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knowledge of the defect, and whether it has or has not advertised its product. Meat packers and canners of fruit and vegetables should be considered manufacturers for this purpose. The distinction between foodstuff in sealed or capped containers and foodstuff not so contained when a middleman is involved could be handled by a distinction in the burden of proof. In the former case the manufacturer should have to prove tampering, whereas in the latter case, the consumer should be required to prove non-tampering. In cases where a retailer has labelled foodstuff manufactured by another as its own, the plaintiff should have a choice of suing either the retailer or the manufacturer.

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Status Of Marital Settlements: Gifts Or Bargaining Transactions

The gift tax section of the Internal Revenue Code provides that a taxable gift is any complete and irrevocable transfer to another, whether in trust or otherwise, to the extent that such transfer is not supported by adequate consideration:

> "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeds the value of the consideration shall be deemed a gift."[1]

In the typical settlement the husband transfers money or property in exchange for his wife's relinquishment of marital rights which have accrued or will accrue.[2] Accordingly, the applicability of the gift tax to a marital transfer will depend upon whether the relinquishment of marital rights constitutes adequate and full consideration in money or money's worth.

Income tax is imposed on gain derived from capital, labor or both combined, and includes profit from the sale or exchange of capital assets. The applicability of the income tax provisions is of importance both at the time of the transfer to the wife and upon the subsequent sale of the property by the wife. If the

1. INT. REV. CODE OF 1954, § 2512(b).
2. Perhaps there are situations where a wife might transfer property in exchange for her husband's marital rights, but for purposes of discussion the typical situation will be assumed throughout this Comment.

property transferred to the wife has appreciated in value since the date of its acquisition by him, the question arises as to whether he has received a taxable gain on the increase in value in the amount of the value of the relinquishment by the wife of her marital rights. The determination of the tax basis of the property when the wife sells or exchanges it at a later date presents another area of difficulty. If the wife received the property as a gift, the Code provides the tax basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift.[3] However, where the property is received by purchase for adequate consideration, the tax basis is the fair market value of the consideration given at the time it was acquired.[4] Therefore, the primary issue in determining the tax basis is the classification of the marital transfer as a gift or purchase for value. It should be noted that the test of adequate consideration, as utilized in determining tax basis for income tax purposes, is not analogous to the test of full consideration in money or money's worth contained in the gift tax provisions of the Code.

Gift Tax Aspects of Marital Settlements

Antenuptial Property Agreements

Gift taxes are imposed upon transfers made for less than an "adequate and full consideration in money or money's worth."[5] It is fairly well settled that transfers of property pursuant to an antenuptial settlement are not for "adequate and full consideration" and thus are subject to the gift tax.[6] The courts have been unwilling to treat mere detriment to the donee or the promise of marriage by the donee as satisfying the requirement of adequate and full consideration.[7]

3. If the donor's tax basis is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss upon the subsequent sale of the property the tax basis is the fair market value. INT. REV. CODE OF 1954, § 1015(b). For the purpose behind Congress requiring that the donee should accept the donor's basis in computing taxable gain see Report of Ways and Means Committee No. 350, 67th Cong., 1st Sess. (1927).

4. See note 30 *infra* and accompanying text.

5. Section 2512(b). See note 1 *supra* and accompanying text.

6. Commissioner v. Wemyss, 324 U.S. 303 (1945); Merrill v. Fahs, 324 U.S. 308 (1945).

7. Commissioner v. Wemyss, 324 U.S. 303 (1945), holding a transfer solely in consideration of future wife's promise of marriage and to compensate her for loss of certain trust income which would cease upon her marriage was not consideration in money or money's worth and subject to the gift tax.

