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The Proposed Uniform Estate Tax Apportionment Act

In this Article the authors examine in detail the practical implications of the new Uniform Estate Tax Apportionment Act. While concluding that the act is not as yet in completely acceptable form, they concede that insofar as it might spur Congress to enact legislation comprehensively dealing with the problem on the federal level, and serve as a guide to future state attempts at apportionment legislation, the act provides a point of departure toward an adequate solution.

Eugene F. Scoles*

Richard B. Stephens**

THE classic prank of outfumbling a friend for the restaurant check has a grim counterpart in the area of state and federal death taxes. Dutch treat is not the invariable rule, and a beneficiary may find that his supposed interest in the decedent's estate has been drastically reduced, or even eliminated, if he is required to pick up the entire tax tab. The subject of this Article is that area of the law that determines where the actual financial burden of death taxes shall fall and, in particular, the proposed Uniform Estate Tax Apportionment Act.

Death taxes that are imposed upon the one who succeeds to property upon the death of another, the familiar state inheritance taxes,¹ raise no general apportionment problem although they may present a question of proper allocation of the tax burden among several persons who receive interests in the same property.² However, some states impose estate taxes³ or supplementary estate taxes,⁴ and the federal death tax is an estate tax. Such taxes on the transmission of property from the dead to the living, as opposed to taxes on succession, are not self-apportioning. Under estate tax

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1. E.g., ILL. REV. STAT. ch. 120, §§ 375-403 (1957); MINN. STAT. § 291 (1957).

2. First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943).

3. E.g., FLA. STAT. § 198 (1957).

4. E.g., ILL. REV. STAT. ch. 120, § 403(a) (1957); MINN. STAT. § 291.34 (1957).

statutes the question that arises is: Whose interest is to be diminished by the amount of tax that must be paid? This is the question the proposed Uniform Act seeks to answer; but before the need for such a statute can be considered or the proposed statute can be appraised it is necessary to examine present rules of law that bear on this question.

Rules concerning the apportionment of estate taxes emerge from three sources: the Internal Revenue Code, will provisions, and state statutes and judicial decisions. Each of these sources will be explored briefly.

I. THE PRESENT APPORTIONMENT RULES

(1.) *Federal statute*

The Internal Revenue Code does not, and probably cannot, establish rules for the apportionment of *state* estate taxes. 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.⁵

Insurance Proceeds. Section 2206⁶ of the Internal Revenue Code of 1954 provides that, in general, beneficiaries of insurance on the decedent's life are required to contribute proportionately to the payment of the federal estate tax, unless the decedent makes a contrary direction in his will.

The contribution is required only with respect to insurance proceeds that form a part of the decedent's gross estate, which is a realistic recognition of the proposition that the recipient should not be called upon to bear any part of the tax burden if insurance proceeds do not in fact affect the amount of the tax. Moreover, the Treasury recognizes⁷ that statutory exemption of the proceeds

5. The discussion of these rules is adapted from the forthcoming book: STEPHENS & MARR, *FEDERAL ESTATE AND GIFT TAXES* (1959).

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

7. Letter Ruling, April 9, 1946, P-H FED. EST. & GIFT TAX SERV. ¶ 122-064 (1959).

of National Service Life Insurance policies from the claims of creditors⁸ relieves the beneficiaries of such policies from contribution to the tax under this section, even though the proceeds of the policies can be included in the gross estate in determining the amount of the tax.

Subject to a qualification concerning proceeds passing to a surviving spouse which is discussed below, if section 2206 applies, a formula determines the amount of contribution that the executor can exact from a beneficiary. He can collect an amount that bears the same relation to the total tax paid as the proceeds included in the gross estate and received by the beneficiary bear to the taxable estate plus the specific exemption. This computation can be expressed as follows:

$$\frac{\text{proceeds included in gross estate}}{\text{taxable estate plus exemption}} \times \text{total tax} = \text{beneficiary's share of tax}$$

If there are several beneficiaries, the share of the tax burden for each is determined with reference to his share of the proceeds.⁹

Insurance proceeds passing to a surviving spouse are the subject of a special rule that takes into account the marital deduction. This is further statutory recognition of the proposition that if insurance proceeds do not in fact affect the amount of the tax the recipient should not be called upon to bear any part of the tax burden. The last sentence of section 2206 makes it clear that if insurance proceeds that pass to the surviving spouse fully qualify for the marital deduction,¹⁰ the spouse is not required to contribute at all to the payment of the tax with respect to such insurance.

A significant point here, however, is the manner in which it is to be determined whether such proceeds qualify fully. Of course, if a marital deduction for the proceeds is denied by the terminable interest rule,¹¹ the proceeds are taken into account in determining the amount of the surviving spouse's contribution to the tax just as if they passed to someone other than the surviving spouse. On the other hand, if the proceeds meet the tests of the marital deduc-

8. 71 Stat. 122 (1957), 38 U.S.C. § 3001 (Supp. V 1958).

9. Probably, credits against the tax reduce "total tax" for this purpose. See *United States Trust Co. v. Sears*, 29 F. Supp. 643, 649 (D. Conn. 1939); *In re Blumenthal's Estate*, 182 Misc. 137, 143, 46 N.Y.S.2d 688, 692 (Surr. Ct. 1943), *aff'd per curiam*, 47 N.Y.S.2d 652 (Sup. Ct. 1944).

10. INT. REV. CODE OF 1954, § 2056.

11. *E.g.*, *Eggleston v. Dudley*, 154 F. Supp. 178 (W.D. Pa. 1957), *rev'd on other grounds*, 257 F.2d 398 (3d Cir. 1958).

tion provision as regards the nature of the interest that passes to the spouse, the question arises whether they are within the *maximum* marital deduction. To the extent that they exceed the maximum, they are again to be taken into account in determining the spouse's contribution to the tax. But for the purpose of this feature of section 2206, the insurance proceeds can be viewed in isolation. That is, insurance proceeds are treated as in excess of the maximum marital deduction *only* if the proceeds alone exceed the maximum; other property passing to the spouse, which might be viewed as absorbing a part of the maximum, can be disregarded for this purpose.¹² In accordance with these principles, insurance proceeds included in the gross estate and passing to a surviving spouse in a way not to qualify for the marital deduction become the "proceeds included in gross estate" in the above formula for determining the spouse's contribution to the tax.

As indicated at the outset, a contrary provision in a will overrides this contribution section. The statute has expressly recognized that a contrary will provision is controlling only since 1942.¹³ But earlier, in holding a particular will provision insufficient to overcome the statutory prescription of contribution, one court at least indicated that an explicit will provision against payment of any part of the tax by the insurance beneficiary would prevail over the statute.¹⁴

Although the effect of a will provision is now settled by the statute itself, the problem of the interrelationship of this section and rules of local law remains. It has been held that section 2206 has the effect of imposing a *duty* on the executor to collect a part of the tax from insurance beneficiaries when section 2206 authorizes such collection.¹⁵ Although section 2206 does not authorize such collection in the face of a contrary *will* provision, the open question is whether when the will is silent it authorizes such collection despite a contrary rule of local law. The statute makes no express exception in such case. Although it has been long recognized that section 2205 does not conflict with provisions of local law calling for apportionment, the Supreme Court once intimated that it might view differently the federal contribution rules on insurance and power-of-appointment property which do not pass through the hands of the executor.¹⁶ Is a state statute or established principle against apportionment in conflict with the federal statute and therefore invalid?

12. S. REP. No. 1013, 80th Cong., 2d Sess. (1948).

13. Revenue Act of 1942, § 404(b), 56 Stat. 798, 945.

14. *United States Trust Co. v. Sears*, 29 F. Supp. 643, 646 (D. Conn. 1939).

15. *Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136, 98 N.E.2d 918 (1951).

16. *Riggs v. Del Drago*, 317 U.S. 95, 102 (1942).

In one state, insurance proceeds passing to a surviving spouse and qualifying for the full marital deduction have been subjected to a part of the tax burden in accordance with the state's apportionment statute.¹⁷ This might appear to be a recognition of the proposition that a state apportionment statute is just as effective as a will to override the contribution principles of section 2206. But the case is not a square holding on the point. The court said the state and federal statutes were not in conflict because, as expressly provided in section 2206, the contribution rule of that section does not apply "to such proceeds except as to the amount thereof in excess of the aggregate amount of the marital deductions allowed."¹⁸ Under this view, it might take a will provision to free a surviving spouse from contribution as regards insurance proceeds that do not qualify for the marital deduction, but a state is free by statute to make its own contribution rules on insurance proceeds that do qualify. This conclusion is at odds with the underlying policy of the federal apportionment provisions to free from the tax burden interests that because of the marital deduction do not contribute at all to the amount of the tax imposed. It may also be at variance with the implication in the Supreme Court's opinion in *Riggs v. Del Drago*¹⁹ that with respect to two classes of non-probate property Congress has occupied the apportionment field.²⁰ Even though the language in question came into the statute after the *Riggs* opinion was written, it is unlikely that Congress intended less than full direction as to the nonprobate assets covered.

The contribution rules of section 2206 do not operate to restrict governmental efforts to *collect* the tax;²¹ when applicable, they simply establish rights and obligations among the persons interested in the estate.

Appointive Property. Section 2207²² of the Internal Revenue

17. *Weinberg v. Safe Deposit & Trust Co.*, 198 Md. 539, 85 A.2d 50 (1951).

18. *Id.* at 554-55, 85 A.2d at 57.

19. 317 U.S. 95, 99, 102 (1942).

