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FLORIDA ESTATE TAX APPORTIONMENT*

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Federal estate tax law today applies a progressive schedule of rates to a base composed of the "probate estate," minus certain deductions,[1] *plus:* jointly held property,[2] proceeds of life insurance payable to named beneficiaries,[3] survivorship annuities,[4] gifts "in contemplation" of death,[5] *inter vivos* transfers with retained life estate or retained right to control enjoyment,[6] *inter vivos* transfers taking effect at death,[7] revocable *inter vivos* transfers,[8] and "general" powers of appointment.[9] In the collection of this tax the congressional scheme renders the personal representative of an estate personally liable.[10] This liability, of course, cannot exceed the value of estate property over which the personal representative has control.[11] When the federal estate tax exceeds the *probate* estate, an automatic special lien against all property in the tax base is created and each item of property is hypothecated for the entire amount of the tax, rather than that item's prorata share.[12] Additionally, personal liability is established in transferees of property included in the tax base, but limited to the value of subject property.[13] These provisions are intended to protect against nonpayment. The primary source of payment, however, is the probate estate.[14]

Situations in which the tax base is much larger than the probate estate raise the question of whether the beneficiaries of the probate estate can require beneficiaries of insurance policies, survivors of joint tenancies, and other interests[15] to reimburse the probate estate for their share of the federal estate tax. Resolution of this question necessitates inquiry into both state and federal estate tax apportionment schemes.

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1. 26 U.S.C. §§2052-56 (1970).
2. *Id.* §2040.
3. *Id.* §2042.
4. *Id.* §2039.
5. *Id.* §2035.
6. *Id.* §2036.
7. *Id.* §2037.
8. *Id.* §2038.
9. *Id.* §2041.
10. 26 U.S.C. §6018 and related regulation 20.6018-2 require the personal representative to file the federal estate tax return. 26 U.S.C. §6151 casts liability for payment of the tax upon "the person required to make such return."
11. M. D. Champlin, Adm'r v. Commissioner, 6 T.C. 280 (1946).
12. 26 U.S.C. §6324 (1970).
13. *Id.* §324(a)(2).
14. 26 U.S.C. §2205 (1970); FLA. STAT. §734.041(3) (1971).
15. *See* text accompanying notes 2-9 *supra.*

Apportionment of federal estate tax is the determination of the tax's "ultimate impact." In earlier days, although the executor generally paid the tax from funds in the residual "probate" estate, he was unable to require other interests included in the tax base to reimburse the residual interest. This obviously led to serious inequities, which were compounded as the tentacles of the federal tax collector extended.

Both the Florida Legislature and the United States Congress have attempted to compel each interest composing the tax base to pay its "fair share."[16] These attempts at "equitable apportionment"[17] have raised interesting questions of law in the fields of property, fiduciary administration, federal constitutional law, federal taxation, conflicts of law, and creditor's rights. This article will review both the Florida and federal apportionment provisions with primary emphasis upon the problem areas that have arisen.

THE FLORIDA APPORTIONMENT PROVISIONS

In 1949 the legislature enacted Florida's first equitable apportionment statute.[18] The basic purpose of the act, identical with the present legislation,[19] was to place the tax burden on interests that created the tax. Since the 1949 law was couched in general terms, many difficult questions were left unresolved. Thus, the prior law was replaced in 1957 by a statute specifically denying apportionment unless directed by the testator's will.[20]

Florida's current apportionment statute originated in 1963[21] and was amended in 1965.[22] The 1965 amendments included foreign estate and inheritance taxes in the apportionment provisions, relieved temporary residuary interests of apportionment, rescinded the apportionment of inheritance taxes,[23] and specially apportioned the foreign tax credit used in computing federal estate tax liability.

The current provision, Florida Statutes, section 734.041, is intended to

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16. 26 U.S.C. §§2206, 2207 (1970); FLA. STAT. §734.041 (1971).

17. Throughout this article the term "equitable apportionment" is used to indicate a system that requires each property interest in the tax base to bear its prorata share of the tax. The term would not include a system that allocated part of the tax burden to a deductible property interest, since that interest would not be taxed. For example, a system that allocated part of the estate tax burden to an interest that qualified for a marital deduction would not be "equitable." Although no system can completely insulate deductible interests against charges for estate tax an "equitable" system will generally tend to avoid that result.

18. Fla. Laws 1949, ch. 25,435, §§1-4.

19. FLA. STAT. §734.041 (1971).

20. Fla. Laws 1957, ch. 57-87, §1.

21. Fla. Laws 1963, ch. 63-106, §1.

22. Fla. Laws 1965, ch. 65-230, §1.

23. Inheritance taxes are levied against a specific property interest and therefore are automatically apportioned by the taxing statute. Estate taxes are levied against the right of transfer. Inheritance taxes have different schedules of rates for each type of included property interest, thereby clearly indicating the amount of tax created by that interest. Estate taxes apply one schedule of rates to one "taxable estate" without differentiating between property interests making up the taxable estate. *See* FLA. STAT. §734.041(2)(a) (1965).

determine the ultimate impact of the estate tax imposed when the decedent has failed to do so.[24] An understanding of the decedent's ability to direct apportionment, however, will be facilitated by first examining the situation where the decedent has died intestate or has left a will failing to direct apportionment. Generally, in the latter situation, section 734.041 attempts to equitably apportion the federal estate tax, requiring the property interests included in the tax base to bear the ultimate impact. Although the efficacy of the statute is unquestioned, the necessity for judicial interpretation is evident.

Application of Section 734.041 — The Apportioning Formula

For convenience, section 734.041 may be divided into three parts. Part I, sections 734.041(1)(a-e) and 734.041(2)(o), allocate the tax in general terms to the various property interests that comprise the taxable estate. Part II, section 734.041(2)(a-d) defines the terms employed in part I. Part III, section 734.041(3), (4), (5), (6), and (7) deals with such matters as procedure and collection.

An initial study of the terms, that is, the apportioning formula, will give substance to the provisions determining how the ultimate impact of the estate tax is apportioned.

The fraction and its multiplicand may be expressed as follows:

$$\frac{\text{Value of Interest Included in Measure of Tax [734.041(2)(c) and (d)]}}{\text{Net Estate [734.041(2)(b)]}} \times \text{Net Amount of Tax as Finally Determined Plus Interest thereon [734.041(2)(a)]}$$

Although the multiplicand is the least ambiguous factor in the formula, the term "finally determined" presents a definitional problem. For purposes of determining the correct amount to be apportioned to a particular property interest, "finally determined" can most likely be defined as the total tax actually paid to the United States, regardless of whether the tax liability was correctly computed. For example, if the estate tax were unintentionally overpaid by the personal representative, and a statute of limitations barred adjustment, the amount actually paid would be the amount finally determined.[25] Ad valorem penalties imposed by the Internal Revenue Code are omitted from this amount,[26] however, since incurrence should normally result in surcharge to the personal representative.

