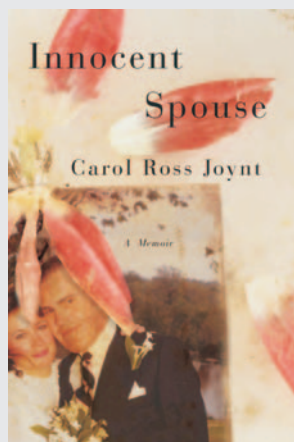


Spousal Tax Secrets Exposed: A Review of *Innocent Spouse*

Reviewed by Robert W. Wood



Innocent Spouse: A Memoir, by Carol Ross Joynt, ISBN 978-0-307-59209-5, is available at <http://www.crownpublishing.com>.

Robert W. Wood practices law with Wood LLP in San Francisco (<http://www.woodllp.com>) and is the author of *Taxation of Damage Awards and Settlement Payments* (4th ed. 2009), *Qualified Settlement Funds and*

Section 468B (2009), and *Legal Guide to Independent Contractor Status* (5th ed. 2010), all available at <http://www.taxinstitute.com>.

Innocent spouse claims are much in the tax news lately, primarily because of the timing of those claims and the IRS's controversial two-year deadline, which it recently abandoned. But there is a much larger canvas of those claims and their real-world impact. Wood reviews Carol Ross Joynt's book, *Innocent Spouse*, finding that tax professionals and the public can both benefit from reading about the real-life nightmare it recounts.

Copyright 2011 Robert W. Wood.
All rights reserved.

It's not every day you pick up a new trade book featuring a tax doctrine as a central character. That's understandable, since taxes are hardly bestseller fare. Yet *Innocent Spouse: A Memoir* by Carol Ross Joynt (Crown 2011) is a potboiler centered on a big but common tax problem. It's even peopled with real-life tax lawyers. They include Cono Namorato of Caplin & Drysdale and former IRS Commissioner Sheldon S. Cohen, then at Morgan Lewis & Bockius LLP (and now at Farr, Miller & Washington).

This is a fun read for a tax lawyer. But I'm sure it will be a real eye-opener for those unacquainted with our sometimes bizarre federal income tax

system. Clearly that's where the book is aimed. I hope it brings new light to the plight of innocent spouses — putative and real — everywhere.

Innocent spouse cases are difficult, clog the courts, and are a hot topic among tax reformers. National Taxpayer Advocate Nina Olson has rightfully lambasted the IRS for its brutish handling of some cases. Just this year, many in Congress stood up almost *Network*-style, in effect saying they're mad as hell and not going to take it anymore. After a congressional letter-writing campaign to IRS Commissioner Douglas Shulman in April, Shulman promised a review of IRS innocent spouse procedures.

Joynt's book couldn't come at a better time. Peeling back the covers on innocent spouse relief is especially appropriate now, because the review promised by Commissioner Shulman ended with the IRS abandoning its longstanding — and long litigated — position that all innocent spouse claims must be initiated within two years of the Service's first collection attempt. In July the Service enunciated its new policy that this enormously controversial rule would no longer apply.¹ The Taxpayer Advocate and numerous Senators and members of Congress lauded the decision.²

When a couple files a joint tax return, both are fully liable not only for what's on the return, but also for what may *not* be, like illegal income, gambling winnings, or foreign bank accounts. The IRS can judge one party innocent to let him (or more often, her) off the hook. Yet, in spite of legal reforms in 1998, convincing the IRS isn't easy. The problem starts with joint returns.

Despite the frequent presence of divorce, an incredible 95 percent of married couples file jointly. The reasons elude me. Perhaps couples take an all-for-one viewpoint, want the limited tax savings typically reaped by joint filing, or just have an accountant who assumes that like most married

¹See IR-2011-80 (July 25, 2011), *Doc 2011-16126*, 2011 TNT 143-10; Notice 2011-70, 2011-32 IRB 1, *Doc 2011-16118*, 2011 TNT 143-9.

