Equitable Apportionment of Federal Estate Tax In Arizona

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All too often imposition of the federal estate tax results in depletion of the devise to the surviving spouse and family, while other devisees receive assets tax-free.[1] In contrast to an inheritance tax, which is assessed against the individual recipient as a tax on that recipient's right to receive the property,[2] the estate tax is a duty imposed on the right of the decedent to transfer his wealth at death.[3] It is thus a charge against the entire estate, but one which ultimately must be allocated to one or more parts of the estate. Depending on how this tax burden is allocated, benefits passing from the decedent may be increased or decreased, and some intended beneficiaries may in fact receive nothing.[4] Where this is the result intended by the testator, as

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1. Under the common law where the residuary estate bears the entire tax burden this problem can arise in different situations. First, where a charitable gift or other tax deductible devise is included in the will, it is the family's share which must bear the entire tax burden if such devises are exonerated from paying taxes. *See* text & notes 4, 46 *infra*. Also, the share received by the family may be unjustly affected where the will makes specific and general devises to nonrelatives and leaves the residue to members of the family, or where nonprobate assets go to nonrelatives. In such a situation in states adhering to the common law rule the family's share may be substantially or completely depleted thereby while the specific and general devisees and nonprobate property recipients receive their assets tax free. *See* YMCA v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47 (1924). See text pp. 1140-41 *infra*.

2. *See* YMCA v. Davis, 264 U.S. 47, 50 (1924).

3. INT. REV. CODE OF 1954, § 2101. In YMCA v. Davis, 264 U.S. 47 (1924), the Supreme Court distinguished estate tax from inheritance tax in the following manner:

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.

Id. at 50; *accord, In re* Estate of Clarke, 66 Cal. 2d 142, 145, 424 P.2d 337, 340, 56 Cal. Rptr. 897, 900 (1967); Bishop Trust Co. v. Burns, 46 Hawaii 375, 377, 381 P.2d 687, 689 (1963).

4. If the tax ultimately is charged against the residue, the exoneration of all other property increases the actual benefit of that property and decreases the benefit for residuary devisees. An increase or decrease also may occur in the residue itself, depending

where the will specifies what part of the estate is to bear the burden of the tax,[5] there is nothing of which to complain. Absent such a provision, however, the ultimate burden of the federal estate tax is determined by state law,[6] with minor exceptions.[7] A primary goal of

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on the method used to calculate the allocation. If some residuary property qualifies for a deduction, the residue may be initially divided into shares, and the deductible share exonerated from contribution, thus effectively increasing its value and proportionately decreasing the value of the remaining residuary shares which must bear additional tax. Alternatively the tax may be deducted from the total residuary estate before dividing it into shares, thus proportionately decreasing the benefit passing to each, including the deductible share. The same general principles apply when the deductible devise occurs in some other portion of the estate required to bear the tax, such as nonprobate property under a partial apportionment system, see text & note 40 *infra*, or nonprobate property and general and specific devises under a total apportionment system. See text & notes 37-39 *infra*.

The first method of calculation suggests a problem in that it allows certain devises to be exhausted or seriously depleted while allowing others to pass tax free. While the second method avoids this problem, it has the drawback of resulting in an absolute increase in the amount of tax payable on the estate. A tax deduction such as a marital deduction or charitable deduction is limited to the amount actually passing to the recipient of the deductible share. If the amount passing is decreased through payment of the estate tax therefrom, the deduction is itself less. Therefore, the amount of property on which the tax is assessed is greater. Also problematical is the second method's allowing a tax to be collected from property which did not contribute to the tax burden, a result which seems contrary to the policy behind allowing such a deduction, which is not to assess taxes against that property. *See generally* H. GARDNER, ESTATE PLANNING IDEAS AND METHODS ¶ 4421 (1969).

5. Both the common law and statutes governing allocation of the federal estate tax recognize the testator's right to otherwise allocate the tax on his estate. *See, e.g., In re* Estate of West, 203 Kan. 404, 454 P.2d 462 (1969); *In re* Machlied's Estate, 60 Wash. 2d 354, 374 P.2d 164 (1962); *In re* Estate of Eberle, 4 Wash. App. 638, 484 P.2d 478 (1971); CAL. PROB. CODE § 970 (West 1956); N.Y. EST., POWERS & TRUSTS § 2-1.8(c) (McKinney 1967); UNIFORM PROBATE CODE § 3-916(b). Allocation of the federal estate tax can be used very strategically to effect tax savings. For a discussion of the various approaches to the allocation of the federal estate tax, see H. GARDNER, *supra* note 4, at ¶ 4117. For suggested will clauses governing tax allocation, see text & notes 118-31 *infra*.

6. Del Drago v. Riggs, 317 U.S. 95 (1942); Marans v. Newland, 143 Mont. 388, 390 P.2d 443 (1964); Wilson's Estate v. Livingston, 8 Wash. App. 519, 507 P.2d 902 (1973).

7. Certain aspects of estate tax apportionment are federally established in sections 2206 and 2207 of the Internal Revenue Code unless the will provides otherwise. Section 2206 gives the executor or personal representative the right to contribution from a recipient of proceeds from an insurance policy on the life of the decedent if the proceeds are payable to a beneficiary other than the decedent's estate. A life insurance beneficiary other than the estate, therefore, is ultimately liable for a prorated share of the estate tax. Section 2207 gives the executor the additional right to estate tax contribution from a recipient of property over which the decedent had a power of appointment.

Whether the power thus granted the executor to seek contribution is permissive or mandatory is unsettled. *See* Scoles & Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 MINN. L. REV. 907, 910 (1959). Although the statutory language does not expressly mandate exercise of the power, section 2206 has been held to impose a duty on the executor to collect a share of the tax from the insurance beneficiary. *See* Pearcy v. Citizens Bank & Trust Co., 121 Ind. App. 136, 96 N.E.2d 918 (1951). There may be certain situations in which the personal representative would prefer not to seek contribution: for example, if the recipient is a close relative of the decedent and was intended as a primary distributee, the personal representative may prefer not to diminish the share. If contribution is permissive, technically this inaction would not be a breach of fiduciary duty. On the other hand, if the provisions create a duty to seek reimbursement, a cause of action may lie against the personal representative by beneficiaries whose respective shares of the estate were reduced by the failure to seek such contribution. An additional problem with viewing sections 2206 and 2207 as mandatory is the potential conflict with state law or policy disfavoring apportionment. Where this con-

such laws should be realization of the probable intent of the average testator,[8] which is not likely to be undue depletion of the family share through taxes.

The common law rule regarding payment of the federal estate tax places the entire burden on the residuary estate.[9] Application of this rule, however, can distort the testator's plan of testamentary disposition, producing inequitable results. Although the residuary devisees often are intended to be the primary beneficiaries,[10] application of the traditional rule may disproportionately deplete the residuary estate[11] and in some instances exhaust it.[12] Recognizing this, many states have adopted a rule of apportionment which attempts to alleviate this situation by allocating the tax among various portions of the estate, rather than imposing it solely upon the residue.[13]

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flict occurred, it would be necessary to determine whether the Internal Revenue Code preempts local statutory or common law.

For a discussion of separate problems that arise when the life insurance beneficiary receives the proceeds in installments, see *Administration and Distribution of Decedents' Estates*, in 2 LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS 708, 717 (A. Winard ed. 1968) [hereinafter cited as LANDMARK PAPERS]; Fleming, *Apportionment of Estate Tax*, 43 ILL. L. REV. 156, 163 (1948).

8. Lindsay, *Florida's Estate Tax Laws—The Need for Compromise*, 35 FLA. B.J. 164, 165-67 (1961); Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 COL. L. REV. 261, 265 (1955); Comment, *Apportionment of Death Taxes: A Comprehensive Survey with Proposed Statute*, 45 TEX. L. REV. 1348, 1360 (1967).

9. *In re* Estate of West, 203 Kan. 404, 454 P.2d 462 (1969); *In re* Fullerton's Estate, 375 P.2d 933 (Okla. 1962); *In re* Estate of Heidner, 7 Wash. App. 488, 500 P.2d 1284 (1972). *See also* cases cited note 35 *infra*.

10. J. TRACHTMAN, ESTATE PLANNING 63 (rev. ed. 1968); Note, *The Apportionment of Federal Estate Tax in Pennsylvania*, 54 DICK. L. REV. 432, 433 (1950).

11. Since the burden-on-the-residue rule charges the residuary estate with expenses other than those which arise out of that estate, its effect can be said to be disproportionate. It has been said, therefore, that equity mandates the apportionment of federal estate tax. Lauritzen, *Apportionment of Federal Estate Taxes*, 1 TAX COUNSELOR'S Q. 55, 76-77 (1957); Comment, *Federal Estate Tax Apportionment*, 16 DEPAUL L. REV. 112, 123 (1966).

12. *See In re* Gato's Estate, 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950); *In re* Mellon's Estate, 347 Pa. 520, 32 A.2d 749 (1943).

13. Of the states adopting equitable apportionment, some have enacted a rule of partial equitable apportionment and others total equitable apportionment. For a discussion of the distinction between these two positions, see text accompanying notes 37-40 *infra*.

Three states have judicially adopted the rule of partial equitable apportionment. *See In re* Estate of Van Duser, 19 Ill. App. 3d 1022, 313 N.E.2d 228 (1974); Carpenter v. Carpenter, 374 Mo. 782, 267 S.W.2d 632 (1954); McDougall v. Central Nat'l Bank, 157 Ohio St. 45, 104 N.E.2d 441 (1952). Three others have enacted the rule legislatively. *See* FLA. STAT. § 733.817 (1976); MASS. ANN. LAWS ch. 65A, § 5 (Supp. 1975); N.J. REV. STAT. § 3A:25-31 (1953).

