Alimony Deduction: Separated and Living Apart While Sharing the Marital Home

I. Introduction

Two recent tax cases have pointed to an ambiguity in sections 71 and 215 of the Internal Revenue Code[1] about what constitutes separateness for purposes of an alimony deduction. The ambiguity is whether a couple can be separated while continuing to share the marital home. The outcome has an important impact on the income tax laws because a determination under section 71 that a couple can be separated while continuing to share the marital home allows a payor spouse to deduct alimony support payments such as the mortgage and utility bills of the residence in which they reside.[2] The deduction benefits all spouses who pay alimony because the deduction is from gross income, that is, the payor spouse does not have to itemize.[3] The importance of allowing the payor spouse this benefit becomes apparent when one considers that high unemployment and inflation cause some couples to continue sharing the same residence although they are separated or are in the process of obtaining a divorce, because the spouses are unable to afford separate residences.

The first case to deal with this issue was *Sydnes v. Commissioner*,[4]

---

1. The pertinent provisions of I.R.C. § 71 (1967) and I.R.C. § 215 (1978) follow:

§ 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS

(a) GENERAL RULE.—

(1) DECREE OF DIVORCE OR SEPARATE MAINTENANCE.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) WRITTEN SEPARATION AGREEMENT.—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(3) DECREE FOR SUPPORT.—If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

§ 215. ALIMONY, ETC., PAYMENTS

(a) GENERAL RULE.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

2. *See* Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978), *rev'g in part and aff'g in part* 68 T.C. 170 (1977); Washington v. Commissioner, 77 T.C. 601 (1981).

3. *See infra* note 67. The spouses must file separate returns pursuant to § 71.

4. 577 F.2d 60 (8th Cir. 1978), *rev'g in part and aff'g in part* 68 T.C. 170 (1977).

decided by the Tax Court in 1977 and reversed by the Eighth Circuit Court of Appeals in 1978. In *Sydnes* the Tax Court held that a husband and wife could not be separated if they lived under the same roof, even though they did not eat, sleep, or associate with each other.[5] The court of appeals disagreed with the Tax Court, holding that whether the parties were separated was a factual issue that had been satisfactorily proved by the taxpayer.[6]

The second case was *Washington v. Commissioner,*[7] which arose in the Sixth Circuit and was decided in 1981 by the Tax Court. In *Washington* the Tax Court confessed that what the term "separated" meant for purposes of the alimony deduction was not entirely clear, but it did not agree with the Eighth Circuit that a couple could be separated while sharing the same residence.[8] It concluded that it would adhere to the rationale of its prior opinion in *Sydnes*.[9] However, in *Washington* three dissenting opinions challenged the majority's reasoning.[10] The dissenting judges contended that the majority's strict interpretation of the statutes was not supported by the legislative history and was not fair in light of present economic conditions.[11]

The Tax Court in both cases determined that spouses cannot be separated while sharing the marital home, believing that duplication of expenses was the motive behind Congress' enactment of the alimony deduction provision.[12] When a couple resides together, even without associating with each other, there is no duplication of expenses. An examination of Congress' purpose and intent reveals that Congress wanted to shift the burden of the tax liability to the spouse who was better able to bear it—the payee spouse.[13] Congress did not mention the need for duplication of expenses. In addition, the Tax Court considered the expenses incurred by the payor spouse toward the mortgage and utility bills as the mere continuation of shared expenses.[14] This is not an accurate characterization of the purpose of support payments made to a spouse. When one spouse pays the mortgage and utility bills for the other spouse, that portion benefiting the payee spouse is not a shared expense, but a support payment. The payor spouse has an obligation that he or she must satisfy according to a court order. Making the payor spouse pay tax on income that he or she has not enjoyed and that is transferred to the other spouse is precisely what Congress was trying to avoid. The payee spouse must pay the tax on the income received.[15]

---

5. 68 T.C. 170, 176 (1977).
6. 577 F.2d 60, 62 (8th Cir. 1978).
7. 77 T.C. 601 (1981).
8. *Id.* at 605.
9. *Id.*
10. *Id.* at 605–08. The dissenting opinions were written by Judge Fay, joined by Judge Wilbur and Judge Nims; Judge Sterrett, joined by Judge Nims; and Judge Ekman, joined by Judge Tannenwald, Judge Irwin, Judge Wilbur, and Judge Nims. *Id.*
11. *Id.* at 606–08.
12. *See infra* text accompanying notes 79–81.
13. *See infra* text accompanying notes 63–78.
14. *See infra* text accompanying note 81.
15. *See infra* text accompanying note 80.

