WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1958 December, 1958 Number 4

ULTIMATE LIABILITY FOR FEDERAL ESTATE TAXES

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THE PROBLEM

Federal estate taxes have significance only as to sizable estates.[1] When, however, the estate is really large, there are few problems which deserve more detailed attention than the determination of the location of ultimate liability for this type of tax-bite. Under the Internal Revenue Code, the gross taxable estate of a decedent includes not only the assets passing by testate or intestate succession from the decedent;[2] but also a long list of "nontestamentary assets," such as (a) life insurance; (b) appointive assets, as to which the decedent has had some type of power of appointment; (c) gifts found to have been made by the decedent "in contemplation of death"; (d) the corpora of many types of trusts created by the decedent prior to his death; (e) property owned with a spouse, or other relative or friend in some form of ownership which includes a right of survivorship; (f) Totten trust bank deposits; (g) United States bonds issued so as to be "payable on death" to a designated beneficiary; and (h) other varieties of interests enumerated in the statute. In estates of quite modest sizability, life insurance, joint bank accounts and tenancies by the entirety often constitute important factors. In really large estates

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1. Federal estate taxes cannot affect a gross estate amounting to less than $60,000. Practically, the utilization of statutory deductions for gifts to surviving spouses and to charities causes gross estates up to $120,000 to be largely free from these worries.

2. Such assets have great diversities, varying from a specific gift of a piano, or of designated jewelry, or of designated shares of stock to a final gift of the "residue."

When a decedent dies intestate, leaving no assets which pass otherwise than by intestacy, no problem of apportionment can arise, as the tax is deducted before any computation of intestate shares. See Hampton's Adm'r v. Hampton, 188 Ky. 199, 221 S.W. 496 (1920); Martin v. Martin's Adm'r, 283 Ky. 513, 142 S.W.2d 164 (1940).

the nontestamentary assets frequently exceed in value the testamentary assets of the decedent. It is not uncommon to find that the federal estate tax amounts to a sum as great as, or even larger than, the total testamentary estate. It thus becomes important to determine whether the federal estate tax is to be apportioned among the total recipients of benefit, or is to fall upon certain recipients in some fixed order of priority as to burden.

THE "NORMALLY OPERATIVE RULE" AND DEVIATIONS THEREFROM

It is uniformly accepted law that a decedent can locate this ultimate burden wherever he wishes it to fall, provided only he clearly states his desires in the dispositive instrument. It is, unfortunately, however, a subject on which the draftsmen of dispositive instruments have, almost uniformly, done a poor job.[3] Part of the trouble, on this point, has been prevailing uncertainty as to the "normally operative rule," that is, the rule which is applied if the instrument says nothing on the topic. What is needed in each state is a clearcut "normally operative rule," from which the draftsman can deviate by unambiguously drawn clauses when any such deviation better serves his client's desire. Furthermore, the thus established "normally operative rule" should be the one likely to be wanted by a majority of the persons making wills and trusts, thus reducing the frequency with which deviating tax clauses become necessary.

INGREDIENTS IN SOLUTION

The present content of the law on the ultimate liability for federal estate taxes includes (a) certain sections in the federal statutes governing a small area only of the problem;[4] (b) widely varying state statutes which have been adopted in some seventeen of the American jurisdictions;[5] (c) judicial decisions in states having no governing statutes;[6] and (d) the practices of lawyers and of courts in applying

3. See, stressing this fact, Sargent, Sins of Oversight in Wills and Trusts, 30 B.U.L. Rev. 301, 303 (1950); Sutter, How to Plan for Apportionment of Estate Taxes, Estate Tax Techniques 2137 (Lasser ed. 1956).

Shifting the federal estate tax from the person normally chargeable to other persons, see, e.g., Goodson v. United States, 151 F. Supp. 416 (D. Minn. 1957); Martin v. New Eng. Deaconess Hospital, 328 Mass. 259, 103 N.E.2d 240 (1952); Lipic v. Wheeler, 362 Mo. 499, 242 S.W.2d 43 (1951); Vondermuhll v. Montclair Trust Co., 14 N.J. Super. 300, 81 A.2d 822 (1951).

See also Kennon, Provision for Payment of Death Taxes, 27 N.C.L. Rev. 94 (1948); Annot., 15 A.L.R.2d 1218 (1951).

4. See notes 8-12 infra.

5. See notes 19-32 infra.

6. See notes 33-37 infra.

existing statutes.[7] It is believed that a careful examination of these four ingredients of existing law will lead to a reasonable choice of that which will best serve as the "normally operative rule," and furnish a sound foundation for the drafting of the basic statute on the subject. The details of such a statute will be, in many instances, corollaries of the basic conclusion.

FEDERAL STATUTES ON APPORTIONMENT

The federal estate tax began with the Revenue Act of 1916.[8] This statute made the tax payable by a decedent's executor or administrator, included procedures for the attainment of a similar result, if the fiduciary failed to perform this duty, but was completely silent as to the location of the ultimate burden of this tax. Two years later,[9] the provision on insurance, which now constitutes section 2206 of the Internal Revenue Code of 1954 was adopted. This directed that, when the gross estate of a decedent included insurance proceeds, the recipient of such proceeds can be compelled to contribute proportionately to the resultant tax. This form of apportionment is now country-wide and has been applied many times by the courts.[10] In and since 1932, the federal estate tax rates increased greatly. Contemporaneously, the frequency of powers of appointment also increased substantially. Where the gross estate of a decedent was found to include appointive assets, a considerable number of state courts decided that the recipients of such assets should, even where no statute so required, be re-

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7. See notes 41-47 infra.

8. The earlier federal experience with a tax on the privilege of receiving assets from a decedent is well reviewed in Knowlton v. Moore, 178 U.S. 41 (1900).

The beginning of the federal estate tax was the Revenue Act of 1916, § 200, 39 Stat. 777.

9. Revenue Act of 1918, § 408, 40 Stat. 1057.

10. See, e.g., Pearcy v. Citizens Bank & Trust Co., 121 Ind. App. 136, 96 N.E.2d 918 (1951); Gaede v. Carroll, 114 N.J. Eq. 524, 169 Atl. 172 (1933); In re Bell's Estate, 73 Montg. Co. Law Rept. 118 (Pa. 1958); Union Trust Co. v. Watson, 76 R.I. 223, 68 A.2d 916 (1949).

