

## Everything You Always Wanted to Know About Farid But Were Afraid to Ask

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## EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT *FARID* BUT WERE AFRAID TO ASK\*

by

Linda Galler\*\*

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\* Younger readers might be interested to know that *Everything You Always Wanted to Know About Sex but were Afraid to Ask* was a 1972 Woody Allen film that took its title from a book of the same name by David Reuben, M.D. Unlike the film, the book was not comedic. Indeed, Dr. Reuben was not happy about the movie and told the *L.A. Herald-Examiner*, "I didn't enjoy the movie because it impressed me as a sexual tragedy. Every episode in the picture was a chronicle of sexual failure, which was the converse of everything in the book." Jeff Stafford, *Everything You Always Wanted to Know About Sex . . . But Were Afraid to Ask*, TURNER CLASSIC MOVIES, <http://www.tcm.com/thismonth/article/?cid=12726&rss=mrq> (last visited July 25, 2012). This Article suggests that the *Farid* story is more like Allen's movie than Reuben's book.

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## I. INTRODUCTION

Students engaged in the study of federal income taxation routinely examine the case of *Farid-es-Sultaneh v. Commissioner*,<sup>1</sup> in which the Court of Appeals for the Second Circuit addressed a wife's tax basis in stock she received under the terms of an antenuptial agreement. While the case invariably engenders a lively and engaging class discussion, the black letter law ultimately is straightforward: her basis equaled the fair market value of the shares on the date they were received because they were acquired for consideration (that being the release of marital rights in her future husband's property). The government had argued that her basis was the same as her husband's (a carryover basis) because she received the stock as a gift.

Perhaps students' enthusiasm for the case results from a sense that they simply do not know the full story. After all, why would an engaged woman accept stock worth \$787,500<sup>2</sup> in exchange for the possibility of receiving over \$33 million upon her husband's death — particularly when her fiancé was twenty-five years her senior with a life expectancy of only sixteen and one-half years?<sup>3</sup> The recital of facts in the court's opinion<sup>4</sup> reflects that the marriage was brief and, one might suspect, tumultuous. Students are also confused by the case name: how did an American citizen end up as Farid-Es-Sultaneh? Alas, neither the trial court nor the Court of Appeals betrayed even the slightest interest in the taxpayer's motives or the details underlying what surely must have been a titillating tale.

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1. 160 F.2d 812 (2d Cir. 1947) (*Farid II*), *rev'd*, 6 T.C. 652 (1946) (*Farid I*).

2. This figure was computed by multiplying the number of shares received (2,500) by the fair market value per share on April, 24, 1924 (as stated in the Court of Appeals opinion). *Farid II*, 160 F.2d at 813; *see also* Stipulation of Facts ¶ 11, *Farid I*, 6 T.C. 652 (No. 2968). For the significance of this particular date, see *infra* text accompanying notes 17–19.

3. *See infra* text accompanying notes 23–27.

4. The facts stated in the Tax Court's opinion are brief. *See Farid I*, 6 T.C. at 652. The facts recited by the appellate court, however, present a fuller account. *See Farid II*, 160 F.2d at 813–14.

This Article reflects the results of a research expedition into the journalistic past and offers the real account.<sup>5</sup> As one might suspect, the story would merit front-page coverage in celebrity gossip magazines if it occurred in modern times, involving as it did fame, wealth, serial separation and reconciliation, and sundry allegations of gold digging and infidelity. Surprisingly, the real story is not reflected in the facts set forth in either the trial or appellate court decision. Indeed, had the real facts been placed in issue, the case might well have been decided for the government. This discrepancy raises thought-provoking and important questions about the role of fact development in litigation and fact finding in the judicial process. This Article explores the impact, both in this case and generally, of litigating on the basis of “facts” that are not true, the strategic decisions that lawyers make in developing facts, and the ethical considerations implicated in framing a story.

This Article begins by describing the facts as they were found and relied upon by the courts in *Farid*. It then recounts another version — the true story — and considers whether the real facts might have occasioned a different result, concluding that the correct facts would have produced a win for the government and a carryover basis. Indeed, *Farid* is a model case for the notion that everything in law revolves around facts.<sup>6</sup> How a story is told or how a fact finder understands a series of facts guides the court’s ruling as much as a judge’s understanding of applicable law.<sup>7</sup> This Article speculates on the motives of counsel in the case for both sides in stipulating to facts that were untrue and concludes that some strategic advantage probably induced them to agree to the facts as we have come to know them over the years. Finally, this Article ruminates on lessons taught by *Farid* in the context of substantive tax law, litigation strategy generally, and ethical considerations. An epilogue provides curious readers with the rest of the *Farid* story; while irrelevant to the legal issue in the *Farid* litigation, the tale of Farid’s life is both fascinating and extraordinary.

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5. The story presented here is as real or true as the press reports of the day. The facts related herein, other than those explicitly referred to as derived from judicial opinions, are based exclusively on contemporaneous newspaper articles.

6. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 11 (4th ed. 2011) (“The analysis of facts permeates this [important] book because the analysis of facts permeates the practice of law.”).

7. *Id.* at 188; *see generally id.* at 131–40, 177–80.

## II. THE FACTS ACCORDING TO THE COURTS

Because the case was fully stipulated, the pertinent facts were never in dispute.<sup>8</sup> The lower court (United States Tax Court), therefore, was not called upon to find facts based on evidence presented but merely adopted verbatim the stipulations crafted and agreed upon by lawyers for the government and for the taxpayer. Whereas the Tax Court's recital of the facts was brief, the Court of Appeals' extended account is fully consistent with the Stipulation of Facts submitted to the Tax Court.<sup>9</sup>

The taxpayer, Doris Farid-es-Sultaneh ("Doris"),<sup>10</sup> was an American citizen who sold shares of common stock in S.S. Kresge Company in 1938 for \$230,802.36.<sup>11</sup> Doris had acquired the shares from her ex-husband, S.S. Kresge ("S.S.").<sup>12</sup> In December 1923, when S.S. was married to another woman and Doris was unmarried, he delivered 700 shares to her; these shares had a fair market value of \$290 per share.<sup>13</sup> The shares were to be held by Doris "for her benefit and protection in the event that the said Kresge should die prior to the contemplated marriage between the petitioner [Doris] and said Kresge."<sup>14</sup> S.S. divorced his first wife on January 9, 1924 and, on or about January 23, 1924, he delivered another 1,800 shares to

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8. *Farid II*, 160 F.2d 812, 813 (2d Cir. 1947); *see also Farid I*, 6 T.C. 652 (1946). Most Tax Court cases are tried on stipulated facts; live testimony is rare. JANE C. BERGNER, *MERTENS LAW OF FEDERAL INCOME TAXATION* § 50.90 (2012). Current Tax Court Rule 91 sets out a mandatory pretrial stipulation procedure covering, *inter alia*, factual matters that are not in dispute. TAX CT. R. 91(a). A stipulation is treated as a conclusive admission of a party but only for purposes of the pending litigation. TAX CT. R. 91(e); *Borchers v. Commissioner*, 95 T.C. 82, 90 (1990), *aff'd*, 943 F.2d 22 (8th Cir. 1991) (stipulated facts are treated in the same manner as facts found by the court on the basis of evidence presented at trial). Why the parties in *Farid I* might have acquiesced in the particular facts in the case is considered later in this article. *See infra* Part III.

9. *See* Stipulation of Facts, *supra* note 2.

10. The taxpayer was known as "Doris" through most of her life. *See infra* note 31 and accompanying text.

11. To get a sense of size of the transaction, the amount realized on the sale in 1938, \$230,802, is equivalent to \$3,756,310.73 in 2012 U.S. dollars. *CPI Inflation Calculator*, U.S. BOARD OF LABOR AND STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Jul. 25, 2012).

12. Mr. Kresge was known as "S.S." *S.S. Kresge Dead; Merchant was 99*, N.Y. TIMES, Oct. 19, 1966, at 1.

13. *Farid II*, 160 F.2d at 813; *see also Farid I*, 6 T.C. at 652. The Stipulation of Facts states that the value of this stock was \$280 per share. Stipulation of Facts, *supra* note 2, ¶ 2.

14. *Farid II*, 160 F.2d at 813 (quoting from the Stipulation of Facts ¶ 2, *Farid-es-Sultaneh v. Commissioner*, 6 T.C. 652 (1946) (No. 2968)).

Doris, these to be held for the same purpose as the first 700 shares.<sup>15</sup> No value was stated for the 1,800 shares.<sup>16</sup>

On April 24, 1924, Doris and S.S. executed an antenuptial agreement in which:

she acknowledged the receipt of the shares “as a gift by the said Sebastian S. Kresge, pursuant to this indenture, and, as an ante-nuptial settlement, and in consideration of said gift and said ante-nuptial settlement, in consideration of the promise of said Sebastian S. Kresge to marry her, and in further consideration of the consummation of said promised marriage” she released all dower and other marital rights, including the right to her support to which she otherwise would have been entitled as a matter of law when she became his wife.<sup>17</sup>

The couple married “immediately after the ante-nuptial agreement was executed.”<sup>18</sup> The value of the stock on April 24, 1924 was \$315 per share and rose to \$330 per share on May 6, 1924, when the shares were transferred to Doris on the corporation’s books.<sup>19</sup>

Doris and S.S. divorced on May 18, 1928. Doris claimed no alimony, and none was awarded to her.<sup>20</sup> Because of a series of stock dividends over the years, Doris’s adjusted basis per share in 1938 (the year at issue) was \$10.66 $\frac{2}{3}$  per share computed on the basis of the fair market value

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15. *Id.*; see also *Farid I*, 6 T.C. at 652.

16. The Stipulation of Facts states that the value of this stock was \$290 per share. Stipulation of Facts, *supra* note 2, ¶ 2.

17. *Farid II*, 160 F.2d at 813. The language within the quotation marks is from the antenuptial agreement. See Stipulation of Facts, *supra* note 2, at Exhibit 1-A. The Stipulation of Facts states that the 2,500 shares referred to in the agreement were the same shares previously received by Doris in December 1923 and January 1924. *Id.* ¶ 3. The alternative version of facts reflects that Doris believed she was going to receive 2,500 additional shares under the agreement. See *infra* notes 52–62 and accompanying text.

18. *Farid II*, 160 F.2d at 813; see also *Farid I*, 6 T.C. at 652.

19. *Farid II*, 160 F.2d at 813.

20. *Id.*

per share at “the time” of her acquisition,<sup>21</sup> and \$0.159091 computed as a carryover of S.S.’s adjusted basis.<sup>22</sup>

The Court of Appeals’ recital of facts concluded by noting the couple’s ages and life expectancies as of the date of their marriage<sup>23</sup> and the value of S.S.’s wealth. Doris was thirty-two years old with a life expectancy of thirty-three and three-fourths years (i.e., sixty-five and three-fourths years).<sup>24</sup> S.S. was fifty-seven years old with a life expectancy of sixteen and one-half years (i.e., seventy-three and one-half years).<sup>25</sup> He was then worth approximately \$375,000,000<sup>26</sup> and owned real estate worth approximately \$100,000,000.<sup>27</sup>

### III. THE TRUE STORY

Before recounting the alternative version of Doris’s story, a brief synopsis of her life and of S.S.’s life, prior to their marriage, is provided here.

#### A. *Before They Met: Doris*

The future Mrs. Kresge began life as Mabel Doris Mercer.<sup>28</sup> She was born in 1889 to Captain George A. Mercer, reported variously as a Pittsburgh police captain, a Superintendent of Buildings in Allegheny, Pennsylvania,<sup>29</sup> and as a partner of Andrew Carnegie.<sup>30</sup> By the time Ms. Mercer applied for a license to marry S.S., she had dropped “Mabel” from use.<sup>31</sup>

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21. *Id.* According to the Stipulation of Facts, the value per share on April 24, 1924 was \$14 per share, but Doris used \$10.66⅔ per share as her adjusted basis. Stipulation of Facts, *supra* note 2, ¶¶ 11–12. The discrepancy is not explained.

22. *Farid II*, 160 F.2d at 813. It is unclear what date the court referred to as “the time” of Doris’s acquisition since she received the shares in two blocks, on two dates, and the corporation recorded her ownership on a third date.

23. *See* Stipulation of Facts, *supra* note 2, ¶ 15 (reflecting life expectancies on April 24, 1924, the date of the marriage).

24. *Farid II*, 160 F.2d at 814.

25. *Id.* at 813.

26. \$375,000,000 in 1924 is worth \$5,032,412,281 in 2012. *CPI Inflation Calculator*, *supra* note 11.

27. *Farid II*, 160 F.2d at 813. \$100,000,000 in 1924 is worth \$1,343,197,661 in 2012. *CPI Inflation Calculator*, *supra* note 11.

28. *P.L. Harden Wedded to Mabel Mercer*, N.Y. TIMES, Apr. 18, 1911, at 3.

29. *Id.*

30. *From the Magazine*, TIME, May 5, 1924.

31. *See S.S. Kresge Obtains License Here to Wed*, N.Y. TIMES, Apr. 24, 1924, at 9 (license issued to S.S. Kresge and Doris Mercer).

