

4-1-2008

Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform

Ira Mark Bloom

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 62 U. Miami L. Rev. 767 (2008)
Available at: <https://repository.law.miami.edu/umlr/vol62/iss3/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform

IRA MARK BLOOM*

Dedicated to the late John T. Gaubatz¹

I. INTRODUCTION

In 1984 John Langbein called for “a unified American law of succession.”² He specifically referenced the area of estate tax apportionment: “The law governing the apportionment of estate taxes between probate and nonprobate assets has been moving strongly toward equal treatment of the two.”³ Professor Langbein also noted the position under a 1964 Uniform Act: “The Revised Uniform Estate Tax Apportionment Act apportions federal and state taxes among probate and nonprobate takers in proportion to their shares, unless the will contraindicates.”⁴

Now almost twenty-five years later, “unification” of federal estate tax apportionment is almost complete.⁵ As will be seen in Part II.A,

* Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. The author would like to thank Jeff Pennell for his helpful comments and Bob Emery, Associate Director and Head Reference Librarian, Schaffer Law Library, Albany Law School, for his extraordinary research assistance and input. The able assistance of James Barr, Albany Law School Class of 2008, is gratefully acknowledged.

1. This article is dedicated to the late John Gaubatz, with whom I had the privilege to work as a coauthor on several law school casebooks, including a 1500 page integrated trusts and estates and taxation book. See JOHN T. GAUBATZ & IRA MARK BLOOM, *ESTATES, TRUSTS AND TAXES: CASES AND MATERIALS ON THE WEALTH TRANSMISSION PROCESS* (1983).

2. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1141 (1984). Professor Langbein had in mind unification of subsidiary laws for wills and nonprobate transfers, as distinct from mandatory laws such as wills formalities. See *id.* at 1139–40.

3. *Id.* at 1138.

4. *Id.* at 1138 n.118. The original Act of 1958, see UNIF. ESTATE TAX APPORTIONMENT ACT § 2 (1958), 8A U.L.A. 281 (2003) [hereinafter 1958 UNIF. ACT], was revised in minor ways by the 1964 Act. See UNIF. ESTATE TAX APPORTIONMENT ACT § 2 (1964), 8A U.L.A. 261 (2003) [hereinafter 1964 UNIF. ACT]. John Gaubatz also recognized the evolving state of the law: “When there is no direction in the will, state apportionment statutes often require contribution by the holders of assets generating the tax.” See GAUBATZ & BLOOM, *supra* note 1, § 22.06, at 22–38.

5. Because most states no longer impose an estate or other death tax, see JEFFREY A. SCHOENBLUM, 2008 MULTISTATE GUIDE TO ESTATE PLANNING, tbl.1.5 (2007), this article focuses only on federal estate tax apportionment issues and assumes that the applicable state does not impose any death taxes.

virtually all states have adopted the principle of apportionment,⁶ including five states that have enacted the latest Uniform version, the 2003 Uniform Estate Tax Apportionment Act.⁷ But from my perspective, true unification in the area of federal estate tax apportionment will be achieved only when American law places the revocable trust device, the functional equivalent of a will, on par with wills in terms of a decedent's ability to change default apportionment rules.⁸ In effect, I am advocating for a change in mandatory laws that currently prohibit or limit a decedent's options in changing default apportionment rules by revocable trusts.⁹

As will be seen in Part II.B, American law has a long way to go if revocable trusts are to be placed on an equal footing with wills.¹⁰ Traditionally, only wills could be used to change default rules on federal estate tax apportionment, and this continues to be the rule in many states. Indeed, this "wills only" rule was the position under the 1958

6. See *infra* notes 23–30 and accompanying text. No attempt is made in this article to provide the apportionment rules for each jurisdiction. Professor Litman purported to do so in her 1998 article. See Donna Litman, *Apportionment of the Federal Estate Tax—Effect of Selective Federal Apportionment and Need for Reform*, 33 REAL PROP. PROB. & TR. J. 393–96 (1998) (state rules as of 1998); see also Jeffrey N. Pennell & Robert T. Danforth, *Transfer Tax Payment and Apportionment*, Est. Gifts & Tr. Portfolio (BNA) No. 834, at B-101-14 (2001) (listing apportionment rules for relevant states).

7. UNIF. ESTATE TAX APPORTIONMENT ACT (2003), 8A U.L.A. 88 (Supp. 2007) [hereinafter 2003 UNIF. ACT]. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") identifies the five enacting states: Alabama, Arkansas, Idaho, New Mexico, and Washington. See Uniform Law Commissioners, A Few Facts about the Uniform Estate Tax Apportionment Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uetaa.asp (last visited Mar. 28, 2008). The 2003 Act has been incorporated into the Uniform Probate Code under UPC § 3-9A-101-115. Professor Kahn, the reporter for the 2003 Uniform Act, wrote an article explaining the Act. See Douglas A. Kahn, *The 2003 Revised Uniform Estate Tax Apportionment Act*, 38 REAL PROP. PROB. & TR. J. 613 (2004).

8. Parity between wills and revocable trusts would be consistent with current policy as articulated under the Uniform Trust Code: "The basic policy . . . of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will." UNIF. TRUST CODE, prefatory note, art. 6 (amended 2005), 7C U.L.A. 368 (2006). The latest Restatement position on powers of appointment adopts the same view by allowing a testamentary power to be exercised by both a will and a revocable trust. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.9 cmt. b (Tentative Draft No. 5, 2006) ("Because a revocable trust operates in substance as a will, a power of appointment exercisable 'by will' can be exercised in a revocable-trust document, as long as the revocable trust remained revocable at the donee's death."). See generally Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 755 (2007).

9. To the extent laws bar a decedent from changing default rules by revocable trusts, these prohibitory laws may be viewed as mandatory, rather than subsidiary, rules. See Langbein, *supra* note 2, at 1134. See generally John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004).

10. Even if a revocable trust can be used to change default rules, the allowable changes may be more limited than under wills. See *infra* Part II.B.2.

and 1964 Uniform Estate Tax Apportionment Acts.¹¹ Although the 2003 Uniform Act accords primacy to wills to change default federal apportionment rules, in some instances revocable trusts can also change the default rules.¹² On the other hand, some states do appear to treat revocable trusts and wills on a par.¹³

Conflict of laws issues further complicate the area of federal estate tax apportionment. Part II.C considers troublesome state conflicts issues, particularly whether the law of the decedent's domicile or the situs of the property should control on apportionment issues.¹⁴ Part III considers various Internal Revenue Code provisions, specifically Sections 2206–2207B of the Internal Revenue Code of 1986.¹⁵ Special attention is given to the overarching question whether these provisions conflict with state rules on apportionment, especially because the 2003 Uniform Act takes the position that these provisions do not have preemptive effect.¹⁶

If the Code provisions have preemptive effect, as this article concludes, a fundamental definitional question is presented: What exactly does the term “apportionment of federal estate taxes” mean? No precise definition is available. In a narrow sense, apportionment can mean charging beneficiaries with an appropriate share of taxes before the payment of federal estate taxes. In that sense, the federal statutes would not be viewed as apportionment statutes because they only authorize the executor to recover estate taxes already paid.¹⁷ On the other hand, if apportionment effectively means who bears the ultimate burden of the federal estate tax liability, then the federal statutes should be viewed as apportionment statutes;¹⁸ they have the ultimate effect of charging the nonprobate beneficiary with an equitable amount of the federal estate tax. For purposes of this article, I will use apportionment in its broadest sense so that the federal recovery statutes will be considered apportion-

11. See 1964 UNIF. ACT § 2; 1958 UNIF. ACT § 2; see also I.R.C. §§ 2206–2207 (2000), discussed *infra* at notes 162–77 and accompanying text.

12. See *infra* notes 63–70 and accompanying text.

13. See *infra* notes 71–72 and accompanying text; see also I.R.C. §§ 2207A, 2207B, discussed *infra* at note 178 and accompanying text.

14. See *infra* notes 75–94 and accompanying text.

15. Unless otherwise noted, the word “Code” refers to the Internal Revenue Code, and “Section” refers to a section of the Internal Revenue Code. These sections authorize the executor or decedent's estate to recover from the applicable person the estate tax attributable to gross estate inclusion of the particular nonprobate transfer, but only after the estate tax has first been paid.

16. See *infra* note 103 and accompanying text.

17. See Jeffrey N. Pennell, *Tax Payment Provisions and Equitable Apportionment*, 22 INST. ON EST. PLAN. ¶ 1806.2, at 18-53 to -55 (1988).

18. As Professors Pennell and Danforth explain, “[T]he practical consequence of §§ 2206 through 2207B is tantamount to federal tax apportionment rules by which Congress intends affirmatively to allocate the estate tax burden.” Pennell & Danforth, *supra* note 6, at A-11.

ment provisions.¹⁹

Part IV of the article concludes with suggested unifying solutions to resolve the inappropriate disparities between wills and revocable trusts in the federal estate tax apportionment area. Indeed, I try to make suggestions that will unify and simplify the entire area of federal estate tax apportionment.

II. STATE LAW DEFAULT RULES ON FEDERAL ESTATE TAX APPORTIONMENT

A. *In General*

As a general matter, state law controls how the burden of federal estate taxes will be borne.²⁰ In effect, state law provides rules for apportioning among the decedent's beneficiaries the estate tax liability that is payable by the executor.²¹ Until 1930, states charged federal estate taxes against the residuary takers, a so-called "burden on the residue" rule.²² Because this rule came to be viewed as unfair,²³ states began to adopt an apportionment approach whereby the tax burden is borne rata-

19. Others have also adopted this view of apportionment. *See, e.g.*, Richard R. Powell, *Ultimate Liability for Federal Estate Taxes*, 1958 WASH. U. L.Q. 327 (1958); *see also infra* notes 114-44 and accompanying text.

20. In the seminal case of *Riggs v. del Drago*, 317 U.S. 95, 101 (1942), the Supreme Court rejected the claim that Section 826(b), the forerunner of current Section 2205, mandated that federal law controlled apportionment of federal estate taxes, specifically the claim that federal estate taxes were payable from the residuary of the probate estate. As a result, New York's apportionment scheme was upheld. *Id.* at 102. At the same time, the Supreme Court intimated that federal law would control on apportionment where Congress specifically legislated on the matter, which at the time of its decision included the forerunners to Sections 2206 and 2207. The issue of federal preemption is addressed *infra* at Part III.A.

21. Section 2002 places the actual liability for estate taxes upon the "executor," a term defined under Section 2203. Where no personal representative has been appointed, the trustee of a revocable trust may be treated as the "executor." *See* I.R.S. Priv. Ltr. Rul. 83-35-033 (May 26, 1983).

22. *See* Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 REAL PROP. PROB. & TR. J. 671, 679-80 (2007).

23. As explained:

The principal objection to an estate tax has been that where the decedent dies leaving a will, and makes no provision therein to the contrary, the entire burden of the tax must be borne by the residuary legatee or legatees. Experience has demonstrated that in most estates the residuary legatees are the widow, children, or nearer and more dependent relatives. This has been one of the objections to the Federal Estate Tax Law in New York. The burden of the tax has been imposed upon the residuary legatees not only as to the property passing under the will, but also upon transfers whether by gift or *inter vivos* trust, or other form of transfer taking effect at death. These transfers are included . . . in the Federal Estate Tax Law . . .

Thus the residuary legatees have been compelled to pay the entire estate tax, including the tax assessed on testamentary transfers and those taking effect at death.

bly by those persons receiving property that generated estate tax.²⁴ Today almost all states employ some type of apportionment scheme.²⁵ In addition to the five states that have enacted the 2003 Uniform Act,²⁶ almost fifteen states rely on earlier versions of the Uniform Act;²⁷ several other states have non-Uniform statutory apportionment systems;²⁸ and a few states have created apportionment by judicial fiat.²⁹ Only Georgia, Iowa, and Wisconsin clearly appear to retain the original, common-law burden on the residue rule.³⁰

24. In 1930 New York became the first state to enact an apportionment system; its validity was upheld by the Supreme Court in *Riggs*, 317 U.S. at 102.

25. Although the predominant apportionment approach is for ratable contribution by all beneficiaries, some states provide for ratable apportionment between probate and nonprobate assets but then prescribe that the applicable residuary estate bear the burden of federal estate taxes that were apportioned against the probate estate and the revocable trust. *See, e.g.*, FLA. STAT. ANN. § 733.817(4)(a) (West 2007); 20 PA. CONS. STAT. ANN. § 3702(b) (West 2005). Very serious consideration was given to using this approach under the 2003 Uniform Act. *See Kahn, supra* note 7, at 628–29.

Most apportionment systems typically exonerate property that generates no tax because of deductions. For example, in New York, a surviving spouse who receives property that qualifies for the estate tax marital deduction bears no burden on such property because the property did not generate any estate tax. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(c)(3) (McKinney 1998 & Supp. 2008). A comparable rule applies if property passes to a qualifying charity for which a charitable contribution deduction is allowed. *See, e.g., id.* The 2003 Uniform Act provides for comparable exoneration, as did both prior Acts. *See* 2003 UNIF. ACT § 2(1)(B); 1964 UNIF. ACT §§ 5(a), (b); 1958 UNIF. ACT §§ 5(a), (b).

26. *See supra* note 7.

27. Exclusive of Idaho, New Mexico, and Washington, which have enacted the superseding 2003 Uniform Act, Alaska, Minnesota, Montana, North Dakota, Oregon, South Dakota, and Wyoming are listed as having enacted the 1958 version, and Hawaii, Maryland, Mississippi, New Hampshire, Rhode Island, and Vermont as having enacted the 1964 version. *See* 1964 UNIF. ACT; 1958 UNIF. ACT. Of these states, several have effectively enacted the 1964 Uniform Act, which was made part of the Uniform Probate Code under UPC § 3-916. *See, e.g.*, ALASKA STAT. § 13.16.610 (2006); HAW. REV. STAT. ANN. § 560:3-916 (LexisNexis 2005); S.D. CODIFIED LAWS § 29A-3-916 (1997 & Supp. 2003). In addition, Maine and South Carolina have enacted UPC § 3-916. *See* ME. REV. STAT. ANN. tit. 18-A, § 3-916 (1964); S.C. CODE ANN. § 62-3-916 (1967 & Supp. 2007).

For purposes of further discussion, Maryland and Montana will not be treated as Uniform Act states because both now allow a decedent to change the default rules by a revocable trust as well as by a will. *See* MONT. CODE ANN. § 72-16-603 (2005); *Gordon v. Posner*, 790 A.2d 675, 680 (Md. Ct. Spec. App. 2002) (construing MD. CODE ANN., TAX-GEN. § 7-308(k)). By contrast, true 1964 and 1958 Uniform Act states allow changes only by will. *See* 1964 UNIF. ACT § 2; 1958 UNIF. ACT § 2.

