similar to that of a wife in a community property state upon Thompson v. Thompson. While that case contained some very broad language, it merely held that a husband could be awarded jointly acquired property which was held in the name of his wife. The case did not hold that spouses in Oklahoma have the same rights as those in community property states. Finally, the court concluded that Colorado law was so different from Oklahoma's that Pulliam was not controlling. Nor was it bound by the Tenth Circuit's holding in Collins I that an Oklahoma wife's right to a statutory share upon divorce did not make her a co-owner under the Davis tests, because the operation of the Oklahoma divorce statute is not affected by the absence of "a right to make present disposition of property, nor absence of a descendable interest. A wife has a vested interest in jointly acquired property of the marital community [by virtue of that statute]."

It is certainly true that the Davis criteria of descendibility, management, and the right of disposition do not control the operation of the Oklahoma divorce statute. A wife in that state may claim her share under that statute regardless of Davis. The issue, however, is whether the interest given an Oklahoma wife by that statute is such that, using the Davis criteria, she is a co-owner claiming her one-half of the marital property, or whether, as in

harsh and has not been consistently followed by the court since Collins II. Note, supra note 83, at 291.

Moreover, the fact the division is solely on the basis of the parties' contributions is not sufficient to avoid Davis. There the Supreme Court did imply that a discretionary division was inconsistent with the concept of a vested interest in the wife. But the Court also required more—that the wife's alleged property interest be descendible, and that she be able to manage or dispose of it—else she was not a true co-owner.

The few differences are: 1) Only contribution is to be considered in Oklahoma, although domestic contributions are sufficient; 2) A property division is mandatory in Oklahoma; and 3) There is some difference in the rights of an Oklahoma wife's heirs to receive property of a surviving husband, although the Oklahoma Supreme Court ignored this in Collins II.

446 P.2d at 297. By this the court obviously meant to deny the applicability of the Davis tests. Yet it attempted to bolster the wife's interest by saying it was exercisable "at any time during marriage, even though she is not entitled to divorce." Id. Apparently the court was referring to a wife's right to a division of property in a separate maintenance proceeding. Okla. Stat. Ann. tit. 12, § 1275 (1961). However, that she is entitled to a division absent a divorce does not greatly enhance her interest in her husband's property. She is still unable to control it, or to make a present or testamentary disposition. Under Davis, she is still not a co-owner, and this division ought to be as taxable as one pursuant to a divorce.
Davis, her interest does not reach the dignity of co-ownership. From that perspective, it is inconsequential that the Oklahoma court labels the interest that she has under the statute as "vested." Whether vested or not, does it meet the Davis criteria? The Tenth Circuit had the opportunity to answer that question in Collins IV when its Collins I decision was vacated and remanded by the Supreme Court, called Collins III, for further consideration in light of the Oklahoma Supreme Court's opinion in Collins II. The opinion of the U.S. Supreme Court was one paragraph in length and did not purport to limit its earlier Davis decision. Nevertheless, the Tenth Circuit reversed itself and held that the factors in Davis were not "federal criteria" which must be met by state law before a wife's rights could be considered those of a co-owner. The language of Davis is to the contrary. The Tenth Circuit's opinion is supportable though, since it concluded that by Collins II the Oklahoma Supreme Court had proclaimed wives in that state to be co-owners of property jointly acquired during the marriage. If that is what Collins II proclaimed, the Oklahoma Supreme Court has since changed its mind.

In Sanditen v. Sanditen, which was not a divorce action, an Oklahoma wife seized upon the vested property right given her by Collins II and on that basis attempted to recover from her husband her portion of property jointly acquired that he had given away gratuitously without her knowledge or consent. The Oklahoma Supreme Court held that Collins II had not given her such an interest. The Sanditen court said Collins II held only that the wife's right to property, granted by the mandatory property division section of the divorce statute, became vested during the

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168 412 F.2d 211 (10th Cir. 1969).
169 393 U.S. 215 (1968) (per curiam). This is the entire opinion:

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

170 412 F.2d at 212.

