Study 12:

Apportionment of Death Taxes

Compiled by

Jeffrey N. Pennell
Atlanta, Georgia

The summary of each state’s laws reflected in this study has been based on an opinion received from a reporter for that state. With rare exceptions reports are Fellows of the College from that state. Following the reporter’s name is the date as of which that state’s material was most recently reviewed. Neither the College nor the individual reporters and editors (who have volunteered their time and experience in the preparation of the studies) assume any responsibility for the accuracy of the information contained in any study.
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*Unless otherwise indicated the data was compiled by Jeffrey N. Pennell

ALABAMA

1. Ala. Code §40-15-18. Cleveland v. Compass Bank, 652 So. 2d 1134 (Ala. 1994), determined that, except to the extent a federal right of reimbursement exists with respect to federal estate tax, the state burden on the residue rule applies, in that case involving the state estate tax liability attributable to qualified terminable interest property includible in the federal gross estate as to which federal estate tax reimbursement rights did exist but not state tax apportionment.


3. Life insurance proceeds deemed liable under the §2206 reimbursement right. McAleer v. Jernigan, 804 F.2d 1231 (11th Cir. 1986).


ALASKA

6. Reporter: George Goerig, Anchorage


10. Alaska Stat. §13.16.610(h), (i).


ARIZONA


ARKANSAS


CALIFORNIA

23. Reporter: James A. Willett, Sacramento


COLORADO

32. Reporter: Samuel David Cheris, Denver


CONNECTICUT

39. Reporter: Martin Wolman, Hartford


41. See Morgan Guaranty Trust Co. v. Huntington, 179 A.2d 604 (Conn. 1962) (power of appointment property); Dolak v. Sullivan, 144 A.2d 312 (Conn. 1958) (survivor annuities); McLaughlin v. Green, 69 A.2d 289 (Conn. 1949) (inter vivos trust).


46. Conn. Gen. Stat. §45a-542d(2)(B) allows payment of interest on death taxes from postmortem income, but only to the extent doing so will not reduce a marital or charitable deduction. Otherwise payment is from principal under Conn. Gen. Stat. §45a-524y(a)(6).

DELAWARE

47. Reporter: Joanna Reiver, Wilmington


49. A personal representative need not distribute property to a legatee until all taxes are paid or adequate security is furnished. Del. Code tit. 12, §2904.


51. Del. Code tit. 12, §2901; cf. Del. Code tit. 12, 2901(b) (a transferee who takes property subject to a mortgage or security interest receives the benefit of any reduction in tax attributable to any reduction in value caused by the debt).

52. Prior to its repeal this was automatic by virtue of the operation of the state inheritance tax. Del. Code tit. 30, §§1301-53, 1322.

DISTRICT OF COLUMBIA


55. Rockler v. Sevareid, 691 A.2d 97 (D.C. App. 1997). See D.C. Code Ann. §47-3714 (a) (last clause), which appears to overrule Riggs v. Del Mar, 390 F.2d 466 (D.C. Cir. 1968) (holding that an elective share of a surviving spouse was computed after payment of tax—meaning that it was a net estate division).


FLORIDA

57. Fla. Stat. §733.817(5).

58. Fla. Stat. §733.817(5)(a)1.


60. Fla. Stat. §732.817(1)(d). See In re Estate of Palmer, 600 So. 2d 537 (Fla. 1992) (holding inapplicable Fla. Stat. §732.215, which provided at that time that any increase in estate, inheritance, or other death taxes caused by election of a surviving spouse’s elective share shall be a burden on that share, stating that the election to take the statutory share instead of a QTIP trust did not increase taxes but only accelerated them from the estate of the surviving spouse to the estate of the deceased spouse and that, to the extent the elective share did not generate taxes because it qualified for the marital deduction, it should not bear the burden of any tax, citing the Fla. Stat. §732.817(2) equitable apportionment rule).


63. Fla. Stat. §733.817(1)(n).

GEORGIA

64. Reporter: A. Kimbrough Davis, Atlanta


67. See Regents of the University System of Georgia v. Trust Company of Georgia, 21 S.E.2d 691 (Ga. 1942) (outside apportionment with respect to power of appointment property); In re Comer’s Trust (101 N.Y.S.2d 916 (N.Y. County 1950) (dicta stating that rule in Georgia was that inter vivos trust would bear a portion of taxes incurred).

