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In Re Estate of Bovaird: The Ultimate Burden of Federal Estate Taxes in Oklahoma

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NOTES AND COMMENTS

IN RE ESTATE OF BOVAIRD: THE ULTIMATE BURDEN OF FEDERAL ESTATE TAXES IN OKLAHOMA

I. INTRODUCTION

The Internal Revenue Code (I.R.C.) governs which property must be included in a decedent's gross estate[1] for federal estate tax purposes,[2] but does not designate which property is to bear the actual burden of paying the tax,[3] allowing state law to control the issue.[4] Although in Oklahoma it is possible to allocate ultimate liability for the federal tax in the will itself,[5] many testators fail to do so.[6] Conflicts

1. In this Note, "gross estate" means property which is included in the estate for purposes of the federal estate tax. I.R.C. § 2031 (1976). "Estate" means anything a person owns when he or she dies. The "taxable estate" is the gross estate less all applicable deductions. I.R.C. § 2051 (Supp. V 1981). "Probate estate" means property which is subject to the decedent's will or to the intestate succession law of Oklahoma. "Non-probate property" is property which has a beneficiary designation or is held in joint tenancy. Thus, when the owner dies, nonprobate property passes directly to the beneficiary or joint tenant. The executor or administrator (referred to as the personal representative) and the probate court have no power over nonprobate property. For example, a house owned solely by X will pass according to his will or, if there is no will, according to the intestate succession law. The proceeds of an insurance policy, which go directly to the beneficiary named in the life insurance contract, are nonprobate property. "Residue" or "residual property" is that portion of the probate estate left after specific devises and bequests. BLACK'S LAW DICTIONARY 1177 (5th ed. 1979).

2. The estate tax provisions of the I.R.C. are §§ 2001-2209 (1976 & Supp. V 1981). The gross estate is defined at § 2031. A simple explanation of the estate tax system is that when a person dies, everything he or she owns is valued. These values are totaled, certain deductions are allowed, and the remainder is taxed at a percentage ranging from 18% to 65%. *Id.* § 2001 (Supp. V 1981). Until 1982 the maximum rate was 70%; the top rate is now scheduled to drop to 50% in 1985. *Id.* § 2001 (1976 & Supp. V 1981). Under the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 171 (codified at scattered sections of the I.R.C.), all property passing to a surviving spouse is deducted from the gross estate to arrive at the taxable estate. I.R.C. § 2056 (Supp. V 1981). Charitable gifts at death are also tax free. *Id.* § 2055 (1976 & Supp. V 1981).

3. I.R.C. § 2002 (1976) provides only that "[t]he tax imposed by this chapter shall be paid by the executor."

4. *See* Riggs v. Del Drago, 317 U.S. 95, 98 (1942) (The Supreme Court, finding that state law governs apportionment of taxes, held that a New York statute apportioning the burden did not violate federal law.); Susman & Fourticq, *Apportionment of Death Taxes: A Comprehensive Survey with Proposed Statute*, 45 TEX. L. REV. 1348, 1361-63 (1967); *see also infra* text accompanying notes 22-29 (discussing history of apportionment of estate taxes).

5. OKLA. STAT. tit. 84, § 3; *id.* tit. 58, § 461 (1981). Title 84, § 3 provides in part:

arise when the testator either fails to allocate the burden or does so ineffectively.[7]

Oklahoma courts have traditionally placed the burden of the tax on the residue of the probate estate.[8] This has been unfair in two ways: first, property which passes outside the will, such as assets held in joint tenancy or in inter vivos trust, is part of the taxable estate but has escaped contribution to payment of the tax; second, certain nontaxable residuary bequests and devises, which do pass under the will, have been forced to contribute to payment. Although residuary bequests to spouses or charities do not create any tax liability,[9] they may bear a significant portion of the federal estate tax.[10]

A recent Oklahoma case, *In re Estate of Bovaird*,[11] which reverses this judicial rule as it applies to a spouse's forced share of the estate, may have a substantially broader impact on the apportionment of federal estate taxes in Oklahoma. This Note examines the background and reasoning of *Bovaird* and attempts to predict how the Oklahoma

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> The property of a testator, except as otherwise especially provided in this code and in the chapter on civil procedure must be resorted to for the payment of debts in the following order:
>
> 1. The property which is expressly appropriated by the will for the payment of the debts.
> 2. Property not disposed of by the will.
> 3. Property which is devised or bequeathed to a residuary legatee.
> 4. Property which is not specifically devised or bequeathed, and,
> 5. All other property ratably.

Id. (footnote omitted). Title 58, § 461 provides:

> If the testator makes provisions by his will or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provisions or designation, out of the estate thus appropriated, so far as the same is sufficient.

