TAXATION OF UNMARRIED PARTNERS

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INTRODUCTION

Marriage plays an essential role in federal taxation. Marital status determines how you file your taxes and what rate is applied to your income. If you are married, you are entitled to file a joint return that will include the aggregated income of both spouses. Sometimes filing as a married couple can create a benefit. More often joint filing will create a penalty.[1] Many scholars have addressed this problem and suggested solutions.[2] In an ideal tax system, these scholars believe that tax laws should be marriage neutral.

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1. *See* Emily Y. Lin & Patricia K. Tong, *Marriage and Taxes: What Can We Learn from Tax Returns Filed by Cohabiting Couples?*, 65 NAT'L TAX J. 807 (2012).

2. *See, e.g.*, Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000); Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implication for Women*, 66 U. CIN. L. REV. 535 (1998); Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

Recognizing marriage as such a bright line in our tax system results in a system that ignores unmarried couples. That doesn't have to be the case as laws from other countries show. The problems for unmarried couples and how they are taxed in the United States are twofold. First, the tax law treats unmarried couples as strangers even though their lives often closely resemble those of spouses.[3] Sometimes this treatment can be beneficial (e.g., two single taxpayers can avoid the marriage penalty created by the joint return). But sometimes failure to recognize the reality of the relationship can be detrimental. For example, two unrelated individuals who share income and expenses may be viewed by the IRS as making taxable transfers. But the second problem, which I believe to be even more serious, is that the IRS has been notoriously silent on what the tax rules are that should be applied to unmarried cohabitating couples.[4] This results in a degree of tax uncertainty. Cohabiting couples simply do not know what the relevant tax rules are.

This Article argues that the uncertainty of the tax consequences of dealings between unmarried partners is particularly problematic and results in uneven tax treatment of similarly situated unmarried couples across the country. That is primarily because their tax advisors, in the absence of clear guidance, advise taking different sorts of positions, some that are pro-taxpayer and some that are not.[5] This uneven treatment is bad tax policy. Indeed, this lack of guidance is bad tax policy. Taxpayers deserve to know in advance the rules that govern their transactions.

I. A SHORT HISTORY OF MARRIAGE AND THE INTERNAL REVENUE CODE

In 1948 the United States first embraced the principle that a married couple should be the taxable unit. The primary principle was that every married couple should pay the same amount of income tax on the same amount of income, no matter how the income might be owned or controlled by the individual spouses. That meant if a husband earned $100,000 and the wife earned nothing, that couple should pay the same amount in taxes as a

3. This is especially true for unmarried couples, who, if registered in those states that recognize marriage-alternative statuses such as registered domestic partnerships or civil unions, not only live their lives as spouses but are treated the same as spouses under state law.

4. The IRS has only publicly announced its position regarding some of the tax rules that apply to registered partners. *See Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions*, IRS, https://www.irs.gov/newsroom/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions#:~:text=Registered%20domestic%20partners%20may%20not,married%20for%20federal%20tax%20purposes [https://perma.cc/U9QQ-9P6D].

5. For example, sometimes couples who split up and make payments to one another pursuant to the split up are advised that the payments are income to the recipient and others are advised that the payments are excluded from income as gifts but may be subject to the gift tax. And others are advised that there are no tax consequences to such payments. All of these options will be discussed in this article.

couple in which the husband earned $50,000 and the wife also earned $50,000.

This was not, strictly speaking, a policy decision. It was an eighteen-year delayed congressional reaction to the 1930 Supreme Court decision in *Poe v. Seaborn*.[6] In that case, the Supreme Court had ruled that spouses living in community property states could split all earned income 50/50. Because of the progressive rate schedule that applied to a taxpayer's income that meant that spouses in community property states paid a lower income tax bill than spouses in non-community property states. Splitting the earned income allowed them to take double advantage of the lower brackets. To prevent that geographic discrimination, Congress elected to enable all spouses to split their income by using a joint return in which the brackets were double what they were for single taxpayers.

There are three tax policy maxims that come into conflict because of the way we have structured our tax system around marriage. Boris Bittker explained this conflict clearly in his important 1975 article on Taxation of the Family.[7] If you embrace these three tax principles: (1) progressive rates, (2) marriage neutrality, and (3) equal taxation of married couples, you will have to choose which is more important. That is because it is impossible to accomplish all three. The aggregation of income owned by two single taxpayers upon their marriage to each other necessarily violates marriage neutrality in a system that uses progressive rates.

The Revenue Act of 1948 was passed almost seventy-five years ago and not much has changed since then. Married couples still file jointly. But the rate structure has changed since 1948 in response to political pressure from taxpayers, first from those who were single and raising children. They argued they should be able to split their income with the children they were raising. And so, in 1951, a Head of Household rate was enacted which provided 50% of the benefit of income splitting.[8] Then single taxpayers complained that they were being overtaxed as compared with married couples who often had a stay-at-home spouse providing beneficial untaxed services in the home. Nor did single taxpayers enjoy economies of scale since they were not sharing a home and home expenses with another.[9] Congress listened to those arguments and in the Tax Reform Act of 1969 reduced the rates of single taxpayers, thereby adding to the effect of what

6. Poe v. Seaborn, 282 U.S. 101 (1930).

7. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975).

8. This was justified in Congress on grounds that a Head of Household had to share her income with the dependent, who under the proposed rate was to be treated as half a person. *See* H.R. REP. NO. 82-586, at 11 (1951).

9. The increase in the rate of unmarried cohabitation, together with the greater acceptability of such living arrangements, takes some of the punch out of this argument.

has become known as the marriage tax penalty.[10] Today many married couples face a marriage tax penalty.[11] And all couples who file jointly are subject to joint and several liability, which can often seem a penalty to a spouse who is held responsible for the unreported income of an absent spouse.[12]

No other advanced country embraces the joint return concept.[13] Great Britain was perhaps the last to abandon the notion and that was thirty years ago.[14] We, the United States, cling to this notion that it is right and just to treat spouses as a single taxpaying unit, indeed often as a single taxpayer.

At the other end of the spectrum are the rules governing taxation of unmarried couples. There are, in point of fact, very few rules, and, for the most part, unmarried couples are treated as two individual single taxpayers who are virtually strangers for purposes of tax law. Even if the couple is registered in a marriage-alternative status under state law, such as registered domestic partners or civil union partners, federal tax law treats the couple as unmarried and thus as tax strangers.[15] This treatment produces odd results since under the laws of most states that recognize these marriage-alternatives, the couple is treated as married for purposes of state tax law.[16]

There is a slight nod by the federal tax authorities to the marriage-alternative status under state law. If the state accords such couples specific state property rights, those rights will be recognized for federal tax purposes. The only clear statement by the IRS that this is the applicable rule is with respect to registered domestic partners in those community property states in which registration at the state level subjects the couple to the

10. The Tax Reform Act of 1969, H.R. 13270, 91st Cong. (1969).

11. The penalty created by the difference in rate schedules was greatly reduced during the George W. Bush administration, but not at the top rates. And treating a married couple as one taxpayer for purposes such as the limitation on deductions for state and local taxes is obviously a penalty. That limitation is $10,000 but if both spouses work and pay state income taxes in excess of $10,000 each, they are nonetheless limited to an overall deduction of $10,000. One recent study shows that more married couples experience penalties than those that experience a marriage bonus. *See* Lin & Tong, *supra* note 1.

