

Florida's Tax Apportionment

Examples

In all examples: (1) D has made lifetime gifts equal to the applicable exclusion amount available at D's death, (2) assume no administration expenses or debts, and (3) D dies a resident of Florida.

Example 1:

Tax apportionment clause in will:

“All Federal or State estate taxes, inheritance taxes, if any, or other death taxes, together with interest and penalties thereon, that may by reason of my death be attributable to my probate estate or any portion of it, including any property received by any person as a family allowance or homestead, shall be paid by my Executor out of the residue of my estate disposed of by this Will, without adjustment among the beneficiaries thereof, and shall not be charged against or collected from any beneficiary of my probate estate.”

Examine clause.

Example 2:

D and her lawyer do not address tax apportionment in their estate planning meetings. D informs her lawyer that her assets valued at \$6 million are in her name and that she wishes to leave her estate equally to her children, stressing the importance of equality. D's signs a will containing the following tax apportionment clause: “I direct that all estate taxes arising as a result of my death on property passing under this Will, or on property outside this Will, shall be paid by my residuary estate.” Two years after executing her will, D takes out a term life insurance policy valued at \$3 million payable to her son.

How are estate taxes allocated?

Example 3:

Assume D's will contains a non-residual devise of \$2 million to D's son. The residue of D's estate (valued at \$4 million) passes equally to D's spouse and D's daughter. Assume D's will does not contain a tax apportionment clause.

How are estate taxes allocated?

Example 4:

Assume the same facts as in Example 3, except the will contains the following tax apportionment clause:

“I direct that all estate taxes be paid by my residuary estate.” What is result?

- A. Does the conclusion change if one of the witnesses to the will's execution states that the decedent asked before executing the will whether her spouse and her daughter will receive equal amounts since they both are left half of her estate and the lawyer answered: "yes."
- B. Does the conclusion change if the cover letter containing a draft of the executed will states: "her residue passes $\frac{1}{2}$ to your spouse and $\frac{1}{2}$ to your daughter?" No mention is made of estate taxes.

Example 5:

D's will leaves D's residuary estate, valued at \$5,000,000 to her children. D's estate also includes a joint bank account payable on D's death to a friend valued at \$2,000,000. D's will contains the following tax apportionment clause:

"I direct my Personal Representative to pay out of the property which would otherwise become a part of the Residuary Estate, all estate, inheritance, transfer and succession taxes, including interest and penalties thereon, which may be lawfully assessed by reason of my death. I waive on behalf of my estate any right to recover any part of such taxes, including any beneficiary of life insurance on my life and anyone who may have received from me or from my estate any property which is taxable as part of my estate."

How are estate taxes allocated?

Example 6:

Assume D has made taxable gifts equal to her applicable exclusion amount. D's gross estate consists of a life insurance policy payable to an irrevocable life insurance trust ("ILIT") valued at \$5,000,000 (D transferred the policy to the trust a year before her death). The ILIT directs the life insurance proceeds be distributed to her son. D's probate estate is valued at \$10,000,000 and is payable to D's daughter. D's will contains the following tax apportionment clause:

"My personal representative shall pay from my residue of my estate all expenses of my last illness and funeral and all estate and inheritance taxes assessed by reason of my death, except that the amount, if any, by which the estate and inheritance taxes shall be increased as a result of the inclusion of property in which I may have a qualifying income interest for life or over which I may have a power of appointment shall be paid by the person holding or receiving that property."

How are estate taxes allocated?

Example 7:

Assume D wants to treat both of her children equally. D wants to give her daughter the closely held business which D believes is worth \$10 million. D has marketable securities worth \$10 million and cash of \$500,000. You have drafted a will which devises the residue of her estate into revocable trust. Article I of the trust contains recitations about the family status. Article II contains the terms to apply during D's lifetime. Here are some options for the dispositive provisions:

Option 1:

Article IV: Devise business to daughter.

Article V: Balance of trust to son.

Option 2:

Article IV: Devise business to daughter.

Devise \$10 million to son.

Article V: Balance of assets split 50/50 between son and daughter.

Option 3:

Article IV: Devise balance of trust equally to daughter and son. Direct that daughter's share is to be funded with stock in business.

What are pros/cons of each option?

Example 8:

Albert's will established testamentary trust for his son Bert. Albert dies resident of state X. Trust grants Bert a general testamentary power of appointment which he can exercise by specific reference to the trust agreement. To the extent he fails to exercise the power to appointment, the trust passes to Bert's issue, in shares per stirpes. Bert dies a resident of Florida. His will does not exercise the general testamentary power of appointment. However, his will calls upon the general power of appointment trust the additional estate taxes caused by its inclusion in his federal gross estate. Bert's taxable estate without the general power of appointment trust is equal of this applicable exclusion amount. He lives his estate to an unrelated individual. Assume the general power of appointment trust has a value of \$5 million on Bert's death. Estate tax of \$2 million (\$5 million x 40%).

How are estate taxes allocated?

Example 9:

Husband dies a resident of State X. State X has enacted a pure estate tax apportionment statute. Husband's will creates QTIP trust for surviving spouse (D). QTIP provides on D's death, \$1 million passes to daughter, with balance of assets (valued at \$1 million on D's demise) passing to son. QTIP has no tax apportionment clause and make no mention of estate taxes. D is a resident of Florida and engages your services to prepare her estate planning documents. D desires to treat her children equally and "rebalance the wealth" given her husband's "unequal" treatment. How do you address the tax apportionment issue?