68. Ga. Code Ann. §53-4-63 shows no favor, and Georgia does not even have an elective share for a surviving spouse.

HAWAII

69. Reporter: Mervyn S. Gerson, Honolulu


76. In the reporter’s opinion statutory principles would appear to be inapplicable. See Haw. Rev. Stat. §560:3-916(a).

IDAHO

77. Reporter: Stephen L. Pruss, Boise

78. Idaho Code §15-3-916 is the Uniform Estate Tax Apportionment Act.

79. Idaho Code §§15-3-916(b); (e). Enforcement powers in the personal representative are provided under Idaho Code §15-3-916(d)(1). Tax that cannot be recovered is equitably apportioned among other interested parties. Idaho Code §15-3-916(g).

80. Idaho Code §15-3-916(e)(2).


82. Idaho Code §15-3-916(f).

83. Idaho Code §15-3-916(c)(2).

ILLINOIS

84. In re Estate of Gowling, 411 N.E.2d 266 (Ill. 1980); Landmark Trust Co. v. Aitken, 587 N.E.2d 1076 (Ill.
Limited authority suggests a trend toward outside apportionment. “It is well settled in Illinois that in an intestate estate, the tax burden should be equitably apportioned between probate and nonprobate assets. Similarly, it is settled that in a testate estate, absent directions from the decedent, an apportionment of federal estate tax liability must be made.” Frederick v. Lewis, 517 N.E.2d 742, 744 (Ill. App. 1988), citing Roe v. Farrell, 372 N.E.2d 662 (Ill. 1978) (joint tenancy property), and In re Estate of Gowling, 411 N.E.2d 266 (1980). See also In re Estate of Peciles, 641 N.E.2d 10 (Ill. App. 1994) (outside apportionment applied with respect to calculation of tax burden in the context of a statutory forced heir share to surviving spouse), and In re Estate of Fender, 422 N.E.2d 107 (Ill. App. 1981) (life insurance proceeds).

Compare In re Estate of Gowling, 411 N.E.2d 266 (Ill. 1980) (equitable apportionment applied with respect to bequest to surviving spouse), with In re Estate of Peciles, 641 N.E.2d 10 (Ill. App. 1994) (equitable apportionment apparently was not applied with respect to the statutory forced heir share of a surviving spouse, which was calculated after tax attributable to the Illinois property that was subject to that claim), and In re Estate of Maddux, 417 N.E.2d 266 (Ill. App. 1981) (equitable apportionment denied for residuary charitable bequests), and In re Estate of Grant, 415 N.E.2d 416 (Ill. 1981) (equitable apportionment denied for statutory forced heir share to surviving spouse). Cf. In re Estate of Martin, 515 N.E.2d 1312 (Ill. App. 1987) (apportioning against estate beneficiaries who refused to consent to special use valuation the increase in tax attributable to their refusal, which effectively apportioned to those who did consent the savings attributable to their election).

**INDIANA**

87. Reporter: Edwin W. Johnson, Evansville


89. Enforcement powers in the personal representative are provided under Ind. Code §29-2-12-6.

90. Ind. Code §§29-2-12-2; 6-4.1-3-1; 6-4.1-3-7.

91. Cf. Ind. Code §6-4.1-6-1.


**IOWA**

93. Reporter: J. Edward Power, Des Moines

94. Iowa Code §§633.449; 633.436, 633.437; In re Estate of DeVoss, 474 N.W.2d 542 (Iowa 1991); Cf. Barlow v. Brubaker, 465 N.W.2d 276 (Iowa 1991) (in a bankrupt estate a tax payment provision in a will, calling for payment of the tax on probate property from the residue without apportionment was deemed adequate to override a state statute requiring payment of all taxes from the residue).

95. See Iowa Code §450.57 regarding state death tax payable from each beneficiary’s share of the residue. Enforcement powers in the personal representative are provided under Iowa Code §§633.449, 450.57.

96. See Iowa Code §§633.436, 633.437, regarding spousal shares. But see In re Estate of Thompson, 512 N.W.2d 560 (Iowa 1994) (computation of the elective share is of the net estate after payment of estate tax, which is not the equitable apportionment result; §633.436 was distinguished because it deals with the order of abatement and not with the manner of computing the spousal entitlement). With respect to charitables, see In re Estate of DeVoss, 474 N.W.2d 542 (Iowa 1991) (abatement rules applied with respect to tax apportionment issue in which it appears that gifts made to charity ought to qualify for a deduction, indicating that equitable apportionment may not apply with respect to charitable bequests); Zion Lutheran Church v. Estate of Lamp, 149 N.W.2d 137 (Iowa 1967).

