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Dunn v. Idaho State Tax Com'n Appellant's Brief Dckt. 44378

IN THE SUPREME COURT OF THE STATE OF IDAHO

LINDA DUNN, Petitioner/Appellant v. IDAHO STATE TAX COMMISSION, Defendant/Respondent	)	Supreme Court Case No. 244378 District Court Case No. CV-15-3329

Supreme Court No. 44378

APPELLANT'S BRIEF

On Appeal from the decision of the District Court of the First Judicial District for Kootenai County.
Honorable Cynthia K.C. Meyer, presiding.

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I. STATEMENT OF THE CASE

A. Nature of the case

This is a state income tax case. It is on review from the First Judicial District, Kootenai County, case No. CV-15-3329. It was submitted on agreed facts and briefs. The security deposit required by Idaho Code § 63-3049 has been paid.

The Idaho State Tax Commission assessed a tax deficiency based solely against Linda Dunn's alleged community property interest in the wages of her non-resident husband. The wages were earned and paid in the state of Texas. The taxable years at issue are 2000, 2001, 2003, 2005 and 2007-2010. Her husband, Barry Dunn, was employed by a Texas company. He died of cancer in 2012. No probate of his estate has been commenced. Vol. 1, p. 39. His estate is not a party in this case.

Including one half of Barry Dunn's Texas wages into Linda Dunn's Idaho income, is the sole issue in this case. R. p. 39. Linda Dunn, Appellant, claims that her husband's wages are defined as the equivalent of separate property in Texas and are not taxable to her for Idaho income tax purposes.

Texas has no state personal income tax. It is prohibited by the Texas State Constitution, Vernon's Ann. Texas Const. Art. 8, § 24 (copy attached, A-1).

In *Parker v. Idaho State Tax Commission,* 148 Idaho 842, 230 P.3d 734

(Idaho 2010), the taxpayers stipulated that Idaho community property laws apply, *id.* at 846. Linda Dunn urges that the community property law of Texas applies, and under U.S. Supreme Court law decided in 2015, the Commerce Clause prevents inclusion. Alternatively, since the unique Texas law treats wages of the earner spouse as his separate property when the issue is a non-tortuous liability. Barry Dunn's wages never entered Idaho in any way. The wages were his alone and directly deposited in a Texas bank.

B. Statement of facts

The facts, having been stipulated by the parties, are not in dispute. Barry Dunn earned the wages outside of Idaho. R. p. 39, 40. Linda Dunn, his wife, was an Idaho resident but her residency is not an issue in this case. R. p. 39. "Mr. Dunn was domiciled in Texas during the years in question. Petitioner was domiciled in Idaho during the same period." R. p. 118. At no time was Barry Dunn domiciled in Idaho. R. p. 39. Barry Dunn earned the money while personally present in Texas. The parties stipulated that Barry Dunn was not an Idaho resident. R. p. 39. During all the years in question, he never worked in Idaho. R. p. 40. Barry Dunn worked as a project manager for an off-shore drilling company, Udelhoven, Inc. Udelhoven, Inc., Barry Dunn's only employer during the relevant time, is a Houston, Texas, company and has no office or business in

Idaho. R. pp. 39, 40. He was domiciled in Texas, had a Texas residence, Texas driver's license and deposited his pay checks in the city of Tomball, Texas, bank account. R. p. 40. During all the times involved, Barry Dunn never worked or earned any of the wage income in Idaho. R. p. 39. Joint federal income tax returns were filed by the Dunns during the relevant periods involved. During all the years at issue, Barry Dunn lived in states other than Idaho. He lived in Washington in 2000, in either Washington or Alaska in 2001, Alaska in 2002, in Alaska or Texas in 2003, and lived in Texas from 2004 until October 2010. Barry Dunn was employed by Udelhoven, Inc., 4606 F.M. 1960 I.M. Road, Houston, Texas. The company operated offshore drilling platforms. R. p. 39 Dunn worked as a project manager. His employment required that he be personally present at the site of the project. R. pp. 39-40. He always resided in the states where he worked. R. pp. 39, 40. While in Texas, Barry Dunn's vehicle was licensed as a Texas vehicle. He obtained a Texas Driver's License. He lived in Tomball, Texas and his pay from Udelhoven, Inc. was deposited directly into his bank account in Tomball, Texas. R., p. 39. Barry Dunn was personally present and earned the income by his personal effort in Texas from 2004 through 2010, mostly on off-shore drilling platforms. R., p. 40.

II. ISSUES PRESENTED ON APPEAL

1. Whether wages earned in Texas by a non resident spouse domiciled in Texas is attributable as Idaho income to a non earning spouse domiciled in Idaho.

2. Whether the District Court erred in interpreting Texas law.

3. Whether wages earned by a non-resident husband in Texas are subject to the Idaho income tax of Linda Dunn, pursuant to Idaho Code § 63-3026A.

4. Whether Texas law, Texas Family Code §§ 3.102(a)(1) and 3.202 (Vernon's Texas Statutes and Code annotated Title 1, Subtitle B, Subchapter C), providing for management and control of earnings to the earner as if he or she were single and specifically rejects joint control, are state of Idaho income to the non earner spouse.

5. Whether the Dormant Commerce Clause, Art. 1, § 8, cl 3 or other U.S. Constitutional provisions, including the Privilege and Immunities Clause, Art. 4, § 2 prevent Idaho income taxation to a spouse of a non resident wage earner.

