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THE FEDERAL ESTATE TAX BURDEN BORNE BY A DISSENTING WIDOW

*Douglas A. Kahn**

RENUNCIATION of her deceased husband's will entitles a widow¹ to a specified percentage of the husband's net estate (or a dower interest) in lieu of any benefits she would otherwise have received under the will.² The size of the dissenting widow's³ share differs among the several states, but the normal range is from one third to one half of her husband's net estate. In some jurisdictions the widow's share is determined, in whole or in part, according to the portion to which she would be entitled if her husband had died intestate, but in these jurisdictions the widow's share generally cannot exceed a specified percentage of the estate.⁴ The property of the decedent that is subject to the widow's dissent is described by such terms as "the net estate," "the surplus after payment of debts," or the "remainder of the personal property."⁵ Whatever language is employed, the thrust of the statutory provisions is to protect a widow by giving her an election to take, in lieu of her husband's testamentary gifts, a specified share of his real and personal property remaining after payment of funeral expenses, administrative expenses, and other claims against the estate.⁶

In situations where the decedent's estate is of sufficient size to cause the imposition of federal estate taxes, the question arises whether the dissenting widow's share is computed as a fraction of the decedent's net estate after deducting federal estate taxes, or whether her share is a fraction of the decedent's net estate computed without regard to estate taxes. In other words, is the widow obligated

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1. For convenience, reference in this article is made only to a widow, but the discussion is equally applicable to a widower who is permitted by local law to renounce his deceased spouse's will (or who is entitled to an intestate share of her estate), and thereby becomes entitled to a forced share of her estate.

2. ATKINSON, *WILLS* 123 (2d ed. 1953).

3. As used in this article, the term "dissenting widow" refers to a widow who has renounced her husband's will.

4. *E.g.*, D.C. CODE ANN. § 18-211(e) (1961 Supp. III); MICH. STAT. ANN. § 27.3178 (139) (1962 Rev.); N.Y. DECED. EST. LAW § 18. Some jurisdictions permit the surviving widow to take more than half of the decedent's estate (*e.g.*, MONT. REV. CODES ANN. § 22-107 (1947)), and some provide her with less than one third (*e.g.*, CONN. GEN. STAT. ANN. § 46-12 (1958 Rev.) (providing a dissenting widow with a life interest in one third of the decedent's estate)).

5. *E.g.*, N.C. GEN. STAT. §§ 29-14, 30-3 (Supp. 1965); N.Y. DECED. EST. LAW § 83.

6. See, *e.g.*, *Mead v. Phillips*, 135 F.2d 819, 824 (D.C. Cir. 1943); *Marans v. Newland*, 143 Mont. 388, 394-95, 390 P.2d 443, 446 (1964).

to bear a proportionate part of the federal estate tax liability? This question has become particularly important since the adoption in 1948 of the marital deduction provisions,⁷ under which all or part of the widow's share may constitute an estate tax deduction for the decedent's estate, thus avoiding any estate tax liability.⁸ It appears manifestly unfair to impose an estate tax burden upon the widow when her share of the estate is excluded from the computation of the tax.⁹ Understandably, there has been substantial litigation over this issue.

The significance of this problem does not rest solely with determining the size of the widow's share vis-à-vis the other beneficiaries. The resolution of the problem will also affect the size of the estate tax payable to the federal government, since the tax is determined in part by the amount of property passing to the widow that qualifies for the marital deduction.¹⁰ Consequently, even if the other beneficiaries of the decedent's estate desire that the widow take the largest share to which she is entitled, the question of the size of the widow's share may be litigated with the Commissioner of Internal Revenue.¹¹ The following hypothetical situation illustrates the dramatic differences in tax liability and in the beneficiaries' participation in the estate depending on whether the widow's share is computed before or after deducting estate taxes.

It is to be assumed that John Hill died leaving a gross estate of \$1,200,000. John's will provided that all of his property should be placed in a trust, under which his wife, Mary, is to receive an income interest for life; upon her death the corpus is to be distributed among John's issue. John's estate had administrative and funeral expenses totaling \$200,000, of which \$140,000 was deducted from the gross

7. Revenue Act of 1948, ch. 168, § 361, 62 Stat. 116. The marital deduction is embodied in INT. REV. CODE OF 1954, § 2056.

8. Of course, the widow's share of the decedent's estate is liable to the federal government for the payment of any and all estate taxes in the same manner that all of the property comprising the decedent's estate is liable for the tax; in other words, the tax constitutes a lien on all of the property comprising the decedent's estate. INT. REV. CODE OF 1954, § 6324.

9. See *Pitts v. Hamrick*, 228 F.2d 486, 490 (4th Cir. 1955).

10. A widow's statutory share is deemed to have passed to her from her deceased husband (INT. REV. CODE OF 1954, § 2056(e)); therefore, if such property does not exceed the maximum limitation and does not constitute a terminable interest (for example, a widow's dower interest, unless commuted, is a terminable interest), it will qualify for the marital deduction. While the Government has contested deductions claimed for a widow's commuted dower interest, the courts have allowed such deductions. *First Nat'l Bank v. United States*, 335 F.2d 91 (4th Cir. 1964); *Wachovia Bank & Trust Co. v. United States*, 234 F. Supp. 897 (M.D.N.C. 1964).

11. See *Merchants Nat'l Bank & Trust Co. v. United States*, 246 F.2d 410 (7th Cir. 1957).

estate.¹² Since the trust corpus does not qualify for the marital deduction, John's executor would report a taxable estate of \$1,000,000 (\$1,200,000 minus [\$140,000 expenses plus \$60,000 exemption]), and the estate will pay an estate tax of \$325,700.

Instead of incurring the above tax, however, assume that Mary's attorney advised her to renounce John's will and to take her statutory share, which under local law is one half of John's net estate. If Mary's statutory share is computed before deducting estate taxes, she will receive \$500,000,¹³ all of which is deductible by the estate. The executor would report a taxable estate of \$500,000, and an estate tax of \$145,700 would be due. The remaining \$354,300 would be distributed to John's issue. If Mary's share is computed after deducting the federal estate taxes, the computations are embroiled in a circuitry, since the amount of the estate tax depends upon the size of Mary's share, and the size of her share is also determined by the amount of tax that is due. The interdependence of these two factors can be resolved by a tedious trial-and-error method or by utilizing a mathematical formula.¹⁴ Accordingly, the size of the widow's share is \$411,698, the estate tax payable to the government is \$176,605, and the amount distributable to John's issue is \$411,697.

Thus, if the widow's statutory share is computed after deducting estate taxes, rather than without regard to such taxes, her share of the estate will be reduced by \$88,302; the federal estate tax liability will be increased by \$30,905; and the share which belongs to John's issue will be increased by \$57,397. It should be noted that in the foregoing hypothetical, the decedent's family might desire that the widow receive a larger share, even at the cost of a reduction of their own share, in order to obtain a greater estate tax deduction, or they might be unwilling to sacrifice part of their share. In any event, the Commissioner may disallow part of the marital deduction if he decides that under local law the widow's share must bear a proportionate part of the estate tax. While the principal concern of this article is the impact of federal estate taxes on a widow's statutory

12. Under INT. REV. CODE OF 1954, § 642(g), the executor may elect to treat administrative expenses, in whole or in part, as either estate tax deductions or income tax deductions. In the hypothetical, it is assumed that \$60,000 of administrative expenses were treated as an income tax deduction.

