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Florida's Estate Tax Laws--Apportionment Versus a Change Against Residue

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FLORIDA'S ESTATE TAX LAWS – APPORTIONMENT VERSUS A CHARGE AGAINST RESIDUE

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During the period from June 13, 1949, to May 13, 1957, Florida had an apportionment act distributing the burden of estate taxes among all parties interested in the decedent's estate. On the latter date this act was superseded by a statute charging estate taxes to residue in the absence of testamentary direction to the contrary. Consideration of the problems arising under the former act remains significant not only because a great many estates subject to its provisions have not yet ripened into final allocation of estate taxes but also because in analyzing the superseding act it is desirable to determine whether the changes are improvements or perhaps constitute a step backward. It is the purpose of this article to analyze problems arising under both laws and to compare the desirability of the results obtained.

THE 1949 ACT APPORTIONING ESTATE TAX

The superseded apportionment act[1] was designed to accomplish two primary purposes: (1) to distribute the burden of federal and Florida estate taxes among all beneficiaries of the decedent, including inter vivos donees, in the proportions that the interests received by each could be said to have contributed to the production of the taxes, and (2) to allocate deductions and exemptions allowed under the taxing acts to the beneficiaries whose interests were subject thereto. The act differed from pre-existing Florida law in four respects:

(1) It required contribution from recipients of nontestamentary assets that nevertheless produced estate tax, such as tenancies by the entireties or gifts held to have been made in contemplation of death.[2]

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[1]FLA. STAT. §734.041 (1949).

[2]The act provided in part: "Whenever it appears . . . that an executor . . . has paid . . . a death tax . . . with respect to any property required to be included in the gross estate . . . the amount of the tax so paid . . . shall be equitably pro-

(2) It excused from contribution the recipients of interests either initially exempt from tax or ultimately deductible.[3]
(3) It abrogated the common law hierarchy of immunity from contribution to tax, whereby residuary legacies were exhausted before general, general before specific, and so forth.[4]
(4) It minimized federal estate tax by exonerating the share of the surviving spouse from contribution to the tax to the extent the share was subject to marital deduction.[5]

The Florida apportionment act was by no means a novel statute. Other states had similar statutes, most of which were modeled upon section 124 of New York's Decedents' Estate Law, originally enacted in 1930.[6] Twenty-nine years of judicial experience with these various acts has pointed up three general questions that may be expected to arise under them; two other questions more or less peculiar to this state may also arise by reason of Florida's dower and homestead laws. These five problems, none of which has been resolved in Florida, are as follows:

(1) In the event that a decedent's gross estate for tax purposes includes realty in a foreign jurisdiction, should the domicile attempt to apportion a share of estate tax to the recipients, or should the apparently clear meaning of the apportion-

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rated among the persons interested in the estate to whom such property is . . . transferred . . . . For the purposes of this act the term 'persons interested in the estate' shall mean . . . all persons who . . . receive . . . any property or interest which is required to be included in the gross estate . . . ." See *In re* Fuchs' Estate, 60 So.2d 536 (Fla. 1952). Prior to the passage of the act all taxes were apparently payable from the testamentary estate; see FLA. STAT. §734.05 (1949). *But see* Hagerty v. Hagerty, 52 So.2d 432, 435 (Fla. 1951) (dictum).

[3]See *In re* Fuchs' Estate, *supra* note 2. Prior to the act the benefits of such deductions were allocated to the entire estate. *In re* Bernay's Estate, 150 Fla. 414, 7 So.2d 444 (1942).

[4]This common law doctrine is codified in Florida by FLA. STAT. §734.05 (1957), which has remained unchanged since before passage of the apportionment act. Reference in the *Hagerty* and *Fuchs* cases to the existence of apportionment at common law prior to adoption of the act would appear to be unfounded except in connection with dower; *cf.* Wells v. Menn, 158 Fla. 228, 28 So.2d 881 (1946).

[5]*E.g.*, since the marital deduction is reduced to the extent the surviving spouse's otherwise deductible interests are subject to contribution to tax, freeing such interests from tax produces the maximum deduction and minimum tax.

[6]The text of this law is set forth at 37 A.L.R.2d 203, n.2 (1954).

ment act be whittled down in deference to the ancient doctrine that all matters arising in connection with real property should be governed by the law of the situs?

(2) If the act should apply to taxes produced by foreign realty, how could it be enforced if the courts of the situs did not recognize its extraterritorial effect? This same enforcement problem arises in connection with inter vivos trusts with a foreign situs that are included in the gross estate.

(3) How are estate tax *credits,* such as those available for gift or estate taxes previously paid, to be treated, in light of the language of the act giving the benefits of *exemptions* and *deductions* to the recipients of interests to which they apply?

(4) How is the tax attributable to dower to be computed in the event that the total interests passing to the widow and required to be included in the gross estate exceed the marital deduction?[7]

(5) Is the tax produced by homestead property to be apportioned and, if so, how?

