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Federal Tax Liens and the Unrecorded Divorce Decree

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Note*

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I. INTRODUCTION

If all your "ex's (ex-spouses) live in Texas," current Fifth Circuit law warns that any property transferred, but not yet recorded, pursuant to a divorce decree while in Texas may be used to satisfy your ex-spouse's tax debt.[1] In addition, by "hang[ing your] hat in Tennessee" your property may soon be subject to similar treatment by the Internal Revenue Service (IRS).[2]

Section 6321 of the Internal Revenue Code states:

* J. David Beasley, J.D. Candidate, University of Nebraska College of Law, 2012, B.M., summa cum laude, Oklahoma City University, 2004. I would like to commend and thank my colleagues at the NEBRASKA LAW REVIEW for their hard work and dedication toward each and every volume of this publication. A special thank you to my wife, Kimberly, and my son, Zachary, for their love and support.

1. GEORGE STRAIT, *All My Ex's Live in Texas, on* OCEAN FRONT PROPERTY (MCA Records 1987).
2. *Id.*

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.[3]

In addition:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.[4]

Courts are to begin their analysis by looking to state law to determine the rights a taxpayer has in the property, then to federal law in deciding whether the "property" or "rights to property" are within the legislative scope of the federal tax lien.[5]

For most § 6321 tax liens, the property that the government has placed a lien on will clearly belong to the delinquent taxpayer. However, in situations where 1) a couple divorces, 2) a couple transfers real property due to divorce proceedings, 3) the designated party fails to adequately record the conveying instrument, and 4) the transferor incurs a tax deficiency, the determination of what interest remained in the transferor can become a hotly contested dispute.

Currently, the federal circuits are split on this issue. The Fifth Circuit, arguing in the present minority, holds that a federal tax lien has priority over a docketed divorce decree that has not yet been recorded.[6] The majority of circuits, however, hold that the delinquent taxpayer has no remaining interest in said property after such conveyance, recorded or not, to which the tax lien could attach.[7] Recently, the IRS has reaffirmed its position that there is an interest remaining in the taxpayer and seems set to litigate if necessary—this time in the Sixth Circuit.[8]

3. I.R.C. § 6321 (2006).
4. *Id.* § 6331(a).
5. Drye v. United States, 528 U.S. 49, 58 (1999); *see* Aquilino v. United States, 363 U.S. 509, 513 (1960) (holding that courts, in determining "the nature of the legal interest" that a taxpayer has in the property the Government seeks under a tax lien, should look first to state law (quoting Morgan v. Comm'r, 309 U.S. 78, 82 (1940)); United States v. Bess, 357 U.S. 51, 55 (1958) (stating that a federal tax lien "creates no property rights but merely attaches consequences, federally defined, to rights created under state law"); *cf. Morgan*, 309 U.S. at 80 ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.").
6. Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986). This argument is detailed below in section II.A.
7. United States v. Gibbons, 71 F.3d 1496 (10th Cir. 1995); Thomson v. United States, 66 F.3d 160 (8th Cir. 1995); United States v. V & E Eng'g & Constr. Co., 819 F.2d 331 (1st Cir. 1987). This argument is discussed in detail in section II.B.
8. I.R.S. Gen. Couns. Mem. 24,039 (June 18, 2010).

The following cases demonstrate the need for standardized treatment of the IRS in relation to a state's recording requirements, especially when dealing with an unrecorded divorce decree. While state law defines what interest a taxpayer retains after such conveyance, this Note suggests that future courts should adopt the majority approach when determining what interest the IRS acquires after issuance of a § 6321 tax lien on a taxpayer's real property. This Note begins, in Part II, by discussing the major cases in the circuit courts that have led to this dispute, along with the recent IRS General Counsel Memorandum which has reignited the conflict. Then in section III.A, this Note demonstrates that a § 6321 tax lien should only attach to the interests of the taxpayer and not to the interests of the taxpayer's creditors. In section III.B, this Note analyzes the application and purpose of state recording acts when integrated with a federal tax lien. Next, in section III.C, this Note argues against a court's treatment of the IRS as a creditor without notice. That section further discusses a possible undeveloped argument that a docketed divorce decree dividing interest in property should qualify as constructive or inquiry notice upon the IRS when a tax lien arises. The Note concludes, in section III.D, with suggestions of judicial and legislative solutions to standardize the treatment of the IRS in tax lien proceedings with regards to conveyances contained in unrecorded divorce decrees.

II. BACKGROUND

A. The Fifth Circuit Approach

The first case in this line of litigation was *United States v. Creamer Industries, Inc.*,[9] decided under Texas state law in the Fifth Circuit. While not a divorce case, *Creamer*'s reasoning with regard to unrecorded conveyances and federal tax liens have been the basis for subsequent divorce-related rulings.[10] On January 21, 1959, Creamer Industries, Inc. (Creamer) and the Maxwell Steel Company, Inc. (Maxwell) entered into a contract to transfer and convey all of Maxwell's assets to Creamer. The contract failed to list six lots, five of which the IRS subsequently levied, on March 24, 1959, to enforce a tax lien against Maxwell. On April 1, 1959, the corrected deed was delivered and backdated to January 21, 1959, but it was not recorded until April 28, 1959.[11] The court, without explanation, proclaimed that, "[a]s to the taxes owed to it, the United States was a 'creditor' within the

9. 349 F.2d 625 (5th Cir. 1965).

10. William D. Elliott, *Fifth Circuit-Taxation 2010*, 42 TEX. TECH L. REV. 825, 834 (2010) ("The root cases in the Fifth Circuit are *United States v. Creamer Industries, Inc*. and *Prewitt v. United States*.").

11. *Creamer*, 349 F.2d at 626.

Texas recording statute,"[12] and was, thus, "protected by the statute."[13]

However, the dissent proclaimed this was "a startling result."[14] Judge Brown added, "Congress has not said that this Nation has a tax lien against any and all property once owned by a delinquent taxpayer to the same extent as some innocent purchaser or judgment creditor might have under local recordation statutes."[15] Furthermore, the "[t]axpayer [Maxwell] here had *no* right in or to the property," and there were no cases supporting "the faintest hope that Maxwell, . . . had any rights, legal or equitable, against anyone . . . to get the property back or assert any interest in it."[16]

Twenty-one years later, in *Prewitt v. United States*,[17] the Fifth Circuit encountered a similar case, this time involving an unrecorded conveyance in the context of divorce proceedings. The pertinent facts of *Prewitt* are as follows: Prior to September 9, 1982, James and Johanna Damon were married and owned the property at dispute in the case. They divorced on that date and property was awarded to Johanna. The decree was entered but not recorded until after a tax levy was imposed on James, due to various illegal activities he had committed. Later, Robert Prewitt purchased the property from Johanna without knowledge of the tax lien against James. Subsequently, on

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12. The Texas recording statute at the time read:

> All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

1925 Tex. Rev. Civ. Stat. 6627. The current Texas recording act reads:

> (a) A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.
> (b) The unrecorded instrument is binding on a party to the instrument, on the party's heirs, and on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.
> (c) This section does not apply to a financing statement, a security agreement filed as a financing statement, or a continuation statement filed for record under the Business & Commerce Code.

TEX. PROP. CODE ANN. § 13.001 (2009).