28. *See Litman, supra* note 6, at 395. Major states that employ an independent statutory apportionment system include California, Florida, New York and Texas. *See* CAL. PROB. CODE §§ 20100–20125 (West 1991 & Supp. 2008); FLA. STAT. ANN. § 733.817 (West 2007); N.Y. EST. POWERS & TRUSTS LAW § 2-1.8 (McKinney 1998 & Supp. 2008); TEX. PROB. CODE ANN. § 322A (Vernon 2003 & Supp. 2007).

29. *See, e.g., In re Estate of Gowling*, 411 N.E.2d 266, 269 (Ill. 1980).

30. The rules of Georgia and Iowa are statutory. *See* GA. CODE ANN. §§ 53-2-101, 55-7-00 (West 2007); IOWA CODE § 633.449 (West 2003 & Supp. 2008). Wisconsin's rules have been judicially created. *See Firstar Trust Co. v. First Nat'l Bank of Kenosha (In re Will of Cooney)*,

The principle of apportionment can be illustrated under the 2003 Uniform Act in the context of property owned at death passing under a will that is subject to estate tax under Section 2033 and property in a revocable trust that is subject to estate tax under Section 2038.³¹ Assume that a decedent died in 2008 having made no taxable gifts and decedent owned property worth \$2 million, which was left to child A. Decedent also died having the power to revoke a trust that he created, pursuant to which child B will receive the entire trust property of \$2 million on decedent's death. Assuming no deductions under Section 2053, decedent's taxable estate will be \$4 million and the federal estate tax payable will be \$900,000.³²

Based on the default rule of Section 4(1) of the 2003 Uniform Act,³³ \$450,000 of the tax will be apportioned against A and \$450,000 will be effectively apportioned against B because each received 50% of the property that generated estate tax liability.³⁴ In contrast, A, as the sole will beneficiary, would bear the entire estate tax burden if Iowa's burden on the residue rule applied.³⁵

541 N.W.2d 467, 468 (Wis. 1995); *Uihlein v. Uihlein (In re Uihlein's Will)*, 59 N.W.2d 641, 649 (Wis. 1953).

Although the state of the law in Arizona is not entirely clear, Arizona most likely is a nonapportionment state. See *In re Estate of Mason*, 947 P.2d 886 (Ariz. Ct. App. 1997) (declining to judicially provide for apportionment by overruling the common-law burden on the residue rule; reliance on the Arizona legislature's failure to enact the Uniform Estate Tax Apportionment Act as part of the Uniform Probate Code). Earlier authorities had suggested that apportionment was the correct approach. See *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963); Arizona Op. Att'y Gen. 67-8, at 17 (Mar. 3, 1967) ("[T]he law ought to be neutral and treat all classes of assets which contribute to the measure of the tax on an equal basis.").

Until recently, Alabama and Kansas used the common-law approach, but both states now employ apportionment. See ALA. CODE § 40-15B-6 (LexisNexis Supp. 2007); KAN. STAT. ANN. § 79-15,126 (2007).

31. Technically, if a settlor retains a power to revoke a trust, Section 2036(a)(2) also requires gross estate inclusion. Of course, the amount includible will be the value of the property even though inclusion is required by both Sections 2038 and 2036. See *infra* notes 146-48 and accompanying text (discussing how Section 2207B might apply to revocable trusts).

32. In 2008 the rate of estate tax payable on a taxable estate (and any adjusted taxable gifts) will be 45% once the \$2 million threshold exemption level is exceeded.

33. Subject to exceptions, "the estate tax is apportioned ratably to each person that has an interest in the apportionable estate." 2003 UNIF. ACT § 4(1).

34. Technically, the tax would be apportioned against the trustee of the revocable trust if the trust property had not been distributed to B. See 2003 UNIF. ACT §§ 4(1), 2(4) (defining person to include a trust); cf. Treas. Reg. § 20.2207A-1(d) (as amended in 2003) (defining person as trustee).

35. See *supra* note 30 and accompanying text. This result assumes that Section 2207B does not apply to preempt Iowa law; if it did, then the revocable trust would bear a ratable share of the taxes. See *infra* notes 146-48 and accompanying text.

B. *Changing State Law Default Rules on Federal Estate Tax Apportionment*

1. ARE REVOCABLE TRUSTS GENERALLY TREATED ON A PAR WITH WILLS?

Most significantly, apportionment rules are default rules. They can be changed, and properly so because the law should effectuate the intention of the decedent.³⁶ The interesting inquiry is whether wills and revocable trusts are accorded the same level of respect in changing default apportionment rules under state law. As will be seen, wills are accorded greater respect.

The 2003 Uniform Act recognizes the primacy of wills over revocable trusts.³⁷ Specifically, if a will unambiguously provides the method for apportionment then the will provision will control without regard to any inconsistent provision in a revocable trust.³⁸ For example, and based on the example above, assume that the decedent's will, executed in August of 2008, provided that all estate taxes, including taxes on non-probate property, should be paid out of property passing under the will. Based on Section 3(1) of the 2003 Uniform Act, the \$900,000 in taxes

36. Effectuation of transferor intention is an overarching principle of gratuitous transfers. As explained in the latest Restatement:

The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor's intention; and (2) that the donor's intention is given effect to the maximum extent allowed by law.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

37. See 2003 UNIF. ACT § 3(a)(1).

38. Section 3 of the 2003 Uniform Act provides, in part, as follows:

- (a) Except as otherwise provided in subsection (c), the following rules apply:
- (1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.
 - (2) Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:
 - (A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and
 - (B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

will be payable from A's \$2 million so that A will wind up with \$1.1 million; B will get the full \$2 million.

Suppose the decedent created the revocable trust in September of 2008 and expressly provided that estate taxes attributable to gross estate inclusion of the trust should be paid from the revocable trust. Would the trust be required to bear any of the \$900,000 in estate taxes? Not under the 2003 Uniform Act. Would it matter if the decedent had expressed his intention more clearly in the revocable trust by stating, "I want estate taxes attributable to gross estate inclusion of the trust to be paid from the revocable trust and expressly do not want my earlier August 2008 will to control the apportionment of taxes"? Not under the 2003 Uniform Act. To carry out the decedent's intention under the 2003 Uniform Act, the decedent would need to change the tax payment provision in the August 2008 will.³⁹

The 2003 Uniform Act provides the following rationale for the primacy of wills over revocable trusts:

If [apportionment] provisions conflict, it is necessary to determine which prevails. A possible choice would permit the directions in each of decedent's instruments determine the extent to which property controlled by that instrument bears a share of estate taxes, but having the provisions for an allocation scheme scattered among a number of documents would make decedent's personal representative search multiple instruments to ascertain the decedent's directions. Instead, the Act provides an order of priority for a decedent's provisions for estate tax allocations. To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument.⁴⁰

I find this rationale unsatisfactory. For the sake of administrative convenience, a cardinal principle of property law is violated; the decedent's intention will not be respected. Indeed, because the personal representative will need to examine revocable trusts to determine the potential estate tax liability (and his or her own liability),⁴¹ it surely isn't asking too much of the personal representative to read and respect the estate tax apportionment provision in the later revocable trust.

Actually, the 2003 Uniform Act accords greater respect to revocable trusts than did earlier versions of the Act. Under the earlier versions of the Uniform Act the default apportionment rules can be changed only

39. Either a codicil or a new will would be necessary.

40. 2003 UNIF. ACT § 3 cmt. para. 5.

41. See I.R.C. § 2203 (2000); 31 U.S.C. § 3701(b) (2000). See generally M. CARR FERGUSON ET AL., FEDERAL INCOME TAXATION OF ESTATES, TRUSTS & BENEFICIARIES ch. 13 (3d ed. 2003).

by will.⁴² Many states continue to apply the “wills only” rule under the earlier Acts.⁴³

Other states attempt to provide greater respect to revocable trusts in terms of changing default rules, especially when there are conflicting provisions in a will and revocable trust.⁴⁴ For example, New York will respect the decedent’s intention in a later revocable trust, provided that the later revocable trust acknowledges an earlier expression of a will’s contrary intention.⁴⁵ As a result, if New York law applied to the hypothetical discussed above, the taxes on the revocable trust property would be payable from the revocable trust because the settlor referenced the prior will’s inconsistent position. On the other hand, a later revocable trust’s direction on apportionment that does not refer to prior will’s inconsistent direction on taxes has no effect under New York law.⁴⁶

New York law also applies to later wills. Specifically, a later will

42. See 1964 UNIF. ACT § 2; 1958 UNIF. ACT § 2. As explained in the comment to the section:

After a great deal of consideration by the members of the Committee and by the representatives of the Section of Taxation, A.B.A., it was the consensus that the right to alter or omit apportionment, whether of property passing under a will or *inter vivos*, be exercised by will *only*.

1958 UNIF. ACT § 2 cmt. Perhaps it made some sense to limit changes by a will when revocable trusts were not widely used, but today revocable trusts are often the primary device to transfer property at death.

43. See, e.g., N.C. GEN. STAT. § 28A-27-2(b) (2007). The devastating impact of the wills only rule was illustrated in *In re Estate of Roe*, 426 N.W.2d 797 (Mich. Ct. App. 1988), which was decided when Michigan law employed the 1964 Uniform Act’s “wills only” rule. In *Roe*, the decedent provided in a trust that all estate taxes would be payable from the trust property and provided in the will that “I make no direction for the payment of . . . taxes assessed by reason of my death, as I have provided for their payment under a certain Agreement hereinafter mentioned.” *Id.* at 798. Because the will also disclaimed any attempt to incorporate by reference the trust terms, the court held that the trust tax payment provision was ineffective because only a will could change the rule of equitable apportionment. The result was that the shares of other beneficiaries were reduced by the taxes that the decedent intended would be borne by the trust beneficiaries. *Id.* at 800.

Professors Pennell and Danforth made the following observation: “The most notable aspect of *Roe* is that the tax clauses involved were verbatim from a major Chicago fiduciary’s form books. This problem exists in literally thousands of estate plans nationwide.” Pennell & Danforth, *supra* note 6, at A-39 n.270.

44. For purposes of discussion, I am assuming that both instruments are in writing. Interesting questions might arise if a conflict arose based on a “direction” in a revocable trust that was created orally, as is possible in most states in personalty based on clear and convincing evidence. See, e.g., UNIF. TRUST CODE § 407 (amended 2005), 7C U.L.A. 489 (2006). Oral wills are extremely rare.

45. New York law provides as follows: “Any such direction [as to apportionment or nonapportionment] in a non-testamentary instrument which is later in date than a prior will or non-testamentary instrument and which contains a contrary direction shall govern provided that the later instrument specifically refers to the direction in such prior will or instrument.” N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(d)(2) (McKinney Supp. 2008).

46. *Id.*

cannot control the direction for payment in an earlier revocable trust unless the will expresses an intention to override the direction in the revocable trust, that is, the later will “specifically refers to the direction [on apportionment] in such prior instrument.”⁴⁷

Massachusetts also has addressed the problem of conflicting instruments. Consider the *Dora* case,⁴⁸ where the decedent executed an earlier revocable trust with a direction on apportionment and a later will with a conflicting provision. The court remanded the case to allow in extrinsic evidence to ascertain the decedent’s intention on whether the later will’s direction on taxes trumped the earlier direction in the revocable trust. The Massachusetts view of revocable trusts is most interesting:

In the absence of any statute indicating otherwise, we see no reason why the provisions of a will must be given precedence over those conflicting provisions of an inter vivos trust which are to become operative at the settlor’s death, particularly when the administration of nonprobate assets is involved. In today’s estate planning, it is not reasonable to conclude that a will is always of greater significance than an instrument creating an inter vivos trust.⁴⁹

Florida law provides a variation on recognizing the ability to direct apportionment in revocable trusts when there are conflicting provisions. Under Florida’s estate tax apportionment statute, a direction in a revocable trust to pay estate taxes attributable to the revocable trust property will be respected if it conflicts with a direction in a will, unless the will expressly overrides the conflicting provision.⁵⁰ As a result, a provision in a later revocable trust will be respected even if no mention is made of the contrary intention in the earlier will.⁵¹

Texas has a different approach to conflicting provisions when a revocable provision on estate taxes on revocable trust property conflicts

47. *Id.* § 2-1.8(d)(1). This provision, effective July 26, 1986, was included as part of the legislation to overrule the New York Court of Appeals’ decision in *In re Estate of Cord*, 449 N.E.2d 402 (N.Y. 1983). In *Cord*, the decedent had executed a revocable trust that provided for the payment of estate taxes on the revocable trust property from the revocable trust. *Id.* at 403. Some forty years later the decedent executed a will that provided for the payment of all estate taxes from the will’s residuary. *Id.* The court held that the later will controlled despite the fact that the decedent may have forgotten about the earlier provision. *Id.* at 405.

48. *First Nat’l Bank of Mount Dora v. Shawmut Bank of Boston*, 389 N.E.2d 1002 (Mass. 1979). *Dora* served as a principal case in John Gaubatz’s casebook. See GAUBATZ & BLOOM, *supra* note 1, § 22.05, at 22–30.

49. 389 N.E.2d at 1006.

50. See FLA. STAT. ANN. § 733.817(5)(h)(5)(b) (West 2007).

51. On the other hand, New York and Florida laws are the same: If a later will provides an inconsistent provision but the will does not address the inconsistency, the earlier revocable trust provision will control.

with a direction on apportionment for those estate taxes under a will.⁵² Consider a revocable trust provision that provides that all estate taxes on revocable trust property be paid from the residue of the revocable trust, and a will provision that directs for payment of estate taxes on the revocable trust from the residue of the will. Based on Texas law that the direction in “the instrument disposing of or creating an interest in the property to be taxed controls,”⁵³ the estate taxes on the revocable trust property will be paid from the revocable trust property, not from the probate estate.

The problem with conflicting directions under a revocable trust and a will can arise when the two instruments are part of an integrated testamentary plan, typically a will that pours over into a revocable trust where both instruments were executed at or about the same time.⁵⁴ The issue has been addressed in California, which allows both revocable trusts and wills to control the apportionment of federal estate taxes.⁵⁵ The California approach is to ascertain intention by treating the instruments as part of an integrated plan and divining what the decedent would have wanted to be the result on apportionment.⁵⁶

The final approach to conflicting directions on apportionment in revocable trusts and wills is that the latest instrument that provides direction on apportionment should control.⁵⁷ This is the approach that

52. Under Texas law, a revocable trust direction on apportionment can only apply to estate taxes on the revocable trust; no comparable limitation is placed on directions in wills. *See* TEX. PROB. CODE ANN. § 322A(b)(2) (Vernon 2003 & Supp. 2007).

53. *Id.* § 322A(b)(3).

