Comment, SURVEY: SPECULATION ON FUTURE TAX LIABILITY IN VALUATION OF MARITAL PROPERTY*

Introduction

Despite the fact that no two states seem to have the same approach to defining and dividing marital property upon divorce, an issue common to all states is whether a state court should consider a spouse's future federal tax liability in the valuation of marital property. Most state courts seem to agree, when asset liquidation has been ordered by the court or when evidence exists that tax liability is certain to be incurred, fairness and equity require that the court consider tax liability and its effect on the overall value of the property. But when a spouse's likelihood of incurring tax liability is uncertain, a debate emerges whether a state court issuing a divorce decree has the obligation or the authority to consider federal tax consequences when assessing property value. As many courts have noted, "a state court or the intention of a State court judge in rendering a divorce decree does not determine the Federal income tax consequences of the divorce judgment he renders."[1]

In fact, when a state court values and divides property between spouses based on factors including the court's interpretation of the future federal tax law, the tax consequences upon which the decision rests can only be speculative. The actual tax consequences may be entirely different depending on whether the event triggering tax recognition ever takes place, and if so, then depending on the applicable tax law and the tax bracket of the spouse at that time. Although federal courts may look to state courts for guidance in characterization of a property trans-

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* J.D. University of Missouri – Kansas City School of Law, 2007. Acknowledgment: the author relied on the following reference for her initial understanding of the concepts in this survey. MELVIN B. FRUMKES, FRUMKES ON DIVORCE TAXATION, Chapter 2 (2002).

[1] Coltman v. Comm'r, Nos. 34415-86, 34536-86, 2551-87, 2727-87, 1991 Tax Ct. Memo LEXIS 146 (U.S. T.C.M. Mar. 21, 1991).

fer,[2] whether a state court should include speculative tax liability in valuation of transferred property is questionable when it is ultimately up to the federal courts to resolve income tax questions.[3]

This article explores state divorce law with regard to property valuation and division. The first section of this article briefly explains some of the differences in the states' approaches to marital property and the federal tax consequences of dividing property between divorcing spouses. The second section describes the conflict that arises when a state court considers the future federal tax consequences in the valuation of martial property, and discusses the arguments in favor of and against consideration of future tax consequences. The third section surveys the variety of positions states have taken with regard to consideration of future tax consequences, and the fourth section briefly summarizes those findings. Finally, the conclusion identifies court trends in consideration of future tax liability as a factor in valuation of marital property.

I. An Overview of Federal Tax Consequences of Marital Property Valuation and Division

Upon the dissolution of a marriage, state law governs how a court identifies and divides marital property. Statutes defining marital property and governing the division of property differ from state to state, yet to determine the appropriate division of property during a divorce, courts generally apply either commu-

2 Hayutin v. Comm'r, 508 F.2d 462, 466-67 (10th Cir. 1974) (citing Colorado state law as the authority on the characterization of a spouse's property interest).

3 Altmann v. Altmann, 978 S.W.2d 356, 360 (Mo. Ct. App. 1998) (citing Coker v. United States, 456 F.2d 676, 676-77 (8th Cir. 1972) (noting the Internal Revenue Service disallowed alimony payment deductions due to its determination that the payments were actually a property settlement, and finding that the term "alimony" was descriptive but not determinative); Wright v. Comm'r, 543 F.2d 593, 598 (1976) (holding "the use of a particular label [such as *alimony*] in the divorce decree or settlement agreement is not conclusive of the parties' intentions"); Bardwell v. Comm'r, 318 F.2d 786, 789 (10th Cir. 1963) (concluding that "tax incidences of [monthly payments] under 26 U.S.C. § 71(a)(1) are [not] to be governed by the rules of state law. . . . state law is not binding upon the federal courts in determining income tax questions arising out of situations such as this")).

nity property or common law principles.[4] Absent an agreement between the spouses, in a community property state the standard is to divide marital property equally between the spouses. In a common law state, a court will divide the marital property according to principles of equitable distribution. Under equitable distribution the standard is to divide property fairly, but not necessarily equally.[5]

In 1962, in *United States v. Davis*,[6] the United States Supreme Court held that a property transfer between spouses or former spouses may incur tax liability if state law provides that the receiving spouse did not have an interest in the property prior to the transfer. In *Davis*, the transferring spouse would recognize any gain as taxable gross income.[7] The result of *Davis* was that tax liability resulting from property division was inconsistent depending on whether the state was a community property state or a common law state.

In 1984, to nullify *Davis*,[8] Congress enacted the Domestic Relations Tax Reform Act (I.R.C. section 1041).[9] I.R.C. section 1041 covers a variety of scenarios in which spouses may transfer property to one another without triggering taxation, including division of property during divorce and transfers between former spouses incident to divorce. The general rule is that when property is transferred from one spouse to another spouse during

[4] There are only a handful of community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin is usually characterized as a community property state, but is a quasi-community property state. Additionally, some states allow spouses to elect community property treatment of marital property. *See*, *e.g.*, Community Property Act of 1998, ALASKA STAT. § 34.77.030 (2007).

[5] "A property division does not have to be equal in order to be equitable based on the particular facts of each case; a determination of what is equitable rests within the sound discretion of the trial court." Diggs v. Diggs, 910 So. 2d 1274, 1276 (Ala. Civ. App. 2005) (citing Golden v. Golden, 681 So. 2d 605 (Ala. Civ. App. 1996)).

[6] 370 U.S. 65 (1962).

[7] *Id*.

[8] The Marriage Penalty: Hearing Before the Committee on Ways and Means, 105th Cong., Appendix B, Attachment 1, § 3 (Jan. 28, 1998) (Testimony of David Lifson, Vice Chair Tax Executive Committee, American Institute of Certified Public Accountants), *available at* http://waysandmeans.house.gov/legacy/fullcomm/105cong/1-28-98/1-28LIFS.HTM.

[9] Domestic Relations Tax Reform Act of 1984, I.R.C. § 1041 (2007).

marriage, divorce, or incident to divorce, neither spouse recognizes any gain or loss on the transfer.[10] Therefore, the transfer is a nontaxable event. There are several qualifications to this general rule, including that the transferee spouse assumes the adjusted basis of the transferor spouse, and if incident to divorce, the transfer must occur within one year of the divorce or be otherwise related to the divorce.[11]

But most importantly, this legislation applies to property transferred during, or as a result of divorce, without regard for whether a state classifies the property as community property or common law property. Instead, simply put, if a state court determines that the best way to accomplish an equal or equitable distribution is to transfer the property from one spouse (or from the marital unit) to the other spouse, then that transfer is treated merely as a title transfer and is nontaxable.[12] By enacting I.R.C. section 1041 Congress chose "to treat a husband and wife [and former husband and wife acting incident to divorce] as one economic unit, and to defer, but not eliminate, the recognition of any gain or loss on interspousal property transfers until the property is conveyed to a third party outside the economic unit."[13] The problem then becomes: what happens when the property is transferred outside the economic unit?

II. Federal Tax Consequences of Transferring Marital Property to Third Parties

When property is transferred to a third party outside the marital economic unit, the transfer usually does not qualify for non-recognition of tax liability as would transfers between spouses under I.R.C. section 1041.[14] Any gain or loss on the transfer of property to third parties generally triggers tax recog-

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10 I.R.C. § 1041(a) (2007).

11 I.R.C. § 1041(b)-(c) (2007). Note that if the transfer is made more than six years after the divorce, there is a presumption the transfer is not related to the divorce. Temp. Treas. Reg. § 1.1041-1T(b) (2007).

12 Property covered under I.R.C. § 1041 includes real property, stocks, pensions, several types of personal retirement plans, and many more types of property, but does not include cash exchanges.

13 Young v. Comm'r, 240 F.3d 369, 375 (4th Cir. 2001) (citing Blatt v. Comm'r, 102 T.C. 77, 80 (1994)).

14 Third-party transfers are not explicitly addressed in I.R.C. § 1041.

nition.[15] However, as clarified by Treasury Regulation section 1.1041-1T(c), a transfer to a third party on behalf of a spouse or former spouse can qualify for I.R.C. section 1041 treatment if it otherwise qualifies under I.R.C. section 1041 and it meets one of three tests:[16] (1) it is required by a divorce or separation agreement; (2) the other spouse or former spouse requests it in writing; or (3) the other spouse or former spouse ratifies it in writing after the fact.[17]

Although Treasury Regulation section 1.1041-1T(c) may seem to add third-person transfers as another category of tax-exempt transactions possible during a divorce, in reality it does not. Instead, Treasury Regulation section 1.1041-1T(c) merely clarifies the meaning of a transfer "incident to divorce" as permitted under section 1041(c). That is, when a spouse transfers property to a third party on behalf of his or her spouse, or as ordered by the court, even if the transaction actually took place only between the transferor spouse and the third party, for tax purposes the property is deemed to have been transferred from the transferor spouse to the transferee spouse, and then to the third party. As a result, I.R.C. section 1041 treatment applies only to the transfer between the spouses. The "deemed" transfer from the transferee spouse to the third party remains a taxable event.[18]

Nonetheless, many divorcing spouses have argued that when significant tax liability is likely to be incurred upon transfer of existing marital property to a third party, courts must consider this liability as a factor affecting the value of the property prior to property division. For example, consider the circumstances of

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[15] It should be noted that the Tax Reform Act of 1997 created a $250,000 exclusion of capital gains tax per spouse ($500,000 per couple) on a principal residence sold after May 6, 1997. If the seller qualifies for the exclusion, consideration of capital gains may be unnecessary for equitable division of many family homes.

[16] Temp. Treas. Reg. § 1.1041-1T(c) (2007).

[17] The ratification must state that the parties intend the transfer to qualify for I.R.C. § 1041 treatment, and the transferor must receive the ratification before the transferor files a return for the year in which the transfer occurred. *See* Temp. Treas. Reg. § 1.1041-1T(c) (2007); Craven v. United States, 215 F.3d 1201, 1205 (11th Cir. 2000).

[18] Temp. Treas. Reg. § 1.1041-1T(c) (2007).

Hovis v. Hovis.[19] In *Hovis*, the divorcing couple could not agree on the value of the husband's corporate stock and pension plan.[20] The husband was then 63 years of age and most executives in his company retired at age 65.[21] He argued that because he was nearing retirement age, and because the corporate shareholder agreement required he redeem his stock at book value upon his retirement, he would realize a substantial gain in income subjecting him to a capital gains rate of twenty percent within two years.[22]

The husband reasoned that because he, individually, would be liable for capital gains taxes in the future when he redeemed his stock, the court should reduce the value of the funds by the amount of his liability prior to equitable division of the marital property. The essence of his argument was if both spouses were going to share the benefit of the value of the fund, fairness dictated that both spouses should share the burden of the future tax liability. The appellate court upheld the trial court's decision to reduce the value of each fund by ten percent prior to property division.[23] Apparently unsatisfied with the amount of the reduction, the husband appealed to the Supreme Court of Pennsylvania.[24]

The Supreme Court of Pennsylvania reversed the appellate court opinion, denying any recognition of tax liability. The court found that the trial court had abused its discretion because the state divorce code did not specifically include future tax liability as a factor a court may consider in valuation of property, and because the amount of tax liability was entirely speculative.[25] The court explained:

> . . .where there is merely a likelihood or possibility that a taxable event will occur, the court is left to speculate as to the tax consequences. . . . if Mr. Hovis dies before retirement, the property passes to his heirs without the imposition of an ordinary income tax or capital gains tax as no taxable event will have occurred. Additionally, if Mr. Hovis decides not to retire at age sixty-five and continues to work until, say, the

19 Hovis v. Hovis, 541 A.2d 1378 (Pa. 1988).
20 *Id*. at 1378.
21 *Id*.
22 *Id*. at 1379.
23 *Id*.
24 *Id*.
25 *Id*. at 1380.

> age seventy or seventy-five, the trial court would be unable to reasonably predict what his future tax liability would be because tax rates constantly change. Consequently, a present deduction from the value of a marital asset for future tax liability that cannot reasonably be calculated and, in fact, may never be imposed could result in a windfall to Mr. Hovis and a corresponding disadvantage to Mrs. Hovis.[26]

Accordingly, the *Hovis* court held potential tax liability may be considered only when triggered by divorce or when certain to occur after the divorce as a result of equitable distribution.[27] Many state courts have reached similar conclusions, finding that consideration of potential tax liability is speculative and puts the court in the unfavorable position of attempting to predict the future.[28]

Courts favoring consideration of future tax consequences as a factor in property division have noted that when two assets have fair market values that are roughly equivalent, but each has a significantly different tax basis, dividing the property by awarding each spouse one of the assets would not result in an equitable division.[29] This is because the asset with the smaller tax basis will incur substantially more capital gains tax liability, and looking only to the fair market value of an asset while failing to consider tax consequences would result in an unbalanced distribution of tax liability.[30] As the court in *Maurer v. Maurer*[31] noted, al-

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26 *Id.*

27 *Id.* at 1381.