At the age of 17, Doris became engaged to Carl Borntraeger, a ward of industrialist Henry C. Frick.<sup>32</sup> Neither Captain Mercer nor Mr. Frick was pleased with the relationship. There reportedly was a scene, and as a result, Doris ran away to New York City to pursue a life on the stage. She landed a minor role on Broadway in a musical comedy, *Earl and the Girl*. Displeased, Captain Mercer tricked his daughter into taking a trip home to Pennsylvania. Once over the state line, Captain Mercer confined his daughter against her will in the Episcopalian Country Home in Germantown.<sup>33</sup> Within a month, Doris and Carl implemented an escape plan worthy of a B movie, involving a seemingly secure second floor window, a linen sheet, a mad slide, and a fall to the ground. The couple returned to New York City but never married.<sup>34</sup>

In 1911, Doris married Percival L. Harden, publisher of *The Club Fellow*, a weekly gossip newspaper — also known to some as a “reputation monger”<sup>35</sup> and as a “tattle magazine”<sup>36</sup> — published in New York and Chicago. It was Mr. Harden’s second marriage, his first having ended in divorce. However, his second marriage soon met the same fate as the first and ended in 1918.<sup>37</sup> After Harden’s death in 1930, Doris is reported to have said: “My first husband was a delightful, worldly man. He was charming not only to me but unfortunately to every other woman he met. Naturally, that was unsettling.”<sup>38</sup>

*B. Before They Met: S.S.*

Sebastian Kresge is best remembered as the founder of S.S. Kresge Company (the “Company”). At the time of his death in 1966,<sup>39</sup> the Company

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32. Interestingly, Doris and Frick are buried in the same cemetery — Homewood Cemetery in Pittsburgh, Pennsylvania. Other notable “inhabitants” include ketchup magnate H.J. Heinz II, former U.S. Senator H.J. Heinz III, and Baseball Hall of Famer Pie Traynor. *Homewood Cemetery*, FIND A GRAVE, <http://www.findagrave.com/php/famous.php?page=cem&FSscemeteryid=45139> (last visited Aug. 7, 2012); *Homewood Cemetery*, JANIE & TIM (Aug. 14, 2011), <http://janieandtim.com/?p=627> (photographs of notable graves).

33. *S.S. Kresge Wed Again*, N.Y. TIMES, Apr. 25, 1924, at 20.

34. *P.L. Harden Wedded to Mabel Mercer*, *supra* note 28, at 3.

35. *National Affairs: Jardines*, TIME, Aug. 23, 1926, at 11.

36. *The Press: So Many of Them*, TIME, Apr. 21, 1930, at 28.

37. *Third Wife Sues Harden*, N.Y. TIMES, Dec. 23, 1926, at 10.

38. *The Press: End of a Gossipist*, TIME, Apr. 28, 1930, at 29. Mr. Harden took his own life in a New York hotel room. *Harden, Publisher, Ends Life by Shot*, N.Y. TIMES, Apr. 18, 1930, at 24.

39. Despite a life expectancy, in 1947, of sixteen and one-half years when he was fifty-seven years old, S.S. lived to be 99. *Farid II*, 160 F.2d 812, 813 (2d Cir.



owned 930 stores throughout the United States, Canada, and Puerto Rico — 670 Kresge variety (“5-and-10-cent”) stores, 150 Kmart department stores, and 110 Jupiter discount stores.<sup>40</sup> S.S. is also remembered as a generous philanthropist, primarily through the Kresge Foundation, which he established in 1924 — coincidentally the same year in which he divorced his first wife and married Doris — through an initial contribution of \$1.3 million and which made grants of \$70 million during his lifetime.<sup>41</sup>

S.S. was born in 1867 on a farm in Bald Mountain, Pennsylvania. As a young man he worked as a traveling salesman. One customer who particularly impressed S.S. was Frank Woolworth, who had founded a 5-and-10-cent store chain several years earlier. Resolving to enter that same business, S.S. went into partnership with John G. McCrory, becoming a half-owner of a 5-and-10-cent store in Memphis and another in Detroit. The partners eventually split, with each partner taking full ownership of one store. S.S. became sole owner of the Detroit emporium and soon began opening Kresge stores throughout the Midwest.<sup>42</sup>

The Company went public in 1912. S.S. served as President from 1907 to 1925 and as Chairman of the Board from 1913 until shortly before his death. In 1925, when S.S. left the presidency, the Company operated 307 stores. That same year, S.S. purchased a large interest in Stern Brothers, a New York department store, and smaller interests in The Fair, a Chicago department store that eventually became part of Montgomery Ward & Co., and Kresge Newark, Inc., a Newark department store that later became Chase Newark Store. S.S. also was President for many years of the Kresge Realty Company.<sup>43</sup> S.S. resided in Detroit from 1899 until he moved to New York City in 1924.<sup>44</sup>

### C. *The First Divorce*

Although S.S.’s courtship of Doris began while Kresge was married to another woman, the ground for divorce alleged by the first Mrs. Kresge

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1947). He died in 1966, outliving Doris by more than three years. *See infra* notes 258–60 and accompanying text.

40. *S.S. Kresge Dead; Merchant was 99*, *supra* note 12, at 1. Annual sales exceeded \$851 million in 1965, when the company employed 42,000 people. *Id.* at 38.

41. *S.S. Kresge Dead; Merchant was 99*, *supra* note 12, at 38.

42. *Id.* Mr. McCrory’s collection of stores grew as well. In 1987, McCrory stores bought all of the Kresge stores that were still operating. Isadore Barmash, *A Kresge-McCrory Reunion*, N.Y. TIMES, Apr. 4, 1987, at 33. For a history of the McCrory businesses, see ISADORE BARMASH, *FOR THE GOOD OF THE COMPANY: WORK AND INTERPLAY IN A MAJOR AMERICAN CORPORATION* (1976).

43. Barmash, *A Kresge-McCrory Reunion*, *supra* note 42, at 33.

44. *Id.*

was cruelty, not adultery.<sup>45</sup> Her divorce pleadings never mentioned another woman but instead described her husband as “frequently sullen and morose,”<sup>46</sup> with a “moody disposition and temperament,”<sup>47</sup> refusing to speak to her or their children for days at a time. He was a “nagger” and a “scolder,” she alleged, who refused to accept responsibility for his children.<sup>48</sup> The couple had five children, two of whom were minors at the time of the divorce. Their oldest son, Stanley, was already working with his father at the time.<sup>49</sup> The divorce settlement reportedly was \$10,000,000.<sup>50</sup>

D. *The Second Marriage and Doris’s Acquisition of Shares*

S.S. and Doris married in New York on April 24, 1924.<sup>51</sup> A year later, the couple was in court. Doris sued S.S. seeking 17,500 shares of Company stock, which she asserted he had promised her before their marriage as a settlement in lieu of her dower rights.<sup>52</sup> News reports at the time valued her claim at \$7,000,000.<sup>53</sup> The complaint alleged that the couple had reached an oral agreement, that S.S. was supposed to have had a written agreement drawn up to reflect the terms of that agreement, but that the document ultimately drafted and signed reflected only 2,500 shares.<sup>54</sup> (This document is the same agreement referred to in the later tax case). Doris further alleged that her husband had caused her to sign the antenuptial agreement “by persuasion, artifice, and fraud.”<sup>55</sup> In this regard, it may be noted that both *Farid* opinions indicated that the agreement was signed

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45. *S.S. Kresge Obtains License Here to Wed*, *supra* note 31, at 9.

46. *Id.*; *see also Wife of Kresge Gets Divorce on Cruelty Charge*, CHI. TRIB., Jan. 12, 1924, at 2.

47. *Kresge Trial Delayed*, N.Y. TIMES, Aug. 19, 1923, at 6.

48. *Id.*

49. *See* STANLEY S. KRESGE, *THE S.S. KRESGE STORY*, 24–25 (1979) (Stanley worked at a Detroit Kresge store during school vacations, became a manager-trainee in 1923, and then managed several 5-and-10-cent stores before joining the Company’s headquarters staff in 1930). Stanley became Chairman of the Board when his father stepped down many years later but retired a year later. *Sebastian S. Kresge, 98, Quits as Head of Chain He Founded*, N.Y. TIMES, Jun. 22, 1966, at 63; *Stanley Sebastian Kresge, 85, Retailer and Philanthropist*, N.Y. TIMES, Jul. 3, 1985, at D19.

50. *Wife Sues Kresge for \$7,000,000 Stock*, N.Y. TIMES, June 23, 1925, at 1. Mrs. Kresge was given sole possession of “the palatial Kresge residence” in Detroit. *Wife of Kresge Gets Divorce on Cruelty Charge*, *supra* note 46, at 2.

51. *S.S. Kresge Wed Again*, *supra* note 33, at 20.

52. *Wife Sues Kresge for \$7,000,000 Stock*, *supra* note 50, at 1.

53. *Id.*; *Mrs. Kresge Reduces Claim to \$1,000,000*, N.Y. TIMES, July 14, 1925, at 21.

54. *Wife Sues Kresge for \$7,000,000 Stock*, *supra* note 50, at 1.

55. *Id.*

immediately before the wedding ceremony.<sup>56</sup> One can speculate on the pressure the bride might have been under at that time. The complaint also alleged that Mr. Kresge had failed to deliver even the 2,500 shares referred to in the agreement.<sup>57</sup>

Doris's lawyer told reporters that S.S. had promised to transfer the shares by May 1, 1925 and, having failed to make any such transfers, had shortly thereafter moved out of the couple's home. He intimated that a separate matrimonial action would be brought.<sup>58</sup>

For reasons now unknown, Doris hired a new lawyer, who amended the original complaint to demand only the transfer of the 2,500 shares mentioned in the antenuptial agreement.<sup>59</sup> Doris's attorney claimed that the 2,500 shares, together with a stock dividend of 1,250, were worth \$2,000,000.<sup>60</sup> The reason for the reduced demand is unclear. One might speculate, however, that the new attorney understood the statute of frauds, under which certain contracts, including contracts in consideration of marriage, are unenforceable unless in writing.<sup>61</sup>

In his opening statement at trial, Doris's lawyer told the following story. The couple met in January 1921, and "a friendship between them had developed in March."<sup>62</sup> Doris was then studying music, and Mr. Kresge asked her how much her studies would cost to complete. She replied "\$10,000," whereupon S.S. opened a brokerage account for her and deposited sufficient securities to provide Doris with that amount. When S.S. closed the account in 1923, it had provided Doris with \$145,000 in income. S.S. had promised to replace the account with 2,500 shares of Company stock but instead offered Doris 2,000 shares in Kresge Department Store. Doris declined the offer in favor of shares in the publicly-traded Company. S.S. immediately transferred 700 Company shares to her and promised to transfer 1,800 more at a later date, explaining that he was a married father of five children and did not want to be associated with such a large gift to woman who was not his wife. S.S. admonished Doris not to have the shares transferred to her on the books of the Company because he wished the gift to be kept secret. Once S.S.'s divorce was finalized, he urged a quick marriage so that the couple would be husband and wife before news of their liaison

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56. *Farid II*, 160 F.2d 812, 813 (2d Cir. 1947); *Farid I*, 6 T.C. 652 (1946).

57. *Wife Sues Kresge for \$7,000,000 Stock*, *supra* note 50, at 1.

58. *Id.*

59. *Mrs. Kresge Reduces Claim to \$1,000,000*, *supra* note 53, at 21.

60. *Justice Paves Way for Kresge Reunion*, N.Y. TIMES, Mar. 9, 1926, at 1.

61. *See, e.g.,* *Hunt v. Hunt*, 64 N.E. 159 (N.Y. 1902); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 124 (1981).

62. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5. Unless otherwise indicated, the descriptions of counsels' opening statements and quotes therefrom are set forth in this article.

reached the press. S.S. then asked for an antenuptial agreement that provided Doris with 2,500 shares in addition to the 2,500 that she already owned.

S.S.'s account, as related in his attorney's opening statement, differed from Doris's attorney's in several material respects. Most importantly, defense counsel claimed there was only one block of 2,500 shares, the shares that were referred to in the antenuptial agreement.<sup>63</sup> While asserting that these shares were not "a gift to cover up [S.S.'s] friendship for [Doris] before their marriage,"<sup>64</sup> S.S.'s lawyer did acknowledge that S.S. had transferred the 2,500 shares to Doris prior to their wedding.<sup>65</sup> The latter assertion is consistent with the Stipulation of Facts in *Farid*, which, while referring to a single block of 2,500 shares, indicated that S.S. had delivered all of those shares to Doris prior to execution of the antenuptial agreement and the marriage.<sup>66</sup>

According to this lawyer's statement, Doris was to receive \$10,000 a year from S.S. for purposes of her music study. A brokerage account was set up to provide her with that amount without "leav[ing] behind a trail of his conduct."<sup>67</sup> S.S.'s lawyer claimed that Doris had received \$205,000 from the brokerage account before it was closed.<sup>68</sup> As to the couple's relationship, S.S.'s attorney conceded that his client "was attentive to Miss Mercer in a Central Park West apartment" for which he paid all of the expenses.<sup>69</sup> "Their friendship was most agreeable. She was nice to him, and there was no question but that he was infatuated with her."<sup>70</sup>

Upon their engagement, which occurred after S.S.'s first wife asked for a divorce but before that divorce became final, S.S. and Doris discussed an antenuptial agreement. Counsel claimed that the possibility of putting 5,000 shares of Company stock in trust for Doris was discussed but that the parties ultimately agreed on an outright transfer of 2,500 shares.<sup>71</sup> Counsel asserted that Doris "developed a strong affection for money" and that when S.S. realized that "she was more fond of his stock and money than of himself," he moved out of their apartment.<sup>72</sup> At that time, he had already transferred 700 shares to her. Doris apologized, S.S. moved back in and, "to

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63. *Id.*

64. *Id.*

65. *Kresges Settle; Reunion Expected*, N.Y. TIMES, Mar. 20, 1926, at 3; see also *Mrs. Kresge Put on 3 Year Trial as Dutiful Wife*, CHI. TRIB., Mar. 21, 1926, at 17.

