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Federal Estate Tax--Apportionment

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usual legal sense, was the solution of another court, which held that knowledge by one defendant of the other's activity was sufficient to attach entire liability where the defendants' separate acts had caused the plaintiff what the court considered a single injury.¹³ Another court sought to make a distinction between "direct" and "consequential" injury the solution to the problem of whether each defendant was liable for the entire harm in a case in which there was an interval of time between the defendants' independent acts and the injury to the plaintiff.¹⁴

The proposed solutions of the above cases have proved abortive. The innovations have remained law only in the jurisdictions where the cases were decided. It seems that the Texas court in the principal case has arrived at the best solution by finding entire liability and allowing procedural joinder of the defendants.

HAROLD L. TICKTIN

FEDERAL ESTATE TAX — APPORTIONMENT*

Approximately three-fourths of the intestate's gross estate consisted of probate assets.¹ The remainder constituted the corpus of a trust which was created by the decedent during her lifetime and which was not subject to probate administration.² The administrator paid the federal estate tax out of the probate assets and then sought to recover from the trustee an amount equal to the trust's proportionate share of the tax. The Ohio Supreme Court, in reversing the lower courts, held³ that the burden of the federal estate tax should be apportioned between the probate and the non-probate assets.⁴

The court cited with approval the case of *Miller v. Hammond*,⁵ which held that a surviving spouse, electing to take against her deceased spouse's

¹² "If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, violates an express statute and creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them." *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 25, 72 N.E. 879, 880 (1904), severely criticized in *City of Mansfield v. Bristor*, 76 Ohio St. 270, 81 N.E. 631 (1907).

¹³ "If parties, although acting independently, know or have reasonable grounds to believe that their independent acts, combining with the independent acts of others, will create a result that will become a nuisance, and they do so causing damage, they become as it were, joint wrongdoers *ab initio* Where all have knowledge of the independent acts that create the result and continue the independent acts with knowledge, this *ipso facto* creates a concert of action and makes a common design or purpose." *Moses v. Town of Morganton*, 192 N.C. 102, 106, 133 S.E. 421, 423 (1926)

¹⁴ The court held that here the injury was "consequential" because the "subject of the injury was different from that upon which the wrongful acts were directly inflicted." *Farley v. Crystal Coal & Coke Co.* 85 W Va. 595, 600, 102 S.E. 265, 267 (1920)

will, is entitled to an estate tax marital deduction and, therefore, her statutory share should not have to pay a part of the federal estate tax when her share does not exceed the amount permitted for the marital deduction. Both the principal case and the *Miller* case cite *Industrial Trust Co. v. Budlong*,⁶ a case similar on its facts to the principal case except that the deceased died testate. The *Industrial Trust* case also held for apportionment.⁷

As a result of these recent decisions, the Ohio rule as to apportionment of federal estate tax can be summarized as follows: Where there are probate and non-probate assets, the court will allow apportionment in the case of intestacy,⁸ and will probably allow apportionment in the case of testacy.⁹ Where there are only probate assets, the court has held against apportionment and has imposed the entire tax upon the residuary estate in the case of one who dies testate.¹⁰ What the court will do in a case where the decedent dies intestate with only probate assets is speculative.

ROBERT PRESTON

* This supplements Note, *Apportionment of Federal Estate Tax*, 3 WESTERN RESERVE L. REV. 164 (1951).

¹ Those assets which are subject to probate administration. See 3 WESTERN RESERVE L. REV. 164 (1951).

² Although not subject to probate administration, the amount of the trust was included in the gross estate by virtue of § 811 (d) of the Internal Revenue Code.

³ *McDougall, Adm'r. v. Central National Bank*, 157 Ohio St. 45, 104 N.E.2d 441, *rehearing denied*, 25 Ohio Bar 181 (1952).

⁴ In the absence of statute the question of where the burden of the tax will fall is a matter of the decedent's intention, either expressed or implied, and where no contrary intention can be found then an equitable apportionment of the tax should follow. There was no expressed intention in the principal case. See 3 WESTERN RESERVE L. REV. 164 (1951).

⁵ 156 Ohio St. 475, 104 N.E.2d 9 (1952), decided several weeks earlier by the same court.

⁶ 76 A.2d 600 (R.I. 1951).

⁷ The court in both the principal case and the *Miller* case, speaking of the *Industrial Trust* case, said: "That holding, in our opinion, discloses a proper application of equitable principles for the purpose of preventing injustice to some heirs and unjustified windfalls to others."

⁸ *McDougall, Adm'r. v. Central National Bank*, 157 Ohio St. 45, 104 N.E.2d 441, *rehearing denied*, 25 Ohio Bar 181 (1952).

⁹ This follows from the express approval of the *Industrial Trust* case both in the principal case and in the *Miller* case.

¹⁰ *Y.M.C.A. v. Davis*, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47, 44 Sup. Ct. 291 (1924).

