FLORIDA'S TAX APPORTIONMENT STATUTE*

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On May 15, 2015, Florida enacted a revised tax apportionment statute.[1] With a few notable exceptions, the changes to existing law were remedial in nature and merely intended to clarify existing law.[2] For the most part, the new statute repeats verbatim the wording of prior law, but substantially improves the law by rearranging the apportionment statute and adding titles.[3] Because most of the modifications were deemed a clarification of existing law, with a few exceptions, the new statute applies to every Florida resident decedent without regard to the date of the decedent's death and applies retroactively to all proceedings pending or commenced on or after July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.[4] With a few exceptions, the language of the current statute has been in place since 1997.[5]

This outline has been divided into five parts. Part I concerns how the new statute apportions death taxes. Part II concerns drafting against statutory apportionment. Part III concerns statutory constructions problems and procedural and fiduciary issues. Part IV addresses effective dates. Part V gives a brief overview of the history of tax apportionment in Florida.

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[1] Laws 2015, c. 2015-27, s. 6. The legislative history of the statute is set forth in the following nearly identical reports: (1) The Florida Senate, Bill Analysis and Fiscal Impact Statement, SB 872, March 9, 2015, prepared by The Professional Staff of the Committee on Judiciary (hereinafter "The Bill Analysis, Judiciary"), and (2) The Florida Senate, Bill Analysis and Fiscal Impact Statement, Bill: CS/CS/SB 872, April 8, 2015, prepared by The Professional Staff of the Committee on Rules (hereinafter "The Bill Analysis, Rules"). All references hereinafter are to §733.817 as codified by Laws 2015, c. 2015-27, c. 6 unless otherwise noted.

[2] Laws 2015, c. 2015-27, s. 10. The substantive changes are discussed herein.

[3] *See* Braun, Akins & Price, "Improvements Made to Florida's Estate Tax Apportionment Statute," *Action Line*, Summer 2015, p. 21.

[4] Laws 2015, c. 2015-27, s. 10. *See* Part IV for a discussion of effective dates of the statute.

[5] Laws 1997, c. 97-240, s. 9, effective October 1, 1998. The statute was further amended as follows: Laws 2004, c. 2000-159, s. 13; Laws 2001, c. 2001-226, s. 167; Laws 2006, c. 2006-217, s. 39; and Laws 2010, c. 2010-5, s. 122.

Part I

Statutory Tax Apportionment

A. Generally Speaking

Since most Florida residents die with less than the applicable exclusion amount, Florida's tax apportionment statute will only apply to a small percentage of Florida estates. As to any simple estate plan that is subject to death taxes,[6] the statute apportions death taxes quite easily. For a Florida domiciliary whose estate consists only of the assets passing under a will, all of the federal estates taxes will be borne by the residuary estate.[7] Nonresiduary devises[8] do not bear any of the tax.[9] For more complicated estates, several overriding principles should be borne in mind in order to grasp the more finite points and apply unless there is a direction against statutory apportionment.

B. Statutory Apportionment: General Overriding Rules

1. Modified Equitable Apportionment

Florida's tax apportionment statute can best be described as "modified equitable apportionment."[10] Generally, property that gives rise to death taxes bears a portion of the taxes. Property that does not give rise to death taxes bears no part of the taxes. For example, if property over which the decedent had a general power of appointment gives rise to estate taxes, the general power of appointment property bears a portion of the estate taxes.

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[6] The author uses the term "death taxes" as a term to encompass estate taxes, inheritance taxes, generation-skipping transfer taxes, or any other tax levied or assessed under the laws of Florida or any other state, the United States, any other country, or any political subdivision of the foregoing.

[7] §733.817(3)(c).

[8] The term "nonresiduary devise" is defined in §733.817(1)(h).

[9] §733.817(3)(c).

[10] *See* The Bill Analysis, Judiciary, Part II, p. 5, and The Bill Analysis, Rules, Part II, p. 5.

Generally, property passing in a deductible manner to a surviving spouse or to charity does not bear any of the death taxes.[11] Deductible devises may bear estate taxes if these devises are located in the residuary estate or in a residuary interest in a trust and non-deductible nonresiduary interests generate estate taxes.[12] In such event, these deductible devises bear a portion of the tax generated by the nonresiduary devises or interests.[13]

The statute exempts protected homestead property, exempt property and family allowance from the estate tax.[14] Nonresiduary devises and interests do not bear death taxes, unless the residue is insufficient to bear the tax.[15]

2. Tax by Tax Basis

Death taxes are to be apportioned on a tax by tax basis.[16] Federal estate taxes are apportioned to property included in the federal taxable estate. Likewise, state estate taxes and generation-skipping transfer (GST) taxes are apportioned on a tax by tax basis to property included in the tax base of that tax. For example, New York estate taxes arising as a result of New York real property owned by a Florida domiciliary will be charged solely to the New York property.

3. Florida Domiciliary

Section 733.817 applies to decedents dying domiciled in Florida. The statute will not govern the apportionment of estate taxes for non-residents of other states, unless the non-domiciliary's governing instrument directs apportionment in accordance with § 733.817.

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[11] Property passing in a deductible manner is not included in the definition of "included in the measure of the tax" as defined in §733.817(1)(e).

[12] *See* The Bill Analysis, Judiciary, Part II, p. 5, and The Bill Analysis, Rules, Part II, p. 5.

[13] §733.817(3)(c).

[14] §733.817(3)(e). *See infra* Part II(F) for further discussion.

[15] §733.817(3)(c)(1).

[16] §733.817(2) requires that "the net tax attributable to the interests included in the measure of **each** tax shall be determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax" (emphasis added). See also §733.817(1)(p) provides that "unless the context indicates otherwise, the term [tax] means each separate tax."

4. Interest By Interest Basis

Generally, transfer taxes are to be apportioned on an interest by interest basis.

The initial step in apportioning each of the various death taxes is to identify the various interests included in the tax base of that tax. In allocating federal estate taxes, jointly held assets, the probate estate, revocable trusts, life insurance and the like are first identified. To determine the amount of estate tax allocated to each interest, the value of the interest (less allowed deductions) constitutes the numerator. The denominator is the taxable estate. In most instances, the multiplicand is the amount of the estate tax.[17]

5. Allocating Deductions

Deductions allowed under IRC §§ 2053 and 2054 are allocated to property paying the deductible expense or the loss.[18] For example, assume the federal gross estate is comprised of a life insurance policy with a death benefit of $500,000 and a probate estate of $500,000. Assume the probate estate is burdened with deductible (and actually deducted on the estate tax return) debts and administration expenses of $100,000. In allocating the federal estate taxes, the taxes are allocated based on the following fractions:

Probate Estate:	$400,000
	$900,000
Insurance:	$500,000
	$900,000

The numerator for allocating estate taxes to the probate estate is reduced by the allowed debts and administration expenses the probate estate bears. A fair result since the probate estate is bearing the costs which gave rise to the deductions.

[17] *See infra* Part I (C)(1)(d).
[18] §733.817(1)(e)(1).

C. Statutory Apportionment: The Detail

Under the apportionment statute, the first step in apportioning death taxes is to divide the various death taxes. Each death tax is to be apportioned separately.[19]

1. Allocation of Federal Estate Taxes

   a. Internal Revenue Code §2032A and §2057(f)

      Recapture taxes arising a result of Internal Revenue Code ("IRC") §2032 A (special use property) and §2057(f) (family owned business interests) are to be apportioned as provided in said code sections and are not to be considered as part of the federal estate tax.[20]

   b. QTIP Property

      The next step in allocating the federal estate taxes is to identify qualified terminable interest property (QTIP), labeled in §733.817(1)(n) as "Section 2044 interest" and defined therein as "an interest include in the measure of the tax by reason of s. 2044 of the Internal Revenue Code."[21] If the federal gross estate contains QTIP property then the additional federal estate taxes resulting from the QTIP's inclusion in the federal gross estate must be determined in the manner provided in Internal Revenue Code ("IRC") §2207A and allocated to the QTIP.[22] After reduction by the additional estate taxes, the practitioner can then proceed to allocate the remaining federal estate taxes.