20. See also Powell, *Ultimate Liability for Federal Estate Taxes*, 1958 WASH. U.L.Q. 327, 330.

21. Treas. Reg. §§ 20.2205-1, 20.2206-1 (1959).

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

Code of 1954 provides that, in general, one who has or receives property over which the decedent had a power of appointment must contribute to the payment of the tax if such property is included in the decedent's gross estate. If the property is included, it is immaterial whether the acquisition was by reason of the decedent's exercise, nonexercise, or release of a power of appointment.²³ Again, however, a contrary provision in the will prevails.

The same basic formula is provided for determining the amount of contribution that may be enforced as is provided with respect to beneficiaries of insurance policies under section 2206. In other words, the amount of the tax to be borne by one acquiring power-of-appointment property is determined as follows:

$$\frac{\text{amount of such property in gross estate}}{\text{taxable estate plus exemption}} \times \text{total tax} = \text{recipient's share of tax}$$

If there are several persons acquiring appointive property, each one bears a portion of the tax burden determined as above with respect to the property received by him.²⁴

As in the case of insurance proceeds,²⁵ this section also makes special provision for property acquired by a surviving spouse; again, the effect of the marital deduction is recognized. If the property subject to a power of appointment *and* insurance proceeds includible in the gross estate and passing to the surviving spouse in a manner that qualifies for the marital deduction are within the amount of the maximum marital deduction,²⁶ such interests passing to the spouse bear no part of the estate tax burden. However, if such insurance proceeds *and* the appointive property exceed in value the maximum marital deduction, the surviving spouse does bear a part of the tax burden on appointive property determined with regard to such excess. In other words, taking into account both section 2206 and section 2207, the maximum marital deduction is utilized first to offset insurance proceeds and then, to the extent not so utilized, to offset appointive property.

such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

23. INT. REV. CODE OF 1954, § 2041 provides the rules for such inclusion.

24. Probably, credits against the tax reduce "total tax" for this purpose. See *United States Trust Co. v. Sears*, 29 F. Supp. 643 (D. Conn. 1939); *In re Blumenthal's Estate*, 182 Misc. 137, 143, 46 N.Y.S.2d 688 (Surr. Ct. 1943), *aff'd per curiam*, 47 N.Y.S.2d 652 (Sup. Ct. 1944).

25. See discussion at text accompanying notes 8-12 *supra*.

26. INT. REV. CODE OF 1954, § 2056(c).

Any excess not so offset goes into the numerator of the fraction set out above to determine the tax burden to be borne by the surviving spouse.

Just as under the insurance section, it is clear that a will provision can overcome the apportionment or contribution rule for appointive property which otherwise is provided by this section. Again, however, the effect of a contrary provision of local law is uncertain; the problem here is the same in principle as that suggested in the discussion of section 2206, above. Similarly, section 2207 does not operate to restrict governmental efforts to collect the tax;²⁷ when applicable, it simply establishes rights and obligations among the persons interested in the estate.

Other Federal Provisions. Pursuant to the general scheme for prompt collection, Congress requires the "executor" to pay the federal estate tax.²⁸ The term executor is defined to include an administrator and, in circumstances in which no qualified executor or administrator is acting, "any person in actual or constructive possession" of any of the decedent's property.²⁹ The obvious objective to facilitate and accelerate collection of the tax is affirmed in section 2205 of the Code as follows:³⁰ "[I]t being the purpose and intent of this chapter [the estate tax 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." These provisions must be viewed only as an effort to establish a focal point for collection; to obviate the need to collect fragmentary portions of the tax from beneficiaries of the estate, and for collection purposes, to make immaterial the source or nature of the funds that are used for payment.³¹

Collection and payment of the tax are problems separate and distinct from that of the ultimate internal rights and obligations of the beneficiaries among themselves. The statutory language from section 2205 quoted above, a part of a section that has aptly

27. Treas. Reg. § 20.2205-1 (1959).

28. INT. REV. CODE OF 1954, § 2002.

29. INT. REV. CODE OF 1954, § 2203.

30. INT. REV. CODE OF 1954, § 2205. The section provides in full:

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 other 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.

31. See also INT. REV. CODE OF 1954, § 6324(a).

been called "a challenging study in ambiguity,"³² seems to recognize the estate tax as a general charge against the estate payable, in the absence of specific provisions such as those relating to insurance proceeds and appointive property, out of the residuary estate or, if necessary, out of particular bequests in accordance with the usual rules on abatement. However, the section clearly does not fasten the burden of the tax upon the residuary legatee. This burden is generally determined by state law. Consistent with this view, section 2205 further provides that any rights to reimbursement which arise out of the tax collecting process are enforceable against the person who should bear the final burden of the tax. If the internal allocation of the burden of the tax among the beneficiaries is not properly made by the executor in accordance with the applicable state law or the express federal provisions, beneficiaries whose interests have been improperly diminished may be entitled to reimbursement from the estate or from other beneficiaries. While such possible rights to reimbursement are *recognized* in section 2205, specific rights are not *established* by that section in the way they are with respect to limited types of property by sections 2206 and 2207. Thus, when those sections are inapplicable, rules of law other than the federal provisions determine the question of apportionment. But when such rights of reimbursement *exist* by nonfederal law, they become *enforceable* by federal law under section 2205.

(2.) Will Provisions

Congress leaves it up to the decedent to say by will, if he wishes, what interests in the estate are to be diminished by the tax.³³ A decedent can specify, for example, that the entire tax is to be paid out of property otherwise specifically bequeathed to a named beneficiary, and, if the value of such beneficiary's interest is equal to or greater than the amount of the tax, no interest other than that of the named beneficiary will be reduced by payment of the tax. In fact, in the case of such a will provision, if the tax were actually paid out of the residuary estate and the specific legacy were distributed intact to the named beneficiary, section 2205 recognizes that the residuary legatees would have a right to reimbursement from the specific legatee which right is enforceable as a claim under a federal statute.

(3.) State Law

Early estate taxes were small as compared to self-apportioning inheritance taxes. The tax upon the estate of a decedent was

32. 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 13.54, at 775 (1942).

33. This is true even as regards interests otherwise subject to the special rules of INT. REV. CODE OF 1954, §§ 2206, 2207.

originally viewed, like any other transfer tax or administration expense, as a part of the cost of administration. By the time estate taxes became appreciable, the common law rule had become fairly well established that taxes upon the estate, as distinguished from inheritance taxes on the recipient, were payable from the residue of the probate estate along with other administration expenses.

As estate taxes became more significant, it became apparent that when not anticipated the common law rule on payment could cause substantial distortion of the testator's plans for distribution of his property. Probably the greatest distortion under the common law rule occurs in cases in which nonprobate assets are included in the estate for tax purposes; in such cases the residuary legatees bear the entire burden of taxes imposed upon the estate, including tax imposed with respect to the nonprobate transfers. Many testators unwittingly provided for the members of their immediate family by leaving them the residuary estate. As a consequence, the burden of the unforeseen taxes often fell upon the widow and children or other members nearest to the decedent.³⁴

Dissatisfaction with the so-called common law rule placing the burden of the federal estate tax upon the residuary was first reflected in legislation enacted in New York in 1930. The New York Decedents' Estate Law, section 124, adopted a new policy approach to the allocation of estate taxes. Under this statute, the burden of federal estate tax is "equitably prorated" among all of the beneficiaries interested in the assets of the estate that were subject to tax in an amount proportionate to their beneficial interests, unless the decedent otherwise directed. This provision for equitable proration or apportionment of the federal estate tax recognized that, if the decedent does not express his intention in regard to an allocation of the tax burden, there is less chance of distortion of his testamentary scheme if all beneficiaries equitably share this burden.

Apparently agreeing with New York as to the preferable policy in the absence of testamentary direction, several states adopted statutes similar to the New York statute.³⁵ Since the Supreme Court's decision in *Riggs v. Del Drago* in 1942, the trend toward the adoption of apportionment by statute has accelerated.³⁶ There are now sixteen states that have statutes providing for apportion-

34. See DECEDENTS' ESTATES COMM'N OF NEW YORK, COMBINED REPORT 338 (Reprint ed. 1930).

35. The states have not agreed on whether the statutory apportionment rule should apply to all assets subject to tax or only to nonprobate assets. See Powell, *supra* note 20, at 332.

36. *Ibid.* See also Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261, 263 (1955).

ment of the federal estate tax to some extent, several such statutes applying, for example, to nonprobate assets only.³⁷ Alabama, on the other hand, has a statute providing that the tax shall not be apportioned in the absence of testamentary direction,³⁸ which may very well be a legislative safeguard against the problem of retroactivity, a common incident of judicial adoption of apportionment. Two states, Maine and Florida, adopted³⁹ and then repealed⁴⁰ general apportionment statutes; the reason for such repeal is not apparent.

