Equitable Apportionment in Oklahoma: What Hath the Courts Wrought?

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I. Introduction

Attorneys must weigh carefully the apportionment of federal and Oklahoma transfer taxes when developing a client’s estate plan and must incorporate appropriate provisions in the will. Prior to 1974, if a will failed to specifically allocate the tax burden, the courts applied the statutory abatement scheme which normally resulted in both the federal and Oklahoma estate taxes being paid from the residue.1

Oklahoma courts first embraced the doctrine of equitable apportionment in In re Davidson.2 If a will fails to designate which property should bear the burden of the estate taxes, the doctrine requires each beneficiary to contribute in the proportion which his or her share bears to the total taxable estate. In applying this formula, the courts consider assets which pass outside probate, such as joint tenancy property and life insurance. The courts also make proper allowances for transfers which qualify for either the marital or charitable deduction.

This article explores the scope of the doctrine of equitable apportionment, analyzing those cases decided since 1982. It also focuses on the interrelationship between equitable apportionment and the relevant federal provisions and whether the legislature should consider reenacting the Uniform Estate Tax Apportionment Act.

II. The Federal Apportionment Provisions

Since the doctrine of equitable apportionment, as fashioned by the Oklahoma courts, applies equally to federal and Oklahoma taxes, it is helpful to first investigate the federal apportionment provisions. The Internal Revenue Code (the Code)3 imposes three different wealth transfer taxes at the time of

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death. Congress first enacted an estate tax on the transfer of a decedent’s taxable estate in 1916. More recently, Congress passed a tax on generation-skipping transfers and an excise tax on excess retirement accumulations. The primary obligation for the payment of these taxes is initially a question of federal law. An estate, generally, is liable for the payment of all federal transfer taxes. The Code also grants the Internal Revenue Service (hereinafter the Service) broad powers to collect the various taxes. For example, a personal representative may become personally liable for the payment of the federal estate tax. The Service can also collect unpaid tax from the estate’s beneficiaries who are liable as transferees. These topics are outside this article’s


8. The Code defines executor to mean the executor or administrator of the estate. See I.R.C. § 2203. In the case of an intestate estate, the term includes an administrator appointed pursuant to 58 Okla. Stat. § 122 (1991), and, in the case of a testate estate, the term includes an executor appointed pursuant to id. § 101. If the estate is not being administered, the term includes any person in actual or constructive possession of the decedent’s property. See, e.g., Estate of Guida v. Commissioner, 69 T.C. 811, 812-13 (1978). This article refers to both administrators and executors as personal representatives.


scope. However, it is important to note that the Service’s ability to collect a
transfer tax from a third person does not affect that person’s right to seek
reimbursement from those beneficiaries who should have borne the tax bur-
den.11

A. Federal Estate Tax

Since the federal estate tax is a tax on the transfer of property, it becomes
the primary obligation of the decedent’s estate.12 In fact, the Code’s expressed
intent is to require the payment of the tax from the estate assets prior to
distribution.13 To further this result, the Code authorizes a beneficiary who
pays a portion of the estate tax to seek reimbursement from the estate,14 or,
if the personal representatives have already distributed the assets, from those
beneficiaries whose shares would have been reduced if the tax were paid prior
to distribution.15 From an initial reading of section 2205, one might conclude
that, absent a contrary provision in the will, the personal representatives must
charge the federal estate tax against the estate’s residue.16 However, the
section’s purpose is to protect those beneficiaries who shoulder a greater tax
burden than they would have sustained had the estate paid the tax prior to
distribution.17

As a result, section 2205 does not direct who shall bear the ultimate
responsibility for the estate tax,18 but merely creates a substantive right in
beneficiaries to seek contribution after its payment.19 It also serves to imple-
ment the apportionment rights created under other Code provisions,20 state
law, or the terms of the will.21 As a result, its significance in the apportionment
debate is normally overstated.22

12. See id. §§ 2001(a), 2205.
13. See id. § 2205. However, the Code includes several provisions which can shift the federal
estate tax burden to specific transferees, absent conflicting provisions in the will or state law.
See id. § 2206 (discussed infra notes 25-39 and accompanying text); id. § 2207 (discussed infra
notes 40-51 and accompanying text); id. § 2207A (discussed infra notes 52-68 and accompanying
text); id. § 2207B (discussed infra notes 69-82 and accompanying text). For a discussion of the
interrelation of these provisions and state law, see infra notes 225-59 and accompanying text.
15. Id.
16. “[I]t being the purpose and intent of this chapter that so far as is practicable and unless
otherwise directed by the will of the decedent the tax shall be paid out of the estate before its
distribution.” Id. (emphasis added).
18. Id. at 98-99. For an interesting discussion of this issue, see JACOB MERTENS, 6 LAW
OF FEDERAL GIFT AND ESTATE TAXATION § 44.04 (1960).
20. See I.R.C. §§ 2206, 2207, 2207A, 2207B.
21. Id. § 2205 (deferring to the decedent’s will). The Supreme Court, in Riggs v. Del Drago,
317 U.S. 95 (1942), recognized the state’s ability to enact apportionment statutes. Id. at 97-98.
22. I.R.C. § 2205 may grant federal courts jurisdiction in all cases where the apportionment
of estate taxes is at issue. See, e.g., Hughes v. Sun Life Assurance Co., 159 F.2d 110 (7th Cir.
1946) (litigants did not argue the jurisdictional issue). Compare Northern Trust Co. v. Baron,
377 F. Supp. 666, 667 (N.D. Ill. 1974) (granting jurisdiction since the claim for the recovery of
tax attributable to life insurance arose under I.R.C. § 2206).
The Code does contain several substantive provisions which can dictate who ultimately bears the estate tax burden. These provisions authorize the personal representatives to seek the reimbursement of estate tax attributable to specific assets passing outside the probate estate. Thus, when applicable, the provisions generally shift the tax burden from the residuary beneficiaries to those receiving nonprobate property. Congress' intent is to achieve an equitable apportionment of the tax burden and to prevent the tax on assets which do not pass pursuant to the terms of the will from inadvertently altering the decedent's estate plan.

1. **Section 2206**

Section 2206 generally authorizes the personal representatives to recoup the estate tax attributable to life insurance included in the gross estate from the beneficiaries who receive the proceeds. It has remained basically unchanged since originally enacted in 1918.

The recoverable amount equals "such portion of the total tax paid as the proceeds of such policies bear to the taxable estate." In the event two or more beneficiaries receive insurance proceeds, the personal representatives can recover from each beneficiary an amount computed with reference only to his or her portion.

If the inclusion of the insurance proceeds in the gross estate does not increase the amount of estate tax, equity should exempt the beneficiary from contributing to the payment of the estate tax. Section 2206 expressly excludes from its application proceeds which pass to the surviving spouse and which

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23. See I.R.C. §§ 2206, 2207, 2207A, 2207B.
25. Insurance on the decedent's life which is payable to a third person is includable in the gross estate if the decedent possessed at his death any incidents of ownership. See I.R.C. § 2042(2).
27. I.R.C. § 2206. In other words, the personal representatives can only recover a proportionate amount of the estate tax, computed as follows:

\[
\text{Recoverable amount} = \frac{\text{Insurance included in gross estate}}{\text{taxable estate}} \times \text{total tax}
\]

Compare the approach adopted in I.R.C. § 2207A (discussed infra note 55 and accompanying text).
28. I.R.C. § 2206 does not limit the Service's ability to recover the federal estate tax from life insurance beneficiaries. See Treas. Reg. § 20.2206-1 (1958); I.R.C. § 6324(a)(1). Any beneficiary who pays more than his or her share can seek contribution from those who should bear the estate tax burden. See I.R.C. § 2205 (discussed supra notes 14-22).
29. No one would suggest that the recipient of life insurance which was not included in the gross estate should contribute to the payment of the estate tax. Although this analogous situation may be distinguished on the basis that the decedent transferred all incidents of ownership prior to death and thus relinquished testamentary control of the policy, the net effect on the estate's residuary beneficiaries is the same as if the policy were included but caused no additional tax. This is one of the cornerstones of equitable apportionment. See infra notes 133-44 and accompanying text.
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qualify for the marital deduction. Although the same principles apply with respect to the charitable deduction, section 2206 is silent with regard to life insurance payable to charities. Since the statute is unambiguous, it is unlikely that a court would exclude charities from its application. Therefore, the only approach which conclusively avoids this inequity under federal law is to specifically exempt charities from contribution in the decedent’s will.

Section 2206 permits the decedent to waive, on behalf of the estate, the right to seek contribution. The statute requires that the waiver appear in the decedent’s will. This is consistent with the policy reasons for the statute of wills since a waiver affects the beneficial interests in an estate and thus is testamentary in nature. As a result, the courts will probably interpret this requirement strictly.

30. If the proceeds are payable to a trust in which the surviving spouse has a qualifying income interest for life within the meaning of I.R.C. § 2056(b)(7)(B)(ii) and if the will is silent with respect to apportionment, personal representatives can affect the size of the trust by electing to treat the trust as qualified terminable interest property as provided in I.R.C. § 2056(b)(7). See infra note 52. An income interest which is contingent on the personal representatives’ election is not a qualifying interest. See Estate of Clayton v. Commissioner, 97 T.C. 327, 336 (1991); Prop. Treas. Reg. § 20.2056(b)-7(c)(1), 49 Fed. Reg. 21,357 (1984). However, under general principles of equitable apportionment, personal representatives have the same discretion with respect to qualified terminable interest property where the will is silent with respect to apportionment. See infra notes 52-68 and accompanying text. As a result, the fact that personal representatives possess this authority should not jeopardize the marital deduction. See, e.g., Estate of Smith v. Commissioner, 66 T.C. 415, 428 (1976), aff’d, 565 F.2d 455 (7th Cir. 1977) (holding that an election to deduct administration expenses on the estate’s income tax return, as permitted by I.R.C. § 642(g), may affect the value of the interest passing to the surviving spouse without disqualifying that interest for the marital deduction); Treas. Reg. § 20.2056(b)-4(a) (1958) (recognizing that the use of the alternate valuation date might affect the amount of the marital deduction).

31. See I.R.C. § 2055.

32. “Where the language and intent of the statute is [sic] clear, courts are without the authority to engage in any creative rewriting of a provision.” Reed v. United States, 743 F.2d 481, 484 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); see also Estate of Cowser v. Commissioner, 736 F.2d 1168, 1171 (7th Cir. 1984); Estate of Renick v. United States, 687 F.2d 371, 376 (Cl. Ct. 1982).