97. See Iowa Code §450.5 and Jackman's Estate, 122 N.W.2d 910 (Iowa 1963) to the effect that state inheritance tax is apportioned between the income and remainder interests.

98. Iowa Code §450A.5.


KENTUCKY

105. Reporter: Sheldon G. Gilman, Louisville


107. Trimble v. Hatchers Executors, 173 S.W.2d 985 (Ky. 1943), is cited for the proposition that apportionment is required with respect to §2035 includible property, but note the date of the case and changes in the current tax law. See also Ky. Rev. Stat. Ann. §§140.020 and 140.040 with respect to §2035 and power of appointment property, respectively.


109. However, because the state tax is on each transferee, the net effect is apportionment among the beneficiaries.


LOUISIANA

112. Reporter: Paul L. Hood, Baton Rouge


MAINE

120. Reporter: David E. Hunt, Portland


MARYLAND

127. Reporter: Hugh A. Mitchell, Jr., Baltimore


129. Md. Code Ann., Tax-GEN. §7-308(a), (b), (c). Enforcement powers in the personal representative are provided under Md. Code Ann., Tax-GEN. §7-308(d).

130. Section 2, ch. 555, Acts 1995, provides that references to “taxable estate” and to “interest(s)” of the decedent in Md. Code Ann., Tax-GEN. §7-308(a)(4) and 7-308(b) do not include any interest of the decedent that is not included in the decedent’s federal and Maryland estate taxes may not be made to any adjusted taxable gift of the decedent notwithstanding any holding or dicta to the contrary in Shepter v. Johns Hopkins Univ., 637 A.2d 1223 (1994).

131. Md. Code Ann., Tax-GEN. §7-308(e). See also §7-308(k): no special provision is made for a person who receives a bequest free of estate tax, but this provision makes sense only if such a person is excluded from paying any federal or Maryland estate tax.


MASSACHUSETTS

136. Reporter: Lawrence O. Spaulding, Jr., Orleans


142. Although the nonprobate property outside apportionment rule in Mass. Gen. Laws ch. 65A, §5(3) may apply if the generation-skipping taxable transfer passes under a trust.

MICHIGAN

143. Mich. Comp. Laws §§700.3920 et seq. Prior to its repeal in 2000, Mich. Comp. Laws §720.11 et seq. was the Uniform Estate Tax Apportionment Act. As is true in all Uniform Act states, waiver of apportionment under Michigan law required a will provision. See In re Estate of Roe, 426 N.W.2d 797 (Mich. App. 1988) (trust tax clause with waiver of apportionment was not effective and the will simply specified that no provision was being made because the trust was directed to make all payments; therefore, no provision was effective to accomplish the decedent’s intent). Now §700.3921(3) permits direction in any governing instrument with respect to the taxes attributable to property passing subject to that instrument, as well as authority to apportion taxes by will with respect to all assets subject to tax. If a conflict exists between instruments the provision in a will governs.

144. Mich. Comp. Laws §700.3920(a)(i) exempt preresiduary bequests of federal and state taxes and impose the full burden of taxes on the probate estate on the residue of the probate estate.

145. Mich. Comp. Laws §§700.3920(b)(i), subject to the same probate apportionment notion that, within a nonprobate disposition such as a trust, the “preresiduary” portion is exempt and all tax attributable to that source is paid from the “residue” thereof.


MINNESOTA

151. Minn. Stat. §524.3-916 is the Uniform Estate Tax Apportionment Act.

152. Minn. Stat. §524.3-916(b). Enforcement powers in the personal representative are provided under Minn. Stat. §524.3-916(d)(1), (g).

153. Unlike the Uniform Act, Minn. Stat. §524.3-916(b)(2)(i) does not preserve the priority of the federal incremental reimbursement right in §2207A and therefore creates a conflict between the state law proportionate apportionment dictated in §524.3-916(b)(1) and the federal reimbursement right.

154. Minn. Stat. §§524.3-916(e)(2), (e)(5).

155. Minn. Stat. §524.3-916(e).

156. Minn. Stat. §§524.3-916(e)(1), (e)(3).

157. Minn. Stat. §524.3-916(f).

158. Minn. Stat. §§524.3-916(b)(2), (f).

MISSISSIPPI

159. Reporter: W. McDonald Nichols, Jackson


MISSOURI

165. Reporter: Michael D. Mulligan, St. Louis

166. In re Estate of Mapes, 681 S.W.2d 476 (Mo. App. 1984), 817 S.W.2d 545 (Mo. 1991); Estate of Wahlin, 505 S.W.2d
99 (Mo. App. 1973); Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954).