6. Whether wages personally earned in Texas by a resident of Texas while domiciled in Texas have a taxable nexus in Idaho? If so, is lack of nexus a violation of due process and the Commerce Clause preventing Idaho income?

7. Whether *Blangers v. State, Dept. Of Revenue and Taxation,* 114 Idaho 944, 763 P.2d 1052 (1988), updated by *Wynne,* applies to prevent Idaho income taxation.

8. Does *Comptroller of Treasury of Maryland v. Wynne,* ___ U.S. ___, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015) apply to control the outcome of this case?

9. Does actual receipt of income need be proved from husband earner to wife?

10. Whether the reciprocal credit statute in Idaho, Idaho Code § 63-3029 is a violation of the U.S. Constitution, Art. 4, § 2, the Privileges and Immunities provision, when the reciprocal state has no state income tax?

11. Does the case of *Lunding v. New York Tax Appeals Tribunal,* 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998) applying the equal footing privileges and immunities constitutional provision apply to this case?

III. STANDARD OF REVIEW

The case was tried on an agreed stipulation of facts before the Court. The Court exercises free review of the case. Free review is exercised over the District Court's application of relevant law to the facts. Also, constitutional issues are pure questions of law over which this Court exercises free review. *Icanovic v. State* 159 Idaho 524, 528-9, 363 P.3d 365 (Idaho 2015); *Crawford v. State,* 160 Idaho

586, 377 P.3d 400, 405 (Idaho 2016); *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (Idaho 2002); *Post v. Idaho Farmway, Inc.*, 135 Idaho 475, 20 P.3d 11 (Idaho, 2001).

IV. ARGUMENT

SUMMARY OF THE ARGUMENT

Under the Commerce Clause, a state may not discriminate between transactions on the basis of some interstate element, i.e. tax a transaction more heavily when it crosses state lines (intrastate) than when it occurs in state (interstate). It is illusory that Barry Dunn's Texas wages ever entered Idaho. The record does not indicate that Linda Dunn ever received any of Barry Dunn's wages. While there is no proof in the record, it is an equally creditable hypothesis that the couple's Idaho sales and real estate taxes could have been paid from all sources of their income and capital. Therefore, sales and real estate taxes pay for Idaho governmental services provided to Linda Dunn. Barry Dunn would have had no state tax to pay if his spouse was domiciled in Texas. This is discrimination. *Wynne*, 135 S.Ct. at 1801-2, requires that the tax structure of every state tax non residents on a non discriminatory basis. Every state includes the eight states that have no income tax, including Texas. *Wynne*, 135 S.Ct. at 1795 holds that the practical effect on taxpayers must be considered. Barry

Dunn's Texas wages are not included in his wife's income for the reason that regardless of label (community or separate) they are not includeable into Linda Dunn's Idaho state income.

A. The Dormant Commerce Clause applies to this case.

> "The Commerce Clause provides that Congress shall have Power. . . to regulate commerce . . . among the several states." U.S. Const. Art. 1, § 8, cl 3. The Supreme Court has interpreted this affirmative grant of authority to Congress as also establishing what has come to be called the Dormant Commerce Clause - a self executing limitation on state authority to enact laws imposing substantial burdens on interstate commerce even in the absence of Congressional action."

United Egg Producers v. Department of Agriculture of Commonwealth of Puerto Rico, 77 F.3d 567, 569-570 (1st Cir. 1996).

Parker v. Idaho State Tax Commission, 148 Idaho 842, 230 P.3d 734 (Idaho 2010) holds that the Dormant Commerce Clause did not apply "unless there is actual or prospective competition between entities in an identifiable market *and* state action that either expressly discriminates against or places an undue burden on interstate commerce." *Id.* at 847. The *Parker* case held that "the commerce clause is not implicated in this case." *Ibid.* 847. The Trial Court, on another issue, noted that the primary issue of community property of Texas was not stipulated, hence *Parker* did not apply to status of community property. R. 126. However, on

the issue of discrimination, the United States Supreme Court has, in a 2015 first impression case, *Comptroller of Treasury of Maryland v. Wynne,* ___U.S. ___, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015) abrogated *Parker* and applied the Dormant Commerce Clause to state cross-border income tax cases. *Wynne* was decided in 2015. *Parker v. Idaho State Tax Commission,* 148 Idaho 842, 848, 230 P.3d 734 (Idaho 2010) was decided before the first impression case of *Wynne,* 135 S.Ct. 1737. *Parker,* 148 Idaho at 848, is obsolete since the 2015 case of *Wynne. Wynne,* 135 S.Ct. at 1801-1804, applies an internal consistency test that requires a court to look to "the tax structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 1802. (Internal quotes disregarded) "Last Term, in *Comptroller of the Treasury of Maryland v. Wynne,* the Court for the first time held that a state's tax on personal income was subject to the restrictions of the dormant commerce clause." *Dormant Commerce Clause, Personal Income Taxation-Comptroller of the Treasury of Maryland v. Wynne.* 129 Harv.L.Rev. 181, November 2015. The Supreme Court 2014 Term (leading case Constitutional Law Article 1, Harvard Law Review Association). The Supreme Court in *Comptroller of the Treasury of Maryland v. Wynne,* 135 S.Ct. at 1796, discarded the distinction between gross receipts and net income,

"Maryland's raw power to tax its residents' out-of-state income does not insulate its tax scheme from scrutiny under the Dormant Commerce Clause." *Id.* at 1799. The issue has emerged from one of the most contentious issues that led to the formation of the U.S. Constitution. "No principle is better settled than that the power of a state, even its power of taxation, in respect to property is limited to such as within its jurisdiction." *New York, L E & WR Co. v. Com. of Pennsylvania,* 153 U.S. 628, 14 S.Ct. 952, 38 L.E. 846 (1894) (quoted in *Miller Bros. v. State of Maryland,* 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954) an excise tax case).