Id. Although estate taxes are not "debts" in Oklahoma, the Oklahoma Supreme Court has held that estate taxes are an administration expense and thus subject to these provisions. Tapp v. Mitchell, 352 P.2d 900, 905 (Okla. 1960); *In re* Estate of Rettenmeyer, 345 P.2d 872, 880 (Okla. 1959).

6. *See, e.g.*, Thompson v. Wiseman, 233 F.2d 734 (10th Cir. 1956). In *Thompson*, the will did not designate a source for payment of estate taxes and the widow resisted contribution, precipitating the suit. *Id.* at 736.

7. *E.g., id.* For sample language appropriating particular portions of the estate, see 2 EST. PLANNING & TAX'N COORDINATOR (RIA) ¶¶ 18,461-18,464 (1981).

8. *E.g., In re* Estate of Fullerton, 375 P.2d 933, 947 (Okla. 1962); *In re* Estate of Rettenmeyer, 345 P.2d 872, 880 (Okla. 1959).

9. The marital deduction is provided for at I.R.C. § 2056 (1976 & Supp. V 1981). The charitable deduction is found at *id.* § 2055.

10. Note, *Estate and Gift Tax: Federal Estate Tax—Burden of a Marital Share*, 33 OKLA. L. REV. 384 (1980). The Note uses two hypotheticals to illustrate the impact of the "burden on the residue" rule on a spouse's share. If part of the residue passes to a spouse, that share must contribute the proportion of tax which it bears to the entire residue. Thus, the spouse's net share can be considerably reduced. *Id.* at 392-93.

11. 645 P.2d 500 (Okla. 1982).

Supreme Court might answer several problems raised for practitioners under the new rule.

II. STATEMENT OF THE CASE

Davis D. Bovaird died in 1979, leaving most of his estate to his three children.[12] Florence H. Bovaird, his widow,[13] elected to take against the will and then sought a declaratory judgment that her forced share[14] did not have to contribute to payment of the federal estate tax.[15] The will provided for payment of estate taxes out of the probate estate and specifically exempted nonprobate property from liability.[16] Mrs. Bovaird argued that her forced share did not come out of the residue and therefore should bear none of the burden of federal estate taxes.[17] The trial court agreed, holding that the will directed that the estate taxes should be paid from the property passing under the will, and that the widow's forced share did not pass under the will but by operation of state law.[18] Appealing to the Oklahoma Supreme Court, the children argued that the widow's share was residue and that no statute or case exempted the widow from payment of federal estate taxes.[19] The supreme court stated the issue: "May a surviving spouse who elects to take against the will of her husband, be required to contribute to the federal estate tax?"[20] It would have been possible for the court to free the widow's share from contribution by simply affirming the reasoning of the trial court, but the court went a step further, adopting principles of equitable apportionment of federal estate taxes.[21]

12. *Id.* at 501. Mr. Bovaird's probate estate was valued at over three and one-half million dollars. Mrs. Bovaird was bequeathed the homestead and certain personal property. Inventory and Last Will and Testament of Davis D. Bovaird, Deceased (in file of *In re* Estate of Bovaird, No. P-79-978 (Dist. Ct. Tulsa Cty. Okla. 1979)).

13. Mrs. Bovaird, a well-known Tulsa philanthropist, died in 1982. *Mrs. Bovaird Dies; Rites Set*, Tulsa World, Oct. 15, 1982, at F3, col. 3.

14. 645 P.2d at 501. A testator cannot leave less to a spouse than the spouse would have received under the intestate succession law. OKLA. STAT. tit. 84, §§ 44, 213 (1981). If he does, the spouse may elect against the will and receive the intestate share. The share so taken is called the "forced share." Little v. Cunningham, 381 P.2d 144, 147 (Okla. 1963); Turner v. First Nat'l Bank, 262 P.2d 897, 900 (Okla. 1953); Thomsen v. Thomsen, 196 Okla. 539, 543, 166 P.2d 417, 420 (1946).

15. 645 P.2d at 501.

16. *Id.* at 502.

17. *Id.*

18. *Id.*

19. *Id.; see* Appellants' Brief at 11, *In re* Estate of Bovaird, 645 P.2d 500 (Okla. 1982).

20. 645 P.2d at 501.

21. *Id.* at 504-05.