54. For example, *Estate of Bradford v. Commissioner*, 84 T.C.M. (CCH) 337 (2002), illustrates the problem in a jurisdiction such as North Carolina, where only a will can change the direction from apportionment. *See* N.C. GEN. STAT. § 28A-27-2 (2007). In *Bradford*, the decedent’s will provided that taxes be paid from the residue, but if the residue was insufficient then the executor could recover the taxes from the trustee of the revocable trust into which estate assets poured. The trust included a charitable beneficiary.

Despite North Carolina’s default law that no estate taxes are apportioned against charitable beneficiaries, *see* N.C. GEN. STAT. § 28A-27-5(a) (2007), the Tax Court held that the decedent’s will overrode this default rule. *Bradford*, 84 T.C.M. (CCH) at *14. As a result, the charitable deduction was effectively reduced because the charitable beneficiary had to bear a portion of the estate taxes. *Id.* *Bradford* also raised the possibility of Section 2207B applying. *See infra* notes 146–48 and accompanying text.

55. California law provides that its default apportionment rule does not apply “[t]o the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument.” CAL. PROB. CODE § 20110(b)(1) (West 1991 & Supp. 2008).

56. *See* *Estate of Wathen v. Greater L.A. Zoo Ass’n*, 64 Cal. Rptr. 2d 805, 806 (Ct. App. 1997) (allowing extrinsic evidence because instruments were ambiguous); *see also* *McKeon v. United States*, 151 F.3d 1201, 1204–05 (9th Cir. 1998) (construing California law).

57. Of course, the issue can only arise in a state where the law allows revocable trusts to control without restrictions. *See, e.g.*, CAL. PROB. CODE §§ 20100–20125 (West 1991 & Supp. 2008); KAN. STAT. ANN. § 79-15,126(b)(2) (2007).

Kansas adopted in the *Pickrell* case,⁵⁸ where a revocable trust was amended five years after will execution to provide for the payment of estate taxes from the revocable trust, even though the will provided that all estate taxes would be paid from the residuary estate. In holding that the later revocable trust provision controlled, the Court concluded as follows:

An individual has the right to designate who or what portion of his or her estate is to bear the burden of the taxes and expenses of administration. An inter vivos trust, which is part of a coordinated estate plan, may include a provision instructing the trustee to pay the trust's ratable share of the death taxes and administration expenses. Under the facts of this case, where a conflict exists between an earlier executed will and later amended inter vivos trust as to how the death taxes and the administration expenses are to be paid, the last instrument in time controls.⁵⁹

In the *Meyer* case, an Indiana appellate court adopted the "final instrument controls" approach and thereby allowed a later revocable trust's direction on apportionment to control over a conflicting direction in an earlier will.⁶⁰ Although the court relied on *Pickrell*, it did so even though the later revocable trust was not part of a coordinated estate plan as in *Pickrell*.⁶¹ The bright-line holding was simply: "We hold that the last instrument in time controls when there is a conflict between unambiguous tax provisions in a will and an inter vivos trust."⁶²

2. ASSUMING A REVOCABLE TRUST CAN CHANGE DEFAULT RULES, ARE THERE ANY LIMITATIONS ON WHAT RULES A REVOCABLE TRUST CAN CHANGE AS COMPARED TO A WILL?

Even if a revocable trust can be used to override default rules, full parity between wills and revocable trusts will not result if greater limitations are placed on what apportionment rules a revocable trust may change compared with what can be effectuated under a will. Nebraska illustrates a very restrictive use of revocable trusts: Only the apportion-

In Illinois, courts have recognized the ability to change apportionment rules by revocable trusts. See *Lurie v. Comm'r*, 425 F.3d 1021 (7th Cir. 2005) (applying Illinois law). In contrast, New York allows a later revocable trust to control only if the trust acknowledges a prior will's inconsistent intention. See *supra* note 45 and accompanying text.

58. *In re Estate of Pickrell*, 806 P.2d 1007, 1008 (Kan. 1991).

59. *Id.* at 1013.

60. *Burke v. Cleland (In re Estate of Meyer)*, 702 N.E.2d 1078, 1084 (Ind. Ct. App. 1998). One argument against recognizing the apportionment provision in the later revocable trust was that the effect would be to alter a will, which can only be done by will revocation or a codicil. In response, the court in *Meyer* pointed to an Indiana apportionment statute that defined a "will" as including a trust for apportionment purposes. *Id.* at 1082 (citing IND. CODE § 29-2-12-1.5 (1994)).

61. *Id.* at 1084 (citing *Pickrell*, 806 P.2d at 1013).

62. *Id.*

ment of the estate tax on the revocable trust property may be changed, whereas a will is not so limited.⁶³ In effect, a revocable trust could not effectively direct that estate taxes on the probate estate be paid from the revocable trust, but the reverse situation is not barred; a will could provide that estate taxes on revocable trust property be paid from the will.⁶⁴

Other states provide greater respect to revocable trusts. For example, under Florida law a revocable trust could provide that federal estate taxes on probate property be payable from a revocable trust.⁶⁵ Based on an amendment to New York's apportionment statute, a revocable trust also could provide that federal estate taxes on probate property be payable from a revocable trust.⁶⁶ Nonetheless, neither Florida nor New York

63. The Nebraska statute provides, in part, as follows:

[T]he amount of the tax so paid or payable, except as otherwise directed in the decedent's will or except in a case when by written instrument executed inter vivos direction is given for apportionment within the fund of the taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall be equitably apportioned and prorated among the persons interested in the estate or transfer.

NEB. REV. STAT. § 77-2108 (2003).

64. In response to my query about the effectiveness of a revocable trust providing for the payment of estate taxes on probate property, Professor Ron Volkmer of Creighton referred the matter to a well-respected Nebraska lawyer who opined as follows:

I . . . find that the provision in the trust dealing with payment of taxes on assets outside of the trust, including the probate assets, is invalid. The statute is cast in a mandatory manner. The will is silent and thus the inter vivos trust can only deal with apportionment of taxes on the trust's assets. . . . Between the case law and the statute, I read that only the will can direct apportionment beyond its boundaries.

E-mail from Ronald Volkmer, Professor of Law, Creighton University School of Law, to Ira Mark Bloom, Justice David Josiah Brewer Distinguished Professor of Law (Nov. 27, 2007, 15:23) (on file with author).

Other states have statutes similar to Nebraska's. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-401(a) (West 2000 & Supp. 2008); NEV. REV. STAT. ANN. § 150.310 (LexisNexis 2003). Although New York law provides the same limitation, *see* N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(a) (McKinney 1998 & Supp. 2008), a subsequently enacted provision appears to override the limitation. *See id.* § 2-1.8(d), discussed *infra* note 67.

65. The Florida statute provides as follows:

For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to this section, or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise shall be effective to direct the payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument.

FLA. STAT. ANN. § 733.817(5)(h)(4) (West 2007).

66. The New York statute provides, in part, that "[s]ubject to [exceptions], any direction as to apportionment or non-apportionment of the tax, whether contained in a will or a non-testamentary instrument, relates only to the property passing thereunder, unless such will or instrument provides

provides complete parity between wills and revocable trusts. Although a will in both states can provide that estate taxes on probate property be paid from a revocable trust,⁶⁷ a revocable trust cannot provide that estate taxes on revocable trust property be paid from property passing under a will.⁶⁸

Michigan law also accords wills greater respect than revocable

otherwise.” N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(d) (McKinney 1998 & Supp. 2008). In *In re Patouillet*, 601 N.Y.S.2d 385, 387 (Sur. Ct. 1993), the court confirmed the settlor’s intent that all federal estate taxes be paid from a revocable trust.

67. N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(d) effectively allows such a result. The Florida statute provides as follows: “A direction in the decedent’s will to pay tax from the decedent’s revocable trust is effective if a contrary direction is not contained in the trust agreement.” FLA. STAT. ANN. § 733.817(5)(h)(3) (West 2007).

Absent statutory authorization, there may be an issue whether a will can apportion federal estate tax liability to a revocable trust. See *Warfield v. Merchants Nat’l Bank of Boston*, 147 N.E.2d 809, 812–13 (Mass. 1958) (holding that a will could not direct payment of federal estate taxes from revocable trust property). Consider Professor Pennell’s observations:

It is not universally established that a decedent’s will may apportion taxes to non-probate assets in the absence of, or contrary to, state law. If state law calls for apportionment of taxes, clearly a decedent’s will may negate that local apportionment rule by calling for payment of all taxes out of the probate estate (assuming decedent’s intent is clear). If state law contains no apportionment authority, or if state law expressly directs against apportionment, the issue is whether a decedent may affirmatively direct, by a provision in a will, that taxes will be allocated to non-probate assets.

.....

... While the authorities in this respect are not uniform, the better supported position appears to be that a sufficient nexus to require inclusion for federal estate tax purposes is a sufficient nexus to permit the decedent to require apportionment or to direct a different form of apportionment than that specified under state law.

Pennell, *supra* note 17, ¶ 1804.10, at 18-41 to -42.

68. The New York statute places a limitation on the broad freedom under part (d), set forth *supra* in note 67, by the following:

Any such direction provided in a non-testamentary instrument only relates to the payment of the tax from the property passing thereunder and such direction shall not serve to exonerate such non-testamentary property from the payment of its proportionate share of the tax, even if otherwise directed in that non-testamentary instrument.

N.Y. EST. POWERS & TRUSTS LAW § 2-1.8(d)(3) (McKinney 1998 & Supp. 2008). Some commentators have suggested that part (d)(3) bars a decedent from even paying taxes on probate property (and other nonprobate property.). See, e.g., Margaret Valentine Turano, *Supplementary Practice Commentaries 2005*, in N.Y. EST. POWERS & TRUSTS LAW § 2-1.8. Under Florida law, a will provision will be necessary:

If the decedent’s will provides that the tax shall be apportioned as provided in the decedent’s revocable trust by specific reference to the trust, the direction in the revocable trust shall be deemed to be a direction contained in the will and shall control with respect to payment of taxes from assets passing under both the will and the revocable trust.

FLA. STAT. ANN. § 733.817(5)(h)(2) (West 2007).

trusts,⁶⁹ as does Texas.⁷⁰

A few state statutes appear to provide parity between wills and revocable trusts regarding how federal estate taxes will be apportioned.⁷¹ Indeed, Iowa, which does not have apportionment, allows both wills and revocable trusts to change its default rule.⁷²

Provided that a will does not direct otherwise on apportionment, the 2003 Uniform Act also allows a decedent to provide extensive direction in a revocable trust for the apportionment of federal estate taxes.⁷³ As Professor Kahn explained: “A direction for apportionment can be made in the form of directing the amount of tax to be borne by specified properties, or it can be exculpatory and preclude the apportionment of taxes to certain properties.”⁷⁴

3. STATE CONFLICT OF LAWS

Conflict of laws issues can also arise in connection with the appor-

69. The Michigan law effectively allows a revocable trust to pay taxes on probate property, but bars a revocable trust from directing that federal estate taxes on the revocable trust be payable from a will: “A direction in a governing instrument for tax allocation and payment in a manner different from [the default apportionment rules] is effective to allocate and pay tax only from property whose devolution is subject to that instrument’s control and with respect to which the tax is being levied.” MICH. COMP. LAWS ANN. § 700.3921(3) (West 2002 & Supp. 2008). On the other hand, the next subsection effectively enables a will provision to direct that a revocable trust pay estate taxes on probate property:

A direction to allocate and pay tax contained in a will is effective to allocate and pay tax even if the will does not control the devolution of property at death with respect to which the tax is being levied, including a direction in a will to allocate and pay tax from a trust of which the testator was the settlor and that was revocable by the settlor, or would have been revocable if the settlor was not incapacitated, until the settlor’s death.

Id. § 700.3921(4).

70. The Texas statute provides in part as follows: “A direction for the apportionment or nonapportionment of estate tax is limited to the estate tax on the property passing under the instrument unless the instrument is a will that provides otherwise.” TEX. PROB. CODE ANN. § 322A(b)(2) (Vernon 2003 & Supp. 2007).

71. *See, e.g.*, CAL. PROB. CODE § 20110(b) (West 1991 & Supp. 2008); MONT. CODE ANN. § 72-16-603 (2005); UTAH CODE ANN. § 75-3-916 (2003 & Supp. 2007).

72. The Iowa law states that “[a]ll federal and state estate taxes . . . owing by the estate of a decedent shall be paid from the property of the estate, unless the will of the decedent, or other trust instrument, provides expressly to the contrary.” IOWA CODE ANN. § 633.449 (West 2003 & Supp. 2008).

73. *See* 2003 UNIF. ACT § 3.

74. Kahn, *supra* note 7, at 618. Professor Kahn further explained:

Note that a direction in an irrevocable trust instrument cannot control the apportionment of taxes to properties not part of that trust’s assets. However, if a decedent made a direction in a revocable trust instrument, and the instrument subsequently became irrevocable prior to the decedent’s death, the instrument will continue to be treated as a revocable trust instrument for these purposes.

Id.

tionment of federal estate taxes. The case of *Mazza*⁷⁵ nicely illustrates the problem. *Mazza* involved a Maryland domiciliary who had a joint interest in District of Columbia real property that was included in the decedent's gross estate under Section 2040.⁷⁶ At the time, Maryland had an apportionment statute, but the District of Columbia employed the burden on the residue rule.⁷⁷ The case involved the attempt by the executor/sole will beneficiary to recover an equitable portion of the federal estate taxes, which had been paid in full, from the surviving joint tenant of the District of Columbia realty.⁷⁸

The lower court held against contribution on the traditional grounds that the law of the situs of the property governed and that apportionment was not required by District of Columbia law.⁷⁹ The court of appeals reversed and held that an interest analysis approach⁸⁰ should have been used because of "the difficulty of categorizing this issue [how estate taxes should be apportioned] in traditional conflicts terms."⁸¹ As explained by the court:

Questions of succession to land have traditionally been referred to the law of the situs. Some problems concerning administration of the estate and determination of the testator's intent are commonly governed by the law of the decedent's domicile. See *Doetsch v. Doetsch*, 312 F.2d 323, 328 (7th Cir. 1963), and the authority cited therein. Proper allocation of the federal estate tax does not seem to fit neatly within either category, and the policies behind both rules may arguably have some application here. In this situation a solution purporting to rest simply on classification might well in fact be an interest analysis approach. Resort to such an artificial device would only cloud the issue and increase the danger that "situs" or "domicile" would be accorded deference in a situation where the original policy basis for such treatment is inoperative.⁸²

Based on application of an interest analysis approach, the *Mazza* court found that Maryland had the "the most significant interest in this

75. *Mazza v. Mazza*, 475 F.2d 385 (D.C. Cir. 1973).

76. *Id.* at 386.