The failure to exempt charities from the application of I.R.C. § 2206 may have unusual results. Assume, for example, that a gross estate consists entirely of $1,000,000 in cash and a $1,000,000 life insurance policy payable to charity. Since the taxable estate is $1,000,000, the formula set forth in I.R.C. § 2206 requires the charity to pay 100% of the estate tax. See supra note 27.

33. Oklahoma’s version of equitable apportionment should insulate the charities from contribution if the will is silent. See infra note 138 and accompanying text.

34. See, e.g., Estate of Boyd v. Commissioner, 819 F.2d 170, 171 (7th Cir. 1987) (decedent directed the executor to pay from the probate estate any tax on life insurance). For a discussion with respect to the specific language required, see infra notes 159-77 and accompanying text.

35. Although there are a number of exceptions, generally a transfer which is not effective until the decedent’s death is invalid unless executed in accordance with 84 OKLA. STAT. § 55 (1991). See, e.g., Waitman v. Waitman, 505 P.2d 171, 175 (Okla. 1972); Yeldell v. Moore, 275 P.2d 282, 282-83 (Okla. 1954).

36. See, e.g., In re Estate of Kapala, 402 N.W.2d 150, 153-54 (Minn. Ct. App. 1987) (determining that, under state law, a provision in a partnership agreement did not effectively waive the estate’s right to recoup estate taxes attributable to the insurance). But see Estate of Leach v. Commissioner, 82 T.C. 952, 955 (1984), aff’d, 782 F.2d 179 (11th Cir. 1986) (Tax
A separate question exists with respect to whether a generic tax exoneration clause\textsuperscript{37} effects a waiver. The concern, of course, is that the decedent may significantly disrupt his or her estate plan by inadvertently waiving the estate's right to recoup taxes from beneficiaries receiving life insurance proceeds.\textsuperscript{38} To determine whether a clause effectively waives the estate's right to reimbursement, the court must ascertain the testator's intent which is primarily a question of state law. As a result, the Oklahoma cases addressing this issue in the context of equitable apportionment should apply equally to section 2206.\textsuperscript{39}

2. Section 2207

Prior to 1942, only the exercise of a general power of appointment\textsuperscript{40} resulted in a taxable transfer.\textsuperscript{41} In 1942, Congress amended the relevant provision to require the inclusion in the gross estate of any property with respect to which the decedent possessed a general power of appointment at the time of death, regardless of whether the decedent exercised that power.\textsuperscript{42} Congress accurately predicted that the change could adversely affect estate plans, especially since decedents may be unaware of the existence of taxable powers. As a result, Congress also enacted the predecessor to section 2207.\textsuperscript{43}

Section 2207 authorizes the personal representatives to recover from the appointive property an amount equal to "such portion of the total tax paid as the value of such property bears to the taxable estate."\textsuperscript{44} This right exists regardless of whether the individuals in possession received the property as a result of the power's exercise, nonexercise, or release.\textsuperscript{45} Furthermore, as in the case of section 2206, if two or more beneficiaries receive appointive property, each beneficiary must contribute an amount computed with reference to only that portion which he or she received.\textsuperscript{46}

\textsuperscript{37} A typical exoneration clause might require the personal representative to pay from the residue of the estate all expenses of the decedent's last illness and funeral, costs of administration, other proper charges against the estate, and estate and inheritance taxes assessed by reason of the decedent's death.

\textsuperscript{38} Congress was alerted to this problem when it enacted I.R.C. § 2207B, which relates to retained interests and which requires a waiver to specifically refer to the code section. See infra notes 73-74 and accompanying text. See also I.R.C. § 2603(b) (containing a similar provision relating to generation-skipping transfer (GST) taxes). See infra notes 92-93 and accompanying text.

\textsuperscript{39} See infra notes 164-72 and accompanying text.

\textsuperscript{40} A general power of appointment is a power exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. See I.R.C. § 2041(b)(1). There are numerous exceptions to this rule. Id.

\textsuperscript{41} See I.R.C. § 811(f) (1939).

\textsuperscript{42} See Revenue Act of 1942, ch. 619, § 403(a), 56 Stat. 798, 942-43.

\textsuperscript{43} See id. § 403(c), 56 Stat. at 943.

\textsuperscript{44} I.R.C. § 2207. The fractional representation of this amount is similar to the formula used with respect to life insurance. See supra note 27.

\textsuperscript{45} See I.R.C. § 2207.

The statute controls unless there is a contrary provision in the decedent's will. In this regard, Congress granted testators broad discretion to charge the appointive property with either a lesser or greater tax burden.47

Section 2207 also exempts from its application appointive property which passes to the decedent's surviving spouse and which qualifies for the marital deduction.49 The section, however, is silent with respect to its effect on property passing to charity. The original legislative history states that section 2207 applies "where the recipient takes or holds the property upon the decedent's exercise, nonexercise, or release of the power, regardless of local rules with respect to the receipt of the property from the creator of the power."50 Although this may imply that state law principles of equitable apportionment do not exempt appointive property passing to charity, this argument, based solely on the legislative history of section 2207, is not persuasive.51

3. Section 2207A

For decedents dying after 1981, an estate can elect to claim a marital deduction for property in which the surviving spouse receives a qualifying income interest for life.52 This normally takes the form of an income interest in an express trust. If an estate elects QTIP treatment for a qualifying trust, the surviving spouse must pay transfer tax on the full value of the trust.53

Since the spouse's interest in a QTIP trust generally is limited to an income interest which expires on the spouse's death, the trust assets are beyond the personal representatives' reach. However, Congress provided a mechanism to

47. See I.R.C. § 2207. For a discussion with respect to the specific language required, see infra notes 164-72 and accompanying text.

48. See In re Will of King, 239 N.E.2d 875, 878 (N.Y. 1968), cert. denied, 393 U.S. 1086 (1969) (decedent's will directed the executor to recover from the appointive property the entire tax burden which that property generated). Charging the appointive property with a tax burden which is greater than that set forth in I.R.C. § 2207 is equivalent to partially exercising the power in favor of the estate. Compare I.R.C. § 2207A (discussed infra notes 56-63 and accompanying text).

49. For purposes of the marital deduction, appointive property "passes" to the surviving spouse if the spouse takes the property as a result of the power's exercise, nonexercise, or release. See I.R.C. § 2056(c)(6).


51. See In re Davidson, 641 P.2d 1110, 1113-14 (Okla. 1982) (Oklahoma Supreme Court, without discussing federal preemption, exempted charities which received appointive property from contributing to the payment of estate taxes). See infra notes 133-38, 240-42 and accompanying text.


53. If the spouse transfers a qualifying income interest during the spouse's life, it is treated as a taxable transfer of the entire trust. See I.R.C. §§ 2511, 2519. If the spouse dies without transferring the interest, the gross estate includes the entire trust. See id. § 2044.
reimburse the spouse's estate for the taxes attributable to the QTIP trust.\textsuperscript{54} Section 2207A permits the estate to recover the difference between the spouse's actual federal estate tax obligation less the tax which the estate would have paid if the QTIP trust were not included in the gross estate.\textsuperscript{55}

The surviving spouse's will can direct the personal representatives to pay all taxes attributable to the QTIP trust from a different source.\textsuperscript{56} The question again arises whether a general direction to pay all taxes from the residue effectively waives the estate's right to seek contribution from the QTIP trust.\textsuperscript{57} Although the courts have not resolved this issue, there is an indication that an effective exoneration clause must mention specifically either the QTIP trust or section 2207A. In \textit{In re Estate of Gordon},\textsuperscript{58} the decedent's will provided as follows:

\begin{quote}
[A]ll Estate inheritance and death taxes (including any interest and penalties) imposed by any jurisdiction by reason of my death with respect to any property includable in my estate for the purpose of such taxes, whether such property passes under or outside my will be paid out of my Residuary Estate as an administration expense, without apportionment.\textsuperscript{59}
\end{quote}

If this clause preempted the application of section 2207A, the resulting estate tax would have virtually eliminated the decedent's residuary bequest to a charity.\textsuperscript{60} The Surrogate Court for New York County refused to apply the clause with respect to the QTIP trust since the result was contrary to the decedent's intent.\textsuperscript{61}

\textsuperscript{54} See \textit{id.} § 2207A (added by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(4)(A), 95 Stat. 172, 304-05, \textit{reprinted in} 1981-2 C.B. 256, 326). Without such a remedy, the decedent could shift the entire estate tax burden to the spouse's individual assets by utilizing a QTIP trust to eliminate the federal estate tax in the decedent's estate. Note also that the spouse can recoup a portion of the gift tax imposed as the result of a lifetime disposition of the qualifying income interest. \textit{See} I.R.C. § 2207A(b).

\textsuperscript{55} See \textit{id.} § 2207A(a)(1); Prop. Treas. Reg. § 20.2207A-1(b), 49 Fed. Reg. 21,362 (1984). This provision authorizes the estate to recover the entire increase in tax resulting from the inclusion of the QTIP trust rather than just a proportionate amount. Compare the amount recoverable with respect to life insurance (discussed \textit{supra} note 27 and accompanying text) and the amount recoverable with respect to appointive property (discussed \textit{supra} note 44 and accompanying text).


\textsuperscript{57} Some states have enacted statutes that require express reference to a QTIP trust to exempt that trust from contribution. \textit{See}, e.g., \textsc{Va. Code Ann.} §§ 64.1-66.1 (Michie Supp. 1992); \textsc{Mich. Comp. Laws} § 205.201(8)(c) (1986).

\textsuperscript{58} 510 N.Y.S.2d 815 (Sur. Ct. 1986).

\textsuperscript{59} \textit{id.} at 817.

\textsuperscript{60} \textit{id.}

\textsuperscript{61} \textit{id.} at 819. The court relied, in part, on the fact that the surviving spouse executed her will and died before the executors in her husband's estate perfected the QTIP election. \textit{id.} at 817. However, the court would have reached the same result under less compelling circumstances:

Moreover, even if she was aware of the probability that such QTIP trust assets
Although the proposed regulations do not address this issue directly, they imply that the waiver must include a direct reference to either the QTIP trust or section 2207A. Absent congressional clarification, courts should determine on a case-by-case basis whether the application of a general exoneration clause to a QTIP trust abrogates the testator's intent.

If the QTIP trust passes to a charity on the spouse's death, the trust will qualify for the charitable deduction in the spouse's estate. Although the issue with respect to whether sections 2206 and 2207 authorize the personal representatives to seek contribution from charitable beneficiaries is unresolved, section 2207A addresses this problem. The amount which the personal representatives can recover from the QTIP trust is equal to the additional tax caused by the inclusion of the trust in the spouse's estate. Since a trust which qualifies for the charitable deduction in the spouse's estate will not result in additional estate tax, section 2207A creates no right to contribution.