Since the statute in effect adopts the Internal Revenue Code definition of "net estate," the denominator of the apportioning fraction is reasonably clear. Section 734.041(2)(b) defines the denominator as the gross estate less the deductions, excluding the specific exemption allowed by the Internal Revenue

24. Such terms as "except as otherwise directed by the will" and "except as otherwise directed by decedent's will" permeate the statute. FLA. STAT. §734.041 (1971).

25. *See* text accompanying notes 116-126 *infra* for a discussion of the problem of delaying collection for final determination.

26. 26 U.S.C. §§6651, 6653 (1970).

Code. Those deductions are provided in part IV, subchapter A of the Code,[27] and include claims and administration expenses,[28] casualty losses during administration,[29] gifts to charities,[30] and gifts to the surviving spouse (the marital deduction).[31] In effect, the denominator is the federal taxable estate without deduction of the specific 60,000 dollar exemption.[32] Note that, excepting charitable and marital gifts and ignoring estate tax and income during administration, this definition comprises the total benefits to be *actually received* by beneficiaries. The importance of this observation becomes evident when the numerator of the apportioning fraction is fully understood.

Section 734.041(2)(c) and (d) defines "included in the measure of such tax" and "value," the key terms used to express the numerator in section 734.041(2)(a). Subsection (c) excludes exempt or initially deductible items from the definition of "included in the measure of such tax." The Internal Revenue Code, however, no longer exempts assets of a citizen or resident[33] and the term "initially deductible" does not appear in the estate tax provisions of the Code.[34] The Code is therefore of limited value in defining the numerator of the apportioning fraction, leaving one in the precarious position of determining the intent of the Florida Legislature in employing the terms. The context points with probability to the charitable and marital deductions, which are deductible *by their nature* and therefore initially deductible rather than upon a subsequent event. In contrast, the interests eventually used for claims or administration expenses, prior to meeting the nonclaim statute or rendering service to the estate, have no deductible characteristics.

Section 734.041(2) (d) defines "value" as "pecuniary worth . . . as finally determined." This can be reasonably interpreted as the beneficial interest reduced by such amounts as claims and expenses of administration, which are deductible and chargeable under local abatement rules.[35]

The foregoing observations interpreting "measure of the tax" and "pecuniary worth" are just that – interpretations. The strongest argument supporting these interpretations appears in the clear definition of the denominator. Adopting the Internal Revenue Code definitions, the legislature has clearly defined the denominator as *those interests, other than qualifying charitable and marital gifts, reduced by proper charges, other than estate tax, under local property rules.* The foregoing interpretations of the numerator must therefore be correct, since only in that manner can the incongruity found in a total apportioning fraction of more or less than one be avoided.

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27. 26 U.S.C. ch. 11 (1970).
28. 26 U.S.C. §2043 (1970).
29. *Id.* §2054.
30. *Id.* §2055.
31. *Id.* §2056.
32. *Id.* §2052.
33. Foreign realty was exempt prior to 1962. *See* 26 U.S.C. §2031 (1970) prior to Pub. L. No. 87-834, §18(a)(1).
34. 26 U.S.C. ch. 11 (1970).
35. FLA. STAT. §734.05 (1965).

APPORTIONMENT TO THE PROBATE ESTATE

In determining the total tax to be apportioned, three separate interests may be charged with a portion of the federal estate tax: first, the probate estate — that property previously in the name of the decedent, now controlled by a personal representative; second, the non-probate estate — those benefits, such as life insurance proceeds and jointly held property received by reason of decedent's death but not controlled by the personal representative; and third, that property falling within special rules — homestead and dower. Although the probate estate is primarily responsible for payment of the estate tax,[36] it bears the ultimate impact of only the tax attributable to property in the probate estate. Generally, the personal representative will be reimbursed for that portion of the tax attributable to outside interests.

Section 734.041(1)(a) and (b) deals with assigning the burden of the tax attributable to the testate[37] probate estate among various interests within the probate estate. For this purpose the probate estate is divided into two classifications — residual and all-other. The statutory scheme obviously intends that the entire amount attributable to the testate estate be charged to the residual estate. Not as obvious, however, is the treatment within the residue.

Section 734.041(1)(b) not only charges that portion of the tax attributable to the residue to that residue, but also provides, using the descriptive terms of the apportioning fraction, that intra-residue apportioning shall charge only those interests included in the tax base. This scheme becomes important when marital or charitable gifts, as well as non-deductible gifts, are included within the residue.[38] For example, assume a tentative residue of $80,000 resulting from $100,000 in assets remaining after specific, demonstrative, and general gifts, less $20,000 in claims and expenses of administration other than estate tax. The residue is bequeathed equally to the surviving spouse (not exceeding maximum marital deduction) and a son. Under section 734.041(2), which describes the apportioning fraction, the numerator will be $40,000, since the wife's interest is not included in the tax base.[39] However, this decides only the amount of tax attributable to the entire residue. Under section 734.041(1)(b), using the same terms as subsection (2), the son will bear the entire

36. *See* note 10 *supra.*

37. Interestingly, a partial intestacy is treated as "non-probate" by providing apportionment to this interest in FLA. STAT. §734.041(1)(e) (1971). Since partial intestacies are uncommon, the ramifications of this provision are not explored here. However, the reader may want to consider this complexity in the following question: "Under what circumstances will one interest bear the ultimate impact of the tax on another interest?" "Probate estate," as used hereafter, will refer to property controlled by will unless otherwise stated.

38. Both the charitable and marital deductions are limited to the amount the beneficiary will actually receive. All charges against the interest, including the tax itself, will reduce the deduction. Charging the estate tax to a deductible interest necessitates employment of high school algebra to compute the deduction and the tax because of the mutual dependency. More importantly, an increase in the tax obligation results.

39. *See* 26 U.S.C. §2056 (1970) and text accompanying notes 32-37 *supra.*

tax attributable to the residue. In this manner tax attributable to the residue will be borne only by those beneficiaries whose interest is not deductible.

Section 734.041(1)(a), charging the tax attributable to specific, demonstrative, and general gifts to the residue raises a different issue. Enlarging for illustration the above example to include a tax attributable to non-residual gifts, the question arises whether the wife's or the sons's interest will be charged. Apparently they will be equally charged, since any direction to equitably apportion intra-residue is noticeably missing.[40] Since the legislature could have equitably apportioned when providing for the tax attributable to the residue, but did not, one must assume that the tax attributable to non-residual probate gifts, the homestead, and uncollectible interests are charged to the residue without regard to deductibility of any interest. The reference to section 734.05 in sections 734.041(1)(d) and (6)(c) reinforces this assumption.[41] Note also that apportioning the tax to a deductible interest decreases that interest and therefore increases the tax liability.[42]

Summarizing, the residue may be charged with estate tax attributable to residue; specific, general, and demonstrative gifts; homestead; and an interest charged with its share of tax, which the executor is unable to collect. If there are both deductible and non-deductible interests in the residue only the tax attributable to the residue is not charged against the deductible interest. This scheme is simple enough as long as there *is* a residue. Situations in which the residual assets have been exhausted involve more complex determinations.