66. Stipulation of Facts, *supra* note 2, ¶¶ 2–4.

67. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

show his good intentions,” S.S. transferred 1,800 more shares to Doris.<sup>73</sup> Only then did the divorce from his first wife and the subsequent marriage to Doris take place.

Doris’s suit was settled after opening statements and before any testimony was given.<sup>74</sup> The couple did not announce the terms of their settlement. Press accounts were inconsistent,<sup>75</sup> but at least one report indicated that Doris received cash but no additional shares.<sup>76</sup> Thus, the question of whether S.S. had promised Doris one or two blocks of 2,500 shares was never publicly resolved.

While Doris’s version of the facts differed in significant respects from S.S.’s version, it is notable for purposes of this Article that Doris’s version also varied from the Stipulation of Facts to which she subsequently agreed in the Tax Court. In litigation with S.S., Doris claimed there were two blocks of 2,500 shares — the 2,500 shares she received prior to the marriage, which were hers irrespective of the antenuptial agreement, and the 2,500 additional shares she was entitled to under that agreement in exchange for releasing her marital property rights. In Tax Court, however, Doris agreed to stipulations that referred only to a single block of 2,500 shares.<sup>77</sup> Moreover, the stipulations explicitly stated that the 2,500 shares Doris received prior to the marriage were the same 2,500 shares referred to in the antenuptial agreement.<sup>78</sup> Notably, the shares themselves were delivered to Doris, in street name, prior to the wedding.

Hence, there are two possible versions of the facts: (1) the 2,500 shares that Doris received prior to her marriage were not the subject of the

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73. *Id.*

74. The matter was settled after the presiding judge urged the couple to seek counsel from the minister of the church they attended. *Kresges Settle; Reunion Expected*, *supra* note 65, at 3.

75. See, e.g., *Reconciliation of Kresges Ends Legal Dispute*, CHI. TRIB., Mar. 20, 1926, at 3 (more than \$1,000,000, of which \$100,000 was in cash); *Mrs. Kresge Put on 3 Year Trial as Dutiful Wife*, *supra* note 65, at 17 (financial settlement contingent upon Doris being a “dutiful wife” for three years; paid out incrementally); *S.S. Kresge Reveals Settlement Terms*, N.Y. TIMES, Mar. 22, 1926, at 21 (statement of S.S. released by Doris’s lawyer denying that settlement imposed any conditions on Doris). In pleadings filed in a divorce action several years later, S.S. stated that he had given Doris \$100,000 to settle the suit. *Mrs. Kresge Fights Husband’s Suit*, N.Y. TIMES, Apr. 18, 1928, at 27.

76. *Reconciliation of Kresges Ends Legal Dispute*, *supra* note 75, at 3.

77. Stipulation of Facts, *supra* note 2, ¶¶ 2–4.

78. *Id.* ¶ 3 (“The twenty-five hundred (2,500) shares of stock referred to in said agreement is the twenty-five hundred (2,500) shares referred to in paragraph 2 hereof.”). Paragraph three goes on to state that Doris had not reported, for federal income tax purposes, the receipt of the 2,500 shares in 1923 (the first 800) or in 1924 (the remaining 1,700). *Id.*

antenuptial agreement, which contemplated an additional 2,500 shares; or (2) there was only one block of 2,500 shares, and the antenuptial agreement referred to shares that Doris already owned at the time the agreement was executed.<sup>79</sup> Before considering the significance of the disparate accounts, one might reasonably ask why Doris, indeed why both parties to the tax dispute, agreed to seek a judicial determination based on facts that varied materially from Doris's prior version of the story.

#### IV. WHY WERE THE FACTS NOT THE FACTS?

*Farid* was decided on stipulated facts. In its present version, Tax Court Rule 91 requires parties to stipulate facts "to the fullest extent to which complete or qualified agreement can or fairly should be reached."<sup>80</sup> In 1945,

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79. The language of the antenuptial agreement itself is susceptible of either interpretation. In stating the reasons for the contact, the agreement speaks in the future tense, stating that S.S. "desires to make provision for the immediate benefit and protection of [Doris]." The operative clauses are worded in the present tense, stating that S.S. "hereby gives, assigns, transfers, and sets over unto the said Doris Mercer, absolutely Two Thousand five hundred (2,500) shares" and that Doris "hereby acknowledges receipt from the said Sebastian S. Kresge of Two Thousand five hundred (2,500) shares." Stipulation of Facts, *supra* note 2, at Exhibit 1-A.

80. TAX CT. R. 91(a)(1). "Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute." TAX CT. R. 91(a)(1).

The Tax Court has characterized the pretrial stipulation process as "the bedrock of Tax Court practice." *Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974). According to the definitive history of the Tax Court, the stipulation requirement is:

largely responsible for the court's ability to keep current with the thousands of cases docketed each year. By eliminating the necessity of proof at trial with respect to uncontroverted issues of fact, pretrial stipulations result in savings of time and expense for both the courts and the parties. Moreover, the necessity of complying with the stipulation procedures forces opposing counsel to consult and to develop the facts of their case in advance of trial. As a result, issues are perceived and litigating risks are evaluated at an early stage of the proceedings. Many observers believe that the high rate of pretrial settlements that obtains in the Tax Court is largely due to this fact of its practice.

HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 277 (1979)(citations omitted). Former Chief Judge Tannenwald listed the advantages of the stipulation process as follows:

First, and perhaps foremost, the stipulation process will force counsel to face the realities of the issues involved and, as a consequence, will often encourage partial, if not complete, settlement. Second, careful attention to the preparation of a

when the Stipulation of Facts in *Farid* was filed, stipulations were common in the Tax Court, but the practice was not yet mandatory.<sup>81</sup> A stipulation generally is treated as a conclusive admission by the parties to the stipulation but is binding only in the pending case and not for any other purpose, nor can it be used against any of the parties in any other case or proceeding.<sup>82</sup> There being no contested issues of fact, Doris and the government jointly moved for a decision without trial.<sup>83</sup>

The stipulations, and the court's findings of fact which incorporated them, did not reflect Doris's earlier version of the circumstances under which Doris received Company shares from S.S., raising the question of why the parties' lawyers might have agreed to the stipulations. One possibility is that counsel for one or both, most likely the government, did not know the true facts.<sup>84</sup> Doris had received the shares more than twenty years prior to commencement of the Tax Court proceeding and had been divorced from S.S. for seventeen years. Another possibility is that taxpayer's counsel wished to save his client from embarrassment. It is also possible that one or

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stipulation of facts will enable the parties to state undisputed subsidiary facts with a degree of precision that in many cases will not be reflected in the oral testimony of witnesses with its inherent uncertainties. Third, the more complete the stipulation of facts, the less time will be required for the trial itself and the more meaningful the trial will be. To the extent that written material is stipulated, needless expenditure of time in marking exhibits and offering them into evidence is avoided. . . . Finally, it is important to note that gaps in the stipulation can cause an issue to be decided against the party having the burden of proof.

Theodore Tannenwald, Jr., *Tax Court Trials: An Updated View from the Bench*, 47 TAX LAW. 587, 591 (1994). For an interesting discussion of practical considerations in the stipulation process, see Robert R. Veach, *Stipulating Facts in Tax Court*, 34 TAXES 669 (1956).

81. See DUBROFF, AN HISTORICAL ANALYSIS, *supra* note 80, at 277-83.

82. TAX CT. R. 91(e).

83. See TAX CT. R. 122(a).

84. Interestingly, the Internal Revenue Manual of today admonishes government attorneys to stipulate only to facts they know to be true. I.R.M. 35.4.7.1; *see also* I.R.M. 35.4.7.3 ("The initial draft [by the government attorney] should be based upon the known facts and documents contained in the administrative file, admissions contained in the pleadings, answers to informal or formal discovery, requests for admissions, and other facts or documents secured during trial preparation."). Had the government attorneys in *Farid I* been governed by today's Manual, they might not have been able to agree to stipulate as they did in the case. The antenuptial agreement does not refer to shares having been received by Doris prior to the marriage. Moreover, the facts alleged in Doris's petition are consistent with her position in the prior litigation with S.S. Amended Petition ¶ 5(D), *Farid I*, 6 T.C. 652 (1946) (No. 2968).

both parties assumed a strategic advantage from the facts as stipulated. It is impossible to know.<sup>85</sup>

A. *Why the Government Might Have Agreed to the Stipulated Facts*

Perhaps the government was willing to accept the stipulation because it believed in the strength of judicial precedent, which it regarded as endorsing its position.<sup>86</sup> In retrospect, this was a poor decision, but, at the time, the government's confidence was probably justified. Indeed, the government won in the Tax Court; the portion of the Tax Court's opinion discussing the law and its application of the facts at bar took up only one sentence. The court merely cited two Supreme Court decisions that it

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85. The applicable rules of lawyers' ethics at the time were the ABA Canons of Professional Ethics. CANONS OF PROF'L ETHICS (1908). (The Canons were adopted by the New York State Bar Association in 1909. Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 283 n.36 (1993) (citing 32 Report of N.Y. State Bar Ass'n 167 (1909)). Unlike present day rules, the Canons were brief (forty numbered paragraphs) and general in nature. Canon 22 ("Candor and Fairness") stated in part: "It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes." CANONS OF PROF'L ETHICS Canon 22. In contrast, today's rule, ABA Model Rule of Professional Conduct 3.3, is quite specific, stating in part:

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012). New York adopted its version of the Model Rules in 2009, [http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional\\_StandardsforAttorneys/Professional\\_Standar.htm](http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_StandardsforAttorneys/Professional_Standar.htm). Thus, if the stipulation had been submitted under the current rules, one could reasonably infer that counsel was not aware that the stipulation was at odds with Doris's prior version of the facts. One cannot reach the same conclusion under the Canons. Of course, it is possible, in either case, that Doris's prior version was false (i.e., that there was only one block of 2,500 shares) and that the stipulation is accurate.

86. Today's Internal Revenue Manual prohibits IRS attorneys from agreeing to stipulations of facts not known to be true, even if they believe that particular facts are irrelevant. I.R.M. 35.4.7.4. Facts that are known to be true may be stipulated to at the request of taxpayer's counsel, however, even if IRS attorneys believe that the particular facts are irrelevant. *Id.*



regarded as directly on point: The determination of the Commissioner is approved upon the authority of *Wemyss v. Commissioner*, 234 U.S. 303, and *Merrill v. Fahs*, 324 U.S. 308.<sup>87</sup> *Wemyss* and *Merrill* both were decided less than eleven months before the government filed its brief in *Farid* and a mere thirteen months (to the day) before the Tax Court rendered its decision.<sup>88</sup>

*Wemyss* involved a transfer of stock by Mr. Wemyss to his fiancée, Mrs. More, a widow, prior to their marriage. The transfer was prompted by Mrs. More's concern that her interests in two trusts created by her deceased husband would cease upon her remarriage. The shares transferred to her by Mr. Wemyss would compensate for her loss of income under the trusts. The couple married within a month after the shares were transferred.

Rejecting the taxpayer's arguments that Mrs. More had given consideration in the form of the marriage and that the transfer compensated her for income she would have lost under the trusts, the Supreme Court held that the entire value of the shares was a gift subject to federal gift tax.<sup>89</sup> The Court found that consideration in the common law sense is irrelevant under the gift tax statute, which provided that "[w]here 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 exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift."<sup>90</sup> Thus, consideration not reducible to a money value, such as love and affection, a promise of marriage, etc., is disregarded for gift tax purposes.<sup>91</sup> The Court also reasoned that consideration must benefit the transferor (donor) in order to afford relief from the gift tax (i.e., the consideration must be received by the donor, not merely given or given up by the donee).<sup>92</sup>

*Merrill*, a companion case to *Wemyss*, concerned an antenuptial agreement between a man of substantial means and his fiancée, Miss Desmare, whose assets were "negligible."<sup>93</sup> Pursuant to the agreement, Mr. Merrill agreed, within ninety days after the marriage to establish an irrevocable trust for his new wife and to provide in his will for two additional trusts for the benefit of his wife and their surviving children. In return, Miss Desmare released all rights she might acquire as wife or widow in her

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87. *Farid I*, 6 T.C. 652, 653 (1946). The Tax Court's opinion was only four paragraphs long.

88. See *infra* notes 96–97 and accompanying text.

89. *Commissioner v. Wemyss*, 324 U.S. 303 (1945).

90. *Id.* at 306–07 (quoting Revenue Act of 1932, § 503, 47 Stat. 169, 247 (1932) (current version at I.R.C. § 2512(b))).

91. *Id.* at 305.

92. *Id.* at 307–08.

93. *Merrill v. Fahs*, 324 U.S. 308, 309 (1945).

husband's property except the right to maintenance and support. The parties married, and the terms of the agreement were carried out.