77. Although Maryland enacted the 1964 Uniform Act, it subsequently made changes to the Act provisions, including the ability to change default rules by nontestamentary instruments. See MD. CODE ANN., TAX-GEN. § 7-308(k) (LexisNexis 1997 & Supp. 2006). The District of Columbia now has an apportionment statute. See D.C. CODE ANN. § 47-3714 (LexisNexis 2001).

78. 475 F.2d at 386.

79. *Id.* at 386-87.

80. Interest analysis is one of several ways to resolve the vexing problems of which law should be applied. See generally EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 5-118 (4th ed. 2004).

81. 475 F.2d at 388 n.6.

82. *Id.* (citations omitted).

controversy.”⁸³ *Mazza* relied heavily on the Illinois case of *Doetsch*,⁸⁴ which determined that the law of the domicile should control because that “brings about the desirable result of uniform treatment of all those who benefit from the property included in decedent’s gross estate for tax purposes, for regardless of the situs of the property there is a single point of reference—decedent’s domicile.”⁸⁵ *Mazza* explained the consequences of not applying the law of the domicile: “If a decedent leaves property in several states, and if each situs applies its own law, some of the recipients may be required to contribute to payment of the federal estate taxes while others are not.”⁸⁶

At the same time, the *Mazza* court recognized that other jurisdictions had applied the law of the situs in apportionment cases, including the leading case of *Isaacson*.⁸⁷ In *Isaacson*, a Massachusetts court refused to apply Maine’s apportionment statute against a revocable trust with a situs in Massachusetts because recognition would improperly result in giving extraterritorial effect to Maine’s statute.⁸⁸ *Mazza*, however, distinguished *Isaacson* and the lower court’s reasoning:

To the extent that the District Court felt *compelled* by territorial considerations to apply the law of the District of Columbia, the court failed to distinguish between an attempt by a domiciliary state to apply its local law regarding tax apportionment to land located in another jurisdiction, on the one hand, and the decision of a situs forum to defer to the local law of the domicile, on the other.⁸⁹

In effect, the *Mazza* court held that there should be no impediment to the situs (forum) state applying the law of the domicile:

The decision of a situs to apply the law of the domicile is, however, simply a determination that the forum’s own choice of law policies are best served by reference to foreign law. Whenever a forum under no compulsion to do so elects as a matter of conflicts policy to apply the law of another jurisdiction, that law is given “extraterritorial effect” in the sense that such effect is present here. But since there are no incursions upon sovereignty in the application of foreign law, this

83. *Id.* at 392. Under the Restatement (Second) of Conflict of Laws, the objective is to determine the law of the jurisdiction that has the most significant relationship by applying numerous policy factors. See SCOLES, *supra* note 80, at 61. These factors, under Restatement section 6, are much broader than those under an interest analysis approach. See *id.* at 59–60. Although the *Mazza* court generally relied on the Second Restatement, it did not specifically rely on the factors under section 6 but applied an interest analysis approach. See 475 F.2d at 389. In any event, the result would surely have been the same had the section 6 factors been applied.

84. *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963).

85. *Id.* at 328.

86. 475 F.2d at 389.

87. *Isaacson v. Boston Safe Deposit & Trust Co.*, 91 N.E.2d 334 (Mass. 1950).

88. *Id.* at 336–37.

89. 475 F.2d at 390; see also *id.* at 390 n.14 (distinguishing *Isaacson*).

“effect” is in no sense a barrier to such deference. The relevant inquiry focuses on the relationships of the two jurisdictions to the controversy, the interests involved, and whether application of foreign law would offend a strong and clearly defined local policy. Objections to application of foreign law would be justified if this analysis were to disclose that important interests of the forum would be sacrificed to advance equal or lesser interests of another jurisdiction, but resolution of that question is not advanced by reference to extraterritoriality.⁹⁰

The well-reasoned case of *Mazza* demonstrates the preferable approach: the law of the decedent’s domicile should determine the rules on apportionment of federal estate taxes even when the property has a situs outside the state of domicile and the local law of the situs state would differ from the state of the domicile’s rule.⁹¹ This was the view of Professor Scoles in his seminal article on conflict of laws and the apportionment of federal estate taxes.⁹² Unfortunately, as illustrated by *Isaacson*,⁹³ there is no certainty that the law of the domicile rule, as distinct from the law of the situs rule, will apply in future cases.⁹⁴

Apart from the issue of apportionment, conflict issues may also involve jurisdictional and collection issues. The 2003 Uniform Act does not specifically address the issues of collection or reimbursement in the context of conflicting state apportionment laws.⁹⁵

90. *Id.* at 391.

91. Of course, this assumes that the decedent was domiciled in only one state. See *California v. Texas*, 437 U.S. 601 (1978) (recognizing Howard Hughes as a domiciliary of both California and Texas for state death tax purposes).

92. Eugene F. Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955) [hereinafter Scoles, *Apportionment*]; accord Eugene F. Scoles, *Estate Tax Apportionment in the Multi-State Estate*, 5 INST. ON EST. PLAN. ¶ 71.700 (1971) (reaffirming earlier position).

93. *Isaacson* was followed by *Warfield v. Merchants Nat’l Bank of Boston*, 147 N.E.2d 809 (Mass. 1958). Although the Massachusetts Supreme Judicial Court later acknowledged Professor Scoles’s criticisms of its situs rule, see *First Nat’l Bank of Mount Dora v. Shawmut Bank of Boston*, 389 N.E.2d 1002, 1008 & n.11 (Mass. 1979), the situs rule has not been abrogated in Massachusetts.

94. The potential problems are most apparent when the domiciliary state has an apportionment rule but the situs state employs the burden of the residue approach, such as Iowa. See *supra* note 30. But problems could also arise if both states employ apportionment but, as in Massachusetts, apportionment applies only to domiciliaries.

Problems can also arise in apportionment states that have different approaches to inside apportionment. For example, in Florida the default rule is that estate taxes apportioned against probate property are payable from the residuary estate. But in Alabama, which has enacted the 2003 Uniform Act, estate taxes apportioned against probate property are paid ratably by all will beneficiaries. If the decedent died domiciled in Alabama but had real property in Florida, would Florida require a specific devisee of the real property to pay an apportioned share of estate taxes?

95. While Section 9(a) of the 2003 Uniform Act empowers a fiduciary to recover taxes, Section 9(b) recognizes that recovery may not be possible. Section 10(a) of the 2003 Uniform Act purports to give a person a right of reimbursement from persons who did not pay the amount of

Consider some of issues suggested by Professor Schoenblum:

- a. Can a domiciliary or local ancillary representative seek contribution from nonresident beneficiaries after paying taxes out of property under his control?
- b. Will the situs state permit the domiciliary state to collect tax on property or income located in the situs state?
- c. Can a trustee in another state be required to contribute assets for the payment of death taxes? Can another state's courts be required to enforce a tax judgment?⁹⁶

Arguably, Section 2205 may also bear on a beneficiary's right to collect "apportionable" taxes.⁹⁷

In the final analysis, Professor Pennell's observations on the conflict of law issues are most pertinent:

Perhaps the most perplexing and least definite issue under the entire apportionment umbrella is the law that should govern apportionment questions in multiple state estates and how an apportionment rule in one state is to be enforced against property or beneficiaries in another state, especially if the law of that other state is at variance with the law of the state dictating apportionment. As most litigators well know, the conflict of laws issue is often the most difficult and least predictable aspect of any controversy, and this certainly is true with respect to apportionment.⁹⁸

taxes they owed if that person pays more than his ratable share. *See* Kahn, *supra* note 7, at 641. Yet, if property is located in a state outside the domiciliary state and the situs state decides against apportionment (in effect, deciding that the person receiving the property does not owe any tax), how would the person paying more than his share claim the right to reimbursement or be able to collect from the out-of-state property/person?

Section 8 of the 1964 Act includes a collection provision for non-residents if there is a reciprocal remedy in the applicable state. The provision, which has been enacted in non-Uniform Estate Tax Apportionment jurisdictions, *see, e.g.*, TEX. PROB. CODE ANN. § 322A (Vernon 2007), was strongly criticized in part for sacrificing uniformity of enforcement. *See* Eugene F. Scoles & Richard B. Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 MINN. L. REV. 907, 935 (1958).

96. 1 JEFFREY A. SCHOENBLUM, *MULTISTATE AND MULTINATIONAL ESTATE PLANNING* § 16.17[B], at 1129–30 (2d ed. 1999). Regarding collection issues, Professor Scoles observed that "the same choice of law rule that determines whether or not there shall be apportionment obviously determines the existence or non-existence of the obligation to contribute to the tax." Scoles, *Apportionment*, *supra* note 92, at 301.

97. Professor Scoles has suggested that federal law might compel collection under his expansive reading of Section 2205, *see* Scoles, *Apportionment*, *supra* note 92, at 301–03, but this result is far from clear. In any event, Section 2205 would not apply to recovery of taxes on nonprobate property from nonresidents. *See* Pennell & Danforth, *supra* note 6, at A-47.

98. Pennell, *supra* note 17, ¶ 1805, at 18-49.

III. FEDERAL “APPORTIONMENT” STATUTES

A. *Federal Preemption Issue*

Sections 2206, 2207, 2207A, and 2207B specifically provide rules for estate taxes on selected nonprobate property, but as Professor Litman has noted, federal provisions inexplicably are not made for other nonprobate transfers.⁹⁹ Moreover, as identified by Professor Litman, the four explicit sections are not uniform in approach nor application.¹⁰⁰

One overriding question is whether these Internal Revenue Code statutes preempt state law apportionment rules in states that do not expressly recognize federal preemption.¹⁰¹ In contrast with the 1964 Uniform Act,¹⁰² the 2003 Uniform Act specifically takes the position

99. See generally Litman, *supra* note 6. Section 2032A(c)(5) (relating to the personal liability of a qualified heir for additional estate tax on premature disposition or cessation of special use property) is distinguishable from situations under Sections 2206–2207B where the personal liability is on the executor; in addition, Section 2032A(c)(5) applies to both probate and nonprobate transfers. Nor is Section 2603(b), the generation-skipping transfer tax personal liability rule under Section 2603(b), limited to nonprobate transfers. These sections will not be further considered in the article.

100. See *id.*

101. See, e.g., CAL. PROB. CODE §§ 20110(b)(2) (West 1991 & Supp. 2008) (apportionment rules do not apply “[w]here federal law directs otherwise”); KAN. GEN. STAT. § 79-15,126 (4) (2007) (apportionment rules “do not apply to the extent federal law directs a different manner of apportionment”). Other states prescribe the same result. For example, Florida law provides as follows:

Except as otherwise effectively directed by the governing instrument, if the Internal Revenue Code, including, but not limited to . . . 2206, 2207, 2207A, [and] 2207B . . . applies to apportion federal tax against recipients of certain interests, all net taxes, including taxes levied by the state attributable to each type of interest, shall be apportioned against the recipients of all interests of that type in the proportion that the value of each interest of that type included in the measure of the tax bears to the total of all interests of that type included in the measure of the tax.

FLA. STAT. ANN. § 733.817(4)(a) (West 2007). Michigan law provides:

An estate, inheritance, or other death tax levied or assessed under the laws of this or another state, political subdivision, or country or under a United States revenue act concerning property included in the gross estate under the law, but excluding taxes for which sources of payment are provided within sections 2206, 2207, 2207A [and] 2207B . . . of the internal revenue code, 26 USC 2206, 2207, 2207A [and] 2207B . . . shall be apportioned in the following manner

MICH. COMP. LAWS ANN. § 700.3920(1) (West Supp. 2008).

102. See MISS. CODE ANN. § 27-10-21 (West 2006) (enacting Section 9 of the 1964 Uniform Act):

If the liabilities of persons interested in the estate as prescribed by this chapter differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this chapter shall apply as if the resulting liabilities had been prescribed herein.

Id. As Professor Kahn explained, “[t]he 1964 Uniform Act takes an entirely different position on this issue and provides that when the federal imposition of liability differs from the 1964 Uniform Act’s apportionment scheme, the tax should be borne according to the federal provision.” Kahn, *supra* note 7, at 623 (citing 1964 UNIF. ACT § 9).

that the federal statutes do not preempt state apportionment laws. As explained in the Comments to Section 3 of the 2003 Uniform Act:

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain nonprobate property that is included in the decedent's gross estate. *There is a conflict among the courts as to whether those federal provisions preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the Act apportions taxes without regard to the federal provisions.* The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by State law or with other rights of collection granted by State law. Since there is no conflict, this Act does not include a direction as to whether federal or State law takes priority.¹⁰³

Because the contrary position—federal law preempts state apportionment rules—may create conflicts, it is important to consider the matter of preemption in some detail,¹⁰⁴ including the historical aspects of current Sections 2206 and 2207. In my view, this historical excursion conclusively establishes that Congress intended that these statutes, and by extension Sections 2207A and 2207B, were enacted to preempt state law.¹⁰⁵ This also was the conclusion of the leading scholars of the time. Substantial case law also supports the conclusion that these federal statutes are preemptive; the contrary authority relied upon by the 2003 Uniform Act is distinguishable.

Consider Section 2206, concerning the liability of life insurance beneficiaries, which currently provides in part 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 taxable estate. If there is more than one such beneficiary, the executor shall be entitled to recover from

103. 2003 UNIF. ACT § 3 cmt. (emphasis added) (citations omitted).

104. See generally JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW* (2006).

105. As explained: "The analysis of a preemption dispute focuses upon statutory construction (the federal statute's words and its drafters' intention) . . ." *Id.* at 1.

such beneficiaries in the same ratio.¹⁰⁶

In effect, Section 2206 allows the executor, who is liable for the payment of federal estate taxes,¹⁰⁷ to collect from a life insurance beneficiary the estate taxes attributable to gross estate inclusion of life insurance, but only after the federal estate tax has been paid.¹⁰⁸ As such, the statute is not technically an "apportionment" statute but a right of reimbursement statute. Nonetheless, if Section 2206 preempts state law on liability, then the net effect will be that the tax on life insurance effectively will have been charged (apportioned) against the insurance beneficiary. In effect, apportionment is really a matter of who bears the ultimate burden of federal estate tax liability.¹⁰⁹

Section 2206 has its origins in the Revenue Act of 1918, which was enacted at a time when no state had yet enacted an apportionment statute.¹¹⁰ As a result, all estate taxes, including taxes on life insurance, were payable by the executor from the residuary of the probate estate under the burden on the residue rule. The 1918 legislative history reveals that legislation was necessary to correct the inequity of having the residue bear the ultimate burden of estate taxes on life insurance.¹¹¹ Specifically, Congress enacted the following 1918 legislation, which allowed the executor to recover from the insurance beneficiary the applicable estate taxes on life insurance that had been paid by the executor:

106. I.R.C. § 2206 (2000).

107. *See id.* § 2002.

108. The last sentence of Section 2206, which was enacted before allowance of the unlimited marital deduction in 1982, provides an exception for property that qualifies for the estate tax marital deduction.