12. The enactment of innocent spouse provisions has alleviated some of this problem. *See* I.R.C. §§ 6015, 6066.

13. *See* Joseph A. Pechman & Gary V. Engelhardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 NAT'L TAX J. 1, 9 (1990). Germany has one rate schedule but for married taxpayers the brackets are doubled. This approach was required by a constitutional ruling from the Supreme Court that equality of taxation before and after marriage were required. *Id.*; *Federal Constitutional Court, January 17, 1957 – 1 BvL 4/54*, OPINIOIURUS, https://opinioiuris.de/entscheidung/851 (access to German opinion found by SCU student, Akira Kimati).

14. Pechman & Engelhardt, *supra* note 13.

15. Treas. Reg. § 301.7701–18(c).

16. Colorado is the exception to this rule. Under Colorado law, taxpayers must file taxes at the state level in accord with whatever status they used for federal filing purposes. *See* COLO. REV. STAT. ANN. §14-15-117.

community property regime.[17] The benefit to such couples is often huge. For example, if one partner is earning a high income and the other is earning very little, the two partners can split the overall income relying on *Poe v. Seaborn*[18] and thereby reduce their overall federal tax burden. Application of this rule creates the same sort of geographical discrimination for unmarried registered couples that *Poe v. Seaborn* had created for married couples prior to enactment of joint returns in 1948.[19]

However, in my view, this geographical discrimination is a very small problem compared to the biggest problem facing unmarried couples: uncertainty as to what the tax rules are. The IRS has issued virtually no guidance for unmarried couples generally. And there are very few court decisions addressing the tax issues that typically arise for such couples. The primary purpose of this article is to identify those issues and suggest ways they might be addressed.

II. THE ROLE OF STATE PROPERTY LAW

"[T]he subject matter of federal taxation is almost always a right, liability, status, or other legal interest created by state law."[20] While there are certain benefits to relying on state property law to determine federal tax outcomes (e.g., certainty and avoiding the need to create an entirely separate federal property regime for tax purposes), there are also built-in inequities such as the one demonstrated by our experience with *Poe v. Seaborn*. State property laws do differ and therefore can create different tax outcomes between taxpayers living in different states.[21]

Congress has cured a number of these geographical discrepancies for married taxpayers. Not only did it enact joint returns in 1948 to cure the *Poe v. Seaborn* income splitting problem, in 1984 it enacted section 1041 to ensure that upon divorce all spouses were treated the same, regardless of the differences in state property rights.[22] Congress has never passed a statute

17. C.C.A. 201021050 (May 28, 2010). There are only three community property states that recognize registered domestic partners: California, Nevada, and Washington.

18. Poe v. Seaborn, 282 U.S. 101 (1930).

19. Spouses in community property states paid lower federal income taxes under the income splitting rules than spouses in non-community property states paid before enactment of the 1948 joint return.

20. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS 4–13 (2d ed. 1989).

21. *See generally* Note, *The Role of State Law in Federal Tax Determinations*, 72 HARV. L. REV. 1350 (1959).

22. Section 1041 provides that no gain or loss shall be recognized by either spouse because of property transfers made incident to divorce. Court decisions had taxed some spouses. *See* United States v. Davis, 370 U.S. 65 (1962). While other decisions had determined that if spouses could be viewed as jointly owning the property that was divided, the property division would be nontaxable. *See* Carrieres

addressing the tax situation of unmarried couples and it is unlikely to do so any time soon. As a result, it is up to the IRS, the agency charged with construing our tax laws, to apply rules to unmarried couples based on existing law, but with as much equity as possible.

III. WHAT ARE THE PROPERTY RIGHTS OF UNMARRIED COUPLES?

Property rights of unmarried couples is a topic on which states vary considerably. Of course, in every state, true legal joint ownership of property is available to unmarried couples if they bother to register the title to the property accordingly. While it is more difficult to prove joint ownership of personal property since it typically requires no registration, certain presumptions likely apply. If both partners are contributing to the household and purchasing items for the household together then it makes sense to presume that the items are owned jointly. If you apply such a presumption, it would be very difficult for the IRS to rebut the presumption. Therefore, any division of jointly-owned property, whether real or personal, should not be a taxable event. The IRS is on record that a partition of jointly owned property outside of marriage is not a taxable event.[23]

But for unmarried couples who acquire property jointly during the relationship in cases in which title is held by only one of the partners, the law is less clear and varies from state to state. In the state of Washington, for example, unmarried couples who are in a committed intimate relationship are recognized by the state as being in a special status.[24] And that status provides certain property rights. Whenever the relationship is dissolved (either during life or at death) the property acquired by the couple during the relationship is split evenly between them. I sometimes characterize these rights as akin to quasi-community property rights. Quasi-community property is property acquired by a married couple while living in a non-community property state but then brought into the community property state when the couple changes its domicile. Once the couple moves to the community property state, any property previously acquired while married is classified as quasi-community, meaning that it is equally divisible at divorce or death.[25] The property rights do not vest until the

v. Comm'r, 552 F.2d 1351 (9th Cir. 1977) (a substantially equal division of community property is not a taxable event).

23. *See* Rev. Rul. 56-437, 1956-2 C.B. 507 (partitioning one jointly owned parcel of land into two separately owned parcels is not a taxable exchange).

24. *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995).

25. Most community property states have statutes creating quasi-community property rights, although Nevada does not. And Texas currently only applies the quasi-community property rule to relationships that end in divorce. *See generally* Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States*, 35 ACTEC J. 74 (2009).

relationship ends. But the rights are fully vested then. If there is a division of these assets 50/50, under case law handed down for spouses before the enactment of section 1041, there should be no taxable event, for the same reason as divisions of jointly held property are not taxable. Each partner is getting what he or she already owned under the law of the state.[26]

Outside of joint ownership or the quasi-community property rights accorded qualifying unmarried couples in the state of Washington,[27] the law becomes more murky. Before the *Marvin* decision by the California Supreme Court in 1976,[28] cohabiting unmarried couples had few rights. Contracts they may have entered into regarding their property rights were routinely unenforceable in court, based on the idea that contracts regarding cohabitation outside of marriage were against public policy. *Marvin* changed that by saying that not only could such contracts be enforced, but, even if the contract was only implied, rather than express, it could be enforced. And, in the right fact situations, certain equitable claims could be made against a partner, including *quantum meruit* and unjust enrichment or quasi-contract.[29] Most states have adopted the holding in *Marvin*, at least to some degree. In some states, however, only express contracts will be enforced.[30] In a handful of states, the contract must be in writing.[31] And

26. See Jean C. Carrieres, 64 T.C. 959 (1975), *aff'd,* 552 F.2d 1350 (9th Cir. 1977) and Rev. Rul. 76-83, both applying this non-recognition of gain rule to married couples.