4. Section 2207B

In 1987, Congress enacted section 2036(c) in an attempt to curb estate freezes. The following year, Congress unartfully reaffirmed its intent to gradually remove the apportionment of estate tax from the auspices of state law by enacting section 2207B. Section 2207B generally empowers an estate...
to recover tax attributable to property included in the gross estate pursuant to section 2036 from the person who receives that property.\textsuperscript{71}

Fearing that section 2036(c) might unintentionally affect a decedent’s estate plan, Congress enacted section 2207B to complement section 2036(c). However, Congress did not limit the provision’s application to property interests includable under section 2036(c). As a result, when Congress repealed section 2036(c),\textsuperscript{72} section 2207B remained.

As is true with respect to the other apportionment provisions, the decedent can waive the application of section 2207B.\textsuperscript{73} To be effective, however, the decedent’s waiver must specifically refer to section 2207B.\textsuperscript{74} Section 2207B also permits the decedent to include the directive in a will or revocable trust.\textsuperscript{75} Perhaps Congress excluded irrevocable trusts since revocable trusts more closely resemble testamentary dispositions.\textsuperscript{76} It is interesting to note, however, that revocable trusts are normally included in the decedent’s gross estate pursuant to section 2038.\textsuperscript{77}

Section 2207B authorizes the personal representatives to recoup from the person receiving the section 2036 property a proportionate amount of the federal estate tax attributable to that property.\textsuperscript{78} Congress acknowledged that certain transfers which are included in the gross estate pursuant to section 2036 give rise to a corresponding charitable deduction.\textsuperscript{79} As a result, section 2207B specifically excludes charitable split interest trusts described in section 664.\textsuperscript{80} However, Congress drafted the exclusion too narrowly. Some section

\textsuperscript{71} Under I.R.C. § 2036, the gross estate includes property which the decedent transferred and from which the decedent retained the income for life. For a discussion of the intricacies of I.R.C. § 2036, see Richard B. Stephens et al., Federal Estate and Gift Taxation § 4.08 (6th ed. 1991).


\textsuperscript{73} See I.R.C. § 2207B(a)(2).

\textsuperscript{74} The I.R.C. § 2036 interests are still subject to apportionment if a will contains a generic exoneration clause directing the personal representatives to pay “all taxes” from the residue. Compare id. §§ 2206, 2207, 2207A.

In 1992, Congress proposed legislation which would require the waiver to refer to the tax levied on the included property, but which would eliminate the need to refer specifically to I.R.C. § 2207B. See Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. § 4701(b).

\textsuperscript{75} See I.R.C. § 2207B(a)(2). The legislative history suggests that a directive in a revocable trust is effective only if the decedent dies intestate. Staff of Joint Comm. on Taxation, 100th Cong., 2d Sess., Explanation of Proposed Finance Committee Amendment to S. 2238, at 5 (Comm. Print 1988). However, the statute controls over contradictory language in the committee reports if the statute is clear and unambiguous. See Estate of Doherty v. Commissioner, 95 T.C. 446, 456 (1990).

\textsuperscript{76} If an irrevocable trust contains the directive, it may be possible to incorporate the trust into the will by reference. See Miller v. First Nat’l Bank & Trust Co., 637 P.2d 75, 77 (Okla. 1981).

\textsuperscript{77} Revocable trusts may also be includable under I.R.C. § 2036.

\textsuperscript{78} See I.R.C. § 2207B(a)(1). This is similar to the approach adopted in I.R.C. §§ 2206, 2207. For a fractional representation of the amount, see supra note 27.


\textsuperscript{80} See I.R.C. § 2207B(d).
2036 interests which are not qualified split interest trusts still give rise to charitable deductions. Section 2036 interests can also qualify for the marital deduction. To avoid this inequity, courts must rely on state law principles of equitable apportionment.

B. Federal Generation-Skipping Transfer Tax

The Code imposes a generation-skipping transfer (GST) tax on transfers occurring at death to skip persons. The GST tax is imposed at the maximum federal estate tax rate and is computed on a tax exclusive basis. As a result, the combined federal transfer tax rate with respect to direct skips may exceed seventy percent. It is important to give careful consideration to the source of the payment of this tax since that decision affects who ultimately pays the tax and the amount of the tax.

In the case of a direct skip occurring at death, the decedent’s estate generally must pay the GST tax. However, in the case of a direct skip from a trust which is included in the decedent’s gross estate, the trustees pay any GST tax. If the personal representatives (or the trustees in the case of a direct skip from a trust) fail to pay the GST tax, the Service can proceed directly against the skip persons.

81. Assume that a person established an irrevocable trust, reserving the income for life, with the remainder passing to charity on his or her death. The trust is includable in the gross estate pursuant to I.R.C. § 2036 and qualifies for the charitable deduction pursuant to I.R.C. § 2055. However, the trust is not a qualified charitable split interest trust described in I.R.C. § 664.

82. Assume that a decedent established an irrevocable trust, reserving the income for life, with the remainder passing to the surviving spouse. Again, the trust is includable in the gross estate pursuant to I.R.C. § 2036. This trust qualifies for the marital deduction pursuant to I.R.C. § 2056.

83. See id. §§ 2611(a)(3), 2612(c)(1), 2613. This article focuses only on direct skips which are also subject to the federal estate tax. The Code also imposes a GST tax with respect to direct skips subject to gift tax, taxable distributions, and taxable terminations. See id. §§ 2611(a), 2612.

84. See id. § 2641(a)(1). The current maximum rate is 55%. See id. § 2001(c)(2)(D). The 5% surtax which phases out the effect of the graduated rates and unified credit does not increase the maximum estate tax rate for GST tax purposes. See H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 994 (1987), reprinted in 1987-3 C.B. 193, 274.


86. Assume that a decedent died in 1991 with a taxable estate in excess of $21,040,000, having fully exhausted the $1,000,000 GST tax exemption. See I.R.C. § 2631(a). Also assume that the direct skip bears the burden of both the federal estate and GST taxes attributable to the direct skip. A $1,000,000 bequest to a skip person results in $709,678 of federal transfer taxes ($550,000 of estate taxes and $159,678 of GST taxes). See id. §§ 2001, 2641(a).

87. Assume the same facts set forth in supra note 86, except that the will expressly provides that all taxes, including the GST tax, are payable out of the residue. As a result, the skip person receives $1,000,000, unreduced by any taxes. This bequest results in $550,000 of estate taxes and $550,000 of GST taxes, or an additional $390,322.

88. The decedent is the transferor, and the transferor is personally liable for the payment of the GST taxes. See I.R.C. §§ 2603(a)(3), 2652(a)(1)(A).

89. See id. § 2603(a)(2).

90. I.R.C. § 2661(2) incorporates into chapter 13 the provisions of subtitle F applicable to the estate tax, including those relating to transferee liability included in I.R.C. §§ 6324(a)(2), 6901. See supra note 10 and accompanying text.
Since the GST tax generally is charged to the property constituting the direct skip, the personal representatives withhold the taxes from the property comprising the direct skip prior to distribution which results in the skip persons indirectly paying the tax. As in the case of the estate tax, an important question is whether the governing instrument overrides the statutory presumption.

The decedent can redirect the tax burden, but only by “specific reference” to the GST tax. As a result, a general direction that “all taxes” be paid from the estate’s residue will not shift the burden. A contrary result could unexpectedly alter the estate plan of a decedent who is unaware of, or fails to appreciate, the significance of the GST tax.

The Code also provides that the decedent must include the direction overriding the statutory presumption in the “governing instrument.” Thus, in the case of a testamentary bequest, the decedent should include the provision in the will. With regard to a direct skip from a trust, the provision should be incorporated in the trust instrument.

If the will directs the personal representatives to pay all GST tax from the residue and if a skip person pays the tax as transferee, the GST provisions do not authorize that person to seek reimbursement from the estate or the estate’s beneficiaries. Since the GST tax normally is payable from the property comprising the direct skip, there is less need to protect the transferees’ interests than in the case of the estate tax. Presumably, the skip person’s primary recourse is to object to the final account and petition for distribution.

C. Federal Tax on Excess Retirement Accumulations

Section 4980A(d) imposes the final federal transfer tax which is equal to fifteen percent of the excess retirement accumulation. The excess retirement

91. See I.R.C. § 2603(b).
92. Id. This is similar to the requirements of I.R.C. § 2207B(a)(2). See supra note 74 and accompanying text.
93. For a discussion with respect to the specific language generally required to override the statutory presumption, see infra notes 164-72 and accompanying text.
94. See I.R.C. § 2603(b).
95. One can argue that a “governing instrument” within the meaning of I.R.C. § 2603(b) is any document which can legally affect the apportionment of federal transfer tax. This would include a will since a decedent can clearly override the presumptions with respect to the apportionment of taxes attributable to property passing outside probate. See infra notes 164-72 and accompanying text. See also I.R.C. §§ 2206, 2207, 2207A(a)(2), 2207B(a)(2). However, until the courts finally resolve this issue, one must give the statute a restrictive interpretation, at least in the planning stage.
96. For a discussion with respect to the applicability of transferee liability, see supra note 10 and accompanying text.
98. See I.R.C. § 2603(b).
99. See 58 Okla. Stat. §§ 611-613, 631-632 (1991); In re Estate of Rettenmeyer, 345 P.2d 872, 878 (Okla. 1959) (holding that issues relating to the beneficiaries’ shares are properly heard and determined at the hearing on the final account), overruled on other grounds by In re Estate of Bovaird, 645 P.2d 500, 505 (Okla. 1982).
100. See I.R.C. § 4980A(d)(1).
accumulation is the excess of the decedent’s interests in qualified employer plans and individual retirement accounts over the present value of a hypothetical annuity payable for a period equal to the decedent’s life expectancy immediately before death. This calculation is dependent on a number of factors, including the decedent’s age at the date of death, an adjustment for the rate of inflation since 1986, and an interest rate which the Service revises monthly.

The tax on excess accumulations is assessed as additional estate tax, and the estate tax apportionment rules apply. Under the federal apportionment provisions, the personal representatives are not entitled to recoup the excise tax from the recipients of the retirement plan assets. However, the decedent’s will or the doctrine of equitable apportionment can reverse this presumption.

III. Apportionment Pursuant to Oklahoma Law

The federal provisions comprise only part of the overall apportionment scheme. State law has exclusive jurisdiction over the apportionment of Oklahoma estate tax. With respect to the federal estate tax, the Internal Revenue Code reaffirms congressional intent to require the personal representatives to pay the tax prior to distribution. However, the question as to who ultimately bears the burden of the federal estate tax remains primarily an issue of state law.

