Can and Should a State Court Order an Unwilling Spouse to File a Joint Federal Income Tax Return?

by
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Tax returns must be filed, taxes must be paid and "fashioning a divorce agreement in accordance with tax consequences is an appropriate and legitimate practice."[1] The parties must consequently keep in mind that "although the parties are often hostile, the tax collector may remain a common enemy."[2]A joint return "exposes themselves to joint and several liability for any fraudulent or erroneous aspect of the return" as well as potential criminal liability.[3]

Generally, married parties do better under the tax code when they file jointly rather than independently. A joint filing would, thus, result in a preservation of marital assets.[4] This article reviews the cases that have held that courts may compel a joint return as well as those holding against the authority to do so. It examines the arguments concerning federal law preemption and makes the argument that a joint return is different from other federal tax matters that a state court may consider in dissolution. Finally, it concludes that as a matter of policy state courts should not require divorcing spouses to file a joint tax return.

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1 Comm'r v. Lester, 366 U.S. 299, 306 (1961).

2 Fechter v. Fechter, 534 N.E.2d 1 (Mass. App., Ct. 1989).

3 Leftwich v. Leftwich, 442 A.2d 139 (D.C. 1982) (Although in the case of a joint return, the civil fraud penalty shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse (IRC Section 6673 (c)).

4 Zummo v. Zummo, 521 N.E.2d 621 (Ill. App. Ct. 1988).

I. Divorce Courts that Require A Spouse to File a Joint Federal Income Tax Return

In a well-reasoned opinion, *Burstyn v. Burstyn*,[5] a New Jersey Appellate Court noted that there are good arguments on both sides of the issue. The court stated that "ultimately, however, we can conclude that the trial courts should have discretion to compel the filing of a joint tax return,"[6] noting that the legislature has directed courts to consider the tax consequences of their rulings on alimony and equitable distribution. The court continued: "Therefore, it seems reasonable that courts should consider the affect upon the marital estate of filing joint or separate tax returns, and, where appropriate, preserve the marital estate by compelling joint returns."[7]

The appellate court affirmed the trial court in *Burstyn* in directing the wife to execute a joint income tax return. There, the wife's alimony payments were to be held until she executed the joint tax return. The court noted that the wife gave no reason for her refusal. The expert in *Burstyn* had testified that by filing a joint return as opposed to "married, filing separately,"[8] the parties would substantially decrease the amount of tax owed.

In its opinion affirming the trial court, the Appellate Court wrote:

> We hold that trial courts in New Jersey have discretionary authority to compel parties in divorce proceedings to file joint tax returns. Whether it is appropriate to compel that result will depend upon the facts presented in any given case. In general, we believe that trial courts should avoid compelling parties to execute joint tax returns because of the potential liability to which the parties would be exposed, and because there generally exists a means by which to compensate the parties for the adverse consequences of filing separately.[9]

The *Burstyn* court looked at several factors in coming to its conclusion: First, there was a significant financial benefit to filing joint returns and the trial court had an obligation to consider the tax implications on its decision. It said, "filing separately would

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5 Burstyn v. Burstyn, 879 A.2d 129 (N.J. Super. Ct. App. Div. 2005).

6 *Id*. at 136.

7 *Id*.

8 *Id*. at 133.

9 *Id*. at 137.

have unnecessarily depleted the funds available to support the family."[10]

Second, there was no evidence that the husband had filed fraudulent returns in the past or that the husband intended to file fraudulent returns for the subject years. The court also noted that "the tax returns were prepared by an independent expert, and the [husband] indemnified [the wife] with respect to the returns."[11]

Third, the husband was the source of all income to be reported. The wife had no income during the marriage and post separation; her only income came from the husband's alimony payments. Fourth, the wife expressed no principal reason why she should file a separate return. Fifth, because the large majority of marital assets were required to pay marital debts, there was little means by which the court could alter the equitable distribution to compensate the husband for the adverse tax consequences of filing separate returns.