13. Mary's share would be half of \$1,200,000 minus the \$200,000 expenses for administration and the funeral.

14. P-H FED. EST. & GIFT TAX SERV. ¶ 120576. See *Second Nat'l Bank v. United States*, 351 F.2d 489, 495 (2d Cir. 1965), where the court stated: "The intricate algebraic formulae and the arithmetical backing and filling required to compute the tax attest to this complexity."

share, it should be noted that identical questions arise in situations where the widow's husband dies intestate.

The protagonists for burdening the widow's interest with federal estate taxes rely primarily on the statutory language of the specific local law provisions that delineate the size of her forced share. Their contention is that the federal estate tax is a claim against the estate, and that it is similar to debts of the decedent and administrative and funeral expenses. They feel that since the widow's share is a percentage of the net estate, which is computed after satisfaction of all estate obligations other than testamentary dispositions, the federal estate taxes should be treated no differently from other claims and accordingly should be deducted prior to computing the widow's share.¹⁵ Except where the applicable state statute under which the widow dissents specifically refers to federal estate taxes,¹⁶ the conflict of decisions on this issue cannot be explained solely by reference to the differences in language employed in the various statutes. Virtually all such statutes will accommodate a construction that the estate tax must first be deducted, and indeed, when read literally, the statutes may well indicate that result. However, many of these statutes were enacted prior to the 1948 adoption of the marital deduction provision, which altered the widow's position with regard to the estate's tax liability, so that her tax posture is now quite different from her position with regard to other estate obligations. Consequently, the dispositive issue is not merely a designation of the literal meaning of the statutory language; rather, there must be a determination of the legislative policy underlying the statute and of the question whether the deduction of federal estate taxes furthers or frustrates that policy.¹⁷ Even where the state statute was

15. See *Herson v. Mills*, 221 F. Supp. 714 (D.D.C. 1963); *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954); *Guaranty Nat'l Bank v. Mitchell*, 111 S.E.2d 494 (W. Va. 1959). The writer was counsel for the plaintiff in *Herson*.

16. See N.C. GEN. STAT. § 30-3 (Supp. 1965). Compare *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963), with *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

17. See *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386 (1948), where the Court quoted from *People of Puerto Rico v. Shell Oil Co.*, 302 U.S. 253, 258 (1937): "Words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." For examples of an application of the above canon of construction to the computation of a widow's share, see *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964); *In re Wolf's Estate*, 307 N.Y. 280, 121 N.E.2d 224 (1954).

enacted or amended after 1948, it is quite possible that the special problems created by the adoption of the marital deduction provision were not considered by the legislature.

The arguments in favor of disregarding estate tax liability in computing the widow's share will normally fall into one or more of five broad categories. First, it is argued that under local statutes or equitable doctrines, federal estate tax liability should be borne proportionately by the property included in the decedent's taxable estate, and to the extent that the widow's share constitutes an estate tax deduction, it is not included in the decedent's taxable estate and therefore should not bear any part of the estate tax liability.¹⁸ Second, many people point out that the congressional purpose for enacting the marital deduction provisions in 1948 was to minimize the disparity in federal tax treatment of married couples in community property and common-law states, and that burdening the widow's share with a portion of the estate tax (with a corresponding increase in estate tax liability) creates substantial tax disadvantages to which an estate in a community property jurisdiction is not subject. Consequently, the congressional policy of substantial equalization would be frustrated if the widow's share were included in the taxable estate.¹⁹ Third, it is frequently argued that the imposition of a portion of the estate tax burden on the widow's deductible share is "unfair and unjust" because it requires her to satisfy an obligation arising from the disposition of property which she did not make or receive.²⁰ Fourth, it is asserted that the state's legislative purpose in enacting a forced share provision—protection of the widow against insufficient testamentary recognition by her deceased husband—may be frustrated where the widow's share is burdened by estate taxes, which in some circumstances could reduce her share to little or nothing.²¹

18. See *In re Fuch's Estate*, 60 So. 2d 536 (Fla. 1952); *Seymour Nat'l Bank v. Heide-man*, 133 Ind. App. 104, 178 N.E.2d 771 (1961); *Jones v. Jones*, 376 S.W.2d 210 (Mo. 1964) (en banc); *In re Wolf's Estate*, *supra* note 17; *In re Rosenfeld's Estate*, 376 Pa. 42, 101 A.2d 684 (1954).

19. See *Dodd v. United States*, 345 F.2d 715 (3d Cir. 1965); *First Nat'l Bank v. United States*, 233 F. Supp. 19 (D. Kan. 1964) (widow's intestate share); *In re Glover's Estate*, 371 P.2d 361, 378 (Hawaii 1962) (Lewis & Mizuha, JJ., dissenting); *Lincoln Bank & Trust Co. v. Huber*, 240 S.W.2d 89 (Ky. Ct. App. 1951); *In re Burnett*, 50 N.J. Super. 482, 142 A.2d 695 (1958) (testamentary residuary bequest to widow).

20. See *Pitts v. Hamrick*, 228 F.2d 486, 489 (4th Cir. 1955); *Hammond v. Wheeler*, 347 S.W.2d 884, 893 (Mo. 1961); *Gesner v. Roberts*, 88 N.J. Super. 278, 212 A.2d 43 (Ch. 1965) (testamentary residuary bequest to widow).

21. See *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964); *In re Wolf's Estate*, 307 N.Y. 280, 121 N.E.2d 224 (1954). The danger that the tax might destroy the widow's share is not merely hypothetical. For example, *In re Gato's Estate*, 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950), involved an estate where the

Fifth, it is urged that the legislature of a common-law state would probably desire that the "geographical equalization" sought by Congress in enacting the marital deduction be enjoyed by the citizens of that state to the fullest extent, and that this objective cannot be accomplished if the widow's deductible share bears the estate tax.²² Finally, in one case involving a testamentary residuary bequest to the surviving widow, the court suggested an additional ground. The court concluded that the probable intent of the deceased husband was to obtain the maximum deduction and thereby minimize estate taxes, and in the absence of a showing of a contrary intent, that purpose should be fulfilled.²³ However, that rationale is not very persuasive in the case of a dissenting widow.

Before discussing the relative merits of the dissenting widow's position, it may be helpful to consider the applicability and operation of federal estate tax apportionment, whether by statute or by judicial construction, since apportionment is one of the major arguments offered on behalf of the widow. Once the principle of apportionment is in focus, we can then examine the several contentions discussed above.

I. APPORTIONMENT OF FEDERAL ESTATE TAXES

From its inception in 1916, the federal estate tax law has required that the decedent's executor make the estate tax payments that are due the Government.²⁴ Because of this provision, the courts in many early cases determined that federal law required that the estate tax be paid out of the residue of the estate without contribution from other probate and non-probate assets.²⁵ In response to those decisions,

net probated value was \$180,571, but the total federal estate tax (arising in part from property transferred during the decedent's life that was nevertheless included in his taxable estate) totaled more than \$190,500. In that case, the widow's share was saved through the application of an equitable apportionment of the estate tax.

22. See *Dodd v. United States*, 345 F.2d 715 (3d Cir. 1965); *Gesner v. Roberts*, 88 N.J. Super. 278, 212 A.2d 43 (Ch. 1965).

23. *Gesner v. Roberts*, *supra* note 22.

24. Revenue Act of 1916, ch. 463, § 207, 39 Stat. 779. Section 208 of the Revenue Act of 1916, 39 Stat. 779 (the predecessor of INT. REV. CODE OF 1954, § 2205) provided that if any person other than the executor acting as such paid the estate tax, that person was entitled to reimbursement from the undistributed estate or to contribution from the distributees of the estate whose shares would have been reduced if the estate tax had been paid prior to distribution of the estate.