[19] §733.817(2).
[20] §733.817(1)(p).
[21] The label and definition of Section 2044 property was added by Laws 2015, c. 2015-27, s. 6. The term and an identical tax treatment appeared in the prior statute at §733.817(3)(a).
[22] §733.817(2)(a).

c. Determining Interests Included in The Measure of the Tax

After allocating the additional federal estate taxes caused by the inclusion of any QTIP to the QTIP, the remaining federal estate taxes are allocated to those remaining interests included in the federal gross estate. Interests included in the measure of the tax must be identified initially. Examples of such interests are jointly held properties, general power of appointment properties, retained life estates, revocable trusts and the probate estate. After each interest is identified, deductible interests are removed, along with adjusted taxable gifts and gift taxes included in the gross estate pursuant to IRC §2035.[23] A common deductible interest is tenancy by the entirety property. Because such property qualifies for the marital deduction, it is removed from the tax base.[24]

In addition to deductible interest, §733.817(1)(3) provides that the term "included in the measure of the tax" does not include "interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts pursuant to s. 2001 of the Internal Revenue Code."[25] This reduction was found in the prior law at §733.817(1) (d).

The recently enacted statutory provides that gift tax included in the gross estate pursuant to IRC §2035 is not included within the measure of the tax.[26] In addition, any inter vivos transfers included in the gross estate pursuant to IRC §529 are not included in the measure of the tax.[27] According to the legislative history, "a majority of decedents do not intend that the recipients of their gift bear the burden of the estate tax as such gifts often consist of contributions to 529 plans for minors or college aged relatives."[28] As noted by Braun, et al., the change results in shifting the estate taxes resulting in the

[23] §733.817(1)(e)(1).
[24] *Id.*
[25] §733.817(1)(e)(2).
[26] §733.817(1)(e)(3).
[27] *Id.*
[28] The Bill Analysis, Judiciary, Part III, p. 9, and The Bill Analysis, Rules, Part III, p. 9.

inclusion of gift taxes and 529 contributions to other taxable interests included in the federal taxable estate.[29] This change only applies to decedents dying on or after July 1, 2015.[30]

In addition, the new statute provides that those interests which bear state estate taxes which give rise to a deduction for state death taxes under IRC §2058 are to be allocated the deduction.[31]

d. Determining The Value of Each Interest

After each non-deductible interest is identified, the "value" of such interest is determined. "Value" is defined in the statute to mean the pecuniary worth of the interest as finally determined for federal estate tax purposes less debts, expenses or other deductions borne by such property and deducted on the estate tax return.[32] Debts and administration expenses deductible under §2053 are the most common deductions. Most of those expenses are borne by the probate estate or decedent's revocable trust, but will also arise in general power of appointment trusts.

Interests which suffer a deductible loss under §2054 can also have the value of their interest reduced.

Only allowed deductions reduce the value of the interest regardless of whether the deduction should have been allowable.[33] Allowable deductions taken on a fiduciary income tax return rather than deducted on the estate tax return will not reduce the value of the interest for purpose of apportioning the estate tax.

[29] See *supra* Braun, et. al, p. 5,
[30] S. 10, ch. 2015-27.
[31] §733.817(2)(c).
[32] §733.817(1)(s).
[33] *Id.*

e. The Interest's Fraction

To determine the federal estate taxes allocated to the interest, the value (less allowed deductions paid by the interest) of the interest serves as the numerator. The remaining federal taxable estate (that portion of the estate tax that remains after the additional estate taxes caused by section 2044 property has been charged to the section 2044 property), less gift tax included pursuant to IRC §2035 and less IRC §529 property, serves as the denominator. [34]This fraction is then multiplied by the remaining federal taxable estate (that portion of the estate tax that remains after the additional estate taxes caused by section 2044 property has been charged to the section 2044 property),less the foreign tax credit, if any.[35]

Except for 2044 property, the formula allows each interest included in the federal taxable estate to benefit from the unified credit of IRC §2010, the gift tax credit of IRC §2012 and the credit for prior transfers of IRC §2013.

f. Inside Entity Apportionment

After the federal estate taxes are apportioned to each interest, the federal estate tax must be apportioned among the recipients inside the interest.

(i) Intestate Estates

In an intestate estate, property passing in a deductible manner to a surviving spouse is not included in the measure of the tax or the value of the interest and therefore does not bear any of the estate taxes.[36] All other intestate heirs bear a portion of the estate taxes based on the value of the interest each heir receives as to the total value received by all non-spousal heirs.

[34] §733.817(2) & §733.817(1)(e).
[35] §733.817(2).
[36] §733.817(1)(e).

(ii) Testate Estates

Nonresiduary devises do not bear any of the federal estate taxes unless the residuary devise is insufficient to pay all of the estate taxes.[37] The federal estate taxes allocable to the nonresiduary devises are charged to all of the residuary devises, whether or not all interests in the residue are included in the measure of the tax.[38] An illustration is helpful. Assume the will contains one nonresidual devise of $2,000,000 to the decedent's son and devises the residue of $4,000,000, after reduction for all allowable §§2053 and 2054 deductions, equally between the decedent's spouse and daughter. Arguably, the net tax attributable to the nonresiduary devise is one-third of the total tax ($2,000,000 divided by $6,000,000). The net tax on the nonresidual devise reduces the residue before its division between the daughter's and the surviving spouse's devises. The surviving spouse must bear half of the tax on the nonresidual devise even though the marital devise is not otherwise subject to estate taxes.

If the residuary estate is insufficient to pay the tax attributable to the nonresiduary devises, the tax is apportioned among the recipients of the nonresiduary devises in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax.[39] The statute does not distinguish between general, demonstrative and specific devises.

Residuary devises bear a portion of the estate taxes in proportion to their value, less allocable deductions, as to the value of all assets in the residue, less allocable deductions.[40] Marital and charitable devises in the residue

[37] §733.817(3)(c)(1).
[38] *Id.*
[39] *Id.*
[40] §733.817(3)(c)(2).

only bear a portion of the estate taxes arising from nonresiduary devises.[41] If the residue is insufficient to pay all of the estate taxes allocable to it, the nonresiduary devises included in the measure of the tax must bear the tax.[42]

In *Estate of Miller*,[43] the court addressed whether a devise constituted a part of the residue or a nonresiduary devise. In Article Second of his will, the decedent devised "one-half of my estate as the same shall be valued for purposes of inventory and appraisement, said bequest not to be reduced by debts, claims or taxes of my estate." In Article Third of his will, the decedent directed "all the rest, residue and remainder of my estate" be divided among charitable and non-charitable beneficiaries. Similar to current law, Florida's tax apportionment statute then in effect directed that estate taxes on nonresiduary devises be borne by the residue and that estate taxes on residuary devises be borne equitable.[44] The charity argued the Article Second devise was a residuary devise and therefore the estate taxes should be apportioned to the devise rather than borne by the devises set forth in Article Third. The court disagreed and directed that the estate taxes on the Article Second devise be borne by all of the residuary devises in Article Third, including the charity.

If the decedent's estate is the beneficiary of a life insurance policy, annuity, or contractual right included in the decedent's gross estate, or is the taker as a result of the exercise or default in exercise of a general power of appointment held by the decedent, that interest shall be regarded as passing under the terms of the decedent's will for the purposes of apportioning the estate taxes in the probate estate.[45] Additionally, any interest included

[41] §733.817(3)(c)(1).
[42] §733.817(3)(c)(2).
[43] 301 So.2d 137(Fla. 4th DCA 1974).
[44] The decedent died in 1968. The applicable statute was §734.041(1)(1965).
[45] §733.817(3)(f)(1).

in the measure of the tax by reason of IRC §2041 (general power of appointment property) passing to the decedent's creditors or the creditors of the decedent's estate shall be regarded as passing to the decedent's estate.[46]

(iii) Trusts

Identical to the treatment of nonresiduary devises in testate estates, nonresiduary interests in a trust do not bear any of the federal estate taxes unless the trust residuary interest is insufficient to bear the tax.[47] Similarly, the taxes attributable to nonresiduary interests are borne by deductible and nondeductible interest in the trust residue.[48] Similar rules as those applying in testate estates apply if the trust residue is insufficient to bear all the taxes.[49]

Nondeductible residuary trust interests bear the estate taxes allocated to the trust residue.[50] Marital and charitable interests in the residue of the trust bear a portion of the estate tax attributable to nonresiduary interests, but do not bear any of the estate taxes on trust residuary interests.[51]

The term "trust" is not defined in the statute. The term "revocable trust" is defined in §733.817(1) (m) as a trust described in §733.707(3). Section 733.707(3) provides:

> "Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (e), either alone or in conjunction with any other person, is liable for the expenses of the

[46] *Id.*
[47] §733.817(3)(d)(1).
[48] *Id.*
[49] *Id.*
[50] §733.817(3)(d)(2).
[51] §§733.817(3)(d)(1) & 733.817(3)(d)(2).

administration and obligations of the decedent's estate…."