Before discussing that complexity, however,[43] one other apportionment directive regarding the probable estate should be considered. Section 734.041(1)(b) allows no apportionment between temporary and remainder estates,[44] thus the corpus will bear all tax attributable to the interest. Since the Tax Reform Act of 1969[45] substantially limits the deductibility of charitable remainders, the importance of the tax complexities created by this provision is diminished. Nevertheless, this direction concerning temporary interests raises two general observations: first, a temporary interest (an income interest) *will* be reduced by *any* reduction of funds going into the trust, since there will necessarily be less income. The apportionment prohibition merely provides for no charges against future receipts of income. Second, the charge of tax attributable to the temporary interest against the remainder interest (only partially accomplished due to the first observation) would violate the apportionment formula if the remainder qualified as tax deductible, since that formula excludes deductible items from the numerator. There is little question

40. This is also true concerning tax attributable to the homestead interest, FLA. STAT. §734.041(1)(d) (1971), and uncollectible apportioned amounts. *Id.* §734.041(6)(c).

41. Note that when the residue is insufficient to pay the tax attributable to non-residue probate interests those interests must pay, but according to the apportioning formula. FLA. STAT. §734.041(1)(a) (1971).

42. *See* note 38 *supra.*

43. *See* text accompanying notes 47-77 *infra.*

44. Other sections of the apportionment statute contain the same directive. *See* FLA. STAT. §§734.041(1)(c), (e) (1971).

45. Pub. L. No. 91-172.

that this more specific provision overrides the more general direction of the apportionment formula.[46] Again, the result is an increase in the federal tax, since charging a charitable remainder with tax attributable to a taxable income interest will increase the estate tax.

THE *George* CASE — AMOUNTS IN EXCESS OF THE RESIDUE

The foregoing discussions of the residual estate have assumed that a residue remains after all charges. In *Estate of George* the Third District Court of Appeals was faced with the more complex situation in which the charges to residue exceeded the residual assets.[47] The approximate figures involved in *George* were:

Assets in excess of non-residual gifts	$44,000
Estate tax attributable to the entire probate estate	33,000
Claims and expenses of administration	17,000

With both specific and general legacies, the court faced the question of how to change the $6,000 residual deficit. If the deficit were classified as tax attributable to specific and general legacies[48] both specific and general legacies would be charged;[49] if classified as claims or expenses, the general legacies would be exhausted prior to any charge against specific legacies.[50] Charging general legacies first, the *George* court adopted the latter classification.[51]

This unfortunate decision, if followed blindly, would emasculate the clearly expressed statutory plan for equitably apportioning this portion of the tax. *George* runs directly counter to the strong trend away from arbitrary appropriation of assets to pay taxes[52] in favor of appropriation of the assets that created the tax.[53]

George can be isolated, however, since the decision is based on an erroneous concession discovered by the court in counsel's computation, which defined the "residual estate" as the residual assets ($44,000).[54] The court then reasoned that, since section 734.041(1)(a) applies only if the residuary estate is insufficient

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46. Similar prohibitions in other jurisdictions against charging temporary interests have been so interpreted. *See* Jack v. Commissioner, 8 T.C. 272 (1947), interpreting Massachusetts' apportionment statute. The apportionment formula has also been superseded in other instances, see text accompanying notes 40-42 *supra* concerning FLA. STAT. §§734.041(1)(a), (d), (6)(c) (1971).

47. 200 So. 2d 256 (3d D.C.A. Fla. 1967).

48. Apparently, at least $6,000 was attributable. However, the opinion is not entirely clear. *Id.* at 257.

49. *See* FLA. STAT. §734.041(1)(a) (1971).

50. *Id.* §734.05.

51. The $44,000 in residual assets was considered as used to pay the $33,000 tax on the entire probate estate first — then $11,000 of the claims and expenses, leaving $6,000 claims and expenses. *In re* Estate of George, 200 So. 2d 256, 257 (3d D.C.A. Fla. 1967).

52. *See, e.g.*, FLA. STAT. §734.05 (1971).

53. *See, e.g.*, FLA. STAT. §734.041 (1971).

54. *In re* Estate of George, 200 So. 2d 256, 257 (3d D.C.A. Fla. 1967).

to pay the tax attributable to specific and general legacies, section 734.05 must apply.

There are two major non-policy objections to this reasoning:

(1). A definition of "residue" including only the residual assets is contrary to its well established definition. "Residue" is generally defined as assets "after all other legacies have been satisfied *and* all *charges, debts,* and *costs* have been paid."[55] Since the apportioning fraction clearly contemplates each interest as after-all-property-charges-except-estate-tax, section 734.041 is using the accepted definition of "residuary estate," except for estate taxes. The *George* case adopts, by concession, a strained and unusual definition of residue, unjustified by usage or the pattern of section 734.041.

(2). *George* uses section 734.06 because of "its broader scope,"[56] pointing out that this section determines who must pay without the restrictive language of section 734.041. The opinion also mentions, in passing, section 734.05 as having a similar order of priority. This analysis presents several questions: What is the relationship between sections 734.041, 734.05, and 734.06? If these statutes conflict, which governs?

The three statutes do not conflict, since the charging of estate taxes is governed solely by section 734.041.[57] This assertion can be substantiated by first examining sections 734.04 and 734.06, disregarding section 734.041. Section 734.05 deals with the appropriation of classes of assets, ignoring relationships within the classes. In this regard section 734.05 is broader in scope than 734.06, since 734.05 provides for charges in the event of either intestacy or partial intestacy. Although section 734.06 duplicates some 734.05 provisions, it deals principally with relationships within classes and the definition of classes.[58] In other words, the primary, broad authority for appropriation is section 734.05. Section 734.06 compliments 734.05, fills in details, but does not conflict.[59]

The foregoing interpretation of the relationship between sections 734.05 and 734.06, both in existence since 1933, provides substance to the 1965 amendment to 734.05. The 1964 amendment, which added parenthetical reference to section 734.041, vested complete authority for charging estate taxes in section 734.041.[60] This interpretation is also consistent with the 1963 passage of section

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55. Park Lake Presbyterian Church v. Henry's Estate, 106 So. 2d 215, 217 (2d D.C.A. Fla. 1958) (dictum). *See also* BLACK'S LAW DICTIONARY (rev. ed. 1948).

56. *In re* Estate of George, 200 So. 2d 256, 257 (3d D.C.A. Fla. 1967).

57. Although FLA. STAT. §734.05 (1971) is used, it is employed by authority of reference in §734.041.

58. FLA. STAT. §734.06 (1971) provides that demonstrative legacies can fit within both specific and general classes, that generally abatement will be proportionately within classes, that substitutes for dower and legacies for consideration have priority within their classes, and in the event one beneficiary pays more than his share he is entitled to contribution from other members of the class.