25. See *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265 (1919); *Farmers Loan & Trust Co. v. Winthrop*, 238 N.Y. 488, 144 N.E. 769 (1924); *Y.M.C.A. v. Davis*, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd*, 264 U.S. 47 (1924). *Contra*, *Hampton's Adm'rs v. Hampton*, 188 Ky. 199, 221 S.W. 496 (1920). For a discussion of the history of estate tax apportionment, see Sutter, *Apportionment of Federal Estate Taxes*, 51 MICH. L. REV. 53 (1952).

the New York legislature enacted a statute in 1930 providing for the apportionment of federal estate taxes, unless the decedent directed otherwise, among the persons entitled to any property included in the gross estate of the decedent for federal estate tax purposes.²⁶ An increasing number of states have followed New York's example, and have adopted some form of apportionment of federal estate taxes.²⁷

The New York apportionment statute was held unconstitutional in a 1941 decision of the New York Court of Appeals on the ground that the estate tax laws required that the tax be borne by the residue of the estate, and that the New York statute therefore contravened federal law.²⁸ In *Riggs v. Del Drago*,²⁹ the United States Supreme Court reversed the New York decision, upheld the constitutionality of New York's apportionment statute, and resolved beyond dispute that Congress intended that the determination of the ultimate placing of the estate tax burden rest on state law rather than federal law. Since the *Riggs* decision, the courts have uniformly applied state law, and indeed have moved so far from the earlier decisions applying federal law that the Supreme Court of North Carolina has suggested that Congress might be constitutionally prohibited by the tenth amendment from preempting state-law control.³⁰

A. Equitable Apportionment

In many of those states that do not have apportionment statutes, the local courts have nevertheless effected an apportionment of federal estate taxes pursuant to the doctrine of "equitable apportionment," which is nothing more than a specific application of the

26. N.Y. Decedent Estate Law, ch. 709, § 124, Laws of 1930. In apportioning the tax, allowance was made for deductions permitted under the tax laws. This statute, as modified, is now N.Y. DECED. EST. LAW, art. 4, § 124.

27. E.g., ARK. STAT. ANN. tit. 63, § 150 (1958); CAL. PROB. CODE §§ 970-77; CONN. GEN. STAT. ANN. § 12-401 (1958); DEL. CODE ANN. tit. 12, § 2901 (1953); FLA. STAT. ANN. § 734.041 (Supp. 1965); LA. REV. STAT. §§ 9.2431-38 (1965); MD. ANN. CODE art. 81, § 162 (1965 Replacement); MASS. ANN. LAWS ch. 65A, § 5 (1964); MICH. STAT. ANN. § 27.3178 (167.101-111) (Supp. 1965); MINN. STAT. ANN. §§ 525.521-28 (Supp. 1965); NEB. REV. STAT. § 77-2108 (1958); N.H. REV. STAT. ANN. §§ 88-A:1 to :12 (Supp. 1965); N.J. STAT. ANN. §§ 3A.25-30 to -38 (1953); OKLA. STAT. ANN. tit. 58, §§ 2001-11 (Supp. 1965); PA. STAT. ANN. tit. 20, §§ 881-87 (Supp. 1965); TENN. CODE ANN. § 30-1117 (1955); VA. CODE ANN. §§ 64-150 to -155 (1950); W. VA. CODE OF 1961, tit. 2, § 4162(1); WYO. STAT. §§ 2-336 to 346 (Supp. 1965). Under an Alabama statute, the tax is to be paid from the residuary of the estate without proration, unless the decedent provided otherwise. ALA. CODE tit. 51, § 449(1) (1958).

28. *In re Del Drago's Estate*, 287 N.Y. 61, 38 N.E.2d 131 (1941).

29. 317 U.S. 95 (1942). See also *Rogan v. Taylor*, 136 F.2d 598 (9th Cir. 1943).

30. See *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953).

equitable concept of contribution.³¹ However, the courts of a number of jurisdictions have rejected this equitable doctrine.³²

Equitable contribution is an ancient doctrine grounded on the premise that persons having a common interest in property, or a common burden, should bear in proportion any obligation imposed thereon, or any such common burden. Specifically, if several parties will benefit from the removal of a lien or similar obligation, then all of them should bear the cost of that removal, and where one of them has borne a disproportionate share of the cost, he is entitled to contribution from the others.³³

While the payment of the estate tax is the immediate responsibility of the executor,³⁴ the obligation is imposed on him only for convenience of collection, and all of the assets comprising the decedent's gross estate (including non-probate assets) are subject to a lien for unpaid taxes. Similarly, each of the persons receiving property from the decedent (before or after his demise and by reason of any action or inaction of the decedent) that is included in the decedent's gross estate is personally liable, to the extent of the value of such property at the date of decedent's death, for any unpaid tax.³⁵ Consequently, it would be inequitable to impose the burden of the estate tax on one or more transferees of decedents' properties while exempting others, since all the transferees benefit proportionately by the payment of the tax and the concomitant release from both the lien on their property and the personal liability. The courts of a number of states having no apportionment statute have applied equitable apportionment so that the estate tax is not borne solely by the residuary legatees, but rather is shared by those who received from the decedent, either prior to or at the time of his death, property or interests in property that are included in the decedent's gross estate.³⁶

31. *E.g.*, *Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 94 A.2d 703 (1953); *Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136, 96 N.E.2d 918, *rehearing denied*, 98 N.E.2d 232 (1951).

32. See *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953); *Guaranty Nat'l Bank v. Mitchell*, 111 S.E.2d 494 (W. Va. 1959).

33. 2 POMEROY, *EQUITY JURISPRUDENCE* § 407, at 147-48 (5th ed. 1941). See also *Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 409, 94 A.2d 703, 708 (1953).

34. INT. REV. CODE OF 1954, § 2002.

35. INT. REV. CODE OF 1954, § 6324.

36. Equitable apportionment has been applied by the following states: Colorado (*Ramsey v. Nordloh*, 354 P.2d 513 (Colo. 1960)); Georgia (*Regents of the University System of Georgia v. Trust Co.*, 194 Ga. 255, 21 S.E.2d 691 (1942)); Indiana (*Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136, 96 N.E.2d 918, *rehearing denied*, 98 N.E.2d 232 (1951)); Iowa (*Kintzinger v. Millin*, 254 Iowa 173, 117 N.W.2d 68 (1962)); Kentucky (*Trimble v. Hatcher's Executors*, 295 Ky. 178, 173 S.W.2d 985 (1943), *cert.*

B. Differentiation Between Probate and Non-Probate Assets

Assets or interests in assets may be included in a decedent's gross estate for tax purposes, even though they are not subject to probate. Such non-probate assets include life insurance, jointly held property, certain inter vivos transfers, and property over which the decedent possessed a general power of appointment.³⁷ The courts have been more receptive to a claim for contribution from the recipients of non-probate assets than to a claim for contribution from testamentary legatees and devisees.³⁸ This distinction conforms with the principal underlying purpose of apportionment rules, and indeed of all rules concerning the disposition of a decedent's estate, that is, to accomplish the testator's wishes, and where the testator's intent is not shown, to provide rules that are most likely to approximate the testator's desires. A testator is often unaware of the estate tax consequences caused by non-probate assets; if he had been informed, he might have desired that the recipients of the non-probate property bear their proportionate share of the tax. On the other hand, a testator is usually aware of the potential estate tax burden on his testamentary estate and presumably intends that the estate tax imposed on the testamentary estate will be borne solely by the residue of his estate.³⁹ Moreover, administrative expenses of the estate and claims against the estate for the decedent's debts are a

denied, 321 U.S. 747 (1944)); Maine (*Gragdon v. Worthley*, 153 A.2d 627 (Me. 1959)); Missouri (*Hammond v. Wheeler*, 347 S.W.2d 884 (Mo. 1961); *Carpenter v. Carpenter*, 364 Mo. 782, 267 S.W.2d 632 (1954)); Montana (*Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964)); New Mexico (*In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953)); Ohio (*McDougall v. Central Nat'l Bank*, 157 Ohio St. 45, 104 N.E.2d 441 (1952)); Oregon (*Beatty v. Cake*, 236 Ore. 498, 387 P.2d 355 (1963)); Rhode Island (*Boyd v. Jordan*, 168 A.2d 286 (R.I. 1961); *Industrial Trust Co. v. Budlong*, 77 R.I. 428, 76 A.2d 600 (1950)); South Carolina (*Myers v. Sinkler*, 110 S.E.2d 241 (S.C. 1959)).

