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Tax Apportionment in Wills and Estate Documents: Allocating Wealth Transfer Taxes Among Beneficiaries

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Tax Apportionment in Wills and Estate Documents

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Tax Apportionment in Wills and Estate Documents: Allocating Wealth Transfer Taxes Among Beneficiaries

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Agenda

- Apportionment clauses in general
- Source of law
  - Federal
  - State
  - Equitable apportionment provisions
- Impact of missing or defective tax allocation provisions
  - Estate tax
  - Gift tax
  - Income tax
  - Generation-skipping tax
- Predeceased spousal assets previously qualifying for marital deduction
- Apportionment clauses and retirement assets

Apportionment Clauses in General

- "Tax apportionment" is the determination of which beneficiaries have their respective shares reduced when there are taxes owed as a result of the decedent's death.
- Today's presentation does not cover the liability and enforcement of the apportionment which is a corollary but separate topic.
- A testator has a right to determine the tax apportionment, but in the absence of guidance from the testator, there are state and federal provisions that will dictate how taxes are apportioned.
- This presentation focuses on understanding and administering the apportionment rules, but it is helpful to spend a moment on what goals might motivate drafting an apportionment clause.

Objectives with Tax Apportionment Clauses

In addressing tax apportionment, planners want to achieve three goals:

1. The overall plan achieves the testator's wishes, which requires running the decedent's balance sheet through the formula set out in the plan.
2. Have evidence that this issue was addressed with the client.
3. The drafting is clear so there is no confusion.

Sources of Tax Apportionment Laws

- Federal
- State
- Discussion of issues arising under equitable apportionment regimes
- Apportionment provisions in estate planning documents

Federal Estate Tax Provisions

- IRC Sections 2205, 2206, 2207, 2207A, and 2207B provide reimbursement (not apportionment) provisions for certain non-probate assets that incur a federal estate tax liability.
- These provisions are in addition to state law provisions and have been found to be complementary to state law instead of preempting state law. *Riggs v Del Drago*, 317 US 95 (1942).
- General rules of thumb:
  - Federal provisions apply to federal estate taxes on certain non-probate property
  - State law applies to: (1) all state estate taxes, (2) all foreign taxes, (3) federal estate taxes on probate property, and (4) federal estate taxes on non-probate property not covered by federal law

Section 2205: Reimbursement out of estate

- This is not an apportionment statute or liability/collection statute, but a provision that above all else protects the government's interest in obtaining payment in a timely fashion.
- Actual payment to IRS to be paid by the executor (IRC Section 2002)—these federal provisions allow for reimbursement after the taxes are paid.
- Beneficiaries receiving property that is not subject to federal reimbursement provisions are still liable for estate taxes attributable to property subject to the special estate tax lien and transferee liability.
- Section 2205 recognizes that a party might be entitled to reimbursement for estate taxes from the estate if any part of share was used to pay estate taxes when the tax should have been paid from elsewhere—it does not establish any right or procedure to do so.
- The provision does not limit the IRS's ability to collect the tax. Specifically Treasury Regulation Section 20.2205-1 states in part "These provisions, however, are not designed to curtail the right of the district director to collect the tax from any person, or out of any property, liable for its payment. The district director cannot be required to apportion the tax among the persons liable nor to enforce any right of reimbursement or contribution."

Sections 2206 and 2207

- Section 2206 provides a right to reimbursement for estate taxes when life insurance is part of the gross estate
  - This federal reimbursement provision does not apply to:
    - Life insurance payable to the estate
    - Life insurance payable to the surviving spouse which qualifies for the marital deduction
    - Note that charitable beneficiaries are NOT included in the exception to the rule
- Section 2207 provides a right to reimbursement for estate taxes when property is included in the gross estate due to a general power of appointment and incorporates the definition of "general power of appointment" by reference to Section 2041—includes the exercise, non-exercise, or release of a power
  - This federal reimbursement provision does not apply to:
    - Property qualifying for the marital deduction
    - Note that charitable beneficiaries are NOT included in the exception
- Waiver of the right to reimbursement under both of these Code sections must:
  - be included in the decedent's last will and testament—other documents will not suffice; and
  - Express a general intent that the life insurance proceeds and/or property subject to the general power pass free of estate taxes—a specific reference to Code section is not needed but a general apportionment clause in an estate planning document will not suffice.