27. Oregon and Nevada are sometimes mentioned as states that resemble Washington in recognizing certain cohabitants as having a status that creates property rights. *See* Beal v. Beal, 577 P.2d 507 (Or. 1978), discussed in Courtney G. Joslin, *Nonmarriage: The Double Bind*, GEO. WASH. L. REV. (forthcoming 2022); *see also* W. States Constr., Inc. v. Michoff, 840 P.2d 1220 (Nev. 1992) (discussed as to this point in Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 16–17 (2017)). In my view, Washington is the only state that has clearly adopted this status-based approach.

28. Marvin v. Marvin, 18 Cal. 3d 660 (Cal. 1976).

29. In many states, however, claims for *quantum meruit* or unjust enrichment have proved impossible outside of proof of an agreement that services provided, or even financial aid in some instances, was not gratuitous. There is a strong presumption that services and other economic benefits provided by one member of the household to another are provided gratuitously. *See* Trimmer v. Van Bomel, 434 N.Y.S.2d 82 (N.Y. Sup. Ct. 1980); Mitchell v. Moore, 729 A.2d 1200 (Penn. Sup. Ct. 1999); *Establishment of "Family" Relationship to Raise a Presumption That Services Were Rendered Gratuitously, as Between Persons Living in Same Household but Not Related By Blood or Affinity*, 92 A.L.R.3d 726, 743–45 (1979).

30. E.g., New York. *See* Morone v. Morone, 413 N.E.2d 1154, 1154–57 (N.Y. 1980).

31. E.g., Minnesota and New Jersey. *See* MINN. STAT. § 513.075 (1980); N.J. REV. STAT. § 25:1-5 (2013).

there are a few hold-out states that continue to reject *Marvin* on grounds of public policy.[32]

IV. TAX ISSUES FOR UNMARRIED COUPLES

A. *Payments from One Partner to the Other During the Relationship*

For married taxpayers there is a statutory rule, section 1041 of the Internal Revenue Code, enacted in 1984, which provides that no transfer from one spouse to another spouse is subject to any tax. Even if the transfer looks like a sale, i.e., a cash transfer by one spouse to another in exchange for property, the income tax result is to ignore the transaction and impose no tax. Gift taxes are not applicable because there is (as of 1981) a 100% marital deduction for purposes of gift taxes.[33] Even before the 100% marital deduction, if one spouse paid for the other spouse's support, that payment was not a taxable gift because taxable gifts do not include payments for state-mandated support.[34]

The law is less clear regarding transfers between partners in an unmarried couple. Obviously the statutory provision in section 1041 cannot apply since it quite clearly only applies to spouses. Since the IRS has taken the position that even Registered Domestic Partners, who are treated like spouses under state law, are not spouses for federal tax law, the Service quite clearly will not construe section 1041 to apply to unmarried unregistered partners.

If the couple is registered under state law as registered domestic partners or as civil union partners, then to the extent the transfer is for purposes of support, the gift tax is not applicable. That is because under state law support is mandated for such couples. Furthermore, support can include items beyond mere necessities.[35]

By contrast, current tax rules do seem to treat payments by one partner to the other, in the absence of a state-imposed obligation of support, as

32. E.g., Illinois. *See* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Blumenthal v. Brewer, 69 N.E.3d 834 (Ill. 2016).

33. I.R.C.§ 2523. There is also a 100% marital deduction for transfers to spouses at death. *See* I.R.C. § 2056.

34. Rev. Rul. 68-379, 1968-2 C.B. 414.

35. The extent of the support obligation is determined under state law and therefore differs from state to state. The IRS will follow state law in determining the extent of the obligation. *See* Rev. Rul. 56-484, 1956-2 C.B. 23; *see also* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 97, 127 n.148 (1991).

taxable gifts.[36] With the size of the current gift tax exemption,[37] this characterization may not trouble many taxpayers. But any taxpayer who makes a taxable gift (i.e., an amount in excess of the current annual exclusion of $16,000 per donee[38]) is legally required to file a gift tax return. And, of course, there is always the threat that the exemption amount may decrease.[39]

Payments of support in the form of tuition and medical expenses are not taxable gifts provided the payments are made directly to the provider of such services.[40] But support in the form of food and housing can be treated as taxable gifts. I have argued elsewhere that this seems inappropriate.[41] There are two main reasons for my argument. One, the gift tax was enacted to support the estate tax.[42] That means that lifetime transfers that are estate depleting are the aim of the gift tax. Paying for basic support year by year hardly seems like a plan to deplete one's estate. And second, there is really no identifiable transfer of property in most of these situations because the richer partner is typically paying for housing and meal costs and not making cash or property transfers. A gift tax is levied on a transfer of property. But if partner *A* is simply providing space for *B* to live with *A* and buying groceries for them to eat together, those transactions do not transfer any property. I have argued elsewhere that, in fact, such payments, even if for entertainment, are more akin to consumption choices by the taxpayer alone primarily for the taxpayer's benefit. I don't want to live alone, eat alone, or travel alone, and so I pay for my partner to join me.[43]

If the payments are not taxable gifts, are the payments for support nonetheless taxable income to the partner? The definition of "gift" is different for income and gift tax purposes. For income tax purposes, the transfer must stem from a motive identified by the Supreme Court as

36. *See* Rev. Rul. 82-98, 1982-1 C.B. 141 (1982) (ruling that a parent's payment to help support an incapacitated adult child for whom he owed no legal obligation of support is a taxable gift); Robert G. Popovich, *Support Your Family but Leave Out Uncle Sam: A Call for Federal Gift Tax Reform*, 55 MD. L. REV. 343 (1996) (discussing the possible gift tax liability for support transfers between family members when there is no legal obligation to support).

37. I.R.C. § 2010 authorizes an exemption amount of $5.0 million, but under § 2010 (c)(3)(C), that amount has been increased to $10 million until 2026. The $10 million is indexed for inflation so that the amount of the exemption for 2022 is $12.06 million. *See* Rev. Proc. 2021-45.

38. The annual exclusion is at I.R.C. § 2503(b) (1954) and it is adjusted for inflation. It was $15,000 in 2021 but has been increased to $16,000 for 2022. Rev. Proc. 2021-45

39. There are currently discussions in Congress about reducing it to $3.5M, as President Biden has proposed. And, in the absence of congressional action, the exemption is scheduled to return to $5.0M, adjusted for inflation, in 2026.

40. *See* I.R.C. § 203(e) (1938).

41. *See* Cain, *supra* note 35.

42. Clearly if one gives one's estate away on one's deathbed to avoid the estate tax, the estate tax would not have its desired effect.

43. *See* Cain, *supra* note 35, at 129.