Apportionment of Taxes Allocable to Foreign Realty

Certainly the language of the apportionment act appears broad enough to include taxes allocable to foreign realty.[8] Aside from the language, however, there is no definite indication as to how the Florida courts might resolve this question. Case law in Florida prior to enactment of the apportionment statute does not indicate that the Florida Supreme Court has taken any position with respect to federal estate tax produced by foreign realty,[9] and there are no reported cases under the act to settle the question.

The proponents of control by the law of the situs appear to derive their position from the interaction of two old and sturdy precepts. The first is the clearly established proposition that the federal estate

[7]An earlier problem in connection with dower under the version of the dower statute, FLA. STAT. §731.34 (1957), in effect prior to 1951, was resolved *In re* Fuchs' Estate, *supra* note 2.

[8]See note 2 *supra.*

[9]*In re* Bernays' Estate, 150 Fla. 414, 7 So.2d 444 (1942), sometimes cited for the proposition that Florida has aligned itself with those states holding that the law of the domicile controls imposition of all federal estate taxes, appears to have dealt only with property passing under Florida law.

tax is a charge against the decedent's assets on the occasion of their transfer by death, as opposed to a charge against the distributees by reason of their receipt of the assets.[10] The second is that all matters pertaining to real property are exclusively within the jurisdiction of the situs. The first precept produces an in rem concept of the tax which, when read with the second, dictates exclusive control by local law.

Opposed to this conceptual position is the recognition implicit in the apportionment act that the tax is ultimately a dollar and cents burden upon the beneficiaries which, in the absence of testamentary direction to the contrary, should be equitably distributed among them. This, too, is an old and respectable concept, equitable apportionment being "nothing more than the doctrine of equitable contribution — itself but an application of the ancient maxim 'equality is equity.' "[11] It is clear that if equitable apportionment of the entire estate tax burden is to be accomplished, *all* assets included in the gross estate must be considered. Moreover, there is actually very little connection between local law and the distribution of the burden of estate tax, because the tax is not charged against any person or thing within the jurisdiction of the situs of the foreign realty; it is an in personam obligation of the domiciliary administration. True, the tax is based upon the transfer of the asset and the transfer is controlled and defined by local law, but even this connection is one of expedience — the taxing act simply ignores local law where Congress did not approve of the results that would be obtained under it.[12]

For these reasons, the domiciliary apportionment of taxes allocable to foreign realty does not constitute an unwarranted interference with or assumption of jurisdiction over the inheritance of foreign realty, as might be the case were the domicile attempting to apportion a specific local law charge such as a real property tax. Accordingly, the statutory apportionment should apply without exception to all assets included in the gross estate.

Cases in other jurisdictions hold both ways on this point. Massachusetts has refused to grant extraterritorial effect to the New York

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[10]Young Men's Christian Ass'n v. Davis, 264 U.S. 47 (1924).

[11]Wilmington Trust Co. v. Copeland, 33 Del. Ch. 399, 94 A.2d 703 (Orphans Ct. 1953).

[12]*E.g.*, the inclusion in gross estate of tenancies by the entireties, gifts in contemplation of death, trusts in which decedent-settlor reserved a life interest, etc.

apportionment statute in cases involving inter vivos trusts,[13] and seems to have reached the conclusion that apportionment acts — presumably including its own[14] — should be limited to apportionment of taxes produced by assets within the jurisdiction of the domicile. New York, on the other hand, has held its act to apply to taxes allocable to foreign realty.[15]

It is submitted that Florida should and probably would follow New York. It is significant that (1) the New York case had been decided at the time of the adoption of the Florida apportionment act and was presumably adopted with it, and (2) the Florida Supreme Court has looked to the New York construction of this statute on at least one occasion.[16]

Enforcement of Apportionment

Once apportionment of taxes with respect to foreign realty or trusts has been ordered, additional problems may arise despite the fact that the executor is authorized by the act to proceed in personam against the person in possession of the property rather than against the asset itself, theoretically bypassing the question of domiciliary judicial control of foreign assets. Fortunately, such problems should be rare. If the domiciliary personal representative has control of other assets destined for the distributee, or if the foreign realty is sold and the proceeds remitted to him, he can effect the apportionment. Similarly, if the distributee is a widow electing dower in Florida, the domiciliary representative can bring this fact to the attention of the county judge's court when dower is allotted and can obtain an order permitting the retention of enough of the dower to satisfy any contribution the widow may ultimately be required to make toward estate tax.[17] If the decedent owned realty in another state, a widow electing dower in Florida must necessarily have elected

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[13]See Warfield v. Merchants Nat'l Bank, 147 N.E.2d 809 (Mass. 1958); Isaacson v. Boston Safe Dep. & Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950).

[14]The Massachusetts apportionment act, MASS. GEN. LAWS ch. 65A, §§5, 5A, was amended in 1948, but the portions applicable to the *Isaacson* and *Warfield* cases remained identical in providing for apportionment of taxes produced by nontestamentary assets and are similar in import to those of the New York act, N.Y. DECED. EST. LAW §124, under which the *Adams* case, *infra* note 15, was decided.