Comptroller of the Treasury of Maryland v. Wynne, ___ U.S. ___, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015), states:

> [I]n order to succeed, the new Union would have to avoid the tendencies toward economic Balkinization that had plagued relations among the Colonies and later among the States under the Articles of Confederation . . . by prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce. *Id.* at 1787.

The case of *Blangers v. State, Dept. Of Revenue and Taxation,* 114 Idaho 944, 763 P.2d 1052 (Idaho 1988) predated *Wynne* by some 28 years, but nonetheless applies the commerce clause and also prohibited excessive burdens on interstate

commerce, stating "Idaho is not the source of this income." *Id.* at 1059. *Blangers*, 114 Idaho at 948, relied on *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), a case also relied on in *Wynne*, 135 S.Ct. at 1793, to determine fair apportionment and whether the tax "is fairly related to the services provided by the State."

B. Idaho Law recognizes source income.

Idaho Code § 63-3026A, in its relevant part, states "(1) for non resident individuals trusts or estates the terms 'Idaho taxable income' includes only those components of Idaho taxable income as computed for a resident which are derived from or related to sources within Idaho." Barry Dunn's wages in Texas were not derived from or related to sources within Idaho. "This "source based" income (i.e. the income earned at its location) is the core issue."

> The states power to tax on the bases of source is no less well recognized than their power to tax on the bases of residence. However, because the power to tax based on source derives only from the protection that the states provide to 'persons property and business transactions *within their borders* it is necessarily more circumscribed than the power to tax that flows from 'domicil' itself. Consequently, when states seek to tax non resident individuals and corporations using source as their sole jurisdictional bases, their power extends only to the non residents property owned within the State and their business, trade or profession carried on therein and the tax is only on such income as derived from those sources. (Underlining added)

Walter Hellerstein, *Deciphering the Supreme Courts Opinion in Wynne*, July 2015,

page 7, J. Tax'n (2015), available at:

http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2004&context=fac_artchop

C. Comparison of common facts and law of *Treasury of Maryland v. Wynne* to Linda Dunn.

The Wynnes lived in Maryland and owned a subchapter S corporation that earned income and paid state income taxes to other states. *Wynne*, 135 S.Ct. at 1793. The *Wynne* opinion treated the subchapter S income as personal income. See, W. Hellerstein, *Deciphering the Supreme Courts opinion in Wynne*, July 2015, J. Of Taxation, p. 5. Maryland allowed a credit for state, but not county taxes, paid in other states. 135 S.Ct. 1793, 1803. The only issue was failure to allow a credit for county taxes. Linda Dunn was taxed by Idaho on income earned by her non-resident husband, earned in Texas. Texas has no state income tax. As a first impression issue *Wynne* held that for Dormant Commerce Clause purposes the difference between gross receipts and net income is eliminated. *Wynne*, 135 S.Ct. at 1792, 1796. At issue in both *Wynne* and Dunn are state income tax on income earned outside the state, i.e. geographical source income. Source income is income earned at the location that is other than the state of the taxpayers domicile. *Hellerstein*, J of Tax'n, July 2015, at 7 f.14. *Wynne* did not establish a strict source based rule. However, *Wynne* considered the source to establish the

internal consistency test of discrimination "to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Wynne* at 1802. The seven states that have no income tax on wages, including Texas, Alaska and Washington, are at a disadvantage as income earned by persons domiciled in these states pay no state tax. Linda Dunn's non-resident husband earns income geographically in these exempt states, the Idaho income tax inherently discriminates. The total tax burden is what matters. *Wynn,* 125 S.Ct. at 1805. The tax on Linda Dunn is discriminatory and unconstitutional in violation of the Dormant Commerce Clause. The distinction of the Trial Court, R. 124-5, is wrong as the couple is burdened with a tax in Idaho on income earned in non income tax states. The total burden is compared. *Parker,* 148 Idaho 842, 230 P.3d 734 (2010) is not binding on this issue as *Wynne,* the decision by the highest court construing constitutional law, holds that the internal consistency test is violated. Walter Hellerstein's book, *J. Hellerstein & W. Hellerstein, State Taxation,* (3d ed. 2003) is referenced in *Wynne,* 135 S.Ct. 1801, he also co authored an amicus brief in *Wynne,* July, 2015, J. of Tax'n at 6.

Idaho taxes income to Linda Dunn that would be exempt if she lived in Texas. This is inherently discriminatory and acts as a tariff. It is voided by the

Dormant Commerce Clause. See *Wynne*, 135 S.Ct. at 1804. The issue is of vital importance to Linda Dunn. Tax free is enormously different from writing a check for additional Idaho income tax. Some versus none is discriminatory.