The Eighth Circuit in *Sydnes* developed a more plausible interpretation of section 71 by stating that couples can be shown to be separated, as a factual matter, while sharing the marital home.[16] However, that court developed no standards to assist the Internal Revenue Service and other courts in determining whether a couple was separated while sharing the marital home. Two state domestic cases, *Heckman v. Heckman*[17] and *Hurd v. Hurd*,[18] provide the needed standards.[19] These standards can justifiably be used in federal tax cases to help fulfill Congress' intent to apply the alimony provision to those couples who are truly separated.[20] In addition, the standards eliminate the possibility of sham separations.[21]

II. The Judicial Handling of the Issue—Whether a Couple Can Be Separated While Sharing the Marital Home

A. Sydnes v. Commissioner—*Tax Court*

In February 1971 Lugene, the wife, filed for dissolution of her marriage to Richard, the petitioner in *Sydnes*. In March Lugene filed an application for temporary alimony. On April 1, 1971, the Iowa District Court ordered Richard to continue paying the usual family bills, including the home mortgage, taxes, and groceries.[22] The order provided that "during the time these proceedings are being conducted the parties will continue to live separately but in the same house."[23]

From April 1 to July 9, 1971, Richard and Lugene continued to reside in the family home, occupying separate bedrooms. Lugene kept her clothing and personal items at the house and spent some time there every day. Lugene rarely saw Richard and never ate meals with him during the separation. During this period Richard spent $1229.90 for Lugene's support, which reflected one-half of the household expenses, $15 per week for food, and the total amount of checks drawn by Lugene on the parties' joint bank account. On July 9 the petition for dissolution was granted.[24]

Richard deducted the $1229.90 as temporary support pursuant to sections 71(a)(3) and 215. The Commissioner disallowed the alimony deduction because the parties were not separated, during the proceedings, within the meaning of section 71(a)(3) since they lived in the same residence.[25] The Commissioner relied on section 1.71-1(b)(3)(i) of the Treasury regulations, which provides that alimony is deductible when the spouses are "separated

16. *See infra* text accompanying notes 29–31.
17. 245 A.2d 550 (Del. 1968).
18. 179 F.2d 68 (D.C. Cir. 1949).
19. *See infra* text accompanying notes 84–107.
20. *See infra* text accompanying notes 108–15.
21. *See infra* text accompanying notes 112–15.
22. 68 T.C. 170, 171 (1977).
23. *Id.* at 172.
24. *Id.*
25. *Id.* at 172–73.

and living apart."[26] The Commissioner interpreted this regulation and section 71(a)(3) as requiring that a husband and wife live in separate residences for alimony purposes.[27]

The Tax Court in *Sydnes* affirmed the Commissioner's position that "separated" means living in separate residences. The Tax Court stated,

> The statutory history of the 1954 changes emphasizes that the factual status of whether the parties are separated rather than their marital status under local law is the key in determining whether amounts paid under a court order are includable in the recipient's gross income and deductible by the payor. . . . We conclude that "separated" as used in the statute and "separated" as used in the regulations mean living in separate residences. Only when living in separate residences do the parties incur the *duplicate* living expenses normally incurred by the divorced or separated couples. In the absence of such duplication, and in the absence of any legislative history cited to us which expressly elucidates what Congress intended, we find it hard to believe that a mere continuation of shared living expenses following estrangement was intended by Congress to generate a deduction when the identical expenses would have been unavailable to the husband as a deduction before the estrangement took place. Moreover, the Court should not be required to delve into the intimate question of whether husband and wife are in fact living apart while residing in the same house.[28]

B. Sydnes v. Commissioner—*Eighth Circuit Court of Appeals*

The Court of Appeals for the Eighth Circuit reversed the Tax Court, disagreeing with the conclusion that under no facts or circumstances could a husband and wife live separately in the same residence.[29] The court of appeals noted that neither the statute nor the regulations specifically indicate that in living separately or apart the parties cannot occupy separate quarters in the same residence.[30] It held that whether the parties are living separately in the

---

26. Treas. Reg. § 1.71-1(b)(3)(i) (1957) (emphasis added).

27. 68 T.C. 170, 174 (1977).