59. An example of using both statutes would be the charge of a pretermitted share against a wholly testate estate with a residue large enough to absorb the entire share. The authority to charge the residuary estate would be §734.05. The authority to spread this charge among the residuary beneficiaries would be §734.06, although there is no provision in §734.06 allowing the charge.

60. To give complete authority to FLA. STAT. §734.041 (1971) it was not necessary to

734.041 providing for treatment of certain taxes in accordance with 734.05. The need to add "and §734.06" was absent, however, since section 734.06 will automatically reconcile intra-class problems created by a 734.05 authorized charge.

Absent the questionable concession in *George,* the following reasoning could have been employed by the court to reach a more equitable conclusion. For purposes of section 734.041 the residue should be $27,000 ($44,000 residual assets less claims and expenses other than estate tax, of $17,000). The tax attributable to the residue should be charged against this residue. To the extent the tax attributable to the residue exceeds $27,000, general legacies should be charged under section 734.05. To the extent the tax attributable to the residue is less than $27,000, the difference (made up of tax attributable to specific and general gifts) should be charged to the residue under authority of section 734.041(1)(a). The balance of the tax, attributable to non-residual gifts, should be equitably charged to both specific and general gifts under section 734.041(1)(a).[61] Under this reasoning beneficiaries of specific gifts would not escape tax attributable to their interests at the expense of beneficiaries of general gifts.

Beyond George

In addition to claims, expenses, tax attributable to residue, and tax attributable to non-residual probate property, section 734.041 charges against the probate estate, in section 734.05 sequence, tax attributable to homestead,[62] and uncollectable apportioned tax.[63] Section 734.041 is unclear, however, as to the order in which these items are charged and against what interests, should they all exist in one probate estate.

Thus, there are five charges to the probate estate in Florida:

(1). Section 734.041(1)(b) charges tax attributable to residue to that residue. No provision for further charges is included, however, if the residue is insufficient. This situation could occur if too many items of apportioned tax have been charged to residue ahead of tax attributable thereto. Absent provisions for further charge, one must look to section 734.05.

(2). Section 734.041(1)(a) charges tax attributable to specific and general gifts to residue on a non-equitable basis disregarding deductible status.

(3). Section 734.041()(a) charges tax attributable to specific and general legacies to those legacies when residue is insufficient on an equitable basis. The assets that create the tax pay proportionately, based on the amount of tax assessed, and deductible specific or general legacies are not charged.

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amend §734.06, since without the basic authority to charge a class there are no problems of abatement or contribution within a class.

61. Omitted from this discussion is the question of priority of claims. *See* 31 U.S.C. §§191, 6324 (1970); FLA. STAT. §733.20 (1971). On the surface this seems pertinent to the issue of classifying a residual deficit — that is, which charges had to be paid first? But priority of debts is important only when someone is not going to be paid. The problem is not present here. Rather, our problem is: Who is going to bear the burden of that which has been paid?

62. FLA. STAT. §734.041(1)(d) (1971).

63. *Id.* §734.041(6)(c).

(4). When 734.041 fails to provide for a tax charge or refers directly to section 734.05 the charge is non-equitable, since 734.05 considers neither exempt or deductible status nor whether the tax was wholly created by the class charged.

(5). To the extent taxes are not apportioned to an interest that can and does bear its share, the probate estate must bear the burden. If those charges to the probate estate exceed the probate assets there is no provision for further apportionment in either 734.05 or 734.041, except the tentative homestead charge.[64] This would result in the non-probate interest on which the federal government levies[65] paying more than its share of the tax.

Viewing these points, the problems that *George* suggested but failed to reach — the potential effect of all five of the possible charges against the probate estate — should be considered in review. The five charges to be examined include:

(1). debts and expenses of administration;
(2). estate tax attributable to residual gifts;
(3). estate tax attributable to specific, general, and demonstrative gifts;
(4). estate tax attributable to homestead; and
(5). estate tax attributable to non-probate interests that cannot be collected by the executor.

The problem is classifying an excess over a specific fund for purposes of determining how that excess will be charged to another fund.[66] The two instances in which classification of the excess is pertinent are when the residual assets are exhausted and when the entire probate estate is exhausted.

Exhaustion of Residual Assets

The exhaustion of residual assets problem was raised in *George* with only the first three of the possible five charges considered. The excess should have been classified as number 3, estate tax attributable to non-residual testamentary gifts.[67] If all five charges had been involved, essentially the same questions are raised. Should all non-residual interests be taxed proportionately or should immunity be granted to certain classes?[68] Should the charges in excess of residual assets be classified as number 3 or as any of the other four?[69]

When the probate estate is sufficient to pay all charges, but the residual gifts are inadequate, residual assets should be consumed first by charges 1, 2, 4, and 5. The scheme of section 734.041 suggests this treatment by apportioning

64. *See* text accompanying notes 74-76 *infra.*

65. *See* text accompanying notes 13-14 *supra.*

66. Creditor priority should not be relevant here. *See* note 61 *supra.*

67. *See* text accompanying notes 47-61 *supra.*

68. Following standard abatement sequence would grant immunity to specific gifts until general gifts are exhausted. *E.g.*, FLA. STAT. §734.05 (1971).

69. Numbers 1, 2, 4, and 5 are all charged against non-residual assets in §734.05 order, ignoring deductible status. Number 3 is just the opposite.

taxes *after* section 734.05 has reduced the estate by debts and expenses, including debts and expenses of administration. Since 734.041(1)(d) and 734.041(6)(c) handle items 4 and 5 by referring simply to 734.05 order, it suggests that the legislature contemplated a charge to residual assets. Further, the careful wording of section 734.041(1)(a) contemplates that charges against specific and general gifts (only possible if residue is exhausted) shall consist of tax attributable to those interests.

Exhaustion of Entire Probate Estate

Even when the total charges exhaust the probate estate, classification of the excess is important, since other interests may have to pay and their right to reimbursement may depend on the classification. Creditor priority becomes important upon exhaustion of the probate assets. Oversimplified, the order of priority runs: (1) expenses of administration, (2) debts to the United States and estate taxes, (3) other debts of decedent.[70] To the extent the excess results in nonpayment of creditors, other than the United States, rights of the executor taken by subrogation become important.[71] To the extent the excess results in nonpayment of federal estate tax, non-probate property will be seized[72] and owners of that property must look to the interests that should have paid the tax.[73] In both cases the right to collect turns on classification of the excess and the theoretical sequence of the five charges to the probate estate. Classification of such excess must consist of tax attributable to homestead (number 4), tax attributable to an uncollectable non-probate interest (number 5), or some combination of the two. An excess could never exist if only the first three charges were involved.