As noted by Professor Litman, Section 2207 does not apply to transfers of life insurance within three years of death because gross estate inclusion is required by Section 2035(a), not Section 2042. *See Litman, supra* note 6, at 357.

109. *See supra* notes 17–19 and accompanying text (discussing definition of apportionment). Consider the intersection of Section 2206 with Iowa law that, as a default rule, requires that all estate taxes be paid from the residuary estate. *See supra* note 30. Assume that an Iowa decedent died owning life insurance that was includible in the gross estate with a will that did not override Section 2206. The executor would first pay the estate taxes from the residuary estate, which would reduce the amount for the residuary beneficiary. Then, the executor would recover from the life insurance beneficiary the proportionate share of estate taxes, which would then be distributed to the residuary beneficiary. The net effect is that the life insurance beneficiary has borne a fair share of federal estate taxes.

110. In 1930 New York enacted the first apportionment statute. *See Powell, supra* note 19, at 332. Prior thereto, New York employed the burden on the residue rule. *See In re Estate of Hallinan*, 347 N.Y.S.2d 157, 158–59 (Sur. Ct. 1973).

111. Consider the following quotation from the House Report to the Revenue Bill of 1918:

Minor changes in verbiage and slight modifications in procedure have been made for the sake of insuring *more equitable, uniform*, and efficient administration of the law. Instances of these are . . . the giving to the executor a right of contribution from the specific beneficiary under policies of insurance.

H.R. REP. NO. 65-767, at 23 (1918) (emphasis added).

If any part of the gross estate consists of proceeds of policies of insurance upon 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, in excess of [the exemption amount] of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.¹¹²

Significantly, this statute did not allow the decedent to change the result by will.¹¹³ In effect, Congress wanted to create a federal rule of apportionment for life insurance. As explained by Randolph E. Paul in his early treatise on federal transfer taxation: "Insurance proceeds constitute the only portion of the taxable estate subjected by the federal statute to a specific rule of apportionment."¹¹⁴

The historical background of Section 2207 provides the irresistible conclusion that current state law apportionment rules are preempted by current Section 2207, which provides in part 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 taxable estate. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio.¹¹⁵

Section 2207 and its predecessor, Section 826(d) of the Internal Revenue Code of 1939, can be understood by reviewing the taxation of powers of appointment prior to and at the time of original enactment by the Revenue Act of 1942. Prior to the Revenue Act of 1942, only exercised general powers of appointment were subject to estate taxation; as a result, the donee could exercise the power to have estate taxes paid from the appointive property and avoid the unfairness of burdening the residue with the tax.¹¹⁶ Pursuant to the Revenue Act of 1942 both unexercised

112. Revenue Act of 1918, ch. 18, § 408, 40 Stat. 1057, 1100. The marital deduction aspects of current Section 2206, *see supra* note 108, were enacted in 1948. *See* Revenue Act of 1948, ch. 168, § 366, 62 Stat. 110, 124.

113. That authority was conferred by the Revenue Act of 1942. *See* Revenue Act of 1942, ch. 619, § 404, 56 Stat. 798, 944–45. In 1939, a court had earlier intimated that a will should be able to override the apportionment rule for life insurance. *See* U.S. Trust Co. of N.Y. v. Sears, 29 F. Supp. 643 (D. Conn. 1939).

114. 1 RANDOLPH E. PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.55, at 784 (1942).

115. I.R.C. § 2207 (2000). Like Section 2206, Section 2207 excludes property subject to the marital deduction.

116. As explained:

As long as property was included in the donee's gross estate only if he exercised a

cised general powers and certain special powers were subjected to estate tax.¹¹⁷ As Randolph Paul explained, fairness only dictated that Congress should create a federal rule of apportionment:

A statute which taxes property because of the mere existence of a power, whether general or special, cannot remain aloof from the question of ultimate incidence. . . . The statute must necessarily work out some principle of allocation which imposes upon the appointive property a share of the estate tax burden.¹¹⁸

And, that is exactly what Congress intended to do when it enacted Section 826(d)—the forerunner of current Section 2207—of the Internal Revenue Code of 1939.¹¹⁹ Consider both the House and Senate 1942

general power there was so little difference between appointed property and the donee's own estate as to obviate the need for distinguishing between the two in allocating relative tax burdens. The donee was free, as a rule, to divert the appointive property or his own to the payment of the estate tax. In the absence of any directions by the donee, the entire tax was payable out of his own residuary estate.

RANDOLPH E. PAUL, *FEDERAL ESTATE AND GIFT TAXATION*, § 9.39, at 287 (Supp. 1946) (footnote omitted).

117. See generally Louis Eisenstein, *Powers of Appointment and Estate Taxes: II*, 52 *YALE L.J.* 494 (1943).

118. PAUL, *supra* note 116, § 9.39, at 287 (footnote omitted). Louis Eisenstein expressed the same sentiments:

An estate tax on special powers must in all fairness provide for the allocation of a proportionate share of the tax burden to the appointive assets. The increase in taxable assets as a result of a power which is not exercisable for the direct benefit of the donee may drastically affect the rate bracket. And in the absence of an apportionment provision the entire tax is payable out of the donee's individual estate, which may be completely depleted.

Eisenstein, *supra* note 117, at 527 (footnotes omitted). Dean Erwin Griswold had earlier expressed the same need for fairness if estate taxation of powers of appointment were to be expanded:

If a tax were to be imposed on the exercise or nonexercise of a special power, however, there should be a provision in the statute under which the tax would be collectible by the executor out of the property over which the power was held. Otherwise the donee might be able to exercise the power only at the cost of a large tax on his estate which he could not make chargeable against the appointed property; or, in the case of a failure to exercise the power, the donee's estate would be subjected to a tax wholly beyond the control of the donee. Both of these results would be objectionable, but could readily be obviated by an appropriate provision in the statute.

Erwin N. Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 *HARV. L. REV.* 929, 956 (1939) (footnote omitted).

Indeed, there was a suggestion that the recovery provision may have been necessary to overcome constitutional objections:

Insofar as the tax is imposed on a special power whether or not exercised, the omission of this provision might have raised constitutional obstacles because the donee under a special power apparently could not without statutory authorization provide by will that the tax be paid out of the appointed property.

Note, *Some Aspects of the Revenue Act of 1942*, 56 *HARV. L. REV.* 428, 453 (1942).

119. As Randolph Paul explained:

Committee Reports: "The purpose of this amendment [Section 826(d)] is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property."¹²⁰

Professor Scoles later explained the 1942 apportionment statute on powers of appointment:

The 1942 amendment to the Internal Revenue Code added an express provision requiring apportionment in the absence of a contrary direction in the will and a correlative requirement of contribution by the recipients of such property. . . . The only federal provisions expressly applicable to apportionment of federal estate taxes are those relating to property subject to powers of appointment and proceeds of life insurance.¹²¹

Based on the foregoing history, it is not surprising that other leading scholars concluded that Sections 2206 and 2207 are federal preemption statutes. Consider the words of Richard Powell:

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.¹²²

Also reflect on the 1964 pronouncements of Professors Scoles and Stephens:

As regards the burden of the *federal* estate tax, the Code provides for apportionment only in the case of tax attributable to two classes of property: (a) proceeds of insurance on the decedent's life and (b) property over which the decedent had a power of appointment.¹²³

Courts also have considered Sections 2206 and 2207 to be preemptive. A New York Court of Appeals opinion is instructive:

Generally speaking, apportionment of taxes among the beneficiaries of an estate, or among persons receiving property which is included

Section 826(d) or some similar provision was a necessary complementary measure for the very reason that the estate tax now reaches appointive assets which, because of the donee's nonexercise or limited authority, cannot be subjected to the burden of payment. It is an expression of Congressional grace to ease the donee's lot.

PAUL, *supra* note 116, § 9.39, at 288. Professor Scoles later suggested that the 1942 recovery statute was enacted to eliminate the serious conflict of laws problems that inhere in powers of appointment. See Scoles, *Apportionment*, *supra* note 92, at 284–85.

120. H.R. REP. NO. 77-2333, at 161 (1942); see also SEN. REP. NO. 1631, at 233–34 (1942).

121. Scoles, *Apportionment*, *supra* note 92, at 285, 288.

122. Powell, *supra* note 19, at 330. Technically, the federal statutes only enable an executor to recover estate taxes but they have the practical effect of serving as apportionment provisions when apportionment is used in the larger sense of who bears the ultimate burden of federal estate taxes. See *supra* notes 17–19 and accompanying text.

123. Scoles & Stephens, *supra* note 95, at 908.

within an estate for tax purposes, is a matter of State law. There are, however, two exceptions to this general rule. The apportionment of taxes attributable to nonexempt insurance proceeds and property subject to a power of appointment is governed by Federal law.¹²⁴

Arguably, the Supreme Court's decision in *Riggs*¹²⁵ provides contrary authority, but on analysis that does not appear to be the case. *Riggs*, which involved Section 826(b) of the Internal Revenue Code of 1939, the forerunner to current Section 2205, upheld the constitutionality of New York's apportionment statute against the contention that only federal law could provide for the apportionment of federal estate taxes.¹²⁶ In the process, the Court distinguished the life insurance and power of appointment apportionment statutes because they dealt

with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor.¹²⁷

Based on the foregoing, Randolph Paul's conclusion on *Riggs* was that it did not provide authority that the federal recovery statutes could be preempted by state law; on the contrary:

The Supreme Court has now announced that, *except for insurance and powers of appointment*, estate tax incidence is a state matter and the local courts are accordingly free to fashion equitable solutions in the absence of state legislation.¹²⁸

The 1986 case of *McAleer*, which raised the issue whether the executor could recover estate taxes from a life insurance beneficiary pursuant to Section 2206, arguably provides authority that the federal statutes are not preemptive.¹²⁹ *McAleer* involved the then applicable Alabama stat-

124. *In re Will of King*, 239 N.E.2d 875, 876 (N.Y. 1968) (citations omitted); *see also* *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 96 N.E.2d 918, 927 (Ind. App. 1951) ("The tax attributable to the proceeds of the life insurance should be apportioned between them in accord with the provisions of § 826(c) [of the IRC of 1939, the forerunner of Section 2206].").

125. *Riggs v. del Drago*, 317 U.S. 95 (1942).

126. The New York Court of Appeals adopted this view. *See In re Accounting of del Drago*, 38 N.E.2d 131 (N.Y. 1941).

127. 317 U.S. at 102. Consider the Court's earlier reference in *Riggs* to these two statutes: "That Congress, from 1916 onward, has understood local law as governing the distribution of the estate after payment of the tax (with the limited exceptions created by § 826 (c) and (d) of the Internal Revenue Code, to be discussed presently) . . ." *Id.* at 98-99.

128. PAUL, *supra* note 116, § 13.54, at 465 (emphasis added). Professor Eisenstein voiced the same view when explaining the forerunner of Section 2207: "This provision is entirely compatible with local statutes which allocate the ultimate incidence of the tax as to properties actually handled as part of the estate by the executor." Eisenstein, *supra* note 117, at 528 (internal quotation marks omitted).

129. *McAleer v. Jernigan*, 804 F.2d 1231, 1232-33 (11th Cir. 1986).

ute that provided that (1) all estate taxes are paid from the probate estate and (2) an executor was not required to recover a share of estate taxes from a life insurance beneficiary.¹³⁰ Based on this provision the *McAleer* court stated:

There are thus two possible conclusions that could be reached in this case. The Alabama statute, section 40-15-18, could be read to conflict directly with the federal statute. In that instance, federal law would permit the executor to recover a portion of the estate taxes from the life insurance beneficiary and Alabama law would preclude such recovery. If that is the case, federal law must prevail. *Alternatively, the Alabama statute could be read as negating any duty on the part of the executor to seek recovery from the life insurance beneficiary, but not preventing the executor from seeking such a recovery.* In that event, federal law would allow the executor to recover.¹³¹

The alternative conclusion suggests that if a state can decide that an executor need not collect estate taxes from a life insurance beneficiary then Section 2206 is not preemptive as a federal estate tax apportionment rule. Instead, a state's apportionment scheme could determine who, in the absence of a will provision, bears the ultimate burden of estate taxation on life insurance.

As it turns out, the *McAleer* court did not have to decide whether this alternative reading should be applied because on either reading the executor was allowed to recover under Section 2206. As such, it is hard to conclude that *McAleer* provides authority that Section 2206 is not preemptive.¹³² Indeed, an earlier statement in *McAleer* suggests that Section 2206 is preemptive: “[I]n the absence of congressional enactments to the contrary, state law governs the allocation of the burden of taxes as to property that is part of the estate, and where Congress has spoken, as with life insurance proceeds not part of the estate, federal law governs.”¹³³

Based on a federal rule of preemption, Professor Litman concluded that “[t]o the extent that federal law grants the executor or the decedent’s

130. See ALA. CODE § 40-15-18 (LexisNexis 2003 & Supp. 2007).

131. 804 F.2d at 1233 (emphasis added).

132. For the view that the obligation of an executor to collect from a life insurance beneficiary is mandatory, see *Pearcy v. Citizens Bank & Trust Co. of Bloomington*, 96 N.E.2d 918 (Ind. App. 1951). Even if *Pearcy* is incorrect because the executor is not technically obligated by Section 2206 to collect the taxes from the life insurance beneficiary (or for any other person liable for taxes under Sections 2207–2207B), it would seem that the practical effect is that the taxes will be collected by the executor; otherwise the executor could be deemed to breach fiduciary duties to the persons who would benefit from collection.

133. 804 F.2d at 1233. As stated in *Tovrea*, “[a]pportionment of federal taxes on life insurance proceeds is governed exclusively by 26 U.S.C. § 2206, and states may not apply contrary state laws.” *Tovrea v. Nolan (In re Estate of Tovrea)*, 845 P.2d 494, 497 n.1 (Ariz. Ct. App. 1992) (citing *McAleer*, 804 F.2d at 1233).

estate a right to recover taxes attributable to specific property, state law should be preempted from reapportioning those taxes in another manner."¹³⁴

Section 2207A is a fairly new provision that was enacted as part of the QTIP scheme in 1981. In essence, the statute authorizes the decedent's estate to recover from the QTIP trust the incremental taxes that are attributable to gross estate inclusion, absent a contrary will or revocable trust provision.¹³⁵ As such, Section 2207A differs from the other recovery statutes that allow for recovery of the average taxes.¹³⁶

Interestingly, and despite the 2003 Uniform Act's assertion of inde-

134. Litman, *supra* note 6, at 373.

135. The Code provides as follows:

(a) Recovery with respect to estate tax.

(1) In general. If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—

(A) the total tax under this chapter [I.R.C. §§ 2001–2053] which has been paid, exceeds

(B) the total tax under this chapter [I.R.C. §§ 2001–2053] which would have been payable if the value of such property had not been included in the gross estate.