28. *Id.* at 175–76. *See also* S. REP. NO. 1622, 83d Cong., 2d Sess. 10, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4621. Pertinent parts of the Senate Committee report are as follows:

> (1) House changes accepted by committee:
>
> Attention has been called to the fact that the present treatment discriminates against husbands and wives who have separated although not under a court decree.
>
> For this reason both the House bill and your committee's bill extend the tax treatment described above to periodic payments made by a husband to his wife under a written separation agreement even though they are not separated under a court decree if they are living apart and have not filed a joint return for the taxable year.
>
> (2) Changes made by committee:
>
> . . . [I]t also provides that this treatment is to be applicable where a wife is separated from her husband if she receives periodic payments from him under any type of decree (entered after the date of enactment of this bill) requiring the husband to make payments for her support and maintenance.

Id. at 4639–40. *See generally* H.R. REP. NO. 1337, 83d Cong., 2d Sess. 10, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4017. Pertinent parts of the House Committee report are as follows:

> Your committee's bill extends the tax treatment described above to periodic payments made by a husband to his wife under a written separation agreement even though they are not separated under a court decree if they are living apart and have not filed a joint return for the taxable year.

Id. at 4034.

29. 577 F.2d 60, 62 (8th Cir. 1978).

30. *Id.*

same house can be proved as a factual matter, which the parties in *Sydnes* had done.[31]

C. Washington v. Commissioner—*Tax Court*

Washington closely parallels *Sydnes*. In April 1977 Alexander Washington, the petitioner, filed an action for divorce. In July Jean Washington, Alexander's wife, filed a petition asking that Alexander be required to pay the mortgage notes, utilities, maintenance, and other expenses during the pendency of the divorce action. On August 1, 1977, the Michigan divorce court entered an order requiring Alexander to pay all mortgage payments on the residence as well as the gas, electric, and water bills.[32]

From August 1, 1977, until their divorce in 1978, Alexander and Jean continued to live in the same residence. They occupied separate bedrooms, used separate bathrooms, prepared meals at different places, and did not eat or talk with each other.[33] Between August 1 and December 31, 1977, Alexander paid $2185.18 for utility bills and mortgage payments. He deducted that amount pursuant to sections 71(a)(3) and 215 on his 1977 income tax return.[34] The Commissioner disallowed the deduction, reaffirming the Tax Court's position in *Sydnes* that "separated" means living in separate residences.[35]

The Tax Court conceded that if Alexander and Jean were separated when the payments were made, the amounts qualified as alimony.[36] It noted, however, that what the term "separated" means for purposes of the alimony deduction is not entirely clear.[37] In *Washington* the Tax Court disagreed with the Eighth Circuit's *Sydnes* holding that separated and living apart may be determined as a factual issue, even though the parties occupy the same residence, provided they occupy separate quarters.[38] The Tax Court maintained that, according to the legislative history accompanying the 1954 amendments to section 71, Congress intended that a husband and wife should not be treated as separate and living apart when both are living in the same residence.[39] The Tax Court concluded that it would adhere to the rationale of its *Sydnes* opinion.[40]

Seven judges, in three opinions, dissented from the reasoning of the majority in *Washington*.[41] They set forth five arguments why a couple can be separated while sharing the marital home.

---

31. *Id.*
32. 77 T.C. 601, 602 (1981).
33. *Id.* at 602–03.
34. *Id.*
35. Brief for Respondent at 10, Washington v. Commissioner, 77 T.C. 601 (1981).
36. 77 T.C. 601, 604 (1981).
37. *Id.*
38. *Id.* at 605. *See supra* text accompanying note 31.
39. 77 T.C. 601, 605 (1981). *See supra* note 28.
40. 77 T.C. 601, 605 (1981).
41. *See supra* note 10.

First, Judge Fay noted in his dissent that section 71(a)(3), which requires a spouse to be separated from the other spouse, is inconsistent with section 1.71-1(b)(3) of the Treasury regulations, which requires the spouses to be separated and living apart.[42] He concluded, however, that declaring section 1.71-1(b)(3) invalid was not proper for two reasons.[43] His first reason was that the legislative history shows that Congress thought living apart was part of being separated.[44] Judge Fay did not explain how he concluded this, other than by reference to the legislative history of section 71. He stated that while the statute, not its history, is the law, legislative history should not be ignored.[45] The second reason was that "separated and living apart" as used in the regulations can be read consistent with the statute.[46] Judge Fay noted that the Eighth Circuit Court of Appeals in *Sydnes* had held that spouses can live apart and separately in the same residence.[47] "[T]wo persons living on separate floors of the same house are living as separate and apart as two persons occupying adjacent apartments."[48]

Second, Judge Fay pointed out that nowhere were duplicated expenses required under section 71, as advocated by the majority.[49] Section 71 does not expressly or implicitly require a duplication of expenses as a prerequisite to the deduction.[50] Judge Fay therefore urged that the Tax Court could make no inference about duplicated expenses when the statute does not establish such a requirement.