13. *Creamer*, 349 F.2d at 628.
14. *Id.* at 629 (Brown, J., dissenting).
15. *Id.*
16. *Id.*
17. 792 F.2d 1353 (5th Cir. 1986).

about August 10, 1983, the IRS seized the property, prompting Prewitt to sue to attack the levy.[18]

The *Prewitt* court affirmed the decision of the district court in favor of the IRS, holding that the IRS "filed a federal tax lien against [James] after the divorce decree became final but before it was properly recorded."[19] The court additionally affirmed that the "IRS was a creditor without notice of the property division, notwithstanding the filing of the divorce decree in state court or the discussion between Johanna and the [IRS] special agents."[20]

Interestingly enough, the *Prewitt* court found that James' property interest was not enforceable since the divorce decree had become final two months prior to the date the tax lien arose.[21] The court then proceeded to call it a "somewhat appealing[ ] . . . argument" but eventually discarded this finding because the majority in *Creamer* had rejected an identical argument.[22] In doing so the court said the "IRS may take advantage of state recording statutes, and the right of certain of James' creditors to reach property he formerly owned until the disposition is properly recorded is sufficient to support a tax lien on the property."[23]

Prewitt was not without its disagreement about the interest left in the conveying delinquent taxpayer. In his concurrence, Judge Jolly stated that he "concur[red] because, and only because [the court was] bound by [its] own precedent," referring to the court's previous *Creamer* decision.[24] He stated that he fully agreed with the *reasoning* in the dissenting opinion in *Creamer*.[25] "Whatever the lien attached to," Judge Jolly added, "it did not attach to this property because it in no way, shape or form belonged to the taxpayer."[26] Even though Judge Jolly's arguments only made it to the level of a concurring opinion, the majority of circuits have supported his reasoning.

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18. *Id.* at 1354–55.
19. *Id.* at 1354.
20. *Id.* at 1355. *See infra* section III.C (discussing the possible argument involving notice given to the IRS, thus denying the IRS the position of being a creditor without notice).
21. *Id.*
22. *Id.*
23. *Id.* at 1355–56. In agreeing with the *Creamer* decision the court supported the finding that the IRS, in similar situations, is a "creditor without notice" and was protected by the recording statute. *Id.* at 1355. For a discussion on how the *Prewitt* and *Creamer* courts reasoned that the IRS was a creditor, see subsection III.C.1, *supra*.
24. *Id.* at 1359 (Jolly, J., concurring).
25. *Id.*
26. *Id.*

B. The Majority Approach

The first notable case in the majority approach was the First Circuit's decision in *United States v. V & E Engineering & Construction Co.*[27] This decision, while also not a divorce case, began the departure from the reasoning of *Creamer* and *Prewitt*.[28] In 1978 and 1979 the government made tax assessments against V & E Engineering (V & E) for failure to pay withholding taxes. During this period V & E owned the parcel of real property at issue in the case. On April 22, 1980, V & E mortgaged the property to the bank to guarantee a promissory note. Then on May 2, 1980, V & E executed purchase and sale agreements where it sold the property, but neither conveyance was recorded until April 25, 1982. On May 21, 1980, the IRS filed a tax lien on the property. In 1985, the United States brought action to foreclose tax liens on property purchased from the taxpayer.[29]

The court ultimately held that a § 6321 lien does not attach to property that a taxpayer had previously conveyed by an unrecorded deed of sale, concluding that "a taxpayer, once having sold his property, no longer has a 'right' to that property within the meaning of section 6321."[30] The court began its analysis by looking to the Puerto Rico recording act.[31] The government argued that this "race-notice" statute "means that the seller of such a property retains the 'right' to transfer it after he has once sold it, provided the original purchaser has not yet recorded."[32] The court could not accept the argument, stating that "[u]nless the statutes provide otherwise, they should not be presumed to give any 'right' to a vendor to convey the same piece of property to two purchasers."[33] It expounded further by writing that the ability to engage in fraudulent transfers is not to be included within the "rights" of the party.[34] In affirming the district court's ruling the court stated that "[u]nder this provision, a vendor is bound by

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27. 819 F.2d 331 (1st Cir. 1987).
28. *See* Elliott, *supra* note 10, at 836.
29. *V & E Eng'g & Constr.*, 819 F.2d at 332–33.
30. *Id.* at 333.
31. P.R. Laws Ann. tit. 31, § 3822 (1987) provided:

> If the same thing should have been sold to different vendees, the ownership shall be transferred to the person who may have first taken possession thereof in good faith, if it should be personal property. Should it be real property, it shall belong to the person acquiring it who first recorded it in the registry. Should there be no entry, the property shall belong to the person who first took possession of it in good faith, and, in the absence thereof, to the person who presents the oldest title, provided there is good faith.

William D. Elliott wrote that the main departure from the Fifth Circuit was the court's interpretation of the jurisdiction's recording statute. Elliott, *supra* note 10, at 836.

32. *V & E Eng'g & Constr.*, 819 F.2d at 333.
33. *Id.*
34. *Id.*

the sale of his property, regardless of the recording of that sale by the purchaser. He, therefore, has no 'right to property' under 26 U.S.C. § 6321."[35]

While *V & E Engineering* was the first in the majority's line of cases, the next major case was decided by the Eighth Circuit, eight years later. *Thomson v. United States*[36] was the first case in the majority's line that directly dealt with the unrecorded conveyance in the context of a transfer of property by way of a divorce decree. Douglas and Mary Thomson divorced in 1971 and the court awarded Mary the couple's home. The "decree provided that Douglas would 'execute all necessary documents to effectively vest ownership in [Mary] and upon failure to do so such ownership shall vest in [Mary] by this Decree.'"[37] The couple, while still making mortgage payments, took out a second mortgage for a $140,000 loan. The next year, 1983, Douglas mortgaged it again without Mary's knowledge. Both mortgages were recorded. In 1985, the vendors of the home executed a warranty deed to the couple. It was not recorded. In 1991, Douglas was assessed $179,752 in unpaid income tax, creating a lien on all of his property under 26 U.S.C. § 6321. The IRS levied the house to collect Douglas's interest, and Mary, the next day, recorded the divorce decree and then brought suit to terminate the levy.[38]

The court ultimately concluded that the Minnesota recording act gave "Douglas no property right in the home to which the government's lien may attach."[39] The court, while looking to state law to determine the taxpayer's interest in said property, chose to address the lower court's assumption, and that of the Fifth Circuit, that the IRS was the equivalent of a "judgment creditor without notice."[40] The *Thomson* court said that "Congress could clothe a government tax lien with the rights and powers of a hypothetical bona fide purchaser or judgment creditor," but questioned whether the statute does so "when it provides that a person's unpaid taxes 'shall be a lien . . . upon all property and rights to property . . . *belonging to such person*.'"[41]

The Eighth Circuit developed its reasoning by citing United States Supreme Court precedent "in construing § 6321: 'The Federal statute relates to the taxpayer's rights to property and not to his creditors' rights.'"[42] The *Thomson* court declined to follow *Creamer* and *Prewitt*, finding the reasoning of *V & E Engineering* to be more in line with the