Another New Jersey Appellate Court followed the rationale of *Burstyn* in 2011.[12] In *Bogdan v. Bogdan,* the appellate court ruled however, that the trial court did not abuse its discretion in refusing to compel Mrs. Bogdan to file a joint tax return.

Because the evidence presented in *Boehmler v. Boehmler* was that the husband would incur additional taxes of $5,000 to $6,000, the appellate court affirmed the trial court in ordering the wife to sign the joint tax return as "it was within the trial court's discretion and authority to require [the wife] to file a joint tax return in order to avoid an unnecessary tax burden which would deplete the funds available for the support of the family."[13] In Ohio, an appellate court similarly recognized that "the trial court not only has the authority [to require the execution of a joint tax return] but also has a duty to consider such action when equitable considerations so demand."[14]

The North Dakota Supreme Court affirmed the trial court's order of the execution of a joint tax return based upon the fact

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10 *Id.*

11 *Id.*

12 Bogdan v. Bogdan, 2011 WL 24 10243 (N.J. Super. Ct. App. Div. May 10, 2011).

13 410 N.W.2d 354, 356 (Minn. Ct. App. 1987).

14 Bowen v. Bowen, 725 N.E.2d 1165, 1179 (Ohio Ct. App. 1999).

that "courts are to consider tax consequences of divorce proceedings."[15] In *Cox v. Cox*, the appellate court upheld the order "requiring the [wife] to either sign a joint federal tax return or pay one-half of the increased tax, interest, and penalty caused by her refusal to sign."[16]

Articulating that "the federal tax code provisions do not deprive the dissolution court of jurisdiction to enter orders as between the parties,"[17] the Colorado Court of Appeals affirmed the lower court order in *In re the Marriage of Lafaye,* stating that "the trial court's ruling precluding wife from amending previously filed joint tax returns was within the court's discretion and consistent with the parties' prior practices and with the court's allocation of responsibility for future tax liabilities."[18]

A notation by the Eighth Circuit Court of Appeals that "there can be a binding joint return even though one of the spouses failed to sign the return" should bolster the above and further state court opinions.[19] In *Heim v. Commissioner*, the Eighth Circuit noted "the Tax Court held that where a husband files a joint return without objection of the wife, who fails to file a separate return, it will be presumed the joint return was filed with the tacit consent of the wife."[20]

In *Riportella v. Commissioner*, the Tax Court held that the failure to sign the return did not prevent it from being a joint return.[21] Mrs. Riportella signed a joint return for the first two years of the marriage. In the third year marital problems surfaced; nevertheless the wife signed with her husband Form 4868 for an automatic extension. When it finally came time to file the return, Mrs. Riportella's response to a request to sign was, "what will you do for me if I sign it?"[22] The return was filed as a joint return, signed only by the CPA. The Tax Court reversed the Service's refusal to consider the return as joint "based on the peculiar facts of the case."[23] The court determined that Mr. Riportella

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15 Oldham v. Oldham, 677 N.W.2d 196, 201 (N.D. 2004).

16 704 S.W.2d 171, 172 (Ark. Ct. App. 1986).

17 *In re* Marriage of Lafaye, 89 P.3d 455, 461 (Colo. Ct. App. 2003).

18 *Id*.

19 Heim v. Comm'r, 251 F.2d 45, 45 (8th Cir. 1958).

20 *Id*.

21 Riportella v. Comm'r, 2 T.C.M. (CCH) 869, 872 (1981).

22 *Id*. at 870.

23 *Id*. at 872.

