

Federal Estate Tax Apportionment

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FEDERAL ESTATE TAX APPORTIONMENT

The federal estate tax¹ is not a tax on property or on the right to receive property from a decedent; rather it is a tax on the privilege of transferring property from the dead to the living.² Inordinate as it might appear, due to it being a federal levy, its principal effect is directed only upon reasonably large estates, because the tax is levied upon a taxable estate over \$60,000.³ Since payment of the estate tax must necessarily reduce the size of the estate available for distribution or diminish the recipient's share of the decedent's property, it is important to determine where the ultimate tax burden is to be placed.

Placement of the tax burden can be made by one of three possible procedures. First, the burden may be borne by the residuary estate.⁴ The effect of this "burden on the residue" doctrine is to give all specific recipients their full respective shares without deduction, and to charge the general beneficiaries the total amount of the tax. Another procedure, referred to as the "equitable apportionment" doctrine, places the impact of the tax upon each and every recipient of the decedent's property in proportion to his benefits.⁵ The third procedure is a compromise between the first two and places the burden both on the residuary beneficiaries under the will and on those taking interests outside the will, the non-probate interests.⁶ By including the non-probate assets, those which pass and vest by gift and contract law and not by will, in the tax apportionment, specific legatees and devisees are granted their full interest and the residuary beneficiaries and the recipients of the non-probate assets are required to pay a proportional share of the tax imposition.

The reason behind the apportionment doctrine is best understood when it is realized that for the purpose of determining the amount of the tax imposition the taxable estate includes not only real and personal property passing under a will or by laws of descent and distribution, but also many non-probate assets. These interests include: (1) gifts made in contemplation of death; (2) inter vivos trusts intended to take effect in possession or enjoyment at or after death; (3) life trusts subject to revocation; (4)

¹ INT. REV. CODE OF 1954, §§ 2001-2209.

² *Lawless v. Lawless*, 17 Ill. App. 2d 481, 150 N.E.2d 646 (1958).

³ INT. REV. CODE OF 1954, § 2052. Another \$60,000 may be deductible by virtue of the marital deduction as provided in § 2056, plus deductibles allowed for transfers to charities. Thus estates up to \$120,000 are generally considered to be tax free.

⁴ *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265 (1919).

⁵ *In re Mellon's Estate*, 347 Pa. 520, 32 A.2d 749 (1943).

⁶ *In re Gato's Estate*, 276 App. Div. 651, 97 N.Y.S.2d 171 (1950), *aff'd*, 301 N.Y. 653, 93 N.E.2d 294 (applying Florida law); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953).

life insurance proceeds; (5) joint tenancy property, which may be stocks, bonds, bank accounts and the family home; (6) powers of appointment; and others.⁷ Therefore, with non-probate assets and specific devises and bequests being included with the residuary estate in the determination of the amount of the tax, if the residuary estate alone had to bear the tax burden it becomes feasible to visualize many situations where the relationship of the former could be so unproportional to the latter as to cause its total depletion. This inequality must also be viewed in regard to the normal practice of testators bequeathing the residue of the estate to spouse, issue or relative.

This comment will consider the placement of the ultimate tax burden and the participation therein of non-residuary beneficiaries. The importance of participation is of immediate monetary concern to all distributees of a decedent's property and has significance to a testator in the planning of his estate,⁸ because he has the right to shift the tax burden from where the law would locate it by the use of appropriately clear language in his will.⁹ This right, recognized in the federal estate tax statute,¹⁰ necessitates knowledge of which procedure, apportionment or burden on the residue, will be applied in the event the testator's will contains no tax provision. Confusion surrounding the applicable law has led to numerous cases involving judicial construction of tax provisions in wills.¹¹

Placement of the ultimate tax burden is not related to its payment, only to the liability for payment. The executor or administrator of an estate¹² is charged by statute with the actual payment of the entire federal estate tax¹³ regardless of the fact that the gross estate consists of non-probate

⁷ INT. REV. CODE OF 1954, §§ 2031-2044.

⁸ Where an intestate leaves no property which can pass except under the laws of descent and distribution, no problem of placement exists. The tax is deducted before the computation of the intestate shares. See *Hampton's Administrator v. Hampton*, 188 Ky. 199, 221 S.W. 496 (1920); *Martin v. Martin's Administrator*, 283 Ky. 513, 142 S.W.2d 164 (1940).