28 *See In re* Marriage of Debuff, 50 P.3d 1070 (Mont. 2002); Oberhansly v. Oberhansly, 798 P.2d 883 (Alaska 1990); *In re* Marriage of Fonstein, 552 P.2d 1169 (Cal. 1976).

29 "If both of the assets are sold relatively soon after the dissolution, a likely prospect in view of the ages of the parties, the tax consequences would create an inequitable disparity favoring the spouse receiving the marital residence. It cannot be said that valuation of assets without taking into account the tax consequences is fairly reflective of the market value of the assets to the parties." Miller v. Miller, 625 So. 2d 1320, 1321 (Fla. Dist. Ct. App. 1993) (citing Nicewonder v. Nicewonder, 602 So. 2d 1354, 1358 (Fla. Dist. Ct. App. 1992) (Zehmer, J., *concurring*)).

30 Furthermore, if future tax liability is not addressed at the time of divorce, a spouse may lose the right to raise the issue at a later time, except if a dramatic change occurs in the parties' circumstances. *See*, *e.g.*, Ivison v. Ivison, 762 So. 2d 329, 337 (Miss. 2000) (stating "ignorance of the tax laws is not a basis for modification of the divorce agreement," and finding that where the current tax laws were the same laws as those in effect when the judgment was entered, no material or substantial change in circumstances existed).

though the exact dollar amount of future tax liability may be unknown, "such uncertainty is outweighed by the fact that . . . it is practically certain that [the asset] will be taxed."[32]

Those in favor of consideration of future tax consequences argue that because courts can use reliable statistical methods to determine a range of possible future tax liabilities likely to be assessed against an asset, courts should employ those methods to establish an average tax value which they could assess against the property to be distributed.[33] Courts could also consider the breadth of the range of possibilities, or standard deviation of the range.[34] By doing so, when the range of possible future tax consequences is overly broad, a court could then decline to consider future tax consequences due to their implied speculative nature.[35] This practice would raise the probability of accuracy, thereby reducing the amount of speculation to an acceptable, reasonable predictability.[36]

While arguments in favor of consideration of future tax liability have their merits,[37] unfortunately, these arguments rely on the predictability of the event triggering tax recognition, usually the sale or transfer of an asset. The reality is that when the occurrence of the triggering event depends on an individual's future decisions, a court will still be in the position of attempting to determine whether the triggering event is reasonably predictable. As a result, as described in the following survey, many courts refuse to consider tax liability unless the triggering event is mandated by the divorce decree, or is otherwise incident to the divorce.

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31 623 N.W.2d 604 (Minn. 2001).

32 *Id.* at 608 (specifically disagreeing with the holding in *Hovis*).

33 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:29 (3d ed. 2006).

34 *Id.*

35 *Id.*

36 *Id.*

37 As discussed *supra*.

III. A Survey of State Court Treatment of Future Federal Tax Liability in the Valuation and Division of Property at Divorce

This section provides an overview of how states treat inclusion of future tax liability in valuation of marital property and, where possible, identifies where states have drawn the line between reasonable prediction of tax liability and unjustified speculation.

Alabama

The Alabama divorce code does not specifically authorize a court to consider tax liability.[38] In fact, the code gives very little guidance to the court on factors for consideration in property division, other than generally allowing a judge to use discretion to consider "the value [of the estate] and the condition of the spouse's family."[39] Interestingly, the statute contains fairly detailed instruction on division of retirement benefits, but does not specifically mention present or future tax considerations.[40]

Case law indicates Alabama courts consider tax liability when the liability is the result of a court-ordered liquidation of assets or is triggered by the division of property between spouses. Specifically, in *Garris v. Garris*,[41] after the trial court granted the husband's motion to modify an existing divorce order to require the wife to pay taxes incurred when the husband liquidated his retirement fund, the appellate court held:

> Inherent in an equal division of the proceeds is the equal division of costs to obtain the remaining liquid assets. When the trial court subsequently entered a judgment against the wife for one-half of the taxes and penalties incurred, it did no more than enforce the original judgment, as it was empowered to do. . . . it had the authority to clarify and enforce its original judgment to the extent of ensuring that the funds remaining be equally divided between the parties as intended by the original divorce judgment.[42]

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[38] ALA. CODE §§ 30-2-1 to -55 (2006).
[39] ALA. CODE § 30-2-51 (2006).
[40] *Id.*
[41] 643 So. 2d 993 (Ala. Civ. App. 1994).
[42] *Id.* at 995 (citing Filer v. Filer, 502 So. 2d 698, 701 (Ala. 1987)).

The *Garris* court determined that the tax liability triggered by the husband's liquidation of the retirement fund affected the overall value of the fund and, therefore, retroactively applied the liability to maintain an equitable division. In effect, the court treated the husband's liquidation of the fund as a tax liability incurred incident to divorce.

Alaska

The Alaska statute governing property division lists several factors for the court's consideration and gives the court broad discretion in determining any additional factors that may be relevant to the case.[43] Although the statute does not specifically refer to present or future tax consequences, Alaska has substantial case law on the subject.

In *Wells v. Wells*[44] the court explained tax liability may be considered in valuation of property only when that liability is "immediate and specific."[45] The *Wells* court affirmed a lower court decision which failed to consider future tax liability as a factor affecting the value of the husband's 401(k) plan, emphasizing that the burden is on the parties to prove tax liability.[46] The court found that because the husband did not demonstrate any immediate and specific tax consequences he would incur as a result of the property division, he did not meet his burden of proof and was therefore not entitled to consideration of tax liabilities.[47]

The Alaska Supreme Court has been consistent in the position that courts need not consider future tax liability, interpreting "immediate and specific" to mean a spouse must show that the tax liability resulted from property division, as well as providing evidence of the liability. As the *Wells* court observed, in *Oberhansly v. Oberhansly*[48] the court first considered tax liability because the court was "concerned that failing to consider tax consequences would make an otherwise equitable property divi-

43 ALASKA STAT. § 25.24.160(a)(2)(G) (2007).

44 Nos. S-11057/11069, No. 1161, 2004 Alas. LEXIS 33 (Alaska Mar. 17, 2004).

45 *Id.* at *2.

46 *Id.* at *14.

47 *Id.* at *13-14, 16.

48 798 P.2d 883 (Alaska 1990).

sion inequitable."[49] This decision made clear that once the issue of tax liability had been raised, the court would give it proper consideration.[50] However, the *Wells* court clarified, "the [appellate] court need not speculate or consider consequences when the party does not prove that a taxable event will occur as a result of the property division."[51]

The Alaska Supreme Court applied the same principles to the cases which followed,[52] and then in *Dodson v. Dodson*[53] the court affirmed an appellate court holding in which the court had considered tax consequences in valuation of the husband's 401(k) account. In *Dodson*, the trial court awarded the husband's 401(k) to the wife and considered future tax liability by discounting the value by thirty-one percent.[54] The Alaska Supreme Court held "regardless of whether [the wife's] future tax liability was immediate and specific, we conclude that the [appellate] court did not err" in discounting the retirement account by the future tax liability.[55] The court upheld the lower court's consideration of the tax consequences associated with liquidating the account due to the "complex and sophisticated circumstances present in the case."[56]

Importantly, *Dodson* implies that there are factors other than immediate and specific tax liability that may influence whether Alaska courts will allow consideration of future tax liability. Even so, in cases after *Dodson*, Alaska courts have continued to hold that tax liability must be immediate and specific to merit consideration in valuation of retirement benefits and other

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49 *Wells*, 2004 Alas. LEXIS 33, at *14 (citing Oberhansly v. Oberhansly, 798 P.2d 883 (Alaska 1990)).

50 *Oberhansly*, 798 P.2d at 886.

51 *Wells*, 2004 Alas. LEXIS 33, at *14 (citing *Oberhansly*, 798 P.2d at 887-88).

52 *See, e.g.*, Money v. Money, 852 P.2d 1158, 1163 (Alaska 1993); Barnes v. Barnes, 820 P.2d 294, 297 (Alaska 1991).

53 955 P.2d 902 (Alaska 1998).

54 *Id.* at 909.

55 The court declared "the parties dispute whether there was evidence of an 'immediate and specific tax liability.' We need not determine whether such a tax liability is present in this case. Regardless of whether [the wife's] future tax liability was immediate and specific, we conclude that the [appellate] court did not err." *Id.*

56 *Wells*, 2004 Alas. LEXIS 33, at *15 (defending the decision in *Dodson*).

property subject to division at divorce.[57] Yet, the *Dodson* decision remains in force and serves to show some cases are especially complex and consideration of future tax liability may be the only route to achieving an equitable outcome.

Arizona

Arizona statutes do not include tax liability as a factor for consideration in valuation of property in divorce.[58] Arizona courts have generally refused to consider future tax consequences, considering tax liability only when it is immediate and specific.[59] For example, in *Mitchell v. Mitchell*[60] the Arizona Court of Appeals flatly refused to consider future tax liability declaring "the *potential* tax consequences which may result from a sale of property should not be considered by the court when valuing the community equity in the property."[61]

Arkansas

In Arkansas, federal tax consequences of the state court's division of property are specifically listed as a statutory factor for consideration in division of property at divorce.[62] Arkansas

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[57] *See, e.g.*, Fortson v. Fortson, 131 P.3d 451 (Alaska 2006) (holding that where the sale of property has not been ordered by the court, future tax consequences need not be considered); Broadribb v. Broadribb, 956 P.2d 1222 (Alaska 1998) (holding that a court need not consider tax consequences associated with exercising stock options); and, as discussed *supra* in text at notes 45-52, *Wells*, 2004 Alas. LEXIS 33.

[58] ARIZ. REV. STAT. § 25-318 (2006).

[59] Biddulph v. Biddulph, 711 P.2d 1244, 1246 (Ariz. Ct. App. 1985) (holding only "consequences resulting from the decree should be considered and that tax consequences arising from the future disposition of an asset should not").

[60] 732 P.2d 203 (Ariz. Ct. App. 1985), *modified on other grounds*, 732 P.2d 208 (Ariz. 1987).

[61] *Id.* at 207 (emphasis added). *See also* Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (holding courts should decline to consider the speculative future effect of taxes in valuing an interest in a retirement plan unless the maturity date is close to the trial date, in which case the tax consequences could be immediately and specifically determined and should be considered (citing Johnson v. Johnson 638 P.2d 705 (Ariz. 1981))); Rowe v. Rowe, 744 P.2d 717 (Ariz. Ct. App. 1987) (holding the trial court's failure to consider tax consequences in valuation of the pension plan was not erroneous because tax consequences were too speculative).

[62] ARK. CODE ANN. § 9-12-315(a)(1)(A)(ix) (2006).

courts have generally interpreted this factor to enable the court to consider tax consequences incident to the divorce, but not future tax consequences. Arkansas case history with regard to future tax liability is mixed. For example, in *Grace v. Grace*[63] the court held "where there was no demonstrable federal income tax consequence resulting from the division of the property, the decree did not require a sale, and there was no evidence that a sale was imminent," the lower court erred when it considered the amount of federal tax that might be incurred if the asset were sold at some time in the future.[64] However, as a workaround to the issue of whether the court should consider future tax liability, at least one Arkansas court has chosen to retain jurisdiction so the parties can raise and resolve tax issues as they arise.[65]

California

Although California property division statutes do not specifically include federal tax consequences as a factor for consideration by the court,[66] California courts generally consider federal tax liability only when it is immediate and specific,[67] and decline to consider tax consequences when the liability is merely speculative.[68] As Arkansas courts have done, one California court suggested if future tax liability is too speculative for accurate consideration, rather than deny consideration entirely, a court

63 930 S.W.2d 362 (Ark. 1996).

64 *Id.* at 363.

65 Bagwell v. Bagwell, 668 S.W.2d 949, 951-52 (Ark. 1984) (holding "the tax consequences which subsequently evolve from a property division should not be permitted to operate inequitably, and where there were doubts as to fairness of imposition on husband of tax liability on sales of property, court should retain jurisdiction until tax results could be ascertained."). *See also* Day v. Day, 663 S.W.2d 719 (Ark. 1984).

66 Cal. Fam. Code §§ 2500-2660 (Deering 2006).

67 *See In re* Marriage of Sharp, Civ. No. 26258, 1983 Cal. App. LEXIS 1805, at *8-9 (Cal. Ct. App. June 7, 1983) (holding that upon the division of community-owned shares of a corporation, and where "the wife's withdrawal is present and immediate and the tax consequences certain . . . in order to equalize the division of the community property, the capital gains tax should be borne equally by both spouses").