As in *Wemyss*, the Court in *Merrill* focused on the question of whether there had been "adequate and full consideration in money or money's worth."<sup>94</sup> Reviewing the legislative history of the phrase in the context of the estate tax, the Court concluded that "adequate and full consideration" excludes relinquishment of dower and marital rights for both estate and gift tax purposes.<sup>95</sup>

*Wemyss* and *Merrill* were decided on March 5, 1945. The government filed its trial brief in *Farid* on February 26, 1946,<sup>96</sup> and the Tax Court issued its decision on April 5, 1946.<sup>97</sup> Although the Tax Court briefs are no longer available, a transcript of oral arguments before the Tax Court reflects that the government's argument was straightforward: the Supreme Court's reasoning in *Wemyss* and *Merrill* should apply to the facts in *Farid*.<sup>98</sup> With the exception of one paragraph, the government's argument in its brief on appeal to the Second Circuit was the same:

. . . that the present case is governed and the issue herein is resolved by the rules laid down by the Supreme Court in *Commissioner v. Wemyss*, 324 U.S. 303, and *Merrill v. Fahs*, 324 U.S. 308, upon the authority of which the Tax Court sustained the Commissioner's determination herein.<sup>99</sup>

Thus, it is likely that the government was willing to accept the taxpayer's version of the facts — reflecting a quid pro quo exchange of dower and marital rights for Company shares because it believed that those facts would support a holding in its favor under the reasoning of *Wemyss* and *Merrill*. It must have been a great surprise to the government that the Court of Appeals did not regard the income tax as subject to the same standards,<sup>100</sup>

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94. *Id.* at 311–13.

95. *Id.* at 312–13.

96. Docket Entries, *Farid I*, 6 T.C. 652 (No. 2968).

97. *Id.*

98. Transcript of Testimony, Appendix to Brief for Petitioner-Appellant at 29, *Farid II*, 160 F.2d 812 (2d. Cir. 1947) (No. 154-20400). The government's brief to the Second Circuit reflects an expanded argument; it is unclear whether the embellishments were argued to the Tax Court or not.

99. Brief for the Respondent at 11, *Farid II*, 160 F.2d 812 (No. 154-20400); *see also Id.* at 21–22.

100. "In our opinion the income tax provisions are not to be construed as though they were in *pari materia* with either the estate tax law or the gift tax statutes." *Farid II*, 160 F.2d at 814.

given the Supreme Court's emphatic conclusion that the estate tax and gift tax rules are in *pari materia* and must be construed together.<sup>101</sup>

A single paragraph in the government's Second Circuit brief hints at what might have been a winning argument: that the transfers of shares by S.S. to Doris were gifts without consideration because they occurred before the marriage, at a point when Doris had no interest in her future husband's property or estate that she could give up in exchange. However, the government did not pursue this argument.

*B. Why Doris Might Have Agreed to the Stipulated Facts*

Doris's counsel might have stipulated to a different version of the facts than Doris had earlier propounded because he was unfamiliar with Doris's earlier account of the story. The attorney who wrote the Tax Court brief and who made oral arguments entered his appearance in the litigation more than twenty years after Doris signed the antenuptial agreement and almost eighteen years after she was divorced from S.S.<sup>102</sup> (The Stipulation of Facts was filed five months after this attorney's entry of appearance).<sup>103</sup> Before the internet age, indeed before the microfilm age, perhaps old stories became lore,<sup>104</sup> then myth, and maybe then were forgotten. Maybe Doris chose not to share the full story with her lawyers, merely sharing with him her copy of the antenuptial agreement and noting that she had received only (one block of) 2,500 shares from S.S. prior to their marriage.

Perhaps Doris's lawyer stipulated to the facts because they reflected Doris's best chance of winning in the Tax Court. If she had both acknowledged receiving the 2,500 shares prior to her marriage and alleged that they belonged to her without conditions as of the date of transfer, as she had in her prior litigation with S.S., the Tax Court might have reasonably concluded that those shares were a gift, without consideration, on the date of transfer, dictating a carryover basis. This point is analyzed in Part V.A. of this Article.

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101. "The guiding light is what was said in *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44, 60 S.Ct. 51, 56, 84 L.Ed. 20: "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." *Merrill*, 324 U.S. at 311-13.

102. Docket Entries, *supra* note 96, at 3 (Entry of Appearance of August Merrill, Sept. 10, 1945). Mr. Merrill replaced another attorney, James Maxwell Fassett, whom Doris had originally retained. *Id.* at 1-2.

103. Docket Entries, *supra* note 96, at 3 (Stipulation of Facts filed Dec. 10, 1945).

104. One might speculate that Doris was not interested in reliving the past. Indeed, as Part III of this Article and the Epilogue demonstrate, she lived a colorful and somewhat embarrassing life.

## V. DORIS'S BASIS UNDER THE REAL FACTS

If Doris's earlier version of the facts had been presented to the Tax Court, her acquisition of shares would have been characterized as a gift, and she would have taken a carryover basis in the shares as a result.

### A. *The Transfer of Shares was a Gift Before the Marriage*

When Doris sued S.S. seeking additional shares, counsel for both parties agreed that S.S. had transferred 2,500 shares to Doris prior to their marriage, at a time when S.S. was married to another woman.<sup>105</sup> S.S. first transferred 700 shares and later transferred an additional 1,800.<sup>106</sup> The Stipulation of Facts in *Farid* is consistent on this point, declaring that S.S. transferred 700 shares to Doris in December 1923 and the remaining 1,800 on or about January 23, 1924.<sup>107</sup> The Stipulation expressly states that all 2,500 shares were to be held *by Doris* “for her benefit and protection in the event that said Kresge should die prior to the contemplated marriage.”<sup>108</sup>

When Doris received the 2,500 shares in two installments, she became the owner of those shares as a matter of law.<sup>109</sup> Under common law principles, ownership of property is transferred when there is a gift — “a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*).”<sup>110</sup> Once an inter vivos gift has been made, it is irrevocable.<sup>111</sup> All three requirements for a valid inter

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105. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

106. *Id.*

107. Stipulation of Facts, *supra* note 2, ¶ 2.

108. *Id.*

109. The shares were held in street name. *See infra* text accompanying notes 119–124. In the absence of information on how the account was titled, this Article assumes that Doris was the sole beneficial owner. This assumption is consistent with both the Second Circuit opinion and the Stipulation of Facts, which state that the shares were delivered to Doris. (They do not, for example, reflect or imply the creation of a joint account with right of survivorship or an account in S.S.'s name payable to Doris upon his death. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 32.4 cmts. d & e, reporter's notes 3 & 4 (1992)). In the litigation between Doris and S.S., S.S.'s attorney asserted in his opening statement that the parties had discussed placing the shares in trust, “but this [idea] was abandoned.” *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

110. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 5.02 (2d ed. 2007).

111. *Id.*

vivos gift — intent, delivery, and acceptance<sup>112</sup> — were present at the instant the shares were transferred to Doris.<sup>113</sup>

### 1. Intent

Both versions of the facts support a conclusion that S.S. intended to make an immediate gift when he transferred the shares. There is no evidence to the contrary; there is no reason to suspect, for example, that S.S. intended the gift to take effect only when he and Doris became husband and wife. Indeed, the Stipulation of Facts directly contradicts such a notion in stating that Doris would have kept the shares had S.S. died prior to the wedding.<sup>114</sup> Likewise, there was no mention in either litigation of conditions on the gift, such as an obligation to return the shares if the couple did not marry.<sup>115</sup> Nonetheless, without any factual basis, Doris's brief in the Second Circuit asserted that possession of the shares had been turned over to her conditionally prior to execution of the antenuptial agreement.<sup>116</sup>

### 2. Delivery

The Second Circuit opinion in *Farid* explicitly states that S.S. delivered the shares to Doris.

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112. *Id.* § 5.03[A].

113. *Cf.* Estate of Copley v. Commissioner, 15 T.C. 17 (1950), *aff'd*, 194 F.2d 364 (7th Cir. 1952). In *Copley*, a couple entered into an antenuptial agreement and married in 1931, prior to enactment of the federal gift statute. The husband agreed to transfer \$1,000,000 to his wife immediately after their marriage but made the actual transfers in 1936 and 1944. The court held that for gift tax purposes, the gifts occurred when the agreement became binding in 1931. One commentator has indicated that the principle applied in *Copley* does not apply to transfers that are made prior to the marriage. LEON GABINET, TAX ASPECTS OF MARITAL DISSOLUTION § 14.4 (2d ed. 2011). The analysis in this Article is consistent with Gabinet's position; an antenuptial agreement is irrelevant with respect to a gift that was completed prior to the marriage.

114. Stipulation of Facts, *supra* note 2, ¶ 2.

115. Conditional gift issues often arise in the context of engagement rings, where courts are called upon to decide whether a ring must be returned when an engagement is broken. The legal issue is whether the ring was given subject to an implied condition subsequent (i.e., the marriage). *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 6.2 cmt. m (2003); SPRANKLING, UNDERSTANDING PROPERTY LAW, *supra* note 110, § 5.03[B]. As stated above, the Stipulation of Facts in *Farid I* reflects that there were no conditions on the transfer of shares. (Doris received an engagement ring from S.S. reportedly valued at \$16,000. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5).

116. Brief for Appellant at 14, *Farid II*, 160 F.2d 812 (2d. Cir. 1947) (No. 154-20400).

In December 1923 when the petitioner, then unmarried, and S. S. Kresge, then married, were contemplating their future marriage, *he delivered to her* 700 shares of the common stock of the S. S. Kresge Company which then had a fair market value of \$290 per share. The shares were all in street form and were to be held by the petitioner “for her benefit and protection in the event that the said Kresge should die prior to the contemplated marriage between the petitioner and said Kresge.” The latter was divorced from his wife on January 9, 1924, and on or about January 23, 1924 *he delivered to the petitioner* 1800 additional common shares of S. S. Kresge Company which were also in street form and were to be held by the petitioner for the same purposes as were the first 700 shares he had delivered to her.<sup>117</sup>

This wording is consistent with the Stipulation of Facts.<sup>118</sup>

The shares were held in “street name,” a practice under which shares are recorded in corporate records as owned by a brokerage firm on behalf of an unnamed customer.<sup>119</sup> Under this common arrangement, the brokerage, not the beneficial owner, is the holder of record.<sup>120</sup> The individual investor retains all rights of ownership (e.g., how the stock is voted and whether to sell).<sup>121</sup> Thus, the fact that S.S. transferred Doris’s stock to an account in street name before the marriage and had the corporation register the stock in her name after the marriage<sup>122</sup> has no bearing on the date of delivery or transfer so long as the brokerage account was hers.<sup>123</sup> The opinion and

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117. *Farid II*, 160 F.2d at 813 (emphasis added). The opinion goes on to state that Doris signed the antenuptial agreement at a time when she “still retained the possession of the stock so delivered to her.” *Id.*

118. *Farid II*, 160 F.2d at 813. Press coverage of Doris’s attorney’s opening statement when she sued S.S. reflects the same language. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

119. See LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, FUNDAMENTALS OF SECURITIES REGULATION 799 (6th ed. 2011).

120. ROBERT W. HAMILTON, MONEY MANAGEMENT FOR LAWYERS AND CLIENTS § 14.6 (1999). A beneficial owner who is not a record owner is not recognized by the corporation as a shareholder for dividend, voting or other purposes. The beneficial owner has legally enforceable rights, however, to compel the record owner to vote the shares as she demands and to turn over any dividends received. *Id.*

121. ALAN R. PALMITER, CORPORATIONS § 19.2 (5th ed. 2006).

122. Stipulation of Facts, *supra* note 2, ¶ 4 (S.S. caused the shares to be transferred to Doris on the Company’s books on or about May 6, 1924).

123. See *Morrison v. Commissioner*, 53 T.C. Memo (CCH) 251, T.C. Memo (P-H) ¶ 87,112 (1987) (for purposes of the charitable contribution deduction,

Stipulation of Facts support a conclusion that it was. Indeed, Doris's attorney in the prior litigation asserted that S.S. had insisted on the delay in recording the premarital transfer on the corporate books because "as a man with a wife and five children, he wanted it kept secret."<sup>124</sup>

### 3. *Acceptance*

There is nothing to indicate that Doris did not accept the shares. Therefore, it is reasonable to conclude that she did.<sup>125</sup> In turn, if the preceding analysis is correct, the gift was complete well before Doris signed the antenuptial agreement, and she owned those shares at the time she signed the agreement.<sup>126</sup> The shares, then, could not have constituted legal consideration for her agreement to cede her marital and property rights because she did not actually receive anything in return for giving up those rights; the shares were already hers. The gift was received prior to the marriage without condition and, therefore, Doris should have taken a carryover basis.<sup>127</sup>

#### B. *Gifts to Mistresses are Excluded from Income*

Doris's lawyers could have argued that she was entitled to a cost (market value) basis in the shares because they were received in exchange

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a gift of stock held in street name is complete on the date on which the brokerage transfers shares to the donee's account).

124. *Justice Paves Way for Kresge Reunion*, *supra* note 60, at 5.

125. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 6.1 cmt. i (2003) (acceptance by donee is presumed, subject to donee's right to refuse or disclaim).

126. This approach is consistent with the Tax Court's analysis of similar facts in *Marshman v. Commissioner*, 31 T.C. 269 (1958), *rev'd on other grounds*, *Commissioner v. Marshman*, 279 F.2d 27 (6th Cir. 1960). In *Marshman*, the taxpayer had divorced in 1934. In 1937, her ex-husband asked her to remarry him, and, as a condition to remarriage, the taxpayer asked him to provide "some financial security." *Marshman*, 279 F.2d at 28. Her ex-husband then transferred shares of publicly traded stock to the taxpayer, and the next day, the couple remarried. However, the second marriage met the same fate as the first. The taxpayer then sold some of her shares after the divorce, raising the question of her basis in the stock for purposes of calculating the gain realized on the sale. The Tax Court determined that the shares had been acquired by gift prior to the marriage, resulting in a carryover basis.