Minnesota has never had a general apportionment statute. However, at one time a statutory provision⁴¹ required apportionment of the additional state estate tax,⁴² which supplements the state inheritance tax. The federal tax continued to be a charge against the residuary estate,⁴³ and it was pointed out that Minnesota was "in the anomalous position of apportioning the state estate tax among the beneficiaries but charging the residuary estate with the entire federal tax."⁴⁴ The anomaly was removed in 1951 when the apportionment rule was replaced by a flat prohibition against apportionment of the state tax, unless directed by the decedent's will.⁴⁵

In addition to the statutory development in this area, several states by judicial decision have espoused the apportionment principle.⁴⁶ Such decisions generally rest upon the equitable doctrine

37. ARK. STAT. § 63-150 (Supp. 1957) (adopted 1943); CAL. PROB. CODE §§ 970-77 (Deering Supp. 1957); CONN. GEN. STAT. §§ 2075-81 (1949); DEL. CODE ANN. tit. 12, §§ 2901-06 (1953) (adopted 1946); MD. ANN. CODE art. 81, § 162 (1957) (adopted 1937, applicable to nonprobate assets only); NEB. REV. STAT. § 77-2108 (Supp. 1955) (adopted 1949); NEV. REV. STAT. § 150.290 (1957) (adopted 1955); N.H. REV. STAT. ANN. §§ 88:1-4 (1955) (adopted 1943; applicable to nonprobate assets only); N.J. REV. STAT. §§ 3A:25-31 (1953) (adopted 1950; applicable to nonprobate assets only); N.Y. DECED. EST. LAW § 124 (adopted 1930); ORE. REV. STAT. § 113.050 (Supp. 1957) (adopted 1949; relating only to surviving spouse's share); PA. STAT. ANN. tit. 20, § 881 (Purdon Supp. 1958) (adopted 1937); TENN. CODE ANN. § 30-1117 (1956) (adopted 1943); TEX. REV. CIV. STAT. art. 3683(a) (1952) (adopted 1947; applicable to surviving spouse's share); VA. CODE ANN. §§ 64-150 (1956) (adopted 1946).

In addition the following states apportion only state taxes: KAN. GEN. STAT. ANN. § 79-1501(b) (1949); N.D. REV. CODE § 57-3723 (1943); R.I. GEN. LAWS ANN. ch. 44, § 22-14 (1956).

38. ALA. CODE tit. 51, § 449 (Supp. 1953) (adopted 1951).

39. Me. Laws 1945, ch. 269; Fla. Stat. § 734.041 (1955) (adopted 1949).

40. Me. Laws 1947, ch. 220; Fla. Stat. § 734.041 (1957).

41. MINN. LAWS 1931, ch. 332, § 7.

42. MINN. STAT. § 291.34 (1957).

43. *In re Estate of Gelin*, 229 Minn. 516, 40 N.W.2d 342 (1949).

44. 34 MINN. L. REV. 704, 705 (1950).

45. MINN. STAT. § 291.40 (1957). A recent decision in the federal courts indicates that in Minnesota a will provision may be effective to impose upon the recipient of nonprobate assets liability for the federal estate tax. *United States v. Goodson*, 253 F.2d 900 (8th Cir. 1958).

46. *E.g.*, *Louisville Trust Co. v. Walter*, 306 Ky. 756, 207 S.W.2d 328 (1948); *McDougall v. Central Nat'l Bank*, 157 Ohio St. 45, 104 N.E.2d 441 (1952),

that all participants in a fund should share the common expenses of the fund. The result is that the states divide about equally on the question of apportionment. A bare majority have adopted by statute or decision the doctrine apportioning in whole or in part the federal estate tax among the beneficiaries of the estate. Of the remaining states, a few have expressly adhered by judicial decision to the so-called common law approach;⁴⁷ in others the cases are unclear or the question has not been raised.⁴⁸

This diversity of approach and the present-day mobility of the American people, which creates multi-state factors in estates, establish the need for a uniform apportionment rule throughout the United States. The need has long been recognized.⁴⁹ Despite repeated suggestions that the best way to establish a uniform presumption in all of the states is by way of a provision in the Internal Revenue Code, Congress has failed to act and the Internal Revenue Service has not pressed for enactment of the needed provision. In view of the need and of the failure of Congress to act, this matter calls for uniform state action. It is therefore a particularly appropriate subject for consideration by the National Conference of Commissioners on Uniform State Laws. Whether the proposed act is an adequate answer to the need can only be appraised by a close study of its specific proposals.

II. ANALYSIS OF THE PROPOSED UNIFORM ACT

In August, 1958, after consideration in its committees over a long period of time,⁵⁰ the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states the Uniform Estate Tax Apportionment Act.⁵¹

explained in Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695 (1954), *cert. denied*, 349 U.S. 911 (1955), *rehearing denied*, 349 U.S. 948 (1955). The cases are collected in Powell, *supra* note 20, at 334-35 n.14. See also Sutter, *Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention*, 51 MICH. L. REV. 53 (1952).

47. *E.g.*, First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943); *In re Estate of Gelin*, 229 Minn. 516, 40 N.W.2d 342 (1949).

48. *E.g.*, Central Trust Co. v. Burrows, 144 Kan. 79, 58 P.2d 469 (1936) (rejecting apportionment under an interpretation of the federal statute later repudiated by the Supreme Court in *Riggs v. Del Drago*, 317 U.S. 95 (1942)); *Estate of Rosalie Cahn Morrison*, 24 T.C. 965, 969 (1955) (reflecting absence of specific authority under Mississippi law). See generally Lauritzen, *Apportionment of Federal Estate Taxes*, 1 TAX COUNSEL Q. 55, app. A, 96-135 (1957).

49. See PAUL, *op. cit. supra* note 32, at 466; Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 813 (1943); Scoles, *supra* note 36, at 309; Note, *Proposal for the Apportionment of the Federal Estate Tax*, 30 IND. L.J. 217 (1955).

50. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 133, 410, 413 (1952) [hereinafter referred to as HANDBOOK followed by distinguishing date]; HANDBOOK 92, 287 (1953); HANDBOOK 87, 100, 247, 249 (1956); HANDBOOK 88 (1957).

51. HANDBOOK 131, 132, 219, 221 (1958).

The act was approved by the American Bar Association in the same month.⁵²

The Commissioners have proposed a *general* apportionment statute. Preliminary question can be raised whether instead the act should be limited in its application to *nonprobate* assets. Controversy on this point alone may be an obstacle to wide adoption of the proposed act. Nevertheless, for the purpose of the ensuing discussion the principle of *general* apportionment is accepted. A seriatim analysis of the sections of the act follows.

Section 1 (Definitions). This section defines terms used in the act, and some of its provisions will be discussed in the course of the discussion of the operative sections.

Section 2 (Apportionment). Under this section the financial burden of state and federal death taxes is spread proportionately among persons interested in a decedent's estate, *unless* there is a contrary provision in the will. A desirable feature of this section is that it adopts the same general method of apportionment as that prescribed by the federal statutory provisions relating to insurance and appointive property which is one method of avoiding conflict with federal provisions. The act provides a formula for determining each person's part of the burden. The value of his interest in the estate over the value of the interests of all persons interested in the estate is the fraction to be applied to the total tax to establish the portion of the tax to be charged against a person's interest. This is the same approach that is taken under the state statutes that are phrased to achieve "equitable" apportionment.⁵³

Taking into account the definition provisions, it is clear that there is to be included in determining the value of a person's interest the value of property he is to receive or has received from or by reason of the death of the decedent to the extent that such property is included in the decedent's estate for the purpose of *the* tax being apportioned. The act applies to both state and federal taxes, but the last sentence of section 2 indicates that the amount to consider in determining a person's interest is the value used in computing the tax being apportioned. If both a state and a federal tax are to be apportioned the computation for the two taxes may differ because of different rules on includibility⁵⁴ or possible differences in valuation.

The status of interest and penalties on the tax is conveniently

52. 44 A.B.A.J. 1122 (1958). The proposed act is set out as an appendix to this article.

53. E.g., N.Y. DECED. EST. LAW § 124; PA. STAT. ANN. tit. 20, § 884 (Purdon 1956).

54. E.g., compare INT. REV. CODE OF 1954, § 2040, with MINN. STAT. § 291.01(3) (1957), and ILL. REV. STAT. ch. 120, § 375(5) (1957).

clarified by the definition in section 1 of the "tax" that is to be apportioned. Although there may be an exception as to method under section 3, discussed below, interest and penalties are to be apportioned as a part of the tax. This is consistent with Internal Revenue Code sections⁵⁵ that provide for collection of interest and penalties "in the same manner as taxes" but which without the express provision in the proposed act would leave room for argument that interest and penalties are not "tax," even though *collected* as such, and not subject to apportionment.

The treatment of interest and penalties was one of the uncertain matters under the early New York statute,⁵⁶ and such uncertainty with its attending threat of litigation has been urged as a basis for rejecting the doctrine of apportionment.⁵⁷ The problem is not confined to apportionment of the tax but extends also to accounting between principal and income as to both receipts and expenses. On the receipts side, the question is whether receipts from property that is sold to pay interest or penalties are properly credited to income or principal. On the expenses side, the question is whether the payments themselves are properly charged against principal or income. The Uniform Principal and Income Act does not expressly answer these questions, but they are answered in some states by detailed statutory provisions⁵⁸ or by case law.⁵⁹ The New York apportionment statute treats interest as tax and as a charge against principal.⁶⁰ At the same time, in New York the income earned during the period of administration by assets that are used to pay debts and taxes is credited to the income beneficiaries.⁶¹ This seems inequitable and may be a circumstance in which under section 3(b) of the proposed act, which has no counterpart in the New York act, the court could vary the apportionment of interest to treat it as a charge against income.⁶²

The literal terms of section 2 of the proposed act and the comments of the draftsmen on this section indicate that "the right to

55. INT. REV. CODE OF 1954, §§ 6601(f), 6659.

56. See, e.g., *In re Manville's Will*, 102 N.Y.S.2d 530 (Surr. Ct. 1950); *Matter of Reid*, 193 Misc. 154, 79 N.Y.S.2d 248 (Surr. Ct. 1948); *In re Jamison's Will*, 272 App. Div. 434, 71 N.Y.S.2d 172 (Sup. Ct. 1947); *In re Chamber's Estate*, 54 N.Y.S.2d 88 (Surr. Ct. 1945).