Although some courts have attempted to place a monetary value on marital rights,[8] the Supreme Court in *Merrill v. Fahs*,[9] held, without deciding that they were not amenable to an evaluation in money, that the relinquishment of such rights was not adequate and full consideration within the meaning of the gift tax statute. The court rested its decision on a provision of the estate tax statute which specifically provides that the surrender of marital rights is not sufficient consideration for estate tax purposes.[10] In justifying advertence to the estate tax provisions, the Court reasoned that for the sake of consistency, the estate tax and gift tax provisions should be construed in *pari materia*.[11]

Property Transfers Incident to Separation and Divorce

The question of gift tax liability, where property is transferred incident to a separation or divorce agreement has, to a large extent, been settled by the enactment of Section 2516 of the 1954 Internal Revenue Code, which provides:

> "Where husband and wife enter into a written agreement relative to their marital and property rights and divorce occurs within 2 years thereafter (whether or not such agreement is approved by the divorce decree), any transfers of property or interests in property made pursuant to such agreement —
>
> (1) to either spouse in settlement of his or her marital or property rights, or

8. The trial court in Merrill v. Fahs, 51 F. Supp. 120 (S.D. Fla. 1943), using mortality tables, and the value of the property the husband presently owned, computed the wife's marital rights in a fixed sum and refused to sanction the imposition of the gift tax. The Supreme Court later reversed this holding. See note 10 *infra* and accompanying text.

9. 324 U.S. 308 (1945).

10. The estate tax statute contains a provision added in 1932 providing that for purposes of the estate tax "a relinquishment or promised relinquishment of dower, curtesy, or other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth." Int. Rev. Code of 1932, § 804, now INT. REV. CODE OF 1954, § 2043(b). This provision in the estate tax section was not added to the gift tax section, nor is it present now.

11. The Court, speaking through Mr. Justice Frankfurter, said: "We believe that there is every reason for giving the same words in the gift tax the same reading [reference to the estate tax provisions]. To interpret the same phrases in the two taxes concerning the same subject matter in different ways where obvious reasons do not compel divergent treatment is to introduce another and needless complexity into this already irksome situation." 324 U.S. 308, 310 (1945). For a discussion of the requirement of legislative intervention to correlate and integrate gift tax and estate tax see Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1 (1941); Griswold, *A Plan for the Coordination of the Income, Estate and Gift Tax Provisions*, 56 HARV. L. REV. 337 (1942).

(2) to provide a reasonable allowance for the support of issue of the marriage during minority,

shall be deemed to be transfers made for a full and adequate consideration in money or money's worth."[12] (Emphasis added.)

Since the enactment of this provision the Commissioner of Internal Revenue has indicated that even where a divorce does not occur within two years from the date of the settlement agreement a transfer incidental to the settlement of dower, curtesy, or other property rights may, nevertheless, be exempt from the gift tax if incorporated in a court decree.[13]

Prior to the 1954 enactment, the Supreme Court had held that a property transfer incorporated in a divorce decree was not subject to the gift tax, the court observing that under such circumstances the transfer was not merely a private agreement, but part of the court decree.[14] The 1954 enactment modifies rather than changes the status of the law in this area by removing the requirement of incorporating the agreement in the divorce decree. It should be noted, however, that transfers to or for the benefit of major children, or to minor children in amounts in excess of their support needs, are subject to the gift tax, whether or not included in a court decree.[15]

INCOME TAX ASPECTS OF MARITAL SETTLEMENTS

Income Tax Liability of the Transferring Spouse

Since the transferring spouse must pay a gift tax on all property transferred incidental to an antenuptial settlement, the question of income tax liability or any increase in value of the property since he acquired it does not arise.