The Court of Appeals for the Seventh Circuit applied equitable apportionment to require contribution by an inter vivos trust in a situation where Arizona law was controlling. *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963). Moreover, the courts of several states with apportionment statutes have applied equitable apportionment in cases arising under facts controlled by the laws of such states prior to the adoption of the apportionment statutes. See, e.g., *Wilmington Trust Co. v. Copeland*, 33 Del. Ch. 399, 94 A.2d 703 (1953); *Succession of Ratcliff*, 212 La. 563, 33 So. 2d 114 (1947); *In re Gato's Estate*, 276 App. Div. 651, 97 N.Y.S.2d 171, *aff'd*, 301 N.Y. 653, 93 N.E.2d 924 (1950) (applying Florida law).

37. INT. REV. CODE OF 1954, §§ 2035-38, 2040-42.

38. See *In re Glover's Estate*, 371 P.2d 361, 372 (Hawaii 1962), where the court refused to relieve the dissenting widow's share of the burden of estate taxes, but expressly left undecided the question whether contribution could be required from beneficiaries of non-probate assets under principles of equitable apportionment. See also *Carpenter v. Carpenter*, 364 Mo. 782, 267 S.W.2d 632 (1954).

39. See *St. Louis Union Trust Co. v. Krueger*, 377 S.W.2d 303 (Mo. 1964) (en banc); *Beatty v. Cake*, 236 Ore. 498, 387 P.2d 355, 359 (1963).

charge against all of the assets of the probate estate, but payment is made from the residue, if there are sufficient assets in the residue, because of a predetermined priority of abatement. To the extent that estate taxes arise on account of assets in the probate estate, they should be treated similarly. However, to the extent that estate taxes arise on account of non-probate assets, the recipients of those assets should not be permitted to benefit from a rule of abatement established for probate assets.

The rules applying or rejecting apportionment of taxes, whether established by statute or judicial decision, are operative only when the decedent has failed to indicate his intent, and of course they must yield to an express provision (or even to an implied expression of intent) in the decedent's will concerning an allocation of the tax burden.⁴⁰ Indeed, in *United States v. Goodson*,⁴¹ involving the law of Minnesota, which at the time of the case had no apportionment statute and had rejected equitable apportionment,⁴² the court required contribution from the recipients of non-probate assets (the trustee of an inter vivos trust created by the decedent, and co-owners of property held jointly with the decedent), even though there was no provision for such payment in the trust instrument or in the deed. The court grounded its decision on a provision in the decedent's will stating that he desired that non-probate assets should bear their proportionate share of the tax.

As noted above, courts fashioning rules of equitable apportionment properly distinguish between probate and non-probate assets and require contribution only from recipients of the latter, since that result will most frequently represent the unexpressed intent of the decedent. However, the tax apportionment rules enacted by state legislatures have a broader reach and usually require contribution from testamentary beneficiaries as well.⁴³ Thus, the burden is placed

40. *Ramsey v. Nordloh*, 354 P.2d 513 (Colo. 1960); *Knowles v. National Bank*, 345 Mich. 671, 76 N.W.2d 813 (1956); *Commerce Trust Co. v. Starling*, 393 S.W.2d 489, 494 (Mo. 1965); *Case v. Roebeling*, 42 N.J. Super. 545, 127 A.2d 409 (1956); *Baylor v. National Bank of Commerce*, 194 Va. 1, 72 S.E.2d 282 (1952). Of course, in situations where a widow renounces her deceased husband's will, she cannot be deprived of her rights to equitable or statutory apportionment by a provision in that will, nor can she benefit from any provision in the will imposing the tax burden on the residuary estate. See *Herson v. Mills*, 221 F. Supp. 714 (D.D.C. 1963); *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964); *In re Uihlein's Will*, 264 Wis. 362, 59 N.W.2d 641 (1953). But see *In re Barnhart's Estate*, 102 N.H. 519, 162 A.2d 168 (1960); *Commerce Union Bank v. Albert*, 201 Tenn. 631, 301 S.W.2d 352 (1957) (granting a dissenting widow the benefits of a tax clause in her deceased husband's will).

41. 253 F.2d 900 (8th Cir. 1958).

42. *Gelin v. Gelin*, 229 Minn. 516, 40 N.W.2d 342 (1949). Minnesota subsequently enacted an apportionment statute. See note 27 *supra*.

43. E.g., MICH. STAT. ANN. § 27.3178 (167.101-111) (1965 Supp.); N.Y. DECED. EST.

on the testator to indicate a contrary intent if he prefers to exempt certain bequests or devises from estate tax burdens. It is difficult to determine whether that aspect of the apportionment statutes is the product of a legislative determination of the likely intention of a decedent, or whether it is an expression of legislative policy favoring an equitable distribution of the estate tax burden. In any event, the equitable distribution of the tax burden has some visceral appeal, and a testator retains the power to change this result if he wishes to do so by inserting an appropriate tax clause in his will.

There is one area of testamentary disposition that clearly warrants the application of rules of apportionment: the bequest and devise of a fractional share of a decedent's estate to his widow. In most instances, the testator wishes to obtain the maximum marital deduction, and he may have refrained from giving his widow his entire estate only for tax reasons. Consequently, the widow's share should be exonerated from estate tax burdens to the extent that it qualifies for the marital deduction, since that result would accomplish the intent of the testator in most circumstances. The widow's share is normally exonerated under apportionment statutes, either by express reference or by a provision that any deduction or exemption allowed by reason of the relationship of any person to the decedent shall inure to the benefit of that person. It is more difficult to utilize the doctrine of equitable apportionment for this purpose, but it is this writer's view that it should be so applied. A testator's desire to minimize taxes is no less typical than his desire that non-probate assets participate in the satisfaction of the estate tax obligation. A recent decision of the Court of Appeals for the Third Circuit exonerated a widow's fractional share of the residue in a situation where no apportionment rules were applicable.⁴⁴ This decision was based partially on the presumption that the testator intended to minimize the estate tax burden.

The unique considerations compelling contribution from the recipients of non-probate assets are perhaps best demonstrated by the fact that it is only as to such assets that the federal government has undertaken to prescribe the manner of apportionment of the estate tax burden, although only two classes of non-probate assets

LAW art. 4, § 124; see *Jerome v. Jerome*, 139 Conn. 285, 93 A.2d 139 (1952). Florida, Massachusetts, and New Jersey either do not provide for tax apportionment among probated assets or have a form of apportionment different from that provided for non-probate assets. See FLA. STAT. ANN. § 734.041 (Supp. 1965); MASS. ANN. LAWS ch. 65A, § 5 (1964); N.J. STAT. ANN. § 3A.25-31 (1953).