A difficult contest between values is then presented. If the excess consists of number 4, a right against homestead beneficiaries is created. This appears to violate the spirit of the Florida constitutional exemption,[74] but section 734.041(1)(d) could indicate a legislative intent to charge homestead. Subsection (2) (d) states "the homestead shall not be subjected to contribution to such tax until the estates' assets are exhausted."[75] If this statute survives the constitutional hurdle, and both charges numbered 4 and 5 are present, the problem arises of which charge exhausted the estate's assets.

If the excess consists of number 5, the conflicts-of-law rules of several states[76] may eliminate any remedy against the interest that should have paid the tax. Thus, the ultimate impact of the tax is shifted to the unpaid creditor of the interest seized by the government.

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70. 31 U.S.C. §191 (1970).
71. United States v. Gilmore, 222 F.2d 167 (5th Cir. 1955); *In re* Gatch's Estate, 153 Ohio 401, 92 N.E.2d 404 (1950).
72. 26 U.S.C. §6324 (1970).
73. 26 U.S.C. §2205 (1970); FLA. STAT. §734.041(6)(b) (1971).
74. FLA. CONST. art. X, §§4(a), (b).
75. FLA. STAT. §734.041(1)(d) (1971).
76. *See* text accompanying note 125 *infra*.

Neither solution is desirable, nor will this writer attempt to predict the action of the court eventually faced with the choice. Basic responsibility for the problem must rest on an irresponsible United States Congress, which passed a high estate tax, a ruthless method and priority of collection, and then carelessly dealt with apportionment in piecemeal fashion.[77] The Florida Legislature, however, could partially remedy this problem by forcing all taxable interests to bear this loss proportionately.

APPORTIONMENT TO THE NON-PROBATE ESTATE

The more complicated problems of testamentary direction and the majority of collection and conflict-of-law problems concern tax attributable to non-probate interests.[78] Charges against non-probate interests are covered in three categories: trusts and appointive property,[79] homesteads,[80] and all other property included in the tax base.[81]

Federal Provisions for Apportionment

Prior to examining the balance of section 734.041, the scheme of federal apportionment should be considered, since the will direction and collection problems of section 734.041 are affected by these statutes. The authority of the federal government in the apportionment area has never been clearly elucidated.[82] Apportionment is not concerned with the amount or payment of the

77. 26 U.S.C. §§2206, 2207 (1970).

78. There remains the problem of dower. As far as §734.041 is concerned there is no unusual problem concerning dower, but the dower section itself complicates the issue. Section 731.34 exempts dower from charges except "where the dower interests shall have the effect of increasing the estate tax." Taken literally, this provision approaches the status of gibberish (consider the ways dower election could *increase* the tax). Florida dower qualifies for the marital deduction (see FED. EST. & GIFT TAX REP. §2081.15 and cases cited therein), but the marital deduction is limited to one-half the adjusted gross estate. In the event property passing to the surviving spouse (by dower and otherwise) exceeds this limit, §734.041 would clearly apportion tax to the excess. Section 734.34 would appear on the surface to conflict with this application of §734.041. It does not seem profitable to increase the length of this article by detailed analysis of this conflict, since much has been written on it. The widow will probably have to bear her share of the tax, that is, to the extent her benefits exceed the maximum marital deduction. *See* FLORIDA WILL DRAFTING & ESTATE PLANNING §17.39 (Fla. Bar Continuing Legal Educ. Practice Manual 1968).

79. FLA. STAT. §734.041(1)(c) (1971).

80. *Id.* §1(a).

81. *Id.* §1(e). There is little reason for the separate treatment or charges to trusts and powers of appointment; subsection (c) could have included those interests. There is reason to treat collection differently, however, since in one case you collect from a fiduciary and in the other from a beneficiary. FLA. STAT. §734.041(3) (1971). Apparently apportionment is broken down the same way in order to be consistent.

82. One answer is the nexus between equitable sharing of the burden, which should create happier taxpayers, and the enumerated power under which the estate tax was passed. This nexus, however, becomes very doubtful when the paltry scope of federal apportionment is examined; too much is left for state statutes.

federal estate tax, but rather with the appropriation and abatement of assets to bear the ultimate impact of one of the expenses of dying. This, traditionally, has been a question of local property rights.[83]

The only United States Supreme Court consideration of the source of the apportionment power was in a case involving apportionment within the probate estate, *Riggs v. Del Drago*.[84] New York's apportionment statute had been invalidated by New York's highest court as usurping a field already occupied by federal statute.[85] The Supreme Court reversed, finding no congressional intent to apportion in *this* federal statute.[86] The Court did mention in dictum the federal apportionment statutes (now sections 2206 and 2207)[87] as examples of congressional intent to apportion.

An examination of these sections reveals variations from Florida's apportioning to these same interests. The federal multiplicand, as was Florida's until the 1965 amendment, is simply the "total tax paid."[88] Now, in Florida "the net amount of tax as finally determined"[89] must be read in conjunction with section 734.041(2)(e) and therefore read "the net amount of tax as finally determined prior to credit for foreign death taxes." Federal apportionment, then, differs from the Florida scheme, the federal scheme distributes a share of the foreign tax credit to insurance and appointive property regardless of actual payment by another interest. Florida does not distribute in such manner, however, unless the foreign interest and the residue are unable to absorb the entire credit.

The denominators are the same. Both the federal and Florida statutes use the Internal Revenue Code term "taxable estate" and add back the exemption.[90]

The major difference is in the numerator. The Florida statute contemplates an amount not exempt or deductible that will actually pass to the beneficiary after all charges except tax.[91] The federal statutes, sections 2206 and 2207, are, however, less clear and poorly drafted compared to section 734.041. Terms such as "part of gross estate,"[92] "proceeds of policies,"[93] and "value of such

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83. *See* J. MERTEN, LAW OF FEDERAL GIFT AND ESTATE TAXATION, ch. 44 (1960) for a review of federal apportionment history and the federal trend in this area.

84. 317 U.S. 95 (1942).

85. *In re* Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131 (1941).

86. 317 U.S. 95, 98 (1942).

87. The Supreme Court of North Carolina is the only high court that has met this issue squarely. It held, largely by finding an inference in *Riggs*, that 26 U.S.C. §2207 (1970) is within the enumerated powers of Congress. First Nat'l Bank v. Wells, 267 N.C. 276, 148 S.E.2d 119 (1966).

88. 26 U.S.C. §§2206, 2207 (1970).

89. FLA. STAT. §734.041(2)(a) (1971).

90. 26 U.S.C. §§2206, 2207 (1970); FLA. STAT. §734.041(2)(b) (1971).

91. *See* text accompanying notes 25-35 *supra*. The charges at issue are those authorized by INT. REV. CODE of 1954, §2053(b). For example, trust termination fees. While normally there are no charges against insurance proceeds, the growing use of insurance trusts could change this. The deductible interest in question is the charitable deduction.

92. 26 U.S.C. §§2206, 2207 (1970).