⁹ *United States Trust Co. v. Sears*, 29 F.Supp. 643 (D.C. Conn. 1939); *In re Walbridge's Estate*, 170 Misc. 127, 9 N.Y.S.2d 907 (1939); "It is considered competent for a testator to specify what property shall assume the burden of inheritance tax on the transfer or right of succession of his estate." *In re McDonald's Estate*, 314 Ill. App. 148, 150, 41 N.E.2d 128, 130 (1942); *U.S. v. Goodson*, 253 F.2d 900 (8th Cir. 1958), recognizing the right of testator to shift the burden of the federal estate tax.

¹⁰ INT. REV. CODE OF 1954, § 2205.

¹¹ See generally, 37 A.L.R.2d 7 (1954), for a collection of cases concerning will provisions affecting tax burdens. The cases are too numerous and the possibilities too great to be included within the scope of this paper.

¹² The definition of "executor" for purposes of the estate tax includes an administrator. INT. REV. CODE OF 1954, § 2203. This procedure is adopted in this paper.

¹³ INT. REV. CODE OF 1954, § 2002.

assets, which do not come within his possession.¹⁴ This duty is placed upon the executor only to facilitate the government's collection of the tax and the ultimate burden is determined by state law.¹⁵ The executor, in order to make payment, must use the funds of the estate available to him. Whether the executor has a right to seek reimbursement on behalf of the residue estate from the recipients of special devises and non-probate interest is the issue of equitable apportionment. The answer to this question will then determine the placement of the ultimate tax burden.

The federal estate tax as first enacted¹⁶ made no attempt at locating the ultimate burden of the tax, though it did make the executor of the estate responsible for its payment.¹⁷ After enactment, a provision was added whereby the executor was entitled to collect a proportionate share of the tax from the beneficiary of any insurance proceeds which were included in the decedent's gross estate, unless the decedent's will provided to the contrary.¹⁸ The effect of this provision was to apportion the tax against non-probate assets consisting of insurance proceeds. In 1942, another provision was added to allow apportionment where the non-probate assets consisted of property subject to a power of appointment.¹⁹ Even before the inclusion of the latter provision some states were allowing apportionment of the estate tax where appointive property was involved.²⁰ No other apportionment provisions have been added to the federal statute to supplement these two non-probate asset directives. Although payment of the tax by the executor was still required, the placement of the ultimate tax burden was not specified.

Early case determination of the apportionment issue was resolved in favor of placing the tax burden on the residuary estate. Support for these holdings was based on various state court interpretations of the federal statute. One supporting proposition argued that inasmuch as the executor was required to pay the tax before distribution of the estate it was a parallel to the required payment of debts, charges and just obligations from the residuary estate; therefore, the tax also was an obligation of the

¹⁴ Treas. Reg., § 20.2002-1.

¹⁵ *Seattle First National Bank v. Macomber*, 32 Wash. 2d 696, 203 P.2d 1078 (1949); *Carpenter v. Carpenter*, 364 Mo. 782, 267 S.W.2d 632 (1954).

¹⁶ Revenue Act of 1916, § 200, 89 Stat. 77.

¹⁷ *Supra* note 13.

¹⁸ Revenue Act of 1918, § 480, 40 Stat. 1057. This section was the basis for § 2206 of the INT. REV. CODE OF 1954.

¹⁹ Revenue Act of 1942, § 403(c). This section was the basis for § 2207 of the INT. REV. CODE OF 1954.

²⁰ *Regents of University System v. Trust Company of Georgia*, 194 Ga. 225, 21 S.E.2d 691 (1942); *Hooker v. Drayton*, 69 R.I. 290, 33 A.2d 206 (1943). Cf. *First National Bank v. Hart*, 393 Ill. 489, 50 N.E.2d 461 (1943). See generally, 150 A.L.R. 723 (1944).

estate to be paid from the residuary.²¹ Another interpretation was predicated upon federal preemption of the area because, since Congress had authorized apportionment in certain situations, no other apportionment was intended.²² Furthermore, it was argued that where specific devises and bequests were made by a testator who also made a gift of the estate residue, he manifested an intention to have the tax burden fall on the residue.²³