The present text of Int. Rev. Code of 1954, § 2206 is as follows:

"Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2051. If there is more than one such beneficiary, the executor shall be entitled to recover from such beneficiaries in the same ratio. In the case of such proceeds receivable by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed under such section."

quired to pay a proportionate share of the resultant tax.[11] The eminent fairness of this result led to the provision in section 403(c) of the Revenue Act of 1942, which now constitutes section 2207 of the Internal Revenue Code of 1954.[12] The provision required that when the gross estate of a decedent includes appointive assets, the recipient of these assets can be compelled to contribute proportionately to the resultant tax. Thus the federal statute now requires apportionment of the federal estate tax as against those who receive either life insurance proceeds or appointive assets included in the gross estate of a decedent. Apart from these two varieties of nontestamentary assets, the federal legislation makes the tax payable by the estate fiduciary, but leaves the location of the ultimate burden to the determination of each state.

JUDICIAL PRELUDE TO STATE STATUTES

Prior to 1916, all of the American experience with death taxes, both state and national, had involved inheritance taxes, that is, taxes upon the recipient's privilege to take. Under such a tax it has uniformly been held that each recipient should pay the tax attributable to his

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11. See, e.g., Regents of University System v. Trust Co., 194 Ga. 255, 21 S.E.2d 691 (1942); Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943) (as to a decedent who died March 22, 1942, prior to the enactment of the federal statute, referred to in note 12 infra). Cf. First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943) (reaching the opposite result as to a decedent who died in 1933).

12. See Int. Rev. Code of 1939, § 826(d), added by 56 Stat. 943 (1942). This statute became effective October 21, 1942. As to it see H. R. Rep. 2333, 77th Cong., 2d Sess. 163 (1942).

The present text of Int. Rev. Code of 1954, § 2207 is as follows:

"Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate, determined under section 2052, or section 2106(a), as the case may be. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section."

As in other cases, the statutory rule applies only in the absence of a contrary direction in the dispositive instrument. See Union Trust Co. v. Watson, 76 R.I. 223, 68 A.2d 916 (1949)

receipt.[13] An early New Hampshire decision unthinkingly carried over this practice to the federal estate tax.[14] This decision was later wisely overruled in New Hampshire.[15] Other states soon saw that an estate tax, imposed on the decedent's privilege to give, was highly like other administration costs, being deductible before there was anything to be distributed. Thus it became established law in many states that the estate tax had to be borne by the residuary estate to the extent that the residue sufficed.[16] Apart from the 1918, later overruled, decision of New Hampshire,[17] there is no American decision known to this writer, involving only assets passing under a will, where a court (without a statutory directive) has departed from the "burden-on-the-residue" principle. Many courts have reached this same result, namely, that the burden of the tax falls on the residuary estate, even when the gross estate of the decedent included nontestamentary assets.[18]

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13. See, e.g., In re Shumack's Estate, 152 Cal. App. 2d 208, 313 P.2d 90 (1957); Hackett v. Bankers Trust Co. 122 Conn. 107, 187 Atl. 653 (1936); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A.2d 124 (1939); Fidelity Union Trust Co. v. Anthony, 13 N.J. Super. 596, 81 A.2d 191, aff'd on other points, 18 N.J. Super. 49, 86 A.2d 594 (1952); Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409 (1956); Central Trust Co. v. Lamb, 74 Ohio App. 299, 58 N.E.2d 785 (1944) (dictum); Cunningham Estate, 69 Pa. D. & C. 579 (1949).

This rule is embodied in R.I. Gen. Laws § 44-23-19 (1956), as amended by R.I. Laws 1957, c. 154.

14. Fuller v. Gale, 78 N.H. 544, 103 Atl. 308 (1918).

Cf. Lauritzen, Apportionment of Federal Estate Taxes, 1 Tax Couns. Q. 55, 57-62 (June 1957), supporting this position by an argument based on the general doctrine of equitable apportionment applicable to joint debtors or co-sureties, and by early cases involving either the apportionment of federal estate taxes to the takers of nontestamentary assets, or the equal sharing of such taxes which necessarily results from an intestate death.

15. Amoskeag Trust Co. v. Trustees of Dartmouth College, 89 N.H. 471, 200 Atl. 786 (1938).

16. Applying the "burden-on-the-residue" principle in cases involving only testamentary assets, see Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320 (1936); Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919); Amoskeag Trust Co., v. Trustees of Dartmouth College, 89 N.H. 471, 200 Atl. 786 (1938); In re Hamlin, 226 N.Y. 407, 124 N.E. 4, cert. denied, 250 U.S. 672 (1919) (under law applicable before 1930 statute); Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946); Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114, aff'd 264 U.S. 47 (1924); Vandervort v. Hodge, 93 Ohio App. 482, 113 N.E.2d 889 (1953); In re O'Shea's Estate, 176 Ore. 500, 159 P.2d 198 (1945); Seattle-First Nat'l Bank v. Macomber, 32 Wash. 2d 696, 203 P.2d 1078 (1949); In re Williamson's Estate, 38 Wash. 2d 259, 229 P.2d 312 (1951).

17. See notes 14-15 supra.

18. Wells Fargo Bank & Union Trust Co. v. Older, 50 Cal. App. 2d 724, 123 P.2d 873 (1942) (inter vivos trust under law applicable before 1943 statute); Ericson v. Childs, 124 Conn. 66, 198 Atl. 176 (1938) (inter vivos trust under law applicable before 1945 statute); First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d

STATUTES IN SEVENTEEN STATES

State statutes on the topic began with a New York enactment of 1930.[19] This statute overgeneralized the increasingly realized desirability of apportionment *in some cases.*[20] It prescribed apportionment as the "normally operative rule" applicable both to testamentary and nontestamentary assets.[21] Other states hesitated to follow the New York example, partly because of doubts as to the validity of a state statute locating the burden of a federal tax. These doubts were eradicated by a decision of the United States Supreme Court in 1942.[22] This decision made it clear that, in cases not exactly covered by federal legislation,[23] the ultimate burden of the federal estate tax could be located wherever state law chose to locate it. New York legislative innovations have had in other states a sometimes undeserved presumption as to wisdom. As a result, statutes embodying the policy of the New York enactment of 1930 and establishing apportionment as the "normally operative rule" applicable to both testamentary and nontestamentary assets have been enacted, and still (in 1958) exist in nine states other than New York, namely, Arkansas, California, Connecticut, Delaware, Nebraska, Nevada, Pennsylvania, Tennessee and Virginia.[24]

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461 (1943) (appointive assets, as to which the rule was changed prospectively by change of federal statute in 1942, see note 12 supra); Central Trust Co. v. Burrow, 144 Kan. 79, 58 P.2d 469 (1936) (gift made in contemplation of death); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923) (inter vivos trust under law applicable before 1948 statute); Knowles v. Nat'l Bank, 345 Mich. 671, 76 N.W.2d 813 (1956) (inter vivos trust); Gelin v. Gelin, 229 Minn. 516, 40 N. W.2d 342 (1948) (joint property); Brauburger v. Sheridan, 7 N.J. Super. 576, 72 A.2d 363 (1950) (inter vivos trust under law applicable before 1950 statute); Farmers' Loan & Trust Co. v. Winthrop, 238 N.Y. 488, 144 N.E. 769, cert. denied, 266 U.S. 633 (1925) (inter vivos trust under law applicable before 1930 statute); In re Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953) (wife's non-barrable share).