Third, Judge Fay noted that neither section 71 nor the regulations thereunder deny an alimony deduction to divorced persons, even if they share the same residence.[51] Therefore, he concluded, it is not reasonable to deny a similar deduction to separated persons, especially since neither the statutes nor the regulations specifically prohibit it.[52]

Fourth, Judge Fay stated that mere convenience for the court should not be the reason for avoiding the issue whether a couple is separated.[53] Although Judge Sterrett recognized that allowing a deduction might involve difficult evidential problems if the court had to delve into intimate questions about the parties' relationship,[54] he urged that a factual inquiry into this issue may not be as cumbersome as the majority feared.[55] For purposes of section 71(a)(3), he suggested that a more reasonable approach, instead of handling the issue

42. 77 T.C. 601, 605–06 (1981) (Fay, J., dissenting).
43. *Id.* at 606.
44. *See supra* note 28.
45. 77 T.C. 601, 606 (1981) (Fay, J., dissenting).
46. *Id.*
47. *Id. See* 577 F.2d 60, 62 (8th Cir. 1978).
48. 77 T.C. 601, 606 (1981) (Fay, J., dissenting).
49. *Id. See supra* text accompanying note 28.
50. *See supra* note 1.
51. 77 T.C. 601, 606 (1981) (Fay, J., dissenting).
52. *Id. See infra* text accompanying notes 108–10.
53. 77 T.C. 601, 606 (1981) (Fay, J., dissenting).
54. *Id.* at 606–07 (Sterrett, J., dissenting).
55. *Id.* at 607 (Sterrett, J., dissenting).

on a case-by-case basis, would be to allow the state court issuing the decree for support to determine whether a husband and wife are separated.[56] He said that a state court presumably would issue a decree for support only when the parties are truly separated.[57] He therefore believed that the state court's determination on the decree for support can also be determinative of "separated" for purposes of 71(a)(3).[58] This approach would eliminate the need for the court to examine every case to determine whether the spouses are actually separated and living apart.[59] Judge Sterrett justified this by saying, "Federal courts long have superimposed Federal tax consequences on State determinations of property rights. It seems equally appropriate to attach Federal consequences to a State court determination of marital rights for such rights are peculiarly within the jurisdiction of state courts to delineate."[60] Judge Sterrett conceded that this approach would not eliminate the need for a factual inquiry into whether the parties are separated for purposes of section 71(a)(2) when the parties have a written separation agreement, but he felt that it would help reduce the burden of determining the separate status as required by section 71(a)(3).[61]

Fifth, Judge Ekman noted that economic conditions often make it impracticable for divorcing spouses to maintain separate residences.[62] Thus, a payor spouse should not be denied an alimony deduction merely because one spouse cannot afford to live elsewhere during the pending divorce; otherwise, the couple will be penalized for its financial status.

III. THE MEANING OF SEPARATION FOR ALIMONY DEDUCTION PURPOSES

A. *Examination of the Purpose of the Alimony Deduction—The History and Background of Section 71*

Prior to 1942 the Code contained no provision for alimony, on the theory that alimony payments were personal expenses covered by the payor spouse's personal exemption.[63] By paying tax on his or her entire net income, even though a large portion of the income might actually be paid to the other spouse, the payor spouse experienced a hardship that was compounded with the rise in graduated tax rates during the war years.[64] Situations arose in which the tax equalled or even exceeded the income left after paying

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* The problem with this approach is that state courts determine whether a couple is separated in light of state law. Thus, some states may hold that couples must be living in separate residences as a condition precedent to obtaining a separation.
62. *Id.* at 608 (Ekman, J., dissenting).
63. 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 31A.01 (1980).
64. J. MERTENS, LAW OF FEDERAL INCOME TAXATION Code Commentary at § 71:1 (1980).

alimony.[65] The hardship imposed on the payor spouse prompted Congress to amend the 1939 Code in 1942.[66] The amendment provided that in computing net income a deduction would be allowed for alimony or separate maintenance payments included in the income of the recipient spouse.[67]