Kentucky has adopted total equitable apportionment by caselaw, *see* Gratz v. Hamilton, 309 S.W.2d 181 (Ky. 1958), and it has been enacted in 31 states by statute. *See* ALASKA STAT. § 13.16.610 (1972); ARK. STAT. ANN. § 63-150 (1971); CAL. PROB. CODE § 970 (West 1956); COLO. REV. STAT. ANN. § 15-12-916 (Supp. 1975); CONN. GEN. STAT. ANN. §§ 27.3178 (167.101) to (167.111) (Supp. 1976); MINN. STAT. ANN. STAT. § 236A (Supp. 1975); IDAHO CODE § 15-3-916 (Supp. 1975); IND. ANN. STAT. § 29-2-12 (Burns 1972); IOWA CODE ANN. § 633.449 (Supp. 1976); LA. REV. STAT. ANN. §§ 9:2431-:2438 (West 1965); MD. EST. & TRUSTS CODE ANN. § 11-109 (1974); MICH. STAT. ANN. §§ 27.3178 (167.101) to (167.111) (Supp. 1976); MINN. STAT. ANN. § 524.3-916 (1975); MONT. REV. CODES ANN. § 91A-3-916 (Spec. Pamphlet 1975); NEB. REV. STAT. §§ 77-2108 to -2112 (1971); NEV. REV. STAT. § 150.310 (1975); N.H. REV. STAT. ANN. § 88-A (1970); N.M. STAT. ANN. § 32A-3-916 (Spec. Pamphlet 1976);

Arizona is one of the minority of states having no apportionment statute.[14] In recently enacting the Uniform Probate Code, the Arizona legislature omitted the apportionment provision contained therein.[15] In the absence of such a statute, Arizona case law—which requires that the residue be charged for estate tax attributable to probate assets—governs allocation of the tax burden.[16] Although the cases say nothing about nonprobate assets, the residue is generally charged with the tax generated by these assets also.[17] The possibility remains, however, of some form of apportionment which would require nonprobate property to bear its share of the tax, thereby relieving the residuary of this burden.[18]

This Note will consider the state of the law in Arizona and explore possible alternatives to the common law burden-on-the-residue rule. After briefly reviewing the background and development of the law governing federal estate tax, the generally recognized methods of estate tax allocation will be presented and analyzed. Current Arizona law in this area will then be discussed and judicial and legislative alternatives to the common law rule proposed. Finally, consideration will be given to estate planning techniques designed to prevent the problems which traditionally have given rise to litigation concerning tax allocation.[19]

N.Y. EST., POWERS & TRUSTS § 2-1.8 (McKinney 1967); N.D. CENT. CODE § 30.1-20-16 (Spec. Pamphlet 1975); ORE. REV. STAT. §§ 116.303-.383 (1973); PA. STAT. ANN. tit. 20, §§ 3701-3705 (1975); R.I. GEN. LAWS ANN. § 44-23.1 (Supp. 1975); S.C. CODE ANN. § 65-563 (Supp. 1975); S.D. UNIFORM PROB. CODE § 3-916 (1975); TENN. CODE ANN. §§ 30-1117 to -1118 (1955); UTAH CODE ANN. § 75-3-916 (Spec. Pamphlet 1977); VA. CODE ANN. §§ 64.1-160 to -165 (1973); W. VA. CODE ANN. § 44-2-16a (1966); WYO. STAT. ANN. §§ 2-338 to -346 (Supp. 1975). A total of 38 states, therefore, utilize some form of apportionment system.

14. *See* Effland, *Estate Planning Under the New Arizona Probate Code*, 1974 ARIZ. ST. L.J. 24-25.

15. Although Arizona adopted the Uniform Probate Code basically as promulgated in 1969 by the National Conference of Commissioners on Uniform State Laws, *see* ARIZ. REV. STAT. ANN. §§ 14-1102 to -7610 (1975), certain alterations were made in the Arizona version, including the omission of section 3-916. *Compare* ARIZ. REV. STAT. ANN. § 14-3916 (1975) *with* UNIFORM PROBATE CODE § 3-916.

16. *In re* Estates of Garcia, 9 Ariz. App. 587, 593, 455 P.2d 269, 275 (1969). Arizona is listed as having completely abrogated the common law rule in P-H 1976 FED. TAXES, ESTATE AND GIFT TAXES ¶ 120,026 and Comment, *supra* note 11, at 116. This classification, however, is based on a decision of a federal court applying Arizona law, which held in favor of equitable apportionment rather than utilizing the common law rule. *See* Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963). The Seventh Circuit cited no Arizona authority to support its decision, and a later Arizona court, while recognizing the *Doetsch* decision, nonetheless required the residue to bear the burden for probate assets. *In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969). For a discussion of these cases, see text accompanying notes 66-81 *infra*.

17. *See In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969); Brewer v. Peterson, 9 Ariz. App. 455, 453 P.2d 966 (1969).

18. *See* text accompanying notes 66-81 *infra*.

19. Harsh consequences may result if a testator is poorly advised about the tax consequences of death. The absence of adequate legal counseling is a primary cause of the problems resulting from the burden-on-the-residue rule. *See* Merchants Nat'l Bank v. Merchants Nat'l Bank, 318 Mass. 563, 570, 62 N.E.2d 831, 836 (1945); *cf.* Willoughby, *Federal Estate Tax—Testator's General Direction against Apportionment—Effect upon Non-probate Property*, 46 ORE. L. REV. 199, 207 (1967). *See also* Featherston, *Some*

THE FEDERAL ESTATE TAX

The federal estate tax originally was enacted as a temporary wartime revenue measure during the first world war.[20] Congress made no provision for allocation of the tax, simply imposing it upon the entire estate[21] and making the personal representative responsible for payment.[22] Since debts and administrative expenses were charged to the residuary estate[23] it was reasonable that the federal estate tax be treated in the same manner.[24] Perhaps because the original rates were so low,[25] it was deemed unlikely that this allocation of the tax would result in hardship to any devisee.[26] The federal estate tax subsequently became an instrument to prevent accumulation of wealth at death,[27] and the amount of the tax, which continued to be charged against the residue, was increased accordingly.[28] As the tax rate

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Estate Tax Litigation Problems of 1960, 3 ARIZ. L. REV. 1 (1961); Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10, 36-45 (1940); Sheffield, *Notes on Equitable Apportionment of Federal Estate Taxes—A Consideration of the New York Statute*, 19 CONN. B.J. 6, 14-15 (1945).

20. *See* H.R. REP. No. 992, 64th Cong., 1st Sess. 1 (1916); Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 IND. L.J. 217, 218-19 (1954); Comment, *The Apportionment Doctrine—A Proposed Ohio Estate Tax Apportionment Statute*, 41 U. CIN. L. REV. 897, 898 (1972). For a discussion of the revenue-raising function currently served by the federal estate tax, see Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX. L. REV. 223 (1956).

21. Revenue Act of 1916, ch. 463, § 202, 39 Stat. 777-78. *See* Note, *supra* note 20, at 219. *See generally* Comment, *supra* note 20.

22. Revenue Act of 1916, ch. 463, § 207, 39 Stat. 779. The personal representative was responsible for the entire estate tax, whether generated by probate or nonprobate property. *In re* Hamlin, 226 N.Y. 407, 410-16, 124 N.E. 4, 6-7, *cert. denied*, 250 U.S. 672 (1919). Examples of property which is nonprobate, or nontestamentary, property are gifts in contemplation of death, transfers with retained life estate, transfers taking effect at death, revocable transfers, annuities, joint interests, proceeds of life insurance, and transfers for insufficient consideration. INT. REV. CODE OF 1954, §§ 2035-2040, 2042-2043. This property never passes through the hands of the personal representative because, as nontestamentary property, it passes by operation of law upon the testator's death, or it passes prior to death.

23. *See In re* Bacigalupi's Estate, 105 Cal. App. 578, 288 P. 122 (Ct. App. 1930); Turner v. Cole, 118 N.J. Eq. 497, 179 A. 113 (Ct. App. 1935); *In re* Brooklyn Trust Co., 179 App. Div. 262, 166 N.Y.S. 513 (1917); *In re* McQueen's Estate, 64 N.D. 21, 250 N.W. 95 (1933).

24. *See* YMCA v. Davis, 264 U.S. 47 (1924); Rogan v. Taylor, 136 F.2d 598 (9th Cir. 1943); Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320 (1924); Bemis v. Converse, 246 Mass. 131, 140 N.E. 686 (1923); Plunkett v. Old Colony Trust Co., 233 Mass. 471, 124 N.E. 265 (1919); Amoskeag Trust Co. v. Dartmouth College, 89 N.H. 471, 200 A. 786 (1938); Comment, *Apportionment of the Federal Estate Tax—Should North Carolina Adopt an Apportionment Statute?*, 52 N.C.L. REV. 737, 738 (1974).

25. The tax as originally imposed started at 1 percent of a net estate of $50,000 and increased to 10 percent on net estates over $5,000,000. Revenue Act of 1916, § 201, 39 Stat. 777. The current rates are much greater. *See* discussion note 28 *infra*.

26. *See generally* Note, *supra* note 20, at 219; Comment, *supra* note 20.

27. Congress increased the tax amount on the theory that heavy taxation diminishes large estates, thus preventing vast accumulations of wealth from being passed intact from generation to generation. JOINT COMM. ON INTERNAL REVENUE, 2 FEDERAL & STATE DEATH TAXES 144-45 (1933). *See also* Comment, *supra* note 20, at 889-90. For a detailed discussion of the development of the federal estate tax, see Eisenstein, *supra* note 20.

28. The federal estate tax rate presently starts at 3 percent on a taxable estate of less than $5,000 and increases to a flat $6,088,200, plus 77 percent of any excess over $10 million, on estates of $10 million and over. INT. REV. CODE OF 1954, § 2001.

increased, the inevitable consequence was a sometimes exhaustive drain on the residue.

The inequity which can arise from allocating the entire tax burden to the residuary estate is aptly illustrated by the cases of *In re Gato's Estate*[29] and *In re Mellon's Estate*.[30] *Gato* involved a probate estate with a value only slightly in excess of $180,000; because two revocable trusts were included in the gross estate for tax purposes, however, the estate tax amounted to over $190,000. The probate estate was, of course, completely exhausted by the tax. In *Mellon*, the testator left a probate estate of over $11 million. The taxable gross estate included several sizable gifts made in contemplation of death, which resulted in an estate tax of $37 million, again completely exhausting the probate estate. In response to this type of situation, many states adopted apportionment rules allocating the tax among the various recipients of the estate including recipients of non-probate property.

The first apportionment statute, enacted by New York in 1930, required that the federal estate tax be equitably prorated among all persons interested in the estate and made contribution by those receiving nonprobate property mandatory.[31] Although the statute was declared unconstitutional by the New York court of appeals,[32] the United States Supreme Court reversed, holding that federal law provided only statutory mechanics for collection and payment, leaving determination of substantive rights to the states.[33] The Supreme Court thus established

29. 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950).

30. 347 Pa. 520, 32 A.2d 749 (1943).

31. Ch. 709, § 124, [1930] McKinney's Sess. Laws of New York 1283-84 (now N.Y. EST., POWERS & TRUSTS § 2.1.8 (McKinney 1967)).

32. *In re* Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131 (1941), *rev'd*, Riggs v. Del Drago, 317 U.S. 95 (1942), *noted in* 42 COLUM. L. REV. 708 (1942), 55 HARV. L. REV. 1053 (1942), 19 N.Y.U.L. REV. 319 (1942). Interpreting section 826(b) of the Internal Revenue Code of 1939 as excluding specific devisees from the tax burden, the New York court held that the New York statute conflicted with the federal estate tax law and thus violated the supremacy clause of the Constitution. *Id.* The New York court's conclusion was based on the federal provision stating, "that so far as is practicable . . . the tax shall be paid out of the estate before its distribution." Int. Rev. Code of 1939, ch. 3, § 826(b), 53 Stat. 128 (now INT. REV. CODE OF 1954, § 2205). Also relied upon was the code provision that any distributee who pays the federal estate tax, in part or in whole, is entitled to reimbursement out of any undistributed part of the estate or by just and equitable contribution from those whose interests in the estate would have been reduced had the distributee seeking reimbursement not paid the tax. *Id. See generally* Comment, *supra* note 20.