Subparagraph (e) of §733.707(3) provides that a "right of revocation" is a power retained by the decedent, held in any capacity, to:

1. Amend or revoke the trust and reinvest the principal of the trust in the decedent; or
2. Withdraw or appoint the principal of the trust to or for the decedent's benefit.

Intuitively, a "trust" is a broader term than a "revocable trust." Section 733.817(3) (d) is not limited to revocable trusts and therefore would include trusts over which the decedent had a general power of appointment and QTIP trusts.

If a trust is the beneficiary of a life insurance policy, annuity, or contractual right included in the decedent's gross estate, or is the taker as a result of the exercise or default in exercise of a general power of appointment held by the decedent, that interest shall be regarded as passing under the trust.[52]

(iv) Common Instrument Construction

Section 733.817(3)(g) provides that a will and revocable trust shall be read together in determining the allocation of inter-interest tax apportionment, if the decedent's estate is a beneficiary of the revocable trust or if the revocable trust is a beneficiary of the decedent's estate. Under these circumstances, the will and revocable trust are considered as one interest to prevent inadvertent abatement of nonresiduary devises or interest when the residue of one of the will or trust is insufficient to bear all of the tax.

[52] §733.817(3)(f)(2).

> For example, assume the decedent executed a pour-over will (a will which devises the residue to the decedent's revocable trust) containing a nonresiduary devise of the decedent's closely-held stock to decedent's daughter, and a revocable trust which contains only a residuary interest to decedent's son. Assume further the decedent dies owning only the closely-held stock in her name with the balance of her assets in the revocable trust. Without the savings provision in the tax apportionment statute, the closely-held stock would bear a portion of the tax liability because there are no assets in the residue of the probate estate. The new statute requires the will and revocable trust to be viewed as one interest so that all of the estate taxes would be borne by the devise to the son in the trust residue.

g. Protected Homesteads, Exempt Property, and Family Allowance

The tax apportionment statute exempts protected homesteads, exempt property and family allowance from apportionment of federal estate taxes.[53]

Section 731.201(33) defines "protected homestead" as:

> "Protected homestead" means the property described in s. 4(a) (1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead.

Protected homesteads, exempt property and family allowance are not allocated any of the estate taxes.[54] The statute provides the tax attributable to the protected homestead, exempt property

[53] §733.817(3)(e).
[54] *Id.*

and family allowance should be borne by the other interests in the estate or revocable trust in the following order of priority:

1. Recipients of interests passing by intestacy that are included in the measure of the federal estate tax;
2. Recipients of residuary devises, residuary interests, and pretermitted shares that are included in the measure of the federal estate tax;
3. Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.[55]

The statute contains additional detail if an elective share is present and if the foregoing interests are insufficient to pay the estate taxes.[56]

h. Other Interests

Jointly held interests, annuities, life insurance beneficiaries, recipients of property over which the decedent had a general power of apportionment and recipients of retained interests also bear a portion of the estate taxes in the proportion that the value of each such interest bears to the total value of all such interests included in the measure of the tax.[57]

2. Florida Estate Taxes

Since Florida no longer imposes an estate tax, the apportionment statute does not need to apportion a non-existent tax.

3. Other State Estate and Inheritance Taxes

Other state's estate taxes are apportioned to property included in the tax base giving due regards to deductible interests.[58] Any

[55] *Id.*
[56] *Id.*
[57] §733.817(3)(h).
[58] §733.817(2).

deduction for state taxes allowed by IRC §2058 shall be allocated to the recipients of the interests that produced the deduction.[59]

4. Generation-Skipping Transfer Taxes

"Generation-skipping transfer tax" is defined as generation-skipping transfer tax imposed by Chapter 13 of the IRC on direct skips of interests includible in the federal gross estate or a corresponding tax imposed by any state or country or political subdivision of the foregoing.[60]The term does not include any GST tax on taxable distributions, taxable terminations or any other GST transfer.[61] GST taxes on direct skips are allocated to the devise or interest giving rise to the GST tax pursuant to IRC §2603.[62]

5. Foreign Transfer Taxes

Foreign transfer taxes are also treated separately and are borne by the interests included in each separate foreign death tax. [63] The statute provides that it shall not be construed to require the personal representative or fiduciary to pay any tax levied or assessed by any foreign country, unless specific directions to that effect are contained in the will or other instrument under which the personal representative or fiduciary is acting.[64]

The foreign tax credit provided in IRC §2014 is allocated among the receipts charged with the foreign tax.[65]

D. Summary

The new statutory apportionment has been carefully drafted to resolve many of the ambiguities associated with the prior statute. The statute equitable apportions the tax and should be allowed to govern unless very good reasons exist to waive its application.

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[59] §733.817(2)(c).
[60] §733.817(1)(b).
[61] *Id.*
[62] §733.817(3)(a).
[63] The foreign tax is treated like any other tax as separate tax. *See* §733.817(2).
[64] §733.817(11).
[65] §733.817(2)(b).

Part II: Directing Against Statutory Tax Apportionment under Florida's Tax Apportionment Act

Probably for historical reasons no longer valid today, many wills contain tax apportionment provisions. It is even commonplace for individuals who have significantly less than the applicable exclusion amount to have tax apportionment clauses in their wills. Old habits die hard, but it is now time for Florida practitioners to carefully determine whether it is best to remove the tax apportionment clauses from most wills and allow the Florida tax apportionment statute to govern.

A will need not direct the payment of estate taxes. Florida law empowers the personal representative to pay taxes even without language in the will and without court approval.[66]

The practitioner should be well aware of the tax apportionment provisions of the new statute before directing against their application. In most cases, the Florida tax apportionment statute will direct the apportionment of taxes in the manner in which the decedent desires. In those rare cases in which the client, after consultation with an attorney, decides to direct against statutory apportionment, the attorney should be extremely familiar with the rules set forth in this outline. Many tax apportionment clauses are insufficient to fully direct against statutory apportionment under the new statute.

A. General Concepts

1. Governing Instrument Limitations

   The tax apportionment statute provides that a governing instrument, such as a will or trust, may call upon itself a greater share of the estate taxes than provided by statutory apportionment.[67] For example, a will can call upon itself all of the estate taxes on property passing outside of the will. But only with two exceptions (hereinafter noted), an instrument cannot shift its tax liability to another instrument. For example,

[66] §733.612(16).
[67] §733.817(4)(a). *See infra* Part V(C)(E) & (F) for the development of this law in Florida.

a will cannot shift its portion of the estate taxes to the designated beneficiary of a life insurance policy. This limitation is extremely important to bear in mind in a reverse QTIP situation.[68] The ideal is for the residual QTIP to bear the estate taxes on the reverse QTIP. Assuming federal law permits the same, the residual QTIP must contain the provision calling upon itself the tax on the reverse QTIP. Language in the reverse QTIP directing the residual QTIP to bear the tax is not sufficient in and of itself. Another option is for the Will to call upon itself the estate tax on the reverse QTIP. This may be untenable however, if the beneficiaries of the reverse QTIP and the beneficiaries of the Will are different.