The United States Supreme Court first recognized this principal in Riggs v. Del Drago, where the Court considered the constitutionality of a New York statute which spread the burden of federal estate taxes proportionately among the estate’s beneficiaries. In determining that the statute did not violate the Supremacy and Uniformity Clauses, 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

101. See id. § 4980A(d)(3).
103. See I.R.C. § 4980A(d)(1).
104. See Temp. Treas. Reg. § 54.4981A-1T(d-8A) (1987). The regulations provide as follows: In all events, the estate is liable for the excise tax of 15 percent on the amount of the decedent’s excess accumulations. Transferee liability rules under chapter 11 do apply, however. Similarly, the reimbursement provisions of section 2205 also apply. Additionally, the rules generally applicable for purposes of determining the apportionment of the estate tax apply to the apportionment of the excise tax under section 4981A(d).

Id.
105. See id.
106. With respect to the allocation of this tax burden under equitable apportionment principles in Oklahoma, see infra notes 258-59 and accompanying text.
107. In fact, they appear to comprise only a minor part of the apportionment scheme. Although the Oklahoma courts have acknowledged the existence of the federal rules, they have failed to apply them in appropriate situations. See, e.g., Estate of LeDonne v. Stearman, 730 P.2d 519, 520-22 (Okla. 1986); In re Davidson, 641 P.2d 1110, 1113-14 (Okla. 1982).
108. See supra notes 12-13 and accompanying text.
110. U.S. CONST. art. VI, cl. 2; id. art. I, § 8, cl. 1.
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; accordingly, [the New York statute] is not in conflict with the federal estate tax law.\textsuperscript{111}

Both state and federal apportionment provisions are subordinate to the decedent’s intent as expressed in the will.\textsuperscript{112} “In Oklahoma, the well-established rule governing the construction of wills is to ascertain and give effect to the intent of the testator, either to the full extent or as far as possible.”\textsuperscript{113} As a result, it is important to remember that the decedent can ultimately determine which beneficiaries will bear the tax burden, regardless of the effect on that beneficiary and regardless of the resulting tax consequences.\textsuperscript{114}

A. Apportionment Prior to 1974

Early cases determined that, absent a contrary provision in the decedent’s will, the transfer tax burden generally fell on the residuary beneficiaries. In Thompson v. Wiseman,\textsuperscript{115} the surviving spouse received a portion of the decedent’s residue, and the will was silent with respect to the apportionment of federal estate tax. In a case of first impression, the Court of Appeals for the Tenth Circuit applied the Oklahoma abatement provision, concluding that federal estate taxes were payable out of the residue.\textsuperscript{116} As a result, a proportionate amount of the taxes reduced the marital share, even though that share qualified for the federal estate tax marital deduction. The court specifically refused to equitably apportion the tax.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111}Riggs, 317 U.S. at 97-98.
\item \textsuperscript{112}68 Okla. Stat. § 285 (1991); I.R.C. §§ 2206, 2207, 2207A, 2207B.
\item \textsuperscript{113}In re Estate of Doan, 727 P.2d 574, 576 (Okla. 1986); see also 84 Okla. Stat. § 151 (1991).
\item \textsuperscript{114}Paying transfer taxes out of property passing to the surviving spouse or to charity reduces the deduction available, and thus increases the tax. See I.R.C. § 2055(c); Treas. Reg. § 20.2056(b)-4(c)(1) (1958); 68 Okla. Stat. § 807(B)(2) (1991); Okla. Tax Comm'n, Permanent Rules, at rule 08.011.10.
\item Assume, for example, that a decedent died in 1992 with a taxable estate of $2,000,000, one-half of which passes to a child and one-half of which passes to the surviving spouse and which qualifies for the marital deduction. If all taxes are payable out of the child’s share, the estate will pay a total of $165,525 of transfer tax, $119,800 in federal estate tax and $45,725 in Oklahoma estate tax. However, if all taxes are payable out of the marital share, there will be a total of $221,601 in federal estate tax and $68,020 in Oklahoma estate tax, or an increase of $124,096.
\item \textsuperscript{115}233 F.2d 734 (10th Cir. 1956).
\item \textsuperscript{116}Id. at 737; see 84 Okla. Stat. § 3 (1991). Section 3 provides, in part, as follows: The property of a testator, except as otherwise especially provided in this code [chapter] and in the chapter on civil procedure must be resorted to for the payment of debts in the following order:
1. The property which is expressly appropriated by the will for the payment of the debts.
2. Property not disposed of by the will.
3. Property which is devised or bequeathed to a residuary legatee.
4. Property which is not specifically devised or bequeathed, and
5. All other property ratably.
\item Id.
\item \textsuperscript{117}Thompson, 233 F.2d at 738-39.
\end{itemize}
The Oklahoma Supreme Court cited *Thompson v. Wiseman* with approval in *In re Estate of Rettenmeyer*.\(^{118}\) The court, relying on the Oklahoma abatement provision, held that the spouse should share the tax burden with the other residuary beneficiaries.\(^{119}\) The following year in *Tapp v. Mitchell*,\(^{120}\) the court refused to charge property passing outside probate with a portion of the estate tax absent testamentary direction.\(^{121}\) Thus, the burden on the residue rule\(^{122}\) became firmly entrenched.\(^{123}\)

In 1965 the Oklahoma legislature enacted the Uniform Estate Tax Apportionment Act.\(^{124}\) The Act incorporated many of the equitable principles which the Oklahoma courts later recognized. For example, the Act required individuals who received property which passed outside probate to contribute to the payment of estate taxes.\(^{125}\) The Act also exempted transfers which qualified for either the marital or charitable deduction.\(^{126}\)

Although there was no judicial dissatisfaction with respect to the Act,\(^{127}\) the legislature repealed the provisions in 1969.\(^{128}\) In a subsequent case, the court reestablished the burden on the residue rule,\(^{129}\) which remained the law of Oklahoma until 1974.

### B. The Recognition of Equitable Apportionment

The Oklahoma estate tax tables are included in title 68, section 825 of the Oklahoma Statutes.\(^{130}\) In 1974, the Oklahoma legislature amended section 825 to establish different tax tables with respect to property passing to collateral and noncollateral beneficiaries.\(^{131}\) The amendment also provided as follows:

\(^{118}\) 345 P.2d 872 (Okla. 1959), overruled by *In re Estate of Bovaird*, 645 P.2d 500, 505 (Okla. 1982).

\(^{119}\) Id. at 879-80.

\(^{120}\) 352 P.2d 900 (Okla. 1960).

\(^{121}\) Id. at 904-05.

\(^{122}\) This term can be misleading. The courts looked to the abatement provision to determine which beneficiaries should bear the estate tax. Normally, the estate taxes are payable from the residue. However, if the will fails to dispose of all of the decedent’s property, the taxes are payable from the property passing through intestacy. *See* [Oklahoma Statutes][1] § 3(2) (1991); *In re Estate of Fletcher*, 308 P.2d 304, 312 (Okla. 1957). Similarly, if the residue is insufficient to pay all of the taxes, the courts resort to property which is not specifically devised or bequeathed. *See* [Oklahoma Statutes][1] § 3(4) (1991); *In re Estate of Murray*, 579 P.2d 203, 205-06 (Okla. Ct. App. 1977); *Tapp v. Mitchell*, 352 P.2d 900, 903-04 (Okla. 1960).

\(^{123}\) *See In re Estate of Fullerton*, 375 P.2d 933, 947 (Okla. 1962); *In re Estate of Fletcher*, 308 P.2d 304, 312 (Okla. 1957).


\(^{127}\) In fact, there were no cases even applying the Act.


Unless the will otherwise provides, the tax shall be apportioned among lineal and collateral persons.

The tax on interests passing to collateral persons shall be apportioned in the proportion that the value of interest received by each collateral person bears to the total of the interests passing to all collateral persons.

The tax on interests passing to lineal persons shall be apportioned in the proportion that the value of interest received by each lineal person bears to the total of all interests passing to lineal persons.

The values used in determining the tax shall be used for that purpose. 12

By enacting this provision, the legislature clearly intended to overrule the burden on the residue rule as it applied to the Oklahoma estate tax.

The Oklahoma Supreme Court first interpreted section 825, as amended, in In re Davidson. 13 A trust over which the decedent possessed a general power of appointment was included in her gross estate for purposes of both federal and Oklahoma estate taxes, 14 even though it was not subject to administration in her estate. The decedent died without exercising the power, and the appointive property passed to the beneficiaries named in the trust instrument, two of which were charities. 15 The decedent’s will was silent with respect to the apportionment of the estate taxes.

The court first determined that section 825 superseded the burden on the residue rule. 16 As a result, the trust beneficiaries were required to contribute to the payment of both the federal and Oklahoma estate taxes, even though section 825 only mandates this result with respect to Oklahoma estate taxes. 17

The court then addressed whether the personal representative could recoup taxes from the trust’s charitable beneficiaries. A strict interpretation of section 825 would not exempt charitable beneficiaries since it fails to distinguish between interests which pass to charities and qualify for the charitable deduction and interests which pass to other collateral beneficiaries. In holding that the charities were not liable for the payment of any portion of the taxes, the court stated:

"Absent statutory direction or an expression of intent on the part of the testator to the contrary, broad equitable principles place

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12. Id.
15. Davidson, 641 P.2d at 1111-12.
16. Id. at 1113. The court, after determining that section 825 was constitutional, stated, "[W]e need not respond to appellant's contention that estate taxes shall be paid out of the residue of the estate, that law having been supplemented by § 825." Id.
17. Under the burden on the residue rule, beneficiaries who received assets which passed outside probate were not required to contribute to the payment of estate tax, even if those assets were included in the gross estate for tax purposes. See, e.g., Tapp v. Mitchell, 352 P.2d 900, 904-05 (Okla. 1960). For a discussion with respect to the procedural aspects of enforcing this right, see infra notes 207-23 and accompanying text.
the burden of federal estate tax on the property which generates the tax, and exonerates therefrom property which does not."\textsuperscript{138}

Within two months after deciding \textit{In re Davidson}, the court further defined the doctrine's scope in \textit{In re Estate of Bovaird}\.\textsuperscript{139} In that case, the surviving spouse renounced her testamentary share and elected to take against the decedent's will. The will directed that

\begin{quote}
all estate, inheritance and other succession taxes \ldots be paid by my Executor out of my estate and my Executor shall neither have nor claim any right of contribution for such taxes against such surviving joint tenant, legatee, devisee or beneficiary of property passing otherwise than under the provisions of this my Last Will and Testament.\textsuperscript{140}
\end{quote}

The sole issue presented on appeal was whether the spouse's forced share, all of which qualified for the marital deduction, was liable for payment of any portion of the federal estate tax.