44. *Dodd v. United States*, 345 F.2d 715 (3d Cir. 1965).

are covered by the federal statutes. As early as 1919, the federal estate tax law empowered executors to recover contributions for payment of estate taxes from the beneficiaries of insurance on a decedent's life, if the insurance proceeds were included in the decedent's gross estate. This provision, with a few modifications, has remained effective since that date.⁴⁵ From 1919 until 1942, the only federal provision for apportioning estate taxes applied to life insurance proceeds. In 1942, Congress enacted a similar provision requiring contribution from persons receiving property over which the decedent once possessed a general power of appointment, if such property were included in the decedent's gross estate.⁴⁶ In 1948, when Congress adopted the marital deduction provisions for the estate tax, it amended these two apportionment provisions to preclude contribution from insurance proceeds or appointive property which passes or has passed to the surviving spouse and for which a marital deduction was allowed.⁴⁷ The two provisions are now set forth in sections 2206 and 2207 of the Internal Revenue Code of 1954 and constitute the only provision for apportionment of estate taxes in federal law. It is difficult to understand why these two types of non-probate assets have been singled out while other non-probate properties included in the decedent's gross estate (such as jointly held property, transfers in contemplation of death, and transfers with retained life interests) have been ignored. The two sections have been criticized as piecemeal legislation, and it has been suggested that they should either be expanded or repealed.⁴⁸ An expansion of these provisions to provide for tax apportionment as to all property included in the decedent's gross estate would eliminate both the patchwork of apportionment rules that now apply throughout the fifty states and the difficult conflict-of-laws question whether contribution from recipients of the property of the decedent is determined under the law of the state in which the decedent was domiciled at death or under the law of the state in which the situs of the property is located.⁴⁹ In the

45. Revenue Act of 1918, ch. 18, § 408, 40 Stat. 1100 (1919). This provision, as amended, is now contained in INT. REV. CODE OF 1954, § 2206. Of course, this rule for apportionment is inapplicable when the decedent has provided in his will for some other scheme.

46. Revenue Act of 1942, ch. 619, § 403(c), 56 Stat. 943. This provision, as amended, is now contained in INT. REV. CODE OF 1954, § 2207. The rule for apportionment is inapplicable if the decedent has made some other provision in his will.

47. Revenue Act of 1948, ch. 168, § 365, 62 Stat. 124.

48. See Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799, 813 (1943), where it is suggested that the better alternative was to repeal both provisions and leave the matter entirely to state law.

49. See Scoles, *Apportionment of Federal Estate Taxes and Conflicts of Laws*, 55 COLUM. L. REV. 261 (1955). Compare *Doetsch v. Doetsch*, 312 F.2d 323, 327-28 (7th Cir. 1963), and *In re Bernays' Estate*, 150 Fla. 414, 7 So. 2d 444 (1942), with *Isaacson v.*

absence of federally imposed uniformity, a beneficiary's estate tax burden may vary greatly under the laws of the several states, and in our mobile society the controlling state law may change from year to year as the decedent changes his domicile or as the situs of the property changes. Therefore, the extent of a beneficiary's federal tax burden may turn on where the decedent happened to reside at the date of his death or where the trustee of an inter vivos trust holds the trust corpus. Of course, a testator can control the apportionment of taxes by a specific provision in his will, but it is doubtful that the testator could require tax contribution from an irrevocable inter vivos trust through a testamentary provision.⁵⁰ Moreover, the testator might be reluctant to insert a provision in the trust instrument requiring the trustee to pay any estate taxes caused by inclusion of the trust corpus in the grantor's estate, for fear that such a provision might have adverse probative value in a controversy with the Government as to whether the trust corpus was transferred in contemplation of death.

The question has been raised whether the tenth amendment precludes Congress from enacting provisions determining the ultimate burden of estate taxes, and whether the authority of Congress is limited solely to the imposition and collection of the tax.⁵¹ However, it appears virtually certain that Congress, having the power to levy an estate tax, also has the power to determine who shall bear the cost of that tax.⁵² The validity of sections 2206 and 2207 may yet be tested, since Alabama law provides *inter alia* that estate taxes shall be paid out of the residue of the estate, and that the executor has no duty to recover from anyone a pro rata portion of the estate tax attributable to inclusion of property, including life insurance proceeds, in the decedent's gross estate.⁵³ The Alabama provision appears irreconcilable with the federal statutes.

II. APPORTIONMENT AND THE DISSENTING WIDOW'S SHARE

In several instances, courts have treated the existence or absence of apportionment rules as virtually dispositive of a dissenting widow's

Boston Safe Deposit & Trust Co., 325 Mass. 469, 91 N.E.2d 334 (1950), and *Beatty v. Cake*, 236 Ore. 498, 387 P.2d 355 (1963).

50. *But see* *United States v. Goodson*, 253 F.2d 900 (8th Cir. 1958), where the court required contribution from recipients of non-probate assets because of a provision in the decedent's will.

51. See *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953); 1 MERTENS, *FEDERAL GIFT & ESTATE TAXATION* § 1.15, at 46-51 (1959 ed.).

52. *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921); *In re Del Drago's Estate*, 287 N.Y. 61, 76-78, 38 N.E.2d 131, 138-39 (1941), *rev'd on other grounds*, 317 U.S. 95 (1942).

53. ALA. CODE tit. 51, § 449(1) (1958).

demand that her share be computed without regard to estate tax liability.⁵⁴ However, in a number of cases the courts have held that the computation of the widow's share is determined only by the language of the statute defining her share, and that the applicability of apportionment rules is therefore irrelevant.⁵⁵ Since the support given the widow's position by a statutory rule of apportionment is greater than the support provided by the applicability of equitable apportionment rules, the two types of rules should be considered separately.

A. *Equitable Apportionment*

As noted above, the function of the equitable apportionment rule is to distribute the estate tax burden equitably among the parties owning property or interests in property that was included in the decedent's estate for tax purposes and who therefore benefited from the payment of the tax, since the payment released the federal lien imposed on their property and relieved them of personal liability. To the extent that property passing or having passed to the widow qualifies for the marital deduction, such property does not create any estate tax liability and therefore should be exempted from contributing toward the payment of the tax.⁵⁶ In situations where a widow renounces her deceased husband's will, she is entitled to a specified percentage of her husband's net estate (defined in differing terms by the various state statutes), and if the net estate is determined after making an allowance for estate taxes, the widow will, in effect, bear a portion of that tax even though her share is tax deductible. Thus, the question is whether the applicability of the doctrine of equitable apportionment modifies the statutory language describing the dissenting widow's share in situations where such language does not explicitly direct that estate taxes be taken into account.⁵⁷

54. Compare *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 513-15, 101 N.E.2d 604, 607 (1951), and *Guaranty Nat'l Bank v. Mitchell*, 111 S.E.2d 494 (W. Va. 1959), with *Seymour Nat'l Bank v. Heideman*, 133 Ind. App. 104, 178 N.E.2d 771 (1961), and *In re Wolf's Estate*, 307 N.Y. 280, 121 N.E.2d 224 (1954).

55. See *Old Colony Trust Co. v. McGowan*, 156 Me. 138, 163 A.2d 538 (1960); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954).

56. *Doetsch v. Doetsch*, 312 F.2d 323, 329-30 (7th Cir. 1963).