[15]*In re* Adams' Estate, 37 N.Y.2d 587 (Surr. Ct. 1940).

[16]*In re* Fuchs' Estate, 60 So.2d 536 (Fla. 1952).

[17]Dacus v. Blackwell, 90 So.2d 324 (Fla. 1956).

her statutory share in the foreign realty.[18] There seems to be no reason to doubt that any apportionment order based on the foreign share may likewise be satisfied against the Florida dower.[19] Even if the personal representative cannot gain control over assets sufficient to satisfy the apportionment order, he may yet obtain an in personam judgment against the distributee which would be enforceable anywhere, provided jurisdictional requirements were met.

In the unusual case in which none of the above solutions is available to the personal representative and he is forced to proceed against the distributee or ancillary administrator in the state where the realty or trust is located, he may well come away empty-handed. Such was the result in *First National Bank of Miami v. First Trust Co. of St. Paul,*[20] in which Minnesota denied extraterritorial effect to the Florida apportionment act; similar results have been reached in other jurisdictions.[21] There is little that can be done if this point is reached. If the personal representative has any reason to anticipate such a situation, he should not distribute any estate assets to a foreign distributee without first insuring that any apportionment that may be ordered can be otherwise satisfied.

Allocation of Credits Against Estate Tax

A third problem arises under all apportionment acts modeled on the New York statute in allocating available credits on property previously taxed, since the act itself allocates only exemptions and deductions to the recipients of interests subject to them. This question has been considered at length in an excellent article by Samuel L. Payne.[22] Two New York cases[23] cited in the article denied allocation of credit to the beneficiary receiving the previously taxed property and applied the credit to the total tax before apportionment. This result is contrary to the implicit rationale of the apportionment act,

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[18]Griley v. Griley, 43 So.2d 350 (Fla. 1949), and authorities cited therein.

[19]See discussion under heading "Dower and the Estate Tax" *infra.*

[20]242 Minn. 226, 64 N.W.2d 524 (1954).

[21]*E.g., see* note 13 *supra.* As to which states recognize the propriety of domiciliary control of estate taxes allocable to foreign immovables, see Annot., 16 A.L.R.2d 1282 (1951).

[22]*Apportionment of Federal and State Estate Taxes Under Florida Law,* 11 MIAMI L.Q. 265, 267-68 (1956).

[23]*In re* Dommerich's Estate, 74 N.Y.S.2d 283 (Surr. Ct. 1945); *In re* Blumenthal's Estate, 182 Misc. 137, 46 N.Y.S.2d 688 (Surr. Ct. 1944).

namely, each beneficiary should pay only the share of the tax that the interest he receives is deemed to have produced. The deficiency may, of course, be cured by amendment, as was done in New York;[24] but in the absence of amendment the allocation of estate tax credits remains in doubt.

It is by no means certain that Florida would follow the New York decisions applying the credit to total tax before apportionment. Conceivably it might be found that in the event the act is deficient or ambiguous, the underlying policy of equitable apportionment — which the legislature has stated to have been the law of Florida prior to the act[25] — would either cover the question itself or compel a broad construction of *exemptions* and *deductions*. On the other hand, this underlying policy was clearly not in evidence in 1942 when *In re Bernays' Estate*,[26] subjecting a tax deductible charitable bequest to contribution, was decided.

Dower and the Estate Tax

If all assets passing to the widow are subject to the marital deduction, dower will bear no portion of the estate tax.[27] But when all such assets are not subject to the marital deduction, the dower statute provides for contribution: "[W]here the dower interest of the widow shall have the effect of increasing the estate tax, her dower shall be ratably liable with the remainder of the estate . . . ."[28] This language raises two questions:

(1) Is it necessary that the election to take dower — as compared with acceptance of the provisions of the will — *increase* the estate tax before dower is liable to contribution, or merely that if all assets passing to the widow exceed the marital deduction and therefore produce tax, dower must bear its ratable share?
(2) If dower is subject to contribution to estate tax, is it "ratably liable with the remainder of the estate" *in toto*, or merely to the extent that the widow's interests exceed the available marital deduction?

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[24]N.Y. DECED. EST. LAW §124 (3) (iii) (1950).
[25]Fla. Laws 1949, ch. 25435 §5.
[26]150 Fla. 414, 7 So.2d 444 (1942).
[27]*In re* Fuchs' Estate, 60 So.2d 536 (Fla. 1952).
[28]FLA. STAT. §731.34 (1957).