93. *Id.* §2206.

property"[94] could indicate valuation before any charges, whether deductible or not. This interpretation is enforced by the specific exclusion of any marital interest.

Contrary to this interpretation is the expressed congressional policy to apportion *equitably*.[95] The normal definition of equitable apportionment would certainly exclude deductible charitable interests. Furthermore, both sections qualify the numerator with the term "if any part of the gross estate *on which tax has been paid* consists of . . . ."[96] If the italicized phrase modifies the word "part" rather than "gross estate," exclusion of charitable interests and that portion of taxable interests used to pay charges is indicated.[97]

Although this issue has not been decided by a federal court, the New York courts have considered the inclusion of a charitable interest in the section 2207 numerator.[98] Recognizing that section 2207 "might leave some doubt" as to inclusion of the charitable interest, the Surrogate applied equitable principles and attributed the prorata share of the estate tax only to the taxable interests in the trust.[99] This interpretation of section 2207 was affirmed by the intermediate appellate court.[100] Three members of New York's highest court affirmed, and four members reversed on another issue not reaching the problem of the section 2207 numerator.[101]

What should counsel do if there is an apparent difference between the two apportionment statutes? Obviously, if sections 2206 and 2207 are within the enumerated powers, the supremacy clause of the United States Constitution would render the conflicting portion of section 734.041 invalid. There may be no conflicts, since, at least in regard to charges and deductible interests, the federal statutes have been interpreted[102] to mean the same as section 734.041. Certainly, counsel for a qualifying charity has grounds to contest application of sections 2206 or 2207 to his clients, since deductible interests should not be subject to apportionment under these statutes.

Directions by the Decedent

The Florida and federal apportionment statutes also make liberal use of

94. *Id.* §2207.

95. *E.g.*, S. REP. No. 1631, 77th Cong., 2d Sess. 233 (1942), discussing enactment of §2207.

96. 26 U.S.C. §§2206, 2207 (1970) (emphasis added).

97. Another argument against inclusion of an interest that pays substantial charges or a deductible charitable interest is the possibility of requiring the recipients of insurance proceeds or appointive property to pay the personal representative more than the total tax paid. This could happen under a definition that allows the numerator to exceed the denominator.

98. *In re* Will of King, 277 N.Y.S.2d 281, 52 Misc. 1021 (N.Y. County Sur. Ct. 1967), *aff'd*, 28 App. Div. 2d 1121, 285 N.Y.S.2d 566 (1st Dep't 1968), *rev'd*, 22 N.Y.2d 456, 239 N.E.2d 875 (1968).

99. It is clear from the facts of this case — large amount of appointive property, very small probate estate — that he excluded the charitable interest from the numerator.

100. *In re* Will of King, 28 App. Div. 2d 1121, 285 N.Y.S.2d 566 (1st Dep't 1968).

101. *In re* Will of King, 22 N.Y.2d 456, 239 N.E.2d 875 (1968).

102. *Id.*

terms such as "unless otherwise directed."[103] These words raise two questions: What is the extent of the decedent's power of direction? How is this power properly exercised?

In the normal course of events an executor will pay the entire estate tax from probate funds, although the tax base includes assets outside the probate estate. Apportionment statutes give the executor a right to reimbursement from those non-probate assets,[104] a right that may be abridged under this same statute by direction in the will. Quite often there is a substantial question of interpretation concerning the testator's intent to abridge. When the will states "the tax shall be paid from my estate," which "estate" is he discussing — the probate estate or the entire taxable estate? Did he intend to charge deductible interests?

This is a factual determination; the majority of difficult cases being determined by the court's "point of departure." Here the question is one of evidentiary presumption. If testamentary directions are vague some courts assume an intention to charge the probate estate, since that was the method used for many years prior to modern apportionment statutes.[105] Florida and the majority of jurisdictions assume apportionment, since this "equitable" state policy is expressed by statute and, therefore, requires "clear" directions to accomplish the contrary.[106] The intention to deny apportionment, or to otherwise deviate from section 734.041, must be clearly expressed by directions in the will or the trust instrument in the case of property held under an *inter vivos* trust or power of appointment.[107] This raises the possibility of conflict between the two documents. As long as both instructions are within the decedent's power, the conflict is merely a question of intent and the later instrument should generally prevail.[108]

Partially, because the concept of affecting non-probate assets by will provisions is quite novel, the major issue concerning will directions is the extent of the decedent's power to apportion. Many items included in the tax base are completely beyond the decedent's control unless apportionment statutes change the normal rule of property. For example, an irrevocable, completed *inter vivos* gift can be included in the tax base as a "gift in contemplation of death."[109] An estate by the entireties, which normally creates a property interest in the spouse not subject to recall, can be included in decedent's tax base.[110] Could apportionment change the irrevocable nature of the gift or amount to a power to recall? Certainly an *unlimited* power to apportion could result in

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103. 26 U.S.C. §§2206, 2207 (1970); FLA. STAT. §734.041 (1971).

104. *See, e.g.*, FLA. STAT. §734.041(3), (4), (5) (1971).

105. *See, e.g., In re* Hota Ling's Estate, 74 Cal. App. 2d 898, 170 P.2d 111 (1946).

106. Hagerty v. Hagerty, 52 So. 2d 432 (Fla. 1951). *See also In re* Estate of Heit, 206 N.Y.S.2d 59 (N.Y. County Sur. Ct. 1960). New York cases are entitled to substantial respect in Florida, since Florida copies the New York apportionment statute. *In re* Fuch's Estate, 60 So. 2d 536 (Fla. 1952).

107. FLA. STAT. §§734.041(1)(c), (e) (1971).

108. *In re* Estate of Strohm, 241 So. 2d 167 (4th D.C.A, Fla, 1970).

109. 26 U.S.C. §2035 (1970).

110. 26 U.S.C. §2040 (1970).

a power to partially revoke a completed transaction. In fact, the power to *increase* the amount of tax statutorily apportioned to a non-probate estate is a power to partially revoke the prior gift, while the power to *decrease* the apportioned amount is merely the power to make a gift of probate assets.

It is highly doubtful whether a power exists to increase the apportioned amount. Charging non-probate assets is a relatively recent development; originally the probate estate bore the entire tax. In fact, according to one major publisher, non-apportionment is still the majority rule.[111] The background and wording of apportionment statutes indicate a power to *relieve* non-probate assets, but only at the expense of the probate estate. Indeed, the off-hand manner in which the power is granted by apportionment statutes strongly indicates a lack of intent to violate normal property rules of revocability. In both the Florida and federal apportionment statutes the power to direct is given merely by a qualifying phrase prior to apportionment. This infers a legislative attempt to insure that the testator's inherent right to direct the disposition of probate assets remains unimpaired. In effect decedent may still direct against any apportionment. Since the statute would charge the non-probate interests upon failure to so direct, he is making a testamentary gift of probate assets to the beneficiaries of non-probate assets.