Section 2207B: Right of recovery where decedent retained interest

- Section 2207B provides a right to reimbursement for estate taxes when property is included in the gross estate due to the decedent having a retained interest
- Section 2207B incorporates the definition of a retained interest by reference to Section 2036
- This federal reimbursement provision does not apply to:
  - Charitable remainder trusts
  - Note that property that qualifies for the marital deduction and charitable deduction are NOT exempted
- Right to reimbursement may be waived by testator, but the waiver must:
  - be included in the decedent's last will and testament OR revocable trust; and
  - "specifically indicates" the waiver

Computation of Reimbursement Amount Under Sections 2206, 2207, and 2207 B

- The reimbursement amount under each of these Code sections is computed as follows:

  [Total Federal Estate Taxes Paid] multiplied by ([value of property in question, e.g., insurance proceeds]/[**taxable** estate])
- Note that the computation gives a proportional benefit of the deductions and unified credit
- Section 2207B's reimbursement provision includes not only the tax liability, but also interest and penalties
- Example:
  - Facts: Decedent had $25 million gross estate, which includes a $8 million life insurance policy that goes half to one child and half to another, $5 million in allowable deductions, and $3,528,000 in federal estate taxes were paid.
  - Question: What reimbursement right does the estate have against each child?
  - Answer: $3,528,000 X ($4 million / $20 million)= $705,600

Section 2207A: Right of recovery in the case of certain marital deduction property

- Section 2207A provides a right to reimbursement for estate taxes when property is included in gross estate because of Section 2044 (i.e. inclusion of QTIP property)
- Right to reimbursement may be waived by testator, but the waiver must:
  - be included in the decedent's last will and OR revocable trust; and
  - be explicit and specific that the right is being waived—the waiver should be "by specific reference to QTIP, the QTIP trust, section 2044, or section 2207A" PLR 200452010 quoting the legislative history on Section 2207A

What Makes Section 2270A Different

- Three things make Section 2207A substantially different from Section 2206, 2207, and 2207B:
  - Computation of reimbursement amount is different
  - Applies in gift tax context for gifts under Section 2519 (Section 2207A(b)), so is not solely an estate tax provision
  - Only provision where there is an explicit deemed gift if the right is not enforced (Treasury Regulation Section 20.2207A-1(a)(2))
    - The deemed gift is from the party who would have benefited from the reimbursement to the party that benefited from not collecting.
    - Date of gift is when reimbursement right is no longer collectible under local law
    - If there is a "delay" (not further defined) in the collection, then it is treated as a below-market loan

Section 2207A: Computation of Reimbursement Amount

- The computation for the amount of the reimbursement is the difference between two tax computations:
  - First computation—the amount of estate taxes owed
  - Second computation—the amount of estate taxes owed if the value of the property included under Section 2044 is removed from the gross estate
- Note that computation allows the benefit of the unified credit and deductions (except those directly attributable to QTIP property) to be used first by those receiving property not included under Section 2044.
- Section 2207B's reimbursement provision includes not only the tax liability, but also interest and penalties
- Example:
  - Facts: Decedent had $25 million gross estate, which includes a $8 million of property in a trust in which the decedent retained an interest under Section 2044, $5 million in allowable deductions, and $3,528,000 in federal estate taxes were paid.
  - Question: What reimbursement right does the estate have against each child?
  - Answer:
    - First computation (estate taxes owed): $3,528,000
    - Second computation (estate taxes owed if Section 2044 property not included—gross estate now only $17 million and taxable estate now $12 million): $328,000
    - Reimbursement Amount ($3,528,000 -- $328,000): **$3,200,000** ($1,788,800 higher than if computed under method used for other provisions)

Duty to Enforce Reimbursement Right

- Regulatory authority under Section 2207A provides deemed gift provision if right not enforced.
- For the other provisions, it is a more complicated question that depends on state and federal law.
  - While only Section 2207A has the regulatory authority that sets forth a deemed gift provision, the logic of applying Section 2511 could arguably apply to the others.
  - Certain state courts have addressed whether there is a duty :
    - Local law might hold that there is a duty to recover the assets. *See Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136 (1951).
    - Local law might hold that to the extent creditors are unpaid, then there is personal liability for not enforcing the right. *See Jeromer v. United States*, 155 F. Supp. 851, 854 (S.D.N.Y. 1957).
    - Local law might be silent on the issue.
  - The Tax Court addresses this issue in the context of Section 2207B in *Turner III* (see next slide).