One exception to the limitation set forth in the preceding paragraph is the statutory provision that a Will may call upon the decedent's revocable trust to bear the probate estate's share of the taxes.[69] In order to be effective, the will must contain an express direction to pay tax from the decedent's revocable trust by specific reference to the revocable trust.[70] Such a direction is effective unless a contrary express direction is contained in the revocable trust.[71] Note, the statute does not require that the revocable trust be a beneficiary of the estate, as required for common instrument construction under §733.817(3) (g).

Can a will call upon itself all of the estate taxes, even on property passing outside of probate, and then direct that the tax be paid by the revocable trust? The statute is not clear. The safer route is for the will to simply provide that the tax shall be apportioned as provided in the decedent's revocable trust by specific reference to the revocable trust.[72] The revocable trust should call upon itself all of the estate taxes if that is the grantor's intentions. The tax apportionment language in the

[68] A "reverse QTIP" is qualified terminable interest property to which the estate of the decedent makes the special election provided in IRC §2652(a)(3).
[69] §733.817(4)(g).
[70] *Id.*
[71] *Id.*
[72] §733.817(4)(f).

revocable trust under those circumstances is deemed to be a direction contained in the Will.[73]

In addition to a will directing that a revocable trust bear the tax otherwise allocated to the estate, a will can also impose on property over which the decedent had a general power of appointment a greater share of the tax than would be allocable to such property under the statutory scheme.[74] In the absence of an effective direction otherwise, the tax apportionment statute would apportion to general power of appointment property a pro rata share of the estate taxes.[75] The statute permits the decedent to expressly direct by will, that the general power of appointment bear the additional estate taxes caused by its inclusion in the decedent's estate.[76] If the estate also includes §2044 property, the additional estate taxes caused by the inclusion of the §2044 property is first calculated, reduces the estate taxes, and then the additional estate taxes arising from the general power of appointment property is computed. [77] This provision seems appropriate if the decedent had the power to appoint the property to their estate. In essence a direction that the general power of appointment bear the additional estate taxes is in essence a partial exercise of the power of appointment. Presumably, the tax apportionment provision must meet any requirements set forth in the power of appointment. For example, if the general power of appointment is contained in a trust agreement which requires that the exercise is only effective if the exercise makes specific reference to the trust, a boilerplate provision which directs that all general power of appointment property bear the additional tax is not sufficient in that the boilerplate provision would not specifically reference the trust. The provision to burden the general power of appointment with the additional estate taxes seem overbroad however if the decedent only had the power to appoint the property to the decedent's creditors. Is the federal government deemed a creditor of the decedent?

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[73] *Id.*
[74] §733.817(4)(e).
[75] §733.817(3)(h).
[76] §733.817(4)(e).
[77] *Id.*

2. Partial Direction Otherwise

The statute specifically permits a direction which directs against a portion of the statute.[78] Section 733.817(4)(j) provides: "An effective express direction for payment of tax on specific property or a type of property in a manner different from that provided in this section is not effective as an express direction for payment of tax on other property or other types of property included in the measure of the tax."[79] This statute permits partial waiver of statutory apportionment. For example, a decedent's Will which directs that the residue bear all of the estate taxes arising as a result of jointly held property being included in the federal gross estate is effective even though the Will does not direct against all provisions of the statute.

In fact, only in the most extreme case should a governing instrument direct totally against statutory application under §733.817. A Will which directs against §733.817 would waive all provisions of the statute including interest to interest apportionment and inter-interest apportionment. Such a broad waiver would have to be coupled with a lengthy tax clause which would cover all the interest to interest and inter-interest apportionment provisions.

Section 733.817(4) (j) provides that a partial waiver is only effective as to the extent of its direction. It is not effective as an express direction for any other apportionment provision.

B. Directing Otherwise

In order for a direction in a governing instrument to be effective to direct against inter-interest (inside the entity) apportionment, the direction in the governing instrument must be express.[80] For example, for a will to direct that nonresiduary interest bear a portion of the estate taxes, the will direction must be express.

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[78] §733.817(4)(j).
[79] *Id*.
[80] §733.817(4)(b).

Similarly, for a direction in a governing instrument to call upon itself taxes that are apportioned under the statute to other interest, the direction must expressly direct that that the property passing under the governing instrument bear the burden of taxation for property not passing under the governing instrument.[81] The statute prior to its May, 2015 rewrite, required an express reference to §733.817 or an express indication that the property passing under the governing instrument is to bear a greater share of the tax. The current statute deletes any reference to the statutory code section.

Section 733.817(4)(c) provides:

> Except as provided in paragraph (d), a direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise shall be effective to direct payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument.[82]

Presumably, the statute is adopting the more stringent test set forth in *Ferrone v. Soffes.*[83] The Third District Court of Appeal in *Ferrone* stated:

> "We conclude that the will must expressly refer to the statute, or expressly indicate that that the estate is to bear the burden of taxation for property passing outside the will (p. 147)."

The similarity between the quoted sentence in *Ferrone* and the statutory language in §733.817(4)(c) is striking. The tax apportionment statute enacted in 1997 adopted the more stringent test set forth in *Ferrone* rather than the more liberal test set forth in *Estate of Collin*.[84] The same standard remains in the current

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[81] §733.817(4)(c).
[82] Similar language was contained in the prior law at §733.817(5)(h)(4).
[83] 558 So2d 146 (Fla. 3rd DCA 1990).
[84] Public Law, c. 97-240, s. 9. *Estate of Collin*, 368 So2d 1350 (Fla. 4th DCA 1979). For a more elaborate analysis of *Ferrone* and *Collin see* Kiziah, "Estate Tax Apportionment: 'Except as Otherwise Directed'," FL BAR J., November 1990, pp 52-53, and Kiziah and

statute in subsection (4). Because the standard has remained the same, case law interpreting the prior statute will serve as guidance in interpreting the current statute.

In a three paragraph opinion, Florida's Third District Court of Appeal in *Nationsbank v. Brenner*[85] reached the conclusion that a will which contained a tax apportionment clause which specifically provided that the will was to bear all of the estate taxes "becoming due by reason of my death, whether or not such property passes under this Will" was not "clear and unequivocal" as required by then Fla. Stat. §733.817(2)(d)(1997). As discussed *infra* in Part V(F), in 1997, Florida removed the "clear and unequivocal" provision for presumably a more relaxed standard of "express."

The Second District Court of Appeal in *Estate of McClaran*[86] examined the following will provision:

> My personal representative shall pay from the residue of my estate all expenses of my last illness and funeral, costs of administration including ancillary, costs of safeguarding and delivering devises, other proper charges against my estate, *and 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"* (emphasis added by the court).

At issue is whether the foregoing tax apportionment language in the will called upon the residuary the estate taxes on life insurance included in the federal gross estate. The life insurance was paid to a life insurance trust. The court does not address why estate tax inclusion occurred. The court examined former §733.817(5)(h)(4) which contained language nearly identical to current

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Chmiel, "Estate Tax Apportionment Statutory Modification," FL BAR J., February 1993, pp. 22-28.

[85] 756 So.2d 203 (Fla. 3rd DCA 2000).

[86] 811 So.2d 799 (Fla. 2d DCA 2002).

§733.817(4)(c). Note, the foregoing tax apportionment language does not expressly call upon itself estate taxes on property passing outside of the will. However, a negative inference can be derived that the language does just that since by directing that QTIP and general power of appointment property bear their share of the taxes, the inference is made that the language was intended to call upon the residue all of the taxes less the two exceptions noted. The court refused to draw a negative inference and concluded that the will had to affirmatively call upon itself the taxes on non-probate property to be effective to do so. The life insurance was required to bear its share of the estate taxes.

Since nearly identical language exists currently in §733.817(4)(c) and that which the court examined in *Estate of McClaran*, presumably, *Estate of McClaran* remains precedent.

In *Boulis v. Blackburn*,[87] the surviving spouse elected the elective share. Because the spouse was not a U.S. citizen, the marital deduction was not available. Her election resulted in estate taxes. The decedent's will provided:

> 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 of 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.

At issue in *Boulis v. Blackburn* , as in *Estate of McClaran, supra*, was whether the tax apportionment language in the will was effective in light of §733.817(5)(h) [now §733.817(4)(c)]. Note, the will called upon itself "all" of the estate taxes. Arguably, "all" means "all." The language did not expressly call upon the residue estate taxes on property passing outside of probate. However, the will did waive the right of reimbursement. Current

[87] 16 So.3d 186 (Fla. 4th DCA 2009).