Thus, both the history and context of apportionment statutes indicate a legislative determination of fair apportionment. This is not mandatory, however, since the testator may unfairly charge his probate estate if he wishes, but there is no historical justification for charging a non-probate interest more than a fair share.

In Florida there is a direct holding that testamentary directions cannot add to the burden allocated to non-probate assets. *In re Barret's Estate*[112] involved section 734.041 during the six-year period the Florida apportionment statute was nonequitable. This statute primarily charged the residuary estate with the entire tax, but also stated: "Nothing in this statute shall prohibit a testator from directing in his will that said taxes be apportioned or paid in a manner other than as provided in this section."[113] The court restricted this statement to provide for deviation *within* the probate estate only.[114]

It appears, then, that testamentary directions can *reduce* the amount charged to the non-probate asset, but cannot *increase* the tax burden of the non-probate interest. Yet by a 4-3 vote the New York Court of Appeals in *King*, relying solely on testamentary directions, charged appointed property more than section 2207's formula apportioned.[115]

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111. FED. EST. & GIFT TAX REP. ¶2490.16 (1972).

112. 137 So. 2d 587 (1st D.C.A. Fla. 1962).

113. FLA. STAT. §734.041 (1957).

114. *In re* Barret's Estate, 137 So. 2d 587, 590-91 (1st D.C.A. Fla. 1962).

115. *See* note 101 *supra*. The majority found an equitable reason for the existence of §2207 and decided this policy indicated equitable interpretation of the phrase "unless the decedent directs otherwise in his will." The facts in *King* were admirably constituted to raise the issue of testamentary power to apportion. The decedent was donee of a general testamentary power of appointment, taxable in his estate whether or not he exercised it. The

The facts of *King* are appealing. The decedent owned a comparably small estate and the appointive fund was very large. His testamentary directions apportioned the *excess* tax caused by inclusion of the appointive property in his taxable estate, rather than a prorata share. This was an attempt to leave his probate estate in the same position as if he had not become donee of the power of appointment. Yet the principle of *King* is disturbing. Even though the decedent's desire to keep his probate estate whole is appealing, it is doubtful that section 2207 was designed to allow a charge in excess of an even proration. The donee's solution lay in proper usage of his power of appointment.

COLLECTION

In Personam v. In Rem

Once tax liability is apportioned among the several parts of the estate, the apportionment problem focuses upon the question of from which part will the tax be collected. Essential to collection problems is an understanding of the nature of the charge for apportioned tax. Is this right to collect, given to the personal representative, a charge in rem or in personam?

Section 734.041 apparently charges individuals. Although subsection (1)(c), regarding *inter vivos* trusts and appointive property, speaks of charging to and paying from trust corpus, this provision relates to determination of the amount to be charged.[116] Of more importance, subsection (3), in authorizing collection, speaks only of individuals – that is, fiduciary in possession, recipients, or beneficiaries. Sections 2206 and 2207 of the Internal Revenue Code similarly indicate personal liability.

If the liability is personal, tracing problems are eliminated. Also, whether the property involved is realty or personalty becomes irrelevant – a welcomed simplicity in this complicated area. However, it is possible for an individual to be taxed on property he no longer possesses. A prime example would be gifts in "contemplation of death."[117] The donee of a gift in contemplation of death could have consumed the gift long before he is confronted with a demand for apportioned tax.

Collection of apportioned tax raises no unusual problems if personal service on the non-probate beneficiary or trustee is obtained. When a non-probate

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power was exercisable *only* by a will executed *after* death of the donor. The donee never attempted to exercise the power, content with allowing the property to go to the takers in default of appointment, but by will executed *prior* to the donor's death he directed apportionment of estate taxes. The burden he apportioned to the appointive property exceeded state or federal formulas. Since the donee failed to comply with the prescribed method of appointment there was no question of this being an "appointment" rather than an "apportionment." His sole authority was found in the federal apportionment statute's power to direct otherwise by will.

116. Even in determination of amount, all other non-probate items are discussed in terms of individuals rather than property. FLA. STAT. §734.041(1)(e) (1971).

117. As defined by 26 U.S.C. §2035 (1970).

beneficiary resides in another state and refuses personal service, however, tax determination and collection becomes more difficult.

Absence of Personal Service — Action in Local Courts

Determination, of course, must precede collection. A determination whereby the foreign resident is put on notice but not served raises several questions of due process. Since the liability is personal, it is difficult to justify as part of the in rem probate proceedings.

Florida recognizes this inconsistency and has held a trustee to be indispensable to an apportionment determination.[118] The case, however, involved only one non-probate party. If there are several non-probate parties and the executor serves all but one, practicality will require a retreat from the "indispensable party" classification. Recognizing that apportionment involves many interests and is properly considered in its entirety, the New York courts will make a determination although one of the parties has not appeared.[119] This determination, binding on all parties served, is probably sound. The clear inference of these opinions is that missing parties are not bound and could challenge determination of the amount when brought before a court having jurisdiction over them.

The significance of the original determination, upon challenge in another court, remains to be seen. The recommendation of the Commissioners of the Uniform Apportionment Statute is to accord the original determination the status of prima facie correctness.[120] Florida also takes this position,[121] but acceptance by foreign jurisdictions remains to be seen.

If any property of the foreign beneficiary can be located within the state, the best cure for lack of service is to convert the action to quasi in rem. If the local property is not part of the probate estate a normal attachment action and quasi in rem determination of liability should suffice. Section 734.041(3) provides for awarding costs and attorney fees of such actions. If the foreign beneficiary has an interest in the probate estate, as well as the non-probate interest causing the collection problem, subsection (4)[122] provides for automatic attachment. The use of the word "any" in the phrases "any tax due" and "any state or federal taxes" seems to indicate that probate property can be subject to the tax on other benefits received by the same beneficiary.[123]

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118. First Nat'l Bank v. Broward Nat'l Bank, 265 So. 2d 377 (4th D.C.A. Fla. 1972).

119. *In re* Slade's Estate, 143 N.Y.S.2d 40 (N.Y. County Sur. Ct. 1955); *In re* Buckman's Will, 62 N.Y.S.2d 337, *aff'd*, 296 N.Y. 915, 473 N.E.2d 37, *cert. denied sub. nom.*, Kay v. MacCormack, 332 U.S. 763 (1947).

120. Uniform Estate Tax Apportionment Act §3(e).

121. *See* FLA. STAT. §734.041(5) (1971).

122. FLA. STAT. §734.041(4) (1971).

123. It is pertinent to note here the necessity for alacrity on the part of the personal representative. He is practicing in the field of creditor's rights and sensitivity to the problem plus prompt action can mean the difference between success and failure. This is particularly true when a non-probate beneficiary has other assets in Florida and may cause them to be removed from the state.

Absence of Personal Service — Action in Foreign Courts

If personal service or attachment are impossible, the practitioner may still have some recourse through the avenues of federal law and conflicts of law.