33. Riggs v. Del Drago, 317 U.S. 95 (1942). The Court stated:

> We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax.

Id. at 97-98. The Court then continued:

> By [section 826(b)] Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution . . . . In short, [section] 826(b) . . . simply provides that, if the tax must be collected after distribution, the

that a state is not constitutionally precluded from requiring equitable apportionment.[34]

While a number of states have retained the common law rule charging the entire tax against the residue,[35] the majority have followed New York and adopted some form of apportionment.[36] Among the rules of apportionment instituted by the states, two basic variations have developed. Under the rule of total apportionment the federal estate tax is prorated among all persons having an interest[37] in the taxable gross estate,[38] thus requiring recipients of probate and nonprobate property to pay a proportionate share of the tax.[39] The rule of partial

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final impact of the tax shall be the same as though it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

Id. at 100-01.

In reality, *Del Drago* simply reaffirmed an already enunciated Supreme Court position. *See* Edwards v. Slocum, 264 U.S. 61 (1924); New York Trust Co. v. Eisner, 256 U.S. 347 (1921); Snyder v. Bettman, 190 U.S. 249 (1903); Knowlton v. Moore, 178 U.S. 41, 78 (1900).

34. 317 U.S. at 102.

35. Cases in 13 jurisdictions have chosen to retain the common law burden-on-the-residue rule. *See In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969); Mazza v. Mazza, 475 F.2d 385 (D.C. Cir. 1973); Spurrier v. First Nat'l Bank, 207 Kan. 406, 485 P.2d 209 (1971); Old Colony Trust Co. v. McGowan, 156 Me. 138, 163 A.2d 538 (1960); Park v. Carroll, 18 N.C. App. 53, 196 S.E.2d 40 (1973); *In re* Rettemeyer's Estate, 345 P.2d 872 (Okla. 1959); Sinnott v. Gidney, 159 Tex. 377, 322 S.W.2d 507 (1959); *In re* Estate of Eberle, 4 Wash. App. 738, 484 P.2d 478 (1971); *In re* Uihlein's Will, 274 Wis. 372, 59 N.W.2d 641 (1953). Additionally, the common law rule has been codified by two states. *See* ALA. CODE tit. 51, § 449(1) (1958); GA. CODE ANN. § 92-3401 (1961). While Mississippi and Vermont have no federal estate tax allocation statute, each has a state estate tax statute which requires the tax to be paid by the executor from the general funds. *See* MISS. CODE ANN. § 91-7-157 (1972); VT. STAT. ANN. tit. 32, §§ 7447, 7453 (Supp. 1975). It is therefore assumed that both Mississippi and Vermont would follow the common law burden-on-the residue rule as to federal estate taxes as well.

36. *See* cases and statutes cited in note 13 *supra*. *Del Drago* related to apportionment only as between specific devises and the residuary estate, not reaching the question of apportionment where nonprobate property is involved. Such a limitation, however, apparently has not been read into the case by the courts or legislatures which have adopted total apportionment. *See generally* authorities cited note 13 *supra*.

37. The Uniform Probate Code defines a person having an interest in the estate as one who is "entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate." UNIFORM PROBATE CODE § 3-916(a)(3). This terminology is not to be confused with the concept of the "interested person," which is defined to include not only heirs, devisees, children, spouses, beneficiaries, and any others having a property right in a trust estate or the estate of the decedent, but also creditors, persons having priority for appointment as personal representative, and fiduciaries representing interested persons. *Id.* § 1-201(20); ARIZ. REV. STAT. ANN. § 14-1201(22) (1975). Apportionment is among all persons interested in the estate, not among all interested persons.

38. The gross estate of a decedent, upon which the federal estate tax is calculated, includes all property owned by the decedent at the time of death, real or personal, tangible or intangible, wherever situated. Additionally, any gifts of property made within 3 years of death are presumed to have been made in contemplation of death and are included in the gross estate. INT. REV. CODE OF 1954, § 2035. Nonprobate property as well as probate property is included. *Id.* § 2031. The taxable estate is determined by subtracting certain deductions from the gross estate. *Id.* §§ 2051-2056.

39. A rule of total apportionment operates to require contribution from all property not specifically exempted either by the will or by statute. Under total apportionment it is irrelevant whether property is probate or nonprobate property, or whether it is a

apportionment, however, singles out nonresiduary devisees for exemption from the tax, charging the residuary estate with the tax allocable to the probate estate; nonprobate recipients, however, bear their proportionate share of the total estate tax.[40] Whether a state should adopt a rule of total or partial apportionment or retain the common law depends on the needs and policy considerations of the state since each system has its own advantages and disadvantages. Each system will be explored in more depth in the following section, after which the needs and policies of Arizona will be analyzed in an attempt to arrive at the rule best suited for Arizona.

ADVANTAGES AND DISADVANTAGES OF THE ALTERNATIVE RULES

In comparing the various systems for allocating federal estate tax, the common law burden-on-the-residue rule has the obvious advantage of affording an administrative ease not possible with apportionment.[41] This method allows the estate tax to be deducted directly from the residue, whereas either means of apportionment requires that the tax be first prorated and then collected from the various beneficiaries. The complexity of apportioning the tax increases the expense of administration and may delay distribution.[42] It is not surprising, therefore, that administrative practicality is a consideration in those states adhering to the common law rule.[43] However, since the primary concern in estab-

specific, general, or residuary devise. If the property generates estate tax, it contributes its proportional share of the tax burden.

40. A rule of partial apportionment operates to relieve the residuary estate of part of the tax burden by requiring that nonprobate property bear the tax which it generates. The tax generated by specific and general devises, however, is still charged to the residue; thus the residuary estate is responsible for a disproportionate share of the tax under this plan.

41. *See* Lindsay, *supra* note 8, at 167-73.

42. Apportionment admittedly creates a degree of accounting complexity not found in the residue charge. Locke, *Administrative Difficulties in the Proration of the Federal Estate Tax*, 21 CONN. B.J. 168 (1947); Sheffield, *supra* note 19, at 6; Comment, *supra* note 20; Note, *supra* note 20, at 228. This increased complexity is said to increase the expense of administration and delay distribution. *See* Mitnick, *State Legislative Apportionment of the Federal Estate Tax*, 10 MD. L. REV. 289, 330 (1949); Sheffield, *supra* note 19, at 17; Note, *supra* note 20, at 228. One suggestion for minimizing the complexity in accounting is a provision exempting from contribution any specific or general devise below a certain percentage of the value of the total taxable estate. Susman & Fourticq, *Apportionment of Death Taxes: A Comprehensive Survey with Proposed Statute*, 45 TEXAS L. REV. 1348, 1396 (1967) (10% proposed). *But see* Lindsay, *supra* note 8, at 164. The view that administrative changes required by an apportionment provision would present difficulties to the capable practitioner is not universally shared. A personal representative already has the facts necessary to calculate the prorated tax on each asset. Applying an apportionment formula, therefore, would seem to be a routine matter and no greater an administrative burden than the currently used process for assessing taxes in a multidevise residuary situation. Interview with Kenneth Haber, Chairman of the Subcommittee on Taxation of the Joint Committee of the Arizona Bar Association—Arizona Bankers' Association, in Tucson, Ariz., Sept. 20, 1974. It is possible, however, that collection problems might arise.

43. *See* YMCA v. Davis, 106 Ohio St. 366, 140 N.E. 114 (1922); Plunkett v. Old

lishing a rule of apportionment should be effectuation of the testator's probable intent and avoidance of the potential for harsh results,[44] the factor of administrative convenience should not be controlling. A further argument advanced by states adopting the common law rule rests on a presumption that a testator knows the law allocating the entire burden to the residue and will specify that taxes be apportioned if that is his intent.[45] This rationale presumes that any harsh results occasioned by the common law rule were intended by the testator, seemingly an erroneous presumption when the residuary devisees are those closest to the decedent. This presumption, therefore, seems questionable at best. The common law rule is problematical not only in resting on a flawed presumption; it also results in an overall increase in taxes when deductible devises such as the widower's share and charitable gifts are included in the residue.[46]

The arguments in favor of the common law rule have been rejected by the majority of states adopting the apportionment principle. According to these states, the common law approach produces results which are inequitable[47] and thus probably contrary to the testator's

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Colony Trust Co., 233 Mass. 471, 475, 124 N.E. 265, 268 (1919). *See generally* Lauritzen, *supra* note 11, at 56; Lindsay, *Florida's Estate Tax Laws—Apportionment Versus a Charge Against the Residue*, 12 U. FLA. L. REV. 50, 60 (1959); Sutter, *Apportionment of Federal Estate Tax in the Absence of Statute or an Expression of Intention*, 51 MICH. L. REV. 53 (1952); Note, *supra* note 20, at 227; Comment, *supra* note 20, at 904.

44. See text & notes 8-13 *supra*.

45. This rationale is not so much an argument in support of the residue rule as it is a justification for not changing that doctrine. Subsequent to adoption of an apportionment rule, that rule would be the law the testator is presumed to know. Only wills written before adoption would present a problem, and these could be excepted from the new rule's operation. Courts also have expressed the view that abrogation of the common law in this matter is better left to the legislature. *See In re* Uihlein's Will, 264 Wis. 362, 376, 59 N.W.2d 641, 648 (1953). This view, however, is countered by Lauritzen, who argues:

> A proper respect for the respective activities of the legislature and the judiciary is a necessary ingredient to the orderly functioning of our jurisprudence, but such respect by the court also implies a necessary amount of self respect by the court itself; and self abnegation to the point of refusing to apply accepted judicial doctrines in a situation when the legislature has made no pronouncement is a disservice to court and litigant alike.

Lauritzen, *Apportionment of Federal Estate Taxes*, in 2 LANDMARK PAPERS, *supra* note 7, at 766. For a general discussion of the importance of the testator's intent, see authorities cited note 5 *supra*.

46. *See* INT. REV. CODE OF 1954, § 2056; discussion note 4 *supra*. Under the common law rule deductible devises are not exonerated from contribution to the tax.

47. The principle objection to an estate tax has been that where the decedent dies leaving a will, and makes no provision therein to the contrary, the entire burden of the tax must be borne by the residuary legatee or legatees. Experience has demonstrated that in most estates the residuary legatees are the widow, children or nearer and more dependent relatives.