57. ORE. REV. STAT. tit. 11, ch. 13, § 0.50 (1964), expressly provides that the dissenting widow's share is to be computed without regard to the federal estate tax to the extent that it qualifies for the marital deduction. The North Carolina courts rejected the dissenting widow's contention in *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953), and held that her share must be computed as a fraction of the decedent's estate after allowance for estate taxes. Several months after the *Green* decision, the North Carolina legislature provided that a dissenting widow's

Initially, consideration must be given to the question whether property which qualifies for the marital deduction (irrespective of whether the property passed to the widow prior to her husband's death, by testamentary disposition, by intestacy, or pursuant to the widow's election) should be required to bear a proportionate part of the estate tax burden. The widow's property that qualifies for the marital deduction is included in her husband's gross estate⁵⁸ and therefore is subject to the federal tax lien for payment of estate taxes. In addition, the widow is personally liable for that payment.⁵⁹ The widow benefits from the payment of the estate tax to the same extent as the other beneficiaries, and thus it may seem fair that she should bear a proportionate part of the tax. However, the equitable doctrine of contribution requires a sharing of a common burden only by persons whose equities are equal.⁶⁰ While the tax liability is imposed on all participants in the gross estate, their equities are unequal, since the widow's share is tax deductible and the others are not. Consequently, where equitable apportionment is applicable, contribution is required according to the participants' share of the decedent's *taxable* estate, and to the extent that the widow's share is deductible, it is not included in the taxable estate, thus exonerating the widow from contributing to the tax burden.⁶¹

However, exoneration of a widow's deductible share from estate tax liability is not dispositive of the question of the size of her forced share. In instances where a widow renounces her deceased husband's will, she becomes entitled to a portion of his estate computed according to the statutory provisions of the state of her husband's domicile (or perhaps of the state in which the situs of property is located). If her share is computed after allowance for federal estate taxes, the net effect of the computation is to charge her with a portion of the estate tax burden. Nevertheless, the manner of computation

share was to be computed without regard to estate taxes where her deceased spouse was not survived by a parent or by lineal descendants. N.C. GEN. STAT. § 30-3 (Supp. 1965); see *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963). However, in cases where the deceased husband is survived by a parent or lineal descendants, the dissenting widow must bear a portion of the tax. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

58. INT. REV. CODE OF 1954, § 2056(a).

59. INT. REV. CODE OF 1954, § 6324(a).

60. See *Vickers Petroleum Co. v. Bliffle*, 239 F.2d 602 (10th Cir. 1956); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); 4 POMEROY, EQUITY JURISPRUDENCE § 1222, at 662-63 (5th ed. 1941).

61. See *Doetsch v. Doetsch*, 312 F.2d 323, 329-30 (7th Cir. 1963); *Seymour Nat'l Bank v. Heideman*, 133 Ind. App. 104, 178 N.E.2d 771 (1961); *Jones v. Jones*, 376 S.W.2d 210 (Mo. 1964) (en banc).

turns upon the construction of the specific statutory language defining the dissenting widow's share, rather than upon a determination of whether she should be burdened by the estate tax. Moreover, the rationale of the doctrine of equitable apportionment does not accord with granting equitable treatment to the beneficiaries so much as it does with approximating the unexpressed intent of the decedent; of course, the intent of the decedent is irrelevant in computing a dissenting widow's share.

The courts of two states—Maine and Ohio—have adopted the doctrine of equitable apportionment, but have nevertheless rejected a dissenting widow's contention that her forced share should be computed without regard to estate taxes. In *Bragdon v. Worthley*,⁶² the Maine court adopted and applied equitable apportionment. Subsequently, in *Old Colony Trust Co. v. McGowan*,⁶³ the court rejected a dissenting widow's contention that her forced share of the estate should be computed without regard to estate taxes. However, the court granted the widow partial relief in holding that taxes on non-probated assets were not to be deducted before computing the widow's share, since she was entitled to equitable contribution from the recipients of those assets and therefore could not be charged with any portion of the tax imposed on their account.

Ohio adopted equitable apportionment in 1952 in *McDougall v. Central National Bank*.⁶⁴ The Ohio courts first accepted a dissenting widow's contention as to the computation of her share in *Miller v. Hammond*,⁶⁵ but in a subsequent case two years later the court overruled *Hammond* and held that estate taxes must be deducted in computing the widow's share.⁶⁶ Although the Ohio courts did not reject the doctrine of equitable apportionment, they did reject the applicability of that doctrine to the computation of a dissenting widow's share. Similarly, the Supreme Court of Hawaii rejected a dissenting widow's assertion that her forced share should be computed without regard to estate taxes, but it did not deem the question of whether the court should adopt equitable apportionment as dispositive of the case and expressly left that question unanswered.⁶⁷

In sum, the existence of the equitable apportionment doctrine is

62. 153 A.2d 627 (Me. 1959).

63. 156 Me. 138, 163 A.2d 538 (1960).

64. 157 Ohio St. 45, 104 N.E.2d 441 (1952). See also *In re McKittrick's Estate*, 172 N.E.2d 197 (Ohio P. Ct. 1960).

65. 156 Ohio St. 475, 104 N.E.2d 9 (1952).

66. *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954).

67. *In re Glover's Estate*, 371 P.2d 361 (Hawaii 1962).

not dispositive in favor of a dissenting widow, and, as we shall see, the absence of such a doctrine does not require a decision that is unfavorable to her. Nevertheless, one of the purposes of equitable apportionment, albeit not the primary purpose, is to divide the tax burden among the beneficiaries in some equitable manner, and the net effect of deducting estate taxes before computing the widow's share is inconsistent with that purpose. This inconsistency is not of sufficient magnitude to warrant modifying statutory language defining the widow's share, but where there are other compelling reasons for so doing, the doctrine may buttress the widow's claim.

B. *Statutory Apportionment*

In those states where the legislature has adopted a statute apportioning estate taxes, the case for computing the widow's share without regard to taxes is far more compelling. By adopting an apportionment statute, the state legislature has demonstrated its desire to have the estate tax burden allocated on an equitable basis, and (in virtually all such statutes) to exonerate the surviving widow's property to the extent that it qualifies for the marital deduction. As noted previously, in most statutes this legislative objective appears to be controlling, even to the extent that it may conflict with the normal intent of the decedent. If the statute defining the dissenting widow's share is susceptible to a construction that would require the computation to be made without regard to estate taxes, that construction should be applied in order to accomplish the legislative policy demonstrated by the apportionment statute.⁶⁸ Indeed, in at least one case where the statute defining the widow's share expressly provided that estate taxes were to be deducted in making the computation, the subsequent enactment of an apportionment statute was deemed so inconsistent with the statutory scheme of computation that the provision for deducting estate taxes was deemed repealed by implication.⁶⁹

The only case in which a statutory rule of apportionment was found to be applicable while a dissenting widow's share was charged with estate taxes is *Weinberg v. Safe Deposit & Trust Co.*,⁷⁰ a 1951 Maryland decision. At the time of that case, the Maryland apportionment statute, which had been enacted prior to the adoption

68. Cf. *In re Rosenfeld's Estate*, 376 Pa. 42, 101 A.2d 684 (1954).

69. *In re Fuch's Estate*, 60 So. 2d 536 (Fla. 1952). See also *In re Wolf's Estate*, 307 N.Y. 280, 121 N.E.2d 224 (1954).

70. 85 A.2d 50 (Md. Ct. App. 1951).

of the marital deduction provision in 1948, exonerated a widow's share of the estate from taxes in certain circumstances, but it specifically provided that there should be no exoneration in situations where the widow renounced her husband's will. The *Weinberg* decision was therefore grounded on the peculiar language of the Maryland apportionment statute, and in view of Maryland's recent adoption of the Uniform Estate Tax Apportionment Act,⁷¹ it is unlikely that *Weinberg* will be followed by the Maryland courts in cases arising under the new statute.