For a spouse to deduct alimony or support payments the 1942 amendment required that the couple be divorced or legally separated under a decree of divorce or separate maintenance.[68] The payments had to be periodic[69] and received pursuant to a legal obligation imposed by the court decree or by a written instrument incident to the decree, and the legal obligation had to be imposed because of the marital or family relationship.[70] A voluntary separation did not qualify for the alimony deduction; there had to be a decree of separate maintenance issued by a court of competent jurisdiction.[71]

The 1954 Code extended this principle to permit alimony deductions in two other situations. Section 71(a)(2) allows a written separation agreement in place of the court decree required in 71(a)(1). The written separation agreement benefits spouses who have separated, but do not desire the publicity, inconvenience, or expense of a court action.[72] Section 71(a)(2) requires that the spouses be separated when the payments are made and that payments be pursuant to a written separation agreement executed after the enactment of the 1954 Code. The other requirements are identical to those in section 71(a)(1). The provision is inapplicable, however, if the spouses file a joint return.[73]

Section 71(a)(3) governs payments made under a court decree for support. The inclusion of support decrees in section 71 was intended to deal with situations in which a spouse sues for support, but no decree of divorce or separate maintenance is involved.[74] The spouses need not be legally separated or divorced under a court decree, and the support decree need not enforce a

---

65. H.R. REP. NO. 2333, 77th Cong., 1st Sess. 46, *reprinted in* 1942-2 C.B. 372, 409.

66. Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 798 (current version at I.R.C. § 215 (1978)).

67. *Id.* The 1942 Act provided for an itemized deduction to be taken from adjusted gross income. The Tax Reform Act of 1976 changed the deduction from an itemized deduction to a deduction from gross income to arrive at adjusted gross income. *See* I.R.C. § 62(13) (1982). Congress believes that it is more appropriate to take the payment of alimony into account as a deduction in arriving at adjusted gross income, rather than as one of the itemized deductions, which are generally limited to personal expenses. STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., 2D SESS., GENERAL EXPLANATION OF TAX REFORM ACT OF 1976, at 116 (Comm. Print 1976). As a result, the alimony deduction is now available to taxpayers even if they do not itemize their deductions.

68. *See supra* note 1.

69. I.R.C. § 71(c) (1967) and Treas. Reg. § 1.71-1(d)(1)-(3) (1957) state that payments are periodic when a principal sum is paid in installments, provided that (1) the principal sum is paid over a period ending more than 10 years from the date of the agreement; or (2) the payments are subject to a contingency such as the death of either spouse, remarriage of the wife, or change in the economic status of either spouse, and the payments are in the nature of alimony or an allowance for support.

70. I.R.C. § 71(a)(1) (1967).

71. 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 31A.01 (1980).

72. J. MERTENS, LAW OF FEDERAL INCOME TAXATION Code Commentary at § 71:3 (1980).

73. I.R.C. § 71(a)(2) (1967).

74. J. MERTENS, LAW OF FEDERAL INCOME TAXATION Code Commentary at § 71:4 (1980).

written separation agreement.[75] Again, the spouses must be separated, file separate returns, and meet the other requirements of section 71(a)(2).[76]

Congress recognized that the pre-1954 Code discriminated against husbands and wives who separated without a court decree. Congress therefore extended the alimony deduction to them.[77] Congress also eliminated differences in divorce and separation policies among the states and established a federal concept of what constitutes alimony for purposes of section 71.[78]

B. *Analysis of the Tax Court's Holding in* Sydnes *and* Washington

The Tax Court had two reasons for concluding that "separated" means living in separate residences. First, the court stated that Congress did not intend to allow an alimony deduction when no duplication of expenses had occurred.[79] The Tax Court took the wrong perspective. Section 71 does not require that divorced or separated couples incur duplicate living expenses. In allowing the payor spouse an alimony deduction, Congress intended to shift the burden of paying the tax on alimony payments to the payee spouse.[80] The Tax Court stated that "a mere continuation of shared living expenses" did not generate an alimony deduction,[81] but payments made by a payor spouse toward the mortgage and utilities of a residence are support payments, not a continuation of shared living expenses. The payor spouse is deprived of the use of those payments and may not even have enough money left to rent an apartment. Congress intended that such support payments be deductible by the payor spouse through the enactment of section 71(a)(3).