In a more thoughtful discussion of the relevant considerations, the court held that "logic, justice, and equity" dictated that, to the extent a spouse's interest qualifies for the marital deduction, the court should not require the spouse to contribute to the payment of the federal estate tax.\textsuperscript{141} The court also said, "The time has come to join the modern trend of thought on this issue. We apply principles of equitable apportionment, and overrule those portions of \textit{Rettenmeyer} that conflict herewith."\textsuperscript{142}

The extent of the court's willingness to insulate the surviving spouse from contribution is more clearly stated in subsequent cases. Unless the decedent's will provides to the contrary,\textsuperscript{143} the spouse's share is exempt from contribution with respect to both federal and Oklahoma estate taxes, regardless of whether the spouse elects to take under or against the will and regardless of whether the spouse receives a specific bequest or a portion of the residue.\textsuperscript{144}

\textsuperscript{138} \textit{Davidson}, 641 P.2d at 1114 (quoting \textit{In re Estate of Wahlin}, 505 S.W.2d 99, 106 (Mo. Ct. App. 1973)).

\textsuperscript{139} Id. at 500 (Okla. 1982).

\textsuperscript{140} \textit{Id.} at 501-02 (quoting \textit{Last Will and Testament of Davis D. Bovaird} (emphasis added)).

\textsuperscript{141} \textit{Id.} at 504 (quoting Seymour Nat'l Bank v. Heideman, 178 N.E.2d 771, 777 (Ind. Ct. App. 1961)). In \textit{Bovaird}, the court was only concerned with the apportionment of federal estate taxes.

\textsuperscript{142} \textit{Id.} at 505 (footnote omitted). The court was unclear whether its decision was based solely on the application of equitable apportionment principles, or whether it was persuaded by the language in the decedent's will. Early in the opinion, the court stated that the forced share "shall be treated preferentially and not be considered as part of the residue, and thus shall not be liable for payment of estate taxes." \textit{Id.} at 503. However, the court would have held for the spouse even if the will had been silent with respect to apportionment. See \textit{In re Estate of Hardesty}, 708 P.2d 596 (Okla. Ct. App. 1985).

\textsuperscript{143} Seeinfra notes 159-77 and accompanying text.

\textsuperscript{144} In a 1985 case, the surviving spouse received a life estate in real estate (which did not qualify for the marital deduction) and the entire residue. See \textit{In re Estate of Hixon}, 715 P.2d 1087, 1088 (Okla. 1985). In requiring the remaindermen to contribute to the payment of both the federal and Oklahoma estate taxes, the court held that, to the extent a surviving spouse's...
C. The Scope of the Equitable Apportionment Doctrine

The doctrine of equitable apportionment is premised on broad equitable principles which place the burden of both the federal and Oklahoma estate taxes on the property which generates those taxes, absent an expression of contrary intent in the will. As discussed above, the doctrine exempts from contribution interests which pass to the surviving spouse and which qualify for the marital deduction and interests which pass to qualified charities. However, the doctrine also affects the apportionment of estate taxes in other situations. Those beneficiaries who receive property which is included in the decedent’s taxable estate must contribute their portion of the federal and Oklahoma estate taxes, regardless of whether they receive a specific bequest or a portion of the residue and regardless of whether the property is subject to administration or passed outside probate.145

1. Is Equitable Apportionment Elective?

The Oklahoma courts have not yet specifically addressed whether the doctrine of equitable apportionment obligates personal representatives to seek apportionment, particularly from beneficiaries receiving assets outside probate.146 In other words, can those estate beneficiaries who would benefit from outside apportionment (in most cases, the residuary beneficiaries) require the personal representatives to pursue recipients of nonprobate assets?

Oklahoma law requires the personal representatives to collect all estate assets,148 which presumably would include the right to reimbursement for estate taxes. Furthermore, if personal representatives have discretion with respect to seeking contribution from nonprobate beneficiaries, they possess the ability to favor one beneficiary over another. The Oklahoma statutes do not grant administrators of an intestate estate this broad authority. Similarly, if a decedent dies testate, no court should empower the personal representa-
atives to change the beneficial interests in the estate absent express language in the will. As a result, the interested parties should have standing to object to the personal representatives' final account if the representatives fail to apportion the estate taxes.

If the residuary beneficiaries fail to object to the final account, they probably will be treated as making a taxable transfer to those beneficiaries who otherwise would be required to contribute to the payment of the estate taxes. The proposed regulations under section 2207A state that the estate's failure to exercise a right of recovery against a QTIP trust included in the gross estate pursuant to section 2044 is treated as a taxable gift from the persons who would benefit from such recovery to the persons from whom such recovery could have been obtained. In other words, the residuary beneficiaries are treated as making a gift to the trust's remaindemen.

A gift is complete when the donor has relinquished dominion and control with respect to the property subject to the transfer. The proposed regulations treat the transfer as complete when the estate's right to recovery is no longer enforceable, which may be prior to the estate's closing. As a result, the residuary beneficiaries may be treated as making a gift even though they can still adequately protect their interests by requesting the court to surcharge the personal representatives at the hearing on the final account.

An issue exists with respect to whether the estate's general creditors can force personal representatives to recoup estate taxes from recipients of non-probate assets. In Wolfe v. Mid-Continent Corp., the decedent's estate was sufficient to pay death taxes, but insufficient to pay the remaining creditors. The Tennessee Supreme Court refused to apply a state apportionment statute to recipients of life insurance proceeds which were otherwise exempt under state law, stating:

This statute does not create a cause of action in favor of creditors of a decedent's estate nor does it authorize an Executor of such estate to take such action for the benefit of the creditors. The purpose of the statute is to enable the Executor to cause such an

149. The courts construe a will in accordance with the decedent's intent as expressed within the will, unless the language is ambiguous. See 84 Okla. Stat. §§ 151-152 (1991); In re Estate of Hixon, 715 P.2d 1087, 1089 (Okla. 1985); Lomon v. Citizens Nat'l Bank & Trust, 689 P.2d 306, 308 (Okla. 1984).
151. See Treas. Reg. § 25.2511-1(a) (as amended in 1986). A nonprobate beneficiary who contributes to the payment of estate tax when the will directs otherwise makes a taxable transfer to the residuary beneficiary unless it is a qualified disclaimer pursuant to I.R.C. § 2518. See Estate of Boyd v. Commissioner, 819 F.2d 167, 172-73 (7th Cir. 1987).
154. Although the answer is unclear, the statute of limitation may run as soon as three years after the personal representatives pay the taxes. See infra notes 214-19 and accompanying text.
156. 435 S.W.2d 836 (Tenn. 1968).
action to be taken in behalf of "persons interested in the estate" merely to prorate Federal Estate and death taxes among themselves on an equitable basis.\textsuperscript{157}

If the probate estate is insufficient to pay all debts, expenses, and taxes, the holding in \textit{Wolfe} clearly appeals to the recipients of nonprobate assets. However, if the estate's right to recoupment is mandatory with respect to its beneficiaries, the holding appears incorrect.\textsuperscript{158}

\section*{2. Language Required to Waive Right to Recoupment}

The doctrine of equitable apportionment only applies if the will fails to specify the source from which the personal representatives should pay the taxes.\textsuperscript{159} The same is true with respect to the federal apportionment provisions.\textsuperscript{160} The question becomes whether generic tax payment provisions are a sufficient expression of contrary testamentary intent.

Generally those courts which have addressed this issue have applied state apportionment provisions. The cases consistently articulate two principles. First, the burden of proof rests on those who challenge the state apportionment scheme.\textsuperscript{161} Furthermore, the decedent must express the direction to pay taxes from a different source in clear and unambiguous language.\textsuperscript{162} Oklahoma courts are in accord.\textsuperscript{163}

A general directive to the personal representative to pay the estate's debts does not override the application of equitable apportionment.\textsuperscript{164} It is also

\textsuperscript{157} Id. at 839. The will also provided that all taxes were to be considered a debt of the estate and not a charge against any beneficiary. \textit{Id}. at 840.

\textsuperscript{158} See, for example, United States v. Gilmore, 222 F.2d 167 (5th Cir.), \textit{cert. denied}, 350 U.S. 843 (1955), where the court required the personal representative to seek recoupment under I.R.C. § 2206 for the benefit of the estate's creditors, stating:

The right of the administratrix to force contribution from the widow beneficiary in the proportions set out in Section [2206] ... was one of the assets of the estate.... The widow as administratrix of course owed a primary duty to the United States and other creditors to collect all of the assets of the estate. \textit{Id}. at 171.

\textsuperscript{159} See 84 OKLA. STAT. § 151 (1991); \textit{see also In re Estate of Bovaird}, 645 P.2d 500 (Okla. 1982). The court observed, "In Oklahoma the cardinal rule for the construction of wills is to ascertain the intent of the testator and give effect thereto ... ." \textit{Id}. at 502.

\textsuperscript{160} \textit{See supra} notes 34, 47-48, 56-63, 73-77 and accompanying text.

\textsuperscript{161} \textit{See}, e.g., Johnson v. Hall, 392 A.2d 1103, 1107 (Md. 1978); \textit{In re Estate of Ogburn}, 406 P.2d 655, 658 (Wyo. 1965).

\textsuperscript{162} \textit{See}, e.g., \textit{In re Estate of Kapala}, 402 N.W.2d 150, 153 (Minn. Ct. App. 1987); \textit{In re Estate of Huffaker}, 641 P.2d 120, 121 (Utah 1982); \textit{In re Estate of Benton}, 215 N.W.2d 86, 89 (Neb. 1974); \textit{In re Estate of Hilliar}, 498 P.2d 1237, 1239 (Wyo. 1972).

\textsuperscript{163} \textit{See Lomon v. Citizens Nat'l Bank & Trust}, 689 P.2d 306, 309 (Okla. 1984) (citing with approval \textit{In re Estate of Fletcher}, 308 P.2d 304, 312 (Okla. 1957), where the court stated that the intention to alter the statutory apportionment scheme must "clearly appear" in the will).

clear, in Oklahoma, that a general directive to pay the estate taxes without specifying the payment's source is also ineffective. In *In re Estate of Fletcher*, the decedent's will instructed the personal representative to pay all estate taxes. With respect to whether the language sufficiently expressed the testator's intent to override the statutory order of abatement, the court concluded:

Casual reading of the will reflects complete absence of language evincing testatrix' intention to appropriate property expressly for this purpose. And, where the statutes make mandatory provisions for payment of debts, etc., testamentary direction that this be done is surplusage and meaningless. Although recognized generally that there may be testamentary provision for a different order of resort to property to pay debts, this intention must clearly appear.