"has carried his burden of establishing that [Mrs. Riportella] intended to file a joint return."[24] The court said:

> [Mrs. Riportella's] attempt to "sell" her signature adds further force to petitioner's position. Audrey was perfectly willing to sign the joint return if petitioner would make it worth her while. This, together with her signature on the Form 4868, indicates that Audrey at all times intended to file a joint return. She merely wanted a price for a valuable commodity, i.e., her signature. Audrey held all the cards and attempted to extract whatever concessions she could. In the midst of a divorce proceeding this is an all too common occurrence.[25]

The *Riportella* court called attention to several important principles: "[F]ailure of one spouse to sign a return is not fatal to the finding of a joint return[26] [and] even a spouse's outright refusal to sign the return has not precluded the return from qualifying as a joint return."[27]

In *Peirce v. Commissioner,* the court found a joint return notwithstanding the wife's failure to sign.[28] The court observed that the wife's actions were the result of her "ill will for him" and to make him squirm.[29]

The question these cases pose is whether or under what circumstances a state court should order a non-willing spouse to file a joint income tax return.

II. Cases Holding that a State Court Lacks the Power to Order an Unwilling Spouse to Sign a Joint Return

A state court order for an unwilling spouse to sign a joint return involves a number of legal issues: First, may the state court override federal law which provides that joint tax return filing is elective? Second, in equitable distribution jurisdictions, does the court's broad power to determine and distribute marital assets extend to ordering a spouse to become liable to the U.S. Treasury when such liability did not arise during the marriage?

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24 *Id.*

25 *Id.* at 871.

26 *Id.* at 870.

27 *Id.* at 871.

28 Peirce v. Comm'r, 43 T.C.M. 900 (1982).

29 *Id.* at 903.

Finally, even if a court can exert such authority, should the court do so given the consequences attendant to filing a joint return?

A. *The Federal Law Argument*

For example, Florida's First District Court of Appeal in *Sweeney v. Sweeney* held that the lower court had erred in ordering the spouses to file a joint return stating:

> Under Internal Revenue Code section 6013 (2003 West), a husband and wife are jointly and severally liable for taxes and penalties on filing a joint return when one spouse has knowledge that the other omitted reporting income, and Mrs. Sweeney claims that her former husband intends to perpetrate a fraud upon the IRS. We agree that Mrs. Sweeney should retain the choice whether to file individually, but direct the trial judge on remand to consider whether there will be tax consequences for either party as a result of filing an individual return, which should be taken into consideration when revaluating the entire equitable distribution.[30]

The *Sweeney* court did not discuss whether its decision was mandated by pre-emptive federal law offering the choice of electing to file a joint return as opposed to separate returns or whether its decision would have been otherwise if the record did not indicate that Mrs. Sweeney feared her husband intended to file a false return.

Other state courts have held that a state court in a divorce proceeding lacks equitable powers to order an unwilling spouse to sign a joint return. A New York Appellate court in *Teich v. Teich*[31] held that federal law gives each spouse the unqualified freedom to decide whether to file jointly or separately. The Oklahoma Appeals Court in *Matlock v. Matlock*[32] held that to give such authority to a state court judge would be tantamount to removing the right of election conferred upon married couples under the Internal Revenue Code.[33]

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30 583 So.2d 398, 399 (Fla. Dist. Ct. App. 1991).

31 658 N.Y.S. 2d 599 (1997).

32 750 P.2d 1145 (Okla. App. 1988).

33 *See also* the following cases agreeing with New York and Oklahoma courts: Kane v. Parry, 588 A.2d 227 (Conn. App. Ct. 1991); Leftwich v. Leftwich, 442 A.2d 139 (D.C. 1982); In re Marriage of Butler, 346 N.W.2d 45 (Iowa Ct. App. 1984); In re Marriage of Lewis, 723 P.2d 1079 (Or. Ct. App. 1986).

State court decisions, however, both supporting and criticizing a state court's power to order filing a joint return inadequately address the question of federal pre-emption and do not consider the subtle but important difference between dividing existing marital liabilities pursuant to an equitable distribution statute and ordering an unwilling spouse to undertake new separate debt, not incurred during the marriage, for the purpose of lowering overall marital debt and thereby preserving more marital property to divide.