68 *See In re* Marriage of Fonstein, 552 P.2d 1169, 1175 (Cal. 1976) (holding that where withdrawal of retirement funds is not a consequence of the property division, the court need not consider future tax consequences).

might retain jurisdiction so the issue may be addressed in the future when the actual effect of the liability is known.[69]

Colorado

The Colorado Disposition of Property statute does not address whether tax liability is a factor courts may consider in valuation of property.[70] Nor is there significant Colorado case history on the subject. The Colorado Supreme Court briefly acknowledged consideration of tax liability in *In re Marriage of Gallo*.[71] The *Gallo* court cites Illinois law in a discussion of methods of valuation of retirement benefits, finding tax assumptions could be used to determine the value of the fund.[72] However, the court also noted that the value is determined as of the date of dissolution, implying that the court is not likely to consider future tax consequences in valuing the fund.[73]

Similarly, the court in *In re Marriage of Finer*[74] found that "in valuing property, the trial court may, in its discretion, consider tax consequences."[75] Yet, the court noted there must be evidence that the spouse will sell the property, and remanded the case to the trial court to determine whether the husband intended to sell the property.[76] In this case the court established a position similar to the position taken by Alaska state courts; that is, to justify consideration of future tax liability, a party must provide evidence of immediate and specific tax liability.

Connecticut

Tax liability is not specifically addressed in the Connecticut statutes describing assignment and valuation of property incident

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69 *See In re* Marriage of Epstein, 592 P.2d 1165, 1172 (Cal. 1979) (superseded by statute on unrelated point). Note that the court did not choose to retain jurisdiction in this case, but only suggested the possibility.

70 COLO. REV. STAT. § 10-14-113 (2006).

71 *In re* Marriage of Gallo, 752 P.2d 47 (Colo. 1988).

72 *Id*. at 54.

73 *Id*.

74 920 P.2d 325 (Colo. App. 1996) *rev'd on other grounds*, 745 P.2d 661 (Colo. 1987)).

75 *Id.* at 332 (citing *In re* Marriage of Grubb, 721 P.2d 1194 (Colo. App. 1986).

76 *Finer*, 920 P.2d at 332.

to divorce.[77] As a result, although Connecticut courts claim to have authority to consider the tax implications of their orders,[78] they commonly uphold decisions declining to consider tax consequences.[79] When Connecticut courts choose to consider federal tax liability, usually it is only with regard to income or property taxes, or available exemptions and credits.[80] But Connecticut case history indicates the courts are reluctant to consider tax liability such as capital gains. For example, in *Rolla v. Rolla*[81] when a husband asked the court how the property division could possibly be equal "in view of the substantial capital gains taxes that will be incurred as a result of the liquidation of assets necessary to obtain the cash required" to achieve distribution, the court responded saying simply, "under our law, a trial court is not *required* to consider the federal tax consequences of its orders" (emphasis in original).[82]

Delaware

Delaware divorce statutes specifically recognize tax consequences as a factor a court should consider when valuing and dividing marital property.[83] Delaware courts have interpreted the code to require that property division "must be undertaken

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77 CONN. GEN. STAT. § 46b-81 (2006).

78 Damon v. Damon, 579 A.2d 124, 126 (Conn. App. Ct. 1990) (noting that the trial court may have declined to force the sale of the family home due to tax implications); Powers v. Powers, 438 A.2d 846 (Conn. 1982) (upholding a lower court's consideration of income tax liability associated with alimony).

79 *See*, *e.g.*, Sander v. Sander, 899 A.2d 670, 678 (Conn. App. Ct. 2006) (noting that because the statute does not specifically list tax implications as a consideration for property valuation, the court is not required to consider them); Clement v. Clement, 606 A.2d 36, 39 (Conn. App. Ct. 1992) (holding that the lower court did not err by failing to consider tax consequences because "there is no requirement in the applicable statutes which makes it mandatory that a trial court consider the federal tax [implications] of its financial orders").

80 *See*, *e.g.*, Brown v. Brown, No. FA020125194, 2003 Conn. Super. LEXIS 1671 (Conn. Super. Ct. June 6, 2003) (referring to a court's right to consider tax implications, then discussing only exemptions and credits); Banas v. Banas, No. 102450, 1995 Conn. Super. LEXIS 542 (Conn. Super. Ct. Feb. 24, 1995) (discussing a court's right to consider tax implications, then discussing only property taxes, tax liens, and income taxes).

81 712 A.2d 440 (Conn. App. Ct. 1998).

82 *Id*. at 447.

83 DEL. CODE ANN. tit. 13, § 1513(a)(11) (2007).

with a view toward mitigating the potential harm to each party after the divorce."[84] In light of this view, the Delaware Supreme Court has a record of considering future tax consequences when dictated by fairness.

In *Donovan v. Donovan*[85] the Delaware Supreme Court held the trial court erred when it decided it would not allocate tax liability in the absence of specific evidence of tax consequences resulting from the husband's withdrawal of funds from his thrift plan account.[86] The court noted that although the err was not an abuse of discretion, the trial court should consider tax liability in the interest of fairness because the withdrawal was court-ordered and capital gains taxes may reduce the cash value of the husband's payout.[87] The Delaware Supreme Court remanded the case so the trial court could give additional consideration to that matter as the court believed was required by Delaware statute.[88]

Delaware's approach to consideration of tax liability on valuation of assets seems to be linked primarily to fairness, rather than first looking to timing or sufficient evidence as many other states do. A determination of fairness, presumably, is at the discretion of the court.

District of Columbia

The District of Columbia property distribution statute has more than one provision for tax liability.[89] These provisions require the court to consider the taxability of an asset as well as the effect of taxes on the value of the asset subject to distribution, thereby distinguishing between taxes such as property taxes and capital gains taxes.[90] Accordingly, District of Columbia courts have noted "tax liabilities are an appropriate and a relevant factor for consideration in dividing property upon divorce."[91] How-

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84 J.D.P. v. F.G.H., 399 A.2d 207, 210 (Del. 1979).
85 494 A.2d 1260 (Del. 1985).
86 *Id.* at 1264.
87 *Id*.
88 *Id*. (referring specifically to DEL. CODE ANN. tit. 13, § 1513(a)(11)).
89 D.C. CODE ANN. §§ 16-910(b)(10) and (11) (2006).
90 *Id*.
91 Bowser v. Bowser, 515 A.2d 1128, 1131 (D.C. 1986) (citing Leftwich v. Leftwich, 442 A.2d 139, 144 (D.C. 1982)).

ever, District of Columbia courts are silent with regard to consideration of future tax liability.

Florida

The statute governing property distribution in Florida does not specifically mention tax liability.[92] Yet, in several cases Florida appellate courts have overturned lower courts due to their failure to consider future tax liability in the valuation of distributed property. For example, in *Mullen v. Mullen*[93] the appellate court remanded the case to the trial court to determine tax consequences in valuation of the wife's early liquidation of her IRA. The *Mullen* court cited *Nicewonder v. Nicewonder*, stating that "a trial court is required to consider the consequences of income tax laws on the distribution of marital assets . . . and failure to do so is ordinarily reversible error."[94] The *Nicewonder* court had previously explained "the trial court should consider all tax consequences, including contingent tax liabilities, that affect the value of the properties distributed to the husband and wife."[95]

Nonetheless, when tax liability claims are not supported by evidence of an immediate and specific liability, Florida courts do not permit speculation.[96] The court in *Goodwin v. Goodwin*[97] made this policy clear when it upheld the lower court's refusal to consider tax consequences because the husband produced no evidence of present tax liability, there was no indication the sale of property was imminent, and it was apparent that the amount of tax eventually owed, if any, was a matter of pure speculation.[98]

Although the court in *England v. England*[99] observed "it [is] unproductive to attempt to set forth any bright-line rule as to

92 FLA. STAT. § 61.075 (2006).

93 825 So.2d 1078 (Fla. Dist. Ct. App. 2002).

94 *Id*. at 1079 (citing Nicewonder v. Nicewonder, 602 So.2d 1354, 1357 (Fla. Dist. Ct. App. 1992)).

95 *Nicewonder*, 602 So.2d at 1357 (Fla. Dist. Ct. App. 1992); *see also Miller*, 625 So. 2d 1320, discussed *supra* at note 31.

96 *See*, *e.g*., Mobley v. Mobley, 920 So. 2d 97 (Fla. Dist. Ct. App. 2006); Baker v. Baker, 763 So. 2d 493 (Fla. Dist. Ct. App. 2000); King v. King, 719 So. 2d 920 (Fla. Dist. Ct. App. 1998); Levan v. Levan, 545 So. 2d 892 (Fla. Dist. Ct. App. 1989).

97 640 So. 2d 173 (Fla. Dist. Ct. App. 1994).

98 *Id*. at 175.

99 626 So. 2d 330 (Fla. Dist. Ct. App. 1993).

when potential tax consequences are appropriately considered and when they are not,"[100] Florida courts have a history of following a principle of considering future tax liability only when evidence supports it.

Georgia

Georgia Domestic Relations code does not list any factors for consideration in valuation or division of marital property,[101] and very little case law exists illustrating how Georgia courts treat consideration of future tax liability. However, cases such as *Kreimer v. Kreimer*[102] indicate the Georgia Supreme Court permits consideration of tax liability in property distribution. In *Kreimer* the court held that in the division of the spouses' jointly held stock, "it is the after-tax valuation of the stock that is essential" and it did not matter which spouse held which shares after the division, "so long as the after-tax value of both parties' holdings are equal."[103] Interestingly, the court was unconcerned with the issue of *when* the stock would be liquidated and the tax liability incurred.

Hawaii

According to Hawaii divorce statutes, courts have broad discretion with regard to property distribution and valuation of assets.[104] The court may allocate expenses incurred by each party incident to divorce, and the court must consider a long list of factors including "all other circumstances of the case."[105] Yet, despite the broad discretion afforded by the statute, Hawaii courts do not tolerate consideration of future tax liability in the valuation of property, describing it as speculation.[106]

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100 *Id*. at 333.

101 GA. CODE ANN. § 19-5-13 (2006).

102 552 S.E.2d 826 (Ga. 2001).

103 *Id.* at 829.

104 HAW. REV. STAT. § 580-47 (2006).

105 *Id*.

106 *See* Jackson v. Jackson, 933 P.2d 1353, 1363 (Haw. Ct. App. 1997) (noting that where the husband had never paid any taxes at any time during the marriage, "a discount for future tax consequences of property division . . . would be based on speculation and is inappropriate"); Gardner v. Gardner, 810 P.2d 239 (Haw. Ct. App. 1991) (finding that the trial court had erred by assuming a sale of the home and assessing tax liability, and because the house was not

Idaho

The Idaho statutory scheme governing divorce instructs courts to approach property division with the goal of achieving "a substantially equal division in value, considering debts, between the spouses."[107] Accordingly, the Court of Appeals of Idaho held in *Carr v. Carr*,[108] when a family business was sold under court order, the court was obligated to consider the tax consequences of the sale. The court has not addressed future tax liability.

Illinois

In property distribution determinations, Illinois courts are statutorily required to divide the marital property in just proportions considering "tax consequences of the property division upon the respective economic circumstances of the parties."[109] Yet, when Illinois courts find future tax consequences overly speculative, they disregard such information. As with many other jurisdictions, Illinois will not consider future tax consequences when no evidence exists that tax liability will be incurred. For example, in *In re Marriage of Hawkins*[110] the husband appealed because the lower court did not consider tax implications in its valuation of an orchard which had been designated as marital property. The appellate court upheld the lower court's decision, finding:

> While a court should take into consideration tax consequences resulting from a sale of property made necessary by the court's judgment in a dissolution case, the court should not speculate as to the existence and amount of future tax liabilities when no such sale is contemplated by the parties or required by the court's division of property.[111]

In *Hawkins*, because the court did not order the sale of the property and no evidence existed of any intent to sell the prop-

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sold "discussion about [the husband] owing capital gains taxes was speculation").

107 Idaho Code § 32-712 (2006).

108 701 P.2d 304, 310 (Idaho Ct. App. 1985).

109 750 Ill. Comp. Stat. 5/503(d)(12) (2007).

110 513 N.E.2d 143 (Ill. App. Ct. 1987).

111 *Id.* at 148-49 (citing *In re* Marriage of Malters, 478 N.E.2d 1068 (Ill. App. Ct. 1985); *In re* Marriage of Emken, 427 N.E.2d 125 (Ill. 1981); and *In re* Marriage of Johnson, 436 N.E.2d 228 (Ill. App. Ct. 1982)).

erty, the court found it did not need to consider possible future tax consequences.[112] Many other cases have held likewise, establishing Illinois policy to disregard tax consequences that a court considers purely hypothetical.[113]

Indiana

The Indiana statutory scheme for divorce includes a provision specifically mandating "the court, in determining what is just and reasonable in dividing property . . . shall consider the tax consequences of the property disposition with respect to the present *and future* economic circumstances of each party."[114] However, seemingly contrary to the plain language of the statute, Indiana courts have consistently held future tax consequences are too speculative in nature to be considered in valuation and division of marital property.[115]

As is true with many other states, when a spouse is required by the terms of the divorce to liquidate assets, Indiana courts will consider tax consequences resulting from that transaction.[116] Yet, this is the only instance in which Indiana courts will consider taxes incurred from the sale of assets to a third party.

