

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2521**

Date:23-Feb-17

**Subject: Marc Soss on *U.S. v. McNicol*: Another IRS Win on
Personal Liability against the Administrator of an Estate**

“In U.S. v. McNicol, the First Circuit Court of Appeals affirmed personal liability under the federal priority statute of a personal representative (‘PR’) of an estate. The lower court had found the PR to be personally liable under the federal priority statute for tax liabilities due from an insolvent estate. The personal liability was accessed by the IRS after the PR transferred ownership of the sole estate assets from the decedent’s estate to herself without making any effort to liquidate them or make any payments to the Government on the decedent’s outstanding tax liability.

When making an argument before any state or federal court it is important not to use ‘alternative facts.’ The Appeals Court reviewed Mrs. McNicol’s arguments and found that the assets of each closely-held corporation were not sold to pay administrative expenses, as argued by Mrs. McNicol, but were maintained to generate income to support the family’s lifestyle.

There are very few instances when the government has not prevailed under the federal priority statute. Mrs. McNicol’s use of alternative facts did not help her case before either the District or Appellate Court.”

We close the week with **Marc Soss’** commentary on [*U.S. v. McNicol*](#).

Marc Soss’ practice focuses on estate planning; probate and trust administration and litigation; guardianship law; and corporate law in Southwest Florida. Marc is a frequent contributor to **LISI** and has published articles and been quoted in the Florida Bar, Rhode Island Bar, North Carolina Bar, Forbes Magazine, Association of the United States Navy, Military.Com, and CNN Business. Marc also serves as an officer in the United States Naval Reserve.

Here is Marc's commentary:

EXECUTIVE SUMMARY:

In [*U.S. v. McNicol*](#), the First Circuit Court of Appeals affirmed the personal liability, under the federal priority statute (31 U.S.C. § 3713(b)), of a personal representative ("PR") of an estate. The lower court had found the PR to be personally liable under the federal priority statute for tax liabilities due from an insolvent estate. The personal liability was accessed by the IRS after the PR transferred ownership of the sole estate assets from the decedent's estate to herself without making any effort to liquidate them or make any payments to the Government on the decedent's outstanding tax liability.

FACTS:

On July 25, 2002, Mrs. McNicol's husband passed away. At the time of his death he had accrued federal income tax liabilities in excess of \$340,000. In contrast, the sole assets of his estate were interests in two closely-held corporations whose values were insufficient to cover the federal income tax liabilities. Mrs. McNicol's was appointed the PR for her husband's estate. Despite the outstanding tax liability, she transferred the corporation shares to herself and made no attempt to make any payments to the Government or any other creditors of the estate.

In October, 2003, the IRS contacted the PR regarding the decedent's outstanding tax liability and formally submitted a claim against the probate estate. After negotiations failed, the IRS served the PR with a formal notice of potential liability under the federal priority statute. Subsequently, the Department of Justice filed suit in the United States District Court seeking in excess of \$340,000 from the estate and/or the PR, and a \$125,000 judgment against Mrs. McNicol personally.

After additional court ordered settlement discussions were unsuccessful, each side moved for summary judgment. Ms. McNicol's argument was predicated upon an equitable exception for family allowances and funeral and administrative estate expenses. The District Court ultimately granted summary judgment in full to the government. Mrs. McNicol's

then appealed the case to the United States Court of Appeals, First Circuit. The Appeals Court affirmed the lower court's ruling that the federal priority statute claim was valid and the PR's argument for equitable exceptions was fatally flawed.

Law & Analysis

The federal priority statute (31 U.S.C. § 3713) provides that when there is an insolvent debtor, or the estate of a deceased debtor is insolvent, the federal government is first in line for payment of claims. The federal statute has been liberally construed and affords the government an unqualified priority of payment for claims due and the ability to assess personal liability when any of a debtors' assets are transferred before first paying the federal government any amount due it. Personal liability will be imposed when the three (3) main elements are found to exist: (i) the assets of the estate were transferred before the claims of the United States were paid; (ii) the debtor's estate was insolvent at the time of the transfer; and (iii) knowledge or should have reasonably investigated that the tax debt was owed.

COMMENT:

When making an argument before any state or federal court it is important not to use "alternative facts." The Appeals Court reviewed Mrs. McNicol's arguments and found that the assets of each closely-held corporation were not sold to pay administrative expenses, as argued by Mrs. McNicol, but were maintained to generate income to support the family's lifestyle. The Appeals Court further opined "Ms. McNicol hoped that the IRS would not seek to collect the liabilities and that the statute of limitations period would expire."

There are very few instances when the government has not prevailed under the federal priority statute. Mrs. McNicol's use of alternative facts did not help her case before either the District or Appellate Court.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Marc Soss

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CITES:

[U.S. v. McNicol, 829 F.3d 77, \(1st Cir. July 15, 2016\).](#)