Washington Law Review

Volume 30 | Number 1

2-1-1955

Community Property—Ownership During Probate of the Estate of One Spouse for Income Tax Purposes

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RECENT FEDERAL DECISIONS

Community Property—Ownership during Probate of the Estate of One Spouse for Income Tax Purposes. In the case of *U.S. v. Merrill,* 211 F.2d 297, (9th Cir. 1954), the court held that when a wife dies in the state of Washington leaving solely community property and the surviving spouse serves as executor of her estate, only one-half of the executor's fee paid to the husband from community funds is taxable to him as income. The other one-half of the fee is chargeable to his share of community property. Further, the court in dictum said that when one spouse dies leaving an estate consisting only of community property, the executor or administrator is *not* the owner of the entire community property for tax purposes. Income follows ownership and hence the income during probate is not taxable solely to the estate but rather one-half to the estate and one-half to the surviving spouse.

The decision in the *Merrill* case resolves the apparent conflict that existed between *Bishop v. Commissioner,* 152 F.2d 389 (9th Cir. 1945), and *Commissioner v. Larson* 131 F.2d 85 (9th Cir. 1942). In the *Larson case,* the court held that income from Washington community property in the hands of the executor of the deceased spouse's estate was taxable in entirety to the estate. This decision was based on the premise that the executor was *owner* of all community property during administration. In the *Bishop* case, the court held that upon the death of a husband domiciled in California one-half of the income from community property during administration was taxable to the estate and the other one-half was taxable to the wife. Only one-half of the executrix's fee the wife received from community funds was taxable as income; the other one-half having been paid from the wife's own share of the community property. The court distinguished the *Larson* case on the grounds that the Washington community property law was substantially different from the California law. Such a distinction does not appear to be valid. There was a difference, but the California law was changed in 1927 and now there is no essential difference between California and Washington community property law. In California, both spouses have a vested interest in community property. *Bishop v. Commissioner, supra.* In Washington, during lifetime, each spouse has an undivided and indivisible one-half interest in community property. On the death of one spouse the community as such is terminated. The surviving spouse then has an undivided but divisible one-half interest in the community property, which together with the deceased spouse's one-half is subject to administration. In other respects, the death of one spouse does not affect the surviving spouse's vested interest in the community property. *In re Coffeys Estate,* 195 Wash. 379, 81 P.2d 283 (1938). In each state then, the respective spouses have a present vested interest in the community property which is not changed by the death of one of the spouses. In the *Merrill* case, the court recognized the invalidity of the distinction they had relied on in the *Bishop* case and held that there was no real difference between the California and Washington law. The court further indicated that the *Larson* case should no longer be followed and that the *Bishop* case was now controlling.

Besides laying at rest the conflict between the *Bishop* and *Larson* cases, the *Merrill* case is important for two reasons: (1) An executor's fee received by one spouse from the community property is only income to him to the extent of one-half of the fee. The other one-half is chargeable against his own property and hence is not income. (2) The court pointed out that when one spouse dies, the estate of the deceased spouse is to be regarded for income tax purposes as embracing only one-half of the community property. Thus it is submitted that in Washington, when the entire estate consists of community property, it is no longer to be considered as a single taxable entity for income tax purposes. Instead, the income from community property during administration is taxable one-half to the estate and one-half to the surviving spouse.

JOHN A. GOSE

Torts—Contribution among Tortfeasors where the United States Is a Party. *United States* v. *State of Arizona,* 214 F.2d 389 (9th Cir. 1954), highlights the recurring problem of contribution between the United States and another joint tortfeasor. In the original case here involved, *P* sued the United States under the Federal Tort Claims Act for injury resulting from an exploding shell picked up on a supposedly dedudded artillery range which had been deeded by the United States to the State of Arizona. The United States brought a third-party complaint against the State of Arizona as a joint tortfeasor, and it is the action on this third-party complaint which is involved in the instant case. The Court of Appeals for the Ninth Circuit held that Arizona law does not permit contribution from another tortfeasor, and, therefore, affirmed the dismissal of the third-party complaint. The court asserted that the basis of this holding was the doctrine of *Erie Railroad v. Tompkins,* 304 U.S. 63 (1937), requiring the application of state substantive law to federal court actions.

The opinion cites *United States v. Yellow Cab Co.,* 340 U.S. 543 (1950), as authority for use of the *Erie* doctrine in matters of contribution where an action is brought under the Federal Tort Claims Act. The *Yellow Cab. Co.* case arose out of an accident between a taxicab and a United States mail truck, as a result of which the passenger of the taxicab sued the cab company; whereupon the cab company impleaded the United States, and the court held that under the Federal Tort Claims Act the United States government had consented to be impleaded as a third-party defendant in an action for contribution, since appropriate state law provided such an action. This was not, however, an application of *Erie v. Tompkins, supra,* but was a strict reading of the Federal Tort Claims Act which provides consent to suit against the United States on account of damage caused by negligence of any employee of the Government "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death *in accordance with the law of the place where the act or omission occurred.*" (Italics added.) Because Pennsylvania law permitted contributions between joint tortfeasors, the United States was obliged to contribute 50% of the verdict awarded against the cab company.

Despite the irrelevancy of *Erie v. Tompkins, supra,* to such a situation, these two cases are graphic illustrations of the diversity of results which occur in the matter of contribution when the United States is involved with another as a tortfeasor. The suit must always be brought under the Federal Tort Claims Act, but the liability for or right to contributions depends on state substantive law which is at great variance from one state to another. [For a comprehensive discussion of the problem of lack of uniformity of contribution for the United States see 3 MOORE'S FEDERAL PRACTICE § 14.29, at 507, *et seq.* (3d Ed. 1948).]

Since the common law prohibited contributions among tortfeasors, and many states have made no statutory provision therefor, those states allow no right of contribution at all. In six states the right of contribution is conditioned on a judgment against the tortfeasors in the original action, there being no provision for impleading or third-party defendant actions. In those states the person injured has sole control of the distribution of loss by contribution. In the states which do have laws with respect to contribution,