Iowa

Iowa courts are statutorily required to consider tax consequences when dividing marital property.[117] Nonetheless, al-

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112 *Id*.

113 *Id*. *See also In re* Marriage of Alexander, 857 N.E.2d 766 (Ill. App. Ct. 2006); *In re* Marriage of Perino, 587 N.E.2d 54 (Ill. App. Ct. 1992); *In re* Marriage of Davis, 576 N.E.2d 44 (Ill. App. Ct. 1991).

114 IND. CODE § 31-15-7-7 (2006) (emphasis added) (original version at IND. CODE § 31-1-11.5-11.1, *repealed by* Ind. Pub. L. No. 1-1997, § 7).

115 *See*, *e.g*., Harlan v. Harlan, 544 N.E.2d 553 (Ind. Ct. App.), *aff'd*, 560 N.E.2d 1246 (Ind. 1990); Knotts v. Knotts, 693 N.E.2d 962 (Ind. Ct. App. 1998), *transfer denied*, 706 N.E.2d 167 (Ind. 1998); Dowden v. Allman, 696 N.E.2d 456 (Ind. Ct. App. 1998); Qazi v. Qazi, 492 N.E.2d 692 (Ind. Ct. App. 1986), *transfer denied*, 503 N.E.2d 894 (Ind. Ct. App. 1987); DeHaan v. DeHaan, 572 N.E.2d 1315 (Ind. Ct. App. 1991); Granger v. Granger, 579 N.E.2d 1319 (Ind. Ct. App. 1991); Nill v. Nill, 584 N.E.2d 602 (Ind. Ct. App. 1992).

116 *See* Irvine v. Irvine, 685 N.E.2d 67 (Ind. Ct. App. 1997) (holding the trial court erred by not considering the tax consequences resulting from husband's liquidation of his pension plan as required under court order of immediate payout to wife, and by husband's and wife's binding antenuptial agreement).

117 IOWA CODE § 598.21(5)(j) (2005).

though Iowa courts will allocate taxes certain to be incurred when circumstances force a liquidation of assets,[118] a recent Iowa appellate ruling affirmed a lower court's decision denying a husband the benefit of tax liability recognition. In *In re Marriage of Lenz*[119] the court upheld the trial court's decision because liquidation of assets was not "relatively certain."[120] *Lenz* involved a property division in which the court ordered the husband to make a lump sum payment to his wife. Yet, the court found because the liquidation of marital assets was not court-ordered and the husband could have obtained loans or sold other real property to acquire the necessary funds for the lump sum payment, the sale of assets was not certain and the court was not obligated to consider the tax consequences.[121]

Lenz is one of many cases in which Iowa courts have drawn a bright line between situations in which tax consequences are certain to result, and situations in which tax consequences are speculative or merely potential liabilities.[122] Furthermore, Iowa courts will consider tax consequences only if sufficient evidence exists that tax recognition will occur,[123] and only if that tax recognition results in an inequitable division of the marital property.[124] The implication is that Iowa courts will not consider future tax

118 *See In re* Marriage of Hogeland, 448 N.W.2d 678 (Iowa Ct. App. 1989) (holding when the husband had no option but to sell his assets to satisfy the court order, the court must consider the tax consequences of doing so).

119 No. 6-103/05-0997, 2006 Iowa App. LEXIS 291 (Iowa Ct. App. Mar. 29, 2006).

120 *Id.* at *11-10

121 *Id.*

122 *Id. See also In re* Marriage of Hayne, 334 N.W.2d 347 (Iowa Ct. App. 1983) (holding that the trial court was not obligated to consider the tax consequences of the husband liquidating his retirement plan when he had other options available).

123 *See e.g.*, *In re* Marriage of Friedman, 466 N.W.2d 689 (Iowa 1991) (finding that when there was no evidence to support discounting the husband's stock because court had not ordered a sale and no sale was pending or even considered, the trial court was correct not to consider tax consequences); *In re* Marriage of Justice, No. 5-115/04-0675, 2005 Iowa App. LEXIS 354 (Iowa Ct. App. Apr. 28, 2005) (finding that even though the husband was awarded a disproportionate amount of the property likely to incur capital gains taxes, the trial court was correct not to consider his tax consequences because evidence of actual tax consequences was sparse).

124 *See e.g.*, *In re* Marriage of Byall, 353 N.W.2d 103 (Iowa Ct. App. 1984) (affirming the trial court's property division because the trial court's failure to

liability unless substantial evidence exists that tax recognition is a certain result of the divorce decree, and that no other options are available to satisfy the order.

Kansas

Similar to many other states, the Kansas statutory requirements for property division require that a court consider "the tax consequences of the property division upon the respective economic circumstances of the parties."[125] However, Kansas courts have a unique way of approaching the issue of tax consequences. The Kansas Supreme Court has rejected that tax consequences must be considered in valuation of property, reasoning that valuing property at its liquidation value rather than its fair market value "would prevent a court from ever valuing property at more than cost because of tax consequences."[126] Instead, Kansas courts must consider tax liability when the tax liability itself produces an inequitable result.[127] The difference is that the focus is on the tax consequences at division, not the valuation of the property.

For example, in *Bohl v. Bohl*[128] when the trial court ordered the husband to satisfy the divorce judgment by liquidating his company, the Kansas Supreme Court remanded to the trial court to consider alternative methods for the husband to satisfy the judgment. The court reasoned "it would be unfair to require Mr. Bohl to liquidate his company and turn the proceeds over to Mrs. Bohl with nothing left for him" due to the husband's tax liability.[129] Accordingly, on remand the trial court found an alternative method to satisfy the judgment without forcing the liquidation of the company, and without consideration of tax rec-

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consider tax consequences to the spouses did not result in an inequitable property division).

125 KAN. STAT. ANN. § 60-1610(b)(1) (2006).

126 Bohl v. Bohl, 657 P.2d 1106, 1111 (Kan. 1983).

127 *Id*. *See also In re* Marriage of Burris, No. 65,507, 1991 Kan. App. LEXIS 878, at *6-7 (Kan. Ct. App. Nov. 8, 1991) (noting "the payment of attorney fees . . . may require the liquidation of assets, which, in view of the after tax effect of the property division, means that the trial court did not in this area give proper consideration to tax consequences").

128 *Bohl*, 657 P.2d at 1111.

129 *Id*.

ognition in valuation of the company.[130] In effect, by requiring the trial court to consider the tax consequences of the judgment, the Kansas Supreme Court held that a trial court must consider how immediate tax consequences resulting from a court order affect the overall equity of a property division, but a trial court may disregard future tax consequences with regard to valuation of that same property.[131]

Kentucky

The Kentucky Property Disposition statute requires a court to consider the value of the property to be divided as well as "the economic circumstances of each spouse *when the division of the property is to become effective*."[132] The statute contains no specific requirement to consider tax consequences,[133] yet in *Owens v. Owens*[134] the Kentucky Court of Appeals interpreted this statute to require that a court must consider tax liability incurred as a result of property division. The *Owens* court held that if dividing and liquidating the husband's interest in his retirement plan at the time of divorce would result in severe tax penalties, the trial court had the discretion to retain jurisdiction and to delay the division of the plan until it was payable without incurring tax penalties.[135] The court held that in such a case to not consider the tax consequences would be an abuse of discretion.[136]

Of course, when the court considers tax liability and decides an equitable division of property can be accomplished by liquidating the funds at divorce without delaying judgment, the court may do so.[137] However, Kentucky appellate courts are silent regarding whether consideration of tax consequences is within the

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130 Bohl v. Bohl, No. 54,376, 1983 Kan. LEXIS 342 (Kan. June 24, 1983).

131 *See also* Reich v. Reich, 680 P.2d 545 (Kan. 1984) (holding that when liquidation of marital property is required, the trial court must consider tax consequences).

132 KY. REV. STAT. ANN. § 403.190 (2006) (emphasis added).

133 *Id.*

134 672 S.W.2d 67, 69 (Ky. Ct. App. 1984).

135 *Id*.

136 *Id*.

137 Halicks v. Halicks, No. 2003-CA-000910-MR, 2004 Ky. App. LEXIS 318, at *4-5 (Ky. Ct. App. Oct. 29, 2004) (affirming the lower court's order to liquidate and distribute the husband's retirement plan and observing the lower court met its obligation to consider tax consequences because it "acknowledged

trial court's discretion when those liabilities are not incurred immediately but may occur in the future.

Louisiana

The Louisiana matrimonial statutory scheme does not address tax liability as a factor for consideration when dividing marital property, and provides very little guidance to the court in general.[138] Perhaps as a result, in 1977 the Louisiana Court of Appeals flatly refused to consider tax consequences of property division in *Moon v. Moon*[139] when it held "any dispute about the tax burden on the retirement benefits is between the parties and the taxing authorities. Taxation issues are not properly before us in the present divorce proceedings."[140]

Yet in subsequent cases Louisiana courts have interpreted the property division statute as intending "to effect an equitable distribution of community assets and liabilities."[141] It was from this point of view the court in *Hannan v. Hannan*[142] reasoned that equitable division of a spouse's retirement fund required the spouses share equally in the rights and liabilities associated with the community property, including tax liability. The court distinguished the *Hannan* case from other cases in which tax liability had not been allocated between the spouses, pointing out that in cases where tax liability was not allocated the liability was not incurred as a result of a court order.[143] The implication is that Louisiana will consider tax liability as a factor in property valuation and division only when the liability is incurred incident to the divorce.

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that the distribution will create a tax burden on the parties and used its discretion to divide the plans fairly").

138 LA. REV. STAT. ANN. § 9:2801 (2006).

139 345 So. 2d 168 (La. Ct. App. 1977), *overruled on different grounds by* McCarty v. McCarty, 453 U.S. 210 (1981).

140 *Id.* at 176.

141 Hannan v. Hannan, 761 So. 2d 700, 704 (La. Ct. App. 2000).

142 *Id*.

143 *Id*. (distinguishing Ramstack v. Krieger, 470 So. 2d 162, 166-67 (La. Ct. App. 1985), *writ denied*, 474 So. 2d 1310 (La. 1985)).

Maine

The Maine statute governing property disposition is very similar to Louisiana's. The statute gives very little specific guidance to the court on factors for consideration when dividing marital property and requires consideration of "the economic circumstances of each spouse at the time the division of property is to become effective."[144] The statute does not specifically address tax liability.[145]

As is true for many other states, Maine case law has established that "the court must consider the tax consequences of distributions it actually orders in its decree."[146] But, future tax liability is generally not a consideration. For example, the court in *Crooker v. Crooker*[147] observed "the value of marital assets should be determined as of the time they are distributed without reference to possible future events," referring to consideration of "potential but unrealized liabilities" as indulgence in speculation.[148] Also, Maine courts will not consider future tax liability by deferring judgment reasoning that deferment fails to achieve the goal of most states to permanently and finally separate the finances of the spouses.[149]

Nonetheless, the Maine Supreme Court has remanded cases for consideration of future tax liability on at least two occasions. In *Bayley v. Bayley*[150] and in *Dubord v. Dubord*[151] the court held the divorce court should have considered tax consequences of a future sale in valuing the property. In *Bayley*, the wife made her intent to sell the property known to the lower court, and she obtained a court order authorizing prejudgment sale of the property.[152] She testified that she could not remain in the home because of the cost of maintaining the home and that she did not wish to live so close to her ex-husband, his business, and his fam-

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144 ME. REV. STAT. ANN. tit. 19-A, § 953 (2006).

145 *Id.*

146 Crooker v. Crooker, 432 A.2d 1293, 1297 (Me. 1981).

147 *Id.*

148 *Id.*

149 *See*, *e.g.*, Berry v. Berry, 658 A.2d 1097, 1099 (Me. 1995) (holding that a court should attempt to "divide the marital property in such a manner as to avoid continued financial interaction between the parties").

150 Bayley v. Bayley, 611 A.2d 570, 571 (Me. 1992).

151 Dubord v. Dubord, 687 A.2d 647, 650 (Me. 1997).

152 *Bayley*, 602 A.2d at 1154.

ily.[153] As a result, the court found "the divorce court did not have to speculate about a potential sale, the home was listed for sale, and by court order a legitimate offer had to be accepted."[154]

In *Dubord* the husband made his intent to sell the properties known to the divorce court.[155] His testimony reflected that his business income had been "greatly diminished," and his "obligations pursuant to the divorce judgment could only be satisfied by selling the marital property, and that he was meeting his obligation of the temporary support order through the sale of property."[156] In this case the court held the trial court should have considered the future tax consequences of a property sale.[157]

Common to both cases is the fact that the divorce court had substantial evidence demonstrating an impending future sale of the marital assets. In such cases, where the future sale is a relative certainty, Maine courts consider the resulting tax liability in valuation of the assets prior to division.

