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# Comments

## APPORTIONMENT OF THE FEDERAL ESTATE TAX IN MISSOURI

### I. THE FEDERAL ESTATE TAX

Congress has imposed the federal estate tax on the transfer of the taxable estate of a decedent to his distributee.<sup>1</sup> It is an excise tax on the transfer of property to a distributee and is independent of receipt of the transferred property by those who share in the estate.<sup>2</sup>

The federal estate tax is distinguished from succession or inheritance taxes which are imposed on the privilege of *receiving* or *taking* property rather than upon *transfer* at death,<sup>3</sup> and the executor of the decedent's estate is personally liable for the payment of the inheritance tax from the estate before distribution.<sup>4</sup> Likewise, the executor of the estate is liable for payment of the federal estate tax,<sup>5</sup> and unless otherwise directed by the will of the decedent, the tax is ordinarily paid out of the estate before its distribution.<sup>6</sup>

Early cases treated the federal estate tax merely as another debt of the decedent to be paid out of the residue of his estate.<sup>7</sup> This rule of non-apportionment was applied mechanically and with very little or no consideration for various hardships imposed by the tax.<sup>8</sup> Justification for the rule was based on erroneous construction of the federal estate tax provisions making the executor liable for payment of the tax, these provisions were thought to indicate congressional intent to impose the tax on the residue of the estate.<sup>9</sup>

Frequent inequitable and unjust enrichment of some beneficiaries at the ex-

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1. INT. REV. CODE of 1954, §§ 2001-2207. The original federal estate tax act is found in 39 Stat. 777 (1916).

2. *Riggs v. Del Drago*, 317 U.S. 95 (1942); *Priedeman v. Jamison*, 356 Mo. 627, 202 S.W.2d 900 (1947).

3. *St. Louis Union Trust Co. v. Becker*, 76 F.2d 851 (8th Cir. 1935); *Priedeman v. Jamison*, *supra* note 2; *In re McKinney's Estate*, 351 Mo. 718, 173 S.W.2d 898 (1943); *In re Rosing's Estate*, 337 Mo. 544, 85 S.W.2d 495 (En Banc 1935).

4. §§ 145.120, .130, RSMo 1959; *In re McKinney's Estate*, *supra* note 3; *In re Rosing's Estate*, *supra* note 3.

5. INT. REV. CODE of 1954, §§ 2002, 2203, 2204, 2205; Treas. Reg. § 20.2002-1 (1954), as amended, T.D. 6600, 1962-1 CUM. BULL. 164.

6. INT. REV. CODE of 1954, § 2205; *Fernandez v. Wiener*, 326 U.S. 340 (1945); *Riggs v. Del Drago*, *supra* note 2.

7. *In re Holmes' Estate*, 328 Mo. 143, 40 S.W.2d 616 (1931); *In re Hamlin*, 226 N.Y. 407, 124 N.E. 4 (1919); *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265 (1919); ATKINSON, LAW OF WILLS 615, 708 (1st ed. 1937).

8. *Ibid.*

9. *St. Louis Union Trust Co. v. Becker*, *supra* note 3; *In re Hamlin*, *supra* note 7; *Plunkett v. Old Colony Trust Co.*, *supra* note 7. See generally, Lauritzen, *Apportionment of Federal Estate Taxes*, 1 T. COUN. Q. 55, 62-67 (1957).

pense of others prompted the state of New York to enact the first state apportionment statute, providing that the federal estate tax burden be "equitably prorated" among all of the beneficiaries interested in the assets of the estate that were subject to tax in an amount proportionate to their beneficial interests, unless the decedent directed otherwise in his will.<sup>10</sup> This statute was held to be constitutional in the landmark case of *Riggs v. Del Drago*,<sup>11</sup> which put to rest the erroneous theory requiring the residuary estate to pay all the federal estate tax. Furthermore, the United States Supreme Court held that Congress intended the tax to be paid out of the whole estate before its distribution, and that state law, with two statutory exceptions, should govern the ultimate thrust of the tax.<sup>12</sup> The two exceptions are recipients of insurance proceeds payable to a beneficiary other than the estate,<sup>13</sup> and recipients of property over which the decedent had a power of appointment.<sup>14</sup> But in all cases, including the two exceptions, a testator may in his will place the burden of the tax where he wishes.<sup>15</sup>