35. *Id.* at 334.
36. 66 F.3d 160 (8th Cir. 1995).
37. *Id.* at 161 (alteration to divorce decree in original).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 161–62 (quoting I.R.C. § 6321 (2006) (emphasis added by court)).
42. *Id.* at 162 (quoting United States v. Nat'l Bank of Commerce, 472 U.S. 713, 727 (1985)); *see* United States v. Rodgers, 461 U.S. 677, 690–91 (1983) ("[T]he Govern-

Supreme Court's reasoning in *National Bank of Commerce* and with the wording of § 6321.[43]

However, the court in *Thomson* did not rule against the government just yet. They still found it necessary to examine the state's recording act. When a recording statute "provide[s] that a conveyance has no effect 'in passing title' until recorded . . . the transferor seemingly retains an interest to which the § 6321 lien may attach."[44] Nevertheless, "if a State's recording act only makes an unrecorded transfer void or voidable as against subsequent judgment creditors or bona fide purchasers, the transferor retains no post-transfer interest."[45] The Minnesota recording act[46] was determined to protect purchasers of real estate who relied on the records, which basically meant judgment creditors and subsequent bona fide purchasers.[47]

The final case in the trilogy of the majority was *United States v. Gibbons*,[48] decided mere months after *Thomson*. In 1970 Betty and David Gibbons acquired title to the disputed property in joint tenancy. They divorced in 1982 and the divorce decree awarded the house to Betty, but the decree was never recorded. Between 1984 and 1990 the IRS filed tax liens against David for nonpayment of taxes. The IRS then brought suit to obtain a judgment on federal tax assessments against the taxpayer, David, and to foreclose liens upon real property in which he had an interest.[49] After determining that the divorce decree did convey an interest to Betty, the court concluded that "the IRS lien against property 'belonging to' David" did not extend to Betty's property interest.[50]

The *Gibbons* court began its analysis by wading through the previously mentioned cases and then proceeded to interpret the Colorado recording act.[51] The court embraced the reasoning of the First and

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ment's lien under § 6321 cannot extend beyond the property interests held by the delinquent taxpayer.").

43. *Thomson*, 66 F.3d at 163.

44. *Id.*

45. *Id.*

46. MINN. STAT. § 507.34 (1986) read:

> [E]very such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance.

47. *Thomson*, 66 F.3d at 163 (quoting Miller v. Hennen, 438 N.W.2d 366, 369 (Minn. 1989)).

48. 71 F.3d 1496 (10th Cir. 1995).

49. *Id.* at 1498.

50. *Id.* at 1501.

51. COLO. REV. STAT. § 38-35-109 (1995) provided that:

Eighth Circuits, thus rejecting the analysis of the Fifth Circuit.[52] In focusing on the state's recording act, it stated that "[a]lthough the Colorado statute provides that an unrecorded conveyance is void 'as against any class of persons with any kind of rights who first records,' it also continues—'except between the *parties thereto* and such as have notice thereof.'"[53] The court added that "[t]he separation agreement, although unrecorded, prevents David [delinquent taxpayer] from contesting Betty's [former spouse] ownership," and that the "IRS must stand in the shoes of David Gibbons, who has no 'rights to property,' . . . to which the tax lien could attach."[54]

C. IRS General Counsel Memorandum 24,039 (June 18, 2010)

On June 18, 2010, the IRS released a Chief Counsel advisory ruling directly on point to the topic at hand.[55] While IRS memorandums are not binding,[56] they do provide insight into the reasoning of the IRS under certain circumstances.[57] For purposes of the memorandum, Husband and Wife acquired real property during their marriage. They subsequently divorced and the divorce decree awarded the property to the Wife. The Husband was ordered to execute a quitclaim deed which was not recorded. After the divorce was final, the Husband was assessed post-divorce tax liabilities. These liabilities were not paid and resulted in a tax lien on the aforementioned property. Later, the Wife recorded the divorce decree.[58]

The IRS ruled that the Husband did retain an interest in the property that was subject to the lien.[59] The IRS stated that it believes that "the reasoning of the First, Eighth, and Tenth Circuits is flawed" and that the *Creamer/Prewitt* line of cases was correctly decided.[60] In do-

> No such unrecorded instrument or document shall be valid as against any class of persons with any kind of rights who first records, except between the parties thereto and such as have notice thereof.

52. *Gibbons*, 71 F.3d at 1501.
53. *Id.*
54. *Id.*
55. I.R.S. Gen. Couns. Mem. 24,039 (June 18, 2010).
56. I.R.C. § 6110(k)(3) (2006) states that "[u]nless the Secretary [of the Treasury] otherwise establishes by regulations, a written determination may not be used or cited as precedent."
57. Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation: Principles and Policies 74 (Robert C. Clark et al. eds., 6th ed. 2009) ("[T]axpayers routinely cite private rulings when it advantageous to do so and courts occasionally cite them as reflecting the IRS position." The balance that must be struck is that of "between fairness to similarly situated taxpayers and the administrative necessity to give only a relatively low level of review to private rulings within the IRS.").
58. I.R.S. Gen. Couns. Mem. 24,039, at 1 (June 18, 2010).
59. *Id.* at 5.
60. *Id.*

ing so, the IRS elevated itself to the status of a protected creditor and ruled that the unrecorded conveyance had no effect on it.[61]

The IRS began its analysis by looking to the relevant state law.[62] It started by citing a Tennessee Bankruptcy decision requiring that a divorce decree is not effective in conveying property against creditors and bona fide purchasers until it is registered.[63] The IRS then quickly went through the analysis of the Fifth Circuit and of the majority, ultimately favoring the reasoning of the Fifth Circuit.[64] The IRS was adamant in its position, stating that the majority side of the circuits was wrong in its decisions.[65] It expounded, saying "[t]hose courts failed to give full meaning to state statutes that provide that a transfer is void or ineffective as to certain parties absent recording."[66] It solidified its decision by citing another bankruptcy case which stated, "unrecorded conveyances, at least insofar as they affect the rights of creditors, are void."[67]

III. ANALYSIS

A split continues as to whose interest a § 6321 Federal Tax Lien attaches: does it attach to the interest of the taxpayer or the taxpayer's creditors? Due to the language of § 6321, the purpose of state recording acts, and the impropriety of treating the IRS as a creditor without notice, § 6321 federal tax liens should only attach to the taxpayer's interest and not to the interests of the taxpayer's creditors. Thus, the focus of the analysis section of this Note will be on the first prong of the Supreme Court's test: determining what rights a taxpayer has in the property.[68]

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61. *Id.* The memo did not delve into the details of how it decided that the IRS was a creditor under the statute, only citing to *Creamer* and *Prewitt* as authority. *Id.* at 2–4. For a discussion on how the *Prewitt* and *Creamer* courts reasoned that the IRS was a creditor, see subsection III.C.1.

62. Since the taxpayers were in the jurisdiction of Tennessee, General Counsel looked to the Tennessee recording act, which provides:

> All of the instruments mentioned in § 66-24-101 shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided.

TENN. CODE ANN. § 66-26-101 (West 2011).

63. I.R.S. Gen. Couns. Mem. 24,039, at 2 (June 18, 2010) (citing *In re* Frasier, 47 B.R. 864 (Bankr. M.D. Tenn. 1985)).

64. *Id.* at 2–3.

65. *Id.* at 5.

66. *Id.*

67. *Id.* (quoting *In re* Hurst, 27 B.R. 740, 746 (Bankr. E.D. Tenn. 2003)).