D. The Idaho Credit statute fails to address the states that have no income tax.

Idaho Code § 32-906 defines Idaho community property and separate property. The code section presumes that all property is community unless the spouses, by written agreement, specify that the property is separate property. "Specifically designated separate property" is the "separate property to the spouse to whom the property belongs. . . . Such property shall be subject to the management of the spouse owning the property and shall not be liable for the debts of the other member of the community." Idaho Code § 63-3029 credits income taxes paid to another state "imposed on the individual." Apparently, it applies dollar for dollar. It does not apply here as Texas has no income tax. This is the source income that prevents the tax sought in this case. The Tax Commission assumes that Barry Dunn's wages are somehow "beamed" into Idaho. It imposes what amounts to a tariff on Linda Dunn. There is no internal consistency as Idaho seeks an income tax on Linda's presumed community half that would not be taxed in Texas.

E. Alternatively, if *Wynne* is disregarded, the law of Texas applies and the Income is still not taxed in Idaho

The two states both have community property ownership laws. The rule is that when the spouses are domiciled in different states, the choice of law where "movables" are the issue depends on where the "most significant relationship to the spouse and to the earnings." *Lane-Burslem v. C.I.R.*, 659 F.2d 209 (D.C. Cir. 1981) is very similar to the Dunn's situation. In *Lane-Burslem*, the wife and husband resided in England but intended to retire in Louisiana, where the wife was born. *Id.* at 211-12. Wife contended, for federal tax purposes, that one half of her wages earned in England was community property and exempt from tax as her husband was a non-resident alien. The law, prior to 1926, allowed the exclusion. The court held that "the ownership interests in marital personal property should be determined by the internal law of the state with the most significant relationship and to the earnings." *Id.* at 214. England, where the wages were earned, had the most significant relationship to the spouses "Under English law, appellant would hold her income as separate, not community, property." *Id.* at 215. In *Seizer v. Sessions,* 132 Wash.2d 642, 940 P.2d 261 (Wash. 1997), the husband lived in Washington where he bought a ticket and won the lottery. His wife lived in Texas. Washington law applied. The court applied

Restatement (Second) of conflicts of Law § 258. The court applied Washington law ". . . because Rosalie and Elmer had separate domiciles when Elmer acquired the lottery winnings, and Elmer was domiciled in Washington at that time. *Id.* at 651 In *in re Marriage of Whelchel,* 476 N.W.2d 104 (C.A. Iowa 1991) a divorce case, the cash management account was acquired when the parties were married and living in Texas and later moved to Iowa. *Id.* at 105-6. The court applied Restatement (Second) Conflict of Law § 258 (1) and § 6(2) and held that where the two state laws differed, Texas law applied as it had the "most significant relationship." *Id.* at 110. It follows here that Texas law applies to Barry Dunn's wages earned and paid in Texas. Texas has a unique marital property concept depending on who has management rights to the property. Management rights fall into two categories, sole management rights and joint management rights. A spouse has sole management rights over community property that would have been his or her separate property had he or she acquired it while single. TEX.FAM.CODE ANN § 3.102(a). (Copy attached). Wages earned by a spouse is sole management property and not liable for non tortious liabilities of the other spouse. Vernon's Texas Statutes and Codes Annotated Family Code § 3.102(a)(1) states that "During marriage, each spouse has the sole management, control and disposition of the community property that the spouse would have owned if single, including (1)

personal earnings." Vernon's Texas Statutes and Codes Annotated Family Code § 3.202 also applies (copy attached); it states "(b) unless both spouse's are personally liable as provided in this subchapter, the community property subject to a spouse's sole management, control and disposition is not subject to: (2) any non tortious liability that the other spouse incurs during marriage." *Wynne* applies and is reason for reversal. However, even if it does not apply Texas law applies and also requires reversal. The two theories to support reversal are independent of the other.

F. The Laws of Texas treat wages like separate property.

The question of what community property law applies is compounded as Idaho community property does not have the exception that wages earned in Texas are solely managed by the earner as if they were separate property. Additionally the reason for the distinction is immunity to the non earner spouse's creditors. The statute, TEX.FAM.CODE ANN. (West 2012) § 3.102 states (a) during marriage, each spouse has the sole management, control and disposition of the community property that the spouse would have earned if single, including (1) personal earnings. TEX.FAM.CODE ANN. (West 2012) § 3.202(b)(2) provides that sole management of community income is not liable for the non earner's spouse's non tortious liabilities. Barry Dunn is stipulated as not a resident or

domiciled in Idaho, hence Idaho community property laws do not apply to him. Secondly, the earnings that are the sole issue in this case were sourced in Texas. Linda Dunn submits that as a result, new cases like *Corrigan v. Testa,* ___ N.E.3d___, 2016 WL 2341977 (S.C. Ohio, 2016) apply to her deceased husbands Texas wages and grant her refund. *Corrigan,* a non resident of Ohio, and Connecticut resident, owner of an LLC, sold the business for a large amount. The Court held that taxation in Ohio violated due process as it sought to tax value earned outside borders of Ohio. The Court held that states could not tax non-resident income beyond its borders. It followed *Wynne,* 135 S.Ct. 1787, 1794, 191 L.Ed.2d 813 (2015). *Id.* at *3. The decision also quoted the "fundamental fairness" of *Quill Corp. v. North Dakota By and Through Heitkamp,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d. 91 (1992) *Ibid.* at *3. The court granted the refund. Based on the principle that, in addition to the State's connection with the person to be taxed, there must be a connection to the activity itself. *Id.* at *6.