III. Federal Law is Preemptive

The Supremacy Clause of the U.S. Constitution makes federal law pre-emptive over conflicting state law, if the federal law is within the bounds of congressional authority under the Constitution and is necessary and proper to the accomplishment of legitimate federal objectives.[34] The U.S. Supreme Court, however, has stated that a state's interest where family and family-property arrangements are involved should not be overridden by federal courts unless substantial national interests will be significantly impaired by application of state law.[35] No federal court has ruled on the Supremacy Clause as it relates to the election to file a joint tax return but federal courts have indicated under what circumstances federal law pre-empts conflicting state law or state court rulings.

In *McCarty v. McCarty*[36] the U.S. Supreme Court considered whether California's community property law which mandated division of military retirement pay should be pre-empted by federal law which provides military retirement pay to accrue solely to the retiree. The court framed the question "whether consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecogni-

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34 *See, e.g.,* Sperry v. Florida, 373 U.S. 379 (1963) (holding that Florida could not prohibit non-lawyers within Florida's jurisdiction from practicing before the U.S. Patent Office).

35 United States v. Yazell, 382 U.S. 341, 352 (1966) (holding that a Small Business Administration loan expressly made subject to state law could not be enforced against the signing spouse's separate property protected under California's coverture law).

36 453 U.S. 210 (1981).

tion."[37] The Court held that military pay may not be divided by community property laws for to do so, "threatens grave harm to 'clear and substantial' federal interests."[38] The Court found strong reason in potential harm to critical federal functions to not permit a state court to divide military pensions. State court rulings dividing military pensions would interfere with the power of Congress under the Constitution[39] to raise and support military forces and to make rules governing those forces, including the military retirement system;[40] and, frustrate the goals of Congress to provide for the retired service member and to meet personal management.[41] A state court could reverse the order of the [federal] statute by making an ex-spouse's interest superior to that of the surviving spouse and children of the service member.[42] Applying different state laws would also disrupt military personnel management as personnel are reassigned and move frequently,[43] and diminish the impact of retirement pay as an inducement to military service.[44] Similarly, to allow state courts to have a say in military retirement matters would impact the military's goal of orderly promotion as personnel would become less eager to retire and thus, likely thwart the federal goal of a youthful military.[45]

IV. The Joint Return Election Differs from Other Federal Tax Matters a State Court May Consider

Although the law of most states requires income taxes consequences to be considered in dividing marital property, these laws merely recognize that dividing marital assets without considering whether the tax attributes of each asset could lead to ineq-

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37 *Id.* at 221 (quoting, Hisquierdo v Hisquierdo, 439 U.S. 572, 583 (1979), in which the Court had held that benefits under the Railroad Retirement Act of 1974 may not be divided under community property law.)

38 *Id.*at 232.

39 U.S. CONSTITUTION, art. I, § 8, cls. 12, 13 and 14.

40 McCarty, 453 U.S. at 232.

41 *Id*. at 233.

42 *Id*.

43 *Id*. at 234.

44 *Id*.

45 *Id*. at 235.

uitable results. There is also little controversy that state courts may order a spouse to relinquish the tax exemption for a child and sign Form 8332 to accomplish that end. Such an order does not conflict with the federal taxing scheme and in fact is contemplated by that scheme in Form 8332. Moreover, orders with regard to the personal exemption for a child deal directly with child support and custody issues and do not carry the potentially more serious consequences associated with filing a joint return.

State courts[46] have also held that allocating as a marital asset the dollar tax benefit of capital loss carryovers to separate return years does not involve the Supremacy Clause because the court is dealing only with financial consequences of tax reporting and is not ordering spouses to report capital loss carryovers in a manner contrary to that required by Treasury Regulations.[47]

V. Federal Obligation to File Tax Returns and Report Income

Under federal tax law, the Internal Revenue Code, each spouse is required to file or not file based on his or her own status[48] and is individually liable to the Treasury for the separate tax on his or her separate taxable income, unless the spouses together elect to file a joint return.[49] A joint return election has the effect of making each spouse liable, not only for his or her separate tax debt, but also for the tax debt of the other spouse, now made a joint and several liability.[50] Thus, the signing of a joint return makes the signing spouse liable to a third-party creditor, the U.S. Treasury, on a new debt. Moreover, an unpaid tax liability on the joint return creates a federal tax lien on all of the signing spouse's marital and non-marital property rights,[51] subjects the signing spouse to potentially serious civil penalties

46 *See, e.g.*, Mills v. Mills, 663 S.W.2d 369 (Mo. Ct. App. 1983).