§733.817(4)(d)(3) provides that a general statement waiving all rights of reimbursement is not an express waiver of the rights provided in IRC §§2207A and 2207B. This subsection was not contained in the prior statute. Even if §733.817(4)(d)(3) had been in effect, it would not be applicable since those federal code sections were not in play in *Boulis v. Blackburn*. The court concluded that the will did expressly call upon itself the estate taxes on property passing outside of probate. The surviving spouse was required to bear a portion of the estate taxes. In the published opinion, the court does not address the waiver provision (the second sentence quoted above) but rather solely addresses the first sentence quoted above.

While the language in former §733.817(5)(h) is essentially the same as that currently in §733.817(4)(c), *Boulis v. Blackburn* remains precedent; however, the question arises as to the waiver provision. Does the enactment of §733.817(4)(d)(3) modify the conclusion? Presumably, since the court in *Boulis v. Blackburn* ignored the waiver in the case, the enactment of §733.817(4)(d)(3) would not alter the result, but, minds can differ on that conclusion.

Section 733.817(4)(c) provides "except as provided in paragraph (d)," a direction to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise shall be effective to call upon the governing instrument all the estate taxes.[88] At first glance, a will that contains the following provision presumably calls upon the probate estate all of the estate taxes:

> "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."

However as analyzed in the next section, the quoted language is not sufficient to call upon the probate residuary estate the estate taxes arising on QTIP property apportioned in accordance with

[88] §733.817(4)(c).

§2207A, retained interest property apportioned in accordance with §2207B and GST taxes apportioned in accordance with §2603.[89]

C. Federal Statutory Provisions

IRC §2207A grants the decedent's estate a right to recover from the QTIP, the additional estate taxes caused by the QTIP's inclusion in the federal gross estate. IRC §2207B permits the decedent's estate to recover from the recipient of IRC §2036 property, a portion of the estate taxes resulting from the inclusion of IRC §2036 property in the federal gross estate. Both IRC §2207A and §2207B permit the decedent in his will (or revocable trust) to waive the right of recovery provides the will (or revocable trust) specifically indicates an intent to waive the right of recovery.

Section 733.817(4)(d)(1)(a) provides that for a direction in a will or revocable trust to waive the right of recovery under IRC §2207A, the direction must expressly waive that right of recovery. The statute provides:

> An express direction that property passing under the will or revocable trust bear the tax imposed by s. 2044 of the Internal Revenue Code is deemed an express wavier of the right of recovery provided in s. 2207A of the Internal Revenue Code. A reference to "qualified terminable interest property," "QTIP," or property in which the decedent had a "qualifying income interest for life" is deemed to be a reference to property upon which tax is imposed by s. 2044 of the Internal Revenue Code which is subject to the right of recovery provided in s. 2207A of the Internal Revenue Code.[90]

According to the apportionment statute, a reference to "qualified terminable interest property," "QTIP," or property in which the decedent had a "qualifying income interest for life" is sufficient to waive the right of recovery under IRC §2207A. The statute does not require a specific reference to the QTIP property. The legislative history states that the language set forth in

[89] §733.817(4)(d).
[90] *Id.*

§733.817(4)(c) is not effective to waive the right of recovery under IRC §2207A.[91] In order to waive the right of recovery under IRC §2207A, the language must contain something more than pay all of the estate taxes on non-probate property from the estate. However, the statute does not require a reference to the specific QTIP trust or property.

The statute provides that if the property is included in the gross estate pursuant to both IRC §2041 (power of appointment property) and IRC §2044, the property is deemed included under IRC §2044.[92]

Similar to the treatment of waiving reimbursement under IRC §2207A, for a direction in a will or a revocable trust to waive recovery under IRC §2207B, the direction must expressly waive that right of recovery.[93]

An express direction that property passing under the will or revocable trust bear the tax imposed by IRC §2036 is deemed an express waiver of the right of recovery provided in IRC §2207B.[94] If the property is included in the gross estate pursuant to both IRC §2036 (retained life interest) and IRC §2038, the property is deemed includible under IRC §2038 and not IRC §2036 and there is no right of recovery under IRC §2207B.[95]

A general statement in the decedent's will or revocable trust waiving all rights of reimbursement or recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in IRC §§2207A and 2207B.[96]

These tax apportionment provisions in §733.817 concerning the federal right of recovery under IRC §§2207A and 2207B assume that the state statute can define what is sufficient to waive recovery

[91] *See* The Bill Analysis, Judiciary, Part III, p. 12, and The Bill Analysis, Rules, Part III, p. 12.
[92] §733.817(4)(d)(1)(b).
[93] §733.817(4)(d)(2).
[94] §733.817(4)(d)(2).
[95] *Id*.
[96] §733.817(4)(d)(3).

under these federal statutes. Can a state statute define a federal statute? Particularly, can Florida's statute deny a federal right of recovery when the property is includible in the gross estate under IRC §2036 simply because it also meets the definition under IRC §2038? Braun, et. al note in their article:

> The prior Apportionment Statute applied to revocable trusts long before the enactment of Section 2207B, which the authors believe was never intended to apply to revocable trusts and there is no policy reason why it should.[97]

Surely the authors are not suggesting that the state statute has priority over a federal statute simply because the state statute was enacted before the federal statute. The authors fail to cite any authority to support their belief that §2207B was never intended to apply to revocable trusts. They are correct. Section 2207B does not apply to property included solely under IRC §2038. The issue is of course that inclusion arises in many cases under both IRC §2036 and IRC §2038. The denial of a right of recovery seems misplaced in the statute. The denial is contained in subsection (4) of the statute which addresses direction against apportionment. It would seem more appropriate for the denial provision to appear in subsection (2) which covers allocation of tax in general. The constitutionality of this provision is in doubt.

Section 2603, concerning GST taxes, permits waiver if the governing instrument makes specific reference to the GST tax. Section 733.817(4)(d)(4) requires a specific reference to the tax imposed by IRC §2601, in other words, a specific reference to the GST tax is required. A reference to the generation-skipping transfer tax or IRC §2603 is deemed sufficient.[98]

IRC § 2032A(c)(5), concerning the additional tax on qualified heirs as to special use property, is silent as to whether it can be waived. The apportionment statute specifically states that the statute does not apply to IRC §2032A(c).[99]

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[97] Braun, et. al, *supra*, at p. 5.
[98] *Id*.
[99] §733.817(1)(p).

IRC §2206, which allocates estate taxes to life insurance beneficiaries, and IRC §2207, which allocates estate taxes to recipients of general power of apportionment property apply unless the decedent's Will directs otherwise. The apportionment statute does not specifically address the right of recovery provided in these two federal code sections. Presumably, since these two recovery statutes permits the decedent's will to direct otherwise and does not require the specificity required in IRC §§2207A and 2207B, they are addressed by §733.817(4)(c) which requires an express direction to call upon the governing instrument taxes that would otherwise be apportioned to such property. Section 733.817(4)(d)(3) specifically states that a "general statement in the decedent's will or revocable trust waiving all rights of reimbursement or recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in s. 2207A or s. 2207B of the Internal Revenue Code." Notable, this subsection does not address whether a general statement is sufficient to waive reimbursement or recovery under IRC §§2206 and 2207. Section 733.817(4)(c) provides that a direction in a governing instrument calling upon itself estate taxes on property not passing under the instrument is effective to call upon itself those estate taxes, except as provided in paragraph (d). Paragraph (d) does not address IRC §§2206 and 2207. Therefore, the general direction in §733.817(4)(c) appears to be sufficient to waive the right of recovery under §§2206 and 2207.