²See Statement of Nina Olson, National Taxpayer Advocate Regarding IRS Announcement on Innocent Spouse Rule Change, July 25, 2011, *Doc 2011-16173*, 2011 TNT 143-26; Press Release, Stark, McDermott Laud IRS Announcement of Corrected Innocent Spouse Rule (July 25, 2011), *Doc 2011-16129*, 2011 TNT 143-38.

couples, they want to file jointly. Reading *Innocent Spouse* could change all that.

Innocent spouse relief is frequently invoked but notoriously tough to get. You generally start the process by filing an IRS Form 8857, "Request for Innocent Spouse Relief," showing that when you signed the joint return you didn't know of the problem, that you had no reason to know of it, and that holding you liable would be unfair. Plainly, fairness is subjective. Many spouses denied innocent spouse relief go to court, but the IRS claims the courts should decide only whether the agency's decision is reasonable. Yet taxpayers have successfully argued that the U.S. Tax Court can take a fresh look at the case, including facts not considered by the IRS.

The author of *Innocent Spouse* is not your average spouse, innocent or otherwise. Joynt is a journalist in her own right, working for years as a writer for Walter Cronkite and then as a producer and writer for NBC News, *USA Today*, and *Larry King Live*. She writes well, and given her pedigree, it's no surprise that she drops names naturally like raindrops. I don't mean that as a criticism. In fact, if the book were not so filled with a kind of who's who of Washingtonians, it wouldn't be nearly as enjoyable to read.

Innocent Mess

Joynt ends up with ownership of Nathans, a 40-year institution in the Georgetown restaurant and bar scene. That, coupled with her media contacts, guarantees big personalities in the book. (Larry King orders up a helicopter to try to save Mr. Joynt's life.) This entertaining exposé reveals a charming and thoughtful spouse who turns out to have a dark side and many, many financial and tax skeletons.

The book is mostly about the aftermath those skeletons create. When Joynt's husband dies unexpectedly, the tax lawyers (Caplin & Drysdale) explain that he was under criminal investigation by the IRS and in big financial trouble. Although the criminal case is dropped, \$3 million will pay the IRS off, they explain. When Joynt says she had no idea about any of her husband's transgressions, the innocent spouse character in the book is born.

Perhaps counterintuitively, it is precisely the elite nature of this Washington insider that makes the book enjoyable and credible. How many putative innocent spouses can ask Watergate reporter Bob Woodward of *The Washington Post* to read an IRS report about their tax liability? In fact, it is Woodward who suggests that his own tax lawyer — Cohen — take a look at this mess.

Within days, Joynt meets with Cohen. Cohen and others at Morgan Lewis then take over for Caplin. Caplin, we are told, had really been allied with Mr. Joynt until his death.

When Joynt says she isn't comfortable with Caplin, Cohen explains diplomatically that it is a fine firm but that choosing counsel is a fundamental client right. Cohen explains that Caplin understandably may have had a hard time making the awkward transition from representing Mr. Joynt in his criminal tax case to representing his surviving spouse claiming innocence.

The author even has a dinner meeting with Leona Helmsley in which the famous Queen of Mean (post-prison term) advises Joynt to "sell what you've got to sell," and pay the IRS.³ I found that advice amusing, although I'm not sure exactly why. As Joynt becomes aware of how much she didn't know about her husband, she also sees what the IRS sees.

The revenue agent's report about her, she says, reads "like the tumescent tabloid profile of a frivolous, spendthrift airhead."⁴ Not knowing that her husband couldn't pay for their lifestyle and that his statements about family money were lies too, Joynt was flummoxed. She knew Caplin had a hard time believing her (surely the Gucci dress didn't help), let alone the IRS.

Joynt even asks herself why she never asked questions. How on earth is it possible to truly have one's head in the sand so deeply and for so long? In this soul-searching book, she refers to her spousal relationship as a form of "marital don't ask, don't tell."⁵ That's a nice turn of phrase that sums up many a marriage. It makes our national obsession with joint tax return filing awfully hard to understand.

