The Minnesota Federal Estate Tax Apportionment Statute: Directing against Its Application

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I. INTRODUCTION

The federal estate tax\(^1\) is imposed on the transfer of assets includible in decedent's gross estate to his distributee.\(^2\) Absent statutory provision for apportionment of this tax, payment of the tax is generally made from the residue of the estate, often depriving the residuary beneficiaries of much or all of their interest in the estate.\(^3\) Such a result may contravene the distribution intended by the testator, especially when the residuary beneficiaries are testator's spouse, issue, or close relatives. Consequently, states have enacted statutes on federal estate tax apportionment, such as the one existing in Minnesota since 1961,\(^4\) to provide a means for distributing the estate tax burden among beneficiaries in a manner presumed to be consistent with the testator's intent.\(^5\)

The presumption of the apportionment statute will not, how-

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2. INT. REV. CODE of 1954, §§ 2001-02; see Mayer v. Reinecke, 130 F.2d 350, 353 (7th Cir. 1942). The federal estate tax is imposed upon the privilege of transferring property; the state inheritance tax is imposed upon the privilege of receiving it. See, e.g., State v. Wagner, 233 Minn. 241, 250, 46 N.W.2d 676, 682 (1951).
3. Both property passing under a will and many nontestamentary assets are includible in decedent's gross estate. Thus the federal estate tax is imposed on gifts in contemplation of death, life insurance proceeds, inter vivos trusts intended to take effect in possession or enjoyment after death, life trusts subject to revocation, joint tenancy property, and property subject to certain powers of appointment. See INT. REV. CODE of 1954, §§ 2031-44.
4. MINN. STAT. §§ 525.521-.527 (1965).
5. The landmark decision in Riggs v. Del Drago, 317 U.S. 95 (1942), set the stage for the passage of state statutes on apportionment by holding that the New York apportionment statute was constitutional. The Supreme Court stated: "[Congress] did not undertake in any manner to specify who was to bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congress intended that state law should determine the ultimate thrust of the tax." Id. at 98.
ever, be identical with testator's intent in all cases. If it is not, a
testator can prevent the application of the state apportionment
statute by express direction in his will. It is difficult, however,
to draft a direction against statutory apportionment in such a
way as to avoid litigation under the statute. It is the purpose
of this Note to delineate the estate planning problems which
exist with respect to the apportionment statute, and to indicate
effective means of drafting a direction against apportionment.

II. DEVELOPMENT AND MECHANICS OF
APPORTIONMENT

The federal estate tax was originally treated as a debt of
decedent's estate, to be paid out of the residue. For example,
the Minnesota rule, established in In re Estate of Gelin, was
that the federal estate tax should be paid out of the residue of
the estate, and that no tax be assessed against property be-
queathed or devised unless the residue was insufficient to pay
the tax. As the burden of the federal estate tax increased,
however, some courts rejected the pay-out-of-residue treatment
in favor of apportionment of the tax burden among the persons
entitled to receive assets of the decedent, on the ground that
nonapportionment would deplete the residuary estate and,
therefore, was an inequitable burden on the residuary benefici-
aries. The policy of spreading the estate tax burden in a pro-
portionate manner was the object of the first state apportion-
ment statute, enacted in New York in 1930. The Minnesota
apportionment statute follows the New York statute with little
more than formal changes. The Minnesota statute on in-

6. MINN. STAT. § 525.521 (1965).
7. See, e.g., Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320
(1924); Central Trust Co. v. Burrow, 144 Kan. 79, 58 P.2d 469 (1936);
Lauritzen, Apportionment of Federal Estate Taxes, 1 TAX COUNSELOR'S
Q. 55 (1957).
8. 229 Minn. 516, 40 N.W.2d 342 (1949); see Comment, 34 MINN.
L. REV. 704 (1950); accord, First Nat'l Bank v. First Trust Co., 242
Minn. 226, 64 N.W.2d 524 (1954).
9. See, e.g., Henderson v. Usher, 125 Fla. 709, 170 So. 846 (1938);
10. The statute applies to both federal and state estate taxes, and
provides for apportionment among both probate and nonprobate assets.
See N.Y. DEC. EST. LAW § 124 (McKinney Supp. 1966). See also
Comment, 34 MINN. L. REV. 704 (1950); Lauritzen, supra note 7, at 87.
11. Susman & Forticq, Apportionment of Death Taxes: A Com-
prehensive Survey with Proposed Statute, 45 Texas L. REV. 1400
(1967).
12. The only significant difference between the statutes of the
interpretation of statutes\textsuperscript{13} and the relevant case law\textsuperscript{14} indicate that where a statute has been taken from another state the construction of the courts of that state is presumed to be adopted also. Therefore, New York case law is relevant to the understanding and application of the Minnesota apportionment statute.