D. Conflict between Instruments

The statute departs from the will control doctrine set forth in *Estate of Strohm* ,[100] and *Yoakley v. Raese*.[101] In both of these cases, the trust provided it was to bear the portion of the estate taxes arising from its inclusion in the gross estate. In both cases, the will called upon itself all the estate taxes even on property passing outside the will. In both cases, the court held that the will controlled and thus all estate taxes fell on the probate estate, hence, the "will control doctrine." Under

[100] 241 So2d 167 (Fla. 4th DCA 1970).
[101] 448 So2d 632 (Fla. 4th DCA 1984).

the new law, the result in both cases would have been the same because in both cases the will was the last executed document.

The new tax apportionment statute abandons the "will control doctrine." If governing instruments contain effective directions that conflict as to the payment of taxes, the most recently executed tax apportionment provision controls to the extent of the conflict.[102] If a will or other governing instrument is amended, the date of the codicil to the will or amendment to the governing instrument is regarded as the date of the will or other governing instrument only if the codicil or amendment contains an express tax apportionment provision or an express modification of the tax apportionment provision.[103] A general statement ratifying or republishing all provisions not otherwise amended does not meet this condition.[104] If the decedent's will and another governing instrument were executed on the same date, the will is deemed executed after the other governing instrument.[105] Presumably, this rule applies notwithstanding the fact that it can be conclusively proved that the will was executed first.

E. Grant of Permission

A grant of permission or authority in a governing instrument to request payment of tax from property passing under another governing instrument is not a direction apportioning the tax to the property passing under the other instrument.[106]

F. Reasons for Directing Against Statutory Apportionment

As set forth *supra* in Part I, the new statutory apportionment statute is well drafted. Attorneys should allow the statute to govern unless, after consultation with the client, sufficient reasons exist to waive its application. Many wills should not contain any tax apportionment clauses. For those who feel uncomfortable with silence, consider the following clause:

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[102] §733.817(4)(h).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] §733.817(4)(i).

> "I direct that all estate, inheritance, succession, generation-skipping transfer, and other death taxes, including any interest and penalties thereon, be apportioned in accordance with applicable state and federal tax apportionment laws in effect at the time of my death."

This suggested sentence confirms federal and state tax apportionment laws. For those situations in which tax apportionment laws are being deviated from, the attorney would be well advised to have file notes explaining the intent of the waiver of statutory apportionment. Since most clients complain about the length of their wills, deleting a dangerous and unnecessary tax apportionment clause will better serve the clients and will serve to reduce malpractice exposure.

There are a few situations where a partial direction against statutory apportionment is likely warranted.

1. Pour-over Will to Revocable Trust

   Generally, in a will that pours over into a revocable trust, it may be best in most cases for the will to direct that estate taxes be apportioned in accordance with the tax apportionment in the revocable trust. As required by §§733.817(3)(g) and 733.817(4)(f), the will should specifically reference the trust agreement and provide that it is the decedent's intent that the provisions of the will and trust be viewed as a common instrument and that the tax apportionment provisions of the trust be viewed as contained in the will.

2. Reverse QTIP

   When the estate plan involves a QTIP and a Reverse QTIP trust, consideration should be given to placing in the QTIP trust a direction that it should bear the estate taxes that will be apportioned under law, both federal and state, to the Reverse QTIP trust. The Reverse QTIP trust should indicate that the QTIP trust will be bearing the estate taxes that would otherwise be borne by it. Both trusts should specifically name the other trust.

3. Deceased Spousal Unused Exclusion Amount

As discussed *supra* in Part I(C)(1)(e), the unified credit is shared among all interest included in the measure of the tax, except §2044 do not share in the unified credit except to the extent other includible interests do not exceed the unified credit. Assume a married individual dies survived by a spouse and children from a prior marriage. Assume the individual dies with her full applicable exclusion amount of $5,400,000 and with an estate plan that devises her entire estate into a QTIP trust for her surviving spouse with the remainder to her children from the prior marriage. Assume further that her executor QTIPs the entire trust and elects to transfer the full unused exclusion amount to the surviving spouse. Assume upon the surviving spouse's death, the trust has a value of $8,000,000 and the surviving spouse dies with an estate equal in amount to the basic exclusion amount at the surviving spouse's death and the deceased spouse's unused exclusion amount. Assume the surviving spouse dies a resident of Florida and devises his estate to his children from a prior marriage. Since the surviving spouse's applicable exclusion amount is equal to the property devised to his children, the federal estate taxes that arise are solely a result of the QTIP's inclusion in the surviving spouse's federal gross estate. Pursuant to IRC §2207A and Florida's apportionment statute, the QTIP must bear all of the estate taxes and does not share in any of the unified credit. The children of the surviving spouse receive the full benefit of their father's and their step-mother's applicable exclusion amounts. The children of the first spouse to die do not receive any benefit of their mother's applicable exclusion amount. Should the estate plans address this issue?

Obviously, one way to eliminate this inequity is for the first spouse's executor to make a partial QTIP election so as to take advantage of the first spouse's applicable exclusion amount. This election has the added benefit of removing the future appreciation of a portion of the estate from estate tax exposure upon the surviving spouse's estate. Unfortunately, those assets will not receive an adjustment to basis. In addition, a partial QTIP election will likely warrant a division of the QTIP into two trusts so that principal distributions, if permitted by the instrument, to the surviving spouse can be made solely from the QTIP trust. Thus,

the partial QTIP trust complicates the estate plan. In larger estates the complication may be warranted but in smaller estates it may add unnecessary expense.

Another option is for the surviving spouse's will to direct against statutory apportionment and direct that the QTIP not bear the additional estate taxes. Of course, the surviving spouse could change his or her will.

Part III: Tax Apportionment Petitions, Fiduciary Issues and Construction Issues

A. Tax Apportionment Petitions

The personal representative may petition at any time for an order of tax apportionment.[107] If no probate administration has been commenced within 90 days of the decedent's death, then any fiduciary may petition for an order of tax apportionment.[108] Six months after the decedent's death, any recipient of property can petition the court.[109]

The court can determine all issues concerning apportionment.[110] If the tax has not been finally determined, the court can determine the probable tax, apportion the probable tax and retain jurisdiction to modify the order as appropriate after the tax is finally determined.[111]

If the court finds it inequitable to apportion interest or penalties, or both, in the manner set forth in §733.817(3)(a) – (h), the court may assess liability for the payment thereof in the manner equitable.[112] If payment of any tax is not effectively directed otherwise and not apportioned by §733.817(3), the court may assess liability for the payment of such tax in the manner that the court finds equitable.[113]

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[107] §733.817(6)(a).
[108] *Id.*
[109] *Id.*
[110] §733.817(6)(b).
[111] *Id.*
[112] §733.817(3)(i)(1).
[113] §733.817(e)(i)(2).

B. Fiduciary Issues

1. Transfer of Property

A personal representative or fiduciary is not required to transfer to a recipient any property reasonably anticipated to be necessary for the payment of taxes.[114] Further, the personal representative or fiduciary is not required to transfer any property to the recipient until the amount of the tax due from the recipient is paid by the recipient.[115] If the property is transferred before final apportionment of the tax, the recipient shall provide a bond or other security for his or her apportioned liability.[116]

2. Relief from Duty

A personal representative or fiduciary may be relieved of the duty to collect the tax by an order of the court finding that:

1. The estimated court costs and attorney fees in collecting the tax will approximate or exceed the amount of the recovery;
2. The person against whom the tax is sought is resident of a foreign country other than Canada and refuses to pay the tax; or
3. It is impracticable to enforce contribution against the person apportioned the tax or the judgment is likely not collectible.[117]

C. Uncollected Tax

Any apportioned tax that is not collected shall be reapportioned in accordance with the apportionment statute as if the portion of the

[114] §733.817(5).
[115] *Id.*
[116] *Id.*
[117] §733.817(8).

property to which the uncollected tax had been apportioned had been exempt.[118]

D. Contribution

The statute provides that it does not limit the right of any person who has paid more than their fair share of the tax to obtain contribution from the others who have not paid their fair share, including the right to seek award of costs and attorney fees.[119]

E. Choice of Law Issues

Section 733.817 governs the apportionment of death taxes for Florida decedents. It addresses the apportionment of death taxes among interests, to wit, the probate estate, trusts, jointly held properties, etc. It addresses the apportionment of death taxes inside governing instruments. The statute applies to all interests and governing instruments creating those interests even those not created by the decedent. For example, the statute addresses QTIP trusts included in the Florida domiciliary estate. In nearly all cases, those QTIP trusts will have been created by the decedent's former spouse. The apportionment statute applies to those trusts regardless of when they were executed and regardless of the domicile of the grantor's of those QTIP trusts. For example, assume wife dies a resident of New York. Assume her will creates a QTIP trust for her surviving spouse which provides that upon the surviving spouse's death, $1,000,000 will be paid to her son and the balance of the trust will pass to her daughter. Under New York law, the $1,000,000 devise will bear estate taxes because of New York's equitable apportionment. If the surviving spouse moves to Florida, will Florida's apportionment statute apply and exempt the $1,000,000 nonresiduary interest from estate taxes? If the QTIP trust were to contain a tax apportionment provision, will the determination as to whether it is effective to waive statutory apportionment be determined under New York or Florida law?