As to the more recent growing body of judicial authority applying equitable apportionment with respect to estates involving nontestamentary assets, see notes 33-35 infra.

19. N.Y. Dec. Est. Law § 124, enacted originally by N.Y. Laws c. 790 (1930), to apply equally to both federal and New York estate taxes.

20. It "overgeneralized" the desirability of apportionment, since it took prior decisions and arguments demonstrating the desirability of apportionment *in cases where nontestamentary assets were involved,* and applied apportionment to *testamentary and nontestamentary assets alike.*

21. Thus if a testator left an estate of $250,000, and by his will gave furniture worth $1000 to a retired family retainer, and a ring worth $1000 to a close friend, the retainer and friend would be compelled each to raise and to contribute between $200 and $300 before becoming entitled to the given chattels.

22. Riggs v. Del Drago, 317 U.S. 95 (1942).

23. These "exactly covered matters" were insurance proceeds after 1918 (see note 9 supra) and appointive assets after October 21, 1942 (see note 12 supra).

24. Ark. Stat. Ann. § 63-150 (Supp. 1957), enacted by Ark. Laws 1943, No. 99,

Three other states, namely, Florida, Maine and Massachusetts, originally adopted general apportionment statutes patterned on the New York prototype.[25] Of these three, Florida and Massachusetts have modified their statutes, Florida by a complete return to the "burden-on-the-residue" principle,[26] and Massachusetts by a return to the "burden-on-the-residue" principle as to testamentary assets, confining apportionment to situations involving nontestamentary assets.[27] Maine simply repealed its apportionment statute after an experience with it lasting only two years.[28]

The statutes originally adopted in Maryland, New Hampshire and New Jersey established apportionment as the normally operative rule

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§ 1, p. 142, amended by Ark. Laws 1955, No. 122; Cal. Prob. Code §§ 970-77 (1956), enacted by Cal. Laws 1943, c. 894, with respect only to federal estate tax, applied in Security-First Nat'l Bank v. Wellslager, 88 Cal. App. 2d 210, 198 P.2d 700 (1948); Conn. Gen. Stat. §§ 2075-81 (1949), enacted by Conn. Laws 1945, §§ 314h-19h, 322h, with respect to federal estate tax and Connecticut estate and inheritance taxes; held unconstitutional in so far as it might apply to persons dying before July 18, 1945, by Parlato v. McCarthy, 136 Conn. 126, 69 A.2d 648 (1949); Del. Code Ann. tit. 12, §§ 2901-06 (1953), enacted by Del. Laws 1946, c. 119; Wilmington Trust Co. v. Copeland, 94 A.2d 703 (Del. 1953), held the statute declaratory of existing law and therefore its application to the estates of persons dying before its enactment was constitutional; Neb. Rev. Stat. § 77-2108 (Supp. 1955), enacted by Neb. Laws 1949, c. 222, § 1; Nev. Rev. Stat. §§ 150.290-.390 (1957), enacted by Nev. Laws 1957, c. 157, §§ 1-13, as a modification of Neb. Rev. Stat. § 77-2108 (Supp. 1955); Pa. Stat. Ann. tit. 20, § 844 (Purdon 1950), for period 1937-51; Pa. Stat. Ann. tit. 20, §§ 881-87 (Purdon Supp. 1957), originally enacted by Pa. Laws 1937, c. 2767, and revised into the Pa. Est. Tax Apportionment Act of 1951, enacted by Pa. Laws 1951, c. 1405; Williams, Notes on the Estate Tax Apportionment Act of 1951, 56 Dick. L. Rev. 210 (1952), gives the views of the sponsor of this Act as to its purposes and accomplishments; In re Dravo's Estate, 388 Pa. 551, 131 A.2d 351 (1957); Tenn. Code §§ 30-1117 to -1118 (1955), enacted by Tenn. Laws 1943, c. 109, applicable to federal estate tax only; Va. Code §§ 64-150 to -155 (1956), enacted by Va. Laws 1946, c. 128.

As to the history and content of the proration movement see Annot., 37 A.L.R.2d 199 (1954); Payne, Apportionment of State and Federal Estate Taxes, 11 Miami L.Q. 265 (1957); Preston, Apportionment of Federal Estate Tax, 3 Western Res. L. Rev. 164 (1951); Scoles, Apportionment of Federal Estate Tax and Conflict of Laws, 55 Colum. L. Rev. 261 (1955); Note, 40 Colum. L. Rev. 690 (1940); Note, 30 Ind. L.J. 217 (1955).

25. Fla. Laws 1949, c. 25435, §§ 1-4 (general apportionment statute) (construed in In re Gato's Estate, 276 App. Div. 651, 97 N.Y.S.2d 171 (1st Dep't), aff'd, 301 N.Y. 653, 93 N.E.2d 924 (1950), to have been declaratory of pre-existing law); Me. Laws, 1945, c. 269; Mass. Laws, 1943, c. 519 (held constitutionally applicable to the estate of one who died prior to statute's enactment by Merchants Nat'l Bank v. Merchants Nat'l Bank, 318 Mass. 563, 62 N.E.2d 831 (1945)).

26. Fla. Stat. Ann. § 734.041 (Supp. 1957).

27. Mass. Ann. Laws c. 65A, §§ 5-5B (1953).

28. Me. Laws 1947, c. 220; Me. Laws 1949, c. 349, § 135.

applicable to nontestamentary assets, leaving the "burden-on-the-residue" principle applicable to testamentary assets.[29]

Alabama since 1951 has had a statute establishing generally the "burden-on-the-residue" principle as to assets both testamentary and nontestamentary.[30]

Thus in the seventeen states having statutes on this topic in 1958, ten states have generally applicable apportionment statutes, four states confine apportionment to nontestamentary assets, and three states have returned to, or initially established, the "burden-on-the-residue" principle as to both testamentary and nontestamentary assets.[31] It should be noted that changes in these statutes, made during the past two decades, reveal a uniform evolution away from applying apportionment generally.[32]

JUDICIAL POSITIONS IN NONSTATUTORY STATES

In addition to the seventeen states dealt with above which have more or less complete statutory answers on the present topic, there are thirty-one other states (soon to become thirty-two by the addition of Alaska). In *nine* of these states, the courts have employed a judicial doctrine of equitable apportionment to compel persons taking nontestamentary assets to share in the payment of the federal estate tax.[33] One of this nine has made the judicial picture complete by

29. Md. Ann. Code art. 81, § 162 (1957), enacted by Md. Laws 1937, c. 546, and amended in minor particulars by Md. Laws 1947, c. 156, and by Md. Laws 1957, c. 747; N.H. Rev. Stat. §§ 88:1-:4 (1955), enacted by N.H. Laws 1943, c. 175; N.J. Stat. Ann. tit. 3A, c. 25, §§ 30-38 (1953), enacted by N.J. Laws 1950, c. 327, commented on in 6 Rutgers L. Rev. 127, 137 (1951); Vondermuhll v. Montclair Trust Co., 14 N.J. Super. 300, 81 A.2d 822 (1951), held the statute not applicable to a 1947 decedent; In re Burnett, 43 N.J. Super. 534, 129 A.2d 321 (1957), applying apportionment to the inter vivos trust assets included in the decedent's gross estate, despite a will clause construed to apply only to testamentary assets.