Duty to Enforce Reimbursement Right

- Recent decision (*Estate of Clyde W. Turner, Sr., Deceased, W. Barclay Rushton, Executor, Petitioner v. Comm'r of Internal Revenue, Respondent*, 151 T.C. No. 10 (2018), popularly referred to as "*Turner III*" of the *Turner* line of cases).
- The Tax Court held that the executor has a duty to exercise the right of recovery under Code Section 2207B to prevent marital deduction property from bearing the burden of estate tax liability attributable to property included in the decedent's estate under Code Section 2036.
  - The decedent's will was silent on tax apportionment, but the Tax Court found that the decedent wished to maximize the marital deduction based on the other language of the decedent's will.

Source of law: State estate tax apportionment

- Common law approach
- Uniform Act
- State comparisons
- Equitable apportionment

Common law approach

- The traditional approach, in the absence of a contrary direction in the testator's will, charges transfer taxes against the residue of the probate estate (referred to as the "burden on the residue" approach)
- States taking some form of the traditional approach: Georgia, Illinois, Iowa, Kansas, Ohio, Wisconsin
- Inside vs. outside apportionment
  - Inside apportionment addresses the allocation of taxes amongst beneficiaries of the probate estate
  - Outside apportionment addresses the apportionment between the probate assets and non-probate assets

Uniform Estate Tax Apportionment Act

- Several iterations of the Uniform Act:
  - Uniform Estate Tax Apportionment Act (1958)
  - Revised Uniform Estate Tax Apportionment Act (1964)
  - Uniform Estate Tax Apportionment Act (2003)
  - Uniform Probate Code
- 2003 Uniform Act has been enacted in Alabama, Arkansas, Colorado, Hawaii, Idaho, Maine, Massachusetts, Mississippi, New Mexico, North Dakota, U.S. Virgin Islands, and Washington
- Other states have adopted the provisions of the 1958 Uniform Act, the 1964 Uniform Act, or through enactment of the Uniform Probate Code (Section 3-916 incorporated the provisions of the 1964 Act): Alaska, Arizona, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Wyoming

Uniform Estate Tax Apportionment Act

- Comparing prior versions of the Uniform Act (1958 Act and 1964 Act) and the 2003 Act
- 2003 Act introduces the concept of “insulated” and “uninsulated” property
- 2003 Act addresses “special elective benefits,” which are those that result in a reduced valuation of specified property that is included in the gross estate, deductions other than marital and charitable deductions allowed for specified property, or the exclusion of specified property.
- 2003 Act provides a right of reimbursement to a person who pays a portion of the tax apportioned to another and an order of priority for collection of estate tax by the fiduciary.
- The following slides will highlight portions of the 2003 Act.

Uniform Estate Tax Apportionment Act

- Under the general rule of the Uniform Act (2003), in the absence of an express apportionment clause in the testator's will (or revocable trust), estate tax is apportioned "ratably to each person that has an interest in the apportionable estate."
  - Each share in the estate is a percentage of the entire taxable estate.
  - The percentage of tax allocated is based on the percentage of the share of the apportionable estate.
  - Assets that are not included in the taxable estate will not be included in the apportionable estate.
- The Uniform Act directs both inside and outside apportionment.
- Avoiding the general rule of the Uniform Act
  - Express and unambiguous direction of the apportionment of estate tax
  - Insufficient: "All debts and expenses of and claims against me or my estate are to be paid out of the residuary of my probate estate." Comment to Section 3 of the Uniform Act (2003).
  - Sufficient: "All taxes arising as a result of my death, whether attributable to assets passing under this will or otherwise, be paid out of the residue of my probate estate." Comment to Section 3 of the Uniform Act (2003).