Not only did the early cases rule against apportionment where devised and bequeathed property was involved,²⁴ but they did so where the taxable estate included non-probate assets, other than life insurance proceeds and appointive property.²⁵ The only case which appears to have upheld apportionment was a 1918 New Hampshire case²⁶ involving specific and residuary legacies. This case appears to be the first to decide the question of the placement of the federal estate tax burden. However, the case was overruled in 1938²⁷ and thereafter, New Hampshire temporarily applied the "burden on the residue" doctrine.²⁸

The aforementioned foundations for state application of the "burden on the residue" doctrine, with the exception of a testator's presumed intention in the absence of a tax provision in his will,²⁹ ceased to exist in 1942 when the United States Supreme Court rendered its decision in *Riggs v. Del Drago*.³⁰ The court held that final determination of the ultimate burden of the federal estate tax was up to the individual states, except where Congress had specifically provided to the contrary.

The *Del Drago* case involved a New York decedent who by will made certain outright bequests to one legatee, created a life trust with a remainder over in others, and left the residuary estate in a life trust to the first mentioned legatee with a remainder over. No provision was made in the will regarding payment of taxes. When the executor sought to have

²¹ *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265 (1919); *Hepburn v. Winthrop*, 65 App. D.C. 309, 83 F.2d 566 (D.C. Cir. 1936).

²² *Bemis v. Converse*, 246 Mass. 131, 140 N.E. 686 (1923); *Farmers Loan Co. v. Winthrop*, 238 N.Y. 488, 144 N.E. 769 (1924), *cert. denied*, 266 U.S. 633 (1925).

²³ *Y.M.C.A. v. Davis*, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47 (1924).

²⁴ *Plunkett v. Old Colony Trust Co.*, *supra* note 21; *In re Hamlin* 266 N.Y. 407, 124 N.E. 4, *cert. denied*, 250 U.S. 672 (1919); *Y.M.C.A. v. Davis*, *supra* note 23.

²⁵ *Wells Fargo Bank and Union Trust Co. v. Older*, 50 Cal. App. 2d 724, 123 P.2d 873 (1942); *Ericson v. Childs*, 124 Conn. 66, 198 Atl. 176 (1938); *Farmers Loan and Trust Co. v. Winthrop*, *supra* note 22; see generally, 37 A.L.R.2d 169, 184 (1954).

²⁶ *Fuller v. Gale*, 78 N.H. 544, 103 Atl. 308 (1918).

²⁷ *Amoskeag Trust Co. v. Trustees of Dartmouth College*, 89 N.H. 471, 200 Atl. 786 (1938).

²⁸ In 1942 the New Hampshire legislature adopted an apportionment statute, N.H. REV. STAT. ch. 88 (1942).

²⁹ *Supra* note 23.

³⁰ 317 U.S. 95 (1942).

the federal estate tax apportioned among all the persons beneficially interested in the estate pursuant to a New York Statute providing for such apportionment,³¹ the life tenants and outright legatee raised objection as to the constitutionality of the apportionment statute. The court-appointed guardian for the infant remainderman under the residuary trust contended that the tax had to be apportioned in accordance with the statute. In holding that the New York statute did not contravene the Federal Constitution's supremacy clause since it was not in conflict with the federal estate tax law, Mr. Justice Murphy said in delivering the opinion of the court:

We are of the 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. . . .³²

The following year, this position was reaffirmed by the Supreme Court in *Harrison v. The Northern Trust Company*.³³

The New York statute upheld in *Del Drago* was the first attempt by a state legislature³⁴ to overcome the inequities of the burden on the residue application. The statute applied to both federal and state estate tax and provided for apportionment to both probate and non-probate assets.³⁵ But because case law in other states was based in part on federal pre-emption in the field,³⁶ the respective legislatures did not follow New York's lead until *Del Drago* affirmed the validity of a state's authority to determine the placement of the tax burden. A study made by the author of the statutory enactments in the various states reveals that there are twenty-three states which today have statutes concerning apportionment. Two states, Alabama and Iowa, specifically provide against apportionment and place the burden of the tax on the residue of the estate.³⁷ Florida, Massachusetts and New Jersey require apportionment in regard to non-probate interests only.³⁸ The other eighteen statutory states provide for apportionment among all parties interested in the decedent's property,

³¹ NEW YORK DECEDENT'S ESTATE LAW, § 124.

³² *Supra* note 30, at 96-7.

³³ 317 U.S. 476 (1942).