30. Ala. Code Ann. tit. 51, § 449(1) (Supp. 1953).

31. See notes 19-30 supra.

32. Some state statutes, applicable either to state taxes only or to very special situations reveal the same trend. See, e.g., Idaho Code Ann. §§ 14-402(10e), 14-403f (1948); Minn. Stat. Ann. § 291.40 (Supp. 1957), changed from its 1931 form by Minn. Laws 1951, c. 249, § 1; N.D. Code § 57-3723 (1943); Tex. Rev. Civ. Stat. Ann. art. 3683a (Vernon 1952), enacted by Tex. Laws 1947, c. 401, as to pre-1948 community property; applied in Matthews v. Jones, 245 S.W.2d 974 (Tex. Civ. App. 1952), repealed by Tex. Laws 1955, c. 55, § 434.

33. Regents of University System v. Trust Co., 194 Ga. 255, 21 S.E.2d 691 (1942) (appointive assets) (result since ratified by federal amendment, see note 12 supra); In re Comer's Trust, 101 N.Y.S.2d 916 (Sup. Ct. 1950) (applying Georgia law to inter vivos revocable trust); Pearcy v. Citizens Bank & Trust Co., 121 Ind. App. 136, 96 N.E.2d 918 (1951) (joint bank accounts and a tenancy by the entirety); Louisville Trust Co. v. Walter, 306 Ky. 756, 207 S.W.2d 328 (1948) (testator left will, but lapsed gift of land passed outside the will); Trimble v.

denying apportionment as between those taking under a will.[34] In an additional *two* states decisions deny apportionment as between those taking under a will, but have not considered apportionment with respect to nontestamentary takers.[35] In *nine* of the remaining twenty states it is clear that the "burden-on-the-residue" principle prevails both as to testamentary and nontestamentary assets.[36] In the remaining *eleven* states neither statutes nor decisions give certainty as to the law, but the writings and opinions of judges and lawyers, familiar

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Hatcher's Ex'rs, 295 Ky. 178, 173 S.W.2d 985, cert. denied, 321 U.S. 747 (1943) (gift made in contemplation of death); Succession of Ratliff, 212 La. 563, 33 So. 2d 114 (1947) (community property passing outside the will); Carpenter v. Carpenter, 364 Mo. 782, 267 S.W.2d 632 (1954) (annuity contract); Traders Nat'l Bank v. United States, 148 F. Supp. 278 (W.D. Mo. 1956) (commuted dower); In re Gallagher's Will, 57 N.M. 112, 255 P.2d 317 (1953) (jointly owned and community property, stressing propriety of confining apportionment to nontestamentary assets); Wachovia Bank & Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953) (computing wife's statutory share after computation of federal tax placed portion of tax load on this share taken outside the will); Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952) (apportionment as to nontestamentary asset taken by spouse, coupled with granting of tax exemption up to limit of marital deduction); McDougall v. Central Nat'l Bank, 157 Ohio St. 45, 104 N.E.2d 441 (1952) (inter vivos trust); Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695 (1954), cert. denied, 349 U.S. 911 (1955) (overruling that part of Miller v. Hammond, supra, which required computation of widow's statutory share free from federal estate tax); Industrial Trust Co. v. Budlong, 77 R.I. 428, 76 A.2d 600 (1950) (inter vivos trusts); Hooker v. Drayton, 69 R.I. 290, 33 A.2d 206 (1943) (appointive assets, result since ratified by federal amendment, note 12 supra, but case stresses line between "true estate" of a decedent and "gross estate" of a decedent for tax purposes).

34. Y.M.C.A. v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), aff'd, 264 U.S. 47 (1924); In re Cole's Estate, 64 Ohio L. Abs. 138, 111 N.E.2d 35 (1952).

See also Preston, Apportionment of Federal Estate Tax, 3 Western Res. L. Rev. 164 (1951).

The same result is clearly indicated for New Mexico and Rhode Island. See In re Gallagher's Will and Hooker v. Drayton, supra note 33. It is also implicit in all the other decisions cited note 33 supra.

35. Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320 (1924); In re O'Shea's Estate, 176 Ore. 500, 159 P.2d 198 (1945).

36. First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943) (result as to appointive assets changed by later enacted federal amendment, see note 12 supra, but reasoning that tax is item of expense, chargeable to residuary estate, applies to other situations); Franz v. Schneider, 14 Ill. App. 2d 464, 44 N.E.2d 798 (1957) (dictum); Central Trust Co. v. Burron, 144 Kan. 79, 58 P.2d 469 (1936) (apportionment refused as to gift made in contemplation of death); Moorman v. Moorman, 340 Mich. 636, 66 N.W.2d 248 (1954) (basing holding on reasoning of nonapportionment, but specific result as to burden of tax on spouse taking statutory share outside will changed by Mich. Stat. Ann. § 27.3178(167) (1955); Gelin v. Gelin, 229 Minn. 516, 40 N.W.2d 342 (1949) (refusing apportionment as to property owned jointly by spouse and decedent, and as to United States bonds, passing by form of issue to son); Gaither v. United States Trust

with local practice, indicate acceptance of the "burden-on-the-residue" principle in most of these jurisdictions.[37]

Putting together all of the foregoing material, it can be said generally that ten states have all inclusive apportionment by statute;[38] fifteen states permit apportionment as to nontestamentary assets, four reaching this result by statute and eleven by decisions;[39] and twenty-three states accept generally the "burden-on-the-residue" principle, three reaching this result by statute, nine by decisions and the balance by commonly accepted practice.[40]

SATISFACTORINESS OF STATUTORY RULES

An important question remains for consideration. To what extent, if at all, is there evidence as to which of the normally operative rules works best? As has been stated earlier, the criterion on this