Maryland

Similar to divorce statutes in many other states, Maryland statutory factors covering property valuation and division during divorce include consideration of "the economic circumstances of each party at the time the award is to be made."[158] Accordingly, Maryland courts have reasoned that because tax liability does not exist at the time an award is made, it may not be considered under this factor.[159] Instead, Maryland courts consider tax liability under a statutory factor enabling the court to consider "any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property."[160] Yet despite Maryland courts' statutory interpretation allowing consideration of tax liability, those courts have held firmly that the test for consid-

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153 *Id.*

154 *Id.*

155 Dubord v. Dubord, 687 A.2d 647, 650 (Me. 1997).

156 *Id.*

157 *Id.*

158 MD. CODE ANN., FAM. LAW § 8-205(b)(3) (2006).

159 *See* Rosenberg v. Rosenberg, 497 A.2d 485, 504-05 (Md. Ct. Spec. App. 1985), *cert. denied*, 501 A.2d 845 (Md. 1985).

160 *Id.* (citing MD. CODE ANN., FAM. LAW § 8-205(b)(11) (2006)).

eration of tax consequences is whether the evidence shows the liability is "immediate and specific," but not speculative.[161] As a result, although tax consequences may be considered, Maryland courts will not discount the value of marital assets by the liability unless the liability is immediate.[162]

Massachusetts

Tax liability is not a specific consideration in Massachusetts property division statutes, but a court is not limited to the factors described in the statute.[163] Even so, Massachusetts courts consider tax liability only when it is a result of a court order, or upon specific evidence of the liability.[164] A court is not deemed to have erred for lack of consideration of tax consequences if a spouse has not presented evidence of the liability to the court.[165] Accordingly, where a spouse *does* produce evidence of tax consequences in a timely manner, the court should consider the evi-

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161 *Id.* (holding because income taxes are immediate and specific they may be considered, but where future tax liability is uncertain it may not be considered).

162 *See* Solomon v. Solomon, 857 A.2d 1109 (Md. 2004); Innerbichler v. Innerbichler, 752 A.2d 291 (Md. Ct. Spec. App. 2000); Skrabak v. Skrabak, 673 A.2d 732 (Md. Ct. Spec. App. 1996), *cert. denied*, 678 A.2d 1048 (Md. 1996); Merriken v. Merriken, 590 A.2d 566 (Md. Ct. Spec. App. 1991); Williams v. Williams, 523 A.2d 1025 (Md. Ct. Spec. App. 1987).

163 MASS. GEN. LAWS ch. 208, § 34 (2007).

164 Fechtor v. Fechtor, 534 N.E.2d 1, 6 (Mass. App. Ct. 1989) (holding "[i]f parties do not request the judge to consider particular tax consequences and do not introduce reasonably instructive evidence bearing on those tax issues, the probate judge is not bound to grapple with the tax issues"); Bennett v. Bennett, 448 N.E.2d 77, 78 (Mass. App. Ct. 1983) (holding "[t]he probate judge was under no obligation to consider the tax effects of his order upon the parties, absent a request (not here made) that he do so and the introduction of adequate evidence relevant to the tax issues"); Angelone v. Angelone, 404 N.E.2d 672, 674 (Mass. App. Ct. 1980) (holding "[b]ecause there was no attempt to introduce evidence concerning tax consequences to the husband of the judge's property assignment . . . the judge's order cannot be plainly wrong, as alleged, for failure to consider such tax consequences" (citing Rice v. Rice, 361 N.E.2d 1305, n.4 (Mass. 1977))).

165 534 N.E.2d 1, 6 (Mass. App. Ct. 1989).

dence "with a view to minimizing unnecessary adverse income tax consequences."[166]

Michigan

Although Michigan divorce statutes do not specifically list tax liability as a factor for consideration in valuation and division of property,[167] a court will consider tax liability when it is incident to the divorce. For example, in *Nalevayko v. Nalevayko*[168] the court held "if in the opinion of the trial court the parties have presented evidence that causes the court to conclude that it would not be speculating in doing so, it may consider the effects of taxation" in distributing the assets.[169] With regard to future tax liability, however, Michigan courts have found that consideration of potential tax liability is too speculative and should not be a factor in property valuation and division.[170]

Minnesota

Minnesota courts have found that although tax liability is not a factor listed by statute for consideration in division of marital property,[171] "it is within the trial court's discretion to consider the tax consequence of a property award as one of many factors pertinent to an equitable division of property."[172] However, the court should consider tax consequences "only where the recognition of tax liability is required by the dissolution or is certain to occur within a short time thereafter."[173] As a result, Minnesota

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166 Sheskey v. Sheskey, 450 N.E.2d 187, 189 (Mass. App. Ct. 1983) (finding that when the case may require liquidating a retirement plan, tax consequences are likely to be of great importance).

167 MICH. COMP. LAWS §§ 522.19, 522.23 (2006).

168 497 N.W.2d 533 (Mich. Ct. App. 1993).

169 *Id.* at 535.

170 Hanaway v. Hanaway, 527 N.W.2d 792 (1995) (finding "in light of the court's determination that no sale or other taxable event was planned or contemplated, we find no clear error or abuse of discretion in its decision not to discount the stock value in anticipation of such consequences").

171 MINN. STAT. § 518.58 (2005).

172 Brockman v. Brockman, 373 N.W.2d 664, 665-66 (Minn. Ct. App. 1985) (citing Johnson v. Johnson, 277 N.W.2d 208, 213 (Minn. 1979); Berthiaume v. Berthiaume, 368 N.W.2d 328, 334 (Minn. Ct. App. 1985)).

173 373 N.W.2d 664, 665-66 (Minn. Ct. App. 1985) (citing Aaron v. Aaron, 281 N.W.2d 150, 153 (Minn. 1979); Helland v. Helland, 354 N.W.2d 591, 592-93

law "precludes any consideration [of tax consequences] where the court must speculate because the evidence is lacking or nonspecific."[174]

Mississippi

Because Mississippi is traditionally a title property state, meaning the person holding title is the sole property owner, no statutes specifically govern marital property division in divorce. Instead, Mississippi has a well-established case history of equitable division of marital property. In *Ferguson v. Ferguson*,[175] the Mississippi Supreme Court formally recognized the long-standing court practice of dividing property according to marital contribution and fairness without regard to title, and promulgated a set of recommended guidelines for a court's consideration in equitable division of marital property.[176] Among those guidelines is consideration of "tax and other economic consequences . . . of the proposed distribution."[177]

Mississippi case law specifically addressing tax liability is uncommon, but in *Davis v. Davis*[178] when future tax liability was addressed as a consideration in property division, the timing of the liability was not an issue; rather, fairness was the determinative factor. In *Davis* the husband argued that even though the value of the property was divided evenly on a balance sheet, the property was not equitably divided if the tax consequences to each spouse were considered.[179] The Mississippi Supreme Court held the lower court did not err when it failed to equitably divide future tax liability because: the husband would be able to claim tax exemptions for the children; he had a steady stream of income decreasing the likelihood he would need to liquidate assets;

(Minn. Ct. App. 1984)). *See also* Reynolds v. Reynolds, 498 N.W.2d 266 (Minn. Ct. App. 1993) (holding that where investment property was in foreclosure with a large balloon payment coming due shortly, the court erred by not considering capital gains taxes that would be incurred upon the inevitable sale of the building).

174 Catania v. Catania, 385 N.W.2d 28, 31 (Minn. Ct. App. 1986) (citing O'Brien v. O'Brien, 343 N.W.2d 850, 854 (Minn. 1984)).

175 639 So. 2d 921 (Miss. 1994).

176 *Id.*

177 *Id.* at 928.

178 832 So. 2d 492 (Miss. 2002).

179 *Id.* at 500.

and he had specifically requested to retain ownership of certain non-liquid assets at issue.[180] Without significant discussion of when the husband was likely to incur the liability, the court held that under such circumstances the assignment of assets with greater tax liability to the husband was not inherently unfair.[181]

Missouri

Missouri statutory guidelines for property division include "the economic circumstances of each spouse at the time the division of property is to become effective," as well as any other factors the court deems relevant.[182] Missouri courts have generally interpreted this statute to require consideration of tax consequences when liquidation of assets is reasonably predictable. For example, in *Richardson v. Richardson*,[183] a Missouri appellate court upheld a lower court decision refusing to consider future tax consequences when there was no evidence the assets were to be sold, commenting that such consideration would be entirely speculative.

Yet, unlike other states in which tax liability must be incurred incident to divorce to merit consideration, in Missouri, if the court determines the sale of an asset is reasonably certain to occur, the court will consider tax consequences without regard for when the triggering event occurs, or whether the sale was specifically ordered by the court. In *Clark v. Clark*[184] the appellate court found that although the wife presented no evidence at trial of the tax liability she would incur upon sale of the property, because the divorce decree was fashioned to encourage the sale of the property the court should consider the tax consequences in

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180 *Id*. at 502.

181 *Id*.

182 MO. REV. STAT. § 452.330 (2007).

183 Richardson v. Richardson, No. 27074, 2006 Mo. App. LEXIS 1657 (Mo. Ct. App. Nov. 11, 2006). *See also* Elrod v. Elrod, 144 S.W.3d 373, 378 (Mo. Ct. App. 2004) (finding although tax consequences are a factor to consider in dividing marital assets, a trial court is not permitted to make deductions to the marital estate for estimated tax liabilities absent sufficient evidence to support its findings); Boschert v. Boschert, 73 S.W.3d 869, 873 (Mo. Ct. App. 2002) (finding "the trial court is not permitted to make deductions to the marital estate for estimated tax liabilities absent sufficient evidence to supports its findings" (citing Baldwin v. Baldwin, 905 S.W.2d 521, 524 (Mo. Ct. App. 1995)).

184 801 S.W.2d 95 (Mo. Ct. App. 1990).

the property division. Likewise, in *Kauffman v. Kauffman*[185] the appellate court found no abuse of discretion when the trial court considered future tax consequences in asset valuation, even though no evidence of an imminent sale had been presented, because the court had inferred from the facts of the case the wife would have to liquidate some assets to support herself "at some point in the future."[186]

Baldwin v. Baldwin[187] also produced interesting results. In *Baldwin* the husband's accountant testified as to the probable amount of deferred tax liability, estimating it would be due beginning within a few years and "there were other variables that might mitigate the liability, including the sale of the property."[188] Additionally, the accountant testified "inquiries about sale of the property failed to find a buyer and there were no foreseeable buyers."[189] Yet the appellate court found no abuse of discretion when the trial court considered tax liability in valuation of the assets based on its finding there was substantial evidence the property would be sold and tax liability incurred, and "the only doubt was about the precise amount of the tax."[190] The trial court noted the tax liability proposed by the accountant was realistic, and the appellate court found the "trial court was free to accept this evidence in evaluating the marital property."[191]

The implication is that Missouri courts are not bothered by speculation on the amount of tax liability, nor does the court need to determine the exact date an asset will be liquidated. The controlling consideration appears to be whether evidence of intent to sell exists. As a result, where liquidation of an asset is reasonably predictable, regardless of the actual date of the triggering event and the precise amount of tax liability, Missouri

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185 101 S.W.3d 35 (Mo. Ct. App. 2003).

186 *Id.* at 50 (finding that although the wife did not testify as to marital assets she might have to sell, "in light of Wife's relatively low income-earning potential, and the fact that most of the assets awarded to Wife are non-cash and non-income producing, the court could reasonably infer that Wife will have to sell assets to meet her needs at some point in the future").

187 905 S.W.2d 521 (Mo. Ct. App. 1995).

188 *Id*. at 524.

189 *Id*.

190 *Id*.

191 *Id*. (citing Hoffmann v. Hoffmann, 676 S.W.2d 817, 826 (Mo. banc 1984)).

courts will consider the effect of future tax liability on the value of an asset.