III. ADDITIONAL REASONS FOR FAVORING A DISSENTING WIDOW

Apart from the applicability of apportionment rules, there are independent reasons advanced on behalf of the dissenting widow's position, and her share may be freed from an estate tax burden even though no apportionment is available under state law.⁷² However, the applicability of apportionment rules lends support to the widow's claim.

A. *The Destruction of the Widow's Share*

One appealing argument advanced for the widow is that if her forced share is burdened by estate taxes, it may be substantially diminished, or even entirely eliminated, through the inclusion in the decedent's gross estate of non-probate assets.⁷³ As previously noted, in cases where non-probate assets are included in the decedent's estate, the amount of estate tax liability may exceed the value of the probate estate.⁷⁴ The legislative purpose underlying the widow's statutory right of election could be frustrated and in some circumstances entirely nullified if the widow's forced share were rendered vulnerable to diminution from non-probate oriented estate taxes. However, this argument is more persuasive in a jurisdiction which has no apportionment rules than in one which requires contribution from the recipients of the non-probate assets, since in the latter case the widow's share is insulated from the tax liability arising from

71. Section 162, ch. 907 of the Maryland Laws of 1965 repealed the prior apportionment statute (MD. ANN. CODE art. 81, § 156 (1957)), and adopted the UNIFORM ESTATE TAX APPORTIONMENT ACT. MD. ANN. CODE art. 81, § 162 (1965 Replacement).

72. See *In re Barnhart's Estate*, 102 N.H. 519, 162 A.2d 168 (1960); cf. *Dodd v. United States*, 345 F.2d 715 (3d Cir. 1965); *First Nat'l Bank v. United States*, 223 F. Supp. 19 (D. Kan. 1964); *In re Burnett*, 50 N.J. Super. 482, 142 A.2d 695 (1958).

73. *In re Wolf's Estate*, 307 N.Y. 280, 121 N.E.2d 224, 228 (1954). See also *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964).

74. See note 21 *supra* and accompanying text.

those assets in which she does not share.⁷⁵ Indeed, this consideration persuaded the Supreme Court of Montana to compute a dissenting widow's share without regard to estate taxes arising from non-probate assets, even though the statutory provision defining her share expressly provided for the deduction of all "estate taxes."⁷⁶

B. *The Marital Deduction*

The most compelling reasons for disregarding estate taxes in computing the widow's forced share arise from the nature and background of the marital deduction allowance. Commencing with the 1930 decision of the Supreme Court in *Poe v. Seaborn*,⁷⁷ married couples in community property states enjoyed an income splitting advantage which was not available to couples in common-law states. In addition, under the laws of most community property states, a husband and wife are each deemed to own one half of the community, and therefore only one half of the community estate is taxed on the husband's death.⁷⁸ Thus, the income-splitting advantage available to couples in community property states extended to estate taxes as well. In 1942, Congress sought to remedy this disparity of tax treatment among the states by altering the estate and gift taxation of community property, but the changes made in that year only substituted different inequalities for those previously existing.⁷⁹ The community property states made vigorous and continual objections to the 1942 amendments.⁸⁰ Moreover, the income tax disparity, which was far more significant than the estate and gift tax treatment, was not remedied by the 1942 Act. In order to provide their citizens with the tax benefits derived from the community property laws, five states and the then Territory of Hawaii adopted a community prop-

75. See *Old Colony Trust Co. v. McGowan*, 163 A.2d 538 (Me. 1960).

76. *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443, 446 (1964).

77. 282 U.S. 101 (1930). *Poe v. Seaborn* held that income earned by a husband residing in a community property state (Washington) was deemed earned one half by the husband and one half by his wife.

78. *Greenwood v. Commissioner*, 134 F.2d 915, 918-19 (9th Cir. 1943).

79. See Revenue Act of 1942, ch. 619, § 402(b), 56 Stat. 798, 942. With the exception of property that could be traced to contribution or personal services of the surviving spouse, all of the community property was included in the estate of the first spouse to die. In no event was the amount included in the estate to be less than that over which the decedent had a testamentary power. In most states, this provision established a minimum inclusion of one half of the community and could require inclusion of the entire community. Thus, community property was taxed in a manner similar to jointly held property with the added disadvantage of the minimum inclusion of one half of the property.

80. See LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 369 (2d ed. 1962).

erty system, and other states, including New York, commenced consideration of such a move.⁸¹

In order to halt the serious disruption of established property law by tax-conscious states, and in order to minimize the differences in federal tax treatment between citizens of community property states and citizens of common-law states,⁸² Congress repealed the

81. See BITTKER, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 332-33 n.2 (3d ed. 1964). The states adopting community property laws were Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania. The Pennsylvania statute was held unconstitutional in *Wilcox v. Pennsylvania Mut. Life Ins. Co.*, 357 Pa. 581, 55 A.2d 521 (1947), and the Oklahoma statute (which, like the Oregon statute, established an optional community property system) was held to be ineffective for income-splitting purposes in *Commissioner v. Harmon*, 323 U.S. 44 (1944).

82. H.R. REP. NO. 1274 ON THE REVENUE ACT OF 1948, 80TH CONG., 2D SESS. 23-25 (1948) (1948-1 CUM. BULL. 241, 258-61), states: "Recently, however, a number of States have shifted from the common law to the community property system. In these cases benefits under the Federal income tax which residents of the State would obtain under the community property system were largely responsible for the abandonment of common law. After one false start, Oklahoma joined the community property group in 1945. Oregon, Michigan, Nebraska, and Pennsylvania were added to the list in 1947. However, the Pennsylvania law has since been found to be unconstitutional.

"The geographical differences in the impact of the individual income tax resulting from the fact that 12 States use community property raises a serious problem, but the fact which makes action at the present session imperative is the potential rapid extension of community property to a large number of other common-law States. The adoption of community property has been advocated widely in spite of a growing awareness of the substantial differences between community property and common law which make a transition from one system to the other extremely difficult. It is now recognized that this transition will be a period of extreme confusion during which the courts, the administrative officials and the legislature will be working out the detailed application of a new and strange system of property law. Nevertheless, many responsible State officials have reached the conclusion that the difference between the impact of the Federal income tax as it applies in community property and common law jurisdictions is so great that the use of community property cannot be avoided. . . .

"Many States are waiting to see what Congress will do about the problem of geographical equalization. If the necessary action is not taken, there will be a flood of ill-advised State legislation intended to produce the same results, but doing so in a manner which has most unfortunate consequences, not only for the taxpayers involved, but also for all the persons who must use or administer the property laws of the States which rush into the community-property system.

"Your committee believes that the best answer to the problem of geographical equalization is the splitting of the combined income of the husband and wife. . . .

"Adoption of these income splitting provisions will provide geographical equalization in the impact of the tax on individual net incomes. The unfortunate and impetuous enactment of community property legislation by states that have long used the common law will be forestalled. . . .

"The basic differences between community and common law interpretations of property rights have also resulted in geographical inequalities in the application of the estate and gift taxes. . . .

"Your committee does not believe that a satisfactory solution to the problem of geographical equalization can be reached by the tactics applied in the 1942 amendments. Hence the repeal of those amendments is recommended, effective with the enactment of this bill. Your committee would be unwilling, however, to repeal the

1942 community property provisions and enacted the split income tax provision, the split gift provision, and the estate and gift tax marital deduction provisions.⁸³ The effect of the estate tax marital deduction provision is that property which passes or has passed from the decedent to his widow, and which meets certain requirements, is deductible from the decedent's gross estate in an amount not to exceed one half of the decedent's adjusted gross estate.