³⁴ *Supra* note 31; originally enacted by NEW YORK LAWS ch. 790 (1930).

³⁵ *Ibid.*

³⁶ *Supra* note 22.

³⁷ CODE OF ALABAMA tit. 51, § 449(1) (Supp. 1965); IOWA LAWS 1963, ch. 326, § 449.

³⁸ FLA. STAT. 1965, § 734.041. Florida had a total apportionment statute in 1949 but repealed it and enacted a no apportionment statute in 1957. The present statute was adopted in 1963; MASS. GEN. LAWS 1932, ch. 65A, §§ 5A-B, as amended by MASS. ACTS 1943, ch. 519, MASS ACTS 1948, ch. 605, § 2; N.J. STAT. §§ 3A:25-30 to -38.

probate and non-probate.³⁹ All statutes provide, however, that a testator has the right to shift the burden of the tax.⁴⁰ A Uniform Estate Tax Apportionment Act was approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws in 1958.⁴¹ The proposed Act contemplated total apportionment and did not distinguish between probate and non-probate assets.⁴² The Act was revised in 1964 to provide for apportionment of expenses incurred in the determination of proration, and to provide for payment out of the residue of the estate when payment could not be collected from a person required to pay the tax.⁴³ However, only four states have deemed it advisable to adopt the 1958 Act or the 1964 revision.⁴⁴ In states which have no applicable apportionment statute, the court makes the final determination as to the ultimate estate tax burden, subject to the testator's directives and the specific intent of Congress.⁴⁵ Nine states still require that the burden be placed on the residue whenever possible.⁴⁶ Of the remaining

³⁹ ARK. STAT. ANN. § 63-150 (Supp. 1965); CAL. PROBATE CODE §§ 970-7, (See *In re Welsh Estate*, 89 Cal. 2d 43, 200 P.2d 139 (1948) upholding constitutionality); CONN. GEN. STAT. § 12-400 (1958); DEL. CODE ANN. tit. 12, § 2901-6, (See *Wilmington Trust Co. v. Copeland*, 33 Del. 309, 94 A.2d 703 (1953) holding statute to be declaratory of existing law and applicable retroactively); LA. REV. STAT. §§ 9:2431-2438 (Supp. 1965); MD. LAWS 1965 ch. 907 (Uniform Estate Tax Apportionment Act, 1964 Revision); MICH. COMP. LAWS §§ 720.11-21 (1948) as amended, LAWS 1963, act 144 (Uniform Estate Tax Apportionment Act), LAWS 1965, act 259; MINN. STAT. 1965 §§ 525.521-527; NEB. REV. STAT. 77-2108 to 2112; NEV. REV. STAT. §§ 150.290-390 (Supp. 1965); N.H. REV. STAT. ANN. ch. 88-A, §§ 1-11 (Supp. 1965), (Uniform Estate Tax Apportionment Act); N.Y. DECEDENTS ESTATE LAW § 124; OKLA. STAT. ch. 58, §§ 2001-11 (Supp. 1965); PENN. LAWS 1951 ch. 1405 (*Purdon*), PENN. STAT. ANN. tit. 20, §§ 881-7); S.D. LAWS 1961 ch. 196; TENN. CODE ANN. tit. 30, §§ 30-1117 to -1118 (Supp. 1965); CODE OF VA. §§ 64, 150-51 (Supp. 1965); WYO. STAT. § 2, 336-46 (Supp. 1965), (Uniform Estate Tax Apportionment Act).

⁴⁰ ". . . the amount of the tax, except in a case where a testator otherwise directs in his will, . . . NEW YORK DECEDENT ESTATE LAW, § 124.

⁴¹ Handbook of the National Conference of Commissioners on Uniform State Laws, 131, 132, 219, 221 (1958).

⁴² See generally, Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 MINN. L. REV. 907 (1959).

⁴³ UNIFORM LAW ANNOTATED, Vol. 9A, p. 494 (1965).

⁴⁴ Maryland, Michigan, New Hampshire and Wyoming, *supra* note 39.

⁴⁵ *Riggs v. Del Drago*, *supra* note 30.