47 *See generally* Treas. Reg.§ 1.121-1(c) (as amended in 1986).

48 I.R.C. § 6012(a (1)(A) (West 2010). All Section references, unless otherwise stated, are to Internal Revenue Code of 1986, as amended (Title 26 United States Code).

49 *Id.* § 6013(a)

50 *Id.* § 6013(d) (3).

51 *Id.* §§ 6321 and 6322.

should the IRS audit the return and assess additional tax,[52] and subjects his or her assets to possible enforced IRS collection measures such as levy and seizure. Federal law affords spouses a choice: follow the general tax scheme of separate liability or elect the rate-splitting and other benefits of a joint return at the expense of becoming jointly and severally liable with all attendant consequences. A spouse not wishing to file a joint return might otherwise be required to file no return and thus not be liable to the IRS. These choices for married couples affect more than marital rights between the spouses, but impact each spouse's separate financial status *vis a vis* the U.S. Treasury. Filing a joint return carries with it serious consequences and failure to advise a spouse of these consequences can subject a professional to malpractice claims.[53]

The federal interest in the joint return election may be somewhat less compelling than preserving military pensions, but a federal concern exists nonetheless: A state court in ordering the unwilling spouse to file jointly interferes with the constitutionally authorized federal tax code,[54] specifically, with the federal scheme of separate liability absent an election to become joint filers. Congress decided to require an affirmative election before a taxpayer would become jointly and severally liable for a spouse's tax debt. State courts that order a spouse to sign a joint return interfere with Congress' power to tax and collect revenues and to provide the manner in which tax liabilities are created, secured and collected. Moreover, joint returns impact the Treasury because less tax is usually collected.

Federal law should preclude state courts overriding an election granted in the federal tax code absent express discretion afforded by Congress to the state courts. Contrarily, Congress intended that filing a joint return and assuming the burdens and

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52 *Id.* §§ 6672 (Substantial Understatement Penalty), 6651(a) (2) (Failure to Pay Penalty).

53 *See, e.g.*, Karam v. Comm'r, 102 T.C.M. (CCH) 311 (2011), in which facts adduced by the court in upholding the denial of innocent spouse relief included that the spouse had obtained a $150,000 malpractice judgment against the tax preparer CPA for his failure to advise her of the consequences attached to filing a joint return.

54 U.S. CONST., amend. XVI: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment amount the several States, and without regard to any census of enumeration."

benefits of joint filing should be elective. Had Congress intended to allow state courts to mandate what was made elective, it could have so stated. With regard to alimony, Internal Revenue Code section 71(b)(1)(B) permits state courts to order that payments otherwise qualifying as taxable alimony be designated as non-taxable and non-deductible.[55] This provision was inserted into Section 71 because Congress intended that divorcing spouses and state divorce courts be permitted to decide the allocation of tax benefits and burdens as between themselves. Section 6013 regarding joint returns affords state courts no such leeway because Congress is the proper authority to establish the standard of tax return liability as between the taxpayer and the Treasury. The joint return election was added to the Internal Revenue Code for a proper federal purpose—to collect tax revenue—that does not exceed the necessary and proper standard. State courts should not interfere.[56]

VI. Compulsion or Contempt?

What if an unwilling spouse refused to sign the joint return? Would the state court judge find the refusing spouse in contempt of court? Would the judge insist that the refusing spouse affix his or her signature to the tax return declaration? The declaration on a tax return is quite sobering: "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements and to the best of my knowledge and belief, it is true, correct and complete."[57]

The tax code adds an exclamation point to the above declaration for willfully subscribing to a return that is false as to any material matter by providing that this constitutes a felony[58] that, when applicable, carries sanctions on top of the civil penalties mentioned above. Although a spouse is not responsible for the tax crimes of his or her mate, it can be factually difficult to separate the extent of knowledge and degree of willfulness of each spouse when a false joint return has been filed.[59]

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55 I.R.C. §§ 71(b)(1)(B), 215(a) and (b) (1986)

56 *See supra* note 33 and accompanying text.