68. *See supra* note 5 and accompanying text. Whether that interest is classified as "property" or "rights to property" is beyond the scope of this Note.

A. The Taxpayer or the Taxpayer's Creditors?

The United States Supreme Court, in a unanimous decision, confirmed that courts should first look to the relevant state law to determine a taxpayer's rights or interest with regards to a § 6321 federal tax lien.[69] A question still remains in the circuits as to whether the language of § 6321, in saying that a lien exists "upon all property and rights to property, . . . *belonging to such person*,"[70] means the rights of the individual taxpayer or the rights of his creditors.[71] However, it appears that the United States Supreme Court has already answered this question.[72]

In construing the language of § 6321 the Supreme Court stated that "[t]he federal statute relates to the taxpayer's rights to property and not to his creditors' rights."[73] In addition, the Court has reasoned "that the Government's lien under § 6321 cannot extend beyond the property interests held by the delinquent taxpayer."[74] It is understandable that the *Creamer* court had a different interpretation of § 6321—the Supreme Court had not yet ruled specifically on that language. What is troublesome is the complete omission of the *National Bank of Commerce* and *Rodgers* rulings by the *Prewitt* court.[75] Lower courts within the jurisdiction of the Fifth Circuit have recognized this discrepancy and suggested that the Supreme Court would not uphold the reasoning of *Creamer* and *Prewitt*.[76] As expected, outside of the

69. Drye v. United States, 528 U.S. 49, 58 (1999); *see* Aquilino v. United States, 363 U.S. 509, 509 (1960) (holding that in applying § 6321, the taxpayer's "rights to property" are determined by state law); Steve R. Johnson, *The Good, the Bad, and the Ugly in Post-*Drye *Tax Lien Analysis*, 5 FLA. TAX REV. 415, 421 (2002) (stating that courts look to state law in the first prong of the test and determine "what powers or privileges does the delinquent taxpayer ha[s] as to the underlying property" and asking whether "the taxpayer [can] receive, use, or benefit from the property, or prevent others from doing so").

70. I.R.C. § 6321 (2006) (emphasis added).

71. *Compare* United States v. Gibbons, 71 F.3d 1496 (10th Cir. 1995) (arguing that § 6321 only encompasses the rights of the individual taxpayer), *and* Thomson v. United States, 66 F.3d 160 (8th Cir. 1995) (same), *with* Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986) (arguing that the language of § 6321 includes the right of the taxpayer's creditors).

72. In addition, leading commentators have called for § 6321 to be amended to not include the unrecorded sales of a delinquent taxpayer when determining property of the taxpayer. Marilyn Phelan, *Texas Tech Professor's Statements at IRS Commission Meeting on Taxpayer Rights*, TAX NOTES TODAY, Feb. 26, 1997, *available at* LEXIS, 97 TNT 39-71.

73. United States v. Nat'l Bank of Commerce, 472 U.S. 713, 727 (1985).

74. United States v. Rodgers, 461 U.S. 677, 690–91 (1983).

75. *Prewitt* was decided three years after *Rodgers* and one year and four days after *Nat'l Bank of Commerce*.

76. Stafford v. Lunsford, 53 S.W.3d 906, 910 (Tex. App. 2001) ("[I]t seems unlikely the United States Supreme Court would agree with *Creamer* and *Prewitt*.").

Fifth Circuit, the contradiction has also been noticed.[77] Nevertheless, *Creamer* and *Prewitt*, even in light of this tension, have still been followed as the law.[78]

The decisions in *National Bank of Commerce* and *Rodgers* do not leave the Fifth Circuit or the IRS with much room to justify their positions. Lower courts that have accurately applied *National Bank of Commerce* and *Rodgers* have run in direct opposition to *Creamer* and *Prewitt*.[79] In the IRS Memorandum the government even quoted Tennessee case law, stating that a "vendor, by the execution of the deed, has divested himself of his legal estate; no title, legal or equitable, remains in him."[80] The IRS then distinguished this authority by citing to another case, *Hays v. McGuire,* which said that "[a]s to certain parties, conveyances have no effect until registration."[81] The IRS treated this as an enforcement of its rights as a creditor. However, if the IRS had read farther down in the *Hays* opinion it would have seen that the ultimate decision of the court was less favorable to its argument. The *Hays* court stated that the recording act did not alter the rights or conveyance between the grantor and the grantee.[82] In actuality the decision of this case reversed the lower court and remanded it, "giving effect to the title papers, as between grantor and grantee, from the date of their execution."[83] This would show that the Tennes-

77. *See* United States v. Gibbons, 71 F.3d 1496, 1501 (10th Cir. 1995) (suggesting the inconsistency of *Nat'l Bank of Commerce* with *Creamer* and *Prewitt*); Thomson v. United States, 66 F.3d 160, 162–63 (8th Cir. 1995) (same).

78. Nakissa v. Turner, No. SA-07-CV-171-RF, 2009 WL 5184215, at *3 (W.D. Tex. Jan. 21, 2009) (following *Prewitt* and *Creamer* in finding that property recorded in a different county than where it was located and, after the filing of a federal tax lien, was subsequently recorded in the county where it was located, did not defeat a federal tax lien assed before the second recording); *Stafford,* 53 S.W.3d at 910 (stating that they "strongly disapprove of *Creamer* and *Prewitt*, but it is plain, as a matter of law, that their interpretation of § 6321 placed a dark cloud on Stafford's [ex-spouse of delinquent taxpayer's] property"); *see* Elliott, *supra* note 10, at 832–39 (writing that there is "a continuation of the Fifth Circuit outside the mainstream of federal circuits on the issue of the effect of an unrecorded divorce decree on lien priorities").

79. *See* Gardner v. United States, 34 F.3d 985, 988 (10th Cir. 1994) (quoting 4 Boris I. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 111.5.4, at 111–12 (1981)) ("[T]he tax collector not only steps into the taxpayer's shoes but most go barefoot if the shoes wear out."). Other lower courts, in anticipating the rulings in *Nat'l Bank of Commerce* and *Rodgers*, also similarly reasoned. *See* St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1301 (8th Cir. 1980) ("The IRS acquires by its lien and levy no greater right to the property than the taxpayer himself has at the time the tax lien arises."); Avco Delta Corp. Canada Ltd. v. United States, 459 F.2d 436, 441 (7th Cir. 1972) ("[T]he government's lien does not exceed the rights of the taxpayer.").

80. I.R.S. Gen. Couns. Mem. 24,039, at 4–5 (June 18, 2010) (quoting Shields v. Mitchell, 18 Tenn. (10 Yer.) 1, 6 (1836)).

81. *Id.* at 5 (citing Hays v. McGuire, 16 Tenn. (8 Yer.) 92, 100 (1835)).

82. *Hays*, 16 Tenn. at 100.

83. *Id.* at 101.

see Supreme Court recognizes that there would be no interest left in the delinquent spouse when it was conveyed to the ex-spouse. If there is nothing left in the delinquent spouse, the IRS has no interest to which it can attach its lien.