The Commerce Clause is not violated if the internal consistency test is met. The answer is found in Edward H. Zalinsky, 7 Wm. & Mary Bus. L. Rev., 797 (2016) *"The Enigma of Wynne."*

> New York City implements this approach under the city's municipal income tax, which applies to residents but not to non residents. Under the test of internal consistency, as explicated by *Wynne*, New

> York City need not offer its residents a credit for out-of-state income taxes because New York City obtains internal consistency by not taxing non residents on their income earned in the city. The New York City tax is thus 'capital export neutral' and passes constitutional muster under Wynne. *Id.* at 814.

Credits might cause the problem but the state did not indulge in this cure as Maryland did not have a credit. Maryland's tax "unconstitutionally discriminates against interstate commerce." The tax here flunks the internal inconsistency test. The reason is that Texas has no income tax. If interstate, the tax is zero. Idaho is taxing Barry Dunn's wages earned in Texas where there is no state income tax. Barry Dunn is a non resident of Idaho and the income is earned outside Idaho. This is inconsistent because no reciprocal credit is needed. The Idaho assessment violates the Dormant Commerce Clause as none of the source activity took place in Idaho. All the tax on the income by Idaho violates the Dormant Commerce Clause. If the couple lived in the place where the income is earned, no state tax would be payable.

Texas Const. Art. 8, § 24 (copy attached) added by an amendment in 1993 will not allow the legislature to enact a state income tax unless it is approved by a majority of voters voting in a statewide referendum. To date, no referendum imposing the tax has been passed.

Hellerstein, Hellerstein and Swain, State Taxation, third ed. 2015, Thomson

Reuters, 2016 Cumulative supplement, no. 2 pp. 4.16[1][c], page S4-35, states:

The Court reaffirmed the point it made in *Tyler Pipe* in *Comptroller of the Treasury v. Wynne.* In *Wynne,* Maryland imposed a tax on a portion of its residents' income earned in other states without providing a credit against the residence-based tax for source-based taxes that Maryland residents paid on such income to states in which the income was earned. The scheme indisputably failed the internal consistency test, and the Court so held. If every state imposed a regime like Maryland's, a taxpayer who confined her activity to one state would pay a single tax on her income to the state where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across lines to earn her income would pay a double tax on such income, one to her state of residence and another to the state in which she earned the income. (Underlining added)

In the course of its opinion in *Wynne,* the Court reiterated the proposition that provision of a credit for taxes paid to other states on the same tax base will ordinarily render an otherwise internally inconsistent regime internally consistent: "Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States. See *Tyler Pipe* ... . If it did, Maryland's tax scheme would survive the internal consistency test and would not be inherently discriminatory. The Court went on to illustrate the point, based on a hypothetical that assumed that all states (like Maryland) imposed a 1.25 percent tax on (1) income that residents earned in the state; (2) income that residents earned in other states; and (3) income that nonresidents earned in the state, but also provided a credit for taxes that residents paid to other states. "In that circumstance, April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax. Specifically, April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State B, because State A would give him a credit against the tax he paid to State B.)

In *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez,* 834 F.3d. 110 (1st Cir. 2016) the Puerto Rico legislature enacted an alternative minimum tax on services provided by a related party or home office outside of Puerto Rico. *Id.* at 43. The

enactment was held unconstitutional on the basis of violating the Dormant Commerce Clause. The case quotes *Wynne* (*Id.* at 126) stating "The dormant Commerce Clause is an implied limitation from the Commerce Clause that 'precludes States from discriminat[ing] between transactions on the basis of some interstate element.'"

G. Federal tax law does not apply.

Federal tax law taxes all property earned in any state. State, not federal law determines the extent of the interest in property. The Court below erred in concluding that *Kimsey v. Kimsey*, 965 S.W.2d 690 (Ct. App. Tex. 1998) supports the conclusion that Barry Dunn's wages were taxable to Linda Dunn for Idaho Income tax purposes. The compelling reason is that in *Kimsey* both litigants were Texas residents in a divorce case. In a divorce case all property is before the court. The court construed federal tax law 26 U.S.C. § 66 and 26 U.S.C. 6013(d)(3). The federal statutes require that married spouses specifically include one half of the community property income in the other's federal tax return. Section 6013 provides that the tax liability of a husband and wife who file a joint tax return shall be joint and several. *Kimsey* was decided in 1992 Texas law, *id.* at 693. Family Code §§ 3.201 and 3.202 were added in 1997 and 2009, after the law applied to *Kimsey* was decided. Federal tax liability is joint and several.

Dolan v. C.I.R. 44 T.C. 420, 426 (1965). However, where federal tax collection is the issue only Federal exemption law applies. Wages are not exempt from federal tax collection on a joint return no matter where earned or who earns them. 26 U.S.C. § 6334. The federal law can ignore the exempt status of property under state law. *U.S. v. Mitchell,* 403 U.S. 190, 204, 91 S.Ct. 1763, 29 L.Ed.2d. 406 (1971). However, the federal income tax case of *Crespi v. C.I.R.* 44 B.T.A. 670 (1941) recognizes domicile. Crespi was born and raised in Texas and was only temporarily in North Carolina. *Crespi* held "A domicile once acquired is presumed to continue until it is shown to have changed." *Id.* at 671. The special rules of 26 U.S.C. 66(a)(1) and 26 U.S.C. § 879(a)(1) also allow couples to disregard community property laws.