These questions were discussed at length in an article appearing in *The Florida Bar Journal* in 1957.[29] Its author concluded that while the language of the statute is misleading, the legislative intent is manifest that dower bear such a portion of the tax as the portion of all assets passing to the widow and not subject to the marital deduction bears to all assets included in the taxable estate. As he pointed out, the rationale of *In re Fuchs' Estate,*[30] the dissenting opinion[31] of *Colclazier v. Colclazier,*[32] and the clear language of the apportionment act, with which the dower statute is in *pari materia,* all support this reasoning. Nothing has occurred since the publication of the article to sustain or refute the conclusions reached. If the question does arise, however, it is submitted that it will be decided in accord with those conclusions.

Homestead and the Estate Tax

The apportionment act provided, in part:

> "[E]xcept that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and paid out of the corpus of such property or fund without apportionment between remainders and temporary estates."

This provision was taken verbatim from the New York statute, but there is no homestead in New York. The provision is seemingly applicable to homestead in Florida in the common case in which homestead property passes as a life estate to the widow with the remainder to the decedent's lineal descendants. Obviously estate tax is produced by homestead here, since the marital deduction is not available for terminable interests. But homestead is "exempt from forced sale under process of any court . . . [except that] no property shall be exempt from sale for taxes,"[33] and this exemption "shall inure to the widow and heirs."[34]

[29]*Legal Questions Under Florida Apportionment Statute,* 31 FLA. B.J. 190, 193.
[30]60 So.2d 536 (Fla. 1952).
[31]Differing from the majority on another point.
[32]89 So.2d 261 (Fla. 1956).
[33]FLA. CONST. art. X, §1.
[34]*Id.* §2.

At the outset, it seems that the exception for taxes would not apply to the charge against corpus referred to in the apportionment act. The charge contemplated by the act is not actually a tax, but merely a statutably imposed obligation to relieve others from a disproportionate and inequitable share of the burden of estate taxes. This conclusion appears inescapable when it is considered that the courts can be expected to give the taxes exception a narrow construction, applying it only to taxes assessed directly against the homestead.[35]

If the charge against corpus referred to in the apportionment act is not to be enforced against the homestead, the courts are left with several alternatives. They may decide that the "other provision made" language of the apportionment act refers to an act of the decedent, whereas homestead arises by operation of law, and may therefore conclude that the quoted provision of the act was never intended to apply to homestead. Or they may arrive at the same result simply by finding that, because of the constitutional exemption, the language cannot apply to homestead irrespective of legislative intent. In either event, apportionment could nevertheless be ordered out of any nonhomestead assets the widow and heirs had or were to receive. Aside from selecting some appropriate actuarial method to evaluate the shares of the widow and heirs, no problems would seem to be created by such an order.

On the other hand, the courts could simply conclude that the apportionment act has no bearing on homestead at all; this interpretation would result in an apportionment of tax based only on other assets. This solution seems contrary to the intent of the act, and it provides no compensating advantages. It is not the purpose of the homestead exemption from forced sale that the widow and heirs shall receive homestead property intact *in addition* to what they may otherwise have or receive, but rather that homestead shall be a specific and irreducible minimum that they may keep in any event.[36] Accordingly, there seems to be no reason why they should not contribute to the tax allocable to homestead from other available assets.

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[35]See the opinion of the lower court in Florida Ind. Comm'n v. Coleman, 154 Fla. 744, 18 So.2d 905 (1944); see also Lafayette Bldg. Ass'n v. Spofford, 221 La. 549, 59 So.2d 880 (1952), so construing a similar provision of the Louisiana constitution.

[36]Patten Package Co. v. Houser, 102 Fla. 603, 136 So. 353 (1931); see discussion of the purpose of the homestead exemption in Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-III,* 2 U. FLA. L. REV. 12, 13-15 (1949).

Recapitulation of Apportionment Problems

If the Florida Supreme Court is ever called upon to decide the matter,[37] it will probably hold that full-scale apportionment against all assets includible in the federal gross estate is directed by the Florida act. Only in rare cases would this full-scale apportionment be frustrated, and then only to the extent of assets situated in a foreign jurisdiction. Tax credits may or may not be allocable to the beneficiaries receiving the property previously taxed, but, if not, a simple amendment could cure this deficiency if the act should be readopted. The problems arising by reason of Florida's dower and homestead laws, while presenting the courts with certain technical difficulties, are largely illusory; they could be easily disposed of in a fashion effectively accomplishing the universal apportionment contemplated by the act and, in the event of re-enactment, could be provided for specifically.

The 1957 Act Charging Estate Tax to Residue

On May 13, 1957, without previous warning to the bar in general, the apportionment act was summarily scrapped and an entirely new version of section 734.041 of the Florida statutes was enacted. This version directs that all estate taxes be charged to residue in the absence of a testamentary direction to the contrary. Thus, when no such direction appears, the new act not only does away with granting to the beneficiaries of tax deductible assets the benefits of the deductions but also exonerates the recipients of nontestamentary assets from a share in the tax, contrary to the underlying policy of equitable apportionment previously recognized by both the legislature[38] and the courts.[39] A number of serious problems are presented by the new statute:

(1) It is not clear whether the residue to which all estate taxes are now to be charged includes residuary foreign realty and, if so, how charges against it are to be enforced.