Montana

Montana law lists several factors for consideration in division of marital property, but does not include tax consequences among those factors.[192] Accordingly, Montana courts will not consider tax consequences unless they are incurred incident to the divorce order. Montana courts have traditionally held "where a property distribution ordered by a court includes a taxable event precipitating a concrete and immediate tax liability, such tax liability should be considered by the court before entering its final judgment."[193]

Nebraska

The Nebraska statute governing property division does not include tax consequences as a factor for consideration in the division of marital property.[194] Yet, Nebraska courts will consider tax consequences in limited circumstances, depending on the type of property being divided. For example, for marital property other than retirement benefits, such as a stock portfolio or a family business, Nebraska courts usually consider future tax consequences only when the tax liability is incident to the divorce, evidence of an imminent sale has been provided, and tax liability is not speculative.[195] The courts in *Mathew v. Palmer*[196] and

192 MONT. CODE ANN. § 40-4-202(1) (2005).

193 *In re* Marriage of Debuff, 50 P.3d 1070, 1079 (Mont. 2002) (citing *In re* Marriage of Lee, 816 P.2d 1076, 1078 (Mont. 1991); *In re* Marriage of Beck, 631 P.2d 282, 285(Mont. 1981)). *See also In re* Marriage of Haberkern, 85 P.3d 743 (Mont. 2004); *In re* Marriage of Swanson, 716 P.2d 219 (Mont. 1986); Gilbert v. Gilbert, 628 P.2d 1088 (Mont. 1981).

194 NEB. REV. STAT. § 42-365 (2007).

195 *See e.g.*, Mathew v. Palmer, 589 N.W.2d 343, 354 (Neb. Ct. App. 1999) (finding, when valuing and dividing stock, "a deduction in value for income tax on property which is not due to be sold in the foreseeable future is clearly speculative, and we do not make that deduction"); Schuman v. Schuman, 658 N.W.2d 30, 34-36 (Neb. 2003) (finding a trial court should not consider tax consequences of the sale of the business unless there is evidence the business is to be sold).

196 *Mathew*, 589 N.W.2d at 354.

Schuman v. Schuman[197] each declined to consider future tax liability where there was no evidence of an imminent sale. This was in spite of the fact that in each case the spouses presented detailed evidence as to values and tax estimates of their property, and in *Schuman* both spouses relied on testimony from their accountants as to the value of the property and to offer tax liability estimates.[198]

Yet, when the issue is whether to discount the value of a retirement plan due to future tax consequences, the Nebraska Supreme Court is more willing to consider future tax liability. In *Buche v. Buche*[199] the court discounted the retirement benefits by future income tax liability, reasoning "since the account will not be withdrawn, the [early withdrawal] penalty may be disregarded, but the income tax will have to be paid eventually and is a proper consideration in determining the present value of the account."[200] The *Buche* court seemed unconcerned with when the liability might be incurred.

Interestingly, on more than one occasion Nebraska courts have implied that the relevant factor determining whether the court will consider future tax liability is solely whether the property is a retirement account.[201] In *McGuire v. McGuire*,[202] a case in which the valuation of a life insurance policy was at issue, a Nebraska appellate court held that because the husband offered no expert testimony on income tax consequences and he testified he did not have present plans to liquidate the funds, consideration of future tax liability was inappropriate. The husband argued that under the rationale of *Buche* "the surrender of an account is not necessary to consider the income tax liability," but the *McGuire* court distinguished *Buche* on the ground that the property in *Buche* was a life insurance policy and not a retirement fund, implying different standards may apply to retirement funds.[203] Similarly, in *Schuman*, the court distinguished *Buche*

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197 *Schuman*, 658 N.W.2d at 34-36.

198 *Mathew*, 589 N.W.2d 343; *Schuman*, 658 N.W.2d at 34.

199 423 N.W.2d 488 (Neb. 1988).

200 *Id.* at 492.

201 McGuire v. McGuire, 652 N.W.2d 293, 300 (Neb. Ct. App. 2002); Schuman v. Schuman, 658 N.W.2d 30, 34-36 (2003).

202 652 N.W.2d at 300.

203 *Id*. at 301.

because the property at issue was a family business not a retirement fund, and held that a trial court should not consider tax consequences of the sale of the business unless there is evidence the business will be sold.[204]

Even so, some exceptions exist. For example, in *Jirkovsky v. Jirkovsky*[205] the appellate court considered whether the lower court appropriately considered future tax liability in the valuation of a retirement fund. The appellate court found that although the *Buche* rule still applied, in *Jirkovsky* where no credible evidence as to the amount of the future income tax liability existed in the record and no testimony had been given as to whether the spouses intended to liquidate the accounts, the trial court erred when it discounted the value of the retirement fund by the fund's future tax liability. Likewise, in several cases since *Jirkovsky*, courts have required expert testimony as to the value and tax liability of a retirement fund, as well as evidence of intention to liquidate the fund, before considering future tax liability.[206]

Complicating matters even more, in *Finney v. Finney*[207] the appellate court found no error when a trial court considered the effect of future tax liability on the value of corporate stock, despite the lack of evidence of an imminent sale, and despite that the property in question was not a retirement fund. The court reasoned that because a certified public accountant was a credible expert and had testified as to the value and potential tax liability of the stock, and because the wife did not object to the expert testimony, the court need not consider whether a sale was imminent.[208] The court cited *Buche* and *Jirkovsky*, as well as the

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204 *Schuman*, 658 N.W.2d at 34-36.

205 525 N.W.2d 615, 620 (Neb. 1995).

206 *See*, *e.g*., Stegeman v. Stegeman, No. A-00-306, 2001 Neb. App. LEXIS 210, at *28-29 (Neb. Ct. App. 2001) (holding "based on *Jirkovsky* and *Buche*, as well as [wife's] testimony which did not establish her withdrawal or intention to withdraw the retirement funds or otherwise be subject to penalty, we find that the district court erred in adopting the reduced figure submitted by [the wife]").

207 No. A-01-770, 2003 Neb. App. LEXIS 46, at *11-12 (Neb. Ct. App. 2003) (citing Buche v. Buche, 423 N.W.2d 488 (Neb. 1988); Jirkovsky v. Jirkovsky, 525 N.W.2d 615 (Neb. 1995)).

208 *Id*.

accountant's testimony that "it's not just a matter of if the tax is going to be paid, it's a matter of when."[209]

Although Nebraska decisions show a general trend to consider future tax liability only in valuation of retirement benefits, or when evidence exists that the property in question will soon be sold, exceptions to this trend are significant. Considered in sum, these opinions fail to illustrate whether Nebraska courts have a clear strategy with regard to consideration of future tax liability in the valuation of marital assets.

Nevada

Nevada statutory guidelines for property division reflect that it is a community property state, requiring either equal division of property or maintenance payments as settlement of the marital estate.[210] The statute does not include factors for valuation of property, and does not address consideration of tax liability. Nevada case law addressing future tax liability in valuation and division of marital property is scant, but the conclusion is clear.[211] When necessary to ensure a fair and equal division of property, Nevada courts "can consider potential tax liability when valuing marital assets if a taxable event has occurred as a result of the divorce or equitable distribution of property, or is certain to occur within a time frame so that the trial court may reasonably predict the tax liability."[212]

New Hampshire

The New Hampshire statute governing property division specifically requires consideration of tax liability.[213] Yet, as the court observed in *In re Telgener*,[214] "although it is well-settled that 'tax consequences should be considered by attorneys and [trial court judges] in their negotiations or rulings,' neither the statute nor our caselaw provides guidance as to when the trial court should consider the tax consequences of its division of

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209 *Id*.
210 NEV. REV. STAT. § 123.259 (2006).
211 *See* Ford v. Ford, 782 P.2d 1304 (Nev. 1989).
212 *Id*. at 1310 (citing *Hovis*, 541 A.2d at 1380-81).
213 N.H. REV. STAT. ANN. § 458:16-a (2007).
214 803 A.2d 1051 (N.H. 2002).

property."[215] In *Telgener* the court looked to case law from several other states and formed the rule that "a trial court may consider tax consequences only when the tax liability is reasonably ascertainable," and that consideration of tax consequences is precluded when the trial court must speculate if a taxable event will occur.[216] In *Telgener* the court held that because whether to liquidate the fund was "entirely dependent on [the husband's] voluntary actions," the tax liability was his own responsibility.[217] The *Telgener* decision implies that the court interprets "reasonable ascertainment" as requiring clear evidence of liability.

New Jersey

Under a New Jersey statute, "tax consequences of the proposed distribution to each party" are included in the factors to be considered by the court during property division.[218] When tax consequences result from a court-ordered sale of marital assets, "or of a contemporaneous sale of assets by an ex-spouse necessary to meet his or her equitable distribution obligation," the liability incurred is not speculative and courts will consider it in the valuation of assets.[219] Consideration of tax liability requires evidence of the liability and is in the interest of attaining an equitable distribution.[220]

New Jersey courts also consider future tax liability in division of marital property when "fixed by competent expert testimony."[221] However, future tax liability is not to be considered in valuation of property. The court in *Stern v. Stern*[222] explained this policy noting that the value of property is not diminished by the fact that a party may have to pay tax on the income produced by it.[223] Therefore, as the court does with present tax liability,

215 *Id.* at 1053 (citing Azzi v. Azzi, 392 A.2d 148 (N.H. 1978)).
216 *Id*. (citing Indiana law (*Irvine*, 685 N.E.2d at 69-70), Maine law (*Crooker*, 432 A.2d at 1297), Minnesota law (*Brockman*, 373 N.W.2d at 665-66), North Dakota law (Kaiser v. Kaiser, 474 N.W.2d 63, 69-70 (N.D. 1991)), and Pennsylvania law (*Hovis*, 541 A.2d at 1380)).
217 *Id*.
218 N.J. STAT. ANN. § 2A:34-23.1(j) (2007).
219 Orgler v. Orgler, 568 A.2d 67, 73-74 (N.J. Super. Ct. App. Div. 1989).
220 *Id*.
221 *Id*.
222 331 A.2d 257 (N.J. 1975).
223 *Id.* at 261.

the court will consider future tax liability only when necessary to attain an equitable distribution.

New Mexico

The statutes governing domestic affairs and property rights in New Mexico give very little guidance as to factors for consideration in property division, and do not mention tax liability.[224] Even so, New Mexico courts have adhered to the general rule that tax liability is a factor for consideration when the tax liability is "immediate and specific," but not when it is merely speculative.[225]

New York

According to New York domestic relations statutes, tax consequences are a factor for consideration in property division.[226] Correspondingly, when evidence of tax liability is presented at trial, New York courts will consider the liability in division of the property.[227] With regard to future tax liability, the court in

224 N.M. Stat. Ann. §§ 40-4-7, 40-3-8 (2007).

225 Mattox v. Mattox, 734 P.2d 259, 265 (N.M. Ct. App. 1987) (holding that the court would not consider future tax liability when evidence indicated that the husband had no immediate plans to sell his stock, and indicating that if he had been able to sell the stock immediately, the court may have reached a different result); *see also* White v. White, 734 P.2d 1283, 1286 (N.M. Ct. App. 1987) (finding "in dividing the interests of the parties in the community property, the court is required to consider the tax consequences of its allocation of property," unless the tax consequences are speculative. (citing *Mattox*, 734 P.2d 259; Cunningham v. Cunningham, 632 P.2d 1167 (N.M. 1981))); Lewis v. Lewis, 739 P.2d 974 (N.M. Ct. App. 1987) (holding future tax consequences are too speculative and should be disregarded).

226 N.Y. Dom. Rel. § 236(5)(d)(10) (2007).

227 *See*, *e.g*., Povosky v. Povosky, 508 N.Y.S.2d 722 (N.Y. App. Div. 1986) (holding that the court did not err when it considered tax consequences only on those assets for which the husband provided evidence, and did not for those assets for which no evidence was presented); Cameron v. Cameron, 802 N.Y.S.2d 542 (N.Y. App. Div. 2005) (holding the court erred by not considering tax consequences when husband produced evidence of liability); Chase v. Chase, 618 N.Y.S.2d 94 (N.Y. App. Div. 1994) (where husband failed to produce any evidence showing amount of tax liability, lower court did not err in failing to consider tax liability); Kudela v. Kudela, 716 N.Y.S.2d 231 (N.Y. App. Div. 2000) (holding the court was not required to consider tax consequences when there was no evidence that the business property would be sold).

Hartog v. Hartog[228] held the credible testimony of a spouse is sufficient evidence to prove the spouse's future intent to liquidate the asset, thereby requiring the court to consider tax liability upon division of the marital property.

North Carolina

The North Carolina property division statute lists tax consequences as a factor for consideration during property division, "including those federal and state tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation."[229] The statute also specifies that the trial court may use its discretion to consider "whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor."[230] North Carolina courts have consistently interpreted this statute to require a court to consider tax consequences when liquidation of an asset is court ordered or is a forced result of an order for a lump sum payment.[231] Trial courts may not engage in speculative consideration of future tax liability.[232]

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228 605 N.Y.S.2d 749 (N.Y. App. Div. 1993) (concluding "the husband's trial testimony that he intended to sell the family businesses and to live off the interest constituted credible evidence from which the trial court could have found that the distributive award should be reduced by an amount equaling the wife's equitable share of the resulting tax liability") *modified*, 647 N.E.2d 749, 754 (N.Y. 1995).