Douglas v. Delp, 987 S.W.2d 879 (S.C. Tex. 1999) holds that earning capacity during marriage is sole management community property. *Perez v. Perez,* 587 S.W.2d 671 (S.C. Texas 1979) is conclusive. Roberto Perez was on active duty during the marriage. A readjustment payment was payable for Roberto's active service, some of which occurred during the marriage. Marian, Roberto's exwife, petitioned for part of the payment as her community interest. The Court held that loss of earnings during marriage was not a community asset. *Id.* at 673. *White v. White,* 710 So.2d 208 (D.C. Fla. 1998) reviews Texas law and concludes that

under Texas law the lump sum separation payment on discharge from the navy was not community property under Texas law. *Id.* at 211.

Montemayor v. Ortiz, 208 S.W. 3d 627 (Ct. App. Tex. 2006) also applies. The case held that a judgment against a husband could not be collected against the wife's special community property. The statute involved in *Montemayor* is the same statute that applies to Barry Dunn's salary. Section 3.102 of the Family Code provides that "during marriage, a spouse has the sole management, control and disposition of the community property that the spouse would have owned if single, including (1) personal earnings." *Id.* at 644. Citing the statute, the Court held "Because Schor's remained under the sole management and control of *Ortiz*, including any profits therefrom (whether or not some other portions of those profits were then contributed to the community), we conclude that the trial court properly determined that Schor's was the special community property of Ortiz, not subject to any nontortious liabilities of Celada, not a joint debt, and not subject to liability for the 1990 judgment debt. TEX.FAM.CODE ANN. (West 2012) §§ 3.102 and 3.202 (Vernon 1998)." *Id.* at 645. The Court held that the retail business of the wife, named Schor's, started after marriage to her husband Celada, who farmed in Mexico, was the special community property of wife and not subject to the "non-tortious liabilities of Celada." *Ibid.* at 645. The trial court

ruled on *Carnes v. Meador*, 533 S.W.2d. 365, 371 (Tex.Civ.App. 1976) and *Maben v. Maben*, 574 S.W.2d. 229, 232 (Tex.Civ.App. 1978) R. 117, to determine community property ownership. These cases are prior to the enactment of U.T.G.A. Family Code, first enacted in 1947 and amended in 2009. The 1997 and Texas law S.B. No. 334, 1997 Tex. Sess. Law Serv. Ch 7 (S.B. 334) made substantial revisions in marital law including Subchapter C titled Marital Property Liabilities that included TEX.FAM.CODE ANN. (West 2012) § 3.202 that at 3.202(a)(1) and (2) that exempts "any liabilities that the other spouse incurred before marriage or (2) any non tortious liabilities that the other spouse incurs before marriage. The revisions led to cases like *Douglas v. Delp*, 987 S.W.2d 879, (S.C. Tex. 1999) a Texas supreme court decision that states "when different kinds of damages are claimed in a single cause of action, we look to the nature of each injury when classifying those damages as community or separate property." *Id.* at 883. "Billy's loss of earning capacity during the marriage constitutes his sole-management community property . . . Therefore, the right to recover for any injury to Billy's earning capacity and credit reputation. . . would have belonged solely to him were he not married." See TEX.FAM.CODE ANN §§ 3.102, 3.102(a); *Cockerham v. Cockerham*, 527 S.W.2d. at 169-70. Therefore the right to recover for any injury to Billy's earning capacity and credit reputation was also swept into

Billy's bankrupt estate, and Gertrude lacks standing to pursue their claims as well." *Ibid.* at 883. The classification of wages as separate management community property is theoretical depending on tort or non tort liability. It depends on the nature of liability. There is no doubt here as state taxes are non tort. It is analogous to Einstein's Theory of Relativity, i.e. everything is moving relative to everything else. There is no fixed frame of reference. Here, if the liability is non tort, the property is treated the same as separate. It is all relative to the frame of reference. Wages are never tortious and they are never considered income to a non resident, non earner spouse. The semantic origin is not important here as there is nothing in the record to indicate a joint account or that the wages ever crossed the several borders into Idaho. It is clear that Texas law applies. Linda Dunn posted the necessary security. If the Idaho Tax Commission assigned the collection to garnish Barry Dunn's wages in a Texas court, the full faith and credit clause, of the U.S. Const. art IV § 1, would deny recovery. Comity does not apply to tax collection and tortious acts in a sister state. See, *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d. 702 (2003). Unlike *Franchise Board, Ibid.* 499. There is a "rudder" to determine that the conflict of law favors Texas in this case. The case of *In re Trammell*, 399 B.R. 177 (Bkcy. D.C. Texas 2007) also applies. The husband had title of a Honda car. The

wife often drove the car but it was titled in the husband's name. The court held that the husband would have owned the vehicle if he was single since it was in his name alone. The court held "In this instance, Trammell would have owned the vehicle if single, since it is undisputed that it is titled solely in his name. Cf.Tex.Fam.Code. Ann. § 3.104(a) (Vernon 2006). (during marriage, 'property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership.' Accordingly, it appears that the vehicle is Trammell's sole management community property." *Id.* at 184. The vehicle was not an asset in the wife's Chapter 13 proceeding.