Since the *Del Drago* case the trend has definitely been in favor of equitable apportionment of the federal estate tax. At least twenty-two states have enacted apportionment statutes,<sup>16</sup> while other states,<sup>17</sup> including Missouri,<sup>18</sup> have adopted equitable apportionment by judicial decree. Only one state has legislated specifically against apportionment.<sup>19</sup> There have been proposals to adopt a uniform estate tax apportionment act,<sup>20</sup> and also a federal apportionment act.<sup>21</sup> The prime pur-

10. N. Y. DECED. EST. LAW, § 124 (1930). See Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 MINN. L. REV. 907 (1959).

11. *Supra* note 2.

12. *Riggs v. Del Drago*, *supra* note 2; *Fernandez v. Wiener*, *supra* note 6; *Carpenter v. Carpenter*, 364 Mo. 782, 267 S.W.2d 632 (1954); *Saracino v. St. Louis Union Trust Co.*, 254 S.W.2d 600 (Mo. 1952); *In re Poe's Estate*, 356 Mo. 276, 201 S.W.2d 441 (1947).

13. INT. REV. CODE of 1939, § 826(c), 53 Stat. 128 (now INT. REV. CODE of 1954, § 2206).

14. INT. REV. CODE of 1939, § 826(d), 53 Stat. 128 (now INT. REV. CODE of 1954, § 2207).

15. INT. REV. CODE of 1954, §§ 2206, 2207; *Riggs v. Del Drago*, *supra* note 2; *St. Louis Union Trust Co. v. Krueger*, 377 S.W.2d 303 (Mo. En Banc 1964).

16. FED. EST. & GIFT TAX REP., ¶ 2490.16 (1964). For a collection of cases construing and applying statutes concerning prorating the federal estate tax, see Annot., 37 A.L.R.2d 199 (1954).

17. *Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136, 96 N.E.2d 918 (1951); *Lincoln Bank & Trust Co. v. Huber*, 240 S.W.2d 89 (Ky. 1951); *Bragdon v. Worthley*, 155 Me. 284, 153 A.2d 627 (1959); *In re Barnhart's Estate*, 102 N.H. 519, 162 A.2d 168 (1960); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953); *McDougall v. Central Nat'l Bank*, 157 Ohio St. 45, 104 N.E.2d 441 (1952); *Myers v. Sinkler*, 235 S.C. 162, 110 S.E.2d 241 (1959). For a collection of cases discussing the ultimate burden of the federal estate tax in absence of statute or will provision, see Annot., 37 A.L.R.2d 169 (1954).

18. *Carpenter v. Carpenter*, *supra* note 12, discussed in *Taxation—Equitable Apportionment of Federal Estate Tax on Non-Probate Property*, 1955 WASH. U.L.Q. 89.

19. ALA. CODE tit. 51, § 449(1) (1940) (as amended by Act 291, Acts of 1951).

20. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 219-226 (1958); REVISED UNIFORM ESTATE TAX APPORTIONMENT ACT, approved by the National Conference of Commissioners on Uniform

pose behind both proposed acts is to provide uniform treatment of the tax and to avoid numerous conflicts of laws problems.<sup>22</sup>

## II. APPORTIONMENT IN MISSOURI

Apportionment of the federal estate tax among beneficiaries who share in the estate has had a slow development in Missouri. An early case, *In re Holmes Estate*,<sup>23</sup> decided before the *Del Drago* decision, adopted the old rule of non-apportionment that in the absence of a will provision otherwise directing payment, the residuary legatee should bear the burden of the tax. The will in that case provided for certain specific bequests, and the residue was to go to testatrix's sons; it did not direct what funds or assets were to be used to pay the federal estate tax or any other charges against the estate. Disregarding any unfairness arising in the case, the court stated:

"[I]n the absence of a definite direction on the subject it must be presumed that the intention was that the ultimate weight" of the tax as a charge against the estate must rest where the law of this state relating to the administration of estates of deceased persons places it. [residue] If it be claimed that inequalities will result, that must be assumed to have been contemplated by the testatrix.<sup>24</sup>

The harshness of the burden-on-the residue rule was readily apparent in *In re Bernheimer's Estate*,<sup>25</sup> in which a testatrix provided by will that her son receive all property owned by her at her death, except *all* stocks and bonds which she bequeathed to others. The Missouri Supreme Court reversed the circuit court's decision that under rules of abatement of legacies the federal estate tax should first exhaust the son's bequest which included jewelry, furs and cash in an amount less than the tax. The supreme court disregarded technical distinctions between "general" and "specific" bequests. Holding the bequest to the son was no more "general" or "specific" than the other bequests, the court substituted a rule of apportionment to impose the tax ratably. The reasoning of the court was that since there was no express residuary clause to bear the burden of the tax, the testatrix, a successful business woman familiar with the federal estate tax, must have *overlooked* its allocation while executing her will. Further, the court thought she probably *intended* the two bequests to "stand as equals," and to bear "proportionately" and "ratably" the federal estate tax and administration expenses. This result made it possible to pay substantially both

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State Laws, August 8, 1964; approved by the American Bar Association, August 13, 1964. For a comprehensive analysis in favor of a uniform law, see Powell, *Ultimate Liability for Federal Estate Taxes*, 1958 WASH. U.L.Q. 327; Scoles and Stephens, *supra* note 10; Annot., 16 A.L.R.2d 1282 (1951).

21. Note, *Proposal for Apportionment of the Federal Estate Tax*, 30 IND. L.J. 217 (1955).

22. *Ibid*; see materials cited in note 20; Scoles, *Apportionment of Federal Estate Taxes and Conflicts of Laws*, 55 COLUM. L. REV. 261 (1955).

23. *In re Holmes' Estate*, *supra* note 7.

24. *Id.* at 150, 40 S.W.2d at 619.

25. *In re Bernheimer's Estate*, 352 Mo. 91, 176 S.W.2d 15 (1943).

gifts, thus carrying out the provisions of the will without extinguishing the bequest to the son.

Although the *Bernheimer* case apportioned the federal estate tax, not until *Carpenter v. Carpenter*<sup>26</sup> did the Missouri Supreme Court adopt equitable apportionment as a rule of law. The case involved an annuity contract<sup>27</sup> payable to the testator's wife as primary beneficiary and two sons as contingent beneficiaries. The annuity contract did not pass under the will, and was therefore non-probate (non-testamentary) property; nevertheless, it was included in the testator's "gross estate" for federal estate tax purposes. The question confronting the court was whether the ultimate burden of the tax attributable to the value of the annuity contract should be borne by the wife or by the probate estate and charged against the residuary legatees, including the wife and two sons. The will contained a provision that federal estate and other taxes be paid out of the estate "so that any bequest may be as free as possible from liens on account of any such taxes"; however, no reference was made to payment of that portion of the tax attributable to the annuity contract passing to the wife independent of the will. After an excellent analysis of estate tax apportionment in other states, the court rejected the general rule recognized by many states at that time:

[T]hat in the absence of an apportionment statute or testamentary provision to the contrary, the ultimate burden of the federal estate tax is not apportioned pro rata among all the devisees, legatees or other recipients of the property included in the taxable estate, but rests on the general estate and thus ultimately falls on the residuary estate.<sup>28</sup>

Instead the court chose to decide the case on equitable principles:

Prorating the federal estate tax . . . between the testamentary estate and the non-testamentary estate seems to provide a fair and impartial basis for distribution of the tax burden . . . where the testator in his will has not . . . otherwise provided except as to devises and bequests under the will. We have seen that there is nothing in the federal estate tax statutes to prevent a proper application of equitable principles to prevent injustice, where the tax is based upon both testamentary and non-testamentary property.<sup>29</sup>

Equitable apportionment was applied in Missouri to prorate the federal estate tax attributable to an inter vivos trust among the trust beneficiaries in accordance with their respective interests in the trust.<sup>30</sup> The will did not contain

26. *Supra* note 12. The first leading case to adopt equitable apportionment was *Hampton's Adm'rs v. Hampton*, 188 Ky. 199, 221 S.W. 496 (1920).

27. *Powell*, *supra* note 20 sets out other non-probate assets which include life insurance, assets over which the decedent has some type of power of appointment, gifts in contemplation of death, inter vivos trust property, and jointly held property with right of survivorship.

28. *Carpenter v. Carpenter*, *supra* note 12, at 792, 267 S.W.2d at 639, *citing* 47 C.J.S., INTERNAL REVENUE § 776 (1946). Also see *Rogan v. Taylor*, 136 F.2d 598 (9th Cir. 1943); *Annot.*, 15 A.L.R.2d 1220 (1951).

29. *Carpenter v. Carpenter*, *supra* note 12, at 797, 267 S.W.2d at 642.

30. *Sebree v. Rosen*, 349 S.W.2d 865 (Mo. 1961).

a provision with regard to the payment of the tax. Since the inter vivos trust corpus passed outside the will, it was non-probate property which was, however, included in the "gross estate" for estate tax purposes. There is some risk involved in cases of testamentary apportionment, in absence of a statute specifically providing for apportionment to non-probate assets, that the testamentary apportionment is ineffective against assets which the testator no longer owned at his death.<sup>31</sup> Problems in this area are complicated by divergent conflicts of law rules among the various states.<sup>32</sup>

The *Bernheimer* case left unanswered the question whether equitable apportionment would be applicable in a case involving a will containing no tax clause, but which unambiguously set forth "general" and "specific" bequests. Some guidance may be found in the dictum contained in the *Carpenter* case setting forth the order of abatement for an executor to follow as he uses the assets in his possession to pay the federal estate tax:

[H]e has to pay it out of the probate estate generally and, more particularly, if there is a residuary estate, out of that estate until it has been exhausted, and, if there is no residuary estate or it has been so exhausted, it must be paid out of the "general" legacies to the exclusion of "specific" legacies. And, as between real and personal property, payment must be made out of the personal estate until it is exhausted. These rules concern only the *initial* method of paying the tax and from what property it shall be paid. They do not concern the matter of the ultimate liability to pay the tax or any right of the estate to reimbursement for that portion of the tax attributable to non-probate property included in the "gross estate" for federal estate tax purposes.<sup>33</sup>

However, the *St. Louis Union Trust Co. v. Krueger*<sup>34</sup> case (discussed *infra*) specifically held that if a will is involved, equitable apportionment has no application. Determination of the federal estate tax burden is fundamentally a matter of intention based upon construction of the will. The abatement statute may have some application, but it is "subject to the provisions of the will."<sup>35</sup>

Presently in Missouri equitable apportionment has its greatest impact on estates which involve the marital deduction. A question of major significance is whether a surviving spouse who renounces the deceased spouse's will takes the amount of the marital deduction<sup>36</sup> free of any burden to pay federal estate tax on the share taken.

In *Hammond v. Wheeler*,<sup>37</sup> a wife elected to take a statutory share against

31. *United States v. Goodson*, 253 F.2d 900 (8th Cir. 1958); *Warfield v. Merchants Nat'l Bank*, 337 Mass. 14, 147 N.E.2d 809 (1958).

32. *Scoles*, *supra* note 22.