Federal law grants recourse only if life insurance proceeds or appointive property are involved. In this case sections 2206 and 2207 allow suit in the federal district court for the district in which defendant resides.[124] All other property interests require action in the courts of the foreign jurisdiction. If the substantive laws of the foreign jurisdiction provide equitable apportionment the problem is solved. If, however, the foreign jurisdiction is one of the many states still charging all estate taxes to the probate estate, the practitioner must argue either for a change in the rule or for application of the apportionment law of the probate domicile.

The question of application of domicile or situs law[125] is one of comity that the state must decide individually. Furthermore, until there is a complete federal law of apportionment the possibility of uncollectible apportioned tax will continue to exist. The trend, however, is definitely toward application of the law of the domicile, New York being the leader in adopting the law of domicile to situs property.[126]

EXPANSION OF FIDUCIARY RESPONSIBILITY

One of the more interesting aspects of this fascinating area is the changing role of the personal representative. No longer does he exist only to protect probate beneficiaries and creditors of the decedent. If the personal representative were responsible only to those interested in the probate estate, his right to elect to deduct certain expenses[127] and to elect the alternative valuation date[128] could present problems. His fiduciary responsibility to other, nonprobate, beneficiaries has necessarily been expanded by his duty to make the estate tax report combined with the effect of apportionment statutes.

The election to deduct expenses raises several questions of apportionment: Does waiver under section 642(g) change the apportioning fraction? Can all interests in the tax base be charged with a portion of the increased multiplicand?[129]

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124. 28 U.S.C. §1391(b) (1970).

125. *See, e.g.*, Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COLUM. L. REV. 261 (1955).

126. Illinois (per federal court interpretation), North Carolina, and draftsmen of the revised uniform act agree. Massachusetts leads the states refusing to apply domiciliary rules of apportionment to Massachusetts property interests; Minnesota and Oregon agree. *In re* Gato's Estate, 93 N.E.2d 924 (N.Y. 1950); Doetsch v. Doetsch, 312 F.2d 323 (9th Cir. 1963); First Nat'l Bank v. Wells, 267 N.C. 276 (1966); Isaacson v. Boston Safe Deposit & Trust Co., 91 N.E.2d 334 (Mass. 1950); First Nat'l Bank v. First Trust Co., 64 N.W.2d 524 (Minn. 1954); Beattis v. Coke, 387 P.2d 355 (Ore. 1963).

127. *See* 26 U.S.C. §642(g) (1970).

128. *See* 26 U.S.C. §2032 (1970).

129. A simple example will help: Assume a taxable estate, prior to the specific exemp-

It appears proper to change both the fraction and the multiplicand. Statutory terms such as "net estate" indicate expenses are taken into consideration only to the extent that they affect the tax result — and the "tax as finally determined" very clearly indicates actual liability, not a hypothetical tax. Yet using this solution, the non-probate interest will be charged more than if the section 642(g) election had not been made.[130]

The opportunity for mischief against non-probate interests increases substantially with the section 2032 election to value six months after death. The probate estate could profit by the section 2032 election even if there were no over-all tax savings.[131] An equal shift in values, from probate valuation to non-probate valuation, would increase the tax burden of non-probate interests with a corresponding decrease in the probate burden.

The Internal Revenue Code gives the authority for these elections to the executor,[132] however, neither Florida nor federal apportionment statutes take into consideration the potential discrimination available in this power to elect. The closest judicial guide is the lucid opinion in *In re Bixby's Estate.*[133] There, faced with the result of a section 642(g) election, the court used "full equitable powers" to make "whole" that interest that suffered the increase in estate tax.[134] Although the will directed payment of estate taxes from residue, the additional estate tax created by the election was charged to the income beneficiaries. The result was that *over-all* savings were obtained by the income interests, but not at the expense of the residuary interests.

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tion, of $400,000; $200,000 is non-probate, $100,000 is specific probate gifts, and $100,000 is residual probate. The estate tax is potentially $94,000. The executor waives deduction of $20,000 in fees chargeable against the residual assets, thereby reporting a taxable estate before exemption of $420,000 and paying a tax of $100,900. Is the apportioning fraction used to compute the liability of the non-probate interest 200/400 or 200/420? Is the multiplicand $94,500 or $100,900? Since the entire savings in income tax inures to the probate beneficiaries only, can the executor equitably make an election increasing the non-probate estate tax burden?

130. This is due to the increase in the *effective* estate tax rate that occurs by increasing a base subject to a *progressive* schedule of rates.

131. For example, an extreme (but in today's stock market not impossible) situation: Assume the interests in the preceeding example had changed in six months to read: non-probate $250,000 (previously $200,000), probate estate $140,000 (previously $200,000). By electing under §2032 the executor can save $3,200 in estate taxes, since the taxable estate (before exemption) would be $10,000 less than on date of death — but the tax attributable to the non-probate interests has increased over $11,000! The burden on the probate estate has been reduced over $14,000. Specifically, apportionment to non-probate interests, based on date of death values 250/400 × $94,500 = $47,250 — on alternative date values: 250/390 × $91,000 = $58,500+. It is possible to profit from a high estate valuation, since it can increase basis for income tax purposes. 26 U.S.C. §1014(a) (1970). This increases the complexity of reconciling the interests of probate and non-probate beneficiaries.

132. 26 U.S.C. §2032(a) (1970). 26 U.S.C. §642(g) (1970) merely requires a waiver to use the expense deductions for income tax rather than estate tax — but, since the executor has responsibility for the estate tax return, 26 U.S.C. §6018 (1970), he is obviously empowered to execute the waiver.

133. 140 Cal. App. 2d 326, 295 P.2d 68 (Cal. 1956).

134. 140 Cal. App. 2d at 339, 295 P.2d at 75.

CONCLUSION

Bixby is an excellent guide but limited by its facts. There, all interests were within the probate estate and well established law[135] required the *Bixby* result. Although a duty to non-probate beneficiaries has not been specifically decreed, it is submitted that it must eventually be established.

Extending the personal representative's power beyond the probate estate is the current trend,[136] however, the executor's responsibility to non-probate interests is only one of many interesting problems in this area. As indicated herein, the computation of apportioned amounts can be complex and collection can be even more so. The next few years should bring judicial solution of many of the problems mentioned in this article. The challenges of estate tax apportionment require more than normal scholarship. The quality of these solutions will vary directly with the time appellate judges and counsel are willing to expend in this area. It is hoped that this article will contribute to that quality.

135. *See* 28 U.S.C. §2205 (1970); FLA. STAT. §734.041(6)(b) (1971).

136. Modern apportionment schedules are not the only example of an executor's decisions affecting non-probate interest. The Uniform Probate Code's concept of "augmented estate" will eventually raise this problem. *See, e.g.*, UNIFORM PROBATE CODE §2-202(3)(ii) (Uniform Laws Annotated 1972).