In *Beal Bank v. Gilbert,* 417 S.W.3d 704, (C.A. Texas 2013) the husband owed the bank on a promissory note. The bank attempted to collect against the wife's inheritance from her parents, but was unable to do so. "The judgment was against Warren only and was based on a non-tortious liability. Beal Bank did not have a right to payment from Pattie's separate property or sole management community property. See TEX.FAM.CODE ANN § 3.202(a)(b)(2)." *Id.* at 710.

Barry Dunn's wages are defined as sole management community property. The wages are not taxable in Idaho or subject to Linda Dunn's debts. See *in re Hall,* 559 B.R. 463 (Bkcy. Texas 2016). "Hall's separate property and community

property that is subject to her sole management and control is not available to creditors of Hall's non-filing spouse." *Id.* at 468. *Patel v. Kuciemba,* 82 S.W.3d 589 (C.A. Texas 2002) applies. It states "Special community property is that portion of the community that is under one spouse's exclusive control and is not liable for the other spouse's debts." *Id.* at 596. The business was special community property and the non operating spouse was not liable. *Id.* at 600. The Trial Court, R. 119, also cited the federal tax case of *Stokby v. C.I.R.,* 26 T.C. 912 (1956). The federal tax law applies to all income wherever derived by U.S. citizens. Under federal law, liability for a joint return is joint and several even though one spouse has no gross income. 26 U.S.C. § 6013(a) and (d)(3). In this case, the consideration whether the Texas income is attributable to the non earner spouse who is living in Idaho for Idaho income tax purposes. Therefore, includeable income, not collection, is the issue.

H. The Privileges and Immunities Clause of the U.S. Constitution also applies.

Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998) involves the same tax as here involved, state income tax. It denied unequal income tax treatment to a non resident as a violation of the privileges and immunities clause of the U.S. Constitution, Art. IV, § 2, entitling

"Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens of the several States." This is based on comity between states. "Further, the manner in which New York taxes nonresidents, based on an allocation of an 'as if' resident tax liability, not only imposes upon nonresidents' income the effect of New York's graduated tax rates." *Id.* at 314. It is against public policy to apply another state's laws. *Comptroller of Treasury of Maryland v. Wynne,* 135 S.Ct. at 1800 mentions the privileges and immunities clause. Since the distinction between gross receipts and net income is removed by *Wynne,* the distinction between income and income tax deductions is also logical and follows *Wynne. Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) applied the full faith and credit clause. U.S. Const. Art. IV, § 1, and held that a Nevada Court was not required to apply California law. The Court would not apply the state of Nevada's tax collection laws to a Nevada resident. The Court would not balance state tax laws. *Id.* at 499.

Hansen v. Scott, 687 N.W.2d 247 (S.C.N.D. 2004) applied Texas law to Texas residents. The place where payment is made is the place where the income was received. See, e.g., *Insteel Industries, Inc. v. Costanza Contracting Co., Inc.,* 276 F.Supp.2d 479, 487 (D.C. Virginia 2003). "To select, as the WPRA suggests, the law of a state to which the individual or personality is a stranger, constitutes no

less random an act than blindly throwing darts at a map on the wall." *Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD,* 766 F. Supp.2d 1122, 1138 (D.C.W.D. Wash. 2011) (holding laws negating domicile unconstitutional).

CONCLUSION

Wynne applies the law of internal consistency to prohibit income from wages paid to non residents outside the taxing state.

The alternative argument also applies. Texas law treats non resident wage income like separate property. Linda Dunn, the non wage earner, is not entitled to any of Barry Dunn's wage income. The case should be reversed and refund granted.

Dated December 31, 2016.

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CERTIFICATE OF SERVICE

I, Richard W. Kochansky, hereby certify that a copy of this Appellant's Brief has been sent by First Class Mail to:

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LINDA DUNN, Petitioner/Appellant v. IDAHO STATE TAX COMMISSION, Defendant/Respondent	)	Supreme Court Case No. 244378 District Court Case No. CV-15-3329

APPENDIX

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article VIII. Taxation and Revenue

Vernon's Ann.Texas Const. Art. 8, § 24

§ 24. Personal income tax; dedication of proceeds

Currentness

Sec. 24. (a) A general law enacted by the legislature that imposes a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, must provide that the portion of the law imposing the tax not take effect until approved by a majority of the registered voters voting in a statewide referendum held on the question of imposing the tax. The referendum must specify the rate of the tax that will apply to taxable income as defined by law.

(b) A general law enacted by the legislature that increases the rate of the tax, or changes the tax, in a manner that results in an increase in the combined income tax liability of all persons subject to the tax may not take effect until approved by a majority of the registered voters voting in a statewide referendum held on the question of increasing the income tax. A determination of whether a bill proposing a change in the tax would increase the combined income tax liability of all persons subject to the tax must be made by comparing the provisions of the proposed change in law with the provisions of the law for the most recent year in which actual tax collections have been made. A referendum held under this subsection must specify the manner in which the proposed law would increase the combined income tax liability of all persons subject to the tax.

(c) Except as provided by Subsection (b) of this section, the legislature may amend or repeal a tax approved by the voters under this section without submitting the amendment or the repeal to the voters as provided by Subsection (a) of this section.

(d) If the legislature repeals a tax approved by the voters under this section, the legislature may reenact the tax without submitting the reenactment to the voters as provided by Subsection (a) of this section only if the effective date of the reenactment of the tax is before the first anniversary of the effective date of the repeal.