The Tax Court's second reason for concluding that separated means living in separate residences was that courts should not delve into the intimate question whether the spouses are actually living apart while living in the same residences.[82] Judge Sterrett in his dissent noted that such a position fails to recognize the unhappy realities of a disintegrating marriage and the difficult economic constraints occasioned thereby.[83] The majority did not explain why courts should not delve into these intimate questions. This lack of reasoning weakens the Tax Court's position on this issue.

75. Treas. Reg. § 1.71-1(b)(3)(i) (1957).

76. I.R.C. § 71(a)(3) (1967); Treas. Reg. § 1.71-1(b)(3)(i) (1957).

77. *See supra* note 28.

78. L. PHILLIPS & W. HOFFMAN, WEST'S FEDERAL TAXATION: INDIVIDUAL INCOME TAXES 110 (1981 ed.).

79. *See supra* text accompanying note 28.

80. *See supra* text accompanying notes 63-67.

81. *See supra* text accompanying note 28.

82. *Id.*

83. 77 T.C. 601, 607 (1981) (Sterrett, J., dissenting).

C. *State Domestic Courts' Handling of Living Separate and Apart While Sharing the Marital Home*

The Eighth Circuit Court of Appeals said that whether the parties are living separately in the same house can be determined as a factual matter.[84] Unfortunately, the court did not establish guidelines for determining whether parties are separated while sharing the marital home, nor were any offered by the dissenting judges in *Washington.* Although *Sydnes* and *Washington* failed to provide guidelines, Judge Sterrett did say that a state court presumably would issue a decree for support only when the parties are truly separated.[85] State court divorce actions have examined the meaning of "separate and living apart" and provide a framework for identifying the characteristics of "separated" for tax purposes.

A general definition of separation as a ground for divorce is that a physical separation of the parties has occurred, with the intent of severing the marital status or of not resuming marital relations.[86] This definition is not totally satisfactory because it does not define what is meant by physical separation. An additional requirement is that the parties must not have any reasonable expectation of reconciliation.[87]

Two state cases help define what is meant by separation and physical separation. *Heckman v. Heckman*[88] was a divorce action following a voluntary separation.[89] In *Heckman* the Supreme Court of Delaware reversed the lower court's holding that the statutory requirement of living separately and apart was not met unless the parties lived in different dwellings.[90] The supreme court acknowledged that several cases had upheld the requirement of separate residences, but noted that in a number of them only the sexual relationship had been severed.[91] It followed the reasoning of the Court of Appeals for the District of Columbia in *Hurd v. Hurd*[92] and *Boyce v. Boyce,*[93] which granted divorce decrees even though both parties were living in the

---

84. *See supra* text accompanying note 31.
85. *See supra* text accompanying notes 55–57.
86. 24 AM. JUR. 2D *Divorce and Separation* § 148 (1966).
87. *Id.*
88. 245 A.2d 550 (Del. 1968).
89. The statute on which the action was based read as follows:
The causes for divorce from the bonds of matrimony shall be:

> ....
>
> (11) When husband and wife have voluntarily lived separate and apart, without any cohabitation for three consecutive years prior to the filing of the divorce action and such separation is beyond any reasonable expectation of reconciliation.

DEL. CODE ANN. tit. 13, § 1522(11) (1957) (current version at DEL. CODE ANN. tit. 13, § 1503(7) (1981)). The current Delaware statute allows a separation if the parties live separately and apart for at least six months, even if the parties reside in the same house, as long as they "occupy separate bedrooms and do not have sexual relations with each other." DEL. CODE ANN. tit. 13, § 1503(7) (1981).

90. 245 A.2d 550, 551 (Del. 1968).
91. *Id.* See Annot., 51 A.L.R. 768 (1927), and Annot., 166 A.L.R. 508 (1947), for a list of the cases to which the court referred.
92. 179 F.2d 68 (D.C. Cir. 1949).
93. 153 F.2d 229 (D.C. Cir. 1946).

same residence, because the "essential thing is not separate roofs, but separate lives."[94]

Commenting on the policy of voluntary separation in Delaware, the court indicated that the state should not compel the continuance of a marital relationship between unwilling parties. This approach contrasted with the former domestic policy of allowing separation only upon certain grounds such as adultery or abuse.[95] Delaware recognizes that when a husband and wife have lived apart for a time, without any intention of resuming conjugal relations, the best interests of society and of the parties will be promoted by a dissolution of the marriage.[96] The court held that this policy was not violated by a finding of voluntary separation under the Delaware statutes, even though the parties continued to reside in the same residence, when all other incidents of the marriage have been mutually abandoned.[97]