"detached and disinterested generosity."[44] I prefer to describe the motivation as one stemming from love and affection, which is a standard also suggested by the Supreme Court.[45] It is actually difficult to imagine any action taken out of disinterest. Actions taken out of love or affection, by contrast, seem more readily recognizable. Some scholars have suggested that to the extent payments made by one partner for the benefit of the other partner stem from an understanding or a contract, they cannot stem from "detached and disinterested generosity."[46] I, by contrast, think the genesis of the underlying contract must be considered. In my view, even if there is a contract, that contract likely arose out of motives of love and affection and thus should be covered by the Supreme Court's test.

The other argument on behalf of the IRS is that any such payments are actually made in exchange for the domestic services or similar services provided by the recipient partner. There are cases on this point, sometimes referred to as the "mistress cases."[47] The IRS wins some of them and loses some of them. As a general rule, it wins the cases in which the woman who is receiving large sums of money is clearly providing sexual services.[48] It tends to lose when the situation involves a couple that is cohabiting and sharing life's expenses.[49]

The case law here is important, not just with respect to the question of how to tax current payments or benefits. If the principles of the *Marvin* case are to be applied to a couple, then it is possible to view the lower-wealth partner, or the partner who is not participating in the marketplace, as accruing contractual or equitable rights to the other partner's property, year by year. How is this accrual or rights to be viewed under the tax law? No case has ever addressed this,[50] and I don't believe any scholar has either.

One possibility is that any such rights that may accrue, year by year, accrued because of the ongoing love and affection and thus such rights are

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44. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

45. After stating the standard as "detached and disinterested generosity," the Court says or "out of affection, respect, admiration, charity or like impulses." *Id.*

46. *See* Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240 (1980); Gary C. Randall, *Tax Status of Friendly, but Unmarried, Taxpayers*, 57 TAXES 27 (1979).

47. Debra Lefler, *Keeping the Books on Romance: The Gift Exclusion in Nonmarital Relationships*, 105 NW. U. L. REV. 1739, 1748 (2011).

48. *See* United States v. Harris, 942 F.2d 1125 (7th Cir. 1991). In this case, the transfers were held to be taxable income, not gifts, but in this criminal prosecution for failure of the taxpayer to report the income, the court held that the law was not sufficiently clear on this matter to sustain the intent required for criminal charges.

49. *See* Pascarelli v. Comm'r, 55 T.C. 1082 (1971); *see also* Austin v. Comm'r, T.C.M. 1985–22 (holding lifetime transfers were excludable gifts but amounts recovered from estate were taxable as compensation).

50. *But see* Reynolds v. Comm'r, 77 T.C.M. 1479 (1999), which did address this indirectly, finding that any such rights that accrued over the period of the relationship were likely acquired by gift.

tax-free gifts. In my own view, however, there is nothing identifiable to tax during the relationship. *Marvin* rights are not presently vested. They come into being only when the relationship ends when there is a possible claim by one partner against the other. We do not tax speculative income. So even if these rights may be thought to be income, they cannot be treated as income as they accrue year by year because there truly are no enforceable rights at that time. At that point in time, we don't know whether they will ever be realized as a thing of value by the claimant. The property to which the claims might attach may be lost, before the relationship ends and any claim is made. In tax parlance, we would say there is no "realization" of income as these rights accrue.

Nor can the "accrual" of these rights be viewed as taxable gifts year by year. That is because in the absence of creating a vested right, there is no property transfer.

If support-style payments between unmarried partners are not subject to the gift or income tax, and if the accrual of *Marvin*-style rights produces no tax consequences as they accrue, then the taxation of married and unmarried couples would be similar during the term of the relationship. Most transfers would not be taxed. However, a clear transfer of property from one partner to the other beyond that partner's need for support and in excess of the annual gift exclusion would presumably constitute a taxable gift since there is no marital deduction for partners.

The key problem here, however, is that no one knows with certainty how these support payments and accrual of *Marvin*-style rights are in fact taxed. A little bit of tax certainty would be good tax policy. And, given the number of unmarried couples paying taxes today, that certainty would be especially helpful. The situation calls for some guidance from the IRS. Without guidance taxpayers are left to make their own determinations or follow the advice of counsel. As a result, some taxpayers in unmarried couples do not report lifetime transfers as income and yet some do.[51]

B. Transfers of Property at Dissolution of the Relationship

1. Divorce Taxation Prior to the Enactment of Section 1041 in 1984

In 1962, the United States Supreme Court handed down its decision in *U.S. v. Davis*,[52] holding that property divisions at divorce could be taxable. The facts in *Davis* are fairly straightforward. Mr. Davis transferred

51. *See In re* Walsh v. Reynolds, 2019 Wash. App. 2d 1041 (June 25, 2019) (over $500,000 in payments were made over the term of the partnership and the recipient reported all payments as income).

52. United States v. Davis, 370 U.S. 65 (1962).

appreciated stock to Mrs. Davis in exchange for her relinquishment of all her marital rights, and, quite frankly, for her consent to the divorce. Mr. Davis was ready to marry another woman. If Mr. Davis had sold his stock, he would have recognized a gain to the extent the selling price ("amount realized") exceeded his adjusted basis.[53] If Mr. Davis had transferred his stock to a creditor to satisfy an outstanding debt in the amount of the fair market value of the stock transferred, he would have similarly recognized a taxable gain. But why should he recognize a gain simply because he transferred his stock in order to gain a divorce? The answer is that the IRS viewed this transaction as akin to paying off a debt. The value of the "marital rights" that Mrs. Davis released were equal in value to the stock transferred.[54] Therefore the transaction is exactly the same as the example of Mr. Davis satisfying an outstanding debt by transferring the appreciated stock.

Since Mrs. Davis was the other party to this alleged taxable exchange, how should she be taxed? Should she realize a gain equal to the amount that the fair market value of the stock she received exceeded her basis in her marital rights? And how in the world would anyone compute basis in something like marital rights anyway? This matter never became a taxing issue because several years later the IRS ruled that anyone standing in the shoes of a Mrs. Davis would report no income upon receipt of the stock.[55]

It is clear that the IRS's concern was that the gain on the stock be taxed at least once, which would have occurred if Mr. Davis had sold the stock and transferred the cash proceeds to Mrs. Davis. The IRS did not want to be whipsawed, that is, have Mr. Davis claim that the exchange was not taxable and then later have Mrs. Davis claim her basis in the stock was nonetheless fair market value at the time of receipt, by claiming the prior transaction was taxable. Then, if and when she sold the stock, the gain represented by the appreciation that occurred while Mr. Davis held the stock would escape tax forever.

The IRS had been whipsawed in a similar fact situation many years before *Davis* was decided. In *Farid-Es-Sultaneh v. Commissioner*,[56] decided by the Second Circuit in 1947, the taxpayer in 1923 had received appreciated stock from her soon-to-be husband in exchange for her soon-to-be acquired, but as yet inchoate, marital rights. The transferor did not treat the transaction as a sale. In fact, he probably viewed the transfer as a pre-

53. I.R.C. § 1001 (1954).
54. *Davis*, 370 U.S. at 72.
55. *See* Rev. Rul. 67-221, 1967-2 CUM. BULL. 63.
56. 160 F.2d 812 (2d Cir. 1947).

marital gift.[57] However, when the transferee sold the stock some fifteen years later, she claimed as her basis the fair market value of the stock at the time she received it. The Second Circuit agreed and characterized the 1923 transaction as a sale of the stock in exchange for her release of the inchoate marital rights. As a result, a large part of the capital gain that otherwise would have been reported as income upon disposition of this stock escaped taxation altogether.