This being so, the first part of the IRS's reasoning in the June 18th Memorandum is wrong. They, along with the Fifth Circuit, have removed a procedural step in determining whose interest in the property the lien can attach. Section 6321 does not say "all property belonging to such person and their creditors." As the *Thomson* court wrote, "[t]he plain meaning of the words 'belonging to' suggests that the lien attaches to property interests owned by the taxpayer, not the property interests vulnerable to the taxpayer's judgment creditors. As every bankruptcy trustee knows, the latter is a potentially larger universe."[84] Congress, in writing § 6321, could have made the lien attach to the interest of the taxpayer and the taxpayer's creditors.[85] They did not. Thus, any analysis that overlooks whether the delinquent taxpayer himself had any interest in the property at the time of the creation of the lien is incorrect from the beginning. Any further analysis by a court or the IRS is moot, being based on an ill-informed assumption.

B. Incorporation of State Recording Acts

Once it is determined that the correct focal point of the lien attachment is on the taxpayer, not the taxpayer's creditors, it is still necessary to look to the applicable state recording act to determine if the taxpayer retained any interest after such conveyance. Recording acts are used to "protect subsequent parties who have no notice of the unrecorded instrument, but the instrument *is duly enforceable between the parties who have notice to the transaction*."[86] The underlying pol-

84. Thomson v. United States, 66 F.3d 160, 162 (8th Cir. 1995).

85. *See* Lynn M. LoPucki & Elizabeth Warren, Secured Credit: A Systems Approach 628 (Vicki Been et al. eds., 6th ed. 2009) ("The U.S. government could have enacted a statute giving federal tax liens priority over all other liens against the debtor's property.").

86. City of Omaha v. Morello, 257 Neb. 869, 879, 602 N.W.2d 1, 6 (1999) (emphasis added). Currently, forty-seven states and the District of Columbia have recording statutes with a "notice" component. *See* Milton R. Friedman & James Charles Smith, Friedman on Contracts and Conveyances of Real Property app. 8A, at 8A-3 to -75 (2010), *available at* Westlaw PLIREF-CONREL. Only Delaware, Louisiana, and North Carolina have pure "race" recording acts. *Id.* In addition, thirteen states have specifically legislated that the conveyance, even without recording, is valid between the parties to it. *See* Alaska Stat. § 40.17.080(b) (2010); Ariz. Rev. Stat. Ann. § 33-412 (2010); Colo. Rev. Stat. § 38-35-109 (2011); Idaho Code Ann. § 55-815 (2003); Kan. Stat. Ann. § 58-2223 (2005); Mass. Gen. Laws. ch. 183, § 4 (2010); Miss. Code Ann. § 89-5-3 (1972); Mo. Rev. Stat. § 442.400 (2000); Neb. Rev. Stat. § 76-238 (Reissue 2009); Nev. Rev. Stat. § 111.315 (2007); S.D. Codified Laws § 43-28-14 (2004); Tex. Prop.

icy of the recording is that "[w]here one of two persons must suffer loss . . . he who . . . by his negligent conduct made it possible for the loss to occur, must bear the loss."[87] This would seem to be the justification of the conclusions reached by the minority view. The conveyee, the non-delinquent ex-spouse, has not fulfilled his duty to record the transfer of the property, thus his "negligent conduct" suggests that he should bear the loss. However, in certain divorce cases the divorce decree will result in tasking not the receiving party with the responsibility of recording, but the conveyor—the delinquent ex-spouse.[88] This would seem to run afoul of the policy behind the recording acts. The government would in turn be taking legally transferred property away from an ex-spouse whose only "negligent conduct" was that she trusted her ex-spouse to perform the required tasks.[89]

Furthermore, in divorce cases, the principal residence of the parties is a large part of the agreed upon settlement.[90] By allowing the delinquent taxpayer to fulfill a post-divorce obligation by using property that has been awarded to the ex-spouse, the separation agreement would hardly be considered just. What was most likely a significant concession by the delinquent taxpayer has been reclaimed by him without any compensation to the deprived party.

In an interesting parallel, premarital agreements which are finalized before the filing of a tax lien may prevent the attachment of property transferred under it.[91] This includes property gathered while the couple is married and subsequently transferred after the lien is filed to the non-debtor ex-spouse.[92] Thus, the delinquent taxpayer would have no interest in the property, thereby dissolving any possibility of

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CODE. ANN. § 13.001 (West 2004); VT. STAT. ANN. tit. 27, § 342 (1989). Louisiana, even though governed by a "race" recording act, states that the "instrument is not effective as to a *third person* until it is recorded." LA. CIV. CODE ANN. art. 3340 (2007) (emphasis added). This could be argued to imply that the instrument would be binding and enforceable against a party to the contract.

87. Universal C. I. T. Credit Corp. v. Walters, 53 S.E.2d 520, 523 (N.C. 1949).

88. *See Thomson*, 66 F.3d at 161 (delinquent taxpayer spouse was ordered by the decree to "execute all necessary documents to effectively vest ownership" in his ex-spouse).

89. *Cf.* Elliot, *supra* note 10, at 832 (proclaiming "[d]ivorced spouses rarely monitor the affairs, financial or otherwise, of their ex-spouse"). Additionally, "[b]y far the most common source of federal tax liens is payroll taxes, in the form of withholding taxes and Social Security contributions owed by employers to the U.S. government." LOPUCKI & WARREN, *supra* note 85, at 625. This would describe the ex-spouse as "negligent" unless they were aware that the delinquent ex-spouse is current on all payroll and employment taxes. Is this a standard that the ex-spouse should truly have to meet?

90. *See* MARJORIE A. O'CONNELL, DIVORCE TAXATION ¶ 8001, at 8011 (2007) ("Housing is a major item of an individual's support and the marital home is frequently used to fulfill that support need.").

91. *Id.* ¶ 18603, at 18112.

92. *Id.*

attaching it to the lien.[93] What makes the law, and thereby the IRS, give more authority to a premarital agreement than to a divorce agreement? Both agreements are contracts between the parties.[94] The premarital agreement is not even filed in any county records. Additionally, it seems *more* authority would be given to a divorce decree since it is usually approved and docketed by a court. Timing should not be an issue since both a premarital agreement and a separation agreement can be completed before the tax lien is filed. The law has inadvertently given more security to couples who expect, or at least contemplate, the dissolution of their marriage, than those who truly believe in "till death do us part." The overall "purpose of the recording act is to protect subsequent bona fide purchasers from unrecorded instruments, not to invalidate a transaction between the parties who entered into it."[95]

In their reasoning, the Fifth Circuit and the IRS quickly decided that the IRS is a creditor or judgment creditor without notice, not even suggesting that it may be connected to the transaction. Many recording acts specifically protect creditors or judgment creditors without notice.[96] Those who use the minority approach understand the protection given to these protected creditors and can dispose of the argument by fitting the IRS into this characterization. A main flaw in this reasoning is that the IRS would be in a position to knowingly take part in conveying a piece of property that has already been conveyed.[97]

C. The IRS as a Creditor Without Notice

In the view of the Fifth Circuit and the IRS, the IRS is considered to be a creditor without notice.[98] These decisions and rulings do not explain or even reason this assumption.[99] The minority's approach, assuming that the IRS is a protected creditor without notice, should fail. Additionally, courts should state a rule that a properly docketed divorce decree, completed before the filing of a federal tax lien, is suffi-

93. *Id.*

94. 41 AM. JUR. 2D *Husband and Wife* § 89 (2005).