NEW YORK COMM'N TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES, COMBINED REPORTS 338 (reprinted ed. 1935). *See* Carpenter v. Carpenter, 364 Mo. 782, 797, 267 S.W.2d 632, 642 (1954); Marans v. Newland, 143 Mont. 388, 393, 390 P.2d 443, 446 (1964); *In re* Gallagher's Will, 57 N.M. 112, 130, 255 P.2d 317, 328-29 (1953); Lauritzen, *supra* note 11, at 76-77; Comment, *supra* note 11, at 123-24. See text accompanying notes 29-30 *supra*.

intent.[48] This position is based on the premise that the testator intended to benefit his residuary beneficiaries and would not have left them with little or nothing.[49] Implicitly rejected, of course, is the presumption that the testator knows the law. It is replaced with the presumption that the testator would never deliberately deprive his residuary devisees, which, like the presumption of legal knowledge, is questionable when imposed as a blanket rule. It is not inconceivable that the testator might desire to place the burden on the residuary beneficiaries, even when they are close relatives or friends. However, this presumption certainly appears closer to the intent of the average testator than the common law's presumed legal knowledge.

The conflict between the presumptions that the testator intended to benefit his residuary devisees and that he intended the residue to be burdened should not, in any event, be determinative of a state's position on apportionment.[50] Indeed, courts which have abrogated the common law have not done so on the strength of the argument concerning the testator's presumed intentions. Rather, they have relied for the most part on equitable considerations.[51] The equitable argument in favor of apportionment centers on the nature of the estate tax as a charge on the entire estate, generated by both probate and nonprobate property. To require the probate estate to bear the entire burden and thus essentially increase the value of nontestamentary property at the expense of testamentary property is viewed as inequitable, since equity seemingly would require each to share its respective portion of the estate tax burden.

A policy consideration which arguably should be weighed in determining tax allocation is the state's interest in preventing its citizens

48. A number of writers commenting on the burden-on-the-residue rule reject the contention that it embodies an accurate presumption of the testator's desires. *See* Lauritzen, *supra* note 11, at 56; Lindsay, *supra* note 43, at 60; Willoughby, *supra* note 19, at 199; Sutter, *supra* note 43, at 53; Note, *Statutory Apportionment of Federal Estate Taxes*, 62 HARV. L. REV. 1022, 1022 (1949); Comment, *supra* note 20, at 904. *See also* Comment, *supra* note 11, at 123-24; Note, *supra* note 20, at 227.

49. See authorities cited note 48 *supra*. Courts have, however, allowed apportionment on the basis of equity alone, the testator's presumed intention being considered a mere fiction. Note, *supra* note 20, at 228; *see In re* O'Connor's Estate, 130 Cal. App. 2d 258, 278 P.2d 748 (1955); *In re* Rutan's Estate, 119 Cal. App. 2d 542, 260 P.2d 111 (1953); *In re* Levas' Estate, 33 Wash. 2d 520, 206 P.2d 482 (1949).

50. Resolution of the conflict of presumptions without involving other relevant factors would be simply a matter of deciding to which presumption one desires to give greater weight.

51. A court which decided to abrogate the common law and adopt equitable apportionment could do so on three possible theories in addition to that based on equity. The first, similar in principle to the equity theory, is the doctrine of unjust enrichment. Since estate tax is a tax on the entire estate, a requirement that only some beneficiaries bear the burden results in unjust enrichment of those who are exempted. The other two theories—restitution and the common count of money paid to another's use—are less often relied upon, but nonetheless available. *See generally* Fleming, *supra* note 7, at 156.

from becoming a financial burden on the public.[52] The common law rule, when so applied as to unduly diminish the residue, may force residuary beneficiaries who had depended upon the decedent for support onto the welfare rolls upon his death. Consequently, the interest of the state in avoiding the burden of impecunious beneficiaries provides an additional justification for adoption of a rule requiring specific expression of any testatorial intent to leave residuary devisees disadvantaged in payment of the estate tax.

Should a state conclude that a weighing of the above considerations militates in favor of an apportionment system, there would remain the choice between total and partial apportionment. The difference between these two systems lies in their treatment of general and specific devises:[53] partial apportionment frees such devises from taxes, while total apportionment does not. As previously noted, both equity and policy seem to call for avoiding depletion or exhaustion of the residue in most situations. Traditionally it has been the inclusion of exonerated nonprobate property in the taxable estate that has caused such depletion.[54] Since both total and partial apportionment require contribution from nonprobate property, the state's interest in protecting the residue should be adequately accomplished by either rule. Although the equitable principle requiring each part of the estate to bear its share of the tax burden would call for allocating the estate tax to general and specific devises as well as to the residuary and nonprobate property, the heart of the equitable argument—based on the prevention of hardship—is satisfied in most cases by the inclusion of nonprobate property in the tax-paying estate.

The intent factor would appear to weigh in favor of partial apportionment. Under the common law, specific and general devises were freed from taxes on the assumption that in the absence of an expression to the contrary, the testator intended specific and generally devised assets to pass unburdened and undiminished.[55] This argument seems persuasive. Because of the specificity with which a testator defines specific and general devises in the will, it should not be inferred that he intended by his silence with regard to tax allocation to subject these assets to the tax burden.[56] Acceptance of this rationale would

52. *See* Doetsch v. Doetsch, 312 F.2d 323, 328-29 (1963).

53. Specific devise refers to specific disposition of certain property, either personal or real. General devise refers to a devise of a certain sum of money. *See* Ives, *Suggestions for Modern Will Drafting*, in 2 LANDMARK PAPERS, *supra* note 7, at 537, 539, 546.

54. *See In re* Gato's Estate, 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950); *In re* Mellon's Estate, 347 Pa. 520, 32 A.2d 749 (1943).

55. *In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969); *In re* Hamlin, 226 N.Y. 672, 124 N.E. 4 (1919), *cert. denied*, 250 U.S. 672 (1919).

56. Of course, the same argument could be made in regard to nonprobate property such as trusts, joint tenancies, and inter vivos gifts. However, the equitable considera-

call for a system of partial rather than total apportionment since the latter would tax specific and general devises, while they would be exonerated by the former.[57]

Partial apportionment also generates less administrative difficulties than does total apportionment. Apportionment often is criticized because it increases problems of accounting and collecting the tax.[58] To the extent this argument has validity,[59] the concern is less under a partial apportionment system, which allows nonresiduary devisees, most commonly specific and general devisees, to receive their property unconditioned on payment of federal estate taxes. Because the personal representative has fewer devisees from whom to seek contribution, this system is administratively less complex.

Despite the arguments against total apportionment, the Uniform Probate Code adopted that rule.[60] Consequently, an argument in favor of total apportionment can now be made based on the desirability of national uniformity.[61] A uniform system would afford greater familiarity with the law[62] and provide equality of treatment among different parts of the estate in multistate estate situations.[63] Despite the allure of such a rule, however, it appears unlikely that apportionment, much less any single system thereof, will be adopted nationwide in the near future.[64] Furthermore, equal treatment of all parts of a decedent's

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tions disfavoring exoneration of such property are much stronger than in the case of specific and general devises. See text accompanying note 54 *supra*.

57. *See* Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963); *In re* Gallagher's Estate, 57 N.M. 112, 225 P.2d 317 (1953).

58. *See* text & notes 41-43 *supra*.

59. See discussion note 42 *supra*.

60. UNIFORM PROBATE CODE § 3-916. The Uniform Probate Code adopted total equitable apportionment as it appeared in the Uniform Estate Tax Apportionment Act. *See* UNIFORM ESTATE TAX APPORTIONMENT ACT § 2 (1964 version). To date only nine states have adopted the Uniform Estate Tax Apportionment Act. 8 UNIFORM LAWS ANN. 53, 54 (Supp. 1976). However, the Uniform Probate Code, which essentially subsumes the Uniform Estate Tax Apportionment Act has been enacted in 10 additional states. *Id.* at 71.

61. A total of 32 states now adhere to a system of total apportionment. *See* total apportionment authorities cited note 13 *supra*.

62. Where the states have differing systems, it is difficult for a testator to know the legal consequences of his silence on the subject of allocation with regard to a multistate estate. Similarly, a mobile testator might lose track of the relevant law as he moves from state to state.

63. An example of the inequitable results which might occur would be the unequal treatment of trusts created by the same testator but located in different states. For instance, a trust located in a state requiring apportionment would be depleted by taxes while a second trust located in a state following the common law burden-on-the-residue rule would receive the property undiminished.

64. Both the Uniform Probate Code and the Uniform Estate Tax Apportionment Act are only suggested models. Unless one or the other were adopted by all states in an unaltered form the various problems which arise in multistate estate situations would continue. It has been suggested that a federal law is needed. Scoles & Stephens, *supra* note 7, at 936-37. However, probating decedents' estates has always been a matter of local law and there is a strong local interest in regard to the burden of taxation as it affects a decedent's heirs. *See* Del Drago v. Riggs, 317 U.S. 95 (1942); Doetsch v.

estate may be accomplished adequately by a conflict of law policy requiring a state dealing with property of a decedent to apply the law of the state in which the will is being probated.[65] Such a rule allows all parts of a decedent's estate to be treated equally by referring to the domiciliary state's law in multistate estate situations.

Regardless of the position taken by the Uniform Probate Code, partial apportionment is the better solution to the problems of the common law. It honors the intentions of the testator in freeing specific and general devises, while protecting the residuary estate from serious depletion by requiring contribution from nonprobate assets. It is also the position most consistent with present Arizona law.

ARIZONA LAW ON FEDERAL ESTATE TAX

Arizona has not as yet established any comprehensive system for allocating federal estate tax. Arizona authorities, however, have developed the outlines of a system of partial apportionment which need only to be adopted as a whole and further defined in future judicial decisionmaking.

The first step in this formulation was taken by the Seventh Circuit, forced in a diversity case to determine whether Arizona courts would follow a rule of apportionment.[66] While recognizing the total absence of Arizona statutory or case law on the subject,[67] the court held in *Doetsch v. Doetsch* that Arizona would apportion estate tax attributable

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Doetsch, 312 F.2d 323 (7th Cir. 1963); *In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969).

65. There have been few cases litigated on the question of conflicts of law in regard to apportionment of federal estate tax. Scoles, *supra* note 8, at 270. Like most states, Arizona has not decided this question. Likewise in states other than those adopting the Uniform Probate Code and its conflicts provision there are no controlling statutes comparable to section 3-916(h) of the Uniform Probate Code which provides that determination of apportionment by the court having jurisdiction of the decedent's estate is prima facie correct in any other jurisdiction. The greatest obstacle to adoption of a uniform choice of law policy along these lines might be expected to involve the treatment of real property. Generally, the law of the situs is applied to questions concerning immovables. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 239 (1971). This could mean that a decision by the courts of the domiciliary state requiring payment of tax by the recipient of a specific devise or nonprobate transfer of land which was located in a state not requiring apportionment would not be honored in an auxiliary action brought in the state of location to enforce contribution. In such a situation the personal representative would be responsible to the federal government for the uncollectible taxes. INT. REV. CODE OF 1954, § 2002. *See generally* Scoles, *supra* at 270-76.

66. Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963). The will of the decedent was admitted into probate in Arizona, the state of domicile at death. A diversity action was filed by the surviving spouse in the Northern District of Illinois, the situs of an inter vivos trust created by the decedent, seeking to hold the defendant distributees of the trust corpus liable for that portion of the federal estate tax attributable to the inclusion of the trust in the decedent's estate. *Id.* at 324-25. Although the court held that the law of Illinois, the situs of the property, must be applied, it found that the Illinois law on conflicts required that the issue of apportionment be governed by the law of the decedent's domicile. *Id.* at 327-28.

67. *Id.* at 328.

to nonprobate property in the form of trusts.[68] The *Doetsch* decision, which is consistent with either total or partial apportionment, was not based on the testator's presumed intentions,[69] but rather on the equitable principle of equal treatment.[70] The *Doetsch* opinion devoted no analysis to Arizona policies as expressed in statutes or cases dealing with other subjects; it thus might be questioned whether this decision represented a valid link in the Arizona law of estate tax allocation had not the policy attributed to Arizona in *Doetsch* been cited with approval by the Arizona attorney general in a 1967 opinion concerning apportionment against nonprobate property.[71] Although the opinion was unclear on whether the burden apportioned to the probate estate would be borne equally by all probated assets or only by the residuary estate,[72] it clearly demonstrated the attorney general's belief that the policies of the state would best be effectuated by requiring nontestamentary property to bear its prorated share of estate tax.[73] Essentially, the attorney general's rationale was based on the same equitable principles which influenced the Seventh Circuit: "[t]he law ought to be neutral and treat all classes of assets which contribute to the measure of the tax on an equal basis."[74]

Whatever the precise meaning of the attorney general's opinion, it now has been judicially established in Arizona[75] that specific and gen-

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68. *Id.* at 329.

69. Indeed, at the time there was no Arizona law which the testator could be presumed to know.

70. *See* 312 F.2d at 329. The court confined its analysis of the issue to quoting from a New Mexico case:

> We have not tallied the jurisdictions on each side, but although the earlier rule may still represent the majority opinion of jurisdictions passing upon the question, we feel no compunction to adhere inelastically to a rule which in the view of this court is not productive of substantial justice. Certainly the vitality of our legal system derives in large part from the function of our courts in applying its *root* concepts, among them that of equal treatment, to ever new and diversified problems. . . . Therefore, the rule is nonprobate assets includible in the gross taxable estate shall bear their proportionate share of the burden of the federal estate tax.

Id., quoting In re Gallagher's Will, 57 N.M. 112, 130, 255 P.2d 317, 328 (1953).

71. Opinion No. 67-8, 1967 OP. ARIZ. ATT'Y GEN. 15.

72. The attorney general made no reference to partial or total apportionment, speaking only in terms of "equitable apportionment." The question to which the attorney general was responding, however, was framed in terms of apportionment "as opposed to the burden being solely that of the probated assets." *Id.* at 15. Similarly, the cases quoted seem concerned primarily with nonprobated assets. Nonetheless, the attorney general used broad language, speaking of contribution by all assets contributing to the measure of the tax. *Id.* at 17. To the extent that total apportionment was advocated, the attorney general has been overruled by the Arizona supreme court. *See In re* Estates of Garcia, 9 Ariz. App. 587, 455 P.2d 269 (1969); text accompanying notes 73-76 *infra.*

73. *See* Opinion No. 67-8, 1967 OP. ARIZ. ATT'Y GEN. 15, 15-17.

74. *Id.* at 17. The opinion also stated that no tax should be allocated to marital and charitable deductions since they did not contribute to the measure of the tax. *Id.*; see text & notes 108-10 *supra.*

75. It should be noted, however, that the case establishing this point went no further than the Arizona court of appeals. The supreme court has yet to rule on the matter.

eral devises are exonerated from the federal estate tax burden. *In re Estates of Garcia*[76] was concerned with the issue of whether the recipient of a specifically devised ranch, constituting approximately one-half of the decedent's estate, was liable for contribution to the estate tax,[77] the remainder being given to other children. Nothing in the will indicated that contribution was the intention of the testator, however, and the court refused to compel such contribution as a matter of policy.[78] In so deciding the court relied on the common law rationale that a testator intends the residue of his estate to be that which remains after debts and costs of administration. The court reasoned that although the federal estate tax technically was not a debt or administrative expense, there nonetheless existed no compelling reason to treat federal estate taxes differently from such obligations.[79] The specific devisee, therefore, was exonerated from federal estate tax. The *Garcia* holding, however, was carefully limited to the issue of allocating taxes between specific and residuary devisees.

So long as *Garcia* retains its validity, total apportionment is precluded in Arizona. However, the combined effect of *Garcia*, *Doetsch*, and the attorney general's opinion seems to point the way toward a partial apportionment system for the state.[80] For the reasons outlined above,[81] such a system should be adopted for Arizona, either judicially or by statute.

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76. 9 Ariz. App. 587, 455 P.2d 269 (1969).

77. Appellants first argued that apportionment between specific and residuary devisees was required by Ariz. Rev. Stat. Ann. § 14-686 (1956) (repealed 1974), but the court concluded that this statute was a codification of the common law in regard only to debts of the decedent. 9 Ariz. App. at 588-90, 455 P.2d at 270-71. Section 14-686 charged debts of the estate against first, the property expressly appropriated by the will for payment of debts; second, property not disposed of by the will; third, residuary property; fourth, general devises; and finally, all other property (specific devises) on a ratable basis.

78. 9 Ariz. App. at 593, 455 P.2d at 275.

79. *Id.* at 590, 455 P.2d at 272.

80. Like all jurisdictions, of course, Arizona adheres to the rule that an expression of the testator's intent contained in the will itself controls whether or not it results in the tax allocation called for by the controlling rule in the state. Brewer v. Peterson, 9 Ariz. App. 455, 460, 453 P.2d 966, 971 (1965); Opinion No. 67-8, 1967 OP. ARIZ. ATT'Y GEN. 15, 17. This is true even though the resulting allocation appears to differ from the probable intent of the testator. Brewer v. Peterson, *supra* at 459, 453 P.2d at 970. The *Brewer* case was an action to compel contribution from the recipient of $1,200,000 in inter vivos gifts. Inclusion of these gifts resulted in an estate tax which exceeded the total available probate assets. *Id.* at 457, 453 P.2d at 968. The court recognized that failure to apportion resulted in frustration of the probable intention of the testator to benefit the beneficiaries under the will, decedent's nephew and grandniece. *Id.* at 456-58, 453 P.2d at 967-69. The will specifically provided, however, that the estate tax should be paid out of the residue, and the court found itself obligated to honor the express will provision, stating, " 'Courts cannot speculate concerning the intention of settlors and testators . . . . The instrument as written must govern. . . . There is no jurisdiction in equity to prescribe what may seem fairer than [that which] the settlor or testator has declared.' " *Id.* at 460-61, 453 P.2d at 970-71, *quoting* Bemis v. Converse, 246 Mass. 131, 132, 140 N.E. 686, 687 (1973). *See generally* Effland, *Estate Planning Under the New Arizona Probate Code*, 1974 ARIZ. ST. L.J. 1, 24-25.

81. See text accompanying notes 41-59 *supra*.

PROPOSAL FOR AN APPORTIONMENT STATUTE

Perhaps the preferable means of adopting a partial apportionment system for Arizona is via statute in order that procedural and other matters collateral to the apportionment formula itself may be clearly established. A proposed model statute is set out below to serve as a model for the Arizona legislature in enacting such a law.

In drafting this proposal, an attempt has been made to be as consistent as possible with the Uniform Probate Code[82] in the interest of uniformity.[83] The proposal differs from the Uniform Probate Code, however, in the one important respect of calling for partial rather than total apportionment.[84] Nevertheless, the method of apportionment as to nonprobate assets is the same as that employed in the uniform act.[85] The model statute differs from the Uniform Probate Code in several additional ways. The Code would seem to allow for alteration of the statutory scheme of apportionment by will only.[86] There would seem to be no policy reason, however, why a testator should not be able to provide in an instrument other than a will for tax apportionment as to the property controlled by that other instrument.[87] Thus, an alteration to this effect has been made in the proposal.[88]

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82. UNIFORM PROBATE CODE § 3-916.

83. It is felt that uniformity would best be promoted by consistency with the Uniform Probate Code, which has met with widespread acceptance since its promulgation in 1969. Although the uniform act requires total apportionment while the proposed model statute requires partial apportionment, this difference does not eliminate the desirability of uniformity in other aspects of the measure. For example, a primary goal of uniformity is the uniform treatment of all of a decedent's assets in a multistate estate situation. Scoles, *supra* note 8, at 266-67. The Uniform Probate Code provides that the law of the decedent's domicile will control all parts of the estate. UNIFORM PROBATE CODE § 3-916(h). If all states look to the law of the domiciliary state, the fact that Arizona requires partial apportionment while other jurisdictions require total apportionment does not affect uniformity of treatment within a decedent's estate. This important provision of the uniform act therefore is included in the proposed statute. Model Statute § 3(J). Consistency with the Uniform Probate Code was advisable also in light of the fact that Arizona has adopted that Code, though omitting its apportionment provision; thus, procedural compatibility is a necessity. The model statute is intended to be incorporated as section 14-3916 in the present Arizona probate code, this being the section at which the omitted apportionment provision would have appeared.

84. *Compare* Model Statute § 2 *with* UNIFORM PROBATE CODE § 3-916(b).

85. *Compare* Model Statute § 2(A)(5) *with* UNIFORM PROBATE CODE § 3-916(b).

86. Section 3-916(b) of the Uniform Probate Code states: "If a decedent's will directs a method of apportionment of tax different from the method described in this Code, the method described in the will controls." This provision seems to indicate that no other method of alteration will be recognized. The Commissioners' Note to section 2 of the 1964 Uniform Estate Tax Apportionment Act, from which this section of the Uniform Probate Code was taken, states that "it was the consensus that the right to alter or omit apportionment, whether of property passing under a will or inter vivos, be exercised by will only." This aspect of the uniform act received criticism from Scoles and Stephens in their article examining the Uniform Estate Tax Apportionment Act, *supra* note 7, at 921-22. Consideration also was given to other comments and criticisms made by these authors. See Scoles & Stephens, *supra* 919-25. *See also* Susman & Fourticq, *supra* note 42, at 1388-90.

87. Scoles & Stephens, *supra* note 7, at 920-21.

88. *See* Model Statute § 2(A)(3).

Another way in which the model statute varies from the Uniform Probate Code is in its treatment of a determination of apportionment by a court having jurisdiction. While the uniform act refers to such determinations as prima facie correct,[89] the proposal makes them binding on parties to the action and prima facie correct as to all others.[90] This provision is in accord with traditional principles of res judicata. In other ways the statute here proposed is basically consistent with the Uniform Probate Code.