Prior to *Commissioner v. Marshman*[16] it was generally believed that the husband realized taxable income upon the transfer of property that had appreciated in value in exchange for his wife's surrender of her marital rights, in compliance with a sep-

12. INT. REV. CODE OF 1954, § 2516.
13. Proposed Treas. Reg. § 25.2516-1.
14. Commissioner v. Harris, 340 U.S. 106 (1950).
15. *Id.* at 111. For a further discussion of the gift tax aspects of property transfers to major children and minors, in excess of their support needs, see Rosenthal v. Commissioner, 205 F.2d 505 (2d Cir. 1954); Karl T. Wiedeman, 26 T.C. 565 (1956).
16. 279 F.2d 27 (6th Cir. 1960), *cert. denied*, 364 U.S. 918 (1961).

aration or divorce agreement.[17] The Third Circuit, in the case of *Commissioner v. Mesta*,[18] held the taxable gain to be the difference between the fair market value[19] of the property at the date of delivery, and the acquisition cost of the property.[20] It was stated that, although the value of the wife's rights may be difficult to ascertain, in the absence of any other value being shown, the value of the property transferred will be imputed to the rights relinquished.[21]

The *Marshman* case involved essentially the same facts as the *Mesta* decision. In both instances husbands had transferred property, which had appreciated in value from the date of acquisition, in exchange for their wives' relinquishment of marital rights. The Sixth Circuit in *Commissioner v. Marshman*,[22] held that since marital rights had no ascertainable fair market value the transaction did not incur income tax liability, although there is language in the decision which would presumably imply that the court believed that some economic gain had been received. The court seems to have required that the fair market value of the property *received* must be determinable from factors other than the value of the property exchanged for it.[23]

Fair market value is ordinarily defined as the price at which property would change hands between a willing buyer and a

17. See notes 18 and 20 *infra* and accompanying text.

18. 123 F.2d 986 (3d Cir. 1941), *cert. denied*, 315 U.S. 695 (1942). See Commissioner v. Halliwell, 131 F. 2d 642 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), holding that a husband received taxable gain when he transferred to his wife securities that had increased in value in exchange for her rights to share in his estate and in lieu of alimony and support of their children. For a further discussion of the realization of income see Helvering v. Horst, 311 U.S. 112 (1940).

19. INT. REV. CODE OF 1954, § 1001(b), while providing that taxable gain is to be measured by the fair market value of the property received, does not stipulate how the fair market value of the property is to be determined.

20. *Ibid.* provides "that the amount realized from the sale or other disposition of property is the sum of the money *received* plus the fair market value of the property (other than money) *received*." (Emphasis added.) This is essentially the same language as existed in the 1939 Internal Revenue Code which was in effect at the time the *Mesta* case was decided.

21. The Court reasoned: "We think that we may make the practical assumption that a man who spends money or gives property of a fixed value for an unliquidated claim is getting his money's worth." Commissioner v. Mesta, 123 F.2d 986, 988 (3d Cir. 1941).

22. 279 F.2d 27, 30 (6th Cir. 1960). The opinion contains language that the marital rights "may be economic gain but it is not a taxable gain."

23. It is submitted that the language of the Court best exemplifies the rationale of the opinion. The Court stated that "there is no taxable gain unless the amount of economic gain is measured in a certain way, and Congress did not intend or authorize that measurement of taxable gain be made in any other way than based on fair market value of the property *received*." (Emphasis added.) *Id.* at 30.

willing seller, neither being under any compulsion to buy or sell.[24] In *Mesta* the court makes it clear that the marital rights relinquished will be evaluated as equivalent to the value of the property exchanged therefor by the husband, unless he is able to prove that the value of the rights is otherwise.[25] In *Marshman*, however, the court was unwilling to assume that the rights were worth what the husband was willing to pay for them, pointing out that because of the strained emotional atmosphere, the husband may be constrained to pay, not what the rights would be worth, but the amount he is willing to transfer in order to be rid of the marriage relationship. *Davis v. United States*, a decision by the Court of Claims following the *Marshman* approach, is presently pending appeal.[26]

Wife's Tax Obligation Upon Subsequent Alienation of Property Received in Marital Settlement