95. City of Omaha v. Morello, 257 Neb. 869, 879, 602 N.W.2d 1, 6 (1999).

96. *See* Friedman & Smith, *supra* note 86, app. 8A at 8A-3 to -75.

97. *See* Hamilton v. United States, 806 F. Supp. 326, 333 (D. Conn. 1992) (explaining that the "Court would effectively sanction the knowing sale by a vendor of the same piece of property to two purchasers" and that it would be "hard pressed to believe that Congress would countenance this result").

98. *See supra* section II.A.

99. *See supra* section II.A. The IRS Memorandum at issue in this Note specifically states, "[w]e have not found anything that indicates that the [IRS] would not be a creditor under state law." I.R.S. Gen. Couns. Mem. 24,039, at 4 (June 18, 2010).

cient to provide notice to the IRS.[100] This rule will then have the effect of defeating any claim the IRS has in being a creditor without notice.

1. Protecting the IRS as a Creditor

In the Fifth Circuit, the court presumptively describes the IRS as a creditor without notice.[101] Where does this justification come from? In *Prewitt*, the court blindly stated that under *Creamer*, "the IRS was a creditor without notice and was thus entitled to the protection" of the recording act.[102] In *Creamer*, the court wrote, without any analysis, that "[a]s to the taxes owed to it, the Unites States was a 'creditor'" under the recording act.[103] The *Creamer* court cited *Underwood v. United States* as authority for this position; however, in the *Underwood* opinion the court only said that "[t]he United States was undoubtedly a creditor."[104] The *Underwood* court's reasoning was thinly supported by acknowledging the conclusion of the trial court, without any further insight.[105]

The *Underwood* trial court reasoned that the government was a creditor because of the similarity of its rights as to other judgment creditors.[106] It then noted that these similar rights of the tax authorities included the right to sue to recover the debt, including getting a garnishment or attachment of property.[107] This similar right clearly convinced the court that the federal tax lien treated the government as a similar lien holder in every respect.[108] The court's presumption and limited reasoning in *why* the IRS is a protected creditor is disconcerting; further, the federal bankruptcy laws lump the federal government into the same category as other secured creditors.[109] But, the IRS should not be on equal footing with other subsequent bona fide creditors when it comes to satisfying a tax lien by trumping an unrecorded conveyance pursuant to a divorce.

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100. This argument has been briefly addressed by a commentator, suggesting that "section 6323 should be amended to provide that the IRS is charged with notice of partitions of property filed in a district court proceeding as well as with the properly recorded deeds." Phelan, *supra* note 72.

101. *See* Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986); United States v. Creamer Indus., Inc., 349 F.2d 625 (5th Cir. 1965).

102. *Prewitt*, 792 F.2d at 1355.

103. *Creamer*, 349 F.2d at 628 (citing Underwood v. United States, 118 F.2d 760, 760–61 (5th Cir. 1941)).

104. *Underwood*, 118 F.2d. at 761.

105. *Id.*

106. Underwood v. United States, 37 F. Supp. 824, 826–27 (E.D. Tex. 1939), *aff'd*, 118 F.2d 760 (5th Cir. 1941).

107. *Id.* at 826.

108. *Id.* at 827.

109. *See* 11 U.S.C. § 507(a)(8) (2006).

The Supreme Court has stated that the IRS is not an ordinary creditor.[110] Its power does not come from creditor rights but that of a "sovereign prerogative" grounded in the constitutional power to collect taxes.[111] Additionally, the IRS has its own set of rules to play by when it is a creditor.[112] The state laws pertaining to exemptions of property do not apply to the IRS.[113] The IRS cannot choose to not enforce its claim against the delinquent taxpayer/debtor.[114] Also, while the bankruptcy code does group the government with other creditors, it specifically disallows any discharge to that debt.[115] These added perks give the IRS much more power to collect on its debt than any other creditor, secured or otherwise, has at its own disposal.

What happens if the IRS is unable to use the unrecorded conveyance to satisfy this debt? A private creditor can sue but has limits to what he can go after to satisfy the debt. The government's tax lien however, is only a part of the "collection machinery" of the IRS.[116] The IRS is not specifically targeting the unrecorded property. Its goal is to collect payment for past due taxes. Furthermore, the government has the threat of criminal prosecution and imprisonment to motivate the delinquent taxpayer to pay.[117] The taxes should be paid, but the IRS should not have the ability to strip an ex-spouse from conveyed property because of an administrative recording oversight. A more equitable outcome would result if delinquent taxpayers paid the tax due with their own interest, or if need be, with jail time.

110. United States v. Rodgers, 461 U.S. 677, 697 (1983).

111. *Id.*; *cf.* Bull v. United States, 295 U.S. 247, 259–60 (1935); Phillips v. Comm'r, 283 U.S. 589, 595–97 (1931); United States v. Snyder, 149 U.S. 210, 214–15 (1893). The IRS, unlike other creditors, taxes and does not extend credit. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 111A.4.3, at S111A-34 to -35 (Supp. No. 3 Part II 2011), *available at* 2007 WL 2325534. While the government cannot protect itself in the same way as an ordinary creditor, the "*general rule* is that the tax collector prevails even if he has not recorded *at all*." *Id.* (quoting United States v. McDermott, 507 U.S. 447, 455 (1993)) (internal quotation marks omitted).

112. LOPUCKI & WARREN, *supra* note 85, at 629. *See also* Timothy R. Zinnecker, *Resolving Priority Disputes Between the IRS and the Secured Creditor Under Revised U.C.C. Article 9: And the Winner Is . . . ?*, 34 ARIZ. ST. L.J. 921, 924 (2002) (noting that a "tax lien becomes enforceable against the taxpayer without the necessity of any filing, so its existence may come as a surprise, not only to the taxpayer but also to its creditors").

113. *Id.*; *see* MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶ 14.07[1][d], at 14–54 (2004) (stating that "any state statute purporting to exempt specified property from the claims of creditors is not effective against the general tax lien"), *available at* 1999 WL 1051006, *3.

114. *McDermott*, 507 U.S. at 455.

115. 11 U.S.C. § 523 (2006).

116. BITTKER & LOKKEN, *supra* note 111, ¶ 111A.4.1 at S111A-25.

117. I.R.C. § 7203 (2006).

2. *Notice to the IRS*

Currently, forty-eight jurisdictions have provisions in their recording statutes that require a subsequent encumbrancer to be without notice of a prior unrecorded conveyance in order to invalidate the transfer.[118] It would therefore be prudent to decipher what is required to put the IRS on notice of the transfer and whether a docketed divorce decree should suffice.[119]

Courts have recognized three types of notice: actual notice, constructive notice, and inquiry notice.[120] Actual and constructive notice have been shown to destroy the ability of the IRS to be a creditor in good faith.[121] The lower court in the *Thomson* case correctly acknowledged that when the IRS was actually notified of the divorce decree, which divested the delinquent taxpayer of the interest in the property, they were on notice for any subsequent liens.[122] Furthermore, "oral notice to an agent of the IRS is sufficient to defeat reliance on the

118. FRIEDMAN & SMITH, *supra* note 86, app. 8A at 8A-3 to -75.

119. Commentators have advocated for the amending of § 6321 to "provide that the IRS is charged with notice of partitions of property filed in a district court proceeding as well as with properly recorded deeds." Phelan, *supra* note 72.