127. The facts alleged in Doris's Tax Court petition implied that she would argue that the shares were bargained for consideration in exchange for her interest in the brokerage account that S.S. had previously established for her. Amended Petition, *supra* note 84, ¶ 5(D). This argument, however, was not pursued.

for services.<sup>128</sup> Such an argument, of course, could have been embarrassing to Doris.<sup>129</sup> In the absence of authority,<sup>130</sup> however, Doris's attorney might well have prevailed had he urged this line of reasoning. Subsequent jurisprudence, nonetheless, has not been sympathetic to this argument. Although there were no cases on point at the time *Farid* was litigated, courts that have considered the issue since then have invariably held that transfers of cash or property from married men to their mistresses are excludable gifts where there is no evidence that the recipient is or has been engaged in the business of prostitution.

Basic principles for determining whether a transfer or payment is a gift are set forth in *Commissioner v. Duberstein*.<sup>131</sup> Although the *Duberstein* articulation is considered the governing rule or standard,<sup>132</sup> the Supreme Court explicitly declined to "promulgate a new 'test' in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise."<sup>133</sup> The Court preferred instead that fact finders apply their own "experience[s] with the mainsprings of human conduct to the totality of the facts of each case."<sup>134</sup> Nonetheless, students of the tax law invariably define a gift by reference to *Duberstein*, as a transfer

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128. Property that is received as compensation for services takes a basis equal to its fair market value because that is the amount includable in the taxpayer's income for the year of receipt. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 41.2.5 (2d/3d ed. 1998). If a taxpayer had received compensation in cash in an amount equal to the fair market value of the property actually received, and had used that cash to purchase property at a fair market value price, the cost basis in that property would be its fair market value. A different basis cannot be justified merely because the property is acquired directly. *Id.*

129. Doris did not report the receipt of shares in income when she received them. This fact, however, is equally damning under her argument in *Farid I*, which the Court of Appeals subsequently adopted. In any event, the statute of limitations had run. *See* I.R.C. § 6501.

130. The first case to address the tax consequences of payments to a mistress who was not a prostitute was decided in 1966, twenty years after the Tax Court issued its decision in *Farid I* and nineteen years after the Second Circuit rendered its decision. *Starks v. Commissioner*, 25 T.C. Memo (CCH) 676, T.C. Memo (P-H) ¶ 66,134 (1966) (payments were gifts).

131. 363 U.S. 278 (1960).

132. *See, e.g., United States v. McKee*, 506 F.3d 225, 247 (3d Cir. 2007); *Lane v. United States*, 286 F.3d 723, 728-29 (4th Cir. 2002); *Peracchi v. Commissioner*, 143 F.3d 487, 496 (9th Cir. 1998); *Goodwin v. United States*, 67 F.3d 149, 151-52 (8th Cir. 1995) ("applying *Duberstein's* objective, no-talisman approach to evaluating transferor intent"); *United States v. Harris*, 942 F.2d 1125, 128-29, 1131 (7th Cir 1991).

133. *Duberstein*, 363 U.S. at 284-85.

134. *Id.* at 289.



motivated by “a detached and disinterested generosity.”<sup>135</sup> The “most critical consideration”<sup>136</sup> is the transferor’s intention; “[w]hat controls is the intention with which payment, however voluntary, has been made.”<sup>137</sup> Thus, a transfer that is made “out of affection, respect, admiration, charity, or like impulses”<sup>138</sup> is a gift, while a transfer that proceeds “from ‘the constraining force of any moral or legal duty,’<sup>139</sup> or from ‘the incentive of anticipated benefit’ of an economic nature,”<sup>140</sup> or is made “in return for services rendered,”<sup>141</sup> is not. Applying this test to determine whether Doris’s receipt of the shares, at a time when she was S.S.’s paramour, was an excludable gift or taxable income would necessitate determining whether S.S. was motivated by altruism or by an expectation of reciprocity.<sup>142</sup>

Parsing a man’s emotions is not easy and so, not surprisingly, courts have had difficulty characterizing transfers of money to mistresses in the context of long-term relationships. As one judge stated, “The motivations of the parties in such cases will always be mixed. The relationship would not be long term were it not for some respect or affection. Yet, it may be equally clear that the relationship would not continue were it not for financial support or payments.”<sup>143</sup> Deciding whether a transfer is purely out of affection or, alternatively, is motivated by hopes of continuing in an adulterous relationship, presents a thorny challenge of divining complex motivations.<sup>144</sup>

In a series of cases (the “mistress cases”), the Tax Court has been called upon to decide whether funds paid or property transferred by men to women in the context of nonmarital relationships were excludable gifts or

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135. *Id.* at 285. (quoting *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956)).

136. *Id.*

137. *Id.* (quoting *Bogardus v. Commissioner*, 302 U.S. 34, 45 (1937) (Brandeis, J., dissenting)).

138. *Duberstein*, 363 U.S. at 285 (quoting *Robertson v. United States*, 343 U.S. 711, 715 (1952)).

139. *Id.*

140. *Id.* (quoting *Bogardus*, 302 U.S. at 41).

141. *Id.* (quoting *Robertson*, 343 U.S. at 714).

142. *See* *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991) (reversing criminal convictions of two women who received money from a wealthy widower because the government failed to present sufficient evidence of his intent regarding the money he gave them).

143. *Id.* at 1132.

144. Invariably, “efforts to determine a single dominant intent underlying long-term, informal relationships contain problems of information, valuation, and consistency that expose courts’ inability to grapple with the intimate details of relationships undefined by law.” Debra Lefler, “*Keeping Books on Romance: The Gift Exclusion in Nonmarital Relationships*,” 105 NW. U. L. REV. 1739, 1742 (2011).

includable in the recipient's gross income.<sup>145</sup> In each opinion, the court examined the facts presented in light of *Duberstein* in an effort to discern the swain's intent. Although each decision was based on its own particular facts, as envisioned in *Duberstein*, the breakdown appears to be that men who made "gifts" to women in the business (or even previously in the business) of selling companionship were held not to have intended gifts<sup>146</sup> while men who made gifts to women who were not in business were held to have made nontaxable gifts.<sup>147</sup> Thus, because there is no evidence that Doris ever placed her sexual services on the market, it is likely that the shares given by S.S. to Doris prior to their marriage would have been treated as excludable gifts, conferring upon Doris a carryover basis.

## VI. LESSONS LEARNED

### A. Tax Considerations

The black letter law emerging from *Farid* may be unassailable — where property is acquired in exchange for other property, the basis in the newly acquired property is its fair market value on the date received. Indeed, this is the holding in the seminal case of *Philadelphia Park Amusement Co.*

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145. *Toms v. Commissioner*, 63 T.C. Memo (CCH) 2234, T.C. Memo (RIA) ¶ 1992-125 (1992); *Austin v. Commissioner*, 49 T.C. Memo (CCH) 520, T.C. Memo (P-H) ¶ 85,022 (1985); *Reis v. Commissioner*, 33 T.C. Memo (CCH) 1333, T.C. Memo (P-H) ¶ 74,287 (1974); *Libby v. Commissioner*, 28 T.C. Memo (CCH) 915, T.C. Memo (P-H) ¶ 69,184 (1969); *Starks v. Commissioner*, 25 T.C. Memo (CCH) 676, T.C. Memo (P-H) ¶ 66,134 (1966); *Brizendine v. Commissioner*, 16 T.C. Memo (CCH) 149, T.C. Memo (P-H) ¶ 57,032 (1957); *Blevins v. Commissioner*, 14 T.C. Memo (CCH) 840, T.C. Memo (P-H) ¶ 55,211 (1955). See Lefler, *supra* note 144, at 1741 (discussing the "mistress cases").

146. *Toms*, 63 T.C. Memo (CCH) 2234, T.C. Memo (RIA) ¶ 1992-125; *Brizendine*, 16 T.C. Memo (CCH) 149, T.C. Memo (P-H) ¶ 57,032; *Blevins*, 14 T.C. Memo (CCH) 840, T.C. Memo (P-H) ¶ 55,211; see also Lefler, *supra* note 144 at 1754-57 (courts have "used prostitution as a proxy for intent").

147. *Austin*, 49 T.C. Memo (CCH) 520, T.C. Memo (P-H) ¶ 85,022; *Reis*, 33 T.C. Memo (CCH) 1333, T.C. Memo (P-H) ¶ 74,287; *Libby*, 28 T.C. Memo (CCH) 915, T.C. Memo (P-H) ¶ 69,184; *Starks*, 25 T.C. Memo (CCH) 676, T.C. Memo (P-H) ¶ 66,134. Similarly, the Tax Court has held that payments or gifts between unmarried cohabitating couples are gifts. *Estate of Cavett v. Commissioner*, 79 T.C. Memo (CCH) 1662, T.C. Memo (RIA) 2000-091 (2000); *Pascarelli v. Commissioner*, 55 T.C. 1082 (1971), *aff'd*, 485 F.2d 681 (3d Cir. 1973). "If these cases make a rule of law, it is that a person is entitled to treat cash and property received from a lover as gifts, as long as the relationship consists of something more than specific payments for specific sessions of sex." *United States v. Harris*, 942 F.2d 1125, 1133-34 (7th Cir. 1991).

v. *United States*.<sup>148</sup> The difference between the courts' analyses in the two cases, however, is that the decision in *Philadelphia Park* is premised on the property exchange having been taxable. The basis in the newly acquired property must be its fair market value in order to ensure that recognized gain is not recognized again or that recognized loss is not taken into account twice.<sup>149</sup> The Second Circuit opinion in *Farid*, however, nowhere recognizes the relationship between taxability on the initial exchange and basis in the acquired property. Thus, Doris achieved the best of all proverbial worlds — no taxable gain on the exchange in which she acquired the shares, and a basis step-up.<sup>150</sup>

Surprisingly, there appear to be no cases in which the government has argued that a person in Doris's position realizes gain on the release of marital rights in exchange for property, prior to marriage. The issue has come up, however, in the analogous context of marital breakups, where a divorcing spouse cedes her marital rights in a bargained for exchange for property. In the divorce context, the IRS's administrative position for many years was that (1) there was no gain or loss to a spouse who released marital rights in exchange for property and (2) her basis nonetheless was the fair market value of the property on the date of it was received.<sup>151</sup> One would

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148. 126 F. Supp. 184 (Ct. Cl. 1954).

149. *Id.* at 188–89 (“To maintain harmony with the fundamental purpose of these sections, it is necessary to consider the fair market value of the property received as the cost basis to the taxpayer. The failure to do so would result in allowing the taxpayer a stepped-up basis, without paying a tax therefor, if the fair market value of the property received is less than the fair market value of the property given, and the taxpayer would be subjected to a double tax if the fair market value of the property received is more than the fair market value of the property given. By holding that the fair market value of the property received in a taxable exchange is the cost basis, the above discrepancy is avoided and the basis of the property received will equal the adjusted basis of the property given plus any gain recognized, or that should have been recognized, or minus any loss recognized, or that should have been recognized.”)

150. Following the logic in *United States v. Davis*, 370 U.S. 65 (1962), S.S. should have been taxed on the transfer of shares to Doris. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 30.04[4] (3d ed. 2002); DAVID WESTFALL ET AL., *ESTATE PLANNING LAW AND TAXATION* ¶ 11.07[1] (2003). Since 1984, prudent planning would be to transfer shares after the couple is married in order to take advantage of I.R.C. § 1041.

151. Rev. Rul. 67-221, 1967-2 C.B. 63; *Davis*, 370 U.S. at 73 n.7 (“Under the present administrative practice, the release of marital rights in exchange for property or other consideration is not considered a taxable event as to the wife.”). Revenue Ruling 67-221, which essentially confirms the statement in *Davis*, does not indicate whether there is no gain or loss realized, or recognized.

hope that the IRS would have taken the same position with respect to premarital transfers but there is no authority.<sup>152</sup>

Since 1984, attorneys advising clients in Doris's position can rely on section 1041, which provides that gain or loss is not recognized on property transfers between spouses and that property received from a spouse is treated as a gift, even if there is consideration, with the result that the transferee takes a carryover basis.<sup>153</sup> Although a fair market value basis usually is preferable to a carryover, the certainty of clear statutory authority is comforting nonetheless. Because section 1041 applies only to transfers between spouses, however, modern antenuptial agreements typically delay property transfers until after a couple is married.<sup>154</sup>

#### B. *Litigation Considerations*

Outside the context of Section 1041 and without the certainty of precedential principles, Doris achieved a stunning result only because her attorneys framed her story as an exchange of valuable property rights for shares. Had the tale been cast instead as perhaps it should have been, with Doris receiving gifts of shares from a paramour at a time he was legally estopped from marrying her on account of a prior matrimonial entanglement, both courts likely would have regarded the transfer of shares as a gift notwithstanding the couple's subsequent marriage. Doris's counsel's strategy was a long shot, in light of *Wemyss*<sup>155</sup> and *Merill*,<sup>156</sup> but brilliant in the end. Students of *Farid* will never know, however, whether counsel's actions were intentional or inadvertent.