In a larger sense, Joynt touches on the scores of others whose lives and finances are upended when a tax boat sails south. Her husband's restaurant had dozens of employees, and more than a few faced their own tax problems when the owner died. Moreover, some employees had received secret, off-the-books income from the high-flying husband. Joynt's signature authority meant potential responsible person payroll tax liability.

Joynt even gives readers a sense of what it's like to deal with lawyers. Yet in her case, the IRS does not appear in court arguing that Joynt knew about the financial problems, took the money, accepted the gifts, wasn't abused, and so on.

³Carol Ross Joynt, *Innocent Spouse: A Memoir*, 118 (2011).

⁴*Id.* at 39.

⁵*Id.* at 171.

Sadly, that sort of bashing occurs frequently. The IRS would say it is necessary, because the putative innocent spouse puts her own character and actions in issue by claiming she had no idea what was going on. Yet the IRS seems to go overboard, often painting an abused spouse as a willing accomplice to her tax cheat husband or as a feckless ignoramus spending money she should have known was owed for taxes.

Road to Perdition

The book is a good account of the travails that even someone with resources and connections faces when trying to keep the IRS at bay. No matter one's money and connections, the Service is a frightening and unforgiving opponent. Joynt also has other legal problems with the landmark restaurant, including a major dispute over the lease. She lands famous Williams & Connolly LLP lawyer Brendan Sullivan (defense counsel to Oliver North in the Iran-Contra scandal) to represent her in that matter — pro bono, no less!

There is a once red-hot feature of innocent spouse lore that doesn't appear in the book: timing. Up until the IRS's July 25 notice,⁶ you generally had to claim innocent spouse relief within two years after the IRS first tried to collect a tax debt. That first collection activity might have been an IRS notice of intent to levy or something more innocuous like a notice from the IRS that offsets a refund from another tax year.

For years, the IRS interpreted this two-year deadline flatly, but the Tax Court has repeatedly allowed claims for equitable relief (a subset of innocent spouse claims) outside the two years. The IRS generally prevailed in appellate court, undoing Tax Court largesse.

It is just as well that Joynt's book skips the detour through the Service's two-year filing policy. The winds of change were blowing when the IRS launched its review in early 2011, but given the years of brutal tax litigation on the issue, the Service must truly be commended for making this marked

change. Of course, it is only equitable relief claims that are within the new IRS policy, but this is a huge step.

What's more, the Service made the change retroactive. The Service has noted that: (a) if your equitable relief request was previously denied solely because of the two-year limit, you can reapply as long as the tax statute of limitations is still open; (b) the IRS will not apply the two-year limit in any pending litigation involving equitable relief innocent spouse claims; and (c) even if IRS litigation over innocent spouse relief is final, the IRS may suspend its collection activity in certain cases.

Of course, there is a more insidious issue beyond timing. Many distraught spouses survive abuse yet still lose all their assets trying to clean up tax messes in which they had no participation and over which they had no control.

How the IRS handles innocent spouse claims more globally requires attention. Well-advised women seeking innocent spouse treatment file on time. Joynt did. But the sea of putative innocent spouse cases involves many who don't have the wherewithal she did to buck the IRS.

As a tax lawyer, I can quibble with minor tax details in the book. I found the repeated references to "the innocent spouse code" odd, including attributing this phrase verbatim to tax lawyers. No tax lawyer hooks those words together just so. Still, that non-idiom is a nitpick.

Innocent Spouse is a page-turning read about the unexpected reversal of fortune people can and do experience. Regardless of our station, all of us should be wary of such threats. For 95 percent of married Americans, that threat is a sword of Damocles suspended above us. We never know when it may fall. After all, who knows what evil (or sloth, or honest but stupid mistake) lurks in the hearts of men (and women)?

Innocent Spouse is fascinating even if you (wrongly) dismiss it as never happening in your own backyard. It should cause many ordinary citizens to begin questioning their own spouses and tax advisers about ways they can protect themselves. That makes it well worth Joynt's living and writing these travails.

⁶See *supra* note 1.