33. *Carpenter v. Carpenter*, *supra* note 12, at 791, 267 S.W.2d at 638. Also see the abatement statute, § 473.620, RSMo 1959.

34. *Supra* note 15.

35. § 473.620, RSMo 1959.

36. INT. REV. CODE of 1939 § 812(e) (now INT. REV. CODE of 1954, § 2056).

37. *Hammond v. Wheeler*, 347 S.W.2d 884 (Mo. 1961). See also *Lincoln Bank & Trust Co. supra* note 17. *But see Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953).

her husband's will under the then applicable election statute;<sup>38</sup> all of which qualified for the marital deduction. The court concluded that in order to take full advantage of the Congressional purpose behind the marital deduction to enable states to provide for equality in taxation among the residents of community property states and non-community property states the wife should be exonerated from payment of any federal estate tax on property received by her which did not contribute to any part of the tax. The court did require the wife to pay that portion of the tax allocable to other property received by her which was included in the taxable estate. The same result was reached in *Jones v. Jones*,<sup>39</sup> in which a surviving spouse renounced her husband's will under the current election statute.<sup>40</sup> There has been one federal court case<sup>41</sup> involving a Missouri decedent's estate in which a proportionate share of the federal estate tax was deducted from that portion of the estate passing to the renouncing spouse; however, the case was decided before the *Hammond* and *Jones* cases and its authoritative value would seem to be of little significance at the present time.

The trend in favor of exonerating marital deduction bequests from the federal estate tax burden as set forth in the *Hammond* and *Jones* cases has been limited by the very recent *St. Louis Union Trust Co. v. Krueger*<sup>42</sup> case, holding that the federal estate tax and other charges against a testatrix's estate must be deducted from the gross value of the estate before computing the portion of the estate to go by will to the estate of the husband who died thirteen months after the testatrix. The will provided for a general bequest of one-half of the estate to go to the testatrix's husband if living, and if he should predecease her, his share of the estate was to go to a nephew who was also the residuary legatee. The court distinguished *Hammond* and *Jones* on the basis that in those cases no will was involved since the surviving spouse renounced it. The will in the *St. Louis Union Trust* case did not contain an express provision directing payment of the federal estate tax; notwithstanding, the court concluded that the will

38. § 469.090(2), RSMo 1949, repealed, Mo. LAWS 1955, at 385, § A. This statute provided that the wife receive "one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts." In *Hammond v. Wheeler*, *supra* note 37, the federal estate tax was held not to be "debt" within the meaning of this statute, and it was not deducted before the wife received her share. See *Guaranty Nat'l Bank v. Mitchell*, 144 W. Va. 828, 111 S.E.2d 494 (1959), holding that a renouncing spouse takes the share after estate taxes which the court placed in the same category as "debts" and other administration expenses within that state's statute governing renunciations.

39. *Jones v. Jones*, 376 S.W.2d 210 (Mo. En Banc 1964).

40. § 474.160, RSMo 1959. *Jones v. Jones*, *supra* note 39 held that a surviving spouse who elects to take against the will becomes an "heir" under the election statute and not under the general intestate statute.

41. *Traders Nat'l Bank v. United States*, 148 F. Supp. 278 (W.D. Mo. 1956). The widow elected to take commuted dower and homestead rights which qualified for the marital deduction, but the amount of the share was reduced by a proportionate amount equal to 37.13 per cent of the federal estate tax on the entire estate; FED. EST. & GIFT TAX REP., ¶ 2490.15 (1964).