229 N.C. GEN. STAT. § 50-20 (2006).

230 *Id*.

231 Shaw v. Shaw, 451 S.E.2d 648 (N.C. Ct. App. 1995) (holding the trial court erred when it ordered a lump sum payment without considering non-liquidity of husband's assets and the tax consequences he would incur as a result of necessarily liquidating those funds to make the payment); Weaver v. Weaver, 324 S.E.2d 915, 920 (N.C. Ct. App. 1985) (holding "we construe § 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders").

232 *See*, *e.g*., Dolan v. Dolan, 558 S.E.2d 218 (N.C. Ct. App. 2002), *aff'd*, 562 S.E.2d 422 (N.C. 2002); Crowder v. Crowder, 556 S.E.2d 639 (N.C. Ct. App. 2001); Harvey v. Harvey, 437 S.E.2d 397 (N.C. Ct. App. 1993) (holding that speculative tax consequences could not be considered even when supported by expert testimony); Wilkins v. Wilkins, 432 S.E.2d 891 (N.C. Ct. App. 1993).

North Dakota

Property division in North Dakota has no statutory factors for consideration by the court.[233] As a result, North Dakota courts have fashioned guidelines for consideration known as the *Ruff-Fischer* guidelines.[234] These factors include consideration of economic circumstances, but they do not specifically address tax liability. Even so, North Dakota courts will consider tax liability as a factor in equitable distribution if parties present evidence of the liability and if the liability will be incurred incident to divorce. In *Kaiser v. Kaiser*,[235] the North Dakota Supreme Court articulated the analysis for whether tax liability should be a factor, holding:

> a trial court in a divorce action should consider potential taxes in valuing marital assets only if (1) the recognition of a tax liability is required by the dissolution or will occur within a short time; (2) the court need not speculate about a party's future dealing with the asset; (3) the court need not speculate about possible future tax consequences; and (4) the tax liability can be reasonably predicted.[236]

The *Kaiser* court found consideration of future tax liability mere speculation and specifically prohibited it.[237] North Dakota courts have consistently upheld this rule.[238]

Ohio

The Ohio distributive award statute requires consideration of "the tax consequences of the property division upon the respective awards to be made to each spouse."[239] As is the case for many states with similar provisions, Ohio appellate courts interpret this statute to require evidence of tax liability and will find

233 N.D. CENT. CODE § 14-05-24 (2006).

234 Nastrom v. Nastrom, 284 N.W.2d 576, 581 (N.D. 1979) (explaining the guidelines).

235 474 N.W.2d 63 (N.D. 1991).

236 *Id.* at 69-70.

237 *Id*.

238 *See*, *e.g.*, Fisher v. Fisher, 568 N.W.2d 728 (N.D. 1997); Wald v. Wald, 556 N.W.2d 291 (N.D. 1996); Welder v. Welder, 520 N.W.2d 813 (N.D. 1994); Gronneberg v. Gronneberg, 412 N.W.2d 84 (N.D. 1987); Briese v. Briese, 325 N.W.2d 245 (N.D. 1982).

239 OHIO REV. CODE ANN. § 3105.171(F)(6) (2006).

an error by a lower court when its consideration of tax liability is speculative.[240]

Oklahoma

In Oklahoma, divorce courts are required to achieve an equitable division of the marital property and assets "by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to be paid such sum as may be just and proper to effect a fair and just division thereof."[241] However, courts are not specifically required to consider tax liability. Although Oklahoma case law on the subject is sparse, when confronted with the issue of future tax liability and its effect on alimony, the Oklahoma Supreme Court held that future tax consequences associated with an asset do not affect the value of that asset and are not an appropriate consideration for the court in division of marital property.[242]

Oregon

Oregon courts are statutorily required to consider tax consequences of property distribution.[243] Accordingly, Oregon courts have held consideration of tax consequences is appropriate when

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240 *See*, *e.g*., Loeffler v. Loeffler, 857 N.E.2d 150, 155 (Ohio Ct. App. 2006) (finding "courts need not consider tax consequences that are speculative" (citing James v. James, 656 N.E.2d 399, 412 (Ohio Ct. App. 1995))); Meeks v. Meeks, No. 05AP-315, 2006 Ohio App. LEXIS 580, at *29 (Ohio Ct. App. 2006) (finding when a trial court's order forces a party to dispose of an asset to meet an obligation imposed by the court, the court must consider the tax consequences (citing Herrmann v. Herrmann, No. CA99-01-006, 2000 Ohio App. LEXIS 5146 (Ohio Ct. App. 2000))); Gould v. Gould, No. CA2004-01-010, 2005 Ohio App. LEXIS 469, at *17 (Ohio Ct. App. 2005) (finding "a court is not required to consider the tax consequences of an award if those consequences are speculative" (citing Day v. Day, 532 N.E.2d 201, 205-06 (Ohio Ct. App. 1988))); Waller v. Waller, 837 N.E.2d 843, 851 (Ohio Ct. App. 2005) (holding "the court need not participate in conjecture and speculation to determine the possible tax consequences of a potential action" (citing Guidubaldi v. Guidubaldi, 581 N.E.2d 621, 625 (Ohio Ct. App. 1990))).

241 OKLA. STAT. tit. 43, § 121 (2006).

242 Meason v. Meason, 717 P.2d 1165, 1167 (Okla. Ct. App. 1985) (holding "with respect to awarding alimony, tax impact is clearly relevant; but, tax impact does not affect the value of jointly acquired assets" (citing Carpenter v. Carpenter, 657 P.2d 646 (Okla. 1983))).

243 OR. REV. STAT. § 107.105 (1)(f), (2) (2006).

supported by sufficient evidence. As the court explained in *In re Marriage of Alexander and Alexander*,[244] even if future tax liability cannot be determined with complete certainty, where there is expert testimony providing a reasonable and supportable basis, the court may make an informed judgment reflecting the potential liability.[245] In other words, Oregon applies a standard of reasonable certainty to consideration of future tax liability in division of marital assets and does not consider tax liability where the court deems the liability is too speculative.[246]

The result has generally been that Oregon courts are willing to consider future income tax liability on retirement benefits, believing the liability to be inevitable, while they are less willing to consider future capital gains tax liability on the sale of marital property such as a home due to the amount of speculation involved.[247] Thus, although Oregon courts have not drawn a bright line with regard to this issue, consideration of future tax liability tends to be conditioned on the type of asset considered.[248]

Pennsylvania

As discussed in the Introduction, in 1988 the Pennsylvania Supreme Court held in *Hovis* that a court's speculation on future tax liability is inappropriate in valuation and division of marital property where the liability cannot be reasonably predicted.[249] Since *Hovis*, many other states have adopted this holding, requiring a court to consider tax liability only when the liability is

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244 742 P.2d 63, 64 (1987).

245 *Id.* at 64. *See also* Follansbee v. Ackerman, 836 P.2d 763, 765 (Or. Ct. App. 1992).

246 *In re* Marriage of Barlow, 826 P.2d 18 (Or. Ct. App. 1992); *In re* Marriage of McLemore, 792 P.2d 481 (1990).

247 *See*, *e.g.*, *In re* Marriage of Rykert, 934 P.2d 519 (Or. Ct. App. 1997) (holding that although there was evidence assets would be liquidated in both cases, the court did not err by considering tax liability in the case of husband's commission benefits, while failing to consider future tax liability in the sale of wife's home).

248 *See In re* Marriage of Drews, 956 P.2d 246 (Or. Ct. App. 1998); *In re* Marriage of Colling, 910 P.2d 1165 (Or. Ct. App. 1996); *In re* Marriage of Cookson, 895 P.2d 345, n.9 (Or. Ct. App. 1995) (noting that "although it can be argued that future tax rates are speculative in that they are subject to change, they are no more speculative than the capitalization rates applied to value corporations").

249 *Hovis*, 541 A.2d at 1381. *See supra* discussion in text at note 20.

incident to divorce or can reasonably be predicted and is supported by reliable evidence.[250]

However, within Pennsylvania, decisions after *Hovis* elaborated on the *Hovis* holding by finding there may be times when speculation on future tax liability is the only means to ensure an equitable division. For example, in the property distribution of *White v. White*,[251] the court required the husband to make large payments to the wife over the course of the next ten years. On the husband's appeal, the *White* court observed that the husband would likely incur substantial tax liability as he liquidated assets over the next ten years to make those payments, affecting the net worth of his share of the marital property.[252] Noting that the intent of the *Hovis* decision was to ensure fairness,[253] the *White* court held "that failure to consider tax consequences in this case results in a severe imbalance in equitable distribution and such a distribution must be made with tax consequences in mind, or another form of distribution devised."[254] *White* indicated tax liability incurred as a result of divorce was a factor for consideration, regardless of whether the liability was incurred concurrent to the divorce, or a decade later.

By 2004 Pennsylvania legislators took matters into their own hands by enacting a new property division statute. The statute includes tax liability as a factor for consideration in property division, as it had before, but the new statute clarifies that the tax "ramifications need not be immediate and certain."[255] The only conclusion that can be drawn from this legislation is that Pennsylvania courts are now statutorily required to consider future tax liability where that liability may be a relevant factor to achieving an equitable distribution of martial property.

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250 *See*, *e.g*., *Grace*, 930 S.W.2d 362, *supra* note 57 (Arkansas); Florida *Levan*, 545 So. 2d 892, *supra* note 87 (Florida); *Ford*, 782 P.2d, *supra* note 186 (Nevada); *Telgener*, 803 A.2d at 1053, *supra* note 189 (New Hampshire).

251 555 A.2d 1299 (Pa. Super. Ct. 1989).

252 *Id*. at 1300-03.

253 *Id*. at 1300 (finding "to insure a 'fair and just determination and settlement of property rights' we favor predictability over mere surmise in the valuation and distribution of marital property after divorce" (quoting *Hovis*, 541 A.2d at 1380-81)).

254 *Id*. at 1303.

255 23 PA. CONS. STAT. ANN. § 3502(a)(10.1) (West 2006) (*modified by* Pa. Act 2004-175 (S.B. 95), § 3).

Rhode Island

Rhode Island law does not expressly provide tax liability as a factor for consideration in assignment of marital property, but the code does allow the court to consider any factor which the court finds just and proper, leaving the issue of tax liability to the discretion of the court.[256] The Rhode Island Supreme Court has allowed that "although a trial justice's decision to take into account tax consequences applicable to a property distribution is committed to his or her sound discretion, when the allocation of marital assets is arbitrary, not supported by proper findings of fact and is inequitable, this Court will decline to accord it deference."[257] In other words, Rhode Island courts may consider tax liability as a factor in division of marital assets only when evidence supports the finding.

South Carolina

The tax consequences of equitable apportionment of marital property are a statutory factor for consideration in property division in South Carolina.[258] Yet, South Carolina courts require that the liability is imminent or incurred incident to divorce, and that the liability is supported by evidence.[259] Speculation on future tax liability is not tolerated by the courts.[260]

South Dakota

Property division in South Dakota statutorily requires only that the court consider "equity and the circumstances of the par-

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256 R.I. Gen. Laws § 15-5-16.1 (2007).

257 Cardinale v. Cardinale, 889 A.2d 210, 224 (R.I. 2006) (quoting Koutroumanos v. Tzeremes, 865 A.2d 1091, 1100 (R.I. 2005); DiOrio v. DiOrio, 751 A.2d 747, 752 (R.I. 2000)).

258 S.C. Code Ann. § 20-7-472(11) (2006).

259 *See*, *e.g*., Wooten v. Wooten, 615 S.E.2d 98, 103 (S.C. 2005) (holding "the family court is required to consider the tax consequences to each party resulting from equitable apportionment. However, if the apportionment order does not contemplate the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a speculative sale or liquidation" (citing Bowers v. Bowers, 561 S.E.2d 610, 617 (S.C. Ct. App. 2002); Ellerbe v. Ellerbe, 473 S.E.2d 881, 884 (S.C. Ct. App. 1996); Graham v. Graham, 390 S.E.2d 469, 471 (S.C. Ct. App. 1990))).