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Co., 230 S.C. 568, 97 S.E.2d 24 (1957) (apportionment refused as to inter vivos trusts); State Tax Comm'n v. Backman, 88 Utah 424, 55 P.2d 171 (1936) (with respect to charitable gift and state death tax); In re Miller's Estate, 316 P.2d 124 (Wash. 1957) (apportioning tax between will takers because of intent found to deviate from normal "burden-on-the-residue" principle); In re Heringer's Estate, 38 Wash. 2d 399, 230 P.2d 297 (1951) (apportioning tax because of found intent to deviate from normal "burden-on-the-residue" principle); Seattle-First Nat'l Bank v. Macomber, 32 Wash. 2d. 696, 203 P.2d 1078 (1949) (exhausting residue to pay tax caused by inter vivos trust before resorting to other assets); Central Trust Co. v. James, 120 W. Va. 611, 199 S.E. 881 (1938); Kanawha Banking & Trust Co. v. Alderson, 129 W. Va. 510, 40 S.E.2d 881 (1946); In re Will of Kootz, 228 Wis. 306, 280 N.W. 672 (1938) (dictum); In re Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953).

37. As to Colorado, see Brofman (Judge of the Denver County Court), Burden of Federal Estate Taxes, 29 Rocky Mt. L. Rev. 498 (1957); as to the remaining states, except Idaho, see reports from various lawyers collected in Lauritzen, supra note 14, at 96-135. The state, name of the lawyer, and the page at which the report appears are: Arizona, William T. McManamon of Chicago, Ill., at 96; Mississippi, Harry Phillips of Nashville, Tenn., at 117; Montana, Perris S. Jensen of Salt Lake City, Utah, at 118; North Dakota, David Brofman of Denver, Colo., at 123; Oklahoma, John F. Dillard of Houston, Tex., at 124; South Dakota, Thomas F. McDonald of St. Louis, Mo., at 126; Texas, John F. Dillard of Houston, Tex., at 128; Vermont, Eugene Howard of Toledo, Ohio, at 129; Wyoming, Clyde Jones of Ottumwa, Iowa, at 134.

38. These states are Arkansas, California, Connecticut, Delaware, Nebraska, Nevada, New York, Pennsylvania, Tennessee and Virginia. See note 24 supra.

39. The statutory states are Maryland, Massachusetts, New Hampshire and New Jersey. See notes 26 and 29 supra.

The nonstatutory states are Georgia, Indiana, Iowa, Kentucky, Louisiana, Missouri, New Mexico, North Carolina, Ohio, Oregon and Rhode Island.

40. The statutory states are Alabama, Florida and Maine. See notes 26, 28 and 30 supra.

The decisional states are Illinois, Kansas, Michigan, Minnesota, South Carolina, Utah, Washington, West Virginia and Wisconsin. See note 36 supra.

The "practice" states are Arizona, Colorado, Mississippi, Montana, North

point is which rule is the one "more likely to be wanted by a majority of the persons making wills and trusts." The New York experience is illuminating on this point. In that state it has come to be accepted that a will which does not exclude the statutorily declared rule *as to testamentary assets* has presumptively been drawn by an inexpert draftsman.[41] Where a New York will contains a tax clause excluding apportionment, courts are liberal in finding the clause applicable to the testamentary assets but reluctant to find it applicable to the assets passing outside the will.[42] This means that in New York, disposers of property, who are competently advised, normally desire apportionment as to nontestamentary assets, but do not desire apportionment as to the assets passing under the will. Similar evidence exists as to other states having a general apportionment statute, such as Connecticut,[43] Delaware,[44] Pennsylvania[45] and Tennessee.[46] In states where

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Dakota, Oklahoma, South Dakota, Texas, Vermont and Wyoming. As to Idaho the evidence is inconclusive.

41. Paul D. Bernard, Esq., has been practicing in this field since 1926. He has worked with the City Bank Farmers' Trust Co. since 1945. In a letter dated April 17, 1957, he wrote to the writer of this article: "In cases where the assets which did not pass under the will (such as insurance not payable to the estate, jointly held property or the corpus of inter vivos trust) were nonexistent or comparatively small, I do not recall any will that did not contain a clause directing that estate taxes be paid out of the residuary or general estate, except in rare instances where it was omitted because of inadvertence or inexperience."

A similar statement could be obtained from almost any counsel experienced in New York law.

Enforcing such will provisions, see In the Matter of Dickinson, 10 Misc. 2d 274, 167 N.Y.S.2d 80 (Surr. Ct. 1957); In the Matter of King, 6 Misc. 2d 922, 160 N.Y.S.2d 929 (Surr. Ct. 1957); In the Matter of Sheldon, 4 Misc. 2d 119, 157 N.Y.S.2d 666 (Surr. Ct. 1957); In the Matter of Zuckerman, 3 Misc. 2d 671, 155 N.Y.S.2d 905 (Surr. Ct. 1956).

42. In the Matter of Bros, 170 N.Y.S.2d 437 (Surr. Ct. 1958); In the Matter of Fischer, 5 Misc. 2d 984, 162 N.Y.S.2d 495 (Surr. Ct. 1957); In the Matter of Jones, 158 N.Y.S.2d 861 (Surr. Ct. 1957); In the Matter of Slade, 4 Misc. 2d 616, 158 N.Y.S.2d 719 (Surr. Ct. 1956); In the Matter of Atkinson, 4 Misc. 2d 992, 156 N.Y.S.2d 589 (Surr. Ct. 1956).

43. See Lauritzen, supra note 14, at 101, quoting Guy Newhall of Lynn, Mass., as follows: "[T]he . . . common practice in Connecticut is to provide that taxes should be paid out of the residue of the estate."

44. See Lauritzen, supra note 14, at 102, quoting Harold A. Kertz of Washington, D.C., as follows: "[T]he prevailing practice in Delaware is to provide in the will that all estate taxes shall be paid from the residue of the estate with no apportionment. . . ."

45. Pennsylvania decisions have found the statutory rule of apportionment effective despite ambiguously worded tax clauses, as in Jeffery's Estate, 333 Pa. 15, 3 A.2d 393 (1939); In re Dravo's Estate, 388 Pa. 551, 131 A.2d 351 (1957); but the past twelve months have witnessed an increasing willingness to find clauses "unambiguous," when this resulted in an exclusion of apportionment, as in Wright Estate, 391 Pa. 405, 138 A.2d 102 (1958); Oberheide Estate, 7 Fiduc. Rep. 20, 8

the statutes require apportionment only as to nontestamentary assets, the courts have frequently sustained clauses excluding the statutory rule.[47]

It is the considered judgment of this writer that disposers of property, who are well advised, infrequently desire apportionment of federal estate taxes as to the assets passing under their wills; but rather commonly desire such apportionment as to the assets passing outside their wills. Thus the "normally operative rule" should embody these attitudes, so that, if the will contains no applicable tax clause, the desires commonly present will be made effective. Any special circumstance, basing a desire to have a different rule applied, can then be cared for by a tailor-made special clause.[48] The need for such clauses in most wills would be thus eliminated.