The legislative adoption of such a statute solves many of the problems judicial adoption would not reach, except perhaps through repeated litigation over a period of years. It sets forth concisely the assets to which estate tax is to be apportioned,[91] and the formula for doing so.[92] It answers the question whether interest and penalties also are to be apportioned,[93] and it grants to the court the power to alter the statutory scheme if in its discretion such is necessary in the interest of justice.[94] A complete procedural mechanism is also detailed.[95]

The Model Statute Proposal

Section 1. Definitions

For purposes of this Act:

A. "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax and the estate tax payable to Arizona.

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

C. "Tax" means the federal estate tax and the Arizona estate tax, and interest and penalties imposed in addition to the tax.

D. "Net estate" means the estate minus allowable deductions.

89. UNIFORM PROBATE CODE § 3-916(h).
90. Model Statute § 3(E).
91. *See id.* § 2(A)(5).
92. *See id.* § 2(B).
93. *See id.* § 1(C) & Commentary.
94. *See id.* § 3(B).
95. *See id.* § 3.

Commentary to Section 1.

This is the definitional section specifically applicable to the ensuing provisions on apportionment. It is intended to be supplemental to the definitional section contained in ARIZ. REV. STAT. ANN. § 1-215 (1974), and the definitional section of the Arizona Probate Code. ARIZ. REV. STAT. ANN. § 14-1201 (1975). Among the applicable terms defined in these sections are person, property, state, and will. The only term which takes on a different meaning in relation to apportionment is estate. When used in regard to apportionment it is necessary that the term be defined to correspond with the gross estate as determined for purposes of the tax.

The proposed statute, by defining the term "tax" to mean both the federal and state taxes, governs apportionment of both taxes.[96] Both interest and penalties are included in the definition of tax in an effort to obviate what in the past has been a source of litigation.[97] Under the proposed statute, these costs will be apportioned in the same manner as the basic tax.

Because the proposed statute applies to both federal and state estate taxes, there may arise situations in which interest or penalty costs are incurred by assets subject to one tax, but not the other. In the interest of fairness, such costs should not be apportioned among recipients of assets not subject to that tax. The precise wording of this definition—"interest and penalties imposed in addition to the tax"—was intended to allow for such situations. There may be other situations in which it would be manifestly unfair to apportion interest or penalties among all persons interested in the estate. For example, a late fee

96. *See generally* Powell, *Ultimate Liability for Federal Estate Taxes*, 1958 WASH. U.L.Q. 327, 339-40. It is not desirable to have two different statutes on estate taxation as the potential for conflict is great and the duplication is unnecessary. Therefore, one statute should be sufficient to deal adequately with apportionment of estate taxes imposed by both state and federal governments. This approach has the additional advantage of simplifying the task of drafting tax clauses when the testator wishes to deviate from the statutory scheme. *See* Warfield v. Merchants Nat'l Bank, 337 Mass. 14, 147 N.E.2d 809 (1958).

97. *See In re* Sinsheimer's Will, 21 N.Y.S.2d 573 (Sur. Ct. 1940). A common error of early apportionment statutes was the failure to include a provision dealing with interest, deficiencies, and penalties. *See* Fleming, *supra* note 7, at 162. New York dealt with this problem by providing that "any interest resulting from the late payment of the tax shall be apportioned in the same manner as the tax and shall be charged wholly to principal." N.Y. EST., POWERS & TRUSTS LAW, § 2.1.8(c)(4) (McKinney 1967). For a discussion of the complications which could arise in the case of temporary interests and remainders, see Mitnick, *supra* note 42, at 317-19; Williams, *Notes on Estate Tax Apportionment Act of 1951*, 56 DICK. L. REV. 210, 214 (1952).

Any question as to accounting between principal and income is not expressly covered by the statute, but rather by preexisting local law. Any hardships or inequities which occur as a result of the imposition of estate tax in this area, however, could be alleviated under section 3(B) which allows a court to apportion interests and penalties equitably where special circumstances cause inequities under section 1. *See* Scoles & Stephens, *supra* note 7, at 919.

may be occasioned due solely to the negligence of the personal representative[98] or a particular devisee. In such a situation section 3(B) allows the court discretion to apportion such expenses in the manner most equitable under the circumstances.

Section 2. Apportionment

A. Unless the will provides otherwise, the tax shall be apportioned in the following manner:

1. If any portion of the estate passed under the will of a decedent in any nonresiduary form, the net amount of the tax attributable thereto shall be charged to and paid from the residuary estate in accord with § 2, subsection B, without requiring contribution from persons receiving such interests. If the residuary estate is insufficient to pay the tax attributable to such interests, any balance of that tax shall be apportioned among the recipients of nonresiduary probate interests. In such a case the amount of tax apportioned against each nonresiduary probate interest shall be that proportion of the balance of the tax due which the value of the nonresiduary interest bears to the total nonresiduary probate estate.

2. The net amount of the tax charged to the residuary estate shall be apportioned among the residuary devisees in accordance with § 2, subsection B.

3. The net amount of the tax attributable to any trust created inter vivos shall be charged to and paid from that portion of the corpus of the trust property included in the measure of such tax and the tax shall be apportioned among the recipients and beneficiaries of such corpus properties or interests, except as otherwise directed by the trust instrument with respect to the fund established thereby, or by the decedent's will. If such inter vivos trust is to bear less than its total proportionate share of tax, such direction must be made by the decedent's will.

4. No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the

98. In Arizona the term "personal representative" is now employed to mean "executor, administrator, successor personal representative, special administrator and persons who perform substantially the same function under the law governing their status." ARIZ. REV. STAT. ANN. § 14-1201(32) (1975). The Internal Revenue Code uses the term "executor" to mean either executor or administrator. INT. REV. CODE of 1954, § 2203. Hereinafter, in order to conform with the Arizona terminology, the term "personal representative" will be used rather than executor or administrator.

tax, if any, on the remainder are chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

5. The balance of the net amount of the tax, including but not limited to any tax imposed with respect to gifts in contemplation of death,[99] jointly held properties passing by survivorship, or property passing by intestacy shall be apportioned among the recipients and beneficiaries of such properties or interests.

B. Apportionment shall be determined in the following manner: the net amount of tax attributable to an interest encompassed by any one of paragraphs 1 through 5 of subsection A shall be that portion of the total net tax which the value of the interest bears to the total net estate.

C. Allowance for exemptions, deductions, and credits shall be made in the following manner:

1. In making an apportionment, any exemption, deduction, or credit granted by the law imposing the tax shall be allowed.

2. Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purpose of the gift inures to the benefit of the person bearing the relationship or receiving the gift; except that when an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.[100]

3. For the purpose of apportionment under § 2, any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent

99. A question bearing on the issue of any irrevocable transaction or transaction in contemplation of death is that of the constitutionality of apportionment against vested interests and irrevocable transfers. Apportionment against such interests has been upheld against charges that such an exercise is an impairment of contract rights. *In re* Ryle's Estate, 170 Misc. 450, 10 N.Y.S.2d 597 (Sur. Ct. 1939). In *Ryle's Estate*, the New York Court noted that taxation of vested interests may be upheld on the grounds that an apportionment statute is procedural and an administrative enactment only; the allocation of federal estate taxes has long been recognized as subject to state regulation; and a testator is presumed to have made such a transfer in contemplation of taxes. *Id.* at 451-54, 10 N.Y.S.2d at 602-04.

100. The last clause of this subsection can be considered an exception to the entire subsection. Recognition is given to the principle that property which does not generate tax should not bear a burden of the tax. An exception is made, however, for prior present interests. Such exception may seem contrary to the spirit of this subsection, but it is consistent with section 2(A)(4), which requires tax attributable to a temporary interest to be charged against the corpus. For a discussion of the problems of computation of prior present interests, see Scoles & Stephens, *supra* note 7, at 926-28.

or his estate shall proportionately reduce the interest of all persons liable to apportionment.

4. Any credit for inheritance, succession, or estate taxes, or taxes in the nature thereof, in respect to property or interests includable in the estate, shall proportionately reduce the interest of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion which, the credit reduces the tax.

5. To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or religious uses, or similar gift or devise does not constitute an allowable deduction for purposes of the tax, solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Act,[101] and to that extent no apportionment shall be made against the property. This does not apply in any instance where the result is to deprive the estate of a deduction otherwise allowable under § 2053(d) of the Internal Revenue Code of 1954, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

Commentary to Section 2.

This section provides the basic rules for apportioning the tax. Subsection A reflects the underlying principle that the desire of the testator is of primary importance. An expressed desire contrary to any statutory provision controls. Paragraphs 1 and 2 set forth that aspect of the system which is peculiar to partial apportionment: the exoneration of nonresiduary devises. The entire tax attributable to the probate estate is charged to the residuary devisees, who bear the tax equitably among themselves. In effect, the tax is subtracted from the residue just as an expense would be, the residue then being divided into shares according to the will.[102] If the residuary estate is not large enough to bear the entire burden, then any excess is equitably apportioned among the nonresiduary devisees.

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101. This section is intended to avoid the reduced tax benefit occasioned by computations which require the amount of tax exemption to be dependent on the amount actually passing to the recipient. *See* Harrison v. Northern Trust Co., 317 U.S. 476 (1942).

102. Subtracting the estate tax before dividing the residue into shares has the disadvantage of reducing the size of each share including shares which are otherwise deductible, such as property eligible for the charitable or marital deductions. INT. REV. CODE of 1954, §§ 2055, 2057. *See* discussion note 127 *infra*. The advantages of this approach, however, outweigh this one disadvantage. Reducing all residuary devises proportionately avoids the potential of severely reducing one. Since close relatives are often provided for as residuary devisees, the policy is aimed at avoiding the possibility that their share of the residue could be extinguished while a charity received its share completely tax free.

Paragraph 3 provides for apportionment against trust assets, recognizing the right of the decedent to alter the statutory scheme in the trust instrument as well as the will. This right is limited, however. The trust instrument may not decrease the total tax to be borne by the trust, but may only increase or shift the burden within the trust itself. This limitation is in accordance with the underlying purpose of any apportionment statute, which is to avoid unexpected and inequitable consequences in the greatest number of cases. A settlor may well want a trust to bear a disproportionate share of the tax. Allowing a trust instrument to increase the tax burden will not work a hardship on the probate estate, so this the settlor may do by means of the trust instrument. If a settlor wishes to decrease the burden, however, he must do so in his will. This avoids the unexpected results which may be occasioned by an increased tax burden on the residue resulting from a decrease in the burden on the trust without evaluating the entire estate.