181 370 U.S. 65, 70 (1961). By the Court's holding that state "tags" did not change the fact that Delaware law places only a burden on her husband's property, rather than make her "a part owner thereof," it is apparent the Court ignored state labels and looked to the substance of state law. See text accompanying notes 125-26 infra; accord, Wallace v. United States, 309 F. Supp. 748, 760-61 (S.D. Iowa 1970), aff'd, 439 F.2d 757 (8th Cir. 1971).

pendency of the divorce action.\textsuperscript{103} Further, a wife has no vested interest in property jointly acquired, for if she had that would make Oklahoma a community property jurisdiction, which it is not.\textsuperscript{104} Therefore, except during the pendency of a divorce action a wife in Oklahoma is not a co-owner.\textsuperscript{105}

A leak sprung in the dike fashioned by \textit{Sanditen}. In \textit{McDaniel v. Oklahoma Tax Commission},\textsuperscript{106} a husband transferred to his wife property held in his name but acquired by their joint efforts during their marriage. He claimed that under \textit{Collins II} his wife already had a vested interest in the property and in effect was a co-owner, so that the division did not constitute a gift by him which could be taxed. After noting that it had made several pronouncements in \textit{Collins II} not necessary to support the result reached,\textsuperscript{107} the court reiterated its holding in \textit{Sanditen} that an Oklahoma wife is vested with an interest in jointly acquired property only during the pendency of a divorce. Interestingly, the court stated that where there was no divorce action the jointly acquired property is owned by the husband.\textsuperscript{108} He has the sole power of disposition; he alone can transfer it; he is liable for the property taxes thereon; and his wife has no descendible interest therein.\textsuperscript{109}

\section*{III. \textit{Imel AND Davis}}

The Colorado Supreme Court expressly followed \textit{Collins II}, \textit{Sanditen}, and \textit{McDaniel} in its \textit{Imel} decision. The court held that while in general a wife had no interest in the property of her husband,\textsuperscript{110} such an interest was vested in her upon the filing of

\textsuperscript{103} Id. at 367.
\textsuperscript{104} Id.
\textsuperscript{105} This did not mean that Mrs. Sanditen was not entitled to relief. The court held that although she had no vested interest until a divorce action was commenced, she could prevent or recover conveyances made by her husband to defraud her right to a share of property upon divorce. The same right exists in Colorado, see note 62 supra.
\textsuperscript{106} 499 P.2d 1391 (Okla. 1972).
\textsuperscript{107} Id. at 1393. One of which evidently was that a wife is, in general, a co-owner or one with a vested interest.
\textsuperscript{108} Id. at 1394.
\textsuperscript{109} Id.
\textsuperscript{110} 517 P.2d at 1334-35. From the cases cited the court meant by this that a wife could prohibit transfers to defraud her of her right of intestate succession. See text accompanying notes 43-56 supra. The court made no mention of those cases allowing a wife to prohibit fraudulent transfers prior to a divorce.
a divorce action. The court found no significant difference between the Oklahoma and Colorado divorce statutes pertaining to the mandatory division of property. It went a step beyond either Sanditen or McDaniel when it declared that it was not "concerned" with the situation in which "one of the parties dies or the action is dismissed prior to a decree of divorce or prior to a division of property." The wife's right was inchoate only in that prior to the division the particular property to be transferred had not been determined. After the filing her rights are analogous to those of a wife who has a resulting trust in the property of her husband, so that it is not necessary, after the filing, for both spouses to join in the conveyance of property held in the name of only one of them. It is submitted that the interest described by the court in Imel is not, applying the Davis tests, sufficient to make her a co-owner. But then assuming, arguendo, that she does become a co-owner upon the filing of a divorce action, the fallacy of holding that there is no taxable transfer in such a situation is easily illustrated.

It is admitted by both the Oklahoma and Colorado Supreme Courts that prior to the filing of a divorce action, a wife has no interest in the property of her husband. Her interest, unlike that of wives in community property states, arises from the transfer mandated by the property division portions of the divorce statute. That this interest vests upon the filing of a divorce action, if true, should be a taxable event in itself. Presumably the wife suddenly has become a co-owner. By filing her action she has what is in effect a vested undivided interest as a joint tenant. The fact that it is undivided should not make a difference for tax purposes. It is not uncommon for a divorce court to fashion a property settlement in which there is not a partitioning of the property, but rather where the former spouses are made joint

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111 Id. at 1332, 1334, 1335.
112 Id. at 1334.
113 Id. at 1335. By this the court implied that the wife's interest "vested" upon filing the divorce action, but should the action be dismissed, or one of the spouses die, she would lose her interest. The district court described her interest as a vested one subject to divestment. 375 F. Supp. at 1118.
114 517 P.2d at 1335.
115 Id.
116 Collins II, 446 P.2d at 296-97. Imel relies upon Collins II in general and seems to have reached the same conclusion. 517 P.2d at 1334-35.
117 There are apparently no reported cases directly on point.
tenants in the property acquired by the husband. Since she was not a co-owner prior to the transfer, why should that transfer not be taxable as the one in Davis? In Davis the wife actually received her husband's property prior to the divorce, yet that was a taxable disposition because prior to that time she was not a co-owner. The same reasoning applied to Imel and Collins II. Prior to the time of the alleged vesting the wife was not a co-owner. Consequently that vesting, like the transfer in Davis, could be viewed as a taxable event.