⁴⁶ *Ramsey v. Nordloh*, 143 Col. 526, 354 P.2d 513 (1960); *In re Glover's Estate*, 45 Haw. 569, 371 P.2d 361 (1962), dower in personalty was held to be probate property for purposes of apportionment and the question was left open in regard to apportionment of non-probate interests. First National Bank of Chicago v. Hart, 393 Ill. 489, 50 N.E.2d 461 (1943), see discussion of the Illinois problem in this comment, *infra*; *Central Trust Co. v. Burrow*, 144 Kan. 79, 58 P.2d 469 (1936), denying apportionment to non-probate interests; *Buffalo v. Barnes*, 226 N.C. 313, 38 S.E.2d 222 (1946); *Cornwell v. Huffman*, 258 N.C. 363, 128 S.E.2d 798 (1963); *Sinnatt v. Gidney*, 159 Tex. 366,

eighteen states, five recognize total apportionment⁴⁷ and eight have required recipients of non-probate interests to share proportionately in the burden with the residuary beneficiaries.⁴⁸ No cases have been found in the other five states which would determine the placement of the ultimate estate tax burden.⁴⁹

STATUS OF APPORTIONMENT IN ILLINOIS

Illinois does not have a statute apportioning the federal estate tax, therefore, subject to a testator's proper directive and to the apportionment provisions of federal legislation, the placement of the ultimate tax burden is by judicial determination.⁵⁰ Although Illinois is generally considered to be included as a member of those states which invoke the "burden on the residue" doctrine,⁵¹ an examination of the principal Illinois cases reveals confusion as to the appropriateness of applying this doctrine. This denial of apportionment, as will be shown, has often been recited as dictum in cases bearing no relation to the federal estate tax burden and has been based on a misunderstanding of the federal estate tax statute. One of the earliest

322 S.W.2d 507 (1959), rejecting apportionment where only probate assets were involved; *Seattle First National Bank v. Macomber*, 32 Wash. 2d 696, 203 P.2d 1078 (1949), denying apportionment to non-probate interests; *Cuppert v. Neilly*, 143 W.Va. 845, 105 S.E.2d 548 (1958), placing burden on residue if sufficient; *Guaranty National Bank v. Mitchill*, 144 W.Va. 828, 111 S.E.2d 494 (1959); *In re Joas's Estate*, 16 Wis. 2d 489, 114 N.W.2d 831 (1962), apportionment denied to non-probate interest.

⁴⁷ *Trimble v. Hatcher's Executors*, 295 Ky. 178, 173 S.W.2d 985 (1943) *cert. denied*, 321 U.S. 747; *Gunn v. Sutherland*, 311 Ky. 578, 224 S.W.2d 929 (1949); *Jones v. Jones*, 376 S.W.2d 210 (Mo. 1964); see U.S. v. *Traders National Bank of Kansas City*, 248 F.2d 667, (8th Cir. 1958) regarding Missouri as applying equitable apportionment; *Marans v. Newland*, 143 Mont. 38, 390 P.2d 443 (1964); *In re Berzel's Estate*, 101 N.W.2d 557 (N.D. 1960); *Beatty v. Cake*, 236 Ore. 389, 387 P.2d 355 (1963), applied apportionment to inter vivos transfer, but language of case is to the effect of total apportionment.

⁴⁸ *Doetch v. Doetch*, 312 F.2d 323 (7th Cir. 1963), applying Arizona law; *Regents of University System v. Trust Company of Georgia*, 194 Ga. 255, 21 S.E.2d 691 (1942); apportionment applied to appointive property prior to enactment of INT. REV. CODE provision; *Pearcy v. Citizens Bank and Trust Co.*, 121 Ind. App. 136, 96 N.E.2d 918 (1951); *Bragdon v. Worthley*, 155 Me. 284, 153 A.2d 627 (1959), applied to inter vivos conveyance, but language of the court that it could apply equitable apportionment might indicate that they would apply total apportionment (Maine enacted a total apportionment statute in LAWS 1947, ch. 220, but repealed it in LAWS 1949, ch. 349; *In re Gallagher's Will*, 57 N.M. 112, 225 P.2d 317 (1953); *McDougall v. Central National Bank of Cleveland*, 157 Ohio St. 45, 104 N.E.2d 441 (1953); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954); *Hooker v. Drayton*, 69 R.I. 290, 33 A.2d 286 (1961); *Meyer v. Sinkler*, 235 S.C. 162, 110 S.E.2d 241 (1959).

⁴⁹ Alaska, Idaho, Mississippi, Utah, Vermont.