The importance of the Stipulation of Facts in *Farid* cannot be overstated, certainly from a procedural standpoint (as the Tax Court did not participate in the fact "finding" process) but, perhaps more importantly, from the perspective of influencing the outcome of the case. Doris could have been portrayed in a less sympathetic manner, as an aspiring actress who seduced an older, married gentleman of prominence, and who was able to induce her lover to transfer substantial sums of money and stock to her. Such a depiction would have been entirely consistent with the actual facts as they were reported in the newspapers of the day, and would probably have resulted in a less favorable judicial outcome. The Stipulation of Facts, however, downplays the tawdriness of the couple's relationship while, at the same time, emphasizes the magnitude of the inheritance rights Doris

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152. *Accord* BITTKER, MCMAHON & ZELENAK, *supra* note 150 at ¶ 5.02[6].

153. I.R.C. § 1041(a), (b).

154. BITTKER, MCMAHON & ZELENAK, *supra* note 150 at ¶ 5.02[6].

155. *Commissioner v. Wemyss*, 324 U.S. 303 (1945).

156. *Merrill v. Fahs*, 324 U.S. 308 (1945).

relinquished in exchange for a mere 2500 shares. Portrayed in this light, the story portends a sympathetic ending.

Trial lawyers know the importance of facts in winning a case. To succeed with a jury, a trial lawyer must weave a story from the evidence in a manner that evokes empathy for her client's position.<sup>157</sup> Similarly, the way that facts are presented in an appellate brief's statement of facts can persuade indirectly, through an organization that emphasizes favorable facts and through choices of wording that affect the reader without stating anything that opposing counsel could reasonably claim is inaccurate.<sup>158</sup> Whether the facts as stipulated in *Farid* resulted from a strategic decision by Doris's lawyer, or not, they portrayed Doris in the most favorable light possible given that (1) she agreed in writing to relinquish her marital property rights in exchange for 2500 shares and (2) she received 2500 shares.

Viewed in this light, *Farid* provides a perfect example for the legal storytelling movement, which emphasizes the use of story and narrative techniques in law practice and teaching.<sup>159</sup> Legal storytelling scholarship teaches that "[t]he heart of persuasive legal advocacy is the facts of the client's story."<sup>160</sup> As described by one commentator:

The basic concept of storytelling in legal writing is to turn the client/plaintiff/defendant into the main character of a story with a compelling plotline . . . . The fundamental principle espoused by most of these [legal storytelling] scholars is that there is a power in stories that lawyers should harness in their advocacy. Those promoting storytelling in the law contend that well-constructed stories have as much power to persuade as well-developed and well-reasoned legal arguments that rely on logic and precedent.<sup>161</sup>

While it is impossible to know how the appellate judges who decided for the taxpayer in *Farid* regarded Doris, it is likely that their opinion of her was

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157. Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127, 131 (2008).

158. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING § 29.1 (6th ed. 2009).

159. Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 LEGAL WRITING 163, 163–64 (2010).

160. Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRS. 75, 77 (2009); cf. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951) ("It may sound paradoxical, but most contentions of law are won or lost on the facts.").

161. Kaiser, *supra* note 159 at 165–66.

more favorable than it would have been had they been presented with the real facts. At best, the Stipulation of Facts might have aroused their sympathy and, at worst, it might have left them agnostic; nothing in the opinion implies a negative impression.

C. *Ethical Considerations*

The importance of facts and how they are presented in litigation might tempt attorneys to ignore facts that are unhelpful or to shade the truth in making their clients' cases. The ABA Model Rule of Professional Conduct 3.3 addresses such enticements by mandating candor in all aspects of judicial proceedings.<sup>162</sup> The Model Rules, of course, were adopted many years after *Farid* was litigated, but modern lawyers engaged in the process of stipulating facts must be mindful of them.

Model Rule 3.3 provides in relevant part:

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

. . . .

(c) The duties stated in paragraph[] (a) . . . continue to the conclusion of the proceeding.<sup>163</sup>

This rule applies only to conduct in proceedings before a "tribunal," defined to include, *inter alia*, "a court,"<sup>164</sup> and envisioning, generally, a "body act[ing] in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular

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162. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012). *See also* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2012). ABA Model Rule 4.1 prohibits untruthfulness to others, generally. The major differences between Model Rule 3.3 and Model Rule 4.1 are that Model Rule 3.3 (1) applies to all statements regardless of materiality and (2) can require a lawyer to disclose information otherwise protected by Model Rule 1.6 (Confidentiality of Information).

163. MODEL RULES OF PROF'L CONDUCT R. 3.3.

164. MODEL RULES OF PROF'L CONDUCT R. 1(m).

matter.”<sup>165</sup> Certainly the Tax Court is a tribunal for purposes of this rule.<sup>166</sup> The Internal Revenue Service, however, is not.<sup>167</sup> Thus, while other principles of ethics require honesty in dealings with the IRS,<sup>168</sup> Model Rule 3.3 does not. The distinction is meaningless in the context of Tax Court litigation, however, because a stipulation of facts agreed to by taxpayer’s counsel and the IRS will be submitted to the court, thereby implicating Model Rule 3.3.<sup>169</sup>

The proscriptions against making false statements and offering false evidence apply only to statements and evidence that a lawyer knows are false. Therefore, if a lawyer reasonably believes that a client’s story is truthful, she does not violate Model Rule 3.3 in recounting that story to the court.<sup>170</sup> (This, of course, raises questions regarding a lawyer’s duty to inquire and, perhaps, conscious ignorance.<sup>171</sup>) It follows that Model Rule 3.3 precludes counsel from agreeing to stipulate to facts, which they know are untrue.

In hindsight, it is obvious that Doris’s counsel gained a great advantage from the manner in which the Stipulation of Facts was drafted,

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165. *Id.*

166. Indeed, practitioners appearing before the Tax Court are required to comply with the ABA Model Rules. TAX CT. R. 201(a) (2010).

167. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 314 (1965). The Opinion reasons as follows:

[The IRS] has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute. While its procedures provide for ‘fresh looks’ through departmental reviews and informal and formal conferences procedures, few will contend that the service provides any truly dispassionate and unbiased consideration to the taxpayer. Although willing to listen to taxpayers and their representatives and obviously intending to be fair, the service is not designed and does not purport to be unprejudiced and unbiased in the judicial sense.

168. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 4.1.

169. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 1 (rule applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, for example a deposition).

170. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 3 (“An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.”).

171. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c (2000).

both because the story it told did not reflect the true facts in material respects and because it painted a picture of Doris that was most sympathetic. This Article has suggested that Doris's counsel might have been unaware of the factual discrepancies but also proposed that he might have agreed to the stipulation purely for strategic reasons. Counsel for the government might have agreed to the stipulations for the same reasons. Indeed, the very nature of the Tax Court's stipulation procedure, mandatory as it is and without scrupulous involvement or oversight by the court, invites strategic but dishonest participation. It is clear, however, that even if both sides are happy with the wording in any or all respects, counsel violate their duty of candor under Model Rule 3.3 by submitting a stipulation of facts, which they know is false. Thus, strategic stipulations must be avoided. Perhaps this is why the Internal Revenue Manual prohibits IRS attorneys from agreeing to stipulations of fact that are not known to be true, even if they believe that the particular facts are irrelevant.<sup>172</sup>

## VII. CONCLUSION

At the outset, the purpose of the research project culminating in this Article was merely to uncover the secrets of Princess Doris Farid-es-Sultaneh. In the process, however, it became apparent that something was amiss. The story of Doris's courtship and marriage, in particular how she came to acquire shares that she later sold, was inaccurately reflected in the evidence on which her tax case was litigated and decided and, therefore, also in the appellate court opinion that has been parsed and memorized by generations of tax students. Whether the differences between the story told here and that recounted in the Stipulation of Facts in the case were intentionally devised, or not, probably will never be known. These differences significantly affected the outcome of the case, and raise thought-provoking and important questions about the role of fact development and fact finding in the judicial process. Lawyers and students alike should be schooled in the role and art of storytelling, but also cautioned against lying in the process. Doris's tale provides a rich illustration of the power of a story well told.<sup>173</sup> Had the courts known the facts as they really happened, a victory for the government would have been the likely result.

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172. I.R.M. 35.4.7.4.

173. "The mastery of effective story telling is not what you say but how you say it. How you tell a story effects [*sic*] how the universe preserves it." KERRY PARKER FILMS, <http://kerryparkerfilms.com/> (last visited Oct. 21, 2012).



### EPILOGUE: WHAT HAPPENED TO DORIS AND S.S.?

For those of us who have studied *Farid*, the desire to know what happened to Doris, and perhaps to S.S., is palpable.<sup>174</sup> Here follows a brief chronicle of the remaining years of the couple's brief marriage and their divorce, and selected stories from their fascinating lives.

#### A. *The Remainder of the Marriage*

Despite reports that the couple had reconciled after settling Doris's suit seeking an additional 2,500 shares, the marriage remained tumultuous. Less than three months after the legal proceedings had ended, Doris sailed to Europe alone.<sup>175</sup> Six weeks later, with Doris abroad, S.S. sued for divorce, claiming that the couple had separated and never reconciled.<sup>176</sup> Doris returned from Europe, vowing to fight S.S.'s "unwarranted action."<sup>177</sup>

S.S. initiated the divorce action in Detroit.<sup>178</sup> The likely explanation for his decision to file in Michigan rather than in New York, where the couple lived and had married, is that grounds for divorce in Michigan were broader than in New York, which permitted divorce solely on the ground of adultery.<sup>179</sup> The suit charged Doris with abandonment.<sup>180</sup> It is also possible that S.S. believed that a court in Detroit would be more sympathetic to him than a court in New York. The Company was headquartered in Detroit and

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174. E.g., Reuven S. Avi-Yonah, *Tax Stories and Tax Histories: Is There a Role for History in Shaping Tax Law?*, 101 MICH. L. REV. 2227, 2230 (2003) (asserting that "the story of Walter [*sic*] Kresge's prenuptial agreement with Farides-Sultaneh would make for more interesting reading than the humdrum divorce in [*United States v.*] Davis, [370 U.S. 65 (1962)]," which was discussed in a book reviewed in the cited article; *Davis* is discussed *supra* at notes 150–151 and accompanying text). Betraying a lack of information on "the real story," Prof. Avi-Yonah describes Doris as Persian belly dancer. *Id.* at 2230 n. 22. Doris, of course, was born and raised in Pittsburgh. See *supra* notes 29–32 and accompanying text.

175. *Kresge's Wife Sails; Divorce Talk Denied*, N.Y. TIMES, June 1, 1926, at 17.

176. *Kresge Asks Divorce from Second Wife*, CHI. TRIB., July 16, 1926, at 1.

177. *Mrs. Kresge Returns to Fight Divorce Suit*, N.Y. TIMES, Aug. 21, 1926, at 5 (quoting Doris).

178. *Id.*

179. J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 559 (2007). New York became the last state to adopt no fault divorce in 2010. N.Y. DOM. REL. LAW § 170(7) (McKinney 2010); TIMOTHY TIPPINS, NEW YORK MATRIMONIAL LAW AND PRACTICE § 14:1.10 (2011).

180. *Can't Halt Kresge Suit*, N.Y. TIMES, Oct. 12, 1926, at 46.

S.S. presumably had professional and personal relationships there. New York, on the other hand, was home only to his extramarital dalliances.

Rather than responding in Detroit, Doris persuaded a New York court to enjoin S.S. from prosecuting the Michigan action because he was a resident of New York. In the New York court's view, the court in Detroit lacked jurisdiction over the matter.<sup>181</sup> The judge presiding in Michigan, however, did not consider himself bound by the New York injunction and permitted the action to continue, but noted that S.S. himself was subject to the injunction and, therefore, could be held in contempt by the New York court should he proceed.<sup>182</sup> S.S. withdrew his action and Doris withdrew hers.<sup>183</sup>

Six months later, in May 1927, S.S. tried again. This time, he specifically claimed to have established residence in Michigan.<sup>184</sup> Doris did not respond initially,<sup>185</sup> choosing instead to commence divorce proceedings in New York.<sup>186</sup> Although Doris did not seek alimony, she asked the court to compel S.S. to pay her attorneys' fees, arguing that her assets and income should not be impaired by the proceeding, in light of S.S.'s philandering.<sup>187</sup> Evidence was introduced concerning a "raid," in April 1927, of a Manhattan apartment maintained by S.S. under the name Mr. Jones.<sup>188</sup> Doris had retained the services of a detective agency,<sup>189</sup> which had followed S.S. and a

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181. *Kresge Enjoined in Divorce Action*, N.Y. TIMES, Oct. 10, 1926, at 18.

182. *Can't Halt Kresge Suit*, *supra* note 180, at 46.

183. *Kresge Drops Divorce*, N.Y. TIMES, Nov. 5, 1926, at 3; *Kresges Drop Legal Battles; No Explanation*, CHI. TRIB., Nov. 5, 1926, at 14. The attorney who represented Doris in defending against the Michigan divorce, as well as in the earlier litigation over the entitlement to shares, ultimately sued her to collect his fees. *Asks \$51,000 as Fee from Mrs. Kresge*, N.Y. TIMES, Sept. 15, 1927, at 33.

184. *Kresge Sues Wife Again for Divorce*, N.Y. TIMES, May 8, 1927, at 27.

185. *Kresge's Wife Fails to Reply to Divorce Suit*, CHI. TRIB., Aug. 7, 1927, at 20.

186. *Mrs. Kresge Asks Divorce*, N.Y. TIMES, Oct. 25, 1927, at 27.