THE MISSOURI PROBLEM AND ITS NEEDED SOLUTION

Missouri needs a statute fixing the location of the ultimate liability for federal estate taxes. It presently has no such statute. It has a well reasoned decision of the Missouri Supreme Court apportioning the burden of such tax to a person receiving certain types of assets outside a will.[49] Thus the courts have taken *a* step favorable to *some* equitable apportionment. In this situation, trust administrators and estate fiduciaries have grave uncertainties. When, and to what extent, will the doctrine of judicial apportionment be expanded? Will it (as it probably would) be expanded so as to apply to all nontestamentary acquisitions, and stop there? Or will it go beyond this boundary and

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Pa. D. & C. 2d 181 (1956); Roth Estate, 6 Fiduc. Rep. 603, 69 Dauph. 178 (Pa. 1957).

46. Commerce Union Bank v. Albert, 301 S.W.2d 352 (Tenn. 1957).

47. See, e.g., In re Berman's Estate, 49 N.J. Super. 95, 139 A.2d 138 (1958); Kershaw v. Kershaw, 125 A.2d 126 (R.I. 1956).

48. In McLaughlin v. Green, 136 Conn. 138, 145-46, 69 A.2d 289, 293 (1949), a form of clause approved by a joint Committee of the Connecticut State Bar Association and the Connecticut Bankers Association on August 1, 1946, as effective to avoid proration is given as follows: "I hereby direct that all legacy, succession, inheritance, transfer and estate taxes, levied or assessed upon or with respect to any property which is included as part of my gross estate for the purpose of any such tax shall be paid by my executor(s) out of my estate in the same manner as an expense of administration and shall not be prorated or apportioned among or charged against the respective devisees, legatees, beneficiaries, transferees or other recipients nor charged against any property passing or which may have passed to any of them and that my executor(s) shall not be entitled to reimbursement for any portion of any such tax from any such person."

Cf. In re Carrington's Estate, 136 N.E.2d 182 (Ohio 1956); Wright Estate, 391 Pa. 405, 138 A.2d 102 (1958); Oberheide Estate, 7 Fiduc. Rep. 20, 8 Pa. D. & C. 2d 181 (1956).

49. Carpenter v. Carpenter, 364 Mo. 782, 267 S.W.2d 632 (1954).

become as all inclusive as the ill-considered statute of New York? Certainty is needed, both for proper fiduciary administration and for the drafting of new instruments. This certainty should be moulded in the light of the ample experience of other states. This means that the statute should establish as the "normally operative rule" apportionment of the tax as to all assets passing outside the will, but included in the gross estate of a decedent for federal estate tax purposes; and should establish the "burden-on-the-residue" principle as to all assets passing under a will. Explicit provision should be included (as now exists in every statute) making it possible for any disposer of property, who so desires, to locate the burden elsewhere than where it would fall by the statutory rule.

Similar Problems in Other States

Missouri is not alone in this need for new and carefully drawn legislation on this topic. The ten states now having general apportionment statutes should move to the middle ground. Similarly the three states having "no apportionment" statutes should recognize the needs injected by an increased frequency of large items of nontestamentary assets. In thirty-one states statutes of the type here recommended for Missouri would be desirable. Only in Maryland, Massachusetts, New Hampshire and New Jersey do the existing statutes reasonably fit modern needs.

Details Deserving Coverage

A state statute on the ultimate location of liability for death taxes should take definite positions on as many matters of detail as are likely to give rise to controversy. The experiences of the states now having statutes on the topic are most suggestive as to these needed details.

Duplicating, overlapping or conflicting statutes are undesirable. Since existing federal provisions adequately cover the "proceeds of policies of insurance on the life of a decedent receivable by a beneficiary other than the executor,"[50] and appointive assets,[51] the state statute can usefully exclude explicitly these aspects of the problem from coverage.[52]

Death taxes, other than the federal estate tax, exist in most states and foreign countries. The statute can usefully gather all of these to-

50. See notes 9-10 supra.

51. See notes 11-12 supra.

52. It is possible, of course, to duplicate exactly the federal provision, as is done in Md. Ann. Code art. 81, § 162(3b) (1951), and in Tenn. Code Ann. § 30-1117 (1955), but it is safer to exclude from the state statute what is adequately cared for by federal enactment. To be avoided at all costs is an actual conflict between

gether under one rule. The Alabama statute, in terms, applies to "all estate taxes, whether state or federal."[53] The Arkansas statute is still more inclusive applying to the "burden of any State and Federal Estate, Death and Inheritance Taxes."[54] The possible utility of a clause applicable to the taxes of other countries is suggested by the facts passed on by a recent decision of Pennsylvania.[55] A possible limitation on the efficacy of a clause applicable in terms to the taxes of other jurisdictions is suggested by a recent decision in Massachusetts.[56] Despite limitations on complete efficacy, which may develop, there is real gain in a statutorily established "normally operative rule" of the broadest possible applicability. This simplifies greatly the drafting task, when special circumstances justify a deviational clause on tax burdens in the dispositive instrument.

A dispositive instrument, such as a will, is frequently prepared and signed many years before the testator dies. Elasticity and adaptability to changing circumstances would be served by a statutory provision, similar to the ones found in Delaware and in Pennsylvania (since 1951), permitting a testator to lodge discretion in his executor or trustee as to the persons and interests to be charged with the tax burden.[57]

To whatever extent the statute directs apportionment of the tax burden, a definitive section should make clear that the sum to be apportioned *includes* any interest or penalties incurred, plus any sums necessarily expended in determining the amount of tax liability or in making the required apportionment; and *is to be diminished by* all discounts earned by early payments, all state tax credits, all credits for property previously taxed or for gift taxes theretofore paid; and further that any refund later recovered is similarly apportionable.[58]

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the state and federal rules, as is illustrated concerning insurance in Ala. Code Ann. tit. 51, § 449(1) (Supp. 1953). Cf. note 59 infra, as to a useful state supplement on the problem of insurance.

53. Ala. Code Ann. tit. 51, § 449(1) (Supp. 1953).

54. Ark. Stat. Ann. § 63-150 (1957).

55. Oberheide Estate, 7 Fiduc. Rep. 20, 8 Pa. D. & C. 2d 181 (1956).

56. Warfield v. Merchants Nat'l Bank, 147 N.E.2d 809 (Mass. 1958).

57. See, e.g., Del. Rev. Stat. Ann. tit. 12, § 2906 (1953): such provision in a will or in the terms of an inter vivos transfer may be in the form of a direction or of a grant of discretion to an executor or trustee to apportion or allocate such taxes or to pay such taxes out of the residuary estate under a will or from any other portion or portions of the estate passing under the will or out of the property transferred inter vivos."