⁵⁰ *Supra* note 30.

⁵¹ *First National Bank of Chicago v. Hart*, *supra* note 46; See also 37 A.L.R.2d, *supra* note 25.

Illinois cases to mention apportionment was *People v. Pasfield*,⁵² which was concerned with the computation of the state inheritance tax. After determining that the federal estate tax was to be deducted before computation, the court went on to say:

As the duty [the federal estate tax] is made payable by the executor or administrator to the collector or deputy collector by the express provision of the statute [Revenue Act of 1916], the duty is an expense or a charge against the estate of the decedent and not an express charge against the shares of the legatees or distributees of the decedent. . . .⁵³

This case, which was decided in 1918, and the cases of *People v. The Northern Trust Company*⁵⁴ and *People v. McCormick*,⁵⁵ which were decided soon thereafter and which were also concerned only with computation of the state inheritance tax, were decided at a time when many jurisdictions considered the tax to be paralleled to the payment of debts, charges and obligations from the residuary, or else considered apportionment to have been pre-empted by the federal estate tax statute.⁵⁶

The 1943 decision of the Illinois court in *First National Bank of Chicago v. Hart*⁵⁷ is the case most often cited as representing the Illinois application of the "burden on the residue" doctrine and disallowment of apportionment. This is so even though the case only involved residuary beneficiaries and no specific recipients of the testator's estate and therefore, was not a true tax apportionment case. In *Hart*, the residuary estate passed in equal thirds to the two living children of the decedent and to two grandchildren by way of an appointive trust. Though the assessment of the total state inheritance tax against the grandchildren was less than that against the two living children, due to a double exemption and resulting lesser rate of assessment, the executor of the estate charged the grandchildren's trust with an equal third of the assessment. The trustee for this trust then sued the two children for the difference between the equal third and the amount actually assessed. At the time of this case, inheritance taxes constituted up to an eighty per cent credit against the entire federal estate tax. The two children contended that they contributed more to the satisfaction of the federal tax by virtue of their being assessed a greater proportion of the state inheritance tax used to offset the federal levy and thus were entitled to contribution from the grandchildren for having paid a larger share. The court, by its disallowment of this contention, gave credence to the "no apportionment" view by saying:

It is sufficient to observe, however, that this State has no provision in its laws relating to the incidence of the burden of Federal estate tax and it must

⁵² 284 Ill. 450, 120 N.E.286 (1918).

⁵³ *Id.* at 454, 120 N.E. at 288.

⁵⁴ 289 Ill. 475, 124 N.E. 662 (1919).

⁵⁵ 327 Ill. 547, 158 N.E. 861 (1927).

⁵⁶ *Supra* notes 21 and 22.

⁵⁷ 383 Ill. 489, 50 N.E.2d 461 (1943).

therefore fall directly upon the corpus of the estate and be considered an item of expense, such as debts, funeral expenses, and the like. The fact that inheritance taxes are allowed as a credit on Federal estate taxes, does not alter the situation with respect to the nature and effect of the two cases. In the absence of statutory enactment directing otherwise, the Federal tax must be considered as a charge against the whole of the estate and not against the individual shares, . . . unless otherwise directed by the testator.⁵⁸

Although earlier Illinois cases⁵⁹ have been cited and considered collaterally as lending authority to the acceptance of the "burden on the residue" rule in Illinois, it is essentially the language of the *Hart* case around which modern Illinois case law has revolved. These cases include: *People v. Luehrs*,⁶⁰ *In re Ginsberg's Estate*,⁶¹ *Franz v. Schneider*,⁶² *Lawless v. Lawless*,⁶³ and *Jimette v. Guest*.⁶⁴ In the *Lawless* case, the court was called upon to decide an action brought by an executor to recover from certain devisees, an equitable proportionate share of the federal estate tax attributable to the inclusion of their interests in real property in the taxable estate. In denying apportionment of the tax, the court asserted its prior holdings that the federal estate tax was a charge of administration and an item of the estate's expense, such as debts and funeral expenses, and concluded:

The amount to be paid or any inequity between the heirs does not change the law. Our courts have in certain cases invoked the doctrine of equitable contribution, but no case has been cited that would affect the situation here.⁶⁵

It would therefore appear that the ultimate federal estate tax burden is placed upon the residuary of the estate in Illinois, and that the apportionment doctrine, in total or only in regard to non-probate assets, is not given recognition.