[118] §733.817(9).
[119] §733.817(10).

Part IV: Effective Dates

Because most of the modifications were deemed a clarification of existing law, the new statute applies to every Florida resident decedent without regard to the date of the decedent's death and applies retroactively to all proceedings pending or commenced on or after July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed, except as follows:

> (1). The amendments made to §733.817(1)(g) and (2)(c) [both of which concern the state death tax deduction] apply to all proceedings pending or commenced on or after July 1, 2015 in which the apportionment of taxes has not been finally determined or agreed for the estates of decedents who die after December 31, 2004.
>
> (2). The amendments made to §733.817(1)(e)(3) [gift taxes included in IRC 2035], (3)(e) [protected homestead, exempt property and family allowance], (3)(g) [requiring that the will or trust pour-over into one another for common construction], (4)(b) , (4)(c), (4)(d)(1)(b), (4)(e), (4)(h) [subsection 4 concerns directing against statutory apportionment], and (6) [order of apportionment], apply to the estates of decedents who die on or after July 1, 2015.[120]

In summary, the new apportionment statute applies to all decedents dying after July 1, 2015 regardless of when the decedent's documents were executed.

Part V: History of Tax Apportionment in Florida

A. Modified Equitable Apportionment: 1949 – 1957

From June 13, 1949 to May 13, 1957, modified equitable apportionment existed in Florida. Florida Law, Chapter 25435, 1949, §1-4, equitably apportioned federal and Florida estate taxes among all property included in the gross estate, except estate taxes apportionment to property passing under the will was to be charged to

[120] Laws 2015, c. 2015-27, s. 10.

the residue of the estate.[121] The statute applied "except in a case where a testator otherwise directs in his will, and except in a case where by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument."[122] The statute provided that " [i]n all cases in which any property required to be included in the gross estate does not come into possession of the executor or administrator, as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this Act…."[123]

B. Residual Apportionment 1957- 1963

In 1957, Florida repealed its modified equitable apportionment which it had originally enacted in 1949 and enacted a statute which charged all of the estate taxes to the residuary estate.[124] The statute provided: "Nothing in this statue shall prohibit a testator from directing in his will that said taxes be apportioned or paid in a manner other than as provided in this section."[125]

C. Modified Equitable Apportionment 1963 –1992

[121] Laws 1949, c. 25435, s. 1. *See* Alan Lindsay, "Florida's Estate Tax Laws – Apportionment Versus A Charge Against Residue," 12 U. FL. L. REV. 50 (1959) and Alan Lindsay, "Florida's Estate Tax Laws – The Need for Compromise, 35 FL. BAR J. NO. 3. 164-173 (March, 1961).
[122] *Id.*
[123] *Id.*
[124] Laws 1957, c. 57-87, s. 1. *See* Alan Lindsay, "Florida's Estate Tax Laws – Apportionment Versus A Charge Against Residue," 12 U. FL. L. REV. 50 (1959) and Alan Lindsay, "Florida's Estate Tax Laws – The Need for Compromise, 35 FL. BAR J. NO. 3. 164-173 (March, 1961). Laws 1957, c. 1976, s. 1 amended Laws 1957, c. 57-87, s. 1 to provide that the act applied only to estates of decedents dying after May 13, 1957.
[125] §734.041(1), Fl. Stat. (1957).

In 1963, Florida reenacted modified equitable apportionment.[126] The statute equitable apportioned estate taxes among all those interest "included in the measure of such tax,"[127] except (1) the estate taxes apportioned to non-residual devises were charged to the residue,[128] (2) the estate taxes on inter-vivos trusts were to be charged to the corpus of the trust,[129]and (3) homesteads were exempt from tax.[130] The statute applied "except as otherwise directed by the decedent's will"[131] as to property passing under the will, "except as otherwise directed by the trust instrument with respect to the fund established thereby, or by the decedent's will,"[132] and "except as otherwise directed by the will" as to other property included in the measure of the tax.[133]
The statute was reenacted with only minor changes in 1965.[134] In 1973, the statute was amended to replace the word "county judge" with "circuit judge."[135]

In *Guidry v. Pinellas Central Bank and Trust Co.*,[136] the decedent's will was silent as to the apportionment of estate taxes. The decedent's will did not devise the probate assets to the decedent's revocable trust. In a lengthy and detailed tax apportionment clause, the decedent's revocable trust required the trustee to pay all estate taxes arising as a result of the decedent's death on all property in the gross estate. In examining §734.041(1)(e)(1973), the court held that the statute did not permit the decedent's trust to call upon itself estate taxes imposed by the statute to other interests included in the measure of the tax. Rather, the court held that the statute only permitted the will to direct against statutory apportionment on non-probate assets. The statute only permitted the trust to direct against apportionment as to property in the trust.

[126] Laws 1963, c. 63-106, s. 1.
[127] §734.041(2)(c), Fl. Stat. (1963).
[128] §734.041(1)(a), Fl. Stat. (1963).
[129] §734.041(1)(c), Fl. Stat. (1963).
[130] §734.041(1)(d), Fl. Stat. (1963).
[131] §734.041(1)(a) & (b), Fl. Stat. (1963).
[132] §734.041(1)(c), Fl. Stat. (1963).
[133] §734.041(1)(e), Fl. Stat. (1963).
[134] Laws 1965, c. 65-230, s. 1.
[135] Laws, 1973, c. 73-334, s. 28.
[136] 310 So.2d 386 (Fla. 2nd DCA 1975).

In 1974, the statute was slightly modified and the code section was moved from §734.041 to its present location at §733.817.[137] In 1975, the direction otherwise clauses existing in then §733.817(1) were moved from their prior location to the end of the sentence.[138] Minor editorial changes were made to the statue in 1977[139] and 1979.[140] The statute was not modified again until 1992.[141]

D. ***Collin, Keesee and Ferrone***

Estate of Collin[142] concerns the apportionment of estate taxes inside the decedent's will .The will provided: "I do hereby direct that all my just debts, estate taxes, and expenses of my last illness and funeral expenses be paid out of my estate."[143] The residue of the estate was divided among twelve devisees in varying percentages. Several of the devisees were charitable organizations, for which the estate was entitled to a charitable estate tax deduction.

Section 733.817(1)(b) (1977) would charge the estate taxes to those residuary beneficiaries whose devises generated the estate taxes rather than payment of the taxes "off the top" and the balance distributed to residuary beneficiaries in the percentages specified in the will. The statute applied "except as otherwise directed by the will." The charitable organizations argued that the direction in the will to charge the estate taxes to the general estate was not specific enough to direct against statutory apportionment. They urged the court to follow the law of New York and require a "clear and unequivocal" direction in the will to effectively direct against statutory apportionment.