See also Pa. Stat. Ann. tit. 20, § 883(a) (Supp. 1957).

58. Partial coverages on these points can be found in N.J. Rev. Stat. Ann. tit. 3A, c. 25, § 33 (1953) (credits for property previously taxed and gift taxes paid, charges for interest); N.Y. Dec. Est. Law § 124(3iii) (same as New Jersey plus credits for early payment), § 124(7) (discretionary inclusion of costs

When the item as to which apportionment is established as the "normally operative rule" involves outsiders, such as an insurance company, or a bank in which joint deposits have been found, or a corporate transfer agent handling jointly held shares or bonds, some states have thought it useful to include an express exoneration of these third persons from tax liability when the third person has made payment pursuant to the terms of the insurance policy, or has made a transfer of funds or other assets pursuant to the terms of the asset's holding.[59] Such a provision would tend to eliminate some of the delays, otherwise incident to apportionment, in realizing on the assets of a decedent.

When the gross estate of a decedent is subject to charitable gifts or to a marital deduction, special problems are raised. These problems can be raised when either all the assets pass by the will of the decedent or some of the assets pass outside the will. Thus the handling of these problems in any statute on apportionment restricted to nontestamentary assets, should conform to the state's handling of such problems in an exclusively testamentary estate. Since the deductible gifts to a charity or to a surviving spouse do not contribute to the size of the tax, it is at least strongly arguable that the applicable apportionment procedures should leave these items undiminished by the tax burden. This is the position taken in the general apportionment statute of Pennsylvania adopted in 1951.[60] It is a position which has found support also from the courts under less clearly worded clauses[61] in the

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of determining tax and of making apportionment); Pa. Stat. Ann. tit. 20, § 884(2), (3) (1956) (credits for property previously taxed and gift taxes paid, credits for state taxes paid).

59. See, e.g., Fla. Laws 1949, c. 25435, § 3 (insurance companies), supplanted, however, by Fla. Stat. Ann. § 734.041 (Supp. 1957) (substituting the "burden-on-the-residue" rule); Mass. Ann. Laws c. 65A, § 5A (1953) (insurance companies and banks).

60. Pa. Stat. Ann. tit. 20, § 884(b) (1957):

"Treatment of Deductions and Credits. The following principles shall apply with respect to deductions and credits allowable: (1) Deductions Allowed by Federal Revenue Laws in Determining the Value of Decedent's Net Estate. Any interest for which deduction is allowable under Federal revenue laws in determining the value of decedent's net estate, such as property passing to or in trust for a surviving spouse and charitable, public or similar gifts or bequests to the extent of the allowed deduction, shall not be included in the computation provided for in Subsection (a) of Section four hereof [the apportionment procedure], and to that extent no apportionment shall be made against such interest, except that when such an interest is subject to a prior present interest which is not allowable as a deduction, the estate tax apportionable against the present interest shall be paid from principal."

61. Conn. Rev. Gen. Stat. § 2076 (1949) provides that "such proration shall be made [proportionately] . . . except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any

general apportionment statute of Connecticut[62] and in the restricted apportionment statute of New Jersey.[63] The statutes of Arkansas, California, Delaware, Nevada, New Hampshire, New York, Tennessee and Virginia have "except" clauses, somewhat like that of Connecticut,[64] but in New York, at least, this clause has not prevented conflicting results.[65] Much thought is needed in reaching a well based determination as to the desired state policy on this point, and then real attention is deserved for the putting of this policy into unambiguous language.[66] Unless the state's policy is unchangeably fixed to the contrary with respect to estates exclusively testamentary, the writer would favor a clause like that operative in Pennsylvania since 1951.[67]

Any requirement of apportionment can make delays in the full enjoyment of the thus burdened interest. This consequence is narrowed, but not eliminated, by confining apportionment to nontestamentary assets. Even when so confined the resultant delays could be awkward with respect to jointly owned bank accounts, jointly owned lands and jointly owned securities, as well as with respect to insurance and appointive assets. Hence apportionment statutes, both general and restricted in scope, commonly contain provisions allowing the giving

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deductions allowed by such act for the purpose of arriving at the value of the net estate. . . ." The New Jersey statute (N.J. Rev. Stat. Ann. tit. 3A, c. 25, §§ 31, 33 (1952)) expressly excludes tenancies by the entirety and has an "except" clause similar to that of Connecticut.

62. New York Trust Co. v. Doubleday, 144 Conn. 134, 128 A.2d 192 (1956); Jerome v. Jerome, 139 Conn. 285, 93 A.2d 139 (1952).

63. Newberry v. Neeld, 46 N.J. Super. 216, 134 A.2d 505 (1957); Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409 (1956).

64. See note 61 supra.

65. For cases freeing the spouse from the tax burden, see In the Matter of Paine, 7 Misc. 2d 795, 164 N.Y.S.2d 582 (Surr. Ct. 1956); In the Matter of Mattes, 205 Misc. 1098, 130 N.Y.S.2d 270 (Surr. Ct. 1954), aff'd, 309 N.Y. 942, 132 N.E.2d 314 (1955).

For cases subjecting the spouse to the tax burden, see In the Matter of Salterini, 7 Misc. 2d 497, 164 N.Y.S.2d 584 (Surr. Ct. 1957); In the Matter of Slade, 4 Misc. 2d 616, 158 N.Y.S.2d 719 (Surr. Ct. 1956) (charity); In the Matter of Noble, 3 Misc. 2d 565, 155 N.Y.S.2d 152 (Surr. Ct. 1956); In the Matter of Wolf, 204 Misc. 356, 121 N.Y.S.2d 412 (Surr. Ct. 1953), aff'd, 307 N.Y. 280, 121 N.E.2d 224 (1954).

For similar holding in another jurisdiction, see Wells Fargo Bank v. Kirkwood, 325 P.2d 449 (Cal. 1958).

66. See Traders Nat'l Bank v. United States, 148 F. Supp. 278 (W.D. Mo. 1956); Wachovia Bank & Trust Co. v. Green, 236 N.C. 654, 73 S.E.2d 879 (1953).

The problem is discussed in Jesse, Spouse's Election and Marital Deduction, 91 Trusts & Estates 768 (1952); Annot., 15 A.L.R.2d 1218 (1951).

Arguing strongly for including spouse and charities in the tax burden, see Lauritzen, supra note 14, at 85-87.