Therefore, one might view the *Davis* case as a case needed to ensure taxation of a portion of appreciation that might otherwise escape taxation. That result was more important than viewing property divisions at divorce as a taxable event per se. And, in fact, post-*Davis*, numerous taxpayers argued that their own property divisions were not taxable events, but instead mere division of property ownership between the two spouses with appropriate carry-over basis rules attached to the divided property. As a result, the appreciation would in fact be taxed upon any ultimate disposition of the property.

The courts generally agreed with the taxpayers so long as they could meet some minimal standard in showing that both spouses had some form of ownership rights in the property before it was divided. That was much easier to prove in community property states where spouses were viewed as owning all community property equally.[58] Provided the property division was a substantially equal division of community property, the transaction would not be treated as taxable. It was simply not a "realization" event for tax purposes.

This rule was extended to some spouses in non-community property states where the taxpayers could show that the non-titled spouse (usually the wife) nonetheless held some equitable interest in the property that was being divided. All of these wives had greater property interests in marital property than Mrs. Davis ever had. She basically had a right to continued support during the marriage and a right to dower upon death. There were no equitable distribution laws at divorce in 1962, the year that *Davis* was decided. This situation began to change in the 1970s. For example, when the Beards divorced in Michigan in 1975, the Tax Court recognized the equitable claims to property that Mrs. Beard had under Michigan law and

57. From his viewpoint, he would not have perceived that he was receiving anything of value akin to a sales price. So he likely viewed this as a gift. But he would not have filed a gift tax return reflecting this understanding of the transaction because the transfer occurred in 1923 and the first gift tax was not enacted until 1924.

58. *See* Carrieres v. Comm'r, 552 F.2d 1350 (9th Cir. 1977) (a substantially equal division of community property is not a taxable event); *see also* Rev. Rul. 76-83 1976 C.B. 3.

ruled that the property division was not a taxable event.[59] In 1984 this rule was codified for all spouses in section 1041.

2. *Property Division for Washington Committed Partners, Registered Domestic Partners, and Civil Union Partners*

Partners whose "status" is recognized and who are awarded property rights based on that "status" should be able to rely on the case law involving spousal divisions of property that developed between 1962, the date of the *Davis* case, and 1984, the date of the enactment of section 1041. To the extent the partners are merely dividing property in which each partner has some sort of claim the division should be treated as a non-taxable, non-realization event.[60]

3. *Property Division for Cohabiting Couples Who are Making Marvin Claims*

Even if a couple is not in a Washington committed relationship or a registered partnership recognized by the state, most cohabiting couples at least have some form of a *Marvin* claim they can assert against each other. To the extent those claims are for equitable interests in the property acquired by the couple, the claims resemble those of registered couples and committed Washington couples. They also resemble claims made by earlier non-titled wives to an equitable interest in marital property at divorce. Those wives were successful in arguing that their property divisions at divorce should not be taxed under the *Davis* case.[61] Remember that the rights held by Mrs. Davis were described by the Court as "inchoate" and did not resemble equitable claims to marital property.

But, of course, there is no established law to this effect. There is one Tax Court memorandum opinion,[62] addressing the payments received by a woman after the man she had been living with for twenty-four years in the State of California ended the relationship. She refused to leave the residence and he sued her for ejectment, trespass, and conversion. She defended,

59. Beard v. Comm'r, 77 T.C. 1275, 1290–91 (1981).

60. *See* Keeva Terry, *Divorce Without Marriage: Taxing Property Transfers Between Cohabiting Adults*, 89 U. CIN. L. REV. 882 (2021) (where this argument is fully developed); *see also* Patricia A. Cain, *Taxation of Property Divisions at Dissolution of Nonmarital Relationships*, LGBT BAR (Nov. 2015), http://lgbtbar.org/wp-content/uploads/2015/12/Taxation-of-Property-Divisions-at-Dissolution-of-Nonmarital-Relationships.pdf [https://perma.cc/5F2F-UUBK].

61. Terry, *supra* note 60.

62. Reynolds v. Comm'r, 77 T.C.M. 1479 (1999). On Westlaw, this case shows up with a red flag in front of it which is explained by saying that the case has been superseded by statute as stated in a 2007 Ninth Circuit opinion. It has not been superseded by statute. The Ninth Circuit mistakenly included this case in a string cite of pre-1041 spousal property divisions at divorce that have in fact been superseded by section 1041. But *Reynolds* is not a divorce case because the couple was never married.

claiming she had an equitable interest in the property although it was titled in his name. Ultimately, they settled. Under the settlement, she received a few items of property, mostly personal items and a car, plus a cash payment that was made over time. The male cohabitant's corporation issued the checks and then reported them as miscellaneous income on a form 1099. Ms. Reynolds claimed that the payments were gifts. The IRS claimed they were compensation for past services. The Tax Court decided that neither was correct. It its view, Ms. Reynolds was cashing in on her equitable interest in his property just as she had claimed.[63] But there was no evidence that the cash she received was greater than whatever basis she may have had in her equitable property (and the judge assumed that whatever interests she did acquire had been acquired by gift).[64] If the amount she received did not exceed her basis, then there would be no taxable gain.

I agree with the basic analysis in the opinion. She was cashing in on her equitable claims to property. But she didn't get property. She got cash. And the cash that she got was after the dissolution. Many property divisions between unmarried couples include distributions of cash. And often those cash distributions occur after the dissolution of the relationship. In such cases it is necessary to identify which items of property the cash is purchasing. While the judge says there was no evidence that her basis was lower than the amount of cash she received, that conclusion is not clearly supported by the facts. If she were cashing in on her equitable interest in the boat that they bought, it might well be true that it had not appreciated in value. But she was also making a claim to real estate, and it is hard to imagine that that had not appreciated during the relationship. In most cases, involving cash payments of this sort, the payments, or at least a portion of them, will be made for appreciated property.

Consider the case of James and Bob, registered domestic partners under California law. They acquire two primary assets during their relationship, a principal residence, and a vacation home. When they dissolve their relationship, they must divide the properties between them fairly. If both pieces of property are worth the same, then one can take the residence and one the vacation home. There should be no gain realized even if both properties have appreciated greatly since being acquired. If the residence is worth more than the vacation home, then the partner who takes the residence will owe the other partner a cash payment in order to "equalize" the division.[65] If James pays Bob an extra $200,000 to take 100% ownership of

63. *Reynolds*, 77 T.C.M. at 1482–83.

64. *Id.* at 1483.