42. *St. Louis Union Trust Co. v. Krueger*, *supra* note 15.

alone was decisive of the question presented and the doctrine of equitable apportionment was not applicable. Construing the whole will, the court found the testatrix's intention was that *all* charges, including the federal estate tax, be paid by the executors before the *net* estate was to be distributed. The will provided for the portion of the estate bequeathed to the husband to pass to a nephew if the husband predeceased the testatrix. If the husband had in fact predeceased the wife there would have been no marital deduction and the share passing to the nephew could only be a share of the *net* estate after payment of *all* charges against the estate, but such was not the case since the husband died thirteen months after the testatrix. It is difficult to understand how the gift over provision (such as appears in any well drafted will) to the nephew indicated the intention of the testatrix that her husband, if he survived her, was to take only a share of the *net* estate. It would appear that the surviving spouse's bequest should be determined as of the date of the testatrix's death, notwithstanding subsequent events. If the Missouri Supreme Court felt that the marital deduction should be computed after deducting the federal estate tax it could have better justified its decision on the reasoning of two recent federal court cases involving Missouri decedents,<sup>43</sup> or by reference to the federal statute.<sup>44</sup>

The *St. Louis Union Trust Co.* case held that a *general* bequest of one-half the estate, which qualified for the marital deduction, should be computed on the *net* estate after deducting the federal estate tax. But, in a case where a will with no tax clause provides for a *specific* bequest or non-factional *general* bequest which qualifies for the marital deduction, equitable apportionment probably would not be applied to charge the marital deduction bequest with any portion of the federal estate tax. However, the bequests may be affected by abatement rules unless the will can be construed to show intention that the bequests not be burdened with any portion of the tax.

Another group of cases which may cause problems in Missouri arises when there is a will with no tax clause and an estate containing non-probate property<sup>45</sup> which qualifies for the marital deduction. One approach to these cases would be to apply equitable apportionment, and as in the *Carpenter* and *Sebree*<sup>46</sup> cases, the surviving spouse would be charged with a proportionate share of the federal estate tax. Another approach based on the *Hammond* and *Jones* cases would be to exonerate the surviving spouse from any portion of the tax burden on the non-probate property to the extent it qualified for the marital deduction. The same result would be reached if the surviving spouse elected to take against the will. The latter approach seems the better reasoned one in

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43. Estate of Oliver B. Avery, 40 T.C. 392 (1963), on appeal to the Court of Appeals for the Eighth Circuit, held for purposes of computing the marital deduction the share passing to the widow under the will must be reduced by a proportional amount for the federal estate tax; *Traders Nat'l Bank v. United States*, *supra* note 41.

44. INT. REV. CODE of 1954, § 2056(b)(4); Treas. Reg. § 20.2056(b)(4) (1954), as amended, T.D. 6600, 1962-1 CUM. BULL. 164.

45. Powell, *supra* note 20.

46. *Sebree v. Rosen*, *supra* note 30.

view of the fundamental Congressional purpose behind the marital deduction to achieve tax equality between community and non-community property states. In any event, drafting techniques specifically relieving the marital deduction bequest from any federal estate tax burden would prevent or at least reduce problems arising in this area.

Apportionment and marital deduction problems also arise in other jurisdictions. It has been successfully argued, as in Missouri, that since property making up the marital deduction is not subject to the federal estate tax, the surviving spouse should bear no part of the tax.<sup>47</sup> However, this view has been severely criticized on the basis that property passing to the surviving spouse is not *exempt* from the tax; rather, the estate is merely given a *deduction* equal to the amount of marital deduction property in computing the tax.<sup>48</sup> Under this view the total tax is increased. Since the amount of the marital deduction is limited to the value of the property actually passing to the surviving spouse to the extent the surviving spouse must contribute to the tax, the reduced deduction creates an increase in the total tax.

Considering the results of the marital deduction cases in Missouri, it may, in some instances, be advantageous for a surviving spouse to elect to take against a marital deduction will bequeathing one-half of the estate to the surviving spouse since the share is received undiminished by any portion of the federal estate tax.