However, a directive to pay the estate taxes from the estate's residue will typically result in each residuary beneficiary bearing a proportionate amount of the estate tax burden, regardless of whether the spouse or a charity receives a share of the residue. In *In re Estate of Doan*, the will directed the personal representative to pay all taxes "out of the residue of my probate estate without reimbursement from any person." A portion of the residue passed to a charity which requested that all taxes be assessed against the distributions to the taxable residuary beneficiaries. In holding against the charity, the court stated:

The doctrine of equitable apportionment is not an immutable rule of law. It is to be applied in furtherance of the testator's intent as expressed in the will. It is not to frustrate the testator's intent.... That the testatrix can express the intention to direct payment of estate taxes from the residuary before distribution is the precise exception included as part of the definition of equitable apportionment. There are no ambiguities or uncertainties in the will.... To hold otherwise would be to reconstruct the Doan will.

166. 308 P.2d 304 (Okla. 1957).
167. *Id.* at 312.
168. A generic reference to pay taxes from the residue will not be effective to charge the residue with federal estate tax attributable to the inclusion of QTIP property and federal generation-skipping transfer tax, the apportionment of which can only be overridden by specific reference. See *supra* notes 56-63, 92-93 and accompanying text.
170. *Id.* at 577.
171. *Id.* But see *In re* Estate of Uri, No. 63,280 (Okla. Ct. App. 1985). In *Uri*, the court, in an unpublished opinion, held that a directive to pay taxes from the estate's principal did not
If there is a direction to pay taxes from the residue, the court is also hesitant to allow extrinsic evidence of the testator's intent in an attempt to contradict the terms of the will. 172

If the will overrides the application of equitable apportionment, the testator is treated as making an additional bequest to those individuals who benefit. In Estate of Boyd v. Commissioner, 173 the decedent's child was a life insurance beneficiary, and the will waived the estate's right to recoup the taxes attributable to the policy. The child disclaimed "any right to have the probate estate pay any federal or Wisconsin estate or inheritance tax on any property passing to me outside the probate estate." 174 The child also reimbursed the estate for a proportionate amount of the tax, increasing the estate's residue which passed to the surviving spouse. The court treated the waiver as an additional bequest to the child. 175 As a result, the child disclaimed an "interest in property" within the meaning of section 2518. 176 Since it was a qualified disclaimer, it increased the estate's marital deduction. 177

D. Procedural Issues

The personal representatives generally shoulder the responsibility for determining the method of apportioning estate taxes and enforcing the estate's right to contribution. 178 Problems can arise with respect to calculating and collecting each beneficiary's share.

1. Computational Aspects

To equitably apportion the federal estate tax, the personal representatives must first calculate each beneficiary's proportionate share of the taxable estate, using values employed for estate tax purposes. 179 They must then clearly express an intention to override equitable apportionment. Id., slip op. at 4-5. An unpublished opinion cannot be cited as precedent. 12 Okla. Stat. ch. 15, app. 2, rule 1.200B(E).

172. See 84 Okla. Stat. §§ 152, 174 (1991); Lomon v. Citizens Nat'l Bank & Trust, 689 P.2d 306, 308 (Okla. 1984) ("Unless some ambiguity or uncertainty arises upon the face of the will, evidence of circumstances and conditions under which the will was made may not be taken into account in determining the testator's intention."). In Estate of Massman, No. 63,636 (Okla. Ct. App. Jan. 14, 1986), the court, in an unpublished opinion, held that the decedent's will clearly directed the personal representative to pay taxes from the residue and refused to permit extrinsic evidence to establish a contrary intent. Id., slip op. at 2. An unpublished opinion cannot be cited as precedent. 12 Okla. Stat. ch. 15, app. 2, rule 1.200B(E).

173. 819 F.2d 170 (7th Cir. 1987).

174. Id. at 171.

175. Id. at 172.

176. Id. at 173.

177. Id. at 172-74.

178. See In re Davidson, 641 P.2d 1110, 1112 (Okla. 1982).

179. For purposes of this calculation, the taxable estate is defined in I.R.C. § 2051 and is shown on line 3, Form 706. This amount should equal the sum of the taxable interests which all beneficiaries receive. The amount of the taxable interests passing to a beneficiary may not equal the actual amount which that beneficiary receives since: (1) the formula uses date of death (or alternate valuation date) values, not date of distribution values; (2) Oklahoma estate taxes which may be payable from a beneficiary’s share are not deductible for federal estate tax
calculate the beneficiary’s share by multiplying that percentage times the total federal estate tax obligation.\textsuperscript{180}

The Oklahoma courts have not yet addressed the apportionment of the federal tax on excess retirement accumulations. The tax is assessed as additional federal estate tax, and the regulations provide that the rules with respect to the apportionment of federal estate tax apply.\textsuperscript{181} Since apportionment remains primarily a question of state law,\textsuperscript{182} federal law does not preempt the Oklahoma courts from equitably apportioning the tax on excess retirement accumulations.

The Oklahoma courts may determine that all beneficiaries who receive interests which are subject to the federal estate tax should share in this additional tax burden.\textsuperscript{183} This result prevents a beneficiary who receives retirement plan assets from paying a disproportionate amount of federal estate tax.\textsuperscript{184} However, in other situations, equity may dictate that the beneficiary who receives the excess accumulations pay the resulting tax. For example, assume that the retirement plan assets pass to the surviving spouse. Those assets are subject to the tax imposed by section 4980A(d) unless the spouse makes the election provided for by section 4980A(d)(5), in which case the tax may be avoided altogether.\textsuperscript{185} Under these circumstances, equity dictates that the surviving spouse pay the additional tax attributable to excess accumulations.\textsuperscript{186} As a result, the courts may have to apportion the tax on excess retirement accumulations on a case-by-case basis.

The results with respect to apportioning the federal GST tax burden are more certain. The Code generally charges the GST tax against that property purposes; and (3) there may be administration expenses and other charges which reduce a beneficiary’s share but which are not deductible for federal estate tax purposes.

\textsuperscript{180} See In re Davidson, 641 P.2d 1110, 1114 (Okla. 1982). This is generally consistent with the approach adopted by I.R.C. § 2206 with respect to life insurance beneficiaries (see supra note 27 and accompanying text); I.R.C. § 2207 with respect to recipients of appointive property (see supra note 44 and accompanying text); and I.R.C. § 2207B with respect to recipients of property in which the decedent retained an interest (see supra note 78 and accompanying text).

With respect to the recovery of taxes attributable to QTIP property included in the gross estate, I.R.C. § 2207A provides that the recipients must pay the additional tax resulting from the inclusion of the property in the gross estate. See supra note 55 and accompanying text. Although the Oklahoma courts have not yet addressed this issue, presumably the federal statute would control. See infra notes 246-49 and accompanying text.


\textsuperscript{182} See Riggs v. Del Drago, 317 U.S. 95, 98-99 (1942).

\textsuperscript{183} In this case, the only amount which changes in the formula enunciated in In re Davidson, 641 P.2d 1110, 1114 (Okla. 1982), is the total estate tax which is increased by the tax on excess retirement accumulations.

\textsuperscript{184} The beneficiary may be surprised to learn that a significant income tax burden already accompanies the retirement plan proceeds. See I.R.C. § 691.

\textsuperscript{185} If the spouse makes the election, I.R.C. § 4980A applies to those interests as if they were the surviving spouse’s. See id. § 4980A(d)(5)(A).

\textsuperscript{186} This is particularly true since the retirement plan assets qualify for the estate tax marital deduction, and thus, the spouse otherwise would not be required to pay any federal estate tax.
constituting the direct skip. \textsuperscript{187} A decedent can change this result by a "specific reference" to the GST tax.\textsuperscript{188} Assuming that the Oklahoma courts give full faith and credit to these provisions, the federal rules preempt state action in this area.\textsuperscript{189} Even ignoring the issue of federal preemption, the Code provides the equitable result since the GST tax burden falls on those individuals who receive the property giving rise to the tax unless the decedent expresses a contrary intent in the will.\textsuperscript{190}

Section 825 establishes the formulas for apportioning the Oklahoma estate tax. With respect to interests passing to collateral persons, the statute provides: "The tax on interests passing to collateral persons shall be apportioned in the proportion that the value of interest received by each collateral person bears to the total of the interests passing to all collateral persons."\textsuperscript{191} There is a similar provision which applies to interests passing to lineal persons.\textsuperscript{192}

The personal representatives must first identify the collateral and lineal persons. In \textit{Estate of LeDonne v. Stearman},\textsuperscript{193} the court interpreted section 825 \textit{in pari materia} with title 68, section 803 of the Oklahoma Statutes, which divides transfers into two categories: transfers to lineal heirs and transfers to nonlineal heirs.\textsuperscript{194} The court concluded that the term "collateral persons," as used in section 825, is not limited to collateral heirs, but includes unrelated beneficiaries. As a result, a collateral person is any beneficiary to which the tax table set forth in title 68, section 803(2) of the Oklahoma Statutes applies. Using the same analysis, lineal persons, as that term is used in section 825, refers to those beneficiaries to which the tax table set forth in title 68, section 803(1) of the Oklahoma Statutes applies.\textsuperscript{195}

There are valid reasons why section 825 provides for two separate apportionment computations. The tax rates with respect to collateral beneficiaries are more progressive,\textsuperscript{196} and it would be unfair to require lineal beneficiaries to pay a portion of the tax attributable to collateral beneficiaries. More importantly, interests passing to lineal beneficiaries receive the benefit of a $175,000 exemption.\textsuperscript{197} As a result of the proper application of the apportion-
tionment formulas in section 825, this exemption inures exclusively to the benefit of the lineal beneficiaries.

2. **Enforcing the Estate's Right to Contribution**

The personal representatives are primarily liable for the payment of the federal and Oklahoma taxes. With regard to the federal taxes, the Code's expressed intent is to require the representatives to pay the taxes prior to final distribution.\(^ {198} \)

Surprisingly, the result under the Oklahoma statutes is not clear. "The executor, administrator, trustee, devisee, heir or transferee" must file the Oklahoma estate tax return.\(^ {199} \) Furthermore, the estate tax generally becomes a lien on all assets transferred, which include those assets transferred outside probate.\(^ {200} \) However, the "administrator, executor, and trustee of every estate ... who, before paying the tax, distributes or transfers any of said estate, to the extent of the value of the property at the time the tax became due, shall be personally liable for such tax until its payment."\(^ {201} \) Since the personal representatives must ensure for their own financial well-being that the Oklahoma estate tax is paid prior to final distribution, they generally assume responsibility for both the filing of the return and the payment of the tax.\(^ {202} \)

The burden of apportioning the federal and Oklahoma taxes and seeking contribution from the beneficiaries also falls on the personal representatives.\(^ {203} \) The complexity of this task varies, however, depending on the nature of the assets included in the taxable estate.