57. Fleming, *Apportionment of Federal Estate Taxes*, 43 ILL. L. REV. 153, 162, 169 (1948).

58. E.g., FLA. STAT. § 733.01 (1957); ILL. REV. STAT. ch. 30, § 163 (1957).

59. *Proctor v. American Sec. & Trust Co.*, 98 F.2d 599 (D.C. Cir. 1938); *Old Colony Trust Co. v. Smith*, 266 Mass. 500, 165 N.E. 657 (1929); *City Bank Farmers Trust Co. v. Taylor*, 53 R.I. 126, 163 Arl. 734 (1933); see SCOTT, TRUSTS § 234.4 (2d ed. 1956).

60. N.Y. DECED. EST. LAW § 124(3).

61. N.Y. PERS. PROP. LAW § 17(b); cf. *In re Harjes' Estate*, 170 Misc. 431, 10 N.Y.S.2d 627 (Surr. Ct. 1939).

62. Presumably the equitable power under § 3(b) overrides § 6 as well as § 2.

alter or omit apportionment, whether of property passing under a will or *inter vivos*, [can] be exercised by will *only*." There are several reasons why this is a controversial rule. It can be attacked on policy grounds, and in some circumstances its application is uncertain. Does it foreclose all *inter vivos* control over apportionment? Does it prevent a transferor from giving an *inter vivos* donee immediate assurances that he will never be called upon to share the estate tax burden? Does it leave an *inter vivos* donee in a position where he may be subjected to more than a statutory share of the burden of estate taxes? Does it affect apportionment of the tax within a fund? These questions should be reviewed briefly.

First, it is difficult to find a policy reason against permitting the settlor of a lifetime trust to condition his grant by the requirement that *all* taxes on his estate be paid out of the trust fund to the extent that the fund is adequate. The provision would be unusual but, for example, one transferring *inter vivos* a substantial share of his estate to *some* of his children might wish to be sure that what he kept would go intact to *another* child, perhaps an incompetent for whom he was providing during his life.⁶³ Under the proposed act, it seems that such a provision would not be honored, for it would be an attempt to alter the statutory apportionment rule other than by will. Such a provision should probably be recognized. If second thoughts prompted a reduction of the trust's share of the tax and there were obstacles to direct alteration of the trust provisions, the burden could be reduced indirectly by bequests to the trust. In fact, a testamentary assumption of the tax burden could well be construed as a bequest to the trust beneficiaries of the amount of the assumed tax.

Second, no policy reason is discernible against permitting the settlor of a lifetime trust to assure its beneficiaries that they will not have to bear any part of the burden of taxes on his estate.⁶⁴ Suppose a person places property in trust reserving the right to the income for ten years and giving the remainder to his son or his son's estate. For that period the son does not know whether he will receive the remainder intact or the remainder reduced by a share of the estate tax, for the settlor's death within the ten year period would leave the trust in the settlor's estate,⁶⁵ and the pro-

63. Such a provision would not be uncommon in a pourover trust, transferring substantially all the assets of the estate owner. A cautious draftsman would probably include a provision authorizing the trustee to pay such estate taxes to avoid litigation over power as well as the question whether a will provision could "reach" the trust assets. See Fleming, *supra* note 57, at 167; cf. *In re Harbord's Will*, 197 Misc. 760, 95 N.Y.S.2d 407 (Surr. Ct. 1950), *aff'd mem.* 281 App. Div. 850, 119 N.Y.S.2d 229 (Sup. Ct. 1953).

64. He cannot of course assure them against the possibility of statutory liens. E.g., INT. REV. CODE OF 1954, § 6324(a).

65. INT. REV. CODE OF 1954, § 2036.

posed act would fasten part of the estate tax liability on the son unless the settlor's will, which can be changed until the time of his death, provides otherwise. Should there not be a way to provide assurance against the tax burden if the settlor wishes to do so? An agreement to provide in the will against liability might be held unenforceable either for lack of consideration or possibly on the ground that such a provision is contrary to policy expressed in the act.⁶⁶

Third, section 2 of the proposed act seems to give the testator *complete* freedom in apportioning the estate tax by provision in his will. The general provisions of the act place a proportionate share of the burden on an inter vivos trust that is subjected to the tax. No doubt this share of the burden can be *reduced*, directly or indirectly, by a will provision. The question is whether it can be *increased* or whether, for example, the testator can by will provide for payment of the entire tax on his estate out of trust funds transferred during life but taxed at death. This may not be objectionable if the trust was revocable until death by the testator. But suppose it is subjected to tax only because the trust was created in contemplation of death and within three years thereof. Perhaps the statute can be supported against constitutional attack, if it permits the will to increase the tax burden, on the ground that to the extent of possible tax liability the inter vivos transfer is rendered revocable by the act. But this is questionable as a matter of policy, for it would make many seemingly complete transfers little more than illusory until the transferor's death. Although some retroactive application of an apportionment act to inter vivos trusts has been sustained,⁶⁷ the problem whether to give retrospective effect to testamentary apportionment provisions seems quite different.⁶⁸

66. In some cases involving inter vivos transfers under separation agreements, the New York courts have recognized the enforceability of contract claims at variance with will or statutory provisions on apportionment (without passing on the question whether such obligations are subject to the same nonclaim limitations as are other inter vivos obligations). *In re McKeon's Will*, 4 Misc. 931, 124 N.Y.S.2d 590 (Surr. Ct. 1953); *In re Brokaw's Estate*, 180 Misc. 490, 41 N.Y.S.2d 57 (Surr. Ct. 1943), *aff'd mem.* 267 App. Div. 811, 46 N.Y.S.2d 887 (Sup. Ct.), *aff'd per curiam*, 293 N.Y. 555, 59 N.E.2d 243 (1944). The inference is that such matters are outside the scope of the apportionment act, and the contractual agreement has been sustained even though the consideration for the promise was not such as to preclude estate tax liability. See *In re Brokaw's Estate*, *supra*, particularly opinion of Desmond, J., dissenting at 558, 59 N.E.2d at 245.

67. *Cf.* *Security First Nat'l Bank v. Wellslager*, 88 Cal. App. 2d 210, 198 P.2d 700 (1948); *Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 94 A.2d 703 (Sup. Ct. 1953); *In re Mayer's Estate*, 174 Misc. 917, 22 N.Y.S.2d 468 (Surr. Ct. 1940); *In re Stanfield's Estate*, 170 Misc. 447, 10 N.Y.S.2d 613 (Surr. Ct.), *aff'd per curiam*, 257 App. Div. 932, 12 N.Y.S.2d 1022 (Sup. Ct. 1939). *But cf.* *Parlato v. McCarthy*, 136 Conn. 126, 69 A.2d 648 (1949).

68. A will direction was given retrospective recognition in *United States v. Goodson*, 253 F.2d 900 (8th Cir. 1958), to effect apportionment against nonpro-

Finally, question may be raised whether section 2 affects in any way division of the tax burden *within* a fund. Of course, as between temporary and remainder interests no apportionment is to be made under section 6, and the tax is to be a charge on the corpus. But can the inter vivos transfer instrument validly alter the section 6 rule? Or can it specify the effect of the tax liability among the remaindermen? It is difficult to see a policy reason against either such alteration or specification, but either might be viewed as an alteration of the statutory apportionment rule other than by will.

In the absence of a statute considerable uncertainty exists regarding the efficacy of a tax provision in an inter vivos transfer instrument. Such uncertainty could, and should, be replaced by positive statutory recognition of such provisions.⁶⁹ If the provision is made, it cannot be done through inadvertence, and the principal justification for special apportionment rules is to provide the supposed best result for circumstances in which a property owner has not dealt consciously with the problem.

In this light, the inclusion of a provision limiting alteration or omission of apportionment to will provisions seems questionable at best.

Section 3 (Procedure for Determining Apportionment). The basic procedural rule, subsection (a), is that the probate court is to determine apportionment as a part of the probate proceedings.⁷⁰ If there are no such proceedings, the probate court of the decedent's domicile is authorized to determine apportionment upon application of the person required to pay the tax.

Two problems are raised by section 3(a). In cases involving ancillary administration: (1) what court has jurisdiction to determine apportionment? and (2) what law does the court apply? If section 3(a) were interpreted as contemplating exclusive apportionment jurisdiction in the state of the decedent's domicile *and*

bate assets. Query: Would such a provision be recognized under the proposed act if it sought to shift the *entire* tax burden to such assets? Cf. *Isaacson v. Boston Safe Deposit & Trust Co.*, 325 Mass. 469, 91 N.E.2d 334 (1950).

69. If this were done, the supremacy of conflicting directions could be determined by such a provision as the following from PA. STAT. ANN. tit. 20, § 883(a) (Purdon Supp. 1958):

Powers of Testator or Settlor. A testator, settlor, or possessor of any appropriate power of appointment may direct how the estate tax shall be apportioned or allocated or grant a discretionary power to another so to direct. Any such direction shall take precedence over the provisions of this act insofar as the direction provides for the payment of the estate tax or any part thereof from property, the disposition of which can be controlled by the instrument containing the direction or delegating the power to another.

70. Reference in this section to the probate court that has jurisdiction over "the administration of the estate" apparently overlooks the section 1 definition of "estate" as the gross estate for *tax* purposes, which may include *nonprobate* property. This could be cured by amending section 3 to read "the administration of the testate or intestate portion of the estate."

if all the forty-nine (or fifty) states enacted the proposed act,⁷¹ both questions could easily be answered. However, there is serious doubt about both contingencies.