The Minnesota apportionment statute provides that unless the will of the testator directs otherwise, the estate tax burden is to be apportioned among the beneficiaries of the estate in the same proportion that the value of the property received by each beneficiary bears to the total value of the property received by all beneficiaries.\textsuperscript{15} For example, suppose that X's estate is distributed to A, B, and C as follows: A receives a specific bequest of $50,000, B receives a life estate and remainder in a nontestamentary trust valued at $100,000, and C receives the remainder of the estate valued at $300,000. The total value of the property received by the beneficiaries is $450,000. Therefore, applying the apportionment statute, each would be assessed the following proportion of the total federal estate tax: A—\( \frac{1}{9} \); B—\( \frac{2}{9} \); and C—\( \frac{2}{3} \).

In the absence of a direction in the will against the application of the apportionment statute, the presumption is that its provisions coincide with the testator's intent as to the estate tax burden. The merits of the presumption include the reduction of litigation on the issue of the tax burden when the testator has not provided for it, more efficient administration of estates, and a rule of certainty in estate planning. However, as in the case of intestate succession statutes, the presumptive intent of the statute will not always coincide with and may even be contrary to testator's actual intent.\textsuperscript{16} Thus, the testator may wish


\textsuperscript{15} Minnesota Stat. §§ 645.16-.17 (1965).

\textsuperscript{16} See Willoughby, Federal Estate Taxation—Testator's General Direction Against Apportionment—Effect Upon Nonprobate Property, 46 Ore. L. Rev. 199, 206 (1967), where the argument is made that testator often misunderstands the law pertaining to apportionment and as a
to direct against the statutory apportionment of estate taxes in his will because he does not want to apportion the taxes.

Testator may also wish to direct against the apportionment statute where his will contains a charitable or marital devise or bequest because he desires no apportionment of taxes among the residuary beneficiaries. The apportionment statute provides that the charitable and marital deductions allowable against the taxable estate shall inure to the benefit of the recipient of the deductible gift.\(^1\) Thus, when there is statutory apportionment of the tax attributable to the residue and one of the residuary beneficiaries is a charity, the charity will receive the benefit of the charitable deduction and no tax will be apportioned against its share of the residue. The entire residuary tax burden will be apportioned among the other residuary beneficiaries.\(^1\) In the absence of the statute, the residue after the payment of taxes on the entire estate would be divided equally among the residuary beneficiaries.

For example, assume that there are three residuary beneficiaries, A, B, and C, and that the residuary estate of $30,000 is to be divided equally among them. Assume further that there is $10,000 tax attributable to the residue. After payment of taxes, therefore, the residue is $20,000. If the apportionment statute is not applied, A, B, and C will each receive one-third of $20,000. However, if there is apportionment, and A and B are charities, they will each receive one-third of $30,000. The entire tax attributable to the residue will fall on C's share, so that he receives nothing.

This benefit which inures to the recipient of the deductible gift under the apportionment statute may be desirable, however, when the marital deduction is applicable since decedent often desires that his spouse receive the greatest benefit. Moreover, the federal estate taxes due for the entire estate may be reduced because of the increase in the marital deduction resulting from its exemption from the apportioned tax burden.\(^2\) The same tax benefit accrues to the entire estate result makes inadequate provision for nonapportionment of nonprobate assets. When the beneficiaries of such nonprobate assets are members of the immediate family, they are often unintentionally burdened with death taxes for the whole estate.


\(^1\) In re Pratt's Estate, 33 Misc. 2d 300, 123 N.Y.S.2d 425 (Sur. Ct. 1953).

\(^2\) The federal estate taxes may be reduced because the amount
when the deductible gift is to a charity. Therefore, the testator should weigh the desirability of the maximum estate tax deductions against his desire that all beneficiaries share in the estate, achieved by a direction against apportionment among the residuary beneficiaries. If testator decides to direct against the apportionment statute to create apportionment in the above circumstance, or to prevent apportionment in the other circumstances, the drafter faces several problems in effectively directing against the statute.