120. FRIEDMAN & SMITH, *supra* note 86, app. 8A at 8A-1 to -2.

> (a) *Actual Notice*. Actual notice means that the purchaser subjectively knows about the prior interest. This test looks to the state of mind of the purchaser.
>
> (b) *Constructive Notice*. Constructive notice means that the purchaser is deemed to have knowledge of all recorded interests, whether or not the grantee in fact searches title. Constructive notice is sometimes called "record notice."
>
> (c) *Inquiry Notice*. Inquiry notice means that the purchaser subjectively knows some facts that suggest that someone might have an unrecorded interest in the property. Inquiry notice is less than "actual notice" because the facts known do not demonstrate that a property interest exists—only that there might be one. The purchaser has a duty to inquire and is charged with whatever that inquiry would have revealed. The most important aspect of inquiry notice is a duty to inspect the land; the purchaser generally takes subject to the rights of parties in possession and other unrecorded interests that are visible from inspection.

Id.

121. Prowse v. Walters, 941 S.W.2d 223, 227 (Tex. App. 1996) (stating that "federal cases suggest that actual or constructive notice to the IRS of a prior unrecorded transfer is sufficient to defeat the attachment or perfection of its tax lien, if it would have been sufficient to defeat the interests of a subsequent purchaser under state law"); *see In re* Blunt, 80 B.R. 234 (Bankr. M.D. Fla. 1987); *see also* Prewitt v. United States, 792 F.2d 1353, 1359 (5th Cir. 1986) (reasoning that if there would have been a recorded divorce decree in the record, it would have trumped the lien whether or not the IRS searched for it).

122. Thomson v. United States, 867 F. Supp. 1420, 1428 (D. Minn. 1994), *rev'd*, 66 F.3d 160 (8th Cir. 1995). However, this was only slightly helpful to the ex-spouse because there was a previous tax lien imposed before actual notice and the notice did not defeat that prior lien, only the subsequent. *Id.*

recording statute and to impute to the IRS knowledge of an unrecorded transfer."[123]

Constructive notice, otherwise known as record notice, imputes the knowledge of the record to third parties, whether or not they know of the record.[124] The *Thomson* lower court, along with the *Prewitt* court, failed to allow the unrecorded divorce decrees to suffice for this type of notice. The *Prewitt* court deemed it a matter of state law to determine which instruments required recording and determined that, under Texas law, a divorce decree was one such instrument.[125] Thus, since the divorce decree was not recorded, constructive notice was not available.[126] The *Thomson* lower court nonchalantly dismissed the idea that a tax return could suffice as constructive notice to the IRS.[127] However, the court only focused on the "home address" listed on the return saying that it did "not divulge anything about [the taxpayer's] ownership interest" relating to the property.[128] Other courts have alluded to the possibility that a judgment can provide constructive notice to third parties.

In *Patlow v. Clark*, the court compared a judgment that was for money to one for property.[129] If it was for money, then the party who won the judgment (the ex-spouse in a divorce proceeding) would have a lien on the money from the docketing of the judgment and would have imputed constructive notice to all.[130] The *Patlow* court stated that the "judgment docket is a public record which gives constructive notice to the world."[131] This argument has not been widely accepted, with many courts giving the deference to state statutes that require recording of divorce decrees.[132] However, considering the ease with which one can search public dockets nowadays,[133] the public docket is just as capable of providing constructive notice. It should, at minimum, suffice for inquiry notice.

123. *Prowse*, 941 S.W.2d at 227; *see* United States v. Purcell, 798 F. Supp. 1102, 1114 (E.D. Pa. 1991).

124. *Thomson*, 867 F. Supp. at 1428 (citing Miller v. Hennen, 438 N.W.2d 366, 369–70 (Minn. 1989)).

125. *Prewitt*, 792 F.2d at 1358.

126. *Id.*

127. *Thomson*, 867 F. Supp. at 1428.

128. *Id.*

129. Partlow v. Clark, 653 P.2d 568, 571–72 (Or. Ct. App. 1982), *aff'd*, 671 P.2d 103 (Or. 1983).

130. *Id.*

131. *Id.*

132. *Cf.* Prewitt v. United States, 792 F.2d 1353, 1358 (5th Cir. 1986).

133. See, for example, Public Access to Court Electronic Records, http://www.pacer.gov (last visited May 19, 2012), and other online databases which lessen the burden and hassle in searching public court documents.

In finally coming to the third type of notice, inquiry notice, courts have found the argument stronger but still unpersuasive.[134] The basis of inquiry notice is that the IRS would have actual notice of something pertaining to the property that would demand they inquire further into the ownership interest of the property.[135] The *Prewitt* court did not accurately look into this argument, eventually merging it with its constructive notice analysis.[136] The *Thomson* lower court used inquiry, or implied, notice to mean that the ex-spouse had to show "possession" of the property.[137] This argument failed due to the fact that the ex-spouse had not maintained "open and continuous" possession of the property.[138] But the court did not rule out the availability of inquiry notice. The courts, incorrectly, never explored whether a divorce decree, or any actual facts that could be used to put the IRS on inquiry of a divorce, could suffice for inquiry notice in the case. In filing a federal tax lien, where a taxpayer could be deprived of her home, a docketed divorce decree should suffice to put the IRS on at least inquiry notice of a delinquent taxpayer's prior divorce.

Inquiry notice requires that an entity must complete a "reasonable investigation" of information, from any source, which suggests that a prior conveyance exists.[139] Courts have also widely held that information contained in various governmental offices that provide a public record give notice to all title searchers.[140] In addition, certain court dockets *do* provide notice. In bankruptcy, transfers to the trustee in bankruptcy need not be recorded but are sufficient when docketed in the bankruptcy court.[141] Wills and transfers by intestate succession

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134. *Id.*

135. *Id.*

136. The court stated that "a major failing of [this] argument is that there was no divorce decree for the IRS to discover." *Id.* However, if there had been a discoverable decree then constructive notice would have been satisfied leaving no need for inquiry notice to come into play.

137. Thomson v. United States, 867 F. Supp. 1420, 1429–30 (D. Minn. 1994), *rev'd*, 66 F.3d 160 (8th Cir. 1995).

138. *Id.* Courts have commonly held that inquiry noticed applied when possession was "visible, open, exclusive, and unambiguous." WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 885 (Jesse H. Choper et al. eds., 3rd ed. 2000); *see* Lamb v. Lamb, 569 N.E.2d 992 (Ind. App. 1991); Ames v. Brooks, 297 P.2d 195 (Kan. 1956). However, there are cases where ambiguous acts of possession were enough for a court to impute notice. *See* Miller v. Green, 58 N.W.2d 704 (Wis. 1953); *see also* Wineberg v. Moore, 194 F. Supp. 12 (N.D. Cal. 1961) (finding that the presence of "no trespassing" signs and personal items at the cabin were enough to put a purchaser on inquiry notice).

139. STOEBUCK & WHITMAN, *supra* note 138, at 882.

140. *Id.* at 876 n.32.