187. *Wife's Attorney Charges Kresge is Philanderer*, CHI. TRIB., Dec. 17, 1927, at 3.

188. *Asserts S.S. Kresge was Caught in a Raid*, N.Y. TIMES, Dec. 17, 1927, at 10.

189. Doris apparently neglected to pay her private detective's bill. Valerian O'Farrell, head of the detective agency, travelled to France, where Doris sought refuge after the divorce, to collect the \$32,066 balance due on his \$46,016 fee; he was unsuccessful. *Kresge's Ex-Wife Sued by Detective*, N.Y. TIMES, Jan. 25, 1929, at 3; *Ex-Mrs. Kresge Divorce Snooper Asks \$32,000 Fee*, CHI. TRIB., Mar. 23, 1929, at 4. He then filed suit against Doris in New York. *Kresge's Ex-Wife Sued by Detective*, *supra*, at 3.

young woman, Gladys Ardelle Fish, to the apartment,<sup>190</sup> where Ms. Fish was found under the bed,<sup>191</sup> “scantily clad.”<sup>192</sup> S.S.’s attorney argued that “he couldn’t see how the state of dress or undress of a co-respondent in a divorce action can influence the granting of counsel fees.”<sup>193</sup> A housekeeper testified that Ms. Fish “was a frequent visitor, came at all hours and had her own key . . . . The housekeeper said she must have remained all night occasionally because she saw the young woman there in the morning. She said that a much younger woman than Miss Fish was also a visitor.”<sup>194</sup> The divorce complaint alleged misconduct with various women, including a sixteen-year-old girl.<sup>195</sup> The court declined to order S.S. to pay Doris’s counsel fees.<sup>196</sup>

S.S. did not contest the divorce or personally appear in court.<sup>197</sup> Nonetheless, a jury trial lasting one hour was held. After fifteen minutes of

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190. *Wife’s Attorney Charges Kresge is Philanderer*, *supra* note 187, at 3. Ms. Fish was reported to be twenty-five years of age. (S.S. was sixty-one.) *Mrs. Kresge is Denied Counsel Fees in Divorce*, CHI. TRIB., Dec. 23, 1927, at 13.

191. *Wife’s Attorney Charges Kresge is Philanderer*, *supra* note 187, at 3. The detectives also testified that liquor was found in the apartment, “only a few feet from where the woman’s legs were sticking out from under the bed.” *Swear Kresge Had Liquor in His Love Nest*, CHI. TRIB., Dec. 18, 1927, at 1. S.S. was known as a supporter and benefactor of the Anti-Saloon League, an organization that advocated prohibition. *Id.* After the trial, leaders of the Anti-Saloon League debated whether to return a \$500,000 gift it had received from S.S. but decided to keep it. *Will Keep Kresge’s Gift*, N.Y. TIMES, Feb. 8, 1928, at 12; *Refuse Kresge’s \$500,000 Gift, Appeal to Drys*, CHI. TRIB., Feb. 8, 1928, at 16; *Bishop Declares S.S. Kresge Gift “Pure Business,”* CHI. TRIB., Feb. 9, 1928, at 3. Rev. James Thomas, an Episcopal minister, defended the decision on religious grounds: “In this case I should say, the thought to be applied is, that the Lord gave it, though the devil brought it, so the league should keep it.” *Kresge’s Gifts*, TIME, Feb. 20, 1928, at 37.

192. *Swear Kresge Had Liquor in His Love Nest*, *supra* note 191, at 1.

193. *Wife’s Attorney Charges Kresge is Philanderer*, *supra* note 187, at 3.

194. *Asserts S.S. Kresge was Caught in a Raid*, *supra* note 188, at 10. The housekeeper also testified that she had seen Ms. Fish in bed one Sunday morning, with S.S. being present in the room. Ms. Fish was introduced as S.S.’s secretary. *Kresge Held Guilty by Divorce Jury*, N.Y. TIMES, Feb. 7, 1928, at 23.

195. *Wife’s Attorney Charges Kresge is Philanderer*, *supra* note 187, at 3; *Kresge Held Guilty by Divorce Jury*, *supra* note 194, at 23; *Bishop Declares S.S. Kresge Gift “Pure Business,”* *supra* note 191, at 3 (seventeen-year-old girl). Ms. Fish’s parents asserted that their daughter and S.S. were “mere friends,” having met at church in New York. Their pastor described her as “one of the finest girls and best workers in the church — a sweet, innocent girl.” N.Y. TIMES, Dec. 18, 1927, at 30. The Chicago Daily Tribune described Ms. Fish as “the merchant millionaire’s light o’ love.” *Mrs. Kresge is Denied Counsel Fees in Divorce*, CHI. TRIB., Dec. 23, 1927, at 13.

196. *Mrs. Kresge is Denied Counsel Fees in Divorce*, *supra* note 195, at 13.

197. *Jury Trial Granted to Mrs. Kresge*, N.Y. TIMES, Jan. 10, 1928, at 55; *Kresge Held Guilty by Divorce Jury*, *supra* note 194, at 23.

deliberation, the jury returned a verdict of misconduct (with Ms. Fish)<sup>198</sup> and the court signed an interlocutory divorce decree, effective in 90 days.<sup>199</sup> No alimony was sought because there was an antenuptial agreement, and none was granted.<sup>200</sup> Doris issued the following statement:

The limitless power of money buys the means to influence public opinion. Therefore, it is best to bear injustice in silence until one can present truth proved by hard facts. Two people could separate with dignity and not desire to harm each other, so I was content to keep my status and to lead a quiet life without interfering with my husband's affairs or asking any favors whatsoever.

My present action was forced upon me in self-defense. For two years I have been persecuted and tortured by two unprincipled litigations brought in the State of Michigan by my husband in his endeavor to gain his freedom by most unscrupulous means. In order to protect my good name I had to spend all my income fighting these groundless litigations, but although I won in both instances it was certain that this persecution would continue, consuming my means and breaking my health.

The only salvation for me was to obtain my freedom by proving the faithlessness and hypocrisy of Mr. Kresge. This was a painful ordeal, but truth was on my side and that is why I won. I can no longer now be prey to double-dealing and treachery.

I always had a firm belief in the justice and protection of a higher power. In my case these have prevailed.<sup>201</sup>

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198. *Kresge Held Guilty by Divorce Jury*, *supra* note 194, at 23. The Chicago Tribune reported that the jury "convicted Kresge of seven charges of infidelity." *Refuse Kresge's \$500,000 Gift, Appeal to Drys*, CHI. TRIB., Feb. 8, 1928, at 16; *see also Interlocutory Decree is Asked by Mrs. Kresge*, CHI. TRIB., Feb. 16, 1928, at 4 ("guilty of infidelity on seven separate occasions").

199. *Divorce Granted Mrs. Kresge on Infidelity Plea*, CHI. TRIB., Feb. 19, 1928, at 7.

200. *Kresge Held Guilty by Divorce Jury*, *supra* note 194, at 23. Later press reports referred to a divorce settlement of \$10,000,000, *S.S. Kresge Marries for the Third Time*, N.Y. TIMES, Nov. 28, 1928, at 16; \$2,000,000, *\$100,000 Jewel Loss on Plane; Princess Victim*, CHI. TRIB., Mar. 29, 1943, at 15; and \$3,000,000, *Princess Charges \$99,500 Swindle*, N.Y. TIMES, May 1, 1947, at 26.

201. *Kresge Held Guilty By Divorce Jury*, *supra* note 194, at 23.

Even though Doris got a divorce order in New York, the Michigan divorce action filed by S.S. continued. Doris moved to examine her husband before the Michigan trial about her allegations that his legal residence was in New York.<sup>202</sup> The judge “refused to order the testimony taken, on the ground that the decree in the New York divorce case” made the Michigan action unnecessary.<sup>203</sup> Nonetheless, the papers filed by the parties in connection with Doris’s motion, which included S.S.’s initial pleadings, became available to curious reporters, who reported on the tawdry allegations.<sup>204</sup>

S.S. alleged acts of cruelty, primarily that Doris had attempted to extort \$10,000,000 from him in exchange for bearing his child.<sup>205</sup> If he refused, S.S. claimed, Doris had threatened “one of the biggest scandals you ever heard of.”<sup>206</sup> Doris reportedly responded to S.S.’s refusal to accept her offer by having “an operation” at a cost of \$1,000.<sup>207</sup> A statement later released by S.S. clarified that Doris was pregnant when she made the demand and that she terminated the pregnancy when S.S. refused to pay the demanded sum.<sup>208</sup> “This was against my wishes,” he said, “as it was my desire that there should be children born as a result of the marriage.”<sup>209</sup> The complaint also alleged that Doris had an “intimate and close relationship” with two men, both referred to as “Mr. W.,”<sup>210</sup> whom S.S. and several friends found inside Doris’s locked New York apartment.<sup>211</sup>

Doris denied all of the allegations in a statement that she distributed to reporters.<sup>212</sup> First, Doris “emphatically” denied that S.S. had accused her of infidelity; his charges, she said, were limited to “conduct unbecoming a wife, whatever he meant by that.”<sup>213</sup> As to her supposed demand for \$10,000,000 to bear his child, Doris stated, “Mr. Kresge never wanted any more children, as he already has five by his former wife, and the disgrace he

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202. *Mrs. Kresge Fights Husband’s Suit*, N.Y. TIMES, Apr. 18, 1928, at 27.

203. *Id.*

204. *Id.*

205. *Id.*; *Wife Wanted \$10,000,000 to Bear Him Child, Says Kresge*, CHI. TRIB., Apr. 18, 1928, at 3.

206. *Wife Wanted \$10,000,000 to Bear Him Child, Says Kresge*, *supra* note 205, at 3; *Mrs. Kresge Fights Husband’s Suit*, *supra* note 202, at 27.

207. *Wife Wanted \$10,000,000 to Bear Him Child*, *supra* note 205, at 3.

208. *Glad to Be Rid of Wife, Kresge Says*, CHI. TRIB., May 22, 1928, at 1.

209. *Wife Wanted \$10,000,000 to Bear Him Child, Says Kresge*, *supra* note 205, at 3.

210. *Id.*; *Mrs. Kresge Fights Husband’s Suit*, *supra* note 202, at 27.

211. *Wife Wanted \$10,000,000 to Bear Him Child*, *supra* note 205, at 3.

212. *Wife of Kresge Denies She Was Untrue to Him*, CHI. TRIB., Apr. 19, 1928, at 10; *Mrs. Kresge Denies Husband’s Charges*, N.Y. TIMES, Apr. 19, 1928, at 27.

213. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

has covered himself with proves that he shows no love, consideration or regard for them.”<sup>214</sup> Regarding the allegations concerning the other gentlemen, she explained that they were father and son. The older “Mr. W.” was a mutual friend of the couple’s, who had endeavored to effect a reconciliation between them.<sup>215</sup> At the time the older Mr. W. was discovered in Doris’s apartment, he was there upon S.S.’s request that he speak to Doris alone to try to convince her to change her mind about the divorce.<sup>216</sup> The friends referred to in S.S.’s pleadings were actually private detectives hired by S.S. to follow Doris and Mr. W.<sup>217</sup> Doris claimed one of them had provided her with a sworn statement that Mr. W. was seated in a single chair, smoking, when they entered the apartment.<sup>218</sup> The statement went on to say that “[t]here was no sign of anything irregular in the behavior, dress or condition of either ‘Mr. W.’ or Mrs. Kresge” and that “[w]e found nothing wrong there.”<sup>219</sup> According to Doris, the younger Mr. W. had merely escorted Doris home from time to time after visits with the older Mr. W. and his wife and children at their residence.<sup>220</sup>

On May 18, 1928, the statutory period for the New York court’s interlocutory decree expired without objection, and the Kresges’ divorce became final.<sup>221</sup> S.S. withdrew the Michigan action.<sup>222</sup> He issued a statement declaring that he was “glad to be rid of” Doris and denied all of the charges she had made during the divorce proceedings concerning other women.<sup>223</sup> Doris sailed to Europe on May 30.<sup>224</sup>

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214. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

215. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

216. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

217. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

218. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

219. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

220. *Wife of Kresge Denies She Was Untrue to Him*, *supra* note 212, at 10; *Mrs. Kresge Denies Husband’s Charges*, *supra* note 212, at 27.

221. *Kresge Divorce Now Final*, N.Y. TIMES, May 19, 1928, at 30.

222. *Kresge Hails Divorce*, N.Y. TIMES, May 22, 1928, at 7.

223. *Glad to Be Rid of Wife, Kresge Says*, *supra* note 208, at 3.

224. *Thaw Sails for a Rest*, N.Y. TIMES, May 31, 1928, at 19. Among the passengers travelling on the same voyage was Harry K. Thaw. *Id.* Years earlier, Thaw had murdered architect Stanford White in Madison Square Garden. See Douglas O. Linder, *Harry Thaw Trials (Stanford White Murder)*, FAMOUS TRIALS (2009), <http://law2.umkc.edu/faculty/projects/ftrials/thaw/Thawaccount.html> (last visited Oct. 21, 2012). The story of that jealous rivalry is the basis of the novel,

B. *Doris*

1. *Doris Becomes a Princess*

In 1933, Doris married a Persian prince whom she had met in Paris.<sup>225</sup> Press reports refer to the groom as Farid Khan Sadri<sup>226</sup> and as Prince Farid of Sadri-Azam.<sup>227</sup> His cousin was the deposed former Shah of Persia (now Iran).<sup>228</sup> During his cousin's reign, the prince held the title "Farid-Es-Sultaneh."<sup>229</sup> The couple divorced in 1936.<sup>230</sup> By paid advertisement following the divorce, the prince asserted that Doris had no legal right to use his name.<sup>231</sup> Nevertheless, Doris referred to herself as Princess Doris Farides-Sultaneh for the rest of her life<sup>232</sup> (which explains the title of her tax case).