III. PROBLEMS IN DIRECTING AGAINST THE APPORTIONMENT STATUTE

A. NONTESTAMENTARY PROPERTY

As a general rule, a direction against apportionment must be explicit and unambiguous, otherwise the direction may be ineffective. For example, a provision in the will directing against statutory apportionment generally will not be effective as to nontestamentary property. The testator must explicitly state in his will that the nonprobate assets are to be exonerated from apportionment, although no provision specifically referring to each of the nonprobate assets need be included. Thus, in In re Pergament's Estate, where decedent's will directed that the taxes on the gross estate be paid out of residue, the court found an ambiguity respecting the exoneration of an inter vivos trust from payment of its pro rata share of taxes. The court going to the spouse will be greater; thus, the amount of the marital deduction may be increased. Lewald v. United States, 245 F. Supp. 336 (S.D.N.Y. 1965). For an argument against the allowance of such benefits inuring to the surviving spouse, see Lauritzen, supra note 7, at 85-87.


21. After the passage of the New York death tax apportionment in 1930, the New York courts interpreted general directions against apportionment as referring to nonprobate as well as probate assets. E.g., In re Halle's Estate, 270 App. Div. 619, 61 N.Y.S.2d 694 (1946); In re Greenwald's Estate, 186 Misc. 854, 53 N.Y.S.2d 937 (Sur. Ct. 1945). However, in 1950 the apportionment statute was amended with the effect of reversing the prior cases.


23. The clause involved in that case was as follows:

I direct and authorize my Executor or Executors to pay from my residuary estate and all inheritance and other estate transfer taxes or death duties that may be imposed or become chargeable against my gross taxable estate; or against any of the devises or bequests herein, it being my intention that each and every devise and bequest under this will shall be delivered to and be taken by every devisee of or legatee hereunder in full and without any deduction for taxes.
held, therefore, that the statutory direction to apportion taxes against beneficiaries of the inter vivos trust was absolute.24

Recent decisions indicate, however, that the attitude of the courts toward apportionment of nontestamentary assets may be changing.25 In In re Chodikoff's Estate,26 for example, a clause directing the payment of all estate taxes out of residue exonerating all specific legatees and beneficiaries from tax liability was held sufficient to exempt from apportionment a nontestamentary gift of insurance to testator's wife, even though no reference was made to such nontestamentary gift in the will. Furthermore, one court has indicated in dicta that a general direction that estate taxes are to be paid out of residue will be sufficient to exempt nontestamentary assets from statutory apportionment.27

B. Property Passing Under a Codicil

When a testator executes a codicil, he will often intend that any direction against statutory apportionment in his will applies to the codicil also. However, unless the codicil itself contains a direction against apportionment it is not clear that this

24. In In re Leonard's Estate, 16 Misc. 2d 465, 184 N.Y.S.2d 552 (Sur. Ct.), aff'd, 9 App. Div. 2d 1, 189 N.Y.S.2d 422 (1959), the court said there was doubt as to whether testator meant to exonerate nontestamentary property from apportionment when he directed in his will as follows: "I direct my executors... to pay all of my just debts, funeral and administration expenses, including such estate and inheritance taxes as may be assessed against my estate..." The court held that the nontestamentary property must be apportioned.

25. In re Pergament's Estate, 29 Misc. 2d 334, 218 N.Y.S.2d 831 (Sur. Ct.), aff'd, 19 App. Div. 2d 945, 245 N.Y.S.2d 312 (1961). Although the court found that there was no direction against apportionment of nontestamentary assets, the court indicated that the general direction against apportionment would have been effective with respect to nontestamentary assets had the last part of the provision beginning "it being my intention" been omitted. See clause quoted in note 23 supra.


27. In In re Schneider's Estate, 49 Misc. 2d 493, 267 N.Y.S.2d 852 (Sur. Ct. 1966), a general clause directing against apportionment was held insufficient to exonerate nontestamentary property from apportionment. The court indicated in dicta, however, that either of the following two clauses would be sufficient to exonerate nontestamentary assets: (1) "My residuary estate is to pay the entire estate tax on my gross taxable estate." (2) "My residuary estate is to pay all estate taxes on my estate, or the gifts, legacies, devises and bequests set forth under my will." See also In re Wheeler's Will, 19 Misc. 2d 335, 186 N.Y.S.2d 134 (Sur. Ct. 1959), aff'd without opinion, 14 App. Div. 2d 549, 219 N.Y.S.2d 235 (1961).
intent will be satisfied. In *In re Ballou's Estate*,\(^2\) for example, the testator's will provided that a certain legacy was to be exempt from apportionment of taxes. The testator subsequently executed a codicil to his will, changing the amount of the bequest. Despite the obvious intent of the testator that only the amount of the bequest be changed, the court held that the bequests of the codicil were subject to statutory apportionment absent direction against apportionment within the codicil.