A better interpretation of Imel and Collins II is that, instead of receiving a vested interest which makes her a co-owner, a wife's marital rights, after the filing of a divorce action, become protectible by the court. Imel was not "concerned" with situations in which the wife died after filing her action. And since the court did not reverse its earlier holdings, it can be inferred that should a wife die, her interest would not be descendible. Presumably neither could she dispose of her share, nor begin to manage or control it. In addition her husband may convey property without joining her. Given the limited nature of the wife's rights, even after vesting, it is clear that whatever right she has is not the same right as that of a co-owner. All that is accomplished by the vesting is that the wife's interest thereafter may be protected by the court even though its quantum is as yet undetermined. That, however, adds nothing to the rights a wife had before these cases. In Colorado a wife has been able for some time to prevent transfers to defraud her.

While neither Imel nor Collins II expressly purports to govern the federal taxation of property settlements, both courts re-

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118 In McDonald v. McDonald, 150 Colo. 492, 374 P.2d 690 (1962) the court decreed that property owned by the spouses in joint tenancy should remain in joint tenancy after their divorce. Oklahoma favors a partitioning, but has upheld a decree making a division of property by designating the spouses as tenants in common. Smith v. Smith, 206 Okla. 206, 242 P.2d 436 (1952).
119 See text accompanying notes 43-56 and 60 supra.
120 517 P.2d at 1335.
122 Nevertheless, the court in Imel stated that
[i]n Colorado a wife may have a certain species of common ownership in
jected the rule in *Davis* that co-ownership was to be determined with reference to federal criteria.\(^{124}\) It is submitted that when state and federal decisions are in conflict, the findings of federal courts regarding the federal taxation of state-created property rights should prevail regardless of the label given these rights by the state courts.

IV. STATE AND FEDERAL CONFLICTS

*Davis* itself did not elucidate carefully the role played by state laws and state court decisions in federal income taxation. It did make clear that whether a wife was a co-owner so that there was no taxable disposition of property by her husband was a question of federal and not state law.\(^{125}\) By that holding the Supreme Court did not presume to control the rights of the parties under state law. That the Court did attempt to do so is the straw man created by state decisions.\(^{126}\) Instead, the Court meant that the operation of the federal taxing statutes upon state-created rights cannot be determined by state law, but must be determined by referring to the objects intended to be taxed by the federal statute. There is much support for this conclusion.

The oft cited\(^{127}\) case of *Burnet v. Harmel*\(^{128}\) held that Texas' characterization of an oil and gas lease as a sale rather than a lease did not prevent the federal income tax statute from taxing the "sale" as if it were a lease. The taxpayer argued that if Texas law classified the transaction as a sale, it must be taxed as a sale and not as a lease. The federal act taxing sales of this kind of asset\(^{129}\) imposed a lower tax than the section which taxed leases of the same property. The Court flatly rejected the taxpayer's

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\(^{124}\) *Collins II* said that the right to make a disposition of her interest and the lack of its descendibility were not controlling. 446 P.2d at 297. *Imel*, besides its general adoption of *Collins II*, simply ignored the criteria, stating it was not "concerned" with the situation in which a spouse died, and declared that a transfer of property pursuant to a settlement resembled a division of property between two co-owners. 517 P.2d at 1334-35.

\(^{125}\) 370 U.S. at 70.

\(^{126}\) As where the Oklahoma Supreme Court in *Collins II* held that the *Davis* factors did not control the operation of Oklahoma's divorce statute. 446 P.2d at 297.

\(^{127}\) See, e.g., 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 61.02, at 2 (1970).

\(^{128}\) 287 U.S. 103 (1932).

\(^{129}\) Revenue Act of 1924, ch. 234, § 208(a), 43 Stat. 262.
argument that whether a sale had occurred depended upon the law of the State of Texas. The federal statute

neither says nor implies that the determination of . . . [whether there was a sale] . . . is to be controlled by state law. For the purpose of applying this section to the particular payments now under consideration, the Act of Congress has its own criteria, irrespective of any particular characterization of the payments in the local law. The state law creates legal interests but the federal statute determines when and how they shall be taxed. We examine the Texas law only for the purpose of ascertaining whether the leases conform to the standard which the taxing statute prescribed . . . .