If all property included in the taxable estate is subject to administration, the task is simplified. Unless all beneficiaries agree as to their respective portions of the tax burden, the representatives can seek a declaratory judgment, requesting the probate court to determine each beneficiary's equitable share.\(^ {204} \) They can also request the court to make this determination in connection with the estate's final distribution.\(^ {205} \) In either case, the personal representatives can reduce, correspondingly, each beneficiary's distribution. If necessary, the probate code authorizes the personal representatives to sell property to raise sufficient funds with which to pay the taxes.\(^ {206} \)

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198. With respect to the federal estate tax, see supra notes 12-13 and accompanying text; with respect to the GST tax, see supra notes 88-90 and accompanying text; with respect to the tax on excess retirement accumulations, see supra note 104 and accompanying text.
199. 68 OKLA. STAT. § 815(a) (1991) (emphasis added).
200. Id. § 811(a).
201. Id. (emphasis added).
202. For a case where the personal representatives paid the estate taxes and then sought reimbursement from beneficiaries receiving nonprobate assets, see In re Davidson, 641 P.2d 1110 (Okla. 1982).
203. Id. at 1112.
206. With respect to the Oklahoma estate tax, 68 OKLA. STAT. § 811(a) (1991) provides, in
The taxable estate usually includes assets which pass outside the estate administration.\textsuperscript{207} If a beneficiary who receives nonprobate assets also receives sufficient probate property to discharge his or her share of the transfer tax obligation, the personal representatives can follow the same procedure outlined above.\textsuperscript{208} The process becomes more problematic if a beneficiary's share of the probate estate is insufficient to discharge his or her portion of the transfer taxes. To resolve any controversy with respect to the amount of each beneficiary's contribution, the personal representatives can seek a declaratory judgment.\textsuperscript{209} However, they may also be required to solicit the court's assistance in pursuing those beneficiaries who are either unwilling or unable to contribute.

Prior to 1989, there were serious concerns with respect to the personal representatives' ability to obtain and enforce a judgment against nonprobate beneficiaries.\textsuperscript{210} However, the legislature resolved many of the issues by expressly authorizing personal representatives to commence an action for apportionment in probate court.\textsuperscript{211} Under this process, the personal representatives can seek contribution either before or after they pay the taxes.\textsuperscript{212} In addition, if the beneficiaries are unwilling to contribute after notification of their obligation, the statute authorizes the recovery of court costs and reasonable attorney fees.\textsuperscript{213}
If the personal representatives seek recoupment after payment, the statute of limitation depends on the lawsuit’s nature. If an action is based on a right conferred by statute, the plaintiff must bring suit within three years of the cause of action arising.\textsuperscript{214} The right to recover Oklahoma estate tax is clearly established by statute.\textsuperscript{215} The right to recoup other taxes under the doctrine of equitable apportionment may be a judicial remedy,\textsuperscript{216} in which case the statute of limitation would normally run five years after the cause of action accrues.\textsuperscript{217} However, this result is unclear.\textsuperscript{218} In any event, it is imprudent for personal representatives to unnecessarily delay the enforcement process, particularly since they owe a fiduciary duty to collect the estate assets within a reasonable time.\textsuperscript{219}

There will be occasions when the personal representatives are unable to collect the apportioned tax from the nonprobate beneficiaries.\textsuperscript{220} This generally does not excuse the estate from making full payment of the transfer tax obligation since the probate assets in most cases secure the full payment of the transfer taxes.\textsuperscript{221} Furthermore, the personal representatives can incur personal liability for the taxes in the event they distribute assets prior to the payment of the taxes.\textsuperscript{222} As a result, it is unlikely that estate beneficiaries, other than the surviving spouse, can recover damages from the personal representatives in the event they are unable to recoup taxes from the nonprobate beneficiaries.\textsuperscript{223}


\textsuperscript{216} The statute clearly sets forth the procedure for pursuing an equitable apportionment claim. See 58 Okla. Stat. §§ 1(b), 268 (1991). It is possible that the right to recoup all taxes is established by statute.


\textsuperscript{218} The Oklahoma Court of Appeals recently discussed this issue in an unpublished opinion, holding that an action to seek contribution for both federal and state estate taxes was not barred by the three year statute of limitation. See Parkhurst v. Parkhurst, No. 71,540 (Okla. Ct. App. 1990). An unpublished opinion cannot be cited as precedent. 12 Okla. Stat. ch. 15, app. 2, rule 1.200B(E).

\textsuperscript{219} The statute of limitation with respect to an action for recoupment should not be confused with the rights of the probate beneficiaries. Even if the representatives fail to bring a timely action, the beneficiaries who otherwise would have benefitted can protect their interests by requesting the court to surcharge the representatives when they submit the final account for approval. See 58 Okla. Stat. §§ 611-612, 631-632 (1991).

\textsuperscript{220} For example, a significant period may pass between the time a person receives life insurance proceeds and the time the personal representatives seek reimbursement, during which improvident beneficiaries may find an alternative use for the funds.

\textsuperscript{221} With respect to federal transfer taxes, see I.R.C. § 6324(a)(1); with respect to Oklahoma estate taxes, see 68 Okla. Stat. § 811(a) (1991).

\textsuperscript{222} With respect to federal transfer taxes, see supra note 9; with respect to Oklahoma estate taxes, see 68 Okla. Stat. § 811(a) (1991).

\textsuperscript{223} The right to recoupment can be viewed as merely an uncollectible asset. This assumes, of course, that the personal representatives did not cause the loss by failing to timely pursue the
Personal representatives should not pay Oklahoma estate tax from assets which otherwise would pass to the surviving spouse unless the will expressly authorizes that payment. Assets which pass to the surviving spouse are not subject to the lien for Oklahoma estate taxes. If the representatives pay Oklahoma estate taxes from the spouse's share and then are unable to recover those taxes from the other beneficiaries, they have unnecessarily diminished the spouse's distribution and should be liable for their actions.

IV. Interrelation with Federal Apportionment

Since 1942, when the United States Supreme Court decided Riggs v. Del Drago, both federal and state courts have acknowledged that apportionment is primarily a question of state law. However, Congress has continued to expand the scope of the federal apportionment provisions. The threshold question, therefore, is to what extent have the federal laws preempted state action.

In recent years, the Supreme Court has been less willing to find congressional intent to supersede state law. The Supreme Court has summarized the basic principles of federal preemption as follows:

Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." It is clear that Congress did not intend to preempt states from supplementing the federal scheme. As a result, the federal apportionment provisions only preempt conflicting state laws.

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224. 68 Okla. Stat. § 811(d) (1991). There is no similar provision applicable to the federal estate tax.
226. Since the Supreme Court decided Riggs v. Del Drago, Congress has enacted I.R.C. §§ 2207A, 2207B.
227. See U.S. Const. art. VI, cl. 2.
230. See Riggs v. Del Drago, 317 U.S. 95, 98-99 (1942). The fact that the federal provisions...
In *McAleer v. Jernigan*, an Alabama statute provided that all taxes, including the federal estate taxes, were a general charge against the estate's residue unless the will provides otherwise. The court invalidated the law to the extent it conflicted with section 2206, stating the following:

Thus, under the reasoning of *Riggs*, in the absence of congressional enactments to the contrary, state law governs the allocation of the burden of taxes as to property that is part of the estate, and where Congress has spoken, as with life insurance proceeds not part of the estate, federal law governs.

If possible, courts interpret state provisions as supplementing the federal provisions. For example, in *In re Estate of Kapala*, the state statute permitted a decedent to exempt life insurance beneficiaries from contribution in the will or other written instrument. The court determined that the federal and state provisions did not conflict and gave effect to the state statute.

Similarly, Oklahoma's version of equitable apportionment complements the federal apportionment scheme. As discussed below, equitable apportionment merely expands on the federal provisions, much like the Minnesota statute in *In re Estate of Kapala*. The question remains, however, whether the federal provisions retain any vitality in Oklahoma.

The results obtained with respect to the apportionment of federal estate taxes attributable to life insurance and appointive property under both the federal provisions and the principles of equitable apportionment are substantially the same. Both apportionment methods require the recipients to contribute to the payment of the estate tax absent a contrary provision in the decedent's will. Both methods also utilize the same formula to determine the beneficiary's share.

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apportion taxes in only limited situations and the fact that most states have enacted comprehensive apportionment statutes also supports this conclusion. For a summary of the various state apportionment statutes, see Jeffrey N. Pennell, *Tax Payment Provisions and Equitable Apportionment*, in *22 Philip E. Heckerling Institute on Estate Planning § 1812* (Matthew Bender 1988).

231. 804 F.2d 1231 (11th Cir. 1986).
232. Id. at 1232.
233. Id. at 1233; *see also* First Nat'l Bank v. Dixon, 248 S.E.2d 416, 419 (N.C. 1978); *In re Estate of Green*, 185 A.2d 57, 61 (N.J. Misc. 1962).
234. 402 N.W.2d 150 (Minn. Ct. App. 1987).
235. Id. at 152. *Compare* MINN. STAT. § 524.3-916(b) (1982) with I.R.C. § 2206 (requiring the waiver to appear in the decedent's will).
236. *Kapala*, 402 N.W.2d at 152-53.
237. To examine the outer limits of imaginative statutory construction, see *Weinberg v. Safe Deposit & Trust Co.*, 85 A.2d 50, 56-57 (Md. 1951), where the Maryland court determined that state law required a spouse who received life insurance proceeds to contribute to the payment of federal estate tax, deftly avoiding a conflict with I.R.C. § 2206 which generally excludes spouses from contribution. *See supra* note 30 and accompanying text.
238. *See supra* notes 25-34, 44-48, 145 and accompanying text.
239. *See supra* notes 179-80 and accompanying text.
There are, however, two areas of minor concern. First, equitable apportionment exempts the surviving spouse and charities from contribution, while sections 2206 and 2207 only exclude the surviving spouse. In this regard, equitable apportionment supplements the federal scheme. The Oklahoma Supreme Court already has exempted from the payment of federal estate tax a charity which received appointive property, and it will reach the same result with respect to life insurance payable to a charity.