If this section is designed as a choice of law reference to the domicile in all cases, such purpose is obscure. Moreover, if a conflict of laws rule referring to the domicile is intended, it is subject to the many doubts raised in the cases and elsewhere⁷² as to the power of a state to impose its rules upon transfers made outside the state. These problems remain notwithstanding the desirability of the single domicile reference.⁷³ Consequently, a more explicit treatment in the proposed act of the problem of governing law would seem appropriate.⁷⁴

Under subsection (d), the apportionment determinations by the probate court are only prima facie correct in subsequent litigation to recover amounts from persons interested in the estate. This provision invites prolonged litigation by not going so far as it reasonably could in establishing finality. The last part of subsection (d) should be amended to provide that the determination under (a):

shall be binding on all persons who are parties to the proceeding and prima facie correct as to others.

With this change, the probate proceeding would render apportionment res judicata when all persons interested in the estate were properly before the probate court, and it is possible that persons outside the state might submit to the jurisdiction of the probate court in some cases.

It is difficult to see why the act should not go this far in seeking finality. The comments of the draftsmen explain the prima facie rule on constitutional grounds, indicating doubt as to the constitutionality of a provision for binding apportionment that could apply, for example, to a beneficiary of an inter vivos transfer who was not before or subject to the jurisdiction of the court. The constitutional questions are intricate and involve the due process, equal protection, and full faith and credit questions of when a court

71. The act is also proposed for enactment in the District of Columbia and Puerto Rico. HANDBOOK 131 (1958).

72. *Warfield v. Merchants Nat'l Bank*, 147 N.E.2d 809 (Mass. 1958); *First Nat'l Bank v. First Trust Co.*, 242 Minn. 226, 64 N.W.2d 524 (1954). These matters are exhaustively explored in Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955). See also Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 398, 438 (1956); Ward, *Conflict of Laws and Estate Tax Apportionment*, 9 U. FLA. L. REV. 194 (1956).

73. Note that there may be federal control of the conflicts of laws questions under at least one interpretation of *Riggs v. Del Drago*, 317 U.S. 95 (1942); see Scoles, *supra* note 72, 55 COLUM. L. REV. at 289.

74. Detailed statutory suggestions are included in Scoles, *supra* note 72, 55 COLUM. L. REV. at 308. In view of this prior treatment, no further analysis is here made.

can bind a person by a proceeding and when that court can apply particular substantive law.⁷⁵ But these objections can be met without permitting apportionment to be relitigated in *all* cases. Even if in the interest of seasonably terminating litigation a court might interpret the statute as drafted to reach the result suggested, the statute should go as far as possible in directing finality.

Subsections (b) and (c) of section 3 appear to deal more with matters of substance than with procedure, providing special treatment of interest and penalties. Although by definition in section 1 such exactions are part of the "tax" and therefore within the general formula approach to apportionment under section 2, these subsections inject equitable considerations into the apportionment of interest and penalties. Under (b) "special circumstances" may authorize an "equitable" apportionment of such items. It appears this language is not intended to apply to the personal representative because under (c) the court may charge such items to the fiduciary if they are attributable to "delay caused by the negligence of the fiduciary." Adoption of an equitable approach to this problem is surely desirable. We are concerned here with charges that are avoidable, which should fall on the one who is responsible for them or who benefits from the delay causing them. Illustrative problems indicating the need for the flexibility provided by subsection (b) have been presented earlier in this Article.⁷⁶ Consequently, attention here will be focused on subsection (c).

There is a technical objection to subsection (c). Why is possible liability of a fiduciary⁷⁷ limited to instances in which penalties or interest are due to "delay caused by . . . negligence"? If an executor embezzled estate funds and filed a fraudulent return, interest on tax ultimately found due would be caused by delay in paying the tax, but a heavy fraud penalty would arise out of the executor's evasive conduct, not delay, and his action would be intentional, not negligent. Perhaps the statute would be interpreted in such a way as to charge him with such a penalty. However, it would seem better to let executor liability rest on "special circumstances" and and "equitable" principles as does beneficiary liability under subsection (b). Fiduciaries probably would like, and may be entitled to, more explicit assurance against personal liability than what

75. Cf. *Warfield v. Merchants Nat'l Bank*, 147 N.E.2d 809 (Mass. 1958); *Isaacson v. Boston Safe Deposit & Trust Co.*, 325 Mass. 469, 91 N.E.2d 334 (1950); *First Nat'l Bank v. First Trust Co.*, 242 Minn. 226, 64 N.W.2d 524 (1954); *In re Buckman's Will*, 270 App. Div. 707, 62 N.Y.S.2d 337 (Sup. Ct.), *aff'd mem.* 296 N.Y. 915, 73 N.E.2d 37, *cert. denied sub nom.* *Kay v. MacCormack*, 332 U.S. 763 (1947); *In re Cronise's Estate*, 167 Misc. 310, 6 N.Y.S.2d 392 (Surr. Ct. 1937); *Scoles*, *supra* note 72, 55 COLUM. L. REV. at 293.

76. See text accompanying note 56 *supra*.

77. Under INT. REV. CODE OF 1954, § 2203, a person "in actual or constructive possession of any property of the decedent" is the statutory executor, charged with

they would have under equitable principles. If the statute gives them such assurance by the separate rules of subsection (b) and (c), subsection (c) should at least not restrict their accountability to instances of delay caused by negligence. But, in any event, viewing the question from the perspective of the general powers of the courts over fiduciaries, the flexible rule of subsection (b) seems suitable. Of course, the executor may be relieved of liability for negligence in the administration of the estate by an exculpatory clause in the will. While it is uncertain that such a clause would be accepted as a *direction* against apportionment, it should at least be taken into account in the exercise of the court's discretion under subsection (c) as drafted or in determining equitable apportionment if the fiduciary's liability were made to rest on the more general language of subsection (b).

Section 4 (Methods of Proration). The provisions of this section set out the means by which apportionment is to be made effective. Three circumstances are recognized. First, one in possession of the decedent's property who is required to pay the tax may withhold from amounts distributed to persons interested in the estate the amount of tax ascribed to their interests. Second, if the property distributable to any such person does not equal that person's share of the tax (as might be the case for example, where the person received a specific bequest of \$5000 but was also the donee of a \$50,000 gift in contemplation of the decedent's death), the one required to pay the tax may retain the property in his possession and recover from the person interested in the estate the balance of his share of the tax. Third, if the one required to pay the tax is not in possession of any property distributable to a beneficiary to whom part of the tax is apportioned (as might be true, for example, if a contemplation of death donee was entitled to receive nothing from the probate of the estate), he may recover from such person the full amount of the tax ascribed to that person's interest.

Subsection (b) seeks to assure ultimate collection from beneficiaries by permitting the fiduciary, subject to judicial approval, to require a beneficiary to post bond for his anticipated tax liability if the fiduciary is to make distribution of any property to him prior to final apportionment of the tax.

These provisions are clear, forthright and not subject to question. Properly interpreted they encompass the problems of enforced contribution for both the original tax and deficiencies.⁷⁸ It may be

the responsibility of filing returns and paying the tax, if no executor or administrator is "appointed, qualified, and acting." Presumably, the definition of "fiduciary" in the apportionment act is sufficiently broad to include such unusual situations.

78. The deficiencies point is covered by the third rule discussed above, for any amount required to be paid as a deficiency, including interest and penalties, is an amount paid as tax.

desirable to add an additional provision concerning refunds. Such a rule, expressing a reverse apportionment principle, should provide expressly that persons whose interests have been diminished by tax have a pro rata right to recover a part of the refund, including any interest, from the one to whom it was paid.

Section 5 (Allowance for Exemptions, Deductions and Credits). Here we find statutory recognition of the need for adjustment in some circumstances of the formula for apportionment provided in section 2. The general rule expressed in subsection (a) is that allowances shall be made for exemptions, deductions and credits; the remaining subsections indicate the manner in which such allowances are to be made.

Subsection (b) applies to the charitable deduction and marital deduction⁷⁹ allowed in determining the taxable estate for federal estate tax purposes (and any similar state exemption or deduction). The statute provides that such deductions "shall inure to the benefit of" the surviving spouse or charity as the case may be. The theory, of course, as mentioned above in the discussion of the federal apportionment provisions, is that since such deductible interests do not contribute to the tax, those receiving them should not be called upon to bear a part of the tax burden. This reasoning may be subject to question⁸⁰ but is generally accepted.

The phrase "shall inure to the benefit of" is more general than it need be.⁸¹ The statute could be more forthrightly drawn to provide:

for the purpose of apportionment under section 2, the amount of such exemption or deduction shall reduce the interest of the person bearing such relationship or receiving such gift.⁸²

It is worth noting that, in any event, the allowance made here will often simplify the computation of the tax when apportionment is in effect. Without this provision the share of a surviving spouse would always be diminished by a ratable part of the tax. The federal statute requires such reductions to be taken into account in determining the value of the interests passing to the spouse for the purpose of the marital deduction.⁸³ Thus, the tax attributable

79. INT. REV. CODE OF 1954, §§ 2055, 2056, respectively.

80. Lauritzen, *Apportionment of Federal Estate Taxes*, 1 TAX COUNSEL. Q. 55, 85 (1957).

81. It might be argued that this language could be interpreted to mean that the tax should be figured with and without the deduction and the difference should be the reduction in the liability of the surviving spouse or charity, as the case may be. This is clearly not intended and should not seriously be entertained by a court.