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[37]There are still many estates in probate subject to the apportionment act, which applies to estates of decedents dying prior to May 13, 1957.

[38]Fla. Laws 1949, ch. 25435, §5.

[39]Hagerty v. Hagerty, 52 So.2d 432 (Fla. 1951). *But see In re* Ruperti's Estate, 86 N.Y.S.2d 887 (Surr. Ct. 1949), in which a New York court construed the pre-apportionment act law of Florida as not requiring such apportionment.

(2) If the residue does include foreign realty, is the widow's foreign statutory share in such realty subject to contribution to estate tax?
(3) It is apparent that the new act is in direct conflict with the dower statute.
(4) In many cases the new act will increase the over-all estate tax.
(5) Most significantly, many situations will arise in which the new act cannot help but frustrate the testator's dispositive scheme — despite the fact that the sole justification for a primary charge against residue, and therefore the only apparent reason for the new act, is the assumption that had the testator considered the matter such would have been his choice.

The problems set forth above may arise in situations in which the testator has failed effectively to provide how estate taxes shall be borne, so that the statutory requirement of a charge against residue comes into play. Another problem of perhaps even more serious proportions can arise even when a testamentary direction is present and the new act is consequently rendered inapplicable *ab initio* by its own terms:

(6) Will a testamentary direction to apportion taxes to non-testamentary assets be effective?

Charging Tax to Residuary Foreign Realty

Unless residuary foreign realty is sold and the proceeds transmitted to the domiciliary personal representative, it is likely that neither the realty nor its recipient will ever be chargeable with a portion of the tax. It is clear that no Florida court has jurisdiction to charge or to entertain a proceeding against the foreign realty itself.[40] Moreover, even if the foreign devisee were before a Florida court, or other assets passing to him were under its control, he would still probably escape sharing in any tax attributable to the foreign realty. The reason for this is that in order to hold the recipient or his other assets liable, it is necessary to proceed against him in per-

[40]See Seattle-First Nat'l Bank v. Macomber, 32 Wash. 2d 696, 203 P.2d 1078 (1949).

sonam; and it appears not only that no such action is authorized by the new statute but that its passage, in fact, precludes such an action.

This conclusion is based on a number of considerations. The new statute will probably be characterized as a return to common law principles.[41] At common law, estate taxes were considered merely a form of administration expense,[42] payable by the domiciliary personal representative out of that portion of the residue to which he took title.[43] The common law did not concern itself with inequality between foreign and domiciliary legatees. Even if the common law in Florida prior to the 1949 act included the doctrine of equitable apportionment, so that the act was merely declaratory of existing law,[44] repeal of that act compromises the validity of the doctrine in any form. Moreover, the new residuary act provides for collecting the tax by a charge against assets rather than people, and the maxim *expressio unius est exclusio alterius* indicates that no other method of collection is available. It would therefore appear that the legislature did not intend that residuary foreign realty not converted into cash and remitted to the domicile should contribute to the tax — otherwise it would not by implication have denied the personal representative an in personam remedy against the foreign devisee that could in most instances be locally enforced, leaving him with nothing but an in rem action in the foreign jurisdiction.

Widow's Statutory Share in Foreign Realty

In the unlikely event that Florida attempts to charge a portion of estate tax to foreign residuary realty, or if the proceeds of the sale of foreign realty come into the hands of the domiciliary personal representative, a special problem arises in determining whether the widow's statutory share is residuary in nature and, if so, whether it should bear a portion of the tax. Whether it is residuary depends, of course, on the law of the situs. In the common event that the widow's share is a fraction of the net estate, it would probably be treated as residuary and a portion of the tax charged to it. There has been at least

[41]Amendment of the Massachusetts apportionment act to provide for the charge to residue of all estate taxes produced by the testamentary estate was held to be a return to common law principles in Weingartner v. North Wales, 327 Mass. 731, 101 N.E.2d 132 (1951).

[42]Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647 (1918).

[43]Hepburn v. Winthrop, 83 F.2d 566 (D.C. Cir. 1936).

[44]See notes 25, 39 *supra*.

one case, however, holding that if such a share were subject to the marital deduction, it would not contribute to tax despite the fact that taxes were primarily payable out of the residue.[45] In that case the court determined that the primary charge to residue applied only to testamentary assets and accordingly held itself free to apportion the tax with respect to nontestamentary assets, among which it classified the widow's statutory share. This holding was rejected in a later case, however, the same court concluding that the very fact that the statutory share was a portion of the net rather than the gross estate indicated a legislative directive that it should share in the estate tax.[46]

Dower

It seems, for three reasons, that dower should not be required to contribute to the estate tax under the new act to the extent that it is subject to the marital deduction. First, dower is intrinsically not residuary in nature, being more akin to a charge against the estate.[47] Second, a classification of dower as residue within the meaning of section 734.041 of Florida Statutes 1957 would be both illogical and contrary to the protective policy that created the right. The underlying reason for charging estate tax to residue at common law — and accordingly the probable basis for the present statute — is the assumption that such an allocation is most likely to accord with the testator's unexpressed intent. Dower, on the other hand, is a creature of statute, a right given the widow in derogation of the testator's intent and designed to protect her from his neglect. If dower were held to be residue, it would enable a wealthy testator, simply by phrasing his will in terms of general legacies rather than residuary bequests, to deplete or exhaust the widow's interest by causing it to bear the entire burden of estate tax. Third, the dower statute directs that when dower increases estate tax it shall contribute to it; the application of ordinary rules of construction to this language would indicate that when dower is subject to the marital deduction and does not produce estate tax, it shall not be subject to contribution.