65. Such "equalization payments" are often made in divorces between spouses where the question is whether or not they are tax free under § 1041 as transfers made "incident to divorce." Treas.

the residence then Bob can be viewed as selling a portion of his interest in the residence to James. The $200,000 would be "amount realized"[66] to Bob on that sale. However, there would be no gain to Bob because he is selling an interest in his principal residence and any gain is likely excluded under section 121.[67]

But if the facts were that the vacation home was worth more than the principal residence, a tax issue would arise. If James pays Bob an extra $200,000 to acquire a 100% interest in the vacation home, then Bob should be viewed as selling part of his interest in the vacation home. He will need to allocate his basis in the property between the portion that was exchanged for property (no gain) and the portion that was sold for cash, which would produce a gain.

The cash cannot be considered community property divided at the time of dissolution if it is paid after the dissolution. In that case it is clearly separate property paid to one party to purchase a portion of his interest in the property.[68] Under the facts, as I have assumed them, that transaction results in a taxable gain. But the gain is likely a capital gain which is taxed at lower rates than ordinary income. And the full cash payment is not taxable because in computing the gain the amount of basis must be subtracted from the cash payment.

Nonetheless, it is my sense that most taxpayers who settle for cash payments in situations like this either treat the entire amount as taxable income or the entire amount as a taxable gift.[69] To ensure equal treatment

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Reg. 1.1041-1T at A-7 (also providing that any payment made more than six years after a divorce is presumed not to be incident to the divorce). For unmarried couples, such payments may be taxable to the recipient whenever paid. It depends on why the payment was made.

66. I.R.C. §1001 provides that a seller normally has gain to the extent of "amount realized" in excess of basis.

67. I.R.C. § 121 (1964) excludes the first $250,000 of gain when a principal residence is sold so long as during the five years preceding the sale, the taxpayer owned the home for at least two years and used it as a principal residence for two years. This exclusion is only available once every two years.

68. It might be possible to take out a mortgage against the more valuable vacation home before dissolution, split the cash proceeds between them and then exchange properties now of equal value because of the mortgage. However, there are many planning difficulties that arise for such a transaction, including a question as to whether a mortgage taken out on a piece of property that is about to become the separate property of one partner is truly community property. Besides, such planning suggestions are beyond the purpose of this article.

69. *See, e.g.*, Taylor v. Goddard, 113 Wash. App. 1039 (2002). In this case, a man paid his female partner a cash payment of $750,000 at the termination of the relationship, and agreed to be responsible for paying her taxes on the cash payment. Everyone seemed to have assumed that 100% of the cash payment was taxable income, despite the fact that this relationship was a committed relationship under the laws of Washington State and the payment should have been viewed as a payment for her 50% interest in any quasi-community property acquired during the relationship.

among taxpayers throughout the country, the IRS should offer guidance about how these transactions should be taxed.

If the claim that is made by the partner seeking compensation at the termination of the relationship is based on *quantum meruit* or an implied contract to pay for services, then the IRS may want to assert that any payments are in fact compensation for services. But I think the situation of cohabitants is more complicated than that. If the partners are viewed as part of a couple that is trying to build a better life together then no matter how the exact legal claim is phrased, the remedy should be viewed as a distribution of the increased wealth that occurred during the relationship. Every couple who splits up and divides property should be treated as merely receiving what is theirs. No gain should result. No ordinary income should result.

If, on the other hand, cash is received by one partner, then to the extent that cash was not already in the couple's possession, i.e., to the extent it is paid in the future, most likely out of future earnings of one partner, then the cash should be viewed as an amount realized upon the sale of the other partner's equitable interest in the property. And, at this point, the issue of basis becomes the main problem. But if the property is viewed as acquired through the joint efforts of both partners, even if only using the cash of one partner, then the basis must be whatever the property cost when it was acquired. That is, in fact, an easy case.

A harder case arises when the claim is against property that was owned by one partner before the relationship began. The original owner has a historical cost basis in the property. The new partner may invest money to improve the property and may expend efforts that increase the value. Nonetheless, I think historical cost basis (adjusted upward for any new cash investments in the property) must be the prevailing rule. The point here is not to create a situation in which any amount of gain escapes taxation. All gains get taxed once. The only question is when. And my suggestion is that it not be upon the dissolution of the relationship and the distribution of the property.

Before Congress enacted section 1041, the IRS found sufficient legal authority to issue a revenue ruling, Rev. Rul. 81-292, holding that an approximately equal division of jointly owned property at the time of divorce would not be taxable. In the General Counsel Memorandum (GCM) issued by Chief Counsel in support of the ruling it is clear that the joint ownership referenced in the ruling does not mean that title must be joint.[70] The GCM cites to numerous cases that had found that in non-community

70. *See* I.R.S. G.C.M. 37,716 (June 28, 1983).

property states, wives often had equitable interests in property akin to community property rights. It also ends with the following footnote:

> Note that there is no such larger entity to be partitioned in an equal in value division of property held by unmarried co-owners. At the time of divorce, all marital property is disposed of. It would be rare if, upon divorce, married co-owners would divide some of their jointly held property while retaining a joint interest in other property. Unmarried co-owners, however, may sever their interest in some jointly owned property while retaining a joint interest in other property. This difference is an important factor in explaining the reason for the discrepancy in the treatment of married and unmarried persons. Also important is the longstanding judicial precedent for treating divisions of property held by married persons as nontaxable.[71]

The married entity described in this footnote is a description that applies equally to committed cohabitants whether registered or not. Given this similarity, they should be treated the same as couples described in this ruling. If the IRS could issue this ruling for married couples before Congress acted, then it should be able to do the same for similarly situated cohabitants. They are not the unmarried co-owners referenced in the footnote. They are a "larger entity" than mere unmarried co-owners.

C. Transfers at Death

If one partner is unmistakenly the owner of the relevant property at death then the value of that property will be included in his or her estate for estate tax purposes under section 2033 of the Internal Revenue Code. A gift of any of that property to a partner, even a registered partner, will not reduce the size of the estate for estate tax purposes. By contrast, a deathtime gift from a married person to a spouse escapes the estate tax completely because section 2056 of the Internal Revenue Code provides a 100% marital deduction for gifts to spouses.[72]

To the extent the estate consists of community property only half of the estate should be included in the taxable estate of the decedent. That is consistent with the way that community property is treated when owned by spouses and, given the Service's recognition of community property rights

71. *Id.*

72. Note that whereas New Hampshire does not recognize common law marriage in general, it has a statute that provides for recognition of such marriages at death if the couple cohabited and held themselves out as married for at least the three years before death. I presume the IRS would treat such couples as married for purposes of the marital deduction, but I can find no authority. But they *are* married under state law at the moment of death. *See* N.H. REV. STAT. § 457:39.

of registered domestic partners, the result should be no different for them. In addition, the "quasi-community" property of committed intimate partners in the state of Washington should be treated similarly. At the moment of death, the decedent's ownership of the property does not extend beyond 50%.[73]

The tax treatment of *Marvin* claims that are pursued against an estate is, however, a slightly more open question. There are fewer cases exploring the nature of such claims because *Marvin* claims, especially if not in writing, are more difficult to prove after one of the partners is dead.[74] In California and some other states, however, such claims can be pursued.[75]

Such claims are normally brought as claims against the estate, similar to creditor claims.[76] And, whereas creditor claims can be deducted from the taxable estate under section 2053 of the Internal Revenue Code, it is doubtful that *Marvin* claims can be similarly deducted. That is because claims against the estate that are founded on a promise or agreement are only entitled to be deducted "to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth."[77] However, in *Estate of Shapiro*, the Court of Appeals for the Ninth Circuit ruled that such a claim may be deductible.[78] The court remanded the case to the District Court because that court had determined that the claim was not enforceable under state law.[79] The Ninth Circuit disagreed with that conclusion. If the claim was found to be valid, the Ninth Circuit opinion should apply to make the value of the claim deductible.