Uniform Estate Tax Apportionment Act

- Exceptions to the overall rule:
- GST Tax incurred on a direct skip upon the death of the decedent is charged to the recipient of the interest. Section 4(2) of the Uniform Act (2003). This provision is consistent with Code Section 2603(b), as noted in the Comment to Section 4 of the Uniform Act (2003).
- QTIP property: the difference between the actual total estate tax and the amount of estate tax calculated as if such property had not been included in the taxable estate under Section 2044 will be apportioned ratably to the recipients of interests in such property. Any remaining balance of the tax is then apportioned ratably to each other person having an interest in the apportionable estate. Section 4(3) of the Uniform Act (2003). This provision generally tracks the result of Code Section 2207A, as noted in the Comment to Section 4 of the Uniform Act (2003).
- "Time-limited interests" (i.e., life estates, annuity interests, etc.): estate tax is apportioned to principal. Section 4(4) of the Uniform Act.
  - Insulated vs. uninsulated property
    - Insulated property is property subject to a time-limited interest which is included in the apportionable estate, but cannot be used for payment of estate taxes due to impossibility or impracticability.
    - Uninsulated property is property other than insulated property that is included in the apportionable estate.
    - The Uniform Act calls for uninsulated property to be used to pay tax attributable to insulated property. An uninsulated interest holder has a right of recovery from distributees of insulated property and a ratable right to obtain a share that subsequently becomes uninsulated.
    - For further discussion, see the Comment to Section 4 of the Uniform Act (2003).

Uniform Estate Tax Apportionment Act

- Credits and deferrals
  - A credit for gift or estate taxes paid on previously taxed property will ratably benefit all persons to whom estate tax is apportioned.
  - Credits for state or foreign estate taxes will ratably benefit all persons to whom estate tax is apportioned, except that such a credit for taxes paid by a beneficiary of the property on which such tax was imposed will inure to the benefit of that beneficiary.

Uniform Estate Tax Apportionment Act

- Collection of Estate Tax
- Order of priority
  - Person to whom the tax is apportioned
  - Any person having an interest in the apportionable estate which is not exonerated from the tax
  - Any other person with an interest in the apportionable estate
  - Any person with an interest in the gross estate
- Right of reimbursement
  - If a person has paid a portion of another's apportioned share of taxes, the payor has a right of reimbursement from such other person and other persons with an interest in the estate to the extent that such other persons have not contributed a portion of the amount collected by the fiduciary in accordance with the order of priority listed above.

Equitable Apportionment

- A majority of states have an equitable apportionment approach.
- Equitable apportionment starts by allocating the tax among the dispositions that are subject to the tax on a pro-rata basis.
- As for bequests which generate an estate tax deduction, an equitable apportionment approach exempts bequests which generate an estate tax deduction (e.g., marital bequests and charitable bequests) from payment of the taxes.

Equitable Apportionment

- Potential issues:
  - Elective share and marital deduction – should the elective share be determined before or after estate taxes are paid?
  - Decedent's intent – lower aggregate tax liability or maximize amounts going to beneficiaries.
  - Benefit of income tax deduction for estate taxes attributable to IRD assets
    - Deduction allowed for income recognized when IRD is drawn upon vs. the deduction for estate tax on IRD.
    - Uniform Estate Tax Apportionment Act (2003) expressly does not provide for equitable apportionment with respect to IRD. The Uniform Law Commission stated that "the current tax treatment of IRD causes serious problems and inequities, but these can only be cured by federal legislation."

Example State Comparisons: NJ

- NJ estate tax apportionment rule is found in § 3B:24-2 (codification of the Uniform Probate Code/1964 Uniform Act)
- Default rule: tax will be apportioned to transferees in the same ratio to the total tax as the ratio which a transferee's interest bears to the total net taxable estate. The balance of the tax is apportioned to the fiduciary. Interest from late payment is apportioned in the same manner.
- Deductions based on the relationship between the transferee and the decedent, or based on the charitable purposes of the bequest, will inure to the benefit of the fiduciary or transferee, as the case may be.
- Deductions for property previous taxed and any credit for gift taxes paid will inure to the benefit of all transferees and the fiduciary
- NJ § 3B:24-5 limits applicability of apportionment provisions unless directed by the terms of the governing instrument

Example State Comparisons: CT

- CGSA 12-401
- Default rule: Tax will be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues, in the proportion that the value of the property bears to the total value of property received by all persons interested in the gross estate.
  - Apportions taxes among all persons interested in the estate (both probate and non-probate property)
- Testator may otherwise direct by the testator's will, or by a written instrument executed inter vivos, that gives direction for apportionment within the fund of taxes assessed upon the specific fund dealt with in such instrument.