More recent cases indicate that courts may be willing to transfer the testator's intent as clearly expressed in the will to the provisions of the codicil. Thus, the intent of the testator with respect to apportionment was applied to the codicil in *In re Chodikoff's Estate*,\(^2\) where the will directed against the apportionment of specific bequests. A codicil to the will provided for additional bequests without mention of apportionment. The court followed the intent of the testator as declared in the will and exonerated the bequests of the codicil from apportionment. Nevertheless, it is always best to include a direction against apportionment within the codicil if nonapportionment thereof is desired.

C. Residuary Property

The general rule as to the application of the apportionment statute to the residuary estate is the same as that applicable to all bequests: estate taxes will be apportioned among residuary beneficiaries unless there is specific language in the will directing against such apportionment. A general direction against apportionment will not suffice.\(^3\) Statutory apportionment among residuary beneficiaries is important when the fractional share of residue which the residuary beneficiaries will receive

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30. The following provision in a will exonerated a nonresiduary bequest from taxes, but it was held not to be a direction against the apportionment of taxes within the residuary estate:

[I direct that] every inheritance, transfer or legacy tax upon or on account of any gift, bequest or devise made by me or any right of inheritance or succession under this my Will under the laws of the United States ... be paid out of my residuary estate.

varies as a result of apportionment. For example, if the bequests include one which qualifies for the charitable or the marital deduction,\textsuperscript{31} the beneficiary of the deductible gift will receive the maximum share, and the remaining residuary beneficiaries must bear the entire tax burden of the residue.

There is also a problem where a will directs against apportionment and states that estate taxes are to be paid from the residuary estate, but the residuary estate is insufficient to pay the estate taxes.\textsuperscript{32} In this situation, it has generally been held that the testamentary direction against apportionment can have no application in the construction of the will and, therefore, the estate taxes are to be equitably prorated against all beneficiaries.\textsuperscript{33}

IV. EFFECTIVELY DIRECTING AGAINST APPORTIONMENT

In the absence of explicit direction in the will to the contrary, the usual presumption is that strict application of the apportionment statute was intended.\textsuperscript{34} In \textit{In re Shubert's Will},\textsuperscript{35} for example, the testator bequeathed the residue of his estate to trustees to be divided into six “equal shares or portions,” three shares to charity and three to named beneficiaries for life with

\textsuperscript{31} \textit{E.g.}, \textit{In re Shubert's Will}, 10 N.Y.2d 461, 225 N.Y.S.2d 13, 180 N.E.2d 410 (1962). Apportionment of the residue resulted where the residuary estate was bequeathed to individual beneficiaries and a charitable foundation in “equal portions.”

The fractional shares of the residuary beneficiaries also vary with apportionment where one residuary beneficiary has received an inter vivos gift which is to be taken into account in determining his share of the residue. For example, assume that A, B, and C are the residuary beneficiaries of a residue of $8,000. A has previously received an inter vivos gift of $1,000, which is to be taken into account in determining A's share. Assume further that estate taxes on the residue are $3,000. If there is no apportionment, B and C receive $2,000 and A receives $1,000 from the residue. This result provides equality since A has already received $1,000 as an inter vivos gift. But now assume that there is apportionment among residuary beneficiaries. B and C each receive $3,000 of residue and A receives $2,000. These amounts are taxable to A, B, and C in accordance with the apportionment statute. Therefore, A will pay $2/8 x $3,000, and B and C will each pay $3/8 x $3,000 for taxes. Inequality results.