The Internal Revenue Code provides that property received as a gift shall carry the same tax basis as it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.[27] It is definitely established that antenuptial property transfers and transfers pursuant to a separation or divorce agreement, which do not come within the ambit of Section 2516 are gifts under the gift tax statute.[28] Nevertheless, the Second Circuit in *Farid-es-Sultaneh v. Commissioner*,[29] has held that in spite of the gift tax provisions, when the property is in the hands of the wife, her tax basis is to be that of the fair market value of the property on the date it was transferred to her under the settlement agreement, and that such transfers are not characterized as gifts for income tax purposes if adequate consideration has been given. Thus the anomalous situation

24. See Fitt's Estate v. Commissioner, 237 F.2d 729, 731 (8th Cir. 1956); *In re* Williams Estate, 256 F.2d 217, 218 (9th Cir. 1958).

25. 123 F.2d 986, 988 (3d Cir. 1941): "The fair market value of the property or benefit received by Mesta for the stock may be difficult to ascertain, but in the absence of *any other value being shown* we think that it is proper to take fair market value" of the property transferred.

26. Davis v. United States, 287 F.2d 168 (Ct. Cl. 1961).

27. If the transaction is not deemed to be for adequate consideration (i.e., the value of the rights relinquished is not equal or above the value of the property transferred), the basis of the property is governed by provision of the Code relating to the basis of property acquired by gifts which provides "if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift." INT. REV. CODE OF 1954, § 1015(a).

28. See notes 6 through 14 *supra* and accompanying text.

29. 160 F.2d 812 (2d Cir. 1947).

exists that whereas for gift tax purposes, transfers of property in exchange for marital rights are not considered to be for adequate consideration at the time of the transfer, the transfer is considered to have been for adequate consideration when the wife later desires to dispose of the property obtained in the settlement. Later cases indicate that where the husband and wife place a value on the property to be transferred this value will become the tax basis of that property when the wife sells or exchanges it. However, the valuation agreed upon must be based upon market conditions at or around the time the agreement is made.[30]

As a result of *Sultaneh* and subsequent decisions a wife who receives property pursuant to a marital settlement enjoys a most advantageous position from an income tax standpoint. If the transfer were regarded as a gift, then it is clear that the wife would hold the property with the same tax basis it had in the hands of the husband. This being the case, upon divestment of the property under an onerous arrangement, the wife would receive taxable income in the amount of the difference between his tax basis of the property and the consideration which she obtained at the time of divestment. The tax on the unrealized appreciation after the acquisition by the husband to the time of surrender could be substantial. However, under the *Sultaneh* treatment of the two transfers, that portion of gain which represents the appreciation before the property settlement is not taxable to the wife who receives it in exchange for her marital rights. Therefore, her monetary gain on the whole transaction is enhanced by the amount of additional tax which she would have had to pay if the settlement had involved a donation.

Income Tax Liability for the Enhanced Value of Property Prior to the Marital Transfer

As a result of the *Sultaneh* decision any increase in value of property prior to an antenuptial settlement does not incur income tax liability since the husband must pay a gift tax on the transfer,[31] and the wife's tax basis is the fair market value of

30. Commissioner v. Patino, 186 F.2d 962 (4th Cir. 1950) (giving shares of stock a tax basis as agreed upon by the parties at the time of settlement); Edina W. Gardner Trust, 20 T.C. 885 (1953) (where stock was transferred into a trust created for the benefit of the wife at an agreed value at the time of transfer that value was permitted as the trust's basis); Aleda N. Hall, 9 T.C. 53 (1947) (where both spouses had agreed to evaluate stock by market conditions over the last few months this value was allowed as the tax basis).

31. See notes 7, 8, and 9 *supra* and accompanying text.

the property at the time she receives it.[32] Furthermore, if the reasoning of the *Marshman* decision is followed in the *Davis* case, property that has appreciated in value prior to a separation or divorce settlement will also avoid income taxation.[33]

To a large extent this gap in our income tax structure can be attributed to the utilization of dual tests in determining what is a gift for gift tax purposes and a gift for the establishment of the tax basis of property in the hands of the wife.