Many problems arising in the apportionment area can be prevented if proper will or trust provisions are drafted expressly and unequivocally stating the testator's true intention regarding payment of the federal estate tax. Court approved language<sup>49</sup> is difficult to locate and is many times inadequate for particular estate plans; thus, this area of drafting is a challenging undertaking for an estate planner. A case of major significance in Missouri is *Lipic v.*

47. *Miller v. Hammond*, 156 Ohio St. 475, 104 N.E.2d 9 (1952), *overruled*, *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954), but on the ground that the Ohio statute giving the right to renounce prohibited freeing the surviving spouse's share from the federal estate tax. See Sutter, *How to Plan for Apportionment of Estate Taxes*, ESTATE TAX TECHNIQUES, 2158-2168, I (Lasser's ed. 1962).

48. *Old Colony Trust Co. v. McGowan*, 156 Me. 138, 163 A.2d 538 (1960); Lauritzen, *supra* note 9, at 85-88.

49. Lauritzen, *supra* note 9, at 91 suggests the following clauses to provide for most apportionment situations:

"I have been informed by my attorney of the problem of apportionment of the Federal Estate Taxes on my estate. Having carefully considered this problem, I hereby declare it to be my express intention that

(Complete Apportionment)

"(1) Such taxes shall be apportioned among those persons receiving the bequest of such portions of my estate as are finally determined to be subject to such taxes.

(No Apportionment)

"(2) Such taxes shall not be apportioned but shall all be paid out of the residue of my probate estate.

(Partial Apportionment)

"(3) Such taxes applicable to the assets forming my probate estate shall be paid out of the residue of my estate, but any such taxes assessed by reason of property outside of my probate estate shall be apportioned among the persons receiving the benefit of such property."

*Wheeler*<sup>50</sup> which involved an inter vivos trust. The testator's will was silent on payment of taxes, but one provision of the trust instrument authorized the trustees

to pay *any and all taxes* which may be assessed against the property included in this trust, whether state, municipal, federal, income or inheritance taxes, and to sell part of the trust property for such purpose.<sup>51</sup> (Emphasis added.)

Construing the provision, the court held the federal estate tax should be equitably apportioned between the probate estate and the non-probate trust estate; that when the settlor used the terms "any and all taxes," he meant "all taxes."<sup>52</sup>

### III. CONCLUSION

Federal estate tax consequences should always be considered before drafting an estate plan. Since Missouri has no apportionment statute, a judicial doctrine of equitable apportionment has been adopted. If a decedent dies intestate there is no problem of apportionment, and the federal estate tax is merely deducted from the estate before its distribution to the heirs. Equitable apportionment has its clearest application in those cases requiring beneficiaries of non-probate property, included in the gross estate for federal estate tax purposes, to pay the amount of the tax attributable to their respective shares.

Marital deduction cases pose the unsettled apportionment problems in Missouri. Two situations commonly arise. One involves the surviving spouse who elects to take against the deceased spouse's will. Except in one federal case,<sup>53</sup> the surviving spouse has not been required to share in the payment of any portion of the tax. The other involves a surviving spouse who takes a bequest which qualifies for the marital deduction. The surviving spouse may receive the bequest only after it has been reduced by a proportionate amount of the tax. A decision clarifying the effects of equitable apportionment on the marital deduction is badly needed.

The testator and lawyer should give serious consideration to the federal estate tax, and the use of proper language cannot be over emphasized. Perhaps most of the problems arising in this area can be minimized by drafting will or other estate plan provisions expressly and unequivocally explaining the testator's intentions regarding payment of the federal estate tax.

W. F. SUTTER

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50. *Lipic v. Wheeler*, 362 Mo. 499, 242 S.W.2d 43 (1951).

51. *Id.* at 510, 242 S.W.2d at 49.

52. *Ibid.* The court said: "The very presence of the tax provision shows Joseph Sr.'s intention to shift from his own estate some of the taxes for which that estate would be liable on account of the trust assets. And we think he meant just what he said—'any and all taxes.'" See also *Priedeman v. Jamison*, *supra* note 2.

53. *Estate of Oliver B. Avery*, *supra* note 43.