67. See note 60 supra.

of security as a means for accelerating distribution prior to the often long delayed ultimate fixation of the amount of tax liability.[68]

Four very special problems can usefully be covered by an apportionment statute. In some states the historical differentiations between land and personalty could cause difficulty in applying an apportionment statute.[69] An express exclusion of the significance of this anachronistic rule in applying the statute can prevent useless litigation. In a statute confining apportionment to nontestamentary assets it might seem unnecessary to include a provision that the "burden-on-the-residue" principle still requires apportionment of the tax between sharers in the residue of the testamentary assets. Such a provision can, however, forestall a claim that the apportionment statute, phrased solely in terms of nontestamentary assets, was designed to alter this rule. Frequently a part of the tax is "apportioned" to an aggregate of interests divided into present and future interests. The apportionment statute must deal expressly with the problems thereby raised. A special form of this problem exists when the future interest is in favor of a normally tax exempt charity, while the present interest is not tax exempt in character. The existing statutes and court decisions typically require the apportioned tax to be paid from the principal.[70] This decreases the sum earning for the present interest owner, and also the sum eventually to be received by the future interest owner. Even in the case of the future interest charitable taker, supposed above, the result thus attained seems better than that resulting from any other procedure thus far suggested for consideration. Nontestamentary assets frequently are governed by dispositive instruments independent of the decedent's will. Since the apportionment statute declares only the "normally operative rule," the statutory rule can normally be freely changed by appropriate provisions in the decedent's will. No trouble arises when the will undertakes to relieve

68. See, e.g., general apportionment statutes, Conn. Rev. Gen. Stat. § 2078 (1949); Del. Rev. Stat. Ann. tit. 12, § 2904 (1953); N.Y. Dec. Est. Law § 124(6) (1950); Pa. Stat. Ann. tit. 20, § 885(b) (Supp. 1957); Tenn. Code Ann. § 30-1117 (1955); Va. Code § 64-153 (1950).

See a similar provision in an apportionment statute confined to nontestamentary assets, N.J. Rev. Stat. Ann. tit. 3A, c.25, § 36 (1952).

69. See Preston, Apportionment of Federal Estate Tax, 3 Western Res. L. Rev. 164 (1951).

This difficulty apparently is nonexistent in Missouri, under the decision in Traders Nat'l Bank v. United States, 148 F. Supp. 278 (W.D. Mo. 1956).

70. See, e.g., N.H. Rev. Stat. Ann. § 88:2 (1955); N.J. Stat. Ann. tit. 3A, c. 25, § 32 (1953) (excellently phrased).

See also In the Matter of Thomas, 197 Misc. 552, 96 N.Y.S.2d 232 (Surr. Ct. 1950); In re Higgins, 99 N.Y.S.2d 463 (Surr. Ct. 1950); In the Matter of Williamson, 38 Wash. 2d 259, 229 P.2d 312 (1951).

Cf. McCeney v. District of Columbia, 230 F.2d 832 (D.C. Cir. 1956).

the assets disposed of by an inter vivos trust from a tax burden imposed by the apportionment statute. If, however, the inter vivos trust is governed by the law of *another state*, and the will clause, or the apportionment statute of the decedent's state, undertakes to compel contribution by the foreign trustee, trouble can be expected.[71] The most that the apportionment statute can do—and this it should do—is to establish a hierarchy of control between tax clauses in the will of a decedent and tax clauses in other dispositive instruments affecting assets in his gross estate, operative within the outer limits established by the rules of conflict of laws.[72]

In general, the apportionment statute can well avoid establishing a detailed, specialized and different procedure for making the apportionment. Most states have adequate procedural machinery for the adjudication of controversial matters arising in the administration of an estate. Complexity, which is useless, is added by a whole new set of procedural provisions. Some provision incorporating the existing procedural machinery is desirable. The statute of Maryland contains one additional clause probably worth incorporating, namely, a short statute of limitations applicable to actions brought for contribution to a paid tax.[73] One other problem of procedure must be covered. Suppose that the fiduciary in charge of the Estate of A has lawfully ascertained that $10,000 of the tax which he has paid should be apportioned to, and paid by, X. For some reason this sum is not collectible from X. X may have become bankrupt. X may be a nonresident and unreachable by effective process. Some provision is needed locating the ultimate liability for an apportioned, but uncollectible, portion of the tax. The New Jersey statute provides that: "If the fiduciary cannot recover the amount of tax and interest thereon apportioned against a transferee, the amount not recoverable shall be dealt with in such manner as the court may determine."[74] New York and Pennsylvania have similar provisions.[75] Under such a statute the residue would normally be charged. Considerable risk of unconstitutionality lies in a provision directing reapportionment of the uncollected portion against the available victims.

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71. See, e.g., Warfield v. Merchants Nat'l Bank, 1471 N.E.2d 809 (Mass. 1958); cf. Lauritzen, supra note 14, at 88-96.

72. See In re Berman's Estate, 49 N.J. Super. 95, 139 A.2d 138 (1958); In the Matter of Osborn, 8 Misc. 2d 859, 166 N.Y.S.2d 446 (Sup. Ct. 1957); see also Scoles, Apportionment of Federal Estate Taxes and Conflict of Laws, 55 Colum. L. Rev. 261 (1955).

73. Md. Ann. Code Gen. Laws art. 81, § 162(7) (1957) (one year).

74. N.J. Stat. Ann. tit. 3A, c. 25, § 35 (1953).

75. N.Y. Dec. Est. Law, § 124(5); Pa. Stat. Ann. tit. 20, § 885 (Supp. 1957).

CONCLUSION

Thus it is urged that an apportionment statute should be confined in its operation to nontestamentary assets; and in detail, should

a) avoid any duplication of the insurance and appointive asset provisions in sections 2206 and 2207 of the Internal Revenue Code;

b) apply not only to the federal estate tax but also to all other death taxes, domestic and foreign;

c) permit a testator to authorize discretionary deviations by his executor;

d) define carefully the items includible in, and excludible from, the sum to be apportioned;

e) relieve third persons from collateral liability;

f) cover carefully the treatment in apportionment, of marital deductions and charitable gifts, conforming to the general policy of the states on these points;

g) allow the giving of security to permit distributions prior to ultimate fixation of the amount of the tax;

h) cover the specific questions of
   i) equal liability of land and personalty;
   ii) continuing apportionment between residuary takers;
   iii) the payment of the apportioned tax by future interest takers, from the principal;
   iv) the hierarchy of control as between tax clauses in separate instruments;

i) incorporate preexisting procedures for the making of apportionments, except for the addition of
   i) a short statute of limitations on actions to recover apportioned parts of the tax; and
   ii) an express provision for a judicial discretionary handling of apportioned items proved to be uncollectible.