57 *See* Form 1040, U.S. Individual Income Tax Return, page 2.

58 I.R.C. § 7206 (West 1982).

59 *See generally,* Robert Steinberg, "*Tax Crimes: Kicking the Hornet's Nest*," 33 FAM. ADVOC. 38 (Spring 2011).

VII. Would a State Court-Ordered Joint Return be Accepted by the IRS or the Tax Court as a Joint Return?

Should an unwilling spouse refuse to sign, despite a court's order, a putative joint return absent the second signature might not be accepted by IRS or the Tax Court as a joint return.[60] In determining if a return is to be treated as a joint return, the Tax Court looks to the intent of the spouses.[61] The unsigned joint return would raise squarely the question whether the state court order overrides the federal scheme of separate liability for spouses who do not voluntarily elect to file jointly and become jointly liable for the consolidated tax debt of both spouses.

On the other hand, if the unwilling spouse signs a joint return under threat of being held in contempt of court, would the IRS or federal courts treat the return filed as a joint return? Generally, a return signed under duress is not treated as a joint return.[62] There is no authority, but, even if the spouse was ordered to sign after appeal would the filing be held voluntary by Tax Court (assuming the spouse signs and then petitions the Tax Court alleging that the signature was under duress), absent another federal court ruling that the return, as filed, is a valid joint return?

Whether a return is signed under duress is a question of fact.[63] A two-pronged test for duress has been applied: Could the taxpayer have resisted the pressure to sign; and, would the taxpayer not have signed without the pressure having been applied?[64] Clearly, signing under compulsion of a state court order appears to satisfy both prongs of the test. Thus, it is possible that IRS and the Tax Court would accept the unwilling spouse's claim

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60 Anderson v. Comm'r, 38 T.C.M.1123 (1984). *See also* Shapland v. Comm'r, 38 T.C.M. (CCH) 1172 (1979)(rejecting a single signature joint return even where the signing spouse was authorized by a state court to sign for both spouses when the non-signing spouse did not intend to file jointly). *See generally* MELVYN B. FRUMKES, FRUMKES ON DIVORCE TAXATION § 9.11.4 (2011)

61 Heim v. Comm'r, 27 T.C. 270 (1956) (holding that intent to file a joint return is a question of fact).

62 Treas. Reg. §§ 1.6015-1(b), 1.6013-4(d).

63 Hughes v. Comm'r, 26 T.C. 23 (1956).

64 Brown v. Comm'r, 51 T.C. 116 (1968). *See also* FRUMKES, *supra* note 60.

that he or she was coerced to sign but did not intend to file a joint return. In that case all the state court will have accomplished is to insure that litigation will continue.

Whether the spouse refuses to sign or signs under protest, he or she may later seek to avoid the joint return liability should the IRS knock on the door. Thus, the question of federal pre-emption will arise either in U.S. Tax Court with regard to a proposed deficiency or attempts by IRS to collect the joint tax debt or in U.S. District Court should the unwilling spouse be held in contempt of court.

VIII. Dividing Marital Liabilities is not the Same as Ordering a Spouse to Incur New Debt

Most equitable distribution statutes require the trial court to identify and distribute marital assets and liabilities between the spouses.[65] In determining an "equitable distribution" the court divides *inter se*, that is, as between the spouses, liabilities incurred during the marriage for proper marital purposes, regardless of which spouse is the named debtor. Clearly the tax liability on income earned during the marriage by either spouse is a marital liability that must be distributed among the spouses. The court may order one spouse to pay all of the liability or allocate the liability among the spouses. In either case, the court is addressing each spouse's share of a marital obligation and is not creating a new obligation to a third-party that did not exist during the marriage.