\textsuperscript{33} See cases cited note 32 supra.


remainder to charity. Although it was apparent that the testator intended the beneficiaries to share equally in the residue, the court gave effect to the strong presumption in favor of statutory apportionment and held that estate taxes were to be apportioned among the residuary legatees. In accordance with the apportionment statute, the charity benefited from the charitable deduction and received shares greater than those received by the individuals. Thus, a provision for equality among legatees is not an effective direction against apportionment.36

Moreover, an ambiguity in a clause directing against apportionment is normally fatal to such direction.37 It is not clear, however, what constitutes an explicit and unambiguous direction against apportionment.38 A direction that all benefactions “be paid and delivered in full and without deduction” has been held effective to direct against apportionment.39 Testamentary clauses bequeathing the balance of the estate after the payment of estate taxes,40 or directing the executor to pay the debts, expenses,

36. The opposite view was taken in In re Cohen's Estate, 35 Misc. 2d 23, 239 N.Y.S.2d 340 (Sur. Ct. 1962), where the testator directed the division of his general estate into twenty parts—three parts left to charity and seventeen parts left as one trust with the income to be divided into equal shares for certain life beneficiaries and the remainder to pass to charity. Because of the difference in ages of the life beneficiaries, the taxes attributable to each were different. Therefore, the court decided there should be no apportionment among the beneficiaries of the seventeen trusts because this would be contrary to testator's intent to have the incomes be equal; thus the holding was that "provisions for equality ... do amount to unambiguous directions against apportionment." See In re Neider's Estate, 52 Cal. Rptr. 47 (Dist. Ct. App. 1966); Gesner v. Roberts, 88 N.J. Super. 278, 212 A.2d 43 (Ch. 1965).

37. In re Johnson's Will, 33 Misc. 2d 643, 227 N.Y.S.2d 384 (Sur. Ct. 1962). The clause: "I direct that all of my just debts, funeral expenses and expenses in connection with the administration of my estate be paid," was held an insufficient direction against apportionment because there was no direction within the will that estate taxes were meant to be included as an expense of administration.

38. The courts are primarily concerned with the intent of the testator, and thus may be willing to infer his intent from the remainder of the will, In re Ogburn's Estate, 406 P.2d 655 (Wyo. 1965), or to look to extrinsic evidence. In re Potter's Will, 43 Misc. 2d 409, 251 N.Y.S.2d 95 (Sur. Ct. 1964). But see In re Chodikoff's Will, 50 Misc. 2d 86, 270 N.Y.S.2d 175 (Sur. Ct. 1965).

39. In re Hotaling's Estate, 74 Cal. App. 2d 808, 170 P.2d 111 (1946). However, the will was executed prior to the operative date of the proration statute, and the testator was charged with knowledge of the law only as it existed at the time he made his will.

and taxes assessed against the estate or any beneficiary have been effective to direct against apportionment.41 These clauses have not, however, been effective in all cases.42 A direction that all debts of the estate be paid out of the residue has been held insufficient to direct against apportionment of the estate tax43 and a clause directing the payment of the debts and expenses of the estate has been held sufficient to direct against apportionment of property passing under the will, but not to direct against the apportionment of nontestamentary assets.44 Moreover, if a direction against apportionment is inconsistent with another clause of the will,45 it probably will not be effective since the contrary provisions may make the direction against apportionment ambiguous and, consequently, ineffective.

It is clear, therefore, that careful draftsmanship is necessary to avoid the application of the apportionment statute. Even when a testator desires apportionment of estate taxes among the beneficiaries of his estate as provided by the statute, it is advisable to so direct in the will in order to avoid litigation of the issue and expedite the administration of the estate.46 The following are examples of clauses which should be included in the will in order to insure the desired result: (1) nonapportionment, (2) apportionment among all beneficiaries, (3) apportionment only among residuary beneficiaries, (4) apportionment only among beneficiaries of nontestamentary property, and (5) exemption of certain bequests from apportionment.

(1) If a testator desires that there be no apportionment

42. A phrase which provided for payment of estate taxes "as may be assessed against my estate" was held ineffective to direct against apportionment in In re Leonard's Estate, 9 App. Div. 2d 1, 189 N.Y.S.2d 422 (1959). The court stated that, "[t]he necessity of a direction against apportionment that will be both clear and unambiguous seems, in reason, even stronger in the case of taxable transfers dehors the instrument in which the supposed direction is sought. . . ." Id. at 2, 189 N.Y.S.2d at 423. See also In re Cutler's Estate, 26 Misc. 2d 805, 209 N.Y.S.2d 353 (Sur. Ct. 1960).
45. In re Pepper's Estate, 307 N.Y. 242, 120 N.E.2d 807 (1954). The court found that the testator had made two inconsistent dispositions of his residuary estate: One clause disposed of all the residue by establishing trusts from it, and the other clause provided that the residue be used to pay taxes which it considered a direction against apportionment. Apparently it makes no difference whether the clause directing against apportionment is prior to or subsequent to the clause with which it is inconsistent. Id. at 250-51, 120 N.E.2d at 811.
of taxes among any beneficiaries, the will should include express clauses which direct against apportionment of taxes on nontestamentary and residuary property. Although general testamentary direction against apportionment probably will not be effective as to these assets, the following clause might be used:

I direct my Executor to pay out of my residuary estate all estate, inheritance, and succession taxes, together with interest and penalties thereon, imposed with respect to any property, whether disposed of by will or not and including my residuary estate, on which these taxes are assessed.47

(2) Where testator desires that there be apportionment of the estate taxes among all beneficiaries, the statute will accomplish this result in the absence of an apportionment clause in the will. In order to avoid problems of construction, however, the following clause might be employed:

I direct that all estate, inheritance, and succession taxes, together with interest and penalties thereon, which may be assessed by reason of my death shall be paid in the first instance by my Executor, but that the ultimate burden of these taxes and charges shall be apportioned among, charged to, and collected from the beneficiaries sharing in my gross taxable estate, including beneficiaries receiving property outside of my probate estate. I hereby authorize my Executor to take such action as may be necessary to collect these taxes and charges from the beneficiaries responsible therefor.48

(3) Where apportionment is desired only among residuary beneficiaries, the following clause may be used:

I direct that all estate, inheritance, and succession taxes, together with interest or penalties thereon, which may be assessed by reason of my death shall be paid in the first instance by my Executor, but only those taxes applicable to nonprobate assets and probate assets other than my residuary estate shall be paid out of my residuary estate. Any such taxes assessed by reason of property passing through my residuary estate shall be apportioned among the persons receiving the benefit of such property, and I hereby authorize my Executor to take such action as may be necessary to collect these taxes and charges from the beneficiaries responsible therefor.

(4) Similarly, where apportionment is desired only among those who receive nontestamentary property, a provision such as the following will suffice:

I direct that all estate, inheritance, and succession taxes, together with interest or penalties thereon, which may be assessed by reason of my death shall be paid in the first instance by my Executor, but only those taxes applicable to assets forming my probate estate (including my residuary estate) shall be

47. See P. Cook, A. Gilbert & E. Stocker, Manual for Preparation of Wills and Administration of Estates in Texas 12-13 (1962); Susman & Forticq, supra note 11, at 1358.
48. Id.
paid out of my residuary estate. Any such taxes assessed by reason of property passing outside my probate estate shall be apportioned among the persons receiving the benefit of such property, and I hereby authorize my Executor to take such action as may be necessary to collect these taxes and charges from the beneficiaries responsible therefor.

(5) If testator desires that there be apportionment among all except for the objects of certain bequests, a clause similar to the immediately preceding clause should be used, explicitly directing the bequests which are to be exonerated from the tax burden. Moreover, if testator adds a codicil to the will, the codicil itself should contain an express provision dealing with the allocation of taxes.

V. CONCLUSION

The courts have taken a rather "hard stand" on applying the apportionment statute whenever an ambiguity existed in a will provision directing against apportionment. To be certain of an effective direction against apportionment there must be no other provisions in the will which conflict with such direction and the direction itself must clearly express what is being exonerated from which taxes and to whom the tax burden is shifted.\(^4^9\) If apportionment of nonprobate assets, residuary assets, or assets disposed of under a codicil is not desired, a specific clause directing against apportionment of each group of these assets should be included in the will. There is support for the position that a general clause such as "My residuary estate is to pay the entire estate tax on my gross taxable estate" will be effective to direct against apportionment of everything but residuary assets. However, it is best to direct against statutory apportionment and to provide for the ultimate tax burden according to the intent of the testator, in order to avoid the statutory presumption of intent to have apportionment.\(^5^0\)

\(^5^0\) In re Agris' Estate, 3 Misc. 2d 821, 155 N.Y.S.2d 296 (Sur. Ct. 1956). In this case the apportionment tended to work to the disadvantage of residuary beneficiaries. The court stated that even though the statute was enacted primarily to benefit the residuary beneficiaries by equitably prorating the burden, it could not find against apportionment where no reference to it existed in the will. Tax apportionment is mandatory as the declared statutory policy unless the testator expressly directs otherwise.