2. *Doris Loses Her Wealth*

Doris's fortunes turned. In 1947, needing money to pay taxes on her New Jersey estate,<sup>233</sup> Doris consigned the 28-karat engagement ring that she

*Ragtime*, by E. L. Doctorow. Thomas L. Chadbourne, an attorney who founded the law firm now known as Chadbourne & Parke, was a fellow passenger, as well. *Thaw Sails for a Rest*, *supra*, at 19. See generally THOMAS L. CHADBOURNE, THE AUTOBIOGRAPHY OF THOMAS L. CHADBOURNE (Charles C. Goetsch & Margaret L. Shivers, eds. 1985).

225. *Report Mrs. Kresge Wed*, N.Y. TIMES, Feb. 4, 1933, at 10. Time Magazine described the prince as the "onetime chamberlain to Persia's late Ahmed Shah Kadjar." *Milestones*, TIME, Feb. 13, 1933. Ahmed Shah Kadjar was the Shah of Persia from 1909 until 1925. Michael P. Zirinsky, *Imperial Power and Dictatorship: Britain and the Rise of Reza Shah, 1921-1926*, 24 INT'L J. MIDDLE E. STUDIES 639 (1992). Ahmed was the last Shah of the Qajar dynasty; he was exiled to Europe in 1923 and deposed in 1925. Mansoureh Ettehadieh, *Qajar, Ahmad, Shah of Iran*, ENCYCLOPEDIA OF THE MODERN MIDDLE EAST (2004).

226. *Report Mrs. Kresge Wed*, *supra* note 225, at 10.

227. *Divorce Parts Prince and Ex-Mrs. Kresge*, N.Y. TIMES, July 1, 1936, at 8.

228. *The Princess*, THE GLEN ALPIN CONSERVANCY, <http://glenalpin.org/the-princess-period.html> (last visited Oct. 21, 2012).

229. *Divorce Parts Prince and Ex-Mrs. Kresge*, *supra* note 227 at 8.

230. *Id.*; *Milestones*, *supra* note 225.

231. *Divorce Parts Prince and Ex-Mrs. Kresge*, *supra* note 227 at 8; *Prince to Write Book on His Divorce from Mrs. S.S. Kresge*, CHI. TRIB., July 1, 1936, at 3.

232. See, e.g., *The Princess*, *supra* note 228 ("the telephone company listed her as the Princess, so that was how everyone in Harding knew her"); *Princess Farides-Sultaneh, 74, Ex-Wife of S.S. Kresge, Dead*, N.Y. TIMES, Aug. 13, 1963, at 31.

233. Doris purchased the sixteen-room, 18-acre Morristown estate in 1940. *The Princess*, *supra* note 228; *Princess to Auction \$75,000 Furnishings*, N.Y. TIMES, Sept. 8, 1949, at 36. Known as Glen Alpin, the estate was sold at a sheriff's sale in

received from S.S. to a Fifth Avenue (New York City) jeweler.<sup>234</sup> Constantino Vincent Riccardi, who turned out to be a convicted stock swindler (among other things),<sup>235</sup> convinced Doris that he could get a higher price for the ring. He also persuaded her to add six other jewelry pieces and proposed marriage, inducing her to ship furnishings from her New Jersey home to his home in Arizona.<sup>236</sup> Six truckloads of furniture, rugs, paintings, and other household goods travelled westward before Doris realized that she had been taken. Doris reported the thefts, which included \$99,500 worth of jewels, to law enforcement.<sup>237</sup> Riccardi was convicted and sentenced to ten years in prison.<sup>238</sup>

In 1949, Doris announced an auction of the furniture and furnishings of her estate.<sup>239</sup> Doris hoped for proceeds of \$75,000, but the auction brought in only \$39,000.<sup>240</sup> The house and grounds were also put up for sale.<sup>241</sup>

### 3. Her Death

Doris died of leukemia on August 13, 1963. She was seventy-four years old and had no known survivors.<sup>242</sup>

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1954 and is now owned by a charitable organization dedicated to its preservation. *The Princess*, *supra* note 228.

234. *Princess Charges \$99,500 Swindle*, *supra* note 200, at 26. According to the New York Times, Doris first met Mr. Riccardi when he visited her estate as a prospective buyer in 1945. *Id.* This was the same year in which the Tax Court rendered its decision in *Farid*, raising the possibility that Doris's finances were not what they were during her marriage to S.S.

235. Riccardi had been arrested at least ten times prior to meeting Doris. *Id.*; *New York Locates 'Master Swindler,'* N.Y. TIMES, May 29, 1948, at 28 ("arrested a dozen times"). He had been convicted of a stock swindle in New York in 1937 and had served three years in state prison before winning a retrial, which prosecutors never initiated. He was enjoined from dealing in securities in New York. He had been disbarred in California for embezzlement. *Princess Charges \$99,500 Swindle*, *supra* note 200, at 26.

236. *Princess Charges \$99,500 Swindle*, *supra* note 200, at 26.

237. *Id.*

238. *Riccardi Gets 10 Years*, N.Y. TIMES, June 22, 1948, at 6.

239. *Princess to Auction \$75,000 Furnishings*, *supra* note 233, at 36.

240. *Princess' Auction Brings in \$39,000*, N.Y. TIMES, Sept. 14, 1949, at 33.

241. *Id.* Doris's obituary in the New York Times stated that she had been sued in 1959 for \$13,000 in bad debts and had paid with receipts from sales of art and furniture. *Princess Farid-es-Sultaneh*, *supra* note 232 at 31.

242. *Princess Farid-es-Sultaneh*, *supra* note 232, at 31.



## C. S.S.

## 1. S.S. Marries Again

Only months after divorcing Doris, S.S. married again. On October 28, 1928, Mrs. Clara K. Swaine, a divorcee, became the third Mrs. Kresge in a private ceremony.<sup>243</sup> Clara's age was given as thirty-four; S.S. was fifty-one at the time.<sup>244</sup> The wedding took place at the home of Clara's mother in Kunkletown, Pennsylvania, twenty-five miles from S.S.'s childhood home.<sup>245</sup> Clara, however, had spent most of her life, and resided at the time, in New York City.<sup>246</sup> Like Doris, Clara "was musically inclined."<sup>247</sup> "Friends of the couple were not surprised at their marriage because they have been seen together a great deal during the past year."<sup>248</sup>

Shortly after the wedding, the Methodist Episcopal conference disciplined the pastor who performed the wedding ceremony.<sup>249</sup> The Church, it seems, permitted marriage following divorce only if the ground was unfaithfulness,<sup>250</sup> which was not the case in either of S.S.'s divorces. The minister was excused by the conference after apologizing for having failed to investigate the circumstances of S.S.'s divorces.<sup>251</sup>

S.S. led a quieter life with Clara than he had with Doris. They resided in Mountainhome, Pennsylvania, near S.S.'s childhood home, and later wintered in Miami.<sup>252</sup> Although S.S. remained active in the affairs of the Company and in other businesses, he rarely was in the public limelight.<sup>253</sup>

## 2. S.S. Focuses on His Work

S.S. stepped down as Company president in 1925,<sup>254</sup> during his marriage to Doris, but continued to serve as chairman until he was ninety-

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243. S.S. *Kresge Marries for the Third Time*, *supra* note 200, at 16.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. S.S. *Kresge Marries for the Third Time*, *supra* note 200, at 16.

249. *Rebuked in Kresge Case*, N.Y. TIMES, Mar. 14, 1929, at 18; *Pastor Regrets Helping Kresge Wed; Absolved*, CHI. TRIB., Mar. 14, 1929, at 3.

250. *Pastor Regrets Helping Kresge*, *supra* note 249, at 3; *Will Inquire on Kresge*, N.Y. TIMES, Nov. 29, 1928, at 30.

251. *Id.*; *Rebuked in Kresge Case*, *supra* at 249, at 18.

252. S.S. *Kresge Dead; Merchant was 99*, *supra* note 12, at 38.

253. *Id.*

254. During the 1920's, S.S. purchased an interest in Stern Brothers, a New York department store, and The Fair, a store in Chicago. He later sold both. *Id.*

eight. He also continued, until that time, to serve as trustee of the Kresge Foundation, a philanthropic foundation he established in 1924 (coincidentally, perhaps, the same year in which he divorced his first wife and married Doris) and to which he donated over \$65 million.<sup>255</sup> At the time S.S. stepped down from both positions, in June of 1966, he was the oldest chairman and the one with the longest tenure (fifty-three years) of any New York Stock Exchange listed company. During his stewardship, the Company launched Kmart discount stores. It operated 136 Kmarts at the time S.S. resigned, as well as 673 Kresge 5-and-10-cent stores and 110 Jupiter stores. In 1965, the Company's annual sales exceeded \$851 million and its employment force exceeded 42,000 people. The Kresge Foundation gave over \$70 million in grants during the same years.<sup>256</sup>

### 3. *His Death*

S.S. was hospitalized in July 1966, shortly after stepping down from his positions with the Company and the foundation. He died three months later at the age of ninety-nine. His third wife, Clara, was at his bedside. In addition to his wife, S.S. was survived by his five children from his first marriage.<sup>257</sup>

In an ironic twist, S.S. outlived both Doris and his life expectancy, as quantified by the Second Circuit in *Farid*. To show that the marital property rights exchanged by Doris had substantial value, the opinion noted S.S.'s net worth and the value of his real estate holdings at the time of the marriage, and to demonstrate the likelihood that Doris would predecease S.S., entitling her to a share of that wealth if not for her exchange of marital property rights for shares in the Company, the court specifically noted that Doris was thirty-two years old when she married S.S., with a life expectancy of thirty-three and three-fourths years (i.e., sixty-five and three-fourths)<sup>258</sup> and S.S. was fifty-seven years old at the time, with a life expectancy of sixteen and one-half (i.e., seventy-three and one-half).<sup>259</sup> In fact, Doris died at the age of seventy-five, predeceasing S.S.

### 4. *The Kresge Legacy*

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255. *S.S. Kresge Dead; Merchant was 99*, *supra* note 12, at 38.

256. *Id.*

257. *Id.*

258. *Farid II*, 160 F.2d 812, 814 (2nd Cir. 1947).

259. *Id.* at 813.

Over the strenuous objections of S.S.'s son, Stanley, the Company changed its name to Kmart Corporation in 1977.<sup>260</sup> In 1987, Kmart Corporation sold its remaining Kresge and Jupiter stores in the United States to McCrory Stores, which discontinued the brand.<sup>261</sup> (Ironically, John McCrory had been S.S.'s partner when he opened his first stores).<sup>262</sup> Kmart Corporation filed for Chapter 11 bankruptcy on January 22, 2002,<sup>263</sup> emerging on May 6, 2003 as Kmart Holding Corporation.<sup>264</sup> In 2005, Kmart Holding purchased Sears, Roebuck and Company and changed its name to Sears Holdings Corporation.<sup>265</sup> As a result, S.S.'s surname no longer is reflected in either the corporate or store names.

The Kresge name continues to flourish in the philanthropic world. S.S. funded the Kresge Foundation with an initial contribution, in 1924, of \$1.6 million and added an additional \$60.5 during his lifetime.<sup>266</sup> Today, the Foundation holds assets of \$3.1 billion and makes gifts far exceeding \$100 million annually in each of seven areas: arts and culture, community development, Detroit, education, environment, health, and human services.<sup>267</sup> Five of S.S.'s descendants serve or have served on the Foundation's board of trustees, carrying on S.S. Kresge's mandate to "promote human progress."<sup>268</sup>

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260. *Stanley Sebastian Kresge, 85, Retailer and Philanthropist*, *supra* note 49, at D19.

261. *Company Briefs*, N.Y. TIMES, Jun. 2, 1987, at 22; Barmash, *A Kresge-McCrory Reunion*, *supra* note 42, at 33.

262. *See supra* note 42 and accompanying text.

263. Danny Hakim & Leslie Kaufman, *Kmart Files Bankruptcy, Largest Ever for a Retailer*, N.Y. TIMES, Jan. 23, 2002, at C1.

264. Constance L. Hays, *A New Start, A New Name. But Have Things Really Changed as Kmart Comes Out of Bankruptcy?*, N.Y. TIMES, May 7, 2003, at C9.

265. *Kmart Completes Acquisition of Sears*, N.Y. TIMES, Mar. 25, 2005, at C3.

266. *About Us*, THE KRESGE FOUNDATION, <http://www.kresge.org/about-us> (last visited Oct. 21, 2012).

267. *Id.*; *see also* Melia Tourangeau, *Kresge Foundation*, LEARNING TO GIVE, <http://www.learningtogive.org/papers/paper209.html> (last visited Oct. 21, 2012) ("The Kresge Foundation has made incredible contributions to the fields of medical research, higher education, health and human services, and the arts by providing bricks and mortar support for non-profit organizations in need of new facilities and equipment. If one were to go to virtually any large university, arts organization, hospital or research institute around the country, chances are the Kresge name would be somewhere.").

268. *About Us*, *supra* note 266.