The *Heckman* court pointed out that economic necessity and stubbornness may compel spouses to remain in the same dwelling after marital relations have ended.[98] The parties may be unable to afford to live separately, or may be trying to gain a favorable position for possession of the house and its contents.[99]

Hurd v. Hurd[100] involved facts similar to those in *Heckman* in an action brought by the wife for support following voluntary separation. Because the husband was unable to get a room due to the scarcity of housing in Washington in 1941, and because he could contribute more money for the support of their infant by living at home, the husband and wife agreed that he could occupy a room in the wife's house. There was no social interaction between them, nor did the husband eat meals in the house after their separation.[101] The trial court refused to grant a decree because even though marital relations had ceased, living in the same house evidenced estrangement rather than separation. The trial court based its denial on the parties' occupancy of adjacent bedrooms.[102] The court of appeals reversed the trial court, holding that a spouse during a legal separation is not required to live in a different residence.[103] Separate lives are essential, not separate roofs.[104] If the parties abandon the relations of husband and wife in all but the most technical legal sense, they are for all purposes separated.[105] The *Hurd* court felt that the parties were separated as effectively as if they were living in separate resi-

94. 245 A.2d 550, 551 (Del. 1968).
95. *Id.* (citing 24 AM. JUR. 2D *Divorce and Separation* § 303 (1966)).
96. 245 A.2d 550, 551 (Del. 1968).
97. *Id.*
98. *Id.*
99. *Id.*
100. 179 F.2d 68 (D.C. Cir. 1949).
101. *Id.* at 68–69.
102. *Id.* at 69.
103. *Id.*
104. *Id.*
105. *Id.*

dences.[106] This voluntary separation should permit the legal termination of a marriage that has ceased to exist in fact.[107]

The key to the construction of "separated and living apart" in these state domestic cases is the parties' abandonment of the incidents of marriage by breaking sexual and social ties. In addition, the parties must have no intent to resume conjugal relations. The *Heckman* and *Hurd* courts recognized that separation entails more than physical distance between the spouses. In addition, they recognized that there are valid reasons for sharing the same residence, such as economic necessity and stubbornness.

Spouses can live separately and apart while sharing the same residence. The question remains whether the meaning given to "separate and living apart" in state court divorce actions can apply to section 71.

D. *Separation for Alimony Purposes Can Mean Separated While Sharing the Marital Home: Proposed Standards*

As the Tax Court majority stated in *Washington,* what "separated" means for purposes of the alimony deduction is not clear.[108] What is clear, though, is that the statute, regulations, and legislative history do not say that a couple cannot live separately and apart in the same residence. In *Washington* Judge Fay observed that if the spouses are divorced or legally separated under a decree of divorce or of separate maintenance, payments that have met the other requirements of section 71(a)(1) will be deductible even if the parties still share the marital home.[109] Congress added sections 71(a)(2) and 71(a)(3) to eliminate the discrimination against those who were separated without benefit of a court order.[110] Congress did not intend for separated parties to meet an additional requirement of living in separate residences. If this were required, Congress would be imposing a stricter requirement, contrary to the purpose stated in the legislative history accompanying the 1954 amendments.

Moreover, the meaning given to "separate and living apart" by the *Heckman* and *Hurd* courts supports congressional intent to treat those living in the same residence like those not sharing a residence. Congress wanted to shift the burden of the tax on alimony payments to the party better able to bear it—the payee spouse.[111] A determination whether the payor spouse qualifies for an alimony deduction is usually clear because both spouses normally will live in separate residences, and because the payments are for the support of the other spouse. Economic conditions have made it difficult for many couples to meet their living expenses, resulting in decisions by separated

106. *Id.*

107. *See also* Hawkins v. Hawkins, 191 F.2d 344 (D.C. Cir. 1951); Boyce v. Boyce, 153 F.2d 229 (D.C. Cir. 1946).

108. 77 T.C. 601, 604 (1981).

109. *See supra* text accompanying notes 51–52. There are no reported cases in which this situation has occurred.

110. *See supra* note 28.

111. *See supra* text accompanying notes 63–67.

spouses to continue sharing the marital home until one spouse is financially capable of moving out.