The non-charitable beneficiaries urged the court to adopt Kentucky law which held that when estate taxes are lumped together with debts

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[137] Laws 1974, c. 74-106, s. 1.
[138] Laws 1975, c. 75-220, s. 95. This change was editorial.
[139] Laws 1977, c. 77-87, s. 41.
[140] Laws 1979, c. 79-400, s. 273.
[141] Laws 1992, c. 92-200, s. 20. *See infra* Part V, Section E.
[142] 368 So. 1350 (Fla. 4th DCA 1979). For further analysis of the case, *see* Trent S. Kiziah, "Estate Tax Apportionment: 'Except as Otherwise Directed,'" FL. BAR J., 52-53 (Nov. 1990) and Trent S. Kiziah and Felix J. Chmiel, "Estate Tax Apportionment Statutory Modification," FL. BAR J., 22-28 (Feb. 1993).
[143] 368 So.2d 1350, at 1353.

and funeral expenses in the will, the estate taxes are to be treated like administration expenses and paid out of the residue before determining the percentages gifts. The court followed the Kentucky law and stated: We do not believe that the statute mandates the use of certain magic words known only to the Probate Section of the Florida Bar. A clear and otherwise unambiguous direction is all that is required and we believe the instrument now before us so directs."[144]

In *Keesee v. Neely*,[145]the Second District Court of Appeal held that the recipients of a life insurance policy included in the decedent's federal gross estate were required to bear a portion of the estate taxes notwithstanding the decedent's will which contained the following language:

> I direct my person representative to pay all expenses incident to my last illness and death, and to pay all estate and inheritance taxes and other governmental taxes and charges, if any, legally imposed on my estate or any part of it…[146]

The court held the quoted language was ambiguous, and therefore, presumably not sufficient to direct against statutory apportionment.

On March 13, 1990, the Third District Court of Appeal addressed apportionment of estate taxes between entities in *Ferrone v. Soffes*.[147] The decedent's will provided: "I direct my Executor, hereinafter named, to pay all debts allowed as claims against my estate, my funeral expenses, and all expenses of administration of my estate, and all estate, inheritance , succession and transfer taxes which may be assessed by reason of my death."[148] As in *Collin*, the direction for payment of estate taxes in *Ferrone* was part of the same sentence directing the payment of debts and funeral expenses. The issue in

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[144] *Id*., at 1355.
[145] 498 So.2d 1026 (Fla. 2nd DCA 1986).
[146] *Id*. at 1027.
[147] 558 So.2d 146 (Fla. 3rd DCA 1990). For further analysis of the case, *see* Trent S. Kiziah, "Estate Tax Apportionment: 'Except as Otherwise Directed,'" FL. BAR J., 52-53 (Nov. 1990) and Trent S. Kiziah and Felix J. Chmiel, "Estate Tax Apportionment Statutory Modification," FL. BAR J., 22-28 (Feb. 1993).
[148] *Id*., at 147.

Ferrone, however, was the apportionment of estate taxes to property held jointly with right of survivorship.

The Third District concluded that the general language in the will was not sufficient to direct against statutory apportionment pursuant to §733.817(1)(e) (1977). The Court stated:

> We conclude that the will must expressly refer to the statute, or expressly indicate that the estate is to bear the burden of taxation for property passing outside the will. In that fashion it will be unmistakably clear that the testator considered the issue and made a deliberate decision about the burden of taxation. It is that degree of particularity which is contemplated by the phrase "otherwise directed by the will." … In the absence of such unequivocal language, the statute will govern.[149]

The Third District acknowledged that its decision was in direct conflict with *Collin* and aligned itself with the dissent in *Collin*.[150]

E. **Modified Equitable Apportionment 1992-1997**

In 1992, Florida revised §733.817 by (1) specifying that language must be inserted in the will if the executor is looking to the trustee of the decedent's revocable trust to pay the estate taxes; (2) setting forth a more stringent standard to direct against statutory apportionment; (3) imposing upon the residuary portion of a trust the taxes on specific distributions; and (4) providing that federal law in certain cases preempts the Florida apportionment statute.[151] Subsection (2) (d) provided:

> A direction against apportionment under this section may be explicit or implicit from the terms of the governing instrument, but must be clear and unequivocal; provided, however, that an implicit direction against apportionment is not sufficient to avoid the apportionment under state or applicable federal law

[149] *Id.*
[150] *Id.*
[151] Laws 1992, c. 92-200, §20. For further analysis of the law, *see* Trent S. Kiziah and Felix J. Chmiel, "Estate Tax Apportionment Statutory Modification," FL. BAR J., 22-28 (Feb. 1993).

> unless the court also finds that the testator considered and made a deliberate and informed decision about the burden of taxation.

The statutory language originates from *Ferrone*.[152] The phrase "clear and unequivocal" is "the standard" set forth in *Ferrone*. The phrase "a deliberate and informed decision about the burden of taxation" is identical to that appearing in *Ferrone*, except for the insertion of the words "and informed" in the statutory language.

Subsection (4) of §733.817 (1992) provided the following:

> "Governing instrument" means a will, a trust agreement, or any other document controlling the devolution of an asset at the death with respect to which the tax is being levied, but a direction in the will or such other instrument for the payment of tax in a manner different than that provided for herein is effective to allocate and pay tax only from assets the devolution of which is subject to control under that instrument, except that a will direction to pay tax from a trust of which the testator was the grantor and which was revocable by the grantor until the date of the grantor's death, is effective if a contrary direction is not contained in the trust agreement.

This subsection specifically permits a will to impose upon a revocable trust established by the grantor the estate taxes that the statute apportions to the probate assets. It appears the statute may prohibit any other governing instrument from directing upon itself more than its apportioned estate taxes.[153] Thus, a QTIP could not call upon itself the estate taxes that would be apportioned to the Reverse QTIP trust.[154]

Editorial revisions to the statute of no real significance occurred early in 1997.[155]

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[152] 558 So.2d 146 (Fla. 3rd DCA 1990).
[153] For further analysis of this issue *see* Trent S. Kiziah and Felix J. Chmiel, "Estate Tax Apportionment Statutory Modification," FL. BAR J., 22, 24 (Feb. 1993).
[154] *Id*.
[155] Laws 1997, c. 97-102, s. 1026.

F. Modified Equitable Apportionment 1997 – Present

Later in 1997, the Florida Legislature totally rewrote Florida's Tax Apportionment Statute.[156] While completely rewritten, the new statute represented an improvement to prior law, serving to clarify and resolve ambiguity rather than codify new law.

The 1997 re-write became law on May 30, 1997 but did not become effective until October 1, 1998.[157] The statute applies to decedents dying on or after October 1, 1998. For estates of decedents dying before October 1, 1998, the prior statute applies.

The 1997 re-write seems to relax the "clear and unequivocal" requirement to direct otherwise contained in the 1992 statute. Subsection (4) of section 733.817 provided:

> For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to this section, or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the instrument whether attributable to property passing under the governing instrument or otherwise shall be effective to direct the payment from property passing under the governing instrument to taxes attributable to property not passing under the governing instrument.

See supra Part II(B) for a full analysis of this subsection, its development and interpretation.

As set forth *supra* in Part V(E), section 733.817(4) of the 1992 statute appeared to prohibit a governing instrument from calling upon itself more than the estate taxes that would be apportioned to the governing

[156] Laws 1997, c. 97-240, s. 9.
[157] *Id*.

instrument. Subsection 733.817(5)(h)(4) (1997) specifically permits the governing instrument to call upon itself a greater share of the estate taxes provided the instrument expressly refers to the section or expressly indicates that the property is to bear estate taxes on property not passing under the instrument. This subsection resolves the ambiguity of §733.817(4)(1992) and the limitation of §734.041(1)(e)(1973) as discussed in *Guidry v. Pinellas Central Bank and Trust Co*[158] and *supra* in Part V(C).

With a few exceptions, this 1997 rewrite remains the current law. Much of the language remains the same. The changes that have occurred since 1997 are set forth *supra* in Parts I, II and III.

In 2000, editorial changes were made to the statute.[159]

The homestead protection was modified in 2001 to provide that the statute protects "protected homesteads."[160]

Slight modifications were also made in 2006 and 2010.[161]

See *supra* Parts I, II and III for changes made to the 1997 statute in 2015.[162]

[158] 310 So.2d 386 (Fla. 2nd DCA 1975).
[159] Laws 2000, c. 2000-159, s. 13.
[160] Laws 2001, c. 2001-226, s. 167.
[161] Laws 2006, c. 2006-217, s. 39 and Laws 2010, c. 2010-5, s. 122.
[162] Laws 2015, c. 2015-27, s. 6.