The effect of a court's joint-return order, however, is to order the unwilling spouse to incur a new liability to the U.S. Treasury on his or her spouse's income tax liability in addition to his or her own liability. But, for such order the unwilling spouse would file separately and become liable to the Treasury only for his or her individual tax debt; or, he or she might not be required to file and thereby incur no direct debt to the U.S. Treasury.

The trial court in a divorce may order one spouse to pay the marital debt of another or order one spouse to pay the other spouse an equalizing distribution of cash to even out the division of marital assets. But, it is quite another matter for a court to

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65 Bock v. Dalbey, 809 N.W.2d 785 (Neb. Ct. App. 2012), *rev'd on other grounds*, 815 N.W.2d 530 (Neb. 2012).

order a spouse to undertake a completely new obligation to a third-party.[66] In *Bock v. Dalbey*,[67] that is precisely what the Nebraska Appellate Court held. The wife was not obligated under federal law to the U.S. Treasury for the tax on her husband's earnings although under state law she was obligated to the marital *res* for such taxes. *Bock* was subsequently reversed in *Bock v. Dalbey*.[68] Without commenting on the applicability of the Supremacy Clause, the Nebraska Supreme Court, decided under state law that adjusting the equitable distribution is the preferred method for dealing with a tax disadvantage to one spouse from filing separately, and that a trial court lacks discretion to order the filing of a joint return.

Its reasoning was that the U.S. Tax Court is not bound to respect the state court order and might well find under IRS regulations and its own case law that such a return was not a valid joint return because the unwilling spouse did not intend to file jointly but was compelled to do so. The Supreme Court stated, "[t]his means that a trial court cannot know with certainty whether its equitable division of the marital estate based on consideration of a joint tax return will be given effect by federal authorities or courts."[69]

The *Bock* court also noted that the lower court's order is a mandatory injunction, an extremely harsh remedy that should not be exercised unless damage would be irreparable and no adequate remedy at law is available. In the case, at hand Nebraska's equitable distribution law, section 42-365,[70] is broad in its scope and could be employed to adjust for any tax inequity.

In addition, the court reasoned that the trial court may consider a party's unreasonable refusal to file a joint return in mak-

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66 The IRS as a creditor has powers beyond other creditors. For example, the IRS already has information about your assets and bank accounts, has pre-suit summons authority, an automatic tax lien for taxes unpaid, statutory transferee liability protection, can levy on bank accounts without court order, can seize household and autos subject to limited exemptions, is immune to homestead and tenants by entirety protection, and has available a limited bankruptcy wipe-out.

67 809 N. W. 2d 785 (Neb. App 2011).

68 815 N.W.2d 530 (Neb. 2012).

69 *Id.* at 535.

70 Neb. Rev. Stat. § 42-365 (Reissue 2008).

ing equitable adjustment where the other spouse is disadvantaged by filing separately. The Supreme Court stated:

> [B]ecause we conclude that (the statute)[71] permits a court to adjust its division of the marital estate to fit the equities of the case, we agree with the *Leftwich* court that equity principles weigh against permitting a trial court to resort to the coercive remedy of compelling a party to file a joint tax return.[72]

Another reason the court found for not compelling joint filing lies in the difficulty of predicting a spouse's exposure to liability under the tax code aligned with the difficulty of obtaining relief from joint liability under the so called innocent spouse escape hatches. The court stated: "Summed up, for a divorcing spouse with little or no taxable income for the tax year, signing a joint tax return may pose considerable liability risk with no appreciable benefit."[73] As a consequence whether to file a joint return the court observed is best left to negotiation between the divorcing spouses. The requested spouse will normally ask for a share of the tax savings and indemnification from unanticipated liability. The court can be moved to become involved if a spouse unreasonably refuses to sign a joint return.