Professor Wendy Gerzog writes fairly convincingly that this is not the sort of claim that was intended to be deducted from the taxable estate.[80] The

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73. *See* Olver v. Fowler, 168 P.3d 348 (Wash. 2007) (holding that at the moment of death 50% of the property vested in the female partner so that the claims against the male partner were limited to his 50% of the jointly owned property).

74. *See* Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79, 100 n.114 (2020); *see especially In re* Estate of Hatten, 440 P.3d 256, 262–63 (Alaska 2019) (holding that domestic partnership ended when intestate died, and thus, probate code, and not common law domestic partnership property principles controlled distribution of intestate's estate).

75. *See* Allen v. Stoddard, 152 Cal. Rptr. 3d 71 (Cal. Ct. App. 2013). It should be noted that the newly approved Uniform Cohabitants' Economic Remedies Act (UCERA) authorizes claims at death, both against the deceased's estate and also by the deceased's estate against the surviving partner. *See* UNIFORM COHABITANTS' ECONOMIC REMEDIES ACT § 4 (UNIF. L. COMM'N 2022), https://www.uniformlaws.org/viewdocument/final-act-4?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5&tab=librarydocuments.

76. And thus likely to the same statutes of limitations that apply to creditors' claims, although California has a special statute of limitations (one year from date of death) that applies to claims based on any promise to make a gift at death. *See* CAL. CIV. PROC. CODE § 366.3.

77. I.R.C. § 2053(c)(1)(A).

78. Estate of Shapiro v. United States, 634 F.3d 1055 (9th Cir. 2011).

79. Estate of Shapiro v. United States, 2008 WL 8448704 (D. Nev. 2008).

80. Wendy C. Gerzog, *Shapiro: Palimony and the Estate Tax*, 131 TAX NOTES 859 (May 23, 2011).

provision of love, affection, companionship, and homemaking services, on which such a claim is based, simply do not constitute consideration in money or money's worth. She may well be right. But Nevada is often compared to the state of Washington as recognizing committed partner claims based on status of the partners rather than their contracts. If, in fact, the partner's claim in *Shapiro* rested on such a claim then, like the quasi-community property claims in Washington, the amount of the distribution should be excluded from the taxable estate of the deceased. That is because the very nature of the claim is to property that is in fact owned by the survivor rather than owned by the decedent. Only property owned by the decedent should go into the taxable estate under section 2033.

Estate of Black, a 1984 California opinion, stands for a similar proposition.[81] The surviving cohabitant in this case had been bequeathed $50,000 in the decedent cohabitant's will. However, under *Marvin*, she wanted to assert a claim to more of the property in the estate. The will contained a "no contest" clause, which at the date of decedent's death was fully enforceable in California. If her *Marvin* claim was in fact a "contest" to the will provisions, she would lose the $50,000 bequest. The court, however, ruled that her claim was not contesting the dispositive provisions of the will but was instead asserting an ownership claim to property that the administrator was including in the decedent's estate.[82] The court ruled that an assertion of ownership of property is not a challenge to the will provisions. Under this analysis, if she were successful on the *Marvin* claim, then the property that she claimed she owned should not be included in the taxable estate of the deceased.[83]

Note that if the claim asserted by the surviving partner is deductible from the taxable estate, the end tax result is the same as providing a marital deduction to the estate for the transfer to the survivor. Relying on this analysis, whenever possible under the facts, would create more equity for the estate taxation of unmarried couples. And, assuming the analysis is correct, even if the decedent leaves everything to the survivor under the will, the estate should take the position that much of that property was in fact already owned by the surviving partner and thus should not be included in the taxable estate.

81. Estate of Black, 206 Cal. Rptr. 663 (Cal. Ct. App. 1984).

82. *Id*. at 668 (the court analogizes her *Marvin* claim to a claim of ownership as a joint tenant or because the property was community property).

83. Note that the estate in this case was far too small to incur estate taxes, but the principle about asserting ownership to property under *Marvin* ought to apply to otherwise taxable estates.

V. HOW OTHER COUNTRIES TREAT COHABITANTS

There is great resistance in this country to according a status to cohabitation. The *Marvin* court resisted such a claim and instead ruled that contracts and equitable claims between unmarried cohabitants could be recognized. The recent action by the Uniform Law Commission in adopting the Uniform Cohabitants' Economic Remedies Act also endorsed the position that status-based claims should be rejected. Here is the explanation from its official website:

> Today, states have no consistent approach for addressing whether and how cohabitants can enforce contract and equitable claims against each other when the relationship ends. The Uniform Cohabitants' Economic Remedies Act does not create any special status for cohabitants. In most instances, the Act defers to other state law governing contracts and claims between individuals.[84]

Only the State of Washington has clearly accorded a status-based remedy for claims between cohabitants.[85] I presume that "status," along with its accompanying rights, would be recognized by the federal government in applying its tax laws. That would be in keeping with the IRS recognition of the community property rights of registered domestic partners in community property states.[86] But there are so many things we do not know even about committed intimate relationships in Washington. Do the partners owe each other any duty of support? If so, is it a sufficient duty to ward off gift taxation of support payments from one partner to the other?

Other countries are more advanced in their treatment of unmarried cohabitants. Sweden stands out as an early example of a country willing to recognize the status of unmarried couples. In 1973, Sweden passed the first version of what is known as the Cohabitees Act. At the time it only recognized opposite sex cohabiting couples, but its terms were extended to same-sex couples in 1988.

The legislation's focus is on the shared dwelling and tangible personal property acquired for joint use in the home. The concern is that the dependent partner who may not have title to any of this property may be unfairly disadvantaged upon a dissolution of the relationship. Therefore, the

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84. *Cohabitants' Economic Remedies Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5 [https://perma.cc/86WH-R49R].

85. Although both Nevada and Oregon are often mentioned as showing some evidence of a possible status-based solution to these dissolution payments. *See supra* note 27 and accompanying text.