82. Cf. PA. STAT. ANN. tit. 20, § 884(b) (Purdon Supp. 1958), which provides: "Any interests for which deduction is allowable . . . in determining the . . . net estate . . . shall not be included in the computation. . . ."; INT. REV. CODE OF 1954, §§ 2206, 2207 discussed above.

83. INT. REV. CODE OF 1954, § 2056(b)(4)(a).

to her interest might reduce the interest passing to her below the maximum marital deduction, and this creates an algebraic problem involving "two mutually dependent variables,"⁸⁴ the amount of the marital deduction and the amount of the tax. Subsection (b) forecloses this problem by, in effect, relieving the surviving spouse's share from the burden to the extent that it qualifies for the marital deduction. Like reasoning applies to bequests to charity.

An exception to the allowance just described is made by the last clause of subsection (b). This clause provides that, if an exempt or deductible interest is subject to a prior present interest that is not exempt or deductible, the tax charged against such prior interest is to be paid from principal. For example, if a decedent left property in trust with the income to be paid to his mother for life and remainder to his wife or the wife's estate, the value of the wife's remainder would, subject to the maximum limitation, qualify for the marital deduction.⁸⁵ The mother's interest would of course not be deductible. Under the exception being considered, the tax attributable to the mother's interest would be a charge on the trust principal and thus reduce the amount qualifying for the marital deduction.⁸⁶ The desirability of this exception to the allowance of deductions is debatable, although it may be difficult to avoid. The exception presents a problem of computation of the estate tax similar to one dealt with in subsection (e), and it may be questionable also as regards the general fairness of the apportionment plan. From the tax aspect, the algebraic problem of computation mentioned above rears its ugly head. If the tax is a charge on principal, the value of the wife's remainder interest is reduced accordingly. In any situation in which the property passing to her was not substantially in excess of the maximum marital deduction, such a reduction in the value of her remainder interest will reduce the marital deduction and increase the tax. But the tax itself is dependent upon the amount of the deduction. Thus, when by reason of this provision the entire tax is charged to the principal, the tax affects the value of the remainder interest given to the surviving spouse, and the usual simplification resulting from the allowance made for deductions is lost.

Moreover, the question arises whether it is fair in effect to burden the wife's deductible interest with tax on a prior nondeductible interest. Of course considerations of fairness in this context must take into account the decedent's opportunity to make whatever arrangements he wishes by provision in his will. But the gen-

84. *Harrison v. Northern Trust Co.*, 317 U.S. 476, 481 (1943).

85. *Treas. Reg. §§ 20.2056(b)-4(d)* (1959).

86. In a slightly different context this rule, charging the principal with the entire tax, is expressed in section 6, discussed below.

eral policy of the statute is to free deductible interests from the tax burden. The exception is at variance with that policy. The draftsmen's comments on a cognate rule in section 6 indicate that, despite a feeling of unfairness, particularly where a deductible charitable interest follows a prior interest, they could see "no practical way to work the matter out." There are ways to work the matter out, and it is a matter of judgment whether any are practical.

Provision could be made to amortize the tax allocable to the temporary interest over the estimated or prescribed duration of such interest. Such an approach might be feasible in some trusts, but the complications that would be presented by non-income-producing property or by legal life estates tend to support the Commissioners' conclusions of impracticability. Of course, amortization difficulties must be weighed against other factors. If an amortization device avoids the reduction in the value of the deductible interest, the inherent unfairness of the proposed rule, the tax increase, and the computation complexities are all eliminated. Even if upon an early termination of the nondeductible interest the unamortized portion of the tax burden fell upon the deductible interest, the tax advantage should not be lost. For example, in the case of a vested remainder in a surviving spouse following a nondeductible life interest, the see-saw effect of a premature death of the life tenant would result in an enhancement in the value of the spouse's interest over its assumed date of death value, which should offset the diminution occasioned by the unamortized tax burden.

Perhaps the complications possible in many cases preclude a general statutory provision either imposing the tax burden on the temporary interest or amortizing it. However, in an appropriate case the estate owner's draftsman should consider incorporating one of these two approaches in a testamentary direction.⁸⁷ The fact that the proposed act permits this lends further support to the Commissioners' conclusions.

Subsection (e) of section 5 which the draftsmen tag "the most controversial part of the Act," should be considered here. It is designed to avoid the intricate algebraic tax computation problem mentioned previously in a situation somewhat similar to that created by the exception to subsection (b) which was just discussed. If a *state* inheritance or other death tax falls upon and is payable from an interest passing to a surviving spouse or a charity, the available federal estate tax deduction is correspondingly reduced. If such a reduction in the otherwise allowable federal deduction increases the federal tax, should a part of the federal tax be ascribed

87. A third possibility, that of giving the executor discretion in this respect seems to present a greater question regarding the effect on the computation of the marital deduction. Cf. Treas. Reg. §§ 20.2056(b)-4(c), (d) (1959).

to such interests? Although to do so would seem superficially to be an equitable rule, the statutory answer is no. Subsection (e) provides that where the federal deduction is disallowed solely by reason of, and to the extent of, the state tax, no apportionment shall be made against this interest. If the interest, for example, passing to a surviving spouse would be fully deductible for federal estate tax purposes except for the amount of the *state* tax imposed upon and payable from her interest, no part of the federal tax is to be apportioned to her interest. Even if seemingly inequitable, the rule may be desirable, because the net effect is that the marital deduction can be determined without regard to the amount of the *federal* tax (and the same would be true of the charitable deduction in similar circumstances), and the need for nice algebraic computations is avoided. This provision, if properly understood, should not be controversial; it is desirable as avoiding confusion and possible resulting litigation.

Nevertheless, in answering one problem this provision creates another. The second sentence of subsection (e) is an attempt to preserve the estate's right to elect a *deduction* for state tax on charitable transfers, rather than merely treating such tax as entering into the computation of the *credit* for state death taxes. A rather recent amendment to the Code⁸⁸ provides this election, but it can be made in the first instance only if "the decrease in tax . . . which results from the deduction . . . will inure solely for the benefit of [qualified] public, charitable or religious transferees." Under the basic apportionment rule and the allowance to be made under subsection (b), the tax is not to be apportioned against a deductible charitable bequest. On the other hand, a part of the tax would be apportioned against such a bequest to the extent that it was nondeductible because of state taxes imposed upon it,⁸⁹ except for the provision of subsection (e). Can these provisions foreclose the deduction? The draftsmen expressed difficulty in seeing "how this could happen" but grudgingly included a precautionary provision at the urging of representatives of the Tax Section of the American Bar Association. The Tax Section was right.

Section 2053(d), providing the election to deduct state taxes on charitable bequests, at first limits the election to instances in which tax reduction arising out of the deduction will benefit only the charity, as explained above. Under (b) and (e) of section 5 of the proposed act, no benefit could actually redound to the charity because it is relieved of liability for *all* estate tax, including that

88. INT. REV. CODE OF 1954, §§ 2053(d), 2011(e).

89. The federal and state charitable deductions and exemptions are not entirely parallel. *E.g., compare* INT. REV. CODE OF 1954, § 2055(a), *with* ILL. REV. STAT. ch. 120, § 401 (1957).

which arises because of the imposition of the state tax. If a charity is not burdened in any event by the federal tax, a reduction in such tax cannot be said to inure solely to its benefit.

However, the federal statute goes on to permit the election to deduct the state tax if the total federal tax is "equitably apportioned" (in which case *some* benefit inures to the charity), even though the special section 2053(d) deduction will also decrease the tax that noncharitable transferees are required to pay. Considering this alternative condition of the federal statute, is the tax "equitably apportioned" under the proposed act when the first sentence of subsection (e) is taken into account? Probably not, because the charitable share is entirely unaffected by the deduction under section 2053(d).

The federal estate tax regulations give an example of the workings of section 2053(d)⁹⁰ in which the gross estate is \$750,000, claims and expenses \$50,000, and the value of property passing to the spouse \$350,000. The remainder is left in equal shares to a son and a qualified charity. It is assumed that state inheritance taxes of \$7000, \$26,250 and \$20,250 are imposed on the interests of the spouse, son and charity respectively, each payable out of the legatee's interest, and further that a state apportionment statute divides the federal tax burden ratably. However, the apportionment rule relieves the spouse of any part of the federal tax burden, even though the marital deduction is reduced to \$343,000 by the state tax on her interest. Note that this is the rule of the first sentence of subsection (e) of the proposed act. The example continues:

If the deduction for State death tax on the charitable bequest is allowed in this case, some portion of the decrease in the federal estate tax would inure to the benefit of the son, [which precludes the election under the first test]. The federal estate tax is not considered to be equitably apportioned in this case since each legatee's share of the Federal estate tax is not based upon the net amount of his bequest subjected to the tax (note the surviving spouse is to pay no tax). Inasmuch as some of the decrease in the Federal estate tax payable would inure to the benefit of the son, and inasmuch as there is no equitable apportionment of the tax, no deduction is allowable under section 2053(d).

From this it appears that under the first sentence of subsection (e) of the proposed act, the section 2053(d) deduction would not be available to an estate to which the proposed act was applicable, the necessary conditions to an effective election under section 2053 being precluded. To save this federal deduction for the estate, the last sentence of subsection (e) was added to the proposed act. The last sentence provides that if the deduction would be lost to

90. Treas. Reg. § 20.2053-9(e) (example 5) (1959).

the estate by application of subsection (e), subsection (e) will not apply. In other words, subsection (e) will apply only if there are no adverse federal tax consequences.