I.R.C. § 2207A(a)(1) (2000).

A treasury regulation provides for recovery as follows:

Person receiving the property. If the property is in a trust at the time of the decedent's death, the person receiving the property is the trustee and any person who has received a distribution of the property prior to the expiration of the right of recovery if the property does not remain in trust. This paragraph (d) does not affect the right, if any, under local law, of any person with an interest in property to reimbursement or contribution from another person with an interest in the property.

Treas. Reg. § 20.2207A-1(d) (as amended in 2003).

136. Professor Litman raised questions about recovery based on incremental or marginal taxes under Section 2207A but not under other sections. *See* Litman, *supra* note 6, at 366–69. She suggested that one reason for the difference was the surviving spouse's lack of control over QTIP property, but wondered, "Is lack of control a sufficient reason to subject the recipients of QTIP to a higher burden of tax . . . ?" *Id.* at 366.

The precise issue arose in connection with the 1942 addition of Section 2207's predecessor because the Act imposed an estate tax that was subject to a special power of appointment such that the donee had no substantial control over the remainder. Consider Louis Eisenstein's observations on the issue:

Under the formula all the taxable assets are deemed to contribute the same amount of tax burden per unit value. There is nothing arbitrary in this rationale. It is no more correct to say that a particular item of property is responsible for the highest estate tax bracket than it is to say that a particular item of taxable income is responsible for the highest income tax bracket. All items of taxable property are simply added together to make one numerical total upon which the tax is imposed. Appointive property should not be treated as a separate taxable unit in the estate, for from the estate tax point of view such property is as much the decedent's as any other included in the taxable estate

Eisenstein, *supra* note 117, at 529 (footnotes omitted).

pendence from federal law on the apportionment of taxes, Section 4(3) of the 2003 Uniform Act provides an apportionment rule that follows in lock-step with the recovery rule of Section 2207A. As explained by Professor Kahn:

*Although the 2003 Uniform Act need not follow federal rules in such matters, the federal tax law that authorizes a personal representative of the surviving spouse to collect a portion of the federal estate tax from the recipients of QTIP property utilizes the marginal rate of the spouse's tax to determine the amount to be collected. The 2003 Uniform Act tracks the federal tax law in that respect.*¹³⁷

Consider the conflict that might have arisen if the 2003 Uniform Act had decided that the estate taxes attributable to Section 2044 inclusion should be apportioned on a ratable rather than on an incremental basis as required by Section 2207A. Would the Uniform Act have successfully trumped federal law by making the QTIP trust liable for a smaller amount of taxes? Not if Section 2207A has preemptive effect, which in effect would bar a state from reapportioning the intended liability. Recent cases addressing the preemption issue have concluded exactly that: Section 2207A preempts state law on the apportionment of federal estate taxes attributable to gross estate inclusion under Section 2044.

In the *Forrester* case, the surviving spouse under a QTIP trust was an Alabama decedent.¹³⁸ Although Alabama law at the time provided that all taxes were payable from the residue of the will,¹³⁹ the court held that the federal tax under Section 2044 was payable from the QTIP trust because Section 2207A preempted Alabama law.¹⁴⁰

137. Kahn, *supra* note 7, at 634 (emphasis added) (footnote omitted). Actually, Section 4(3) of the 2003 Act is a vast improvement on Section 2207A, which does not coordinate recovery for incremental taxes with recovery based on average taxes for other nonprobate transfers, such as life insurance. See Litman, *supra* note 6, at 366–69 (discussing these problems). For example, if the gross estate consisted of \$2 million of life insurance and \$2 million of QTIP property includible under Section 2044 and there were no deductions, the federal estate tax would be \$900,000. See *supra* note 32 and accompanying text. Under Section 2207A, recovery of the full \$900,000 would be allowed from the QTIP property but under Section 2206, \$450,000 also would be recoverable from the life insurance beneficiary. Surely the personal representative doesn't get to keep \$450,000.

The last sentence of Section 4(3) succinctly provides: "The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate." 2003 UNIF. ACT. § 4(3). As applied to the above example, no tax would be apportioned against the life insurance beneficiary because all taxes were apportioned against the QTIP property.

138. *Hollis v. Forrester (Ex parte Forrester)*, 914 So. 2d 855, 857 (Ala. 2005). For a discussion of *Forrester*, see Gerzog, *supra* note 22, at 704–06.

139. See ALA. CODE § 40-15-18 (LexisNexis 2003 & Supp. 2007). Effective January 1, 2008, the 2003 Uniform Act is the law of Alabama.

140. *Forrester*, 914 So. 2d at 862. In effect, the court followed its earlier decision in *Cleveland v. Compass Bank*, 652 So. 2d 1134, 1137 (Ala. 1994) ("Section 2207A clearly preempts

The Supreme Court of Colorado's opinion in the *Klarner* case¹⁴¹ is even stronger authority that Section 2207A preempts state law apportionment rules. *Klarner* held that Section 2207A not only preempted Colorado law with respect to federal taxes but also that the section preempted Colorado law on state death taxes:

Section 2207A indisputably preempts Colorado law with respect to the application of *federal* taxes. In order to achieve the coordinating effect envisioned under the Colorado statutes themselves, we conclude that section 2207A preempts conflicting Colorado law, even as to state estate taxes.¹⁴²

The regulations under Section 2207A also support the conclusion that the section preempts state law apportionment rules. Specifically, if the decedent does not waive the right of reimbursement and the taxes are not recovered, a gift is deemed made by the person benefiting from non-recovery.¹⁴³

Consider how the provision would apply to an Iowa estate if the executor/sole beneficiary fails to seek reimbursement for the incremental estate taxes attributable to Section 2044 where the will does not waive the right to reimbursement. The will beneficiary should be deemed to make a gift to the beneficiaries under the QTIP trust based on Section 2207A's preemptive effect over Iowa law, which provides that taxes on nonprobate property be paid from the probate estate.¹⁴⁴ If Section 2207A did not have preemptive effect then no gift should occur because the will beneficiary would bear the ultimate burden of the tax on the QTIP property.

Section 2207B is the latest federal apportionment statute.¹⁴⁵ Unlike

§ 40-15-18 with regard to the payment of federal estate taxes attributable to Q-TIP property . . ."). The court, however, held that Alabama estate tax on the QTIP property was payable from the residue, because Section 2207A was not preemptive with regard to the state tax. See *Forrester*, 914 So. 2d at 860-62; accord *Cleveland*, 652 So. 2d at 1137-38 ("2207A makes no specific provision for the apportionment of state estate taxes."). *Contra* Katz, Look & Moison, P.C. v. Shirley (*In re* Estate of Klarner), 113 P.3d 150, 155-56 (Colo. 2005) (en banc) (holding that Colorado estate tax also was governed by Section 2207A).

141. *Klarner*, 113 P.3d 150.

142. *Id.* at 155-56 (citations omitted).

143. The Regulation provides in part as follows:

Failure to exercise right of recovery. Failure of an estate to exercise a right of recovery under this section upon a transfer subject to section 2044 is treated as a transfer for Federal gift tax purposes of the unrecovered amounts from the persons who would benefit from the recovery to the persons from whom the recovery could have been obtained. The transfer is considered made when the right of recovery is no longer enforceable under applicable law. A delay in the exercise of the right of recovery without payment of sufficient interest is a below-market loan.

Treas. Reg. §20.2207A-1(a)(2) (as amended in 2003) (citation omitted).

144. See IOWA CODE § 633.449 (West 2003 & Supp. 2008).

145. Section 2207B(a)(1) provides as follows:

the other statutes, the issue of preemption has not been specifically addressed, but there is no reason to suspect that Congress intended that Section 2207B be treated differently from the other federal preemption statutes on apportionment. An issue to be decided, especially where state law provides that estate taxes shall be paid from the residuary estate, is the reach of Section 2207B's preemptive effect. Specifically, does Section 2207B apply to revocable trusts?¹⁴⁶ Because revocable trusts can be included in the gross estate under Section 2036(a)(2)¹⁴⁷ (as

(a) Estate tax.—

(1) In general. If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate by reason of section 2036 (relating to transfers with retained life estate), the decedent's estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the total tax under this chapter [IRC Sections 2001 et seq.] which has been paid as—

- (A) the value of such property, bears to
- (B) the taxable estate.

I.R.C. § 2207B(a)(1) (2000).

In contrast with Section 2207A, which allows for reimbursement of the incremental taxes, Section 2207B allows for recovery of the average taxes, similar to Sections 2206 and 2207. Like Section 2206, Section 2207B does not apply to transfers within three years of death of property that would have been included under Section 2036 because gross estate inclusion is required by Section 2035.

Unlike Sections 2206, 2207, and 2207A, which take into account the effect of the marital deduction, there is no comparable exception under Section 2207B. This raises an unfortunate problem if the remainder beneficiary of a trust is the decedent's surviving spouse, for whom a marital deduction would be allowed under Section 2056. In such a case, the trust wouldn't generate any estate tax liability, yet the executor is apparently authorized to collect a ratable share of taxes from the trustee, which in turn could reduce the marital deduction based on Section 2056(b)(4). Surely this is an unintended result that could be ameliorated by regulation. *Cf.* Treas. Reg. § 20.2207A-1(a)(1) (as amended in 2003).

146. I have in mind the common revocable trust—one that was created by the decedent and under which he or she held the power of revocation until death, which in addition to Section 2038 would be includable under Section 2036. *See infra* note 147. Certain revocable trusts will not be included under Section 2036 if the decedent did not retain a power of revocation. *See* Carolyn Burgess Featheringill, *Estate Tax Apportionment and Nonprobate Assets: Picking the Right Pocket*, 21 CUMB. L. REV. 1, 38 (1990).

Undoubtedly, Section 2207B applies to retained interests under irrevocable trusts, which are includable in the gross estate provided the trust was created after November 10, 1988, Section 2207B's effective date. *See* *Arzt v. Savarese*, 36 F. Supp. 2d 653, 657 (D. Del. 1999) (Section 2207B does not apply to earlier transfers). Thus, in a state like Iowa, the executor can obtain reimbursement for estate taxes attributable to Section 2036 inclusion.

147. As explained in *IRA MARK BLOOM ET AL., FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFTS*, § 8.01, at 390 (Rev. 3d ed. 2002) (ellipsis in original):

In addition to taxing a decedent because of a retained income interest, § 2036 taxes the decedent if a power over the income is retained. Section 2036(a)(2) includes in a decedent's gross estate property interests previously transferred, if the decedent has retained for life (or a similar period) "the right . . . to designate the persons who shall possess or enjoy the property or the income therefrom." If the decedent's power of revocation applies to the possession or enjoyment of the property (typically the income from a trust), this section requires taxation of the entire trust in the decedent's estate.

well as under Section 2038), an argument can be made that revocable trusts are governed by Section 2207B.¹⁴⁸ In addition to this issue, Professor Litman has observed that Section 2207B “raises several unanswered questions regarding the ultimate apportionment of the federal estate tax attributable to a section 2036 trust.”¹⁴⁹

Notwithstanding the 2003 Uniform Act’s position that the federal statutes do not preempt state law,¹⁵⁰ the evidence strongly suggests that Congress intended that the statutes have preemptive effect. And if this is the reality, then conflicts can arise, despite the Uniform Act’s assertion that no conflicts exist.¹⁵¹ For example, a conflict could arise between Section 2206 and a state that has enacted the 2003 Uniform Act,¹⁵² which exonerates a charity from contributing to estate taxes.¹⁵³

148. As noted in *Burke v. Cleland (In re Estate of Meyer)*, 702 N.E.2d 1078, 1081 n.3 (Ind. Ct. App. 1998):

Without citing to any authority, the Burkes argue that § 2207B is not applicable because the property is “more properly included” under § 2038 (reservation of right to revoke) rather than § 2036 (reservation of life interest in income). This argument is without merit because the two sections are not mutually exclusive. *See* Treas. Reg. § 20.2031-1(a)(2) (noting that there is considerable overlap and property may be included under more than one section).

In *Estate of Bradford v. Commissioner*, 84 T.C.M. (CCH) 337 (2002), the IRS specifically argued that revocable trusts were governed by Section 2207B because they are includible under Section 2036, a position that the court seemed to accept based on its reliance on Section 2207B as an alternative means to resolve the dispute.

In a Technical Advice Memorandum, the Internal Revenue Service concluded that Section 2207B applied to a revocable trust which as a result was required a ratable portion of the federal estate tax. *See* I.R.S. Tech. Adv. Mem. 1999-15-001 (Apr. 16, 1999).

149. Litman, *supra* note 6, at 352. Professor Litman discusses the revocable trust inclusion and other issues under Section 2207B. *See id.* at 344–52.

150. *See* 2003 UNIF. ACT § 3 cmt., set forth in text accompanying note 103 (“There is a conflict among the courts as to whether [I.R.C. §§ 2206–2207B] preempt a State law apportionment provision. Choosing the position that there is no federal preemption, the Act apportions taxes without regard to the federal provisions.”).

151. Although the Uniform Act acknowledges the right to reimbursement, it takes the position that states are free to decide how the collected funds be handled so that no conflicts will arise. *See id.* My problem with this position is that it disregards the fundamental reason for these reimbursement statutes—the imposition of ultimate liability for the federal estate taxes attributable to gross estate inclusion of the particular species of property. As a result, conflicts can arise when state law diverges from federal law. In my opinion, any conflict should be resolved by recognizing the supremacy of federal law. In other words, federal law preempts state law.

A potential conflict was earlier discussed. *See supra* note 137. The Internal Revenue Service clearly thinks that a conflict exists. Consider its view regarding Section 2206 in a General Counsel Memorandum:

A question could arise whether a state law in conflict with § 2206 would apply. For example, a state statute could provide that . . . in the absence of an order in the will, all estate taxes are payable from the residuary estate. Should such a situation arise, it seems clear that the federal law, expressed in § 2206, would prevail.

I.R.S. Gen. Couns. Mem. 34,127 (May 20, 1969).

152. *See supra* note 7.

153. *See* 2003 UNIF. ACT § 2(1)(B).