Example State Comparisons: NY

- EPTL 2-1.8(c): “Unless otherwise provided in the will or non-testamentary instrument, and subject to paragraph (d-1) of this section:
- (1) The tax shall be apportioned among the persons benefited in the proportion that the value of the property or interest received by each such person benefited bears to the total value of the property and interest received by all persons benefited, the values as finally determined in the respective tax proceedings being the values to be used as the basis for apportionment of the respective taxes.”
- Apportions taxes among all persons interested in the estate (both probate and non-probate property)
- Testator can provide otherwise in the testator’s will and non-testamentary instruments

Example State Comparisons: NY

- New York's statute provides for specific rules in the case of conflicting apportionment provisions.
- EPTL 2-1.8(d): "Subject to subparagraphs (1), (2) and (3) of this paragraph, any direction as to apportionment or non-apportionment of the tax, whether contained in a will or a non-testamentary instrument, relates only to the property passing thereunder, unless such will or instrument provides otherwise.
  - (1) Any such direction in a will which is later in date than a prior non-testamentary instrument and which contains a contrary direction shall govern provided that the later will specifically refers to the direction in such prior instrument.
  - (2) Any such direction in a non-testamentary instrument which is later in date than a prior will or non-testamentary instrument and which contains a contrary direction shall govern provided that the later instrument specifically refers to the direction in such prior will or instrument.
  - (3) Any such direction provided in a non-testamentary instrument only relates to the payment of the tax from the property passing thereunder and such direction shall not serve to exonerate such non-testamentary property from the payment of its proportionate share of the tax, even if otherwise directed in that non-testamentary instrument."

Others Issues

- Other issues
- Conflict among estate planning documents
  - Coordinating provisions between will and revocable trust
  - Effect of amendments and codicils (*Estate of Charles Kuralt*, discussed later)
- Conflict of laws
  - How to handle overlapping apportionment rules in estates with property and/or beneficiaries in multiple states
  - Two approaches: apply the law of the state of domicile or the law of the situs of property and/or administration
- State inheritance taxes
  - States with an inheritance tax compute such taxes based on the relationship between the beneficiary and the decedent.
  - Should inheritance tax be paid by each beneficiary or charged against the residue?

Missing or Defective Tax Allocation Provisions: Charitable Deduction

- Estate tax implications: charitable deduction
- IRC § 2055(c) provides that "If the tax imposed by section 2001, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this section, then the amount deductible under this section shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes."
- Charging taxes against the residue without any language excluding the charitable bequest, or affirmatively charging taxes against charitable bequests, will result in a circular computation that decreases the available deduction, in turn increasing the total taxes ("tax-on-tax").

Missing or Defective Tax Allocation Provisions: Marital Deduction

- Estate tax implications: marital deduction
- IRC § 2056(b)(4) provides that "In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

  (A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest;"
- Similar to the charitable deduction issue, charging taxes against the residue without any language excluding the martial bequest, or affirmatively charging taxes against a marital bequests, will result in a tax-on-tax.

Missing or Defective Tax Allocation Provisions: Gift Tax Issues

- Gift Tax Implications: “Phantom” assets
- IRC 2035(b) provides that “the amount of the gross estate (determined without regard to this subsection) shall be increased by the amount of any tax paid under chapter 12 by the decedent or his estate on any gift made by the decedent or his spouse during the 3-year period ending on the date of the decedent’s death.”
- Certain states have their own add back rules for gifts made
- Difficult to apportion taxes in a will or trust to donees of gifts on which gift tax was paid within the three-year period – they may not have the funds to pay the tax liability. May also subvert donor intent and donee expectations.
- Planning suggestion: Implement a “net net gift” agreement that would have the beneficiary agree to pay the estate taxes attributable to the gift taxes added back to the gross estate (*See Steinberg v. Commissioner*, 141 T.C. No. 8 (2013).