(e) The legislature may provide for the taxation of income in a manner which is consistent with federal law.

(f) In the first year in which a tax described by Subsection (a) is imposed and during the first year of any increase in the tax that is subject to Subsection (b) of this section, not less than two-thirds of all net revenues remaining after payment of all refunds allowed by law and expenses of collection from the tax shall be used to reduce the rate of ad valorem maintenance and operation taxes levied for the support of primary and secondary public education. In subsequent years, not less than two-thirds of all net revenues from the tax shall be used to continue such ad valorem tax relief.

(g) The net revenues remaining after the dedication of money from the tax under Subsection (f) of this section shall be used for support of education, subject to legislative appropriation, allocation, and direction.

(h) The maximum rate at which a school district may impose ad valorem maintenance and operation taxes is reduced by an amount equal to one cent per $100 valuation for each one cent per $100 valuation that the school district's ad valorem maintenance and operation tax is reduced by the minimum amount of money dedicated under Subsection (f) of this section, provided that a school district may subsequently increase the maximum ad valorem maintenance and operation tax rate if the increased maximum rate is approved by a majority of the voters of the school district voting at an election called and held for that purpose. The legislature by general law shall provide for the tax relief that is required by Subsection (f) and this subsection.

(i) Subsections (f) and (h) of this section apply to ad valorem maintenance and operation taxes levied by a school district on or after the first January 1 after the date on which a tax on the net incomes of natural persons, including a person's share of partnership and unincorporated association income, begins to apply to that income, except that if the income tax begins to apply on a January 1, Subsections (f) and (h) of this section apply to ad valorem maintenance and operation taxes levied on or after that date.

(j) A provision of this section prevails over a conflicting provision of Article VII, Section 3, of this Constitution to the extent of the conflict.

Credits
Adopted Nov. 2, 1993.

Notes of Decisions (1)

Vernon's Ann. Texas Const. Art. 8, § 24, TX CONST Art. 8, § 24
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Family Code (Refs & Annos)
Title 1. The Marriage Relationship (Refs & Annos)
Subtitle B. Property Rights and Liabilities
Chapter 3. Marital Property Rights and Liabilities (Refs & Annos)
Subchapter B. Management, Control, and Disposition of Marital Property

V.T.C.A., Family Code § 3.102

§ 3.102. Managing Community Property

Currentness

(a) During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

(1) personal earnings;

(2) revenue from separate property;

(3) recoveries for personal injuries; and

(4) the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

(b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

(c) Except as provided by Subsection (a), community property is subject to the joint management, control, and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement.

Credits
Added by Acts 1997, 75th Leg., ch. 7, § 1, eff. April 17, 1997.

Notes of Decisions (327)

V. T. C. A., Family Code § 3.102, TX FAMILY § 3.102
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Family Code (Refs & Annos)
Title 1. The Marriage Relationship (Refs & Annos)
Subtitle B. Property Rights and Liabilities
Chapter 3. Marital Property Rights and Liabilities (Refs & Annos)
Subchapter B. Management, Control, and Disposition of Marital Property

V.T.C.A., Family Code § 3.104

§ 3.104. Protection of Third Persons

Currentness

(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in that spouse's possession and is not subject to such evidence of ownership.

(b) A third person dealing with a spouse is entitled to rely, as against the other spouse or anyone claiming from that spouse, on that spouse's authority to deal with the property if:

(1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and

(2) the person dealing with the spouse:

(A) is not a party to a fraud on the other spouse or another person; and

(B) does not have actual or constructive notice of the spouse's lack of authority.

Credits
Added by Acts 1997, 75th Leg., ch. 7, § 1, eff. April 17, 1997.

Notes of Decisions (20)

V. T. C. A., Family Code § 3.104, TX FAMILY § 3.104
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Family Code (Refs & Annos)
Title 1. The Marriage Relationship (Refs & Annos)
Subtitle B. Property Rights and Liabilities
Chapter 3. Marital Property Rights and Liabilities (Refs & Annos)
Subchapter C. Marital Property Liabilities

V.T.C.A., Family Code § 3.202

§ 3.202. Rules of Marital Property Liability

Effective: September 1, 2009
Currentness

(a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.

(b) Unless both spouses are personally liable as provided by this subchapter, the community property subject to a spouse's sole management, control, and disposition is not subject to:

(1) any liabilities that the other spouse incurred before marriage; or

(2) any nontortious liabilities that the other spouse incurs during marriage.

(c) The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage.

(d) All community property is subject to tortious liability of either spouse incurred during marriage.

(e) For purposes of this section, all retirement allowances, annuities, accumulated contributions, optional benefits, and money in the various public retirement system accounts of this state that are community property subject to the participating spouse's sole management, control, and disposition are not subject to any claim for payment of a criminal restitution judgment entered against the nonparticipant spouse except to the extent of the nonparticipant spouse's interest as determined in a qualified domestic relations order under Chapter 804, Government Code.

Credits
Added by Acts 1997, 75th Leg., ch. 7, § 1, eff. April 17, 1997. Amended by Acts 2009, 81st Leg., ch. 1244, § 1, eff. Sept. 1, 2009.

Notes of Decisions (452)

V. T. C. A., Family Code § 3.202, TX FAMILY § 3.202

Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document