260 *Id*.

ties."[261] Almost directly inverse to the practice of New Jersey courts, tax liability is considered by South Dakota courts only in valuation of property.[262] The South Dakota Supreme Court has reasoned tax liability is not relevant in property division because South Dakota trial courts are not bound by any mathematical formula when dividing property, and as a result, tax liability is relevant only prior to division, during property valuation.[263] It is only when a tax liability affecting the value of an asset is incident to a requirement in the divorce decree that South Dakota trial courts may consider tax liability.[264]

Tennessee

The Tennessee statute governing distribution of marital property specifies that a court should consider tax consequences of the division or property, as well as "costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset."[265] However, case law tends to indicate that Tennessee courts will not consider future tax liability. Instead, Tennessee recognizes that evidence of tax liability does not necessarily indicate an inequitable property division.[266] For example, in *Fulbright v. Fulbright*[267] the court held that the trial court did not err when it declined to apply a discount for future tax liability because even though the husband would eventually be subject to income tax, his incurrence of the liability was not imminent and in the meantime the husband would receive income and appreciation on the untaxed assets.[268] Furthermore, the court found that evidence indicated the husband would be "earning interest and dividends at a tax deferred rate which, over time, will probably meet or exceed any

261 S.D. Codified Laws § 25-4-44 (Michie 2006).

262 Kelley v. Kirk, 391 N.W.2d 652, 656 (S.D. 1986).

263 *Id.*

264 *Id.* at 657 (citing Wallahan v. Wallahan, 284 N.W.2d 21 (S.D. 1979); Lien v. Lien, 278 N.W.2d 436 (S.D. 1979)). *See also* Krage v. Krage, 329 N.W.2d 878 (S.D. 1983) (holding that because tax consequences were not conjectural it was appropriate for the trial court to consider them).

265 Tenn. Code Ann. § 36-4-121(c)(9) (2007).

266 *See* Fulbright v. Fulbright, 64 S.W.3d 359, 367 (Tenn. Ct. App. 2001).

267 *Id.*

268 *Id.*

potential taxes."[269] Based on this justification, Tennessee courts generally will not consider future tax liability in division of marital assets.[270]

Texas

The statutory rule for property division in Texas is that the court proceed in a manner the court deems just and right.[271] Also, the Texas statutory scheme for divorce includes a specific provision for consideration of taxes during property division.[272] This statute specifies that the court may consider whether the asset will be subject to taxation and, if so, when the tax will be required to be paid.[273] Texas courts have interpreted this statute as meaning future tax liability that is merely hypothetical should not be considered in valuation or division of property.[274]

Utah

The Utah statute governing property division does not address tax liability as a factor for consideration.[275] Even so, Utah has traditionally held tax liability is an appropriate factor for consideration in valuation and division of marital property, unless the liability is merely speculative.[276]

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269 *Id*.

270 *See*, *e.g*., Jekot v. Jekot, No. M2006-00316-COA-R3-CV, 2007 Tenn. App. LEXIS 6, at *10-11 (Tenn. Ct. App. 2007) (citing Hasty v. Hasty, No. 01-A-01-9504-CH00176, 1995 Tenn. App. LEXIS 615 (Tenn. Ct. App. 1995)).

271 TEX. FAM. CODE ANN. § 7.001 (2006).

272 *Id*. at § 7.008.

273 *Id*.

274 *See*, *e.g*., Harris v. Holland, 867 S.W.2d 86 (Tex. App. 1993); Simpson v. Simpson, 679 S.W.2d 39 (Tex. App. 1984); Freeman v. Freeman, 497 S.W.2d 97 (Tex. App. 1973).

275 UTAH CODE ANN. § 30-3-5 (2006).

276 *See* Howell v. Howell, 806 P.2d 1209 (Utah Ct. App. 1991) (holding the trial court did not err by refusing to speculate about hypothetical future tax consequences of a property (citing Alexander v. Alexander, 737 P.2d 221 (Utah 1987))); Savage v. Savage, 658 P.2d 1201, 1204 (Utah 1983) (holding that the trial court did not err by refusing to consider tax liability when both spouses presented conflicting testimony and neither side could prove the value of the asset by a preponderance of the evidence).

Vermont

The Vermont property settlement statute does not include tax liability as a factor for the court's consideration in divorce.[277] Similar to the New Jersey holding, the Vermont Supreme Court has held that potential tax liability should not be considered for valuation of property, but may be considered during division of property.[278] Additionally, the court has found tax liability should be recognized if a spouse presents evidence a tax liability will be incurred as a consequence of the court order, or if consideration of liability is necessary to attain equity in the division of assets.[279]

Virginia

The Virginia property division statute specifically includes tax liability as a factor for consideration in property division.[280] Yet, Virginia courts will consider future tax liability in distribution of assets if necessary to prevent an inequitable distribution of property. For example, in *Barnes v. Barnes*[281] the appellate court held that the lower court correctly considered future capital gains taxes when it awarded the wife only thirty-five percent of the value of the marital home in division of marital property. The court reasoned this allocation was appropriate because the husband would be liable for the entire capital gains tax liability on the house should it ever be sold.[282]

However, Virginia courts have generally required evidence that a spouse will incur tax liability before considering the liability in distribution of the property.[283] Although these decisions illustrate seemingly inconsistent results, Virginia courts have de-

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277 VT. STAT. ANN. tit. 15, § 751 (2007).

278 *See*, *e.g.*, Hayden v. Hayden, 838 A.2d 59 (Vt. 2003); Mabee v. Mabee, 617 A.2d 162 (Vt. 1992); Johnson v. Johnson, 605 A.2d 857, 860 (Vt. 1992).

279 *See*, *e.g.*, Stalb v. Stalb, 719 A.2d 421 (Vt. 1998) (holding the court order caused an unnecessary tax burden to the husband, thereby creating an inequitable division); Narwid v. Narwid, 641 A.2d 85 (Vt. 1993) (holding lower court did not err by failing to consider tax liability where no evidence of liability was presented).

280 VA. CODE ANN. § 20-107.3(E)(9) (2007).

281 428 S.E.2d 294, 300 (Va. Ct. App. 1993).

282 *Id*.

283 *See*, *e.g.*, Boyd v. Boyd, No. 1372-00-2, 2001 Va. App. LEXIS 520, at *6 (Va. Ct. App. 2001) (holding where no evidence of tax liability was presented, lower court did not err by failing to consider it); Arbuckle v. Arbuckle, 470

fended such results reasoning that the statutes themselves provide that tax liability is a consideration only in distribution of property, not in valuation.[284]

Washington

Washington courts are statutorily required to consider the "economic circumstances of each spouse at the time the division of property is to become effective," but courts are not specifically required to consider tax liability.[285] Washington courts have consistently held that "if tax consequences are imminent, or come directly from a trial court's property distribution, and the amount of taxes is not speculative then 'such consequences are probably considered in valuing marital assets.'"[286]

West Virginia

Tax liability is not a statutory factor for consideration in West Virginia property division and valuation code.[287] West Virginia courts will consider tax liability if it is incident to the divorce, yet future tax liability is considered too speculative for consideration by the court.[288]

S.E.2d 146 (Va. Ct. App. 1996) (holding the court is not required to consider speculative tax liability).

284 Owens v. Owens, 589 S.E.2d 488 (Va. Ct. App. 2003) (citing Arbuckle v. Arbuckle, 500 S.E.2d 286, 289 (Va. Ct. App. 1998) (differentiating between § 20-107.3(A) governing property valuation and § 20-107.3(E)(9) governing property division)). *See also* Turonis v. Turonis, No. 2110-02-4, 2003 Va. App. LEXIS 130, at *9-10 (Va. Ct. App. 2003) (asserting *Arbuckle* and *Barnes* stand for the proposition that where sale is unlikely and, therefore, speculative, a court may not consider taxes and associated sales costs in valuation of marital assets).

285 WASH. REV. CODE § 26.09.080 (2007).

286 *In re* Marriage of McChesney, No. 23983-7-III, 2007 Wash. App. LEXIS 344, at *12 (Wash. Ct. App. 2007) (quoting *In re* Marriage of Hay, 907 P.2d 334, 336 (1995)).

287 W. VA. CODE §§ 48-7-103 and -104 (2007), respectively.

288 *See*, *e.g.*, Hudson v. Hudson, 399 S.E.2d 913 (W. Va. 1990) (remanding for determination of whether asset liquidation was incident to court order in which case tax liability would be an appropriate consideration, citing *Bettinger*); Bettinger v. Bettinger, 396 S.E.2d 709, 716 (W. Va. 1990) (holding where there is no evidence of intent to sell the asset, there is no basis for reducing a spouse's share by way of a purported tax liability); Roig v. Roig, 364 S.E.2d 794 (W. Va. 1987) (remanded for development of a factual record with regard to whether

Wisconsin

The Wisconsin property division statute requires the court consider the tax consequences to each party.[289] Compared to other states' decisions, Wisconsin courts have interpreted this requirement somewhat liberally, holding that "in the absence of any expert testimony or other evidence to the contrary, the court may rely on its knowledge and experience to engage in reasonable speculation regarding the anticipated tax impact on the present value of retirement assets."[290] Even so, in most cases the court will decline to consider tax liability which is speculative, finding tax liability must be imminent or incident to court order to merit consideration.[291] For example, in *Ondrasek v. Ondrasek*[292] the court held the trial court erred by discounting the asset where there was nothing in the record to suggest that a sale was imminent, the judgment created no taxable event regarding these assets, and there was no evidence that the judgment would force a sale.[293]

Wyoming

The Wyoming statute governing property division in divorce requires only that courts make a just and equitable disposition, having regard for the condition in which the parties will be left by the divorce.[294] Wyoming courts have adopted the rule that tax

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the husband's financial circumstance required he liquidate his pension plan, without which the court could not make a determination on the appropriateness of the consideration of tax liability).

289 WIS. STAT. § 767.61(3)(k) (2006).

290 Rumpff v. Rumpff, 688 N.W.2d 699, 706 (Wis. Ct. App. 2004).

291 *See*, *e.g.*, Scheuer v. Scheuer, 711 N.W.2d 698, 705 (Wis. Ct. App. 2006) (holding that husband's choice, to liquidate his retirement plan rather than to sell his home or take a loan to pay his wife, was his own, and therefore not subject to the court's consideration for tax liability incurred); Preuss v. Preuss, 536 N.W.2d 101, 105 (Wis. Ct. App. 1995) (holding "when there is no evidence that a liability is imminent or likely, consideration of it 'strays into the realm of speculation and mere theory'" (citing Popp v. Popp, 432 N.W.2d 600, 605 (Wis. Ct. App. 1988))).

292 377 N.W.2d 190 (Wis. Ct. App. 1985).

293 *Id.* at 195.

294 WYO. STAT. ANN. § 20-2-114 (2006).

liability may be considered only when incident to the divorce.[295] Correspondingly, Wyoming courts will not speculate on future tax liability, reasoning "it would be the basest form of speculation to attempt to determine tax consequences of a voluntary liquidation of assets at an unknown future time."[296]

IV. Findings

The states can be categorized as follows with regard to how state courts treat consideration of future tax liability:[297]

- States that consider tax liability only if the liability is immediate and specific, or incident to the divorce, but which generally view consideration of future tax liability as impermissible speculation: AK, AL, AR, AZ, CA, CO, IA, ID, IL, IN, KS, LA, MA, MD, ME, MI, MN, MT, NC, ND, NE, NJ, NM, NV, OH, SC, SD, TN, TX, UT, VA, VT, WA, WI, WV, WY.
- States that consider future tax liability if the event triggering liability is reasonably predictable and if a party presents sufficient evidence of the liability: FL, GA, ME, MO, NE, NH, NY, OH, OR, PA, RI, TX.
- States that specifically consider tax liability as a factor affecting fairness: DE, MS, VA.
- States that may permit deferral of judgment and retention of jurisdiction until some time in the future when liability is incurred or can be reasonably estimated: AR, CA, KY.
- States that permit consideration of future tax consequences in property distribution, but not property valuation: KS, NJ, VA, VT.
- States that permit consideration of future tax consequences in property valuation, but not property distribution: SD.
- States that may consider future tax liability, depending on the type of asset: CT, NE, OR.

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295 *See*, *e.g.*, Hall v. Hall, 125 P.3d 284 (Wyo. 2005); Blanchard v. Blanchard, 770 P.2d 227 (Wyo. 1989); Dice v. Dice, 742 P.2d 205 (Wyo. 1987).

296 *Hall*, 125 P.3d at 289.

297 Note that the rule described by each category is generalized for the purposes of categorizing the states' treatment of tax liability and many states have idiosyncrasies in how they apply the rule. Note also that because some states have used multiple approaches or have not made a clear distinction between approaches, some states will fall into more than one category.

- States that do not consider future tax liability: CT (specifically with regard to capital gains taxes), HI, OK.
- States that are silent with regard to future tax liability: DC, ID, KY.

V. Conclusion

A majority of state courts have held that tax liability should be considered in property division and valuation only when incurred incident to the divorce, or when otherwise immediate and specific. However, a significant minority of states will consider future tax liability when the property being valued or divided is a specific type of property, or when not considering future tax liability will produce an inequitable result. One state, Pennsylvania, has even specifically legislated that future tax liability is a factor for consideration in property division by declaring tax ramifications need not be immediate and certain.[298] The many variations in the states' treatment future tax liability indicate the complexity of forming rules around issues involving federal tax law, state divorce law, and potential future events.

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[298] 23 PA. CONS. STAT. ANN. § 3502(a)(10.1) discussed in Pennsylvania, *supra* note 234.