If the widow's total interests in the gross estate exceed the avail-

[45]Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952).

[46]Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695 (1954).

[47]See the argument of the widow in Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

able marital deduction, the dower statute and the 1957 act cannot be readily harmonized and the result is uncertain. If dower is not residuary, how, under the new act, can it ever be liable for any portion of the tax as directed by the dower statute as long as there is in fact sufficient residue to pay the tax? Either the estate tax provision of the dower statute, which was added in 1951 to make that statute consistent with the 1949 apportionment act, must have been repealed to some extent by adoption of the present version of section 734.041, or else the new act is simply not applicable to a dower situation in which total interests passing to the widow exceed the available marital deduction. While the former alternative appears technically the more probable,[48] there are strong arguments against it, namely: (1) complete exoneration of dower from contribution to estate tax can produce a situation in which the entire testamentary estate is exhausted in payment of taxes attributable to the widow's interests while she pays nothing; and (2) if there is any area in Florida jurisprudence in which the doctrine of equitable apportionment is well established, it is in connection with dower.[49]

Estate Tax

In at least three instances the new act will serve to increase overall estate tax. The first is when the bequest to the surviving spouse is expressed in residuary terms, so that his or her share is specifically chargeable with a portion of estate tax. The second is when the surviving spouse takes a statutory share in foreign realty, the share is measured in residual terms, the realty is sold, and the proceeds are transmitted to the domiciliary personal representative or otherwise become subject to a charge for estate taxes.[50] The third is in the event of intestacy when there is a surviving spouse.

In each of these three situations the share of the surviving spouse will be subject to a charge for a portion of the estate tax, thus reducing the marital deduction, increasing the tax, and incidentally

[48]Just such an implicit repeal of the previous dower statute was held to have been effected by passage of the apportionment act; see *In re* Fuchs' Estate, 60 So.2d 536 (Fla. 1952).

[49]Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1936).

[50]In the unlikely event that the Court should apply the doctrine of Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952), no increase in estate tax would be produced under the new act in connection with the widow's statutory share if entirely subject to the marital deduction.

precipitating the series of calculations produced by the interaction of decreasing marital deduction, increasing over-all tax, resulting increase in spouse's contribution, resulting further reduction of marital deduction, and so forth.[51] Of the three, the increase in tax brought about by the surviving spouse's election to take a statutory share in foreign realty is in one sense the most serious, since no act of the testator can avoid it. Even if he directed in his will that taxes be paid out of specific assets not passing to his widow, she cannot take advantage of this provision when taking against the will.[52]

All three of these situations were, of course, provided for under the 1949 apportionment act, since, to the extent subject to the marital deduction, the share of the surviving spouse was free of liability for estate tax.

Destruction of Dispositive Scheme

The theoretical basis for charging estate tax to the residue is a part of the larger common law concept that all debts and expenses must be borne by it — in itself no more than recognition of the meaning of the word *residue* and so an effectuation of the testator's intent. In the early days of estate taxation, few distinctions were drawn between estate taxes and other charges.[53] But there is a vast difference between charging debts and ordinary probate expenses to the residue — or, more accurately, simply measuring residue as what is left after their payment — and charging estate taxes produced by nontestamentary assets to the residue. In the first instance, such a charge merely effectuates the testator's intent implicit in his use of residuary terms; in the second, the result is to charge a transfer tax the testator probably never envisioned — if he had, he would have provided for its payment — against beneficiaries who may not have received that transfer. It does not follow from the fact that the testator must have desired that the residuary beneficiaries bear the first kind of expense that he would have wished them also to bear the second. Unless such an inference is not merely possible but necessary, ordinary tenets of

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[51]For the practical effect of this interaction of the spouse's tax contribution and the marital deduction, see example under heading "Destruction of Dispositive Scheme" *infra,* in which a "first trial" marital deduction of $925,000 is ultimately reduced to nothing.

[52]Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936).