141. *Id.* at 876.

need not be recorded, but can be found in the probate court records.[142] These courts' dockets do not provide any more notice to a third party than a docketed state court divorce decree. A docketed divorce decree, once reviewed by a judge, is no more capable of defrauding or deceiving the IRS into avoiding attachment of a lien to a piece of property than any of the previously mentioned judgments.[143] A docketed divorce decree is hardly a "rumor or ambiguous statement" which need not be investigated further.[144] With the continued automation and computerization of public records, the time needed for the IRS to check for any divorce decrees would not vastly decrease its ability to file a tax lien. It seems a small inconvenience for the government to check the court records when the risk to an ex-spouse could mean the loss of his home.

Another piece of information, which is available on a yearly basis to the IRS, is the taxpayer's tax return. As stated above, the *Thomson* lower court did not allow the address change on the tax return to impute notice to the IRS.[145] The court did not mention that if they filed a tax return, the filing statuses of the parties should have been changed from married to single.[146] This annually-required document, which requires a party to inform the IRS of the party's marital status, should be enough information to put the IRS on inquiry notice.

Before the divorce, the couple likely reported a status on their federal income tax return(s) of either "married filing jointly" or "married filing separately."[147] After a couple files for divorce they are required by law to change their filing statuses.[148] The return also requires that the name and social security number of a taxpayer's spouse to be listed.[149] As of the due date of the return the IRS would have actual notice of whether the couple was still married. If they were no longer married, how does this change not put the IRS on inquiry notice of a

142. *Id.* Furthermore, certain actions in law such as eminent domain, adverse possession, and creation of certain easements do not create a recording requirement even if reduced to judgment. *Id.* at 877.
143. One purpose of the recording requirement is to disallow secret conveyances. H. C. J., Annotation, *Priority Where Senior Instrument Affecting Real Property Is Recorded After Execution but Before Recording of Junior Instrument*, 32 A.L.R. 344, 352 (1924).
144. *See* Stoebuck & Whitman, *supra* note 138, at 883 (stating that the duty to make a more thorough investigation does not require a subsequent purchaser to "pursue rumors or ambiguous statements").
145. Thomson v. United States, 867 F. Supp. 1420, 1428 (D. Minn. 1994), *rev'd*, 66 F.3d 160 (8th Cir. 1995).
146. *See* I.R.C. § 2 (2006).
147. *Id.* An obvious flaw to this argument is the ability of a married person to file head of household both before and after a divorce, if certain requirements are met. *Id.* In such circumstances, the annual income tax filing requirement may not be enough to put the IRS on inquiry notice.
148. *Id.*
149. *Id.*

divorce decree between the two taxpayers? The IRS should be required to either investigate further or, at the very least, accept evidence of the divorce decree which is presented to them to supersede its attached tax lien.

D. Judicial and Legislative Solutions

The Supreme Court does not grant certiorari to many tax cases.[150] Therefore, clarifications in tax law must come from Congress, usually by way of Treasury regulations,[151] or by the reasoning of lower courts.[152]

First, Congress or the Treasury should clarify whose interest a § 6321 action attaches. The clarification should be that § 6321 only pertains to the interests available to the taxpayer at the time of the lien and not to his creditors' or any subsequent third party's interest.[153] This solution should currently be applied by all courts because of the Supreme Court's rulings in *National Bank of Commerce* and *Rodgers*, which commentators have described as requiring the IRS to "step into the shoes" of the taxpayer.[154] By following the Supreme Court's rule or a clarification by the Treasury, the unrecorded sales of a delinquent taxpayer will not be available to the IRS for the satisfaction of the debt. This would force the IRS to look elsewhere in the delinquent taxpayer's assets to find payment and in turn not shift that penalty to an unsuspecting, innocent ex-spouse. The IRS would not be out of options to collect, like a non-governmental creditor, but could use its blanket lien powers to attach other interests.[155] If there are no assets for the IRS to acquire, the government always has the threat of imprisonment.[156]

Second, courts should allow a properly docketed divorce decree which transfers property to rebut the IRS's presumption that the delinquent taxpayer still maintains an interest in the property.[157] The IRS should be put on constructive notice of the properly docketed

150. GRAETZ & SCHENK, *supra* note 57, at 88 ("Certiorari is granted in only a small portion of the federal tax cases in which it is sought—recently less than 10 percent.").

151. *See id.* at 72 (quoting I.R.C. § 7805(a) (2006) which "provides that 'the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement' of the internal revenue laws").

152. *See id.* (writing that discrepancies in outcomes are common and lead to attorneys searching for a sympathetic circuit).

153. This solution is not ground breaking, having been proposed in 1997 by Texas Tech University Professor Marilyn Phelan. Phelan, *supra* note 72.

154. BITTKER & LOKKEN, *supra* note 111, ¶ 111A.4.2 at S111A-28.

155. *See* I.R.C. § 6321 (2006) (stating that the lien attaches to "all property and rights to property," not to a certain piece of property).

156. *See id.* § 5871.

157. *See supra* subsection III.C.2.

court divorce decree. The IRS may argue that this would increase its burden. However, it does not seem unfair to place the burden of producing the evidence on the ex-spouse. After all, the ex-spouse could have avoided this inconvenience by assuring recordation. This burden of production would send a clear but equitable message. When property is transferred pursuant to a divorce decree, the ex-spouse should record the decree, the deed, or both. If the transferring document is not recorded, the property will remain vulnerable to divestment from other subsequent third parties, whereas with respect to the IRS, the burden will be on the non-delinquent ex-spouse to produce the decree but there will be no threat of losing the property.

Finally, the IRS should be put on inquiry notice of the delinquent taxpayer's marital status when filing a tax lien.[158] Once it is determined that a lien be filed, the IRS should be required to perform a quick check of the delinquent taxpayer's past filing statuses. The government should look for any changes from married, filing jointly or separately, to single, or a change in a spouse's social security number, in the case that a taxpayer was divorced and married in the same year. If changes are found, the IRS should be required to gather information from the delinquent taxpayer and any of the ex-spouses pertaining to property transferred pursuant to the divorce. The IRS should be protected by requiring that any interests in the property be shown to have been acquired before the date of the tax lien. Not only would this lessen the negative perception of the IRS in taking homes away from unsuspecting ex-spouses, but providing notice to any ex-spouses could also greatly reduce the time spent in clearing up interest discrepancies.

IV. CONCLUSION

This Note discussed the IRS's continued attempts to invoke its power to collect on a federal tax lien over a previously unrecorded conveyance. This Note proceeded by describing the history of the federal tax lien as it relates to unrecorded conveyances, especially with regards to divorced taxpayers, and how the circuits are currently split in their reasoning of their decisions. It analyzed whose interest the tax lien should attach, the application of various types of state recording acts, and the treatment of the IRS as a creditor without notice. The Note concluded with a description of possible judicial and legislative solutions to quell this dispute and attempt to provide a fair outcome for all of the parties.

The IRS has many methods for collection and "proceeding by lien and administrative levy is the most summary and severe of those rem-

158. *See supra* subsection III.C.2.

edies."[159] The IRS and the courts should be particularly meticulous and thorough when depriving a taxpayer, albeit a delinquent one, of their property. This is especially true when there is the possibility that the property is a family's home which currently belongs to an ex-spouse who may have children residing therein. The law should not punish an ex-spouse for the delinquency of a former spouse thereby allowing the delinquent spouse to satisfy a tax bill with property that they do not rightfully own.

159. Thomson v. United States, 66 F.3d 160, 163 (8th Cir. 1995); *see* United States v. Rodgers, 461 U.S. 677, 695–96 (1983).