A second concern relates to the language required to override the different apportionment schemes. In other words, the estate may argue that language in the decedent's will, which overrides the application of equitable apportionment, may not preclude the application of sections 2206 and 2207. Although the specific requirements of sections 2206 and 2207 are unclear, the controlling factor should be the testator's intent, which is primarily a question of state law. As a result, the Oklahoma cases addressing this issue in the context of equitable apportionment should apply equally to sections 2206 and 2207.

With respect to QTIP property included in the decedent's gross estate, there is an additional concern. Section 2207A requires the recipients of the QTIP property to pay the additional federal estate tax resulting from the property's inclusion in the gross estate. Under the general principles of equitable apportionment, however, recipients only contribute a proportionate amount. Although the Oklahoma courts have not addressed this issue, section 2207A should control. Furthermore, section 2207A adopts the equitable approach. Requiring the recipients of QTIP property to pay only a proportionate amount of the transfer tax permits the first spouse to die to shift a portion of his or her federal estate tax obligation to the surviving spouse's estate.

There are several potential conflicts between section 2207B, which establishes the right of recovery with respect to property over which the decedent retained a taxable interest, and equitable apportionment. First

240. See supra notes 32-33, 50-51 and accompanying text.
241. See In re Davidson, 641 P.2d 1110, 1113-14 (Okla. 1982). Although the court was aware of the existence of I.R.C. § 2207, it failed to discuss the issue of federal preemption.
243. The converse may also be true.
244. Most cases addressing this issue have interpreted state apportionment statutes. See generally Brunner, Payment of Death Taxes, supra note 164; Brunner, Estate or Inheritance Taxes, supra note 165.
245. For a discussion of these cases, see supra notes 159-77 and accompanying text.
246. See supra note 55 and accompanying text.
247. See supra notes 179-80 and accompanying text. In almost all cases, this would be a lesser amount.
248. In this case, equitable apportionment would conflict with, rather than supplement, section 2207A. See supra notes 228-29 and accompanying text.
249. See supra note 54.
of all, property included in the gross estate pursuant to section 2036 can give rise to either a marital or charitable deduction.\textsuperscript{250} The doctrine of equitable apportionment exempts the recipients of these interests from contribution. Since this supplements, rather than conflicts with, section 2207B,\textsuperscript{251} the doctrine of equitable apportionment should control.\textsuperscript{252}

In addition, section 2207B recognizes contrary expressions of intent contained in revocable trusts.\textsuperscript{253} Even assuming that the doctrine of equitable apportionment will give effect to only waivers appearing in wills, this portion of section 2207B should control with respect to the apportionment of federal estate tax.\textsuperscript{254} However, the Oklahoma courts may be willing to expand the doctrine to include waivers appearing in other documents that have testamentary effect such as revocable trusts.\textsuperscript{255}

Section 2207B also requires the waiver to specifically refer to the Code section. This is another instance where the Oklahoma courts should give effect to the express language of the statute. Therefore, a direction to pay all federal estate taxes from the residue exempts all nonresidual beneficiaries, other than the recipients of property included in the gross estate pursuant to section 2036, from contributing toward the payment of federal estate taxes.

There is less uncertainty with respect to the interrelation of equitable apportionment and the federal GST tax. Pursuant to federal law, the GST tax is generally paid from the assets comprising the direct skip,\textsuperscript{256} which should be the same result obtained under equitable apportionment. In addition, to alter the tax burden, section 2603(b) requires that the waiver must expressly refer to the GST tax. As in the case of section 2207B, the Oklahoma courts should respect this limitation since a contrary result would conflict with applicable federal law.\textsuperscript{257}

A final concern involves the interrelation of equitable apportionment and the tax on excess retirement accumulations. The tax on excess accumulations is assessed and apportioned as estate tax.\textsuperscript{258} However, it falls

\textsuperscript{250} See supra notes 81-82 and accompanying text.  
\textsuperscript{251} Section 2207B exempts only certain charitable split interest trusts. See I.R.C. § 2207B(d). See supra note 80 and accompanying text.  
\textsuperscript{252} In an analogous setting, the Oklahoma courts have exempted charities which receive appointive interests. See supra note 138 and accompanying text.  
\textsuperscript{253} I.R.C. § 2207B(a)(2).  
\textsuperscript{254} A contrary result conflicts with the federal provision. See supra notes 228-29 and accompanying text.  
\textsuperscript{255} The court should not recognize waivers contained in nontestamentary instruments. A specific direction with respect to the apportionment of estate taxes can have a significant effect on the decedent's estate plan. The policy reasons for the statute of wills dictate that decedents must incorporate waivers into valid testamentary instruments. See, e.g., \textit{In re Estate of Kapala}, 402 N.W.2d 150, 153 (Minn. Ct. App. 1987) (holding that a waiver must appear in a writing which possessed testamentary intent, invalidating a waiver contained in a partnership agreement).  
\textsuperscript{256} See I.R.C. § 2603(b).  
\textsuperscript{257} A contrary result under state law not only would shift the burden of the GST tax, but also would increase that tax since the taxable amount of the direct skip is the value of the property received by the skip person. See id. § 2623.  
\textsuperscript{258} See supra note 103 and accompanying text.
outside the scope of the federal apportionment provisions. As a result, the apportionment of this tax remains exclusively a question of state law.259

V. Conclusion

The Oklahoma Supreme Court has joined the “modern trend of thought” by adopting the doctrine of equitable apportionment to more closely approximate the typical testator’s intent.260 By spreading the transfer tax burden among all beneficiaries who receive taxable interests, the court ensures that the federal and state transfer taxes do not distort the testator’s estate plan. This is accomplished at a cost, however. The burden of apportioning transfer taxes normally falls on the personal representatives. However, the paramount objective remains the protection of the testator’s intent, and the additional administrative burden which the representatives must bear seems insignificant by comparison.

The legislature has addressed some of the procedural problems.261 Rather than attacking the unresolved issues piecemeal, however, it should enact a comprehensive solution such as the Uniform Estate Tax Apportionment Act (the Uniform Act).262 The only justification advanced for the legislature’s 1969 repeal of the Uniform Act has been the administrative burden which it placed on the personal representatives.263 However, that same burden has reappeared in the form of equitable apportionment.

There are many similarities between the Uniform Act and equitable apportionment as defined by the Oklahoma courts. Both require beneficiaries who receive taxable interests to pay a proportionate amount of the federal and state estate taxes, regardless of whether the interests pass through or outside probate.264 In addition, both generally exempt from contribution gifts which qualify for the marital and charitable deductions.265 The Uniform Act also apportions Oklahoma estate tax, properly taking into account the different tax tables and the $175,000 exemption for gifts to collateral persons.266 Finally, the Uniform Act authorizes the decedent to expressly apportion taxes in his or her will.267

259. For an equitable approach to the apportionment of this tax, see supra notes 181-86 and accompanying text.
260. See In re Estate of Bovaird, 645 P.2d 500, 505 (Okla. 1982).
261. See supra notes 211-13 and accompanying text.
262. UNIF. ESTATE TAX APPORTIONMENT ACT (1982). Almost half of the states have enacted the Uniform Act, indicating its widespread acceptance. See Pennell, supra note 230, § 1804.
263. See Huff, supra note 2.
264. UNIF. ACT §§ 1(4), 2. The Uniform Act does not apportion federal GST tax. Id. § 1(6). However, the federal apportionment provisions reach an equitable result. See supra notes 91-95 and accompanying text.
265. UNIF. ACT § 5(b). This section as applied to charities is broader in scope than I.R.C. §§ 2206, 2207, 2207B. However, there is no conflict within the meaning of UNIF. ACT § 9. See discussion infra note 271 and accompanying text.
266. UNIF. ACT § 5(a)-(b); 68 Okla. STAT. §§ 3, 809 (1991).
267. UNIF. ACT § 2. The section does not authorize waivers in other testamentary instruments.
The Uniform Act differs from equitable apportionment in at least two major respects. The Uniform Act recognizes that in unusual cases, it may be necessary to deviate from the general apportionment scheme. Thus, the court has discretion to direct apportionment in any manner which it finds equitable. Furthermore, in Oklahoma, the successful litigant in an apportionment action may recover expenses, while the Uniform Act generally apports expenses in the same manner as the taxes.

The Uniform Act addresses many issues which the Oklahoma courts have not yet resolved. For example, if the Uniform Act conflicts with federal apportionment provisions, the federal rules control. As a result, under the Uniform Act, a QTIP trust must bear the incremental federal estate tax resulting from its inclusion in the surviving spouse's gross estate. In addition, a specific reference to section 2207B is required to override the application of that section, and that reference can appear in either a will or a revocable trust.

Another problem concerns QTIP trusts which are fully deductible for federal estate tax purposes but only partially deductible for Oklahoma estate tax purposes. Under the doctrine of equitable apportionment, a portion of the Oklahoma estate tax is payable from the trust. This, in turn, reduces the deduction for federal and Oklahoma estate tax purposes, thus increasing the amount of estate taxes. The Uniform Act specifically exempts QTIP trusts from the payment of Oklahoma estate tax.

The Uniform Act also resolves procedural problems now facing the personal representatives. The Uniform Act expressly authorizes the personal representatives to withhold from any property in their possession the taxes attributable to the beneficiary otherwise entitled to receive that property. More importantly, the Uniform Act also specifically exonerates personal representatives who initiate collection procedures within a reasonable time but who are unable to collect the apportioned tax from nonprobate beneficiaries.

This does not prohibit the courts from recognizing a waiver contained in a revocable trust for purposes of I.R.C. § 2207B. See supra notes 75-77 and accompanying text. For the wisdom of restricting the waivers to wills, see Eugene F. Scoles & Richard B. Stephens, The Proposed Uniform Estate Tax Apportionment Act, 43 Minn. L. Rev. 907, 919-22 (1959).

The Oklahoma courts may have the same flexibility under the doctrine of equitable apportionment. However, the Oklahoma courts have not yet addressed this issue.


See supra notes 246-49 and accompanying text.

See supra notes 253-55 and accompanying text.


It also creates an interrelated tax computation. See Internal Revenue Serv., Publication 904 (rev. May 1985).

Unif. Act § 5(e).

Id. § 4.

Id. § 7.
The Uniform Act may not solve all apportionment issues and some commentators disagree with respect to specific provisions. However, it answers many questions which will otherwise take years for the Oklahoma courts to resolve. Since the Uniform Act supplements the current doctrine of equitable apportionment, its passage would permit Oklahoma to continue its move toward a modern solution to the apportionment of estate taxes.

279. For an excellent analysis of the Uniform Act and the underlying equitable principles, see Scoles & Stephens, supra note 267.