[53]See Annot., 37 A.L.R.2d 169, 177-80 (1954).

equitable contribution require imposition of the tax burden upon the recipients of the interests producing it.[54] The lack of justification for this inference in many cases and the disastrous results it can produce may best be illustrated by the following example:

> H *is married and has three sons; the bulk of his estate is in a family business worth $4,000,000. Two of his sons reach maturity;* H *takes them into his business and gives each a $1,000,000 interest, paying the gift tax. In his will* H *provides for an equal interest to his third son on reaching maturity, with the residue to his widow. He dies within three years of the first gift. Both gifts are held to have been made in contemplation of death.*

Estate tax calculation produces the following results:

If the widow takes under the will

Gross estate		$4,000,000	
Ultimate marital deduction[55]	—0—		
Funeral, administration expenses, etc.	$75,000		
Specific exemption	60,000		
Total deductions		135,000	
Taxable estate		$3,865,000	
Gross etstate tax		1,758,550	
Credit gift tax[56]		552,750	
Net estate tax			$1,205,800
Third son's share			719,200
Widow's share			—0—
Share of first two sons (each)			1,000,000

[54]See Wilmington Trust Co. v. Copeland, 33 Del. Ch. 399, 94 A.2d 703 (Orphans Ct. 1953).

[55]"First trial" marital deduction is $925,000. This calculation of ultimate available marital deduction from that is lengthy and has been omitted.

[56]Gift tax was calculated on the basis that these were the testator's only gifts to his elder sons during the years in question and that his lifetime exemption, previously unused, was exhausted. The gifts were not split, however.

If the widow takes dower[57]

Gross estate		$4,000,000	
Marital deduction	$666,666		
Funeral, administration expenses, etc.	75,000		
Specific exemption	60,000		
Total deductions		801,666	
Taxable estate		$3,198,333	
Gross estate tax		1,374,266	
Credit gift tax		552,750	
Net estate tax			$ 821,516
Third son's share			436,816
Widow's share			666,666
Share of first two sons (each)			1,000,000

Under the 1949 apportionment act[58]

Gross estate		$4,000,000	
Marital deduction	$925,000		
Funeral, administration expenses, etc.	75,000		
Specific exemption	60,000		
Total deductions		1,060,000	
Taxable estate		$2,940,000	
Gross estate tax		1,231,400	
Credit for gift taxes		552,750	
Net estate tax (each son contributes $226,216.66)			$678,650
Widow's share			925,000
Share of three sons (each)			773,783

It is apparent in the above example that the testator intended that his sons should share equally in his estate. Without statutory apportionment of taxes to nontestamentary assets, however, this in-

[57]Obviously the widow will take dower, since she receives nothing under the will.

[58]Assuming that the credit for gift taxes paid was allocable to the estate in general.

ferential intent will almost certainly be defeated; there is very little chance that such an inference will be held to constitute the unequivocal sort of testamentary direction necessary to overcome the statutory charge to residue.[59] Thus in the first instance the third son will take $719,200, the widow nothing; and the over-all estate tax will be $527,150 higher than under apportionment. In the second instance — which will surely result if the widow is apprised of her rights — the third son will receive $436,816, which is less than one half the share received by each of his brothers; the widow will receive $666,666; and the estate tax will still be $142,866 higher than if apportionment were effected.

This example is perhaps extreme, but the problems it presents are not unusual. Were the testator in the example to die intestate, or were his will to be invalidated, application of the doctrine of advancements and the widow's ensuing election to take dower would result in a very similar situation. If the gifts to the elder sons were held not to be advancements, it is evident that the third son would take even less.

Many other instances can be imagined giving rise to similar problems, such as the creation of a tenancy by the entirety or a joint tenancy, creation of an inter vivos trust later held to be revocable or otherwise taking effect on the settlor's death, and so forth. In fact, in every case in which substantial nontestamentary assets are included in the gross estate and the testator makes no effective provision for the payment of taxes produced by them, it seems that the only inference that may safely be drawn is that the testator did *not* intend the residue to bear those taxes. In such situations it is the height of injustice to single out and saddle the residuary estate — which is in most instances the portion of the estate passing to the primary objects of the testator's bounty — with the entire burden of the taxes.

This point has been recognized in other jurisdictions. Perhaps the most interesting example is Massachusetts, which, like Florida, had an apportionment statute and subsequently abandoned it in favor of charging estate taxes to residue. But Massachusetts did not return to the common law concept entirely; it specifically retained apportionment in connection with nontestamentary assets, thus avoiding the situation illustrated above.[60]

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[59]See Annot., 15 A.L.R.2d 1216, 1224 (1951).

[60]See discussion of the Massachusetts statute, note 14 *supra*.

A second anomaly in the new act lies in the fact that although it seems to comport with the testator's probable intent in charging taxes attributable to *testamentary* assets to residue, even here it may be partially self-defeating. If, as discussed above, taxes attributable to residuary foreign realty may not be charged against it, the assumed intent is necessarily defeated *pro tanto*. Certainly if the testator wanted taxes charged to residue, he would not wish to exonerate a portion merely by reason of its location.

Testamentary Apportionment of Estate Tax to Nontestamentary Assets

In the event that a testator anticipates that an inter vivos gift or gifts may ultimately be included in his gross estate for federal tax purposes, the new act appears to grant him the right to direct apportionment of a share of the tax to that gift: "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."