However, once the relevancy of these cases to the issue of apportionment is considered, the applicable doctrine appears to be in question. The early decisions⁶⁶ and the holding in the *Luehrs* case⁶⁷ were concerned only with the problem of computing the net estate for state inheritance tax purposes and not with apportionment between beneficiaries of the estate. These cases merely decided a method of tax computation and not placement of the ultimate tax burden.

⁵⁸ *Id.* at 497, 50 N.E.2d at 464-5.

⁵⁹ *Supra* notes 52, 54 and 55.

⁶⁰ 408 Ill. 383, 97 N.E. 2d 307 (1951).

⁶¹ 4 Ill. App. 2d 138, 123 N.E. 2d 739 (1955).

⁶² 14 Ill. App. 2d 464, 144 N.E.2d 798 (1957).

⁶³ 17 Ill. App. 2d 481, 150 N.E.2d 646 (1958).

⁶⁴ 35 Ill. App. 2d 434, 183 N.E.2d 194 (1962).

⁶⁵ *Supra* note 63 at 492, 150 N.E.2d at 651.

⁶⁶ *Supra* notes 52, 54 and 55.

⁶⁷ *Supra* note 60.

The *Hart* case, on the other hand, which furnishes the most authoritative language regarding non-apportionment, loses some of its forcefulness when it is recognized that its holding in regard to the federal estate tax, while germane, was not necessary to the determination of the principal issue, for the court had been called upon only to determine apportionment of the state inheritance tax. Although *Hart* was decided after the *Del Drago* case and thus recognized the right of the state to determine location of the federal tax burden, it involved appointive trust assets with the powers being exercised in 1933. This was before the 1942 enactment of Sec. 403(a) of the Revenue Act.⁶⁸ Therefore, the non-apportionment of appointive assets, implied by *Hart*, would have no effect today. Furthermore, some authorities contend that the proper interpretation of the language used in the *Hart* case shows that the court had in mind the view that the federal estate tax was a levy against the whole of the decedent's taxable estate and was not solely a burden on the residue of the probate estate.⁶⁹ Support for this proposition is based on the close similarity of language between the *Hart* and *Del Drago* cases. In *Hart*, the Illinois Supreme Court said that, "the Federal tax must be considered as a charge against the whole of the estate . . ."⁷⁰ and, in *Del Drago* the United States Supreme Court stated that, "the Federal estate tax should be paid out of the estate as a whole."⁷¹ A distinction must necessarily be made between the taxable estate of a decedent and the probate estate under the law of wills in order to interpret the language of these cases.⁷²

Other Illinois cases which hold in favor of the "burden on the residue" rule are merely extensions of the *Hart* decision. The *Ginsberg* case⁷³ involved a tax dispute concerning apportionment between tax exempt and non-tax exempt beneficiaries of federal income tax, and not estate tax. In *Franz v. Schneider*⁷⁴ the no apportionment holding was dictum and only collateral to the issue of state inheritance tax apportionment. The references therein to the *Hart* case were employed only to negate a legatee's contention concerning construction of a will provision. *Lawless v. Lawless*,⁷⁵ although an action to recover equitable contribution by means of apportionment, was primarily concerned with apportionment as applied to personal property and to real property bequeathed and devised under a will, and not with apportionment between the residue and other interests

⁶⁸ *Supra* note 19.

⁶⁹ Lauritzen, *Apportionment of Federal Estate Tax*, 1 TAX COUNS. Q. 55, 81-83 (June 1957).

⁷⁰ *Supra* note 57 at 497, 50 N.E. 2d at 465.

⁷¹ *Supra* note 30 at 97.

⁷² *Supra* note 69.

⁷³ *Supra* note 61.

⁷⁴ *Supra* note 62.