As the commissioners' note to the Uniform Estate Tax Apportionment Act suggests,[103] paragraph 4 may seem unfair in that temporary interests bear the tax burden for the total trust or property value involved, while the remainder bears no tax burden. This treatment, however, avoids the hardship which could possibly come from requiring a tax contribution from the recipient of an income or future interest. The tax required could be greater than the present income received from the asset, and in the case of a future interest, the beneficiary may indeed have no funds from which to pay the tax. This provision also applies to a future interest which would otherwise qualify for a charitable or marital deduction, thus resulting in a reduction of the tax benefit. By charging the tax to the trust corpus or the present interest, the corpus or present interest is reduced. The interest which then belongs to the spouse or charitable devisee is less and deductions allowed under the provisions of the marital and charitable deduction are likewise less. The maximum tax benefit is not realized;[104] however, it was felt that paragraph 4 provides the only workable solution to otherwise complex computation problems.[105]

Paragraph 5 supplements paragraph 3 in requiring all recipients of nonprobate assets to contribute a proportionate share of the estate

103. UNIFORM ESTATE TAX APPORTIONMENT ACT § 6, Commissioners' Note (1964 version).

104. The maximum benefit is lost because the amount of the benefit is limited to the amount of the property actually passing to the recipient. If the tax is charged to the principal or corpus, this procedure reduces the future or remainder interest since the amount of the future or remainder interest is dependent on the size of the principal or corpus.

105. *See* UNIFORM ESTATE TAX APPORTIONMENT ACT § 6, Commissioner's Note (1964 version). *But see* Scoles & Stephens, *supra* note 7, at 926-28.

tax, to that extent relieving the residue of the disproportionate burden it now carries under the common law. No mention is made of the federal statutory provisions directing contribution from recipients of life insurance proceeds and appointive property.[106] Since the federal statute requires contribution from these recipients, it is unnecessary to duplicate those provisions.[107]

Subsection B provides the precise method of calculating the allocations. Subsection C recognizes the basic proposition that those assets which do not contribute to the evaluation of the net estate upon which the tax is calculated should not be required to pay any of the tax. This exemption preserves the maximum tax benefits already in existence.[108] The two deductions to which this would apply are the marital deduction[109] and the charitable deduction.[110]

Paragraph 3 of subsection C provides that any credit for gift taxes or death taxes of a foreign country shall benefit all persons subject to the apportionment. That is, each beneficiary shall have his tax burden proportionately reduced. Paragraph 4, however, provides that credit for inheritance, succession, or estate taxes shall benefit those receiving the property upon which the taxes were previously paid. This provision in effect avoids twice requiring taxes from the same property. Paragraph 5 is a provision which ensures that all possible tax benefits will be preserved.

Section 3. Procedure

A. The court having jurisdiction over the administration of the estate of a decedent shall determine the apportionment of the tax. If there are no probate proceedings, the court of the county where the decedent was domiciled at death shall determine the apportionment of the tax upon the application of the person required to pay the tax.

B. If the court finds that it is inequitable to apportion interests and penalties in the manner provided in § 2 because of special circumstances, it may direct apportionment in the manner it finds equitable. If penalties and interest assessed in relation to the tax are found by the court to be due to

106. INT. REV. CODE OF 1954, §§ 2206-2207.
107. Powell, *supra* note 96, at 339 n.52.
108. See discussion note 4 *supra*. Another tax benefit which a testator may care to preserve is the tax exempt status provided under section 2039(c) of the Internal Revenue Code. That section provides an estate tax exemption for distributions from a qualified employee pension or profit sharing or stock bonus plan payable to a beneficiary other than the estate of the testator.
109. *See* INT. REV. CODE OF 1954, § 2056.
110. *See id.* § 2055. *See generally* J. TRACHTMAN, *supra* note 10.

delay caused by the personal representative, the court may charge the personal representative with the amount of the assessed penalties and interest.

C. The expenses reasonably incurred by the personal representative and by other persons interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in § 2 and charged and collected as a part of the tax apportioned. If the court finds it is inequitable to apportion these expenses it may otherwise direct payment.

D. Any amount of tax which cannot after a good faith effort be collected from any person shall be apportioned among all the other persons interested in the estate whose interests are subject to apportionment. Any person who is charged with more than the amount of tax apportionable to him shall have the right to obtain contribution from those who have not paid the full amount of the tax apportionable to them. Any such judgment obtained shall include costs and reasonable attorney's fees.

E. In any action to recover from any person interested in the estate the amount of the tax apportioned to that person in accordance with this Act, the determination of the court in respect thereto shall be binding on all persons who are parties to the proceeding and prima facie correct as to others.

F. The tax shall be paid by the personal representative out of the estate. In all cases in which any property required to be included in the gross estate and against which tax is properly allocated does not come into the possession of the personal representative, he shall be entitled, and it shall be his duty, to recover from the fiduciary or persons in receipt of such property the allocated amount of such tax payable by the fiduciary or persons under the provisions of this Act. In any case where the personal representative brings an action to recover a share of tax apportioned to any interest, any judgment he may obtain shall include costs and reasonable attorney's fees.

G. The personal representative may withhold from any property distributable to any person interested in the estate the amount of tax attributable to that interest. If the

property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from that person, the personal representative may recover the deficiency from the person interested in the estate.

H. If property held by the personal representative or other person is to be distributed prior to final apportionment of the tax, the personal representative or other person may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

I. Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to that person until the expiration of 3 months following final determination of the tax. The personal representative or other person required to pay the tax who institutes the action within a reasonable time after the 3 months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible.

J. Subject to this section a personal representative acting in another state or a person required to pay the tax who is domiciled in or a resident of another state may institute an action in the courts of this state to recover a proportionate amount of the federal estate tax, an estate tax payable to another state, or a death duty due by a decedent's estate to another state. Such an action may be brought against a person interested in the estate who is either domiciled in or a resident of this state or who owns property in this state subject to attachment or execution. For the purposes of such an action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate is prima facie correct.

K. This Act does not apply to taxes due on account of the death of a decedent dying with 12 months after the enactment of the Act.

Commentary to Section 3.

Section 3 is basically drawn from the Uniform Probate Code. This procedural section incorporates apportionment into the usual probate proceeding.[111] Subsection A gives the court that has jurisdiction over the administration of the decedent's estate the power to determine apportionment whenever the estate is being probated. Subsection B grants that court discretion to alter the statutory procedures for apportionment in special situations where the specified rules of apportionment do not lead to an equitable result. For example, if the personal representative is responsible for a late charge, he should bear the cost, not the entire estate. Similarly, the court may decide to charge a devisee responsible for a penalty being imposed with the additional cost. In any such case in which the court would choose to alter the statutory scheme of apportionment, the guiding principle should nonetheless be equity and an attempt to do justice in the situation.

Subsection C is intended to avoid any question as to who bears the expenses reasonably incurred by the personal representative in the determination and apportionment of tax. Such expenses are to be apportioned according to tax apportionment rules. In the majority of cases this is the fairest approach. There may be circumstances in which to do so would not be equitable, however, perhaps because of the nature of the expense. In such case the court has the discretion to order payment in accordance with the demands of equity.

Subsection D recognizes potential difficulties in collecting the apportioned tax from some of the beneficiaries, especially those receiving property which did not pass through the hands of the personal representative. Rather than leaving this part of the tax to be borne by the personal representative, it is more equitable to have the entire estate bear it proportionately. Those made to bear the additional expense, however, have a cause of action against the noncontributing party.

Subsection E makes any determination by the court in an action to require contribution binding as to parties to the action and prima facie correct as to all others. This change was made in response to the criticism[112] that the Uniform Probate Code, which simply makes such determinations prima facie correct,[113] does not provide sufficient finality to determinations by the court. There is no policy reason why

111. The scope of the probate court's subject matter jurisdiction is established by ARIZ. REV. STAT. ANN. § 14-1302 (1975). Section 14-1201 defines "court" as "superior court." *See also id.* § 14-1307.

112. *See* Scoles & Stephens, *supra* note 7, at 923.

113. UNIFORM PROBATE CODE § 3-916(h).

such determinations should not be binding on parties to the action. The language of the proposed section reflects this view.

Subsection F is necessary to clearly establish the proposition that it is the personal representative's duty to preserve the estate by seeking contribution, a question that until now has been unsettled.[114] This duty, of course, continues to extend under federal law to the recovery of taxes apportioned against property over which the decedent had a general power of apportionment[115] and to beneficiaries of insurance proceeds on the life of the decedent.[116]

Subsection G sets out the procedures by which the personal representative may seek contribution from those against whom the tax is apportioned. It establishes his right to withhold property of those required to contribute or at his discretion release the property. This section is further aided in its effectiveness by subsections F, H, and I. Subsection H allows the personal representative to require a bond to ensure contribution from those to whom he may wish to release property. Subsection F gives him the right to bring an action against any recipient of nonprobate property who does not voluntarily contribute. A 3 months' grace period for bringing such a suit was decided upon for subsection I. A reasonableness standard is used, however, in regard to the amount of time after the initial 3 months in which an action should be brought. These time periods are in accordance with the Uniform Probate Code.[117]

Subsection J attempts to alleviate problems of uniformity, reciprocity, and enforcement of tax apportionment in multistate estates. Uniformity in treatment of the various estate assets in multistate estate situations is aided by recognizing that any action in the courts of this state will be governed by the law of the state having jurisdiction over the administration of the estate. It provides that any determination as

114. *See* Scoles, *supra* note 64, at 303-04. *Compare* ALA. CODE § 51-449(1) (1958) (discretionary with the personal representative whether or not to seek contribution) *with* Pearcy v. Citizens Bank & Trust Co., 121 Ind. App. 136, 96 N.E.2d 918 (1951) (mandatory that the personal representative seek contribution).

115. *See* INT. REV. CODE OF 1954, § 2207. This section provides that the personal representative shall be entitled to receive a proportionate contribution from persons receiving property over which the decedent had a power of appointment. If the surviving spouse receives such property and such property also qualifies for the marital deduction under section 2056, the property will be subject to contribution only as to the amount of property which may exceed the maximum allowed under the marital deduction.

116. *See* INT. REV. CODE OF 1954, § 2206. This section provides that the personal representative is entitled to seek contribution for a proportional share of the tax from any beneficiary who receives proceeds of insurance policies on the life of the decedent. As with property subject to decedent's power of appointment, see discussion note 115 *supra*, insurance proceeds may be protected by the marital deduction provisions.

117. UNIFORM PROBATE CODE § 3-916(g). For a discussion of the debate over these time periods, see UNIFORM ESTATE TAX APPORTIONMENT ACT § 7, Commissioners' Note (1964 version).

to apportionment by the court having jurisdiction over administration of the estate is prima facie correct. Reciprocity is facilitated by giving a cause of action in this state to persons domiciled in other states who have been required to pay a tax which was properly apportioned under the applicable law to an Arizonan. The immediate effect of this subsection also is to make enforcement of a foreign judgment possible in Arizona, thereby greatly enhancing the ability of foreign representatives to enforce foreign orders in Arizona courts. It is hoped that this will facilitate reciprocity by encouraging other states to adopt similar positions, especially in respect to Arizona.

Subsection K attempts to establish a workable provision for retroactivity. There is no completely acceptable way to deal with retroactivity. If the Act were made applicable only to those wills drawn after its enactment the lag time would be too great. Twelve months gives ample opportunity to those who have drawn wills containing no tax clause to arrange for a codicil if the absence of a tax clause had meant reliance on the common law.