It is one thing to recognize that subsection (e) without the last sentence would preclude the election under Code section 2053 (d) and another to say whether the remedial sentence is an effective remedy. Suppose the commissioner asserts a deficiency on the ground that subsection (e) precludes the deduction for state tax on a charitable transfer. The statute is drafted in such a way that the commissioner's victory on the basic issue would not support the deficiency but would simply invoke the remedial sentence to render subsection (e) inapplicable. On the other hand, if subsection (e) is not applicable, then some part of the *federal* tax would be apportioned to the charitable bequest and the amount of the charitable deduction would be reduced by the amount of the *federal* tax so apportioned. This leads directly to the complicated computation of the tax caused by the "mutually dependent variables" which subsection (e) attempts to avoid. The question then becomes whether the value of the section 2053(d) deduction exceeds the burden of the "mutually dependent variable" computation and the loss of the charitable deduction to the extent of the federal tax allocated to the charity.

Assuming the last sentence of subsection (e) is retained, a broader question is raised regarding its efficacy to protect the 2053(d) deduction. Is it, on the one hand, only a "heads I win—tails you lose" alternative as to which the federal courts might decline to make the selection? Or, on the other hand, does it raise only a moot question under 2053(d) which the courts might refuse to entertain? If viewed as a condition subsequent to the creation of interests the provision may be ineffective. In a somewhat analogous gift tax case⁹¹ the court refused to condone "this sort of trifling with the judicial process,"⁹² since to do so would force the court to decide an issue which did not present a proper justiciable controversy.⁹³

Nevertheless, even with some doubt about the efficacy of the remedial sentence, subsection (e) should be left as is. Its principal provision will often be operative when no deduction is being

91. *Commissioner v. Proctor*, 142 F.2d 824 (4th Cir. 1944).

92. *Id.* at 827.

93. In *Commissioner v. Proctor*, 142 F. 2d 824 (4th Cir. 1944), one who made a gratuitous transfer of a future interest in property purported to attach the condition that the transfer would be nullified and the property would remain his if the transfer were held subject to the federal gift tax. Among other objections to the device, the court pointed out that under the provision the court's final judgment in the tax controversy would be "held for naught because of the provision of an indenture necessarily before the court when the judgment [was] rendered." *Id.* at 827.

claimed for state tax on charitable transfers. This is sufficiently advantageous to warrant the risk that it may sometimes preclude the elective deduction.⁹⁴

Subsection (c) of section 5 deals with the effect on apportionment of deductions for property previously taxed and credits for gift tax paid on a decedent's lifetime transfers and death taxes paid to a foreign country. The general rule expressed is that the reduction in tax resulting from such items shall be spread ratably among all persons subject to apportionment. There are, however, several defects in this subsection.

It is surprising that the draftsmen did not take into account the 1954 Code change from a *deduction* for property previously taxed⁹⁵ to a *credit* for property previously taxed.⁹⁶ It is quite possible the courts could bridge this gap by virtue of the general rule expressed in subsection (a), but the statute should deal expressly with the effect of a *credit* for estate tax on prior transfers.

If foreign death taxes or if gift taxes paid by the decedent or his estate give rise to a credit, it is clear enough that the resulting decrease in tax is to be spread ratably among those subject to apportionment. That is, the advantage does not simply inure to the benefit of the one who is in receipt of the property with respect to which the tax that gives rise to the credit was imposed.⁹⁷ But what if the recipient, himself, of a lifetime gift that is later subjected to estate tax was held liable, as donee,⁹⁸ for the gift tax due? It is doubtful whether he can get reimbursement for the gift tax as such from the decedent's estate.⁹⁹ Should he not at least reap the full benefits of the credit that arises from the gift tax that *he* paid? The statute does not expressly deal with this situation although the policy reflected in subsection (d) relating to inheritance tax is in accord with the suggestion being made here. Subsection (c) provides a rule only as to gift tax paid by *the decedent or his estate*; the following proviso could well be added:

Provided, however, that if any credit for gift taxes arises with respect to gift tax that has in fact been paid by a person interested in the estate, such credit shall inure to the benefit of such person.

94. INT. REV. CODE OF 1954, § 2053(d) is not invariably advantageous and, even when it should be used, the apparent tax benefit arising out of the deduction is offset to some extent by a reduction of the credit for state taxes that would otherwise be allowed. INT. REV. CODE OF 1954, § 2011(e).

95. Int. Rev. Code of 1939, §§ 812(c), 861(a)(2).

96. INT. REV. CODE OF 1954, § 2013.

97. It would be clearer that the term "gift taxes" does not refer only to foreign gift taxes if the word "for" were inserted before the word "death" in subsection (c).

98. INT. REV. CODE OF 1954, § 6324(b).

99. Fidelity Union Trust Co. v. Anthony, 13 N.J. Super. 596, 81 A.2d 191 (Ch. 1951) (rejecting the possibility of an implied promise by the donor to pay the gift tax).

Subsection (d) gives to one who pays a state inheritance, succession, estate or similar tax that results in a credit the advantage of such credit, ratably along with others who may also pay such taxes.¹⁰⁰

Section 6 (No Apportionment Between Temporary and Remainder Interests). The provisions of this section have been anticipated in the discussion of section 5(b). The statutory rule against apportionment within a fund is clear enough. It is based upon the convenience in trust administration of paying the tax from principal, which avoids accounting problems incident to amortization, as well as on the possible hardship inherent in a requirement of immediate payment by an income beneficiary. Its fairness, however, is open to question. Suggestions made earlier in the discussion of section 5(b) as to how this problem might possibly be dealt with are equally applicable here.¹⁰¹ In this instance, however, the test of practicality of alternative arrangements must be viewed without the consideration, relevant in section 5(b), of simplification of computation of the charitable and marital deductions for federal estate tax purposes. Thus section 6 is even less open to objection than section 5(b).

Section 7 (Exoneration of Fiduciary). This section sets the scope of a fiduciary's duty as regards implementation of the apportionment rule. It should be read in conjunction with section 4 under which the fiduciary's withholding or recovery efforts are framed in permissive language. Although section 7 is presented negatively, indicating circumstances in which he cannot be held liable, the reasonable implication is that he has a duty, not merely a right, to effectuate apportionment.¹⁰²

The first and second sentences of section 7 represent an attempt to minimize controversy over a fiduciary's liability for failure to initiate suit. Difficult problems of proof which could arise are avoided if the statute is construed literally. The first sentence relieves the fiduciary or other person required to pay the tax of any duty to initiate suit before the expiration of three months following the final determination of the tax.¹⁰³ The second sentence reinforces this by expressly providing against liability if suit is begun season-

100. Provision for the treatment of gift tax paid by the donee could be incorporated into this subsection instead of into subsection (c).

101. See text accompanying note 85 *supra*.

102. The statutes of several states make this duty explicit. N.Y. DECED. EST. LAW § 124(5); PA. STAT. ANN. tit. 20, § 885 (Purdon Supp. 1958). In view of the fiduciaries' responsibility of equal treatment of beneficiaries, it would seem clear that since the right exists, a duty to pursue it in absence of satisfactory excuse is also present.

103. The change suggested in the drafting committee's comments to substitute "the payment of the tax" for the "final determination of the tax" seems desirable. Why this change was not incorporated in the final draft was not explained. Collection efforts should follow promptly after payment; final determination might take many years if tax liability is litigated.

ably after the expiration of the three months period, even if the obligation was collectable some time after the decedent's death but became uncollectable thereafter.

The section also recognizes that circumstances will arise when collection of a person's share of the tax cannot be made. For example, if the decedent gave his son \$50,000 within three years of death and in contemplation thereof, the son might squander the gift. If he receives nothing else from the decedent, he may be entirely judgment proof. The burden of the tax paid must of course be borne by someone, and section 7 reapportions the son's share of the tax among the other persons interested in the estate. The statute seems to require reapportionment in all cases.¹⁰⁴

The draftsmen deliberately omitted from the last sentence of section 7 any language that would give others whose share of the tax is increased by the son's default a cause of action against the son. The reason stated is that to do so "would be impracticable and difficult of enforcement." While the committee seems not to favor such a cause of action, it clearly exists under any apportionment statute that does not expressly deny it. The proposed act places the obligation upon all persons interested in the estate, and section 2205 of the Code makes the resulting rights and obligations enforceable as federal rights. Section 2205 provides:

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 . . . , such person shall be entitled to reimbursement . . . by a just and equitable contribution by the persons . . . whose interest is subject to equal or prior liability for the payment of taxes. . . .

Does this not give the others a cause of action *without* affirmative provision in the state statute?

There may be "difficulties of enforcement" but they do not support the adoption of a rule against eventual justice. On the contrary, the other beneficiaries would probably be grateful for, and have a reasonable claim to, a statutory assist even if their efforts do face substantial enforcement difficulties. Thinking again in terms of the illustration above, if the son should strike oil not long after his default, it is difficult to see why the other persons interested in the estate should not be able to compel him to make good the added expense which his default cost them. The following clause should be added at the end of section 7:

but the fiduciary and each other person shall have the right to recover from the person in default the amount by which his share of the tax was increased by such default.