It would seem that a partial solution to this problem would be for Congress to integrate the provisions of the estate, gift and income tax sections of the Internal Revenue Code, whereby the classification of a property transfer as a gift for gift tax purposes would automatically cause the wife to receive the property with the same tax basis as her husband. It is suggested that this would be a possible solution in the antenuptial settlement area.

However, the problem raised in the *Mesta* and *Marshman* type situation would not be solved by the employment of a consistent classification. Perhaps the most realistic approach to the measuring of taxable income to the husband is exemplified by the reasoning of the court in *Mesta.* There seems little doubt that the husband receives economic gain by the relinquishment of marital rights. Moreover, it would be unrealistic to conclude that the wife received such property as a gift, since she relinquishes valuable rights in exchange for the property. Since the husband is the only one who benefits from this increased value, it is suggested that the *Mesta* approach should be followed and fair market value of the property be attributed to the rights relinquished, unless established otherwise by the husband.

Conclusion

In deciding cases involving the gift tax aspects of antenuptial property settlements the Supreme Court has formulated precise rules of law, whereby all transfers of property in exchange for the relinquishment of marital rights are subject to the gift tax. Moreover, in most cases involving separation or divorce settlements Congress has removed gift tax liability.

When the wife later sells or exchanges property received in

32. See note 30 *supra* and accompanying text.
33. See note 23 *supra* and accompanying text.

accordance with a marital settlement her tax basis is the fair market value of the property at the time she acquired it. In the area of income tax liability the only unresolved area of the law is the income tax consequences to the husband of property settlements involving property that has increased in value from the time of its acquisition. The pending decision in the *Davis* case could settle the hiatus in this area. However, it is submitted that congressional action will be required to alleviate the present tax void in antenuptial property settlements.

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Damages For Pain And Suffering--The Propriety Of Per Diem Arguments

It is now generally recognized that pain and suffering are proper elements to be considered in determining damages in a personal injury suit.[1] When attempting to award these damages the difficult problem of determining what is a fair and adequate award immediately presents itself. There is no way to evaluate the losses caused solely by pain and suffering in monetary terms owing to the impossibility of making a third person exactly aware of the extent and nature of this damage. In recognition of this fact, it has been stated that the enlightened conscience of the jury is the only permissible guide,[2] and that the ultimate test is that of the reasonableness of the award.[3] But in actuality, the standard of reasonableness is of only limited assistance to a juror attempting to arrive at a proper award. He is still left relatively uninformed and may be skeptical of his ability to cor-

1. *Physical pain and suffering*: Lacy v. Lucky, 19 La. App. 743, 140 So. 857 (1932); Nevala v. City of Ironwood, 232 Mich. 316, 205 N.W. 93 (1925); Nashville v. Brown, 25 Tenn. App. 340, 157 S.W.2d 612 (1942). *Mental pain and suffering*: Crawford v. Zurich General Accident and Liability Ins. Co., 42 So.2d 553 (La. App. 2d Cir. 1949); Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949). *Future pain and suffering*: Shuck v. Keefe, 205 Iowa 375, 218 N.W. 31 (1928); City of Richmond v. Hill, 195 Ky. 566, 242 S.W. 867 (1922).

2. See Braddock v. Seaboard Air Line Ry., 80 So.2d 662, 667 (Fla. 1955). In states such as Louisiana where juries are seldom used in civil cases, the judge will of course serve the same function as the jury normally would if used. However, this Note deals primarily with the damage problem as it concerns the jury. The problem in Louisiana is dealt with in note 17 *infra*.

3. See Braddock v. Seaboard Air Line Ry., 80 So.2d 662, 666 (Fla. 1955); Faught v. Washam, 329 S.W.2d 588, 602 (Mo. 1959); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 609, 106 N.W.2d 274, 277 (1960).