The Tax Court in *Sydnes* and *Washington* believed that duplicated expenses were necessary in allowing alimony deductions.[112] Although the court did not substantiate this conclusion, its main concern may have been that allowing a couple to share a home while legally separated might lead to many sham separations, in which couples would claim to be separated to obtain the alimony deduction. Any advantage gained by this ploy would be illusory because, while the payor spouse deducts the alimony, the payee spouse includes it in income. Although this method could be used to shift income from a high-bracket taxpayer to a low-bracket payee spouse, the scheme would not succeed if the court looked to the facts, as suggested by the Eighth Circuit in *Sydnes*, to determine whether the couple is truly separated.[113]

No standards currently exist for determining whether a couple is truly separated for alimony deduction purposes. However, *Heckman* and *Hurd* can provide the necessary standards. The Internal Revenue Service and the courts should determine whether the parties (1) have abandoned the incidents of marriage, (2) have an intent to resume conjugal relations, and (3) have a valid reason for sharing the same residence.

These standards, taken from *Heckman* and *Hurd*, should apply to the tax laws because "separated and living apart" is ambiguous. Congress gave no indication of what it meant by the term in the Code or legislative history. It was attempting, however, to equalize the divorce and separation policies among the states by establishing a federal concept of what constituted alimony for purposes of section 71.[114] Congress recognized that some states had liberalized their divorce policies by allowing couples to separate by a voluntary and mutual agreement. The pre-1954 Code did not allow an alimony deduction to a payor spouse in a voluntary separation, so Congress amended the Code to avoid discriminating against this spouse. Believing that separation entails more than physical distance, state domestic courts have determined that spouses can be separated while sharing the marital home. Therefore, when one spouse must pay support to the other spouse, the payment constitutes an obligation and not a "mere continuation of shared living expenses" as defined by the Tax Court.[115] Congress has not expressly foreclosed this view. It intended that support payments be deductible pursuant to section 71. Therefore, when Congress extended section 71 in 1954 to encompass separation agreements, it wanted to allow the alimony provision to apply to spouses who were separated. It did not make duplication of expenses or separate residences prerequisites to obtaining the deduction. The standards taken from *Heckman* and *Hurd* do not violate the intent of Congress in amending the Code.

---

112. *See supra* text accompanying notes 28 and 40.
113. *See supra* text accompanying notes 29–31.
114. *See supra* text accompanying notes 77–78.
115. *See supra* text accompanying note 81.

E. *Application of Proposed Standards to* Washington

The petitioner in *Washington* did not appeal.[116] What is the result if the standards taken from *Heckman* and *Hurd* are applied to *Washington*? It is arguable that all incidents of marriage had been abandoned, because Jean and Alexander had separate bedrooms, prepared meals at different places, did not talk to each other, and did not do anything that a married couple might do. This abandonment was reinforced by their intent not to resume conjugal relations, which was adequately illustrated by their involvement in predivorce proceedings. Finally, although the facts are not clear why the parties shared the residence, there are two possible indications. Alexander said that he had been ordered by the state court to make support payments to Jean or be arrested, even though he was poor.[117] Also, Alexander argued the case *pro se*.[118] Alexander apparently did not have enough money to hire counsel, nor after paying support to Jean did he have enough money to move to another residence.

Therefore, it should be concluded that Alexander and Jean were separated for alimony purposes. Conceivably, Alexander did not have enough money to pay the additional tax since he had given money to Jean as support. This situation is what prompted Congress to enact the alimony deduction and to shift the tax to the party better able to pay it—the payee spouse.

Courts should recognize separateness for what it really is and should not penalize truly separated couples who must share the marital home for extenuating reasons.

William A. Leuby

116. *Washington* originated in Michigan. Michigan later amended its statute concerning grounds for divorce to the present version cited below. No domestic case challenging this statute has come before the Sixth Circuit to show how receptive the court would be to allowing a couple to be separated while sharing the marital home. Although the issue here concerns federal tax law, the Sixth Circuit may be more receptive to the proposed standards in light of Michigan's statute, which parallels the theories outlined in this Note.

MICH. COMP. LAWS ANN. § 552.6 (1982) provides:

(1) A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of statutory language.

(2) The defendant, by answer, may either admit the grounds for divorce alleged or deny them without further explanation. An admission by the defendant of the grounds for divorce may be considered by the court but is not binding on the court's determination.

(3) The court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

117. Petition to the Tax Court, Addendum, Washington v. Commissioner, 77 T.C. 601 (1981).

118. *Id.*