⁷⁵ *Supra* note 63.

included in the taxable estate. The court held that the personal estate must be exhausted before realty can be charged with the payment of debts and costs of administration, but cited the *Hart* decision in reaching its conclusion. *Lawless* did imply however, that under certain circumstances the court could invoke equitable contribution.⁷⁶ Finally, in *Jinnette v. Guest*,⁷⁷ a will provision directing apportionment against the recipients of a specific bequest of corporation stock was ruled ineffective on the grounds that the recipients' rights to the stock arose out of a prior agreement which had precluded the imposition of any charge or encumbrance. Nevertheless, the court again made needless mention of the *Hart* decision when it said:

In 1937, at the time the agreement was made, as today, the federal estate tax was treated in Illinois as a claim or expense of administration, payable out of the residuary estate and not a charge against individual legatees unless otherwise specifically directed by the testator.⁷⁸

Lip service of Illinois' apportionment position has also been made in the federal court. The United States Supreme Court in *Harrison v. Northern Trust Company*,⁷⁹ decided in the same year as the *Hart* case, and which also affirmed the *Del Drago* decision, made note of non-apportionment in Illinois when it stated: "while the estate tax may be a charge against the entire estate under Illinois law, admittedly its payment will operate to reduce the amount of the residuary estate."⁸⁰ But this case did not involve the question of apportionment of the federal estate tax, but rather, concerned itself solely with the interpretation of a federal tax statute. The federal court has also entertained the apportionment problem where estate assets were situated in several states, each having a different view regarding apportionment. The case of *Doetch v. Doetch*⁸¹ involved such a conflict of law problem. Non-probate trust assets were located in Illinois, and the decedent was domiciled in Arizona. The United States Court of Appeals had to determine whether Illinois would apply its own law as situs of the trust, to determine an apportionment of the estate tax, or whether it would apply the law of the decedent's domicile. There were no Illinois cases in point, but the court determined that the laws of the situs of the domicile would prevail. It was stated:

When questions of apportionment of estate taxes arise in courts of a state of the situs of a trust whose assets are includible in decedent's gross estate for tax purposes, the law of the situs refers to the law of decedent's domicile to resolve the question.⁸²

⁷⁶ *Id.* at 492, 150 N.E.2d at 651.

⁷⁷ *Supra* note 64.

⁷⁸ *Id.* at 440, 183 N.E. 2d at 197.

⁷⁹ 317 U.S. 476 (1942).

⁸⁰ *Id.* at 480.

⁸¹ 312 F.2d 323 (7th Cir. 1963).

⁸² *Id.* at 328.

The court therefore did not find it necessary to determine the law of Illinois in respect to placement of the ultimate tax burden. But in applying Arizona law the court found that there was neither a statute on apportionment nor a judicial pronouncement on the subject. The court was of the opinion that Arizona would adopt the rule of apportionment and so applied it to the case.

One example of the circumstances under which the Illinois courts have allowed apportionment by way of equitable contribution is found in the case of *Northern Trust Company v. Wilson*,⁸³ where the widow of the decedent renounced the will and sought to take her statutory share free from the estate tax burden rather than after payment of the tax. The court held that the widow would have to take her share subject to the tax. Commenting upon this case, one authority has stated that, "as would have been expected, by a court following the principles of equitable apportionment, the Illinois court held that the widow should take her share after the payment of federal estate taxes."⁸⁴

Summarizing the apportionment position of Illinois, it can be stated that generally the ultimate burden for payment of the federal estate tax is to be placed upon the residuary estate except where the Internal Revenue Code specifically provides to the contrary, and subject to the directives of a testator. This rule has been predicated upon judicial determination and not statutory enactment, and is based on *stare decisis* consisting of cases involving a misunderstanding of the federal estate tax statute application, and unnecessary application of the rule. No clear cut federal estate tax apportionment problem has yet been presented to the Illinois courts involving probate and non-probate assets, and it is probable that none will be, because in view of the language used by the Illinois Supreme Court in the *Hart* decision and the many citations thereto in the Appellate Court, most testators, whose estates will be subject to the estate tax imposition, will include a tax clause in their will specifically attempting to locate the ultimate tax burden. These estates, upon probate, will then involve litigation of the construction of the tax provision.⁸⁵

CONCLUSION

The doctrine of apportionment is primarily intended to remedy possible inequities and to promote justice. It acts to prevent inequality and unjust enrichment and is founded upon the principles of equitable contribution. Since Illinois has not applied this doctrine by judicial pronouncement, the 1967 State Legislature should give careful consideration to the enactment of either a total apportionment statute or at least one applicable to non-

⁸³ 344 Ill. App. 508, 101 N.E. 2d 604 (1951).

⁸⁴ Lauritzen, *supra* note 69, at 81.

⁸⁵ *Supra* note 11.