In most circumstances, the property passing to the widow pursuant to her election to take her forced share will qualify for the marital deduction and will therefore reduce the tax burden of the estate. If the widow's share is computed after the deduction of taxes, then she must bear a portion of the estate tax burden even though the property received by her was excluded from the computation of that tax and therefore did not cause any part of its imposition. Of course, if for some reason a portion of the widow's share should fail to qualify for the marital deduction, such portion is not tax exempt and should therefore contribute to the satisfaction of the tax burden, but only to the extent that it is not deductible. The Court of Appeals for the Fourth Circuit once declared that to charge a dissenting widow's share of the estate with the federal tax would be "unfair and unjust,"⁸⁴ and accordingly noted its approval of a South Carolina probate court decision computing a widow's intestate share without an allowance for estate taxes. The Fourth Circuit also placed considerable reliance on the fact that a contrary result would frustrate the congressional purpose underlying the enactment of the marital deduction provision, which was to obtain a geographical equalization of tax treatment by freeing the interest of the surviving spouse in a common-law state from estate taxes so that her treatment would be comparable to the tax treatment afforded citizens of community property states. This consideration has been influential in the decisions of a number of courts.⁸⁵

amendments without corrective legislation. Repeal alone would reproduce the pre-1942 conditions which are even further from equalization than existing law.

"With the repeal of the 1942 amendments your committee recommends an application of the 'splitting' technique used under the income tax. . . . In the case of the estate tax, 'splitting' means an exemption in common law states of up to one half of the decedent's estate if it passes outright to the surviving spouse." See also S. REP. NO. 1013 on the Revenue Act of 1948, 80th Cong., 2d Sess. 23-29 (1948) (1948-1 CUM. BULL. 285, 302-06); 94 CONG. REC. 3040-41 (1948).

83. Revenue Act of 1948, ch. 168, §§ 301, 351, 361, 362, 364, 62 Stat. 110, 114, 116-21, 125-28.

84. *Pitts v. Hamrick*, 228 F.2d 486, 490 (4th Cir. 1955). See also *Hammond v. Wheeler*, 347 S.W.2d 884, 893 (Mo. 1961).

85. See *First Nat'l Bank v. United States*, 233 F. Supp. 19 (D. Kan. 1964); *Lincoln*

A significant number of courts, however, have held that the determination of a widow's forced share is controlled by state law, and that the congressional purpose in enacting the marital deduction provisions is irrelevant.⁸⁶ These courts point to section 2056(b)(4) of the 1954 Code⁸⁷ as indicating that Congress contemplated that a widow's share might be required to bear a portion of the estate tax burden under local law and consequently did not intend to pre-empt the issue. While these decisions are correct in asserting that state rather than federal law controls, they fail to consider the interplay between the congressional act and the policies of the state legislatures. Congress did not adopt the marital deduction provisions for its own selfish reasons or even to further a pervasive national policy favoring widows. In fact, Congress merely reacted to the vigorous complaints of the states regarding the inequality existing before the adoption of the marital deduction provision, and to the readiness of the legislatures in the common-law states to disrupt established property systems in order to obtain desired tax advantages for their citizens. It is difficult to believe that state legislatures would be willing to enact (or seriously consider enacting) an entirely foreign property system (which in most states would substantially enhance the size of a widow's forced share of her husband's estate) solely to obtain tax advantages for its citizens, but after having been granted tax advantages similar to those available in community property states would stubbornly insist upon minimizing the proffered relief. Rather than vigorously asserting the states' independence from the congressional purpose, the courts should consider whether the legislative policy of the state involved encompasses the benefits granted by the marital deduction provision.⁸⁸ It is this writer's opinion that the presumption should be made in favor of maximizing the widow's share, unless the legislature has indicated a contrary intent (such as was done by Alabama and North Carolina), rather than to presume that the widow's share (and the estate) should not benefit from the marital

Bank & Trust Co. v. Huber, 240 S.W.2d 89 (Ky. Ct. App. 1951); *In re Burnett*, 50 N.J. Super. 482, 142 A.2d 695 (1958); *In re Rosenfeld's Estate*, 376 Pa. 42, 101 A.2d 684 (1954).

86. *E.g.*, *Herson v. Mills*, 221 F. Supp. 714 (D.D.C. 1963); *In re Glover's Estate*, 371 P.2d 361 (Hawaii 1962); *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953); *In re Uihlein's Will*, 264 Wis. 362, 59 N.W.2d 641 (1953). See also *Moorman v. Moorman*, 340 Mich. 636, 66 N.W.2d 248 (1954).

87. INT. REV. CODE OF 1954, § 2056(b)(4) provides, *inter alia*, that the computation of the value of property passing to the surviving spouse must allow for the effect that the federal estate tax and certain other taxes have on such property.

88. See *Dodd v. United States*, 345 F.2d 715 (3d Cir. 1965); *Gesner v. Roberts*, 88 N.J. Super. 278, 212 A.2d 43 (Ch. 1965).

deduction unless the legislature has affirmatively indicated that it desires that result. The suggested presumption in favor of permitting the widow the full benefit of the marital deduction is particularly strong where the dissenting widow's share is computed according to the share she would have received had her husband died intestate.

In the latter regard, the decision of the Michigan Supreme Court in *Moorman v. Moorman*⁸⁹ is noteworthy. In that case, the court rejected the widow's claim that her one-third share of the "residue" of her intestate husband's estate should be determined without regard to estate taxes, and held that the congressional purpose in enacting the marital deduction was irrelevant. The decision is somewhat perplexing, since Michigan was one of the states that adopted community property laws for a brief period in order to secure the tax advantages ultimately given to common-law states by the 1948 act. The Michigan legislature subsequently adopted an apportionment statute.⁹⁰

IV. CONCLUSION

In states which have adopted a statutory method of tax apportionment, the dissenting widow's claim for tax exemption in computing her share is reasonably secure. In states which have not enacted such a statute, widows have had some success in obtaining tax exemptions, but, from an overall viewpoint, it appears that they have not received the treatment they deserve. In fairness, the widow should not be required to bear an estate tax burden that was imposed on account of the transfer of property to persons other than the widow herself, and it is unlikely that the state legislature would desire that she do so. The purpose of granting the widow a statutory election is to protect her from disinheritance or inadequate testamentary gifts from her husband, and the legislative policy underlying such provisions would certainly be furthered by permitting the widow to enjoy fully the tax relief granted by the federal government. Moreover, prior to the adoption of the marital deduction provisions, many of the common-law states evidenced a concern over the tax detriments that their citizens suffered in contrast to the citizens of community property states, and the legislatures of some of these common-law states felt driven to the extreme solution of adopting community property laws in order to overcome those detriments. Surely such states would not

89. 340 Mich. 636, 66 N.W.2d 248 (1954).

90. See note 27 *supra*.

wish to deprive their citizens of the benefits granted by the federal government in response to the concern initially evidenced by the states themselves.

In any event, the courts should not seek to resolve the question of the estate tax burden on the widow's share solely by reference to the technical definition of the words employed in the state statute defining that share, particularly where the statute was enacted prior to the adoption of the marital deduction provision in 1948. The courts should consider the impact of the marital deduction on the widow's share, and they should attempt to determine how the marital deduction allowance coordinates with state legislative policy and what interpretation of the provision defining the widow's statutory share best conforms with that policy. The resolution of the question involved is more complex than a mechanical application of dictionary definitions or sterile rules of construction.