It appears that if the testator in the example given in the preceding section anticipated the devastation the new act would effect, he could still save the situation by a testamentary direction that if inter vivos gifts were included in his gross estate the donees should bear their proportionate share of estate tax — or could he?

The new act throws the burden of estate taxes on residue unless the testator provides otherwise; it is thus a codification of common law.[61] Cases arising under the common law rule have reached opposite conclusions as to the testator's power to charge by a provision in his will a portion of estate taxes to assets he neither owned nor controlled at his death. Two such cases are *United States v. Goodson*[62] and *Warfield v. Merchants National Bank*.[63] Both arose in jurisdictions where the common law rule, as now codified in Florida, was applicable — the *Goodson* case by reason of the fact that the domicile, Minnesota, subscribed to the common law rule, the *Warfield* case by reason of the fact that neither the New York nor the Massachusetts apportionment statutes were applicable to the estate of a nonresident decedent in the forum, Massachusetts, so that the court

[61]Weingartner v. North Wales, 327 Mass. 731, 101 N.E.2d 132 (1951); see Annot., 37 A.L.R.2d 176 (1954).

[62]253 F.2d 900 (8th Cir. 1958).

[63]147 N.E.2d 809 (Mass. 1958).

was compelled to fall back on the common law. The *Goodson* case dealt only with jointly held property and inter vivos trusts included in the testator's gross estate for federal tax purposes, but it may fairly be stated to stand for the rule that even without statutory apportionment a testator may by will direct apportionment of estate tax to nontestamentary property he disposed of prior to his death. In the *Warfield* case a testamentary direction to apportion estate tax to an inter vivos trust included in the gross estate was held ineffective because the direction did not amend the trust in the way provided by the trust instrument. The rationale of this case appears to be that a testator in his will can charge taxes to an inter vivos transfer only to the extent that he has retained control over the transferred asset; therefore it appears that in Massachusetts, in cases in which its apportionment act is inapplicable, substantially all testamentary attempts to apportion taxes to nontestamentary assets will fail.

There is no certainty as to which case Florida will follow; the result in the *Goodson* case, while more desirable, appears somewhat violative of ordinary property concepts in permitting an inter vivos donor to recapture a portion of his gift ex post facto for the payment of estate tax. In any event, however, it is significant that in the *Goodson* case the litigation was against the United States Treasury Department, so until the matter is settled in Florida a testator attempting testamentary apportionment of estate tax to inter vivos transfers can anticipate an interested third party to the problem who will not be content with an amicable settlement among the beneficiaries.

Recapitulation of the Problems of the New Act

It is probable that the 1957 act is not applicable to residuary foreign realty or to a surviving spouse's statutory share in foreign realty even if residuary in nature. It is thus partially self-defeating in that it denies complete effect to its own implicit rationale that the testator intended residuary interests to share equally in the burden of tax. The new act is, moreover, in conflict with the existing dower statute, and its application is obscure in instances in which the widow elects dower and total interests passing to her exceed the available marital deduction. Furthermore, the new act will result in more over-all estate tax in many instances and, in failing to provide for contribution to tax from nontestamentary assets, can result in situations largely destructive of the testator's dispositive scheme.

Finally, there is no certainty that even if the testator exercises his apparent option to apportion estate taxes to nontestamentary assets, the attempted apportionment will be effective; in any event, the Treasury can be expected to require or itself institute real litigation on this point.

Recommendations

There is nothing intrinsically wrong with charging estate taxes to residue; in so far as taxes produced by the testamentary estate are concerned, it seems probable that such a charge would conform to the testator's wishes had he considered the problem. But in making such a charge the legislature is throwing the entire burden of tax on one class of beneficiaries, contrary to the maxim *equality in equity*. Obviously, such unequal distribution should not be directed unless there are solid grounds for assuming that the testator would have so wished. And it seems extremely doubtful that the testator would have so wished in situations in which a substantial portion of tax is produced by nontestamentary assets. Therefore, either the 1949 apportionment act should be readopted with specific provisions as to the doubtful aspects discussed above, or else the new residue act should be amended so as to

(1) apply only to taxes produced by testamentary assets;
(2) reinstate apportionment as to nontestamentary assets, as now is the case in Massachusetts following its abandonment of full scale apportionment;
(3) apply to residuary foreign realty or a surviving spouse's statutory share in foreign realty if residual in nature, the domiciliary personal representative being empowered to proceed in personam against the recipients of the property in order to effectuate such a charge.

Finally, serious consideration should be given the fact that in the event of intestacy, or if the will is so drawn as to define the share of the surviving spouse in residuary terms, over-all estate tax will be increased unless allowances are made for any deductions granted by the taxing act. It seems doubtful whether the testator's — or intestate's — *probable* unexpressed intent that residuary beneficiaries share the tax burden equally is any stronger than his *certain* unexpressed intent that estate taxes be minimized.

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