Missing or Defective Tax Allocation Provisions: Income Taxes

- Income tax liabilities accruing before the decedent's death are not dealt with in tax apportionment clauses; instead, they are debts of the decedent and subject to the rules that govern apportionment for debts and administration expenses generally.
- Income in respect of a decedent ("IRD")
  - Amounts receivable to which the decedent was entitled at the time of the decedent's death
  - IRD property can include retirement plans, unpaid, salary, and accrued interest.
  - IRD property should not be apportioned taxes to the extent possible. Liquidating IRD property to pay taxes will be an income tax recognition event.
- Specifically bequeathed property
  - Similarly, if specific bequests are apportioned tax, property may need to be liquidated in order to pay the tax liability.

Missing or Defective Tax Allocation Provisions – GST Tax

- IRC 2603 provides for specific tax apportionment provisions for GST taxes—IRC Section 2603(a) spells out who is liable and IRC Section 2603(b) addresses the apportionment:
  - GST tax imposed on taxable distributions will be paid by the transferee.
  - GST tax imposed on a taxable termination or a direct skip from a trust will be paid by the trustee.
  - GST tax imposed on a direct skip, other than a direct skip from a trust, shall be paid by the transferor (i.e., the estate of the decedent) but may be apportioned to the skip person.
  - GST tax imposed on direct skips is "tax exclusive."
- Default rule: the tax is charged to the property constituting the transfer unless otherwise directed by the terms of the instrument. Waiver of this provision requires <u>specific reference</u> to the GST tax.
- As an example, where a tax apportionment clause apportions tax to the residuary (without any specific reference to the GST tax), a legatee of a $1 million bequest constituting a direct skip would actually receive $1 million less the GST tax attributable to the bequest.
- Drafting suggestion: if the intent is to apportion payment of all taxes to the residue, GST tax must be expressly referenced.

Missing or Defective Tax Allocation Provisions

- GST Tax Implications
- Wasted GST exemption
  - If GST exemption was allocated to a QTIP trust, payment of tax from such property leads to a waste of some portion of the GST exemption.
  - Partially exempt trusts which are apportioned tax will waste some exemption on payment of GST taxes.
- Plan should provide for how apportionment should work if a non-skip person disclaims resulting in a skip.

Missing or Defective Tax Allocation Provisions

- Case Study: *Estate of Charles Kuralt*, 68 P3d 662 (2003)
  - Charles Kuralt devised his Montana property to his romantic companion (Shannon) pursuant to a letter addressed to Shannon. The District Court held that the letter was a codicil and the judgment was affirmed on appeal to the Montana Supreme Court. Under the terms of Kuralt's will, the residue of the estate was to go to his wife and his two children. The will provided that all death taxes would be paid without apportionment out of the residuary estate.
  - In subsequent litigation, the Supreme Court held that the will clearly and unambiguously directs against statutory apportionment and charges estate tax to the residue. Despite evidence that the will was intended to take full advantage of the marital estate tax deduction, the language of the will is clear in charging taxes against the residue.
  - Tax result: Shannon was not allocated any portion of the estate tax burden. The devise in the codicil caused an increase in the overall tax burden and reduced the amount of property ultimately going to the residuary beneficiaries (including the marital bequest and hence the marital deduction).

Predeceased Spousal Assets

- Most often an issue when spouses' estate plans do not have identical provisions.
- Surviving spouses should address IRC Section 2207A in their estate plans—this does not necessarily mean either waive or not waive—but it must be actively considered.
- Need to consider equity of Section 2207A if surviving spouse has DSUE amount available for use as this can become a flashpoint.

Apportionment Clauses and Retirement Assets

- Many states direct outside apportionment; further, many estate plans direct all estate taxes to be paid from the residue of the estate. Where non-probate assets, and specifically retirement assets, are significant, extra consideration should be given to the tax apportionment clause.
- As discussed above, taxes should generally not be apportioned to IRD property, which includes retirement plans.
- Estate tax being apportioned against retirement assets will also have implications for the ability to stretch qualified plan benefits.

Apportionment Clauses and Retirement Assets

- Issues to address
  - Ability of decedent to apportion taxes to retirement assets can be limited.
  - Availability of funds to pay the tax given restrictions on plan funds.
  - Collectability - the fiduciary does not have access to the retirement assets.
  - Right of setoff by the fiduciary against a beneficiary's share of property otherwise under the control of the fiduciary.

Thank you

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