Specifically, if the decedent's will does not provide otherwise as permitted under Section 2206, must a qualifying charity as life insurance beneficiary contribute to the payment of estate taxes even though the state apportionment statute exonerates the charity from paying the tax?¹⁵⁴ Although noting that there is no authority directly on point, the leading treatise on federal transfer taxes takes the position that a specific will provision is necessary to exonerate the charity in such a case.¹⁵⁵ Professor Litman is in agreement: "Further, if federal law grants a right of recovery from a beneficiary who is a . . . charity, then state law should be preempted from apportioning the tax among other beneficiaries."¹⁵⁶

The unfortunate result of federal preemption by Section 2206 in the above example is that additional estate taxes may be generated because the charitable deduction will be reduced if the charity must bear a burden of the estate taxes.¹⁵⁷ This makes no sense from a policy perspective.¹⁵⁸ The simplest way to resolve the problem would be for a Treasury Regulation to provide that recovery would not be available against the charitable beneficiary.¹⁵⁹

Bizarre results could arise in a jurisdiction that did not enact the 2003 Uniform Act but followed its no-conflict reasoning. Consider how matters could play out in a state like Iowa, which provides that federal estate taxes be paid from the probate estate as the default rule.¹⁶⁰ An Iowa decedent dies owning a life insurance policy; the executor pays the estate tax from the probate estate and then seeks to recover the life insurance beneficiary's ratable share of estate taxes. But the life insurance beneficiary says that recovery will be a wasted act because Iowa law effectively provides that all estate taxes on life insurance be paid from

154. See RICHARD B. STEPHENS ET AL., *FEDERAL ESTATE AND GIFT TAXATION* ¶ 8.05[4] (7th ed. 2002) (discussing the conflict). Other scholars have noted the potential problem. See, e.g., Eisenstein, *supra* note 117, at 532–33.

155. See STEPHENS ET AL., *supra* note 154, ¶ 8.05[4].

156. Litman, *supra* note 6, at 373.

157. See *id.* at 374 (discussing how estate taxes would be increased). In contrast with the problem involving a charity under Section 2206, the problem should not arise under Section 2207A because a charitable deduction will be taken into account under Section 2207A. See Treas. Reg. § 20.2207A-1(c) (as amended in 2003).

158. See Eisenstein, *supra* note 117, at 532–33.

159. Cf. Treas. Reg. § 20.2207A-1(c) (as amended in 2003) (no recovery involving charitable beneficiary). A regulatory fix would also need to deal with charitable deductions under split interests.

The same problem—recovery is not barred from charitable beneficiaries—also exists under Sections 2206 and 2207. Section 2207B(d) bars recovery from charitable remainder trusts but inexplicably doesn't bar recovery from a charitable remainder beneficiary if the decedent reserved a life estate or term interest in a residence or farm. Professor Litman has suggested that the three sections be amended to provide uniformity of treatment for deductions. See Litman, *supra* note 6, at 397–98.

160. See *supra* note 30 and accompanying text.

the residue so that if the taxes were collected they would have to be returned to the life insurance beneficiary.

B. *Changing the Default Rules Under the Federal Statutes*

Each of the four Internal Revenue Code statutes allows a decedent to change the default rule. The earlier statutes, Sections 2206 and 2207, permit only a will to provide a contrary direction on apportionment. On the other hand, Sections 2207A and 2207B would allow a revocable trust, in addition to a will, to provide otherwise. Of course, this lack of symmetry makes no sense but it is understandable. The early statutes never contemplated revocable trusts as instruments affecting the payment of taxes.¹⁶¹

1. SECTIONS 2206 AND 2207

Issues can arise and have arisen regarding the effectiveness of will provisions overriding the default federal liability rules.¹⁶² For example, in the *Fogleman* case,¹⁶³ a will provided that all taxes be paid from the

161. Section 2205, the forerunner of which was enacted in 1916, also limits changes to those by will:

If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and *unless otherwise directed by the will of the decedent* the tax shall be paid out of the estate before its distribution.

I.R.C. § 2205 (2000) (emphasis added).

162. There may even be a question whether federal or state law controls whether a will has “otherwise” directed. See Scoles, *Apportionment*, *supra* note 92, at 286 (suggesting that state law should control on issue). This seems to be the approach adopted by the courts. See, e.g., *In re Estate of Miller*, 595 N.E.2d 630 (Ill. App. Ct. 1992) (considering original version of Section 2207A). As explained in *In re Will of Cooney*, 541 N.W.2d 467 (Wis. 1995): “The federal tax system regularly looks to state laws for application of a variety of provisions of the tax code, and § 2207A(a)(2) is no exception [as to what constitutes a direction otherwise].” *Id.* at 471–72 (*footnote omitted*).

If a federal statute required greater specificity, then the federal requirement would need to be satisfied. See *Miller*, 595 N.E.2d at 634 (distinguishing earlier version of Section 2207B, which required specific reference to the statute to change default recovery rule). *But cf.* *Myers v. Ellerbush*, 746 N.E.2d 408, 409–10 (Ind. Ct. App. 2001) (construing will’s direction against reimbursement as satisfying the specific reference requirement that was required under Section 2207B before amendment deleted specific reference requirement); see also *Eisenbach v. Schneider*, 166 P.3d 858 (Wash. Ct. App. 2007), discussed *infra* notes 184–94 and accompanying text.

163. *Snell & Wilmer, L.L.P. v. Fegen (In re Estate of Fogleman)*, 3 P.3d 1172 (Ariz. Ct. App. 2000), discussed in Gerzog, *supra* note 22, at 698–99, 716–18.

residue and that no reimbursement be made based on Section 2206. Because it turned out the residue was insufficient, the life insurance beneficiaries were still responsible for paying a ratable share of federal estate taxes based on Section 2206.¹⁶⁴

The *Williams* case¹⁶⁵ also involved an estate with an insufficient residue to pay all taxes as specified under the will. In addition, the will expressly negated apportionment or reimbursement. Nonetheless, the court held that persons under a general power of appointment that was included in the gross estate were required to pay a ratable share of taxes under Illinois' default apportionment rules.¹⁶⁶

An issue not specifically addressed, but suggested, in the recent case of *Lurie*¹⁶⁷ is the effectiveness of a will provision for Section 2207

164. As explained:

¶ 31 In this case, estate taxes, which are the responsibility of the estate to pay, have been generated by the insurance proceeds. Yet the proceeds of the policy are not available to pay Decedent's debts, so the estate remains insolvent and unable to pay the estate taxes. This dilemma is resolved by 26 U.S.C. § 2206, which directs that the beneficiaries of a life insurance policy pay the estate taxes generated by the policy. Because the burden of payment of the taxes generated by the life insurance proceeds ordinarily falls upon the beneficiaries and not the estate, the will provision requiring the estate to pay the taxes generated from the insurance proceeds should be treated as a bequest to the insurance beneficiaries of the amount of taxes on the insurance proceeds. Thus, clause 12.1 [pay all taxes from the residue] and the residuary gift fail because there is no residuary from which to pay the taxes.

¶ 32 Having determined that clause 12.1 fails, we must now address whether clause 12.2 assists the beneficiaries. Clause 12.2 of the will specifically prohibits seeking reimbursement of the taxes from the insurance beneficiaries. Clause 12.2 transforms the residuary legacy of clause 12.1—the gift of the amount of taxes on the insurance proceeds—into a preferred general legacy for the insurance beneficiaries. If the estate were not completely insolvent, other legacies would abate to pay the taxes generated by the life insurance policy and achieve Decedent's wishes. But because the estate assets are insufficient to pay any of the legacies, there are no funds with which to pay this gift to the insurance beneficiaries, and clause 12.2 fails also. Accordingly, the insurance proceed taxes must be paid as directed by law, and the insurance beneficiaries are responsible for bearing the burden of taxes generated by the life insurance policy.

Fogleman, 3 P.3d at 1182–83 (citations omitted).

165. *In re Estate of Williams*, 853 N.E.2d 79 (Ill. App. Ct. 2006).

166. The *Williams* court pronounced

a rule providing that where a testator directs through her will that all obligations be paid from the residue yet the will is silent as to the source of funds in the case that the residue is insufficient to cover such liabilities, equitable apportionment must be applied if it is later discovered that the residue is in fact insufficient. In such a case, the testator has failed to clearly express her intent as to who should be responsible for the additional payments and the will is ambiguous on this issue. The application of the doctrine of equitable apportionment is therefore proper.

Id. at 84.

Although Section 2207 was not raised in *Williams*, the Section may have also applied based on the reasoning of the court in *In re Estate of Fogleman*, 3 P.3d 1172.

167. *Lurie v. Comm'r*, 425 F.3d 1021 (7th Cir. 2005).

purposes where the estate pours over into a revocable trust. In *Lurie*, the decedent's will provided for the pour over of the residue into a revocable trust; the revocable trust provided that if the estate assets were insufficient to pay the taxes then they would be paid from the principal of the revocable trust.¹⁶⁸ As it turned out, the decedent exercised powers of appointment that resulted in gross estate inclusion of several trusts; the court held that the estate taxes were payable from the revocable trust rather than from the trusts that were includible as a result of the decedent's exercise of powers of appointment. The unfortunate tax result was that federal estate tax liability, presumably generated by Section 2041 gross estate inclusion,¹⁶⁹ reduced the amount that otherwise would have passed to the surviving spouse under the revocable trust, which in turn would have qualified for a federal marital deduction.

In *Lurie*, the tax court identified one of the issues: "Whether, under Illinois law, we may consider decedent's intent expressed in his revocable trust instrument regarding whether Federal estate tax . . . costs are payable out of property in the revocable trust that would otherwise pass to decedent's surviving spouse. We hold that we may."¹⁷⁰

Assuming gross estate inclusion was required under Section 2041, Section 2207 would have applied, which in turn only allows a decedent to override the section by a will.¹⁷¹ Presumably, a direction in a will that estate taxes be paid from a revocable trust would likely be sufficient to override the default rule of reimbursement under Section 2207.

State law may be applicable to determine whether a will has over-

168. The trust provided in relevant part:

Upon the death of the Grantor, the Trustee shall, to the extent that the assets of the Grantor's estate . . . are insufficient, pay . . . all . . . estate . . . taxes, including any interest and penalties thereon, which may be assessed by reason of the Grantor's death, without reimbursement from the Grantor's Executor or Administrator, from any beneficiary of insurance upon the Grantor's life, or from any other person . . .

All such payments shall be charged first against the principal of the trust estate other than a Marital Trust.

Lurie v. Comm'r, 87 T.C.M. (CCH) 830 (2004) (first ellipses in original).

169. The actual basis for inclusion was never discussed, but I will assume that Section 2041 was the reason. Professor Gerzog has suggested that gross estate inclusion of the trusts was required under Section 2041(a)(3). See Gerzog, *supra* note 22, at 683 n.40. The basis for inclusion is far from clear because the lifetime exercises of the limited powers would more properly be treated under Section 2514(d), the gift tax analog of Section 2041(a)(3), assuming transfer taxation was appropriate as a power of appointment, rather than taxation under some other section. Gross estate inclusion may also have been required under Section 2041(a)(1) or (a)(2) if the decedent's lifetime exercise was over a general power that otherwise would have resulted in gross estate inclusion under one of the string provisions if the decedent owned the property outright.

170. *Lurie*, 87 T.C.M. (CCH) 830.

171. On appeal, the Seventh Circuit seemed to hold that the will also negated apportionment, see *Lurie*, 425 F.3d at 1025–26, but did not discuss the possible application of Section 2207.

ridden the liability rule under Section 2207. The *Coe* case¹⁷² specifically addressed a Michigan statute that required more than a general will direction for payment of taxes to override Section 2207.¹⁷³ In holding the Michigan statute applicable, the court stated: “Although federal preemption issues abound when dealing with federal estate tax apportionment, we believe that the language in [the statute] controls because it further defines what the phrase ‘unless the decedent directs otherwise in his will’ means and crafts an exception to the general rule of apportionment.”¹⁷⁴

If Sections 2206 and 2207 preempt state law apportionment statutes, then a will provision will be necessary even if a state recognizes the ability to apportion taxes by a revocable trust.¹⁷⁵ For example, if a California resident provides in a revocable trust that taxes on life insurance be paid from the trust, the direction may not be recognized because Section 2206 allows the direction to be made only in a will.

Once again, wills and revocable trusts are not treated with equal dignity for federal estate tax apportionment purposes. Along with the myriad of other changes that should be made in the specific federal estate tax apportionment statutes,¹⁷⁶ Sections 2206 and 2207 should be amended to allow change in the default rules by revocable trusts in addition to wills.¹⁷⁷

2. SECTIONS 2207A AND 2207B

Sections 2207A and 2207B differ from Sections 2206 and 2207 in two significant ways in terms of changing the default apportionment rules. First, the rules can be changed not only by wills but by revocable trusts.¹⁷⁸ Second, the default rules cannot be changed unless the dece-

172. *Green v. Finney (In re Estate of Coe Marital & Residuary Trusts)*, 593 N.W.2d 190 (Mich. Ct. App. 1999).

173. The then applicable statute provided as follows:

A general direction in a will to pay all taxes imposed on account of a testator's death shall not be construed to include taxes imposed because of the testator's exercise, nonexercise, or release of a power of appointment unless the testator expressly manifests an intention that taxes so imposed be paid out of his or her estate.

MICH. COMP. LAWS ANN. § 700.133a(2) (West 2002) (repealed 2000). See *Coe*, 593 N.W.2d at 193.

174. *Coe*, 593 N.W.2d at 193. Because the will directed against apportionment, the will provision was held to be controlling even though no mention was made of the power of appointment.

175. See *supra* note 162 and accompanying text. Under the 2003 Uniform Act, the issue should be moot because the 2003 Uniform Act does not consider Sections 2006 and 2007 to be apportionment statutes. Of course, this conclusion, if ever tested, may be held erroneous.

176. See generally Litman, *supra* note 6.

177. Such technical fixups would be unnecessary if, as I recommend, Sections 2206–2207B were repealed. See *infra* note 178 and accompanying text.

178. Although Sections 2207A and 2207B are more enlightened than Sections 2206 and 2207

dent in the applicable instrument “specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.”¹⁷⁹ In contrast, Sections 2206 and 2207, which only allow a decedent to change the default rule by will, merely require that “the decedent directs otherwise in his will.”¹⁸⁰

The issue whether a decedent’s will has overridden the default rule of Section 2207A has generated substantial litigation, including cases arising under the earlier version of Section 2207A, which only required that “the decedent otherwise directs by will” to change the default rule. Several cases held that a direction in the residuary clause of a will to pay all taxes was not sufficient to override Section 2207A.¹⁸¹ In effect, state law rules of will construction were applied to determine the effectiveness of a will provision changing Section 2207A’s default rule.¹⁸² Resort to state law seems appropriate in such instances because state law was used to merely amplify the federal requirement that the will direct otherwise.¹⁸³

The recent case of *Eisenbach*¹⁸⁴ raises a more serious question regarding the preemptive effect of Section 2207A, specifically Section 2207A(a)(2), which provided and now provides as follows:

(2) Decedent may otherwise direct. Paragraph (1) [the default apportionment rule] shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.¹⁸⁵

Eisenbach involved a joint revocable trust of husband and wife that provided for a QTIP trust on the husband’s death and a separate trust over the wife’s property.¹⁸⁶ The joint revocable trust provided as

in that either a will or revocable trust can change the default rule, the following disturbing statement appears in the Joint Committee Explanation: “In addition, where a decedent lacks a will, there would be no right of contribution if the decedent specifically directs in a trust serving as a substitute for a will.” STAFF OF J. COMM. ON TAXATION, 105TH CONG., EXPLANATION OF PROPOSED FINANCE COMMITTEE AMENDMENT TO S. 2238, at 5 (Comm. Print 1988). The official legislative history of Section and 2207A and 2207B does not provide this statement-limitation on the use of revocable trusts.