The Davis Court, using a similar rationale, concluded that Congress, by its broad definition of income, intended that the appreciation of the stock transferred by the husband be taxed, and that the controlling federal statutory language “sale or other disposition” of property included his transfer to his wife. In other words, whether there is a taxable transfer from husband to wife or a nontaxable division between them is dependent upon the Court’s interpretation of congressional intent regarding the taxation of interests or property created by the state. It does not depend, as Imel and Collins urge, upon the label or tag the state chose to give the wife’s interest. The nature of the right created is to be determined by the federal court, which then determines whether that right is an object intended to be taxed by the federal statute.

That a federal court may make an independent appraisal of state-created property rights, and then determine the effect of the federal tax statute upon a transaction involving those rights, is supported by the early case of United States v. Robbins. A husband and wife domiciled in the community property state of

130 287 U.S. at 110 (emphasis added) (citations omitted).
131 370 U.S. at 68.
132 Id. at 71.
133 Accord, Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940), where the Court determined that what Wisconsin called a special power of appointment was actually the same interest meant to be taxed under a statute which taxed general powers of appointment. While the act did not actually define a “general power of appointment,” the Morgan Court, like the Davis Court, was able to determine Congress’ intent in that regard. “If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.” Id. at 81. This process has been called the “economic realities” test. 10 J. MERTENS, supra note 127, at 3.
California had attempted to file separate income tax returns whereby each would report one-half of the community income, which in their case was either earned solely by the husband or came from his separate property. The Treasury Department at that time did not permit the splitting of community income between spouses domiciled in California, presumably because the interest of a California wife in the community property was insubstantial and amounted to a mere expectancy while her husband was alive. The Court, in an opinion by Justice Holmes, affirmed the ruling of the Treasury Department. Holmes' opinion rested on the ground that California Supreme Court cases showed that the wife had only an expectancy. Unlike other community property jurisdictions, a California wife had no descendible interest in the community property. *Davis'* requirement that a wife must have a descendible interest in order to be a co-owner is thus in accord with *Robbins*. *Collins II* and *Imel* either ignore or deny the requirement that a wife have a descendible interest to be a co-owner. Neither of these decisions make the wife's interest descendible, nor does the prior case law.

Subsequent to *Robbins*, California enacted a statute making the wife's one-half interest in the community property descendible, and subsequently the Supreme Court held that California spouses could split their income. Justice Holmes' dicta in *Robbins*—that a California husband could be taxed upon the whole of community income because he possessed extensive control over it—was not followed in later cases. In *Poe v. Seaborn*, one of several test cases which argued Holmes' dicta, the first-mentioned factor which indicated the substance of the wife's interest in the community property was her right to make a testamentary disposition.

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132 T.D. 3138, 4 CUM. BULL. 238 (1921) allowed income splitting in all the other community property states. Congress has, since 1948, provided for joint returns in all states. INT. REV. CODE of 1954, §§ 2, 6013. There remain, however, income tax advantages for community property spouses who receive community income. See Swihart, supra note 134, at 126.

133 269 U.S. at 326.

134 See text accompanying notes 43-56 supra.

135 Ch. 18, § 1, [1923] Cal. Sess. Laws.


137 269 U.S. at 327.

138 282 U.S. 101 (1930). This case was cited in *Davis* for the proposition that until Congress granted relief (e.g., joint returns) common law jurisdictions have fewer tax advantages than community property states. 370 U.S. at 71.

139 282 U.S. at 110. See also Goodell v. Koch, 282 U.S. 118, 121 (1930); Hopkins v.
Colorado and Oklahoma's description of a wife's interest in the property of her husband as "vested" subsequent to the filing of a divorce action does not change the result dictated by Davis or Pulliam. The rule is that the nature of the state-created right must be ascertained by a federal court which decides whether the right created or the transaction which occurred is the object to be taxed by the taxing statute. So the conclusory label "vested" does not determine whether the essential federal criteria for co-ownership have been met. As has been seen, the wife's vested right is not descendible, it gives her no rights of management or disposition, and, certainly in the Colorado case, its quantum was subject to the discretion of the divorce court. Notwithstanding being "vested," the wife's rights are insufficient to prevent the operation of the federal tax upon the husband's transfer. This would by no means be the first instance of a federal court's disregarding a vested state property right in matters of federal taxation.