167. In re Estate of Nease, 643 S.W.2d 97 (Mo. App. 1982).

168. Mo. Rev. Stat. §145.552 (Qualified Terminable Interest Property); In re Estate of Mapes, 681 S.W.2d 476 (Mo. App. 1984), 817 S.W.2d 545 (Mo. 1991); Estate of Wahlin, 505 S.W.2d 99 (Mo. App. 1973); Sebree v. Rosen, 349 S.W.2d 865 (Mo. 1961); Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954).


170. Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954).


MONTANA

172. Reporter: David L. Johnson, Billings


NEBRASKA

180. Reporter: M. Douglas Deitchler, Lincoln


NEVADA

189. Reporter: George K. Folsom, Reno


NEW HAMPSHIRE


NEW JERSEY

204. Reporter: Robert A. Hetherington, III, Hackensack


NEW MEXICO


NEW YORK


223. See In re Gordon, 510 N.Y.S.2d 815 (1986); In re Bowen, 347 N.Y.S.2d 862 (1973); In re Molenhauer, 13 N.Y.S.2d 619 (1939). Enforcement powers in the personal representative are provided under N.Y. Est. Powers & Trusts Law §§2-1.8 (e), 2-1.8(f).

224. N.Y. Est. Powers & Trusts Law §§2-1.8(c)(1), 1-8.1(d-1), 2-1.13; see In re King, 239 N.E.2d 875 (N.Y. 1968); In re Pergament, 218 N.Y.S.2d 831 (1961); In re Rosen, 199 N.Y.S.2d 838 (1960); In re Ritzeheimer, 204 N.Y.S.2d 301 (1960); In re Leonard, 189 N.Y.S.2d 422 (1959); In re Jones, 158 N.Y.S.2d 861 (1956); In re Shalett, 82 N.Y.S.2d 797 (1948); In re Tracy, 72 N.E. 519 (N.Y. 1904). Recipients of inter vivos gifts includible in the decedent’s gross estate are not subject to outside apportionment rule. In re Metzger, 579 N.Y.S.2d 288 (1992).


226. N.Y. Est. Powers & Trusts Law §2-1.8(c)(3).

227. N.Y. Est. Powers & Trusts Law §2-1.8(b); In re Masten, 546 N.Y.S.2d 880 (1989); In re Brown, 65 N.Y.S.2d 624 (1943).

228. N.Y. Tax Law §1022.

NORTH CAROLINA

229. Reporter: Barry B. Kempson, Asheville


233. N.C. Gen. Stat. §28A-27-5(b) provides that the previously taxed property and foreign death tax credits benefit any person paying the tax that generates the credit, §28A-27-5(c) provides that credits for “inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.” No provision deals with the §2015 credit.


NORTH DAKOTA

236. Reporter: Robert E. Rosenvold, Fargo


238. N.D. Cent. Code §30.1-20-16(5).

OHIO

240. Reporter: James S. Wachs, Cincinnati


244. Ohio Rev. Code Ann. §§2113.86(b), (C)(1), (D). But see In re Estate of Widener, 31 Ohio B. Rep. 304 (App. 1986) (the entire residue passed to charity; there was no tax clause in the document and the court rejected equitable apportionment). See also Weeks v. Vandeveer, 233 N.E.2d 502 (Ohio 1968) (elective share under prior law was determined after payment of taxes; it is unclear whether the new law will cause a different result); In re Estate of McVicker, 492 N.E.2d 491 (Ohio Prob. 1985) (elective share was determined after payment of tax, new §§2113.86 and 2113.88 being deemed not to change that result); Estate of Ferrara v. United States, 94-1 U.S. Tax Cas. (CCH) ¶60,181 (N.D. Ohio 1994) (equitable apportionment did not protect a marital deduction because the burden on the residue rule precluded apportionment to a preresiduary bequest of the credit shelter amount; equitable apportionment only would have allocated the tax burden within the residue to a nondeductible portion of the residue).