Lastly, the *Bock* court recognized the practical difficulties created by tax return deadlines. Spouses may under Section 6013(b) of the tax code, elect to amend and file a joint return within three years after filing separate returns. But the election to file a joint return is irrevocable once the current year's tax filing deadline has passed. A separate return may not later be filed.[74] Thus, the court stated: "If a trial court orders a party to file a joint return, he or she will usually have to comply quickly or risk being held in contempt . . . [y]et even if the party appeals the order, the party cannot revoke the joint return."[75] The court correctly surmised that the spouse is left out on a limb dependent solely on the tax code's hyper-technical innocent spouse rules for relief.

Consider spouses who own a home encumbered by a mortgage with a seven percent interest rate. Today, mortgages can be

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71 *Id*.

72 Dalbey, *supra* note 68, at 536.

73 *Id.* at 537.

74 I.R.C. § 6013(f) (4) (West 2003).

75 Dalbey, *supra* note 68, at 538.

obtained with a three percent interest rate. Can the court order the husband to co-sign a new loan for the wife that her post divorce expenses will require less support? Is not that precisely what the court does when it orders one spouse to sign a joint return in order to lower the taxes which must be paid from the marital estate? The court is creating a new obligation to the Treasury on the part of the unwilling spouse. The tax debt may be a marital debt; but, the IRS, the absolutely worst creditor,[76] could not collect the debt from assets, martial and non-marital, of both spouses, absent a joint return election.

IX. Conclusion: A State Court Should Not Order an Unwilling Spouse to Sign a Joint Return

A spouse may rightly not wish to file jointly for many reasons. A joint return carries with it joint and several liability for the tax shown on the return and for taxes that may later be assessed with regard to the return year. While Section 6015 offers limited relief to a so-called "innocent spouse," the facts justifying relief from joint and several liability can be difficult to establish.[77] The right of indemnification from the other spouse is an imperfect protection because IRS collection efforts may cause hardship to the spouse who was ordered to file jointly against his or her will.

As indicated above, a joint return is signed under express penalties of perjury carrying felony consequences for falsity.[78] How therefore does a spouse who does not believe in the honesty of her former spouse sign the scary declaration on the joint return? Filing a joint return will involve communicating information to the tax preparer, often retained by the other spouse. The preparer's loyalty is to the other spouse and positions taken in the return may not be in the best interest of the signing spouse.

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76 That often extends into the U.S. Tax Court when one spouse asserts innocent spouse status and the other spouse inevitably intervenes under authority of I.R.C. 6015(e)(4) (West 2006) and TAX CT. R. 325.

77 *See e.g.*, Yosinsky v. Comm'r, 104 T.C.M. (CCH) 55 (2012); Nunez v. Comm'r, 103 T.C.M. (CCH) 1664 (2012); U.S. v. Lebeau, 2012 WL 835160 (S.D.Cal. March 12, 2012) (innocent spouse defense may not be raised as an affirmative defense in suit by government to reduce federal income tax debt to judgment).

78 See *supra,* note 58 and accompanying text.

Regardless of federal pre-emption issues or a desire to preserve marital assets, a state court should not impose its judgment over a spouse's right to elect or not to elect joint filing. The court should not impose these obligations and risks on an unwilling spouse when federal law specifically affords spouses the right to elect or not to elect to file jointly. To so order is to exalt power over wisdom. Requiring the parties to file a joint income tax return following the divorce is a recipe for additional litigation when one spouse wants to file separately for whatever reasons. If the court finds those reasons to be spiteful or irrational, the court can charge the refusing spouse with the additional tax liability engendered by his or her contumacious refusal by either adjusting the equalizing cash in equitable distribution or amount of alimony payments. But, the court should not order the joint filing forcing the unwilling spouse to risk contempt or assume the potentially harsh consequences of signing a joint return.