CONCLUSION

Except for allowing a wife her separate property and earnings, little change has occurred in marital property law in com-

Bacon, 282 U.S. 122, 126 (1930); Bender v. Pfaff, 282 U.S. 127, 131 (1930); Swihart, supra note 134, at 119-21.

That principle has also been explained as follows:

State law is not used for tax purposes in the same way that it is employed by a federal court exercising jurisdiction in diversity cases under the principle of Erie R. R. v. Tompkins. Under the Erie doctrine . . . state law furnishes the substantive rule of decision. In tax cases, on the other hand, the substantive rule is federal, and state law merely establishes some of the facts to which the court applies federal law in order to reach its conclusions. Whether or not a particular fact is to be established by means of state law is a matter of legislative intent.


The Tenth Circuit Court of Appeals, on April 30, 1975, heard oral arguments on the appeal of Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1974). The district court followed the opinion it received from the Colorado Supreme Court in response to the question it certified to that court. The Tenth Circuit has not yet decided the case. Dicta in two recent Tenth Circuit cases indicate that court favors the Davis rule. See Wiles v. Commissioner, 499 F.2d 255, 259 (10th Cir. 1974) and Hayutin v. Commissioner, 508 F.2d 462, 468 (10th Cir. 1974), where, referring to a wife's vested right announced in Imel, the court said

[such a characterization is not controlling for tax purposes. Rather, consideration must be given to the true nature of the transfer under Colorado law. When so viewed, it is apparent that Colorado places a burden upon the husband's property rather than making the wife a part owner thereof.

Id. (citation omitted).
mon law states,\textsuperscript{145} including Colorado and Oklahoma. A wife in these states is not allowed a one-half interest in marital property\textsuperscript{146} which she may manage and control, or dispose of presently or by will. Instead, she is entitled to her own property, which is often less than that of her husband. She is also given certain rights against the property of her husband should the marriage be dissolved by divorce or death, but these rights do not make her husband’s property subject to her control or disposition.\textsuperscript{147} In the case of divorce her interest is not even a fixed share.\textsuperscript{148} As Davis

\textsuperscript{145} Johnston, supra note 18, at 1090:

Beyond a married woman’s separate property and outside earnings . . . there has been no fundamental change in marital property law. Wives are still expected to perform services in the home for their husbands without recompense beyond the limits of the husband’s duty of support.

\textsuperscript{146} Colorado’s new Uniform Dissolution of Marriage Act defines marital property to be divided at dissolution as all property acquired by either spouse after the marriage except that acquired by gift, bequest, devise, descent, and some other property. Colo. Rev. Stat. Ann. § 14-10-113(2) (1973). Marital property closely resembles community property. However, the statute does not make Colorado a community property state because it does not give a wife, or either spouse, any interest in the marital property which they did not already have in Colorado. Instead of changing Colorado into a community property state, the statute, by its express terms, merely specifies what property may be divided upon dissolution. Id.

\textsuperscript{147} The Colorado Supreme Court in Imel evidently felt it could skirt this deficiency by holding that the right which vested upon filing a divorce action (which even then was not descendible) was inchoate prior to that time (and therefore naturally beyond the wife’s control and disposition) only in the sense that the specific property to be transferred had not yet been determined. 517 P.2d at 1335. The weakness of this argument is that a true co-owner, such as a wife in a community property state, need not have her one-half interest specifically determined before she may dispose of it, e.g., at death. De Funiak §§ 198-99.

Equally unavailing is the argument that the right to a share at divorce makes her a co-owner because the statute granting it is mandatory. Besides the fact that she could get much less than one-half and perhaps nothing, the mere fact it is mandatory that the court give her some of her husband’s property does not give her the rights of control and disposition that Davis demands.

\textsuperscript{148} It has been argued (e.g., by Gunn, supra note 3, at 249 n.87) that because the quantum of a wife’s share upon divorce in a common law property state is subject to the discretion of the court should not cause a different tax result than a divorce in a community property jurisdiction, since several of those states have similar provisions. See De Funiak § 227. Davis implied that the discretion granted the trial court was inconsistent with the notion the wife was a co-owner. 370 U.S. at 70. See also note 94 supra. It is submitted that, while a discretionary division would seem inconsistent with the concept of co-ownership in either jurisdiction, there is nevertheless a fundamental difference between the two situations.