Section 8 (Action by Non-Resident, Reciprocity) Section 8 is

104. Cf. N.J. REV. STAT. § 3A:25-35 (1953); N.Y. DECED. EST. LAW § 124(5); PA. STAT. ANN. tit. 20, § 885 (Purdon Supp. 1958).

intended to meet the problem of enforcing contribution in multi-state cases and this purpose is laudable. It does, however, contain provisions that are subject to serious question on policy grounds and which are also vulnerable to constitutional attack. The section provides that outside the area of apportionment of the Internal Revenue Code, a nonresident can sue in the state of enactment on a claim for contribution only if the state in which the cause of action originated affords a substantially similar remedy.¹⁰⁵ This approach based on reciprocity is particularly out of place as between states of the United States in suits involving *personal* claims and *private* litigation. The proposed act is a private law statute and we are not concerned with reciprocal tax exemptions where one state is granting a public privilege. In the absence of draftsmen's comments it may be speculated that this provision was viewed as a prod to enactment of the proposed act, but, if so, it seems an improper prod, for it sacrifices uniformity of enforcement. The approach hardly seems consistent with the objectives of the National Conferences of Commissioners on Uniform State Laws.

The second objection to section 8 is more substantial. Subsection (b)(1) denies a forum for enforcement of a private right in the absence of reciprocity. To do so is a violation of the full faith and credit clause of the federal constitution, as it has long been interpreted, whether the suit is on a judgment of the court of a sister state¹⁰⁶ or on a cause of action resting on a statute.¹⁰⁷

In addition to serious questions of constitutionality under the full faith and credit clause, the discussion above relating to section 2205 of the Internal Revenue Code and section 7 of the proposed act is pertinent here.¹⁰⁸ Subsection 8(b)(2) permits an action to enforce contribution for federal estate taxes, regardless of reciprocity, if apportionment is authorized by Congress. The question is whether subsection 8(b)(2) purports to authorize such suits only with respect to apportionment under sections 2206 and 2207, relating to life insurance and power of appointment property, or whether it also embraces the federal recognition of state apportionment rules under section 2205.¹⁰⁹ The supremacy clause of the federal constitution would preclude the denial of a forum for a suit to enforce

105. An alternative right exists with respect to apportionment "authorized by Congress." UNIFORM ESTATE TAX APPORTIONMENT ACT § 8(b)(2).

106. *Milwaukee County v. M. E. White Co.*, 298 U.S. 268 (1935); *Kenney v. Supreme Lodge*, 252 U.S. 411 (1920).

107. *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951).

108. See text at notes 30-32, and 102-104 *supra*.

109. Technically § 8(a) gives a remedy in some cases to a "fiduciary" where one would not exist under the exception relating to executors in INT. REV. CODE OF 1954, § 2205. See note 30 *supra*. This factor has little bearing however on the question of the interrelation of state and federal law here being raised.

contribution based on state law made enforceable as a matter of federal right under section 2205. In this light it seems likely the courts would adopt the broader interpretation of section 8 under which the statute can be sustained.

Nevertheless, these questionable matters in section 8 and the relative unimportance of its restrictive provisions, if they are interpreted in such a way as to escape constitutional attack, suggest that all of subsection (b) and the related introductory clause of subsection (a) should be deleted.

III. CONCLUSION

The need for nationwide uniformity of approach to the question of the ultimate impact of both federal and state estate taxes will probably continue to grow rather than diminish. A preferable first step toward uniformity would be a federal statute apportioning the *federal* estate tax. A federal statute is appropriate even though apportionment goes beyond tax determination and collection because it would help to reduce the private litigation and interstate conflicts which are occasioned by the federal tax. The federal government should not be blind to the disturbing effect of tax legislation, beyond the direct financial consequences, upon individuals and states. Congress has an obligation to alleviate, as far as it is able, the inconvenience and hardship incident to the imposition of a federal law. Here the single tax levied upon assets often located in and going to persons located in several state jurisdictions creates problems that are not easily susceptible of state solution and of which Congress should take heed.¹¹⁰

In view of the failure of Congress to act, the National Conference of Commissioners on Uniform State Laws is to be commended for attacking the complex problem of apportionment. Acknowledging that it may be a late date at which to question the proposed Uniform Estate Tax Apportionment Act, our conclusion is nevertheless that the proposed act does not supply an adequate answer to the need for a uniform state approach to the apportionment problem.¹¹¹ If the objections raised to the act in this article are sound, some states may reject it outright, defeating its law reform purpose, and diverse

110. Further, the Internal Revenue Service should not shirk its responsibility to come forward with proposals for legislation in this area.

111. This conclusion seems borne out by other recent studies of the problem. See particularly Powell, *Ultimate Liability for Federal Estate Taxes*, 1958 WASH. U.L.Q. 327. Powell's article does not refer to the proposed act, probably because prepared at a date prior to its approval, but contains much which is pertinent to an evaluation of this act. Even if one rejects Powell's preference on a broad policy level for a statute that apportions the tax only against nonprobate assets, the proposed act would make a rather poor showing under his exhaustive analysis and proposed test for good state apportionment statutes. *Id.* at 345.

modifications of the act by enacting states may frustrate the objective of the Conference to achieve uniformity. Early re-examination and revision may avoid both these eventualities. Meanwhile, approval of the proposed act by the National Conference and by the American Bar Association helps to focus attention on the need for a uniform approach to the apportionment problem. If such action should spur Congress to enact comprehensive legislation appropriately dealing with the apportionment of the *federal* estate tax, the very considerable effort that has gone into the proposed act will not have been in vain. Moreover, it might be hoped and perhaps expected that such federal legislation would be adopted as a model for state legislation further attacking the vexing problem of apportionment of *state* death taxes.

In any event, as all informed attorneys know, no legislation in this area will ever eliminate the need to consider with respect to each transfer or proposed transfer of property the way in which the ultimate estate tax burden should fall. Further consideration of proposed apportionment legislation may help to drive home this matter to some who have not in the past had an adequate awareness of its significance.

APPENDIX

UNIFORM ESTATE TAX APPORTIONMENT ACT

SECTION 1. [*Definitions.*] In this Act

(a) "Estate" means the gross estate of a decedent as determined for the purpose of Federal estate tax [and the estate tax payable to this state] [and the death duty payable by a decedent's estate to this state].

(b) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(c) "Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, guardian, and trustee.

(d) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(e) "Tax" means the Federal estate tax [and the estate tax payable to this state] [and the death duty payable by a decedent's estate to this state] and interest and penalties imposed in addition to the tax.

(f) "Fiduciary" means executor, administrator or [sic] any description, and trustee.

SECTION 2. [*Apportionment.*] Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose.

SECTION 3. [*Procedure for Determining Apportionment.*]

(a) The [Probate Court] having jurisdiction over the administration of the estate of a decedent shall determine the apportionment of the tax. If there are no probate proceedings, the [Probate Court] of the [county] wherein the decedent was domiciled at death upon the application of the person required to pay the tax shall determine the apportionment of the tax.

(b) If the [Probate Court] finds that it is inequitable to apportion interest and penalties in the manner provided in Section 2, because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(c) If the [Probate Court] finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the fiduciary with the amount of the assessed penalties and interest.

(d) In any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act, the determination of the [Probate Court] in respect thereto shall be prima facie correct.

SECTION 4. [*Method of Proration.*]

(a) The fiduciary or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the fiduciary or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the fiduciary or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the fiduciary or other person required to pay the tax, the fiduciary or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act.

(b) If property held by the fiduciary is distributed prior to final

apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the [Probate Court] having jurisdiction of the administration of the estate.

SECTION 5. [*Allowance for Exemptions, Deductions and Credits.*]

(a) In making an apportionment, allowances shall be made for any exemptions granted, [any classification made of persons interested in the estate] and for any deductions and credits allowed by the law imposing the tax.

(b) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift shall inure to the benefit of the person bearing such relationship or receiving the gift; except that when an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(c) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment.

(d) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof in respect to property or interests includable in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in proportion as the credit reduces the tax.

(e) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in Section 2 hereof, and to that extent no apportionment shall be made against the property. The sentence immediately preceding shall not apply to any case where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code of 1954 of the United States, relating to deduction for State death taxes on transfers for public, charitable or religious uses.

SECTION 6. [*No Apportionment between Temporary and Remainder Interests.*] No interest in income and no estate for years or for life or other temporary interest in any property or fund shall be subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if

any, on the remainder shall be chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

SECTION 7. [*Exoneration of Fiduciary.*] Neither the fiduciary nor other person required to pay the tax shall be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the [three months] next following final determination of the tax. A fiduciary or other person required to pay the tax who institutes the suit or proceeding within [a reasonable time] after [the three months' period] shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the fiduciary or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate, who are subject to apportionment.

SECTION 8. [*Action by Non-Resident, Reciprocity.*]

(a) Subject to the conditions in subsection (b) of this section a fiduciary acting in another state or a person required to pay the tax [domiciled] [resident] in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either [domiciled] [resident] in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state shall be prima facie correct.

(b) The provisions of subsection (a) of this section shall apply only:

(1) If such other state affords a remedy substantially similar to that afforded in subsection (a) hereof;

(2) With respect to Federal estate tax, if apportionment thereof is authorized by Congress.

SECTION 9. [*Uniformity of Interpretation.*] This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 10. [*Short Title.*] This act may be cited as the Uniform Estate Tax Apportionment Act.

SECTION 11. [*Severability.*] If any provision of this act or the application thereof to any person or circumstance is held invalid,

the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 12. [*Repeal.*] [The following acts and parts of acts are hereby repealed:

(a)

(b)

(c)

SECTION 13. [*Time of Application of Act.*] This act shall not apply to taxes due on account of the death of decedents dying prior to [six months after the enactment of this act.]