249. Ohio Rev. Code Ann. §§1340.02(D), 2109.67(D).

OREGON

254. Reporter: Robert D. Dayton, Portland


OKLAHOMA

250. Reporter: James R. Eagleton, Tulsa


252. Enforcement powers in the personal representative are provided under 58 Okla. Stat. §268.

253. See Lomon v. Citizens Nat’l Bank & Trust, 689 P.2d 306 (Okla. 1984); In re Estate of Bovaird, 645 P.2d 500 (Okla. 1982); In re Davidson, 641 P.2d 1110 (Okla. 1982); cf. In re Estate of Doan, 727 P.2d 574 (Okla. 1986) (decedent’s will was deemed to have overridden equitable apportionment with respect to a portion passing to charity).
RHODE ISLAND


277. However, the state generation-skipping transfer pick up tax follows §2603. R.I. Gen. Laws §44-40-12.

SOUTH CAROLINA

278. Reporter: F. Ladson Boyle, Columbia


SOUTH DAKOTA

281. Reporter: Thomas H. Foye, Rapid City

282. S.D. Codified Laws §29A-3-916 is the Uniform Estate Tax Apportionment Act.

283. S.D. Codified Laws §29A-3-916(b). State inheritance tax is apportioned to each taker. S.D. Codified Laws §10-40-2. Enforcement power in the personal representative is provided under S.D. Codified Laws §29A-3-916(d)(1).

284. S.D. Codified Laws §§29A-3-916(b), (i).

285. S.D. Codified Laws §29A-3-916(c)(2).

286. S.D. Codified Laws §§29A-3-916(e)(1), (e)(3).

287. S.D. Codified Laws §29A-3-916(f).

288. S.D. Codified Laws §29A-3-916(a)(5).

TENNESSEE

289. Reporter: Robert L. McMurray, Cleveland


TEXAS

295. Tex. Prob. Code Ann. §322A is the Uniform Estate Tax Apportionment Act, to which Texas made a number of significant changes: (1) the tax apportionment scheme does not apply to the §2701(d)(1)(A) tax on unpaid dividends; (2) the apportionment dictated by the Act may be altered under §322A(b)(2) by the decedent in a will or by the instrument that governs disposition of property otherwise subject to tax payment; (3) the benefit of a §2032A reduction in tax attributed under §322A(i) to special use property is granted first to the recipient of that property and the recapture tax is apportioned among the persons “whose action or cessation of use caused the imposition of additional tax, unless all persons with an interest in the qualified real property agree in writing to dispose of the property, in which case the additional tax shall be apportioned among the remainder interests”; and (4) the benefit and the burden of any extension of time to pay any tax is apportioned to the persons who receive the property that generates the extension.

296. Enforcement powers in the personal representative are provided under Tex. Prob. Code Ann. §§322A(n), (o), (s), (u).


298. Tex. Prob. Code Ann. §§322A(c), (d), (e), (f).


UTAH

302. Utah Code Ann. §75-3-916 is the Uniform Estate Tax Apportionment Act.

303. Utah Code Ann. §75-3-916(2). Enforcement powers in the personal representative are provided under Utah Code Ann. §§75-3-916(4), (7).
304. Utah Code Ann. §§75-3-916(1)(d), (2).
305. Utah Code Ann. §§75-3-916(5)(b), (5)(e).
306. Utah Code Ann. §§75-3-916(c), (d).
308. Utah Code Ann. §75-3-916(3)(c).
309. Utah Code Ann. §75-3-916(1)(f).

VERMONT


VIRGINIA

317. Enforcement powers in the personal representative are provided under Va. Code Ann. §64.1-163.

WASHINGTON

325. Wash. Rev. Code §83.110.050(5).
326. Wash. Rev. Code §§83.110.050(3), (4)
327. Wash. Rev. Code §83.110.060, but not with respect to a §664 charitable remainder trust.

WEST VIRGINIA

328. Reporter: Thomas G. Freeman, II, Charleston

WISCONSIN

332. Reporter: Richard Z. Kabaker, Madison
333. Will of Uihlein, 59 N.W.2d 641 (Wis. 1953).
334. See Wis. Stat. §863.11 for general abatement rules.
335. Wis. Stat. §72.28(c), which dictated payment from corpus, was repealed effective 1992.

WYOMING

336. Wyo. Stat. Ann. §2-10-101 et seq. is the Uniform Estate Tax Apportionment Act. There is no statutory apportionment applicable to the state pick up tax, as to which the burden on the residue rule is applicable. In re Estate of Stratton, 756 P.2d 1342 (Wyo. 1986).