In common law property states the existence of a court’s discretionary power to divide the husband’s property is reflective of the fact that his wife never had a vested interest therein, and that whatever interest she will receive is dependent upon the discretion of the court. “What [she will receive] might be ascertained independently of the extent of
held, such rights impose a burden upon the property of her husband, but hardly make her a co-owner thereof. A state's declaration, as in \textit{Imel} or \textit{Collins II}, that she is theoretically a co-owner but without the rights of one is a "theoretical protestation"\textsuperscript{14} that she ought to be viewed as a co-owner for tax purposes despite the true nature of her rights. The state's label fails to prevent the tax imposed by \textit{Davis} because it fails to make her a true co-owner. For that reason it does not seem unfair\textsuperscript{15} to tax the husband, who, like Mr. Davis, has his property to himself but alleges his wife owns it too. Why should he have it both ways?

The \textit{Davis} criteria—a descendible property right not subject to the discretion of a court and which a wife may manage and dispose of—have traditionally been lacking in common law property states. At one time \textit{Davis} could be criticized\textsuperscript{151} because

\begin{itemize}
  \item the husband's property" (370 U.S. at 70), \textit{i.e.} without reference to a fixed percentage of whatever her husband owned.
  \item On the other hand, in community property jurisdictions both spouses are viewed as having vested one-half interests in the community property. \textit{See} note 36 \textit{supra}. A court's discretion in making a division of property between them is therefore not reflective of the fact that a wife has no interest in the community property until a discretionary award is made by the court. Instead, the court's discretion can be viewed as its power to divest either spouse of part of his one-half interest should the court make an unequal division because of fault, financial condition, etc. This is supported by the fact that in New Mexico and Louisiana the community property must be equally divided. \textit{De Funiak} § 227, at 515. In New Mexico it has been held that, absent a statute authorizing a court to make an unequal division thereby divesting a spouse of a portion of his one-half, the court has no such power. \textit{Beals v. Ares}, 25 N.M. 459, 499, 500, 185 P. 780, 793 (1919).
\end{itemize}

\textsuperscript{14} This term was used by Cahn, \textit{Local Law in Federal Taxation}, 52 \textit{Yale L.J.} 799, 827 n.116 (1943), in describing the recently enacted and since repealed Oklahoma community property statute. Cahn noted that the wife's very limited power of control and disposition over community property was difficult to reconcile with the concept of community property and with the "theoretical protestation" of the statute that each spouse had a vested one-half interest therein. He further stated that "[w]henever the local statute appears to be inspired by the objective of special tax privileges, unrelated to historic institutions of the state, it must be examined with a high measure of skepticism." \textit{Id.} at 828. Perhaps the same could be said of \textit{Imel} and \textit{Collins II}.

The term "amiable fiction" was used by Justice Sutherland in \textit{Tyler v. United States}, 281 U.S. 497, 503 (1930), to describe the common law notion that at death no transfer, and hence it was argued no taxable transfer, occurred between husband and wife holding property as tenants by the entirety. The taxpayer's argument was unsuccessful for reasons not relevant here, but the language aptly describes the fiction that no transfer occurs in Colorado or Oklahoma divorce property settlements because the wife is already a co-owner of the property.

\textsuperscript{15} At least it has not seemed so unfair as to persuade Congress to change the result. One draft of a statute which would do so has been available since 1954. \textit{See} \textit{ALI Fed. Income Tax Stat.} § 257(a)(Feb. 1954 Draft).

\textsuperscript{151} \textit{See}, \textit{e.g.}, Gunn, \textit{supra} note 3, at 250-51.
a wife's power to manage and dispose of her interest was also lacking in the eight community property states. Yet husbands in those states received favorable tax treatment. It appears, though, that in community property states there is a definite trend toward making a wife a true co-owner. Common law property jurisdictions suffer by comparison.

It has been asserted that the fairest regime of marital property is community property. In that system both spouses are recognized as equal partners and true co-owners. If Colorado and Oklahoma wish to benefit husband/taxpayers in their states upon the theory that husband and wife are co-owners of marital prop-

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152 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. De Funaki § 1, at 1. While the wife's control and ability to dispose of her interest were determinative in Davis, it might also be pointed out that there are other matters which may be equally important such as her liability for debt. Id. § 94, at 235.


Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing and acknowledging the deed or other instrument of conveyance, by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated.


erty, the proper method would be to make them so. *Imel* relies upon the theory that husband and wife are co-owners, but ignores the fact that in Colorado they are not.

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