ESTATE PLANNING TECHNIQUES

Often a testator leaves his will silent as to the payment of taxes, perhaps consciously intending that the current law control the payment and ultimate allocation of the tax burden. However, silence in a will is neither an effective nor a safe way to handle payment of taxes. A testator should always clearly express his precise intentions regardless of the law, thus ensuring that the estate taxes are paid in the intended manner. Thus, the estate planner or will drafter must be concerned with advising the client of the tax consequences of his particular estate,[118] such as the amount of tax and the allocation of the burden of taxation. This section is intended to serve as a guide for estate planners in constructing estate tax clauses so as to effectuate a testator's tax apportionment intentions in a variety of situations. These examples provide a starting point for the drafter in devising the proper clause for the testator's particular situation.[119]

118. For an in-depth discussion of the various considerations involved in estate planning, see T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 124-86 (1972) and J. TRACHTMAN, *supra* note 10, at 14-87 (the marital deduction and marital deduction wills); G. STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS 181-82 (1952) and J. TRACHTMAN, *supra* at 35-68 (trusts as they relate to an overall estate plan and estate planning for tax purposes); J. TRACHTMAN, *supra* at 88-133 (life insurance considerations). The estate planner should also note that each new codicil requires reconsideration of the estate tax consequences. H. GARDNER, *supra* note 4, at ¶ 4117.4.

119. The following suggested clauses are taken in part from H. GARDNER, *supra* note 4, at ¶ 4117.4; G. STEPHENSON, *supra* note 118, at 166; Wright, *The Nebraska Apportionment Act*, 32 NEB. L. REV. 534-35 (1953); and Susman & Fourticq, *supra* note 42, at 1358-60.

Taxes Paid From the Residue

In less complex estate situations a testator usually desires to make a limited number of specific and general devises, leaving the bulk of his estate under a residuary clause to those he wishes to benefit most, usually his surviving spouse or other close relatives.[120] If there is a small or nonexistent nonprobate estate, it would be appropriate to direct that the estate taxes be paid from the residue, allowing the specific and general devises to pass free of tax liability. Under this allocation, administration and closing of the estate are not encumbered or delayed by contribution procedures. A will clause directing all estate taxes to be charged against the residue should include a provision either apportioning the tax among the various residuary devisees or specifying that it be charged against the residue in general, depending on the testator's wishes.[121] The latter provision would allow the tax to be deducted before division among the respective residuary devisees.[122]

A clause requiring that the federal estate tax be taken from the residue and apportioned among the residuary devisees is exemplified by the following sample clause. This clause exonerates from contribution any portion of a residuary devise which is not included in the federal estate tax base.[123]

> I direct that my personal representative[124] pay out of my residuary estate all federal estate taxes[125] imposed on any assessed property passing under my will, by reason of my death, or assessed within my gross taxable estate, together with interest or penalties

120. *See, e.g., In re* Estate of Vermeersch, 109 Ariz. 125, 506 P.2d 256 (1973); Payne v. Todd, 45 Ariz. 389, 43 P.2d 1004 (1935); Hill v. Hill, 37 Ariz. 406, 294 P. 831 (1931). *See also* J. FARR, AN ESTATE PLANNER'S HANDBOOK 272 (3d ed. 1966).

121. Absent such an explicit provision, state law may work apportionment contrary to the testator's intentions. For example, New York apportionment law will apportion within the residue absent a contrary provision if the testator has indicated only that the residuary estate in general is to bear the tax. *See In re* Fairchild's Will, 15 Misc. 2d 272, 178 N.Y.S.2d 886 (Sur. Ct. 1958). In Arizona the tax would be charged against the residue along with the debts of the estate and expenses of administration, which are deducted before division into residuary shares. *See* Brewer v. Peterson, 9 Ariz. App. 455, 453 P.2d 966 (1969).

122. See discussion notes 102, 127 *supra.*

123. See text & notes 108-10 *supra.*

124. In place of, or in addition to, the term personal representative, a testator may prefer to reflect the terminology of the state in which he believes his will may be probated.

125. The suggested clause is limited to the federal estate tax. The Arizona estate tax, ARIZ. REV. STAT. ANN. § 42-1501 to -1535 (1956), and other possible death taxes which may be occasioned by the testator's death could be incorporated into this clause if desired. In such a situation the first phrase would read: "I direct that my personal representative pay out of my residuary estate all estate, inheritance, death, succession, and transfer taxes . . . ." Likewise, the last sentence of this example would conclude: "an estate tax deduction or exemption."

For a discussion of the integration of federal estate, gift, and income taxes, see R. HOLZMAN, HOLZMAN ON ESTATE PLANNING 13-14 (1967).

> thereon, to be apportioned equitably among the residuary devisees after division of the residuary estate, but a residuary devisee shall not be required to bear any part of such taxes to the extent that his, her, or its share qualifies for a federal estate tax deduction or exemption.

If a marital deduction trust is established, the testator is wise to add to the above clause a provision specifying that taxes are to be paid out of "that portion of the residue of my estate which is not included in the gift qualifying for the marital deduction." This is also an added procedural convenience for the probating attorney because it prevents the mathematical complexity resulting from a situation in which the amount of tax depends on the amount of deduction.[126]

A tax clause requiring that the federal estate tax be paid from the residuary estate, but not allowing for apportionment within the residue, should be constructed in the following manner:

> I direct that the federal estate tax imposed on any assessed property passing under my will, by reason of my death, or assessed within my gross taxable estate, together with interest or penalties thereon, shall be paid by my personal representative out of my residuary estate, in the same manner as an expense of administration, before the division of the residuary estate into shares.

Providing specifically that the taxes are to be treated as an administrative expense ensures that the taxes will be deducted first, with any division among residuary devisees made subsequently. While this method of calculation does not exonerate tax exempt devises from contribution as the previous clause would, a testator may nonetheless prefer this as it lessens the burden on the other residuary devisees.[127]

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126. This determination is mathematically complex because the amount of the deduction depends on the amount of property actually passing to the recipient. When deductible property is made to share in the tax burden, the amount of such property actually passing to the beneficiary is reduced. The amount of the deduction is also thereby reduced since it is calculated on the basis of property actually passing to the recipient. This interdependence of variables requires an algebraic computation. *See* Comment, *supra* note 20, at 908.

127. This alteration in the tax burden as between exempt and nonexempt residuary devises is the primary distinction in the effects of the two clauses, though there are certain procedural effects as well. The shares which would pass to the individual residuary devisees under the two methods of calculation are as follows:

(a) *Reduction of the residue.* Assume the will directs the residue to be divided into five equal parts, one-fifth going to each of the testator's four children and one-fifth to a charity. Assume further that the residue is $1,000,000 and the tax is $400,000. Deducting the tax first leaves $600,000 to be divided among the five recipients. Each child and the charity receives $120,000.

(b) *Apportioned.* Assuming the same facts, under a plan of apportionment within the residue the tax would be calculated as follows: the $1,000,000 would first be divided among the five devisees, each receiving $200,000. Since the charity is exempt from paying tax, the $400,000 in estate tax must be apportioned among the four children. Each pays $100,000 reducing his or her total to $100,000. The charity, however, receives $200,000.

This is particularly true where the residuary devisees are to be the primary objects of his bounty.[128]

Taxes Apportioned Between the Probate and Nonprobate Estates

In estate planning situations in which the testator prefers that the general and specific devises pass unburdened by taxes,[129] but recognizes that freeing nontestamentary assets from taxation may create a serious burden on the residue, a partial apportionment clause is advisable. This clause frees the specific and general devises from tax liability while ensuring that the residue will not suffer unexpected or harsh tax consequences from the inclusion of nonprobate property in the gross taxable estate. A tax clause to this effect reads as follows:

> I direct that the federal estate tax imposed on any assessed property passing under my will, by reason of my death, or assessed within my gross taxable estate, together with interest or penalties thereon, shall be paid in the first instance by my personal representative. Those taxes applicable to assets forming my nonprobate estate shall be equitably apportioned among the persons receiving the benefit of such property. The estate tax attributable to the probate estate shall be paid from the residue . . . .

This clause should also specify whether there is to be apportionment or nonapportionment within the residue.[130] Nonapportionment would be accomplished by adding the following phrase at the end of the sample clause:

> in the same manner as an expense of administration, before the division of the residuary estate into shares.

Apportionment, on the other hand, would be accomplished by adding:

> before division of the residuary estate into shares, but a residuary devisee shall not be required to bear any part of such taxes to the extent that his, her, or its share qualifies for an estate tax deduction or exemption.

The first part of this suggested apportionment clause gives the personal representative the right to pay the estate tax and then proceed against the devisees and distributees ultimately liable for it. He may then withhold assets or require contribution before distributing the assets, or postpone settlement of the tax debt until some time following distribution.

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128. See discussion note 102 *supra.*

129. This approach would be particularly advisable where the specific and general devises are too small to warrant contribution or are devised to persons whom the testator would prefer to relieve from taxation.

130. See text accompanying notes 121-28 *supra.*

Taxes To Be Totally Apportioned

In some estate situations a testator's desire that the residue not bear a disproportionate share of the tax burden may require total apportionment. For instance, specific and general devises may be quite large while the residue is comparatively small. In such a case he will want to provide that each distributive share contribute equitably to the tax burden.[131] A clause so directing would read:

> I direct that the federal estate tax imposed on any assessed property passing under my will, by reason of my death, or otherwise assessed within by gross taxable estate shall be apportioned ratably among the distributive shares of my estate and that each distributee shall have deducted from his share, or be required to pay before distribution, his proportionate share of such tax, or post a bond upon the discretion of my personal representative. The personal representative shall have the right to proceed against recipients of property which did not pass through his hands for reimbursement.

Again, the clause gives the personal representative flexibility to accomplish contribution either before or after distribution.

CONCLUSION

Present Arizona law fails to apportion the ultimate burden of the federal estate tax, which therefore continues to be a charge against the residuary estate. The results of such an approach often are not only contrary to the testator's intentions, but also prejudicial to beneficiaries who may be the decedent's closest relatives. A careful apportionment plan could prevent many of these unfortunate results.

Arizona law presently presumes that it is the testator's intention to pass specific and general devises unburdened by taxes. A rule of partial apportionment would work to preserve this presumed intention of the testator while avoiding the hardships of the common law rule. The needs and policies of Arizona thus would be best served by the partial apportionment of federal estate taxes. The time has come to establish such a system in Arizona, either by judicial decision or, preferably, by appropriate legislation.

131. Another alternative deserving of consideration by the estate planner is the possibility that the apportionment not be equitably prorated. See H. GARDNER, *supra* note 4, at ¶ 4423 for a discussion and illustration of a case which would call for this type of treatment. Another possibility is to exonerate certain property specifically and to direct apportionment among the remaining assets. See J. FARR, *supra* note 120, at 272. There also may be circumstances in which the testator wishes to exonerate one or more nonprobate transfers while subjecting specific and general devises to the tax. The testator, of course, has power to specify in the will any of these alternatives.