86. Memorandum 201021050 from Off. Chief Counsel, IRS, (May 28, 2010).

statute provides equitable rules for distribution of rights to the property upon a dissolution of the relationship.[87]

1988 is early for the recognition of legal rights of same-sex couples in legislation. At the time, claims regarding marriage equality for same-sex couples were springing up around the world. But the first recognition of marital rights for same-sex couples did not occur until 2001 in the Netherlands.[88] Same-sex unmarried couples in the Netherlands were accorded rights as couples before they won the right to marry.[89] Belgium followed the Netherlands in recognizing same-sex marriage in 2003.[90] Despite Sweden's earlier recognition of same-sex unmarried couples as being entitled to the same rights as opposite-sex unmarried couples, Sweden did not extend marital status to same sex couples until 2009.[91]

During this period of time, numerous European countries created registration statuses primarily for same-sex unmarried couples because they were not allowed to be married. Sometimes these statutes were extended to cover heterosexual unmarried couples as well, but the primary impetus for most of these statutes was to grant rights to same-sex couples who could not, at the time, be married under the country's laws.[92]

The progress that various countries made toward recognizing unmarried partnerships and according them marital-type rights is complicated by each country's struggle toward recognition of same-sex marriage. While in some countries the driving force toward recognizing rights for unmarried cohabitants was to recognize and honor the individual choice of many couples who elected to live together rather than to marry, in other countries the driving force was to provide rights, short of marriage to same-sex couples.

Canada is a prime example of this phenomenon. Canada now treats unmarried couples as married for tax purposes if they cohabitate for a twelve-month period or reside together with a child of whom both are

87. For a discussion of the history of this legislation, see Eva Rydstedt, *The Challenge of New Families*, 19 COLUM. J. GENDER & L. 1076, 1077–79 (2010). For a description of how this law applies today, see SWED. MINISTRY JUST., COHABITEES AND THEIR JOINT HOMES (2017), https://www.government.se/4ac0bb/contentassets/e95d660fd9354c139439e051fd8ed4db/cohabitees-and-their-joint-homes.pdf [https://perma.cc/ECG7-4AP5].

88. *See generally* Nicholas J. Patterson, *The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law*, 2 CHI. J. INT'L L. 301 (2001).

89. *Id.*

90. *See* Allison O'Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy*, 37 CORNELL INT'L L.J. 199 (2004) (summarizing the legislation of different member states recognizing different forms of same sex partnership).

91. *See* Francesca Strumia, *Tensions at the Border in the U.S. and the E.U.: The Quest for State Distinctiveness and Immigrant Inclusion*, 25 AM. U. INT'L L. REV. 969, 998 n.94 (2010).

92. O'Neill, *supra* note 90 (summarizing the various types of partner registration statutes).

parents. This law was enacted initially in the early 1990s, but it only applied to opposite sex couples.[93]

Discrimination against lesbians and gay men was widespread in Canada in the 1990s. Such discrimination became illegal under Canadian cases decided in various provinces during the 1990s, but these cases did nothing to require the recognition of same-sex couples as being legally equal to married couples or to common law heterosexual partnerships.[94] A handful of cases did recognize some minimal property rights in cases involving long-term same-sex cohabitants, rights akin to those recognized under the *Marvin* principles. At the same time, however, Ontario enacted legislation that treated same-sex "partners" as spousal equivalents if they have "lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives."[95] This legislation was limited to issues regarding medical consent, but was a step in the right direction.[96]

The situation in Canada changed completely when the Supreme Court of Canada decided the case of *M v. H*.[97] The case involving the dissolution of a long-term lesbian relationship. M sued H for spousal support which was available to spouses and to common law heterosexual partners under the Ontario Family Law Act.[98] She claimed that the exclusion of same-sex couples from the definition of common law partner violated the Canadian Charter of Rights and Freedoms. The Supreme Court agreed. Therefore, before any province in Canada had recognized the right of same-sex couples to marry, the Supreme Court declared that same-sex couples had to have the same marital-type rights provided to heterosexual unmarried couples under the various Family Law Acts.[99]

South Africa is another good illustration of how a country might accord equal spousal status to unmarried couples. In 2001 the South African tax laws were amended to provide a new definition of spouse. This new definition provided:

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93. For a history or how this treatment of unmarried couples came to be, see Nicholas Bala, *Canada: Growing Recognition of the Realities of Family Life*, 32 U. LOUISVILLE J. FAM. L. 269, 274 (1994).

94. *Id.* at 276.

95. Consent to Treatment Act, S.O. 1992, c.31, ss. 2, 17(1)(4) (Can.).

96. *Id.*

97. M. v. H., [1999] 2 S.C.R. 3.

98. A common law partner defined as a couple who had cohabited for at least twelve months or had a child together had all the rights of a spouse under the Family Law Act. Note that each province has its own Family Law Act and this provision defining spouse was in Acts in several other provinces as well.

99. For more about this decision, see Brenda Brossman, *Canadian Same Sex Relationship Recognition*, 48 CLEV. ST. L. REV. 49 (2000).

> 'Spouse', in relation to any person, means a person who is the partner of such person -
> (a) in a marriage or customary union recognised in terms of the laws of the Republic;
> (b) in a union recognised as a marriage in accordance with the tenets of any religion; or
> (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,
> and 'married', 'husband' or 'wife' shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property;"[100]

Under the South African Constitution, the equality provision in the Bill of Rights is very strong. It prohibits unfair discrimination, directly or indirectly, on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[101] This requirement supports the amendment to the tax laws changing the definition of spouse to remove discrimination on the basis of marital status and sexual orientation.[102]

While the registration statutes offered in some countries are a welcome option to marriage for some, we will continue to face problems regarding couples who do not marry or register but do often merge finances and property in a cohabitation arrangement. Laws about property rights for such couples are necessary, especially for the protection of the more dependent partner. But then we also need clear tax laws telling us how those property rights will be recognized in our tax system.

CONCLUSION

Developments regarding recognition of cohabitants, whether for property rights or for tax purposes, have been affected by the battle for recognition of same-sex marriage. That has been true in other countries as well as in the United States. In fact, the IRS appears to believe that with the arrival of same-sex marriage, there was no need for them to worry about

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100. Taxation Laws Amendment Act 5 of 2001, § 5(j), amending Income Tax Act 58 of 1962. For a discussion of this provision and how it came to be added to the Income Tax Act see Howard H. Galt, *An Analysis of the South African Revenue Services' Recognition of Unmarried Partners as Spouses*, U. DURBAN-WESTVILLE (2002).

101. *See* Pius Nkonzo Langa, *Equality Provisions of the South African Constitution*, 54 SMU L. REV. 2101 (2016).

102. South Africa did not recognize same-sex marriage until 2006. *See* Justice Albie Sachs, *The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriages*, 102 KY. L.J. 147, 159 (2014).

guidance for unmarried couples, including registered domestic partners. However, given the ongoing prevalence of cohabitation, both same-sex and opposite sex,[103] it is time for the IRS to rethink this position.

103. The number of unmarried partners living together in the United States nearly tripled in two decades from 6 million to 17 million, 7% of the total adult population. *See* Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, CENSUS (Sept. 23, 2019), https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html [https://perma.cc/KPE6-LRM4]. They also tend to be older, more racially diverse, more educated, and higher income earners. *See id.*