179. I.R.C. § 2207(B)(a)(2) (2000).

180. *Id.* §§ 2206, 2207.

181. *See, e.g., In re Estate of Gordon*, 510 N.Y.S.2d 815 (Sur. Ct. 1986).

182. State statutes were also enacted. *See, e.g., VA. CODE ANN.* § 64.1-165.1(A)(2) (2007). New York now allows a will (but not a revocable trust) that “specifically directs otherwise” to change the default apportionment rule for QTIP property subject to New York estate tax. *See N.Y. EST. POWERS & TRUSTS LAW* 2-1.8(d-1)(1)(B) (McKinney 1998 & Supp. 2008).

183. *Cf. Green v. Finney (In re Estate of Coe Marital & Residuary Trusts)*, 593 N.W.2d 190 (Mich. Ct. App. 1999) (applying Michigan law to amplify Section 2207).

184. *Eisenbach v. Schneider*, 166 P.3d 858 (Wash. Ct. App. 2007).

185. *Id.* at 863 (emphasis omitted).

186. *Id.* at 859.

follows:

The Trustee shall pay out of principal, to the extent that this trust shall be included in the gross estate of either Settlor for the purposes of determining federal estate taxes or Washington estate taxes, a ratable share of such taxes determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor (after exemptions and deductions are taken) as determined for estate tax purposes by the authority assessing the tax.¹⁸⁷

When the wife (the surviving spouse) died, the trustee of her separate trust sought to collect the estate taxes caused by inclusion of the QTIP trust in the wife's gross estate.¹⁸⁸ The trustee of the QTIP trust argued that only ratable contribution was required based on the foregoing trust language.¹⁸⁹ The lower court held that ratable contribution was required because the decedent's intent should control, not total contribution, despite the language of Section 2207A, which required a specific indication to override contribution from the QTIP trust.¹⁹⁰ The appellate court agreed.¹⁹¹

Although *Eisenbach* may be read as not recognizing 2207A's preemptive effect, the case may be read as deferring to Section 2207A but construing (perhaps incorrectly) Section 2207A's "specifically indicates" language as satisfied when the decedent's intention on apportionment is clear.¹⁹²

187. *Id.* at 863–64 (emphasis omitted).

188. *Id.* at 862.

189. *Id.* at 863.

190. "To interpret Section 2207A to override the testators' intent because they failed to use magic words enacted after their testamentary documents had been drafted and signed would constitute a broad reach for a federal statute, especially where the federal government has nothing to gain from the interpretation." *Id.* at 864 (quoting from lower court).

191. The appellate court stated:

Congress amended § 2207A to require a settlor to specifically waive recovery, reasoning that "persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP." . . . The amendment was to ensure that the testator's intent effectively controlled. Nowhere in the legislation or in its legislative history is there any suggestion that a clear statement of testamentary intent regarding the allocation of the tax burden is to be displaced by the provisions of the statute.

Id.

192. Arguably, the decedent satisfied the specific indication requirement when she referred to ratable contribution if the "trust shall be included in the gross estate of [the] Settlor," because inclusion would be required under Section 2044 if her husband made a QTIP election and she was the surviving spouse. *Id.* at 651. Indeed, the specific indication requirement falls between the earlier standard of "otherwise" directing *see* I.R.C. § 2207A(b) (before amendment in 1997), and specifically mentioning the statute and perforce requires something less than specific reference. As such, the following legislative history should be read as merely an example of how the specific indication requirement can be met: "[T]he right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g.,

Indeed, it seems clear that 2207A would have controlled in *Eisenbach* had the trust been silent and the will provided that all estate taxes be paid from the residue.¹⁹³ Had *Eisenbach* involved the original version of 2207B, which required a specific reference to the section to change the default recovery rule, the trust provision seemingly would have been ineffective.¹⁹⁴ But 2207B now is in line with 2207A in requiring only a specific indication.

The 2003 Uniform Act raises more serious problems, assuming as this paper does, that specific federal statutes, including Section 2207A, preempt state law.¹⁹⁵ Section 3(1) of the Act provides as follows: "To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly."

Consider a direction in a will that "all taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate." The Uniform Act takes the position that this provision "satisfies the Act's requirement for an explicit mention of estate taxes and is specific and unambiguous as to what properties are to bear the payment of those taxes."¹⁹⁶

Does this direction comply with Section 2207A's requirement that the decedent specifically indicate that the default rule of Section 2207A not apply? Based on the reason for this requirement, this direction quite arguably does not comply with Section 2207A. Of course, if the 2003 Uniform Act's position—Section 2207A and the other statutes do not have preemptive effect—was correct,¹⁹⁷ then the issue should not arise.

IV. CONCLUSION

Unification of the law of wills and revocable trusts in the area of federal estate tax apportionment is far from complete despite the near

by a specific reference to QTIP, the QTIP trust, [26 U.S.C.] section 2044, or section 2207A)." H.R. REP. NO. 105-148, at 614 (1997).

193. The court referred to an earlier line of cases that held that general "pay all tax" clauses in a will did not apply to taxes attributable to Section 2044 inclusion. See, e.g., *In re Estate of Gordon*, 510 N.Y.S.2d 815 (Sur. Ct. 1986). Indeed, this was the holding in *Hollis v. Forrester (Ex parte Forrester)*, 914 So. 2d 855 (Ala. 2005): 2207A preempted former Alabama law. See *supra* text accompanying note 140.

194. But see *Myers v. Ellerbush*, 746 N.E.2d 408, 410 (Ind. Ct. App. 2001) (holding Section 2207B inapplicable because reimbursement was waived even though Section 2207B was not specifically mentioned as required by the statute at the time).

195. See *supra* note 105 and accompanying text.

196. 2003 UNIF. ACT § 3 cmt. Idaho provides model language for compliance. See IDAHO CODE ANN. § 15-3-1303(d) (Supp. 2007). Idaho also provides that appropriate will language controls even if the will is not probated. See *id.* § 15-3-1303(a)(1).

197. See *supra* note 103 and accompanying text.

unanimous rule of apportionment among the states.¹⁹⁸ Lack of uniformity is most evident regarding the ability of a decedent to change default rules on federal estate tax apportionment. The approaches are all over the lot: States that have enacted the earlier Uniform Acts and others only allow changes by will;¹⁹⁹ under the 2003 Uniform Act a revocable trust can be used to change the rules but only if a will has not otherwise done so.²⁰⁰ Still other states recognize the ability to change rules by revocable trusts even if there is a will provision to the contrary.²⁰¹

Another state law matter involves the lack of uniformity on conflict of laws issues.²⁰² Some situs (forum) states apply the federal estate tax apportionment rules in the state of domicile while others may apply their own rules on federal estate tax apportionment.²⁰³ As a result, federal taxes on wills and revocable trust property may or may not be ratably apportioned.²⁰⁴

Federal statutes on apportionment vastly complicate the area. Despite the 2003 Uniform Act's position,²⁰⁵ it seems clear that the applicable federal statutes preempt state law.²⁰⁶ Although the statutes adopt the principle of ratably apportionment, with the notable exception of Section 2207A,²⁰⁷ the statutes may conflict with applicable state apportionment rules regarding exoneration of charitable and marital beneficiaries, particularly if Section 2207B applies to revocable trusts.²⁰⁸

In addition, the federal statutes may conflict with state laws on changing default rules. For example, a decedent can change QTIP property by a will or a revocable trust but in many states only wills can change default rules. Alternatively, a decedent can change default rules under Section 2206 and 2207 only by will even though in the applicable state a revocable trust may also change the default rules.

198. Only a few states employ the burden on the residue rule. *See supra* note 30. And, even in those states, Section 2207B may compel apportionment for revocable trust property. *See supra* notes 146–48 and accompanying text.

199. *See supra* notes 42–43.

200. *See supra* note 40.

201. *See supra* notes 44–62 and accompanying text. Even if a revocable trust can be used to change default rules, will changes may be accorded greater latitude. *See supra* notes 63–74 and accompanying text.

202. *See supra* notes 75–94 and accompanying text.

203. *See id.*

204. Even if the situs state applies apportionment, it may only apply to domiciliaries. *See Isaacson v. Boston Safe Deposit & Trust Co.*, 91 N.E.2d 334 (Mass. 1950).

205. *See supra* note 103 and accompanying text.

206. *See supra* notes 104–43 and accompanying text. Several states, including those that have enacted Section 9 of the 1964 Uniform Act, recognize the preemptive effect of the federal statutes. *See supra* notes 42–43 and 101.

207. *See supra* note 136 and accompanying text.

208. Unlike Sections 2206 and 2207, which exonerate marital deduction but not charitable deduction property, Section 2207B exonerates neither as a general principle. *See supra* note 145.

Must this morass of confusion and disarray continue? I think not. One suggestion is to have either federal law or state law control the substantive issues involving federal estate tax apportionment instead of the current situation where both laws control some facets of federal estate tax apportionment. But which set of laws should control? When most states used a burden on the residue approach, it probably made sense for federal law to control the area to ensure apportionment.²⁰⁹ Today, when apportionment is the controlling principle in virtually all states, I think it makes more sense for state law to determine the burden of federal estate taxes. By deferring to state law on substantive federal estate tax apportionment issues, the Supreme Court's sensible views in *Riggs* would be carried to their logical conclusion: "Congress intended that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax" ²¹⁰

My solution would have state rules on federal estate tax apportionment exclusively control for both probate property, which was the *Riggs* results, and for all nonprobate property.²¹¹ In effect, state law apportionment rules would provide all default rules.²¹² Unlike the federal reimbursement-type statutes, which first require payment of the estate tax

209. Randolph Paul, acting in his capacity as Tax Advisor to the Secretary of Treasury, made this suggestion in 1942:

Federal apportionment statute.—At the present time there is no provision apportioning the estate-tax liability among the beneficiaries of the estate other than a provision relating to life insurance. There is no sound basis for having an express provision apportioning liability in regard to life insurance without similar provisions covering other transfers subject to the estate tax. It is therefore suggested that there be incorporated in the estate tax an apportionment provision which would apportion the liability for tax in those cases in which the decedent did not himself prescribe a method of apportionment.

Hearings on Revenue Revision of 1942 Before the H. Comm. on Ways & Means, 77th Cong. (1942), reprinted in 33 U.S. REVENUE ACTS 1909–1950 THE LAWS, LEGISLATIVE HISTORIES, & ADMIN. DOCUMENTS 94 (Bernard D. Reams, Jr. ed., 1979) (statement of Randolph Paul, Tax Advisor to Secretary of Treasury).

He later observed that federal absorption of the area would be necessary if states failed to enact apportionment systems. See PAUL, *supra* note 114, § 13.54, at 465. Because virtually all states now have apportionment systems, an overarching federal system is unnecessary. A more recent proposal would leave states to determine federal estate taxation rules for probate property but have federal law expanded to cover all nonprobate transfers. See Litman, *supra* note 6, at 397.

210. *Riggs v. del Drago*, 317 U.S. 95, 97–98 (1942).

211. A state exclusivity approach—the rules would be governed by state law, rather than the piecemeal approach of state and federal substantive laws—was actually suggested in 1942. See Edmond N. Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 813 (1942).

212. Hopefully, the few states that continue to use the antiquated burden on the residue rule, see *supra* note 30, will be persuaded to change to an enlightened method of apportionment. Because states would be free to decide whether ratable contribution should be employed or whether contribution would be made from the residuary property under a will or revocable trust

and then recovery, the apportioned tax would be initially allocated to all nonprobate transfers. Of course, implementation of state control would involve the repeal of Sections 2206–2207B.²¹³ The collection of the apportioned taxes that were formerly governed by the federal right of reimbursement rules simply would be folded into the existing collection for other nonprobate and probate transfers.²¹⁴

Under my approach two new federal statutes would replace the repealed federal statutes to ensure uniformity among the states. The first statute would eliminate conflict of laws disputes when a decedent had property outside the domiciliary state. Specifically, the federal statute would mandate that the law of decedent's domicile govern the substantive rules on apportionment wherever the property is located²¹⁵ and that collection of apportioned taxes from a fiduciary or beneficiary be authorized without regard to domicile.²¹⁶ The net effect of these steps—state domiciliary law controls the substantive rules for federal estate tax apportionment but federal law ensures the effectuation of these rules—would be the elimination of both the federal and state conflicts that presently exist with federal estate tax apportionment.

The second federal statute would address the other area of disunity: the ability (or inability) to change default rules by revocable trusts. Consistent with the view that revocable trusts are the functional equivalent of wills, I would propose a federal statute that allows revocable trusts to do exactly what can be done under a will in changing a state's default rules. Indeed, this is the approach under the 2003 Uniform Act. But unlike the Uniform Act, the federal statute would allow changes to be made by revocable trusts even if there were a conflicting will provision on federal estate tax apportionment. My bright-line rule would simply provide that the latest instrument controls, treating the latest will or revocable trust as expressing the decedent's final intent.²¹⁷

I recognize that states traditionally provide rules regarding wills

after initially apportioning taxes against the will and revocable trust, *see supra* note 25, only virtual uniformity may result.

213. Section 2205 could also be repealed. States might wish to follow the 2003 Uniform Act's approach, which apportions the incremental federal estate tax on Section 2044, rather than the average tax, including its provision on coordination with apportionment otherwise based on average rates. *See supra* note 137 and accompanying text.

214. *See, e.g.*, 2003 UNIF. ACT § 9 (Collection of Estate Tax by Fiduciary).

215. Professor Scoles suggested this federal legislation for property not governed by Section 2206 and 2207. *See Scoles, Apportionment, supra* note 92, at 310. Because those sections would be repealed if my solution were adopted, no exception would be necessary.

216. This provision should eliminate any collection, enforcement, and jurisdictional problems in non-domiciliary states. I am assuming that property will be situated somewhere within the United States. Hopefully treaties could deal with property situated outside the United States.

217. Contemporaneously executed pour over wills and revocable trusts could be construed as one instrument.

and revocable trusts and that federal statutes on the matter, including a statute to eliminate the conflict of laws issues, would be unusual.²¹⁸ The countervailing reasons for these federal statutes, however, seem persuasive. In one fell swoop, the rules for wills and revocable trusts in the federal estate tax apportionment arena would become virtually uniform.

218. See generally Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991). I doubt, however, there would be serious constitutional objection to federal statutes that ensure the fair and efficient collection and payment of the federal estate tax.