III. OKLAHOMA LAW PRIOR TO *BOVAIRD*

The I.R.C. provides that the federal estate tax shall be paid by the executor[22] without specifying how the burden is to be distributed among the beneficiaries of the estate or whether the executor has the right to demand contribution towards the tax liability from nonprobate beneficiaries. There are, however, three exceptions: the executor may demand contribution from nonprobate beneficiaries for tax liability created by life insurance proceeds;[23] by the exercise, nonexercise, or release of a power of appointment;[24] or by certain property qualifying for the marital deduction under the new terminable interest rules.[25]

Because the I.R.C. requires the executor to pay the tax, some early courts held that federal law required that the tax be paid out of the probate estate.[26] In *Riggs v. Del Drago*,[27] the United States Supreme

22. "The tax . . . shall be paid by the executor." I.R.C. § 2002 (1976). Treas. Reg. § 20.2002-1 (West 1981) provides, "This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of property which does not come within the possession of the executor or administrator." If no executor or administrator is appointed, the I.R.C. provides that anyone in "actual or constructive possession of any property of the decedent" is considered an executor. I.R.C. § 2203 (1976).

23. I.R.C. § 2206 (1976) provides in part:

> Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate.

24. I.R.C. § 2207 (1976) reads in part:

> Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041 [powers of appointment], the executor shall be entitled to recover from the person receiving such property by reason of the exercise, non-exercise or release of a power of appointment such portion of the total tax paid as the value of such property bears to the taxable estate.

25. I.R.C. § 2207A (Supp. V 1981). "Qualifying terminable interest property" is commonly known as QTIP. As a general rule, life estates and other estates terminating after a certain length of time or on a particular event do not qualify for the estate and gift tax marital deduction. *Id.* § 2056(b)(1) (1976). Executors of estates of decedents dying after 1981, however, may elect to have certain property interests qualify for the marital deduction. The property is subsequently taxed when the surviving spouse (the donee) dies or disposes of the property. *Id.* §§ 2044, 2056(b)(7) (Supp. V 1981). Section 2207A allows the estate of the surviving spouse to recover from the recipient of the property the amount of federal estate tax caused by inclusion of the property in the estate of the surviving spouse. For example, if A and B are married and A dies, his executor may elect to include any QTIP in the marital deduction. If he so elects, the property is not taxed in A's estate. When B dies, the property is taxed in her estate. B's estate has the right, under § 2207A, to recover the estate tax allocable to the QTIP from B's devisee. *See* 3 EST. PLANNING & TAX'N COORDINATOR (RIA) ¶¶ 44,830-44,836 (1982), 48,241-48,249 (1983); 2 FED. EST. & GIFT TAX REP. (CCH) ¶¶ 7530 (1977), 7533 (1983), 8371 (1982), 8374.10 (1982).

26. *E.g.*, In re Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131 (1941). The New York Court of Appeals held that "Congress . . . placed the burden of the tax upon the residuary estate rather than upon legacies." *Id.* at 69, 38 N.E.2d at 135. The court also held that federal law governed the issue. "Since Congress had the power to . . . determine where the burden should rest, those

Court established the current federal rule that allows state law to govern the allocation of the burden of federal estate taxes. In *Riggs*, the New York Court of Appeals struck down a New York statute apportioning the tax, holding that the field was preempted by federal law.[28] The Supreme Court reversed, holding that "applicable state law . . . should govern . . . the ultimate impact of the federal tax."[29] The effect of this rule is to allow each state to allocate the burden, either by statute or judicial rulemaking. A substantial number of states have adopted complete equitable apportionment statutes, requiring each asset to bear the share of estate tax which it generates.[30] Other states have adopted either equitable apportionment[31] or the "burden on the residue" rule[32] by court decision.

"Equitable apportionment" does not have a commonly agreed upon meaning. For example, it may mean that nontaxable shares of

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acts are the supreme law of the land and the State legislative acts in question, if in conflict with the Federal law, are a nullity . . . ." *Id.* at 77, 38 N.E.2d at 139 (citation omitted). Prior to *Riggs v. Del Drago*, the Massachusetts Supreme Court held that federal law required that the burden of federal estate taxes be placed on the residue of the probate estate. "[T]he law makes no provision for apportionment of the tax among legatees, but leaves it simply to be paid out of the estate before distribution is made." Plunkett v. Old Colony Trust Co., 233 Mass. 471, —, 124 N.E. 265, 267 (1919). I.R.C. § 2205 (1976) provides some support for this position, allowing beneficiaries holding property who are forced by I.R.S. action to pay estate tax to recover such amounts from the undistributed estate. *See also* Plunkett, *Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention*, 51 MICH. L. REV. 53, 54-58 (1952) (summary of the early cases). The debate over which law controls was ended when the United States Supreme Court reversed *In re Del Drago's Estate*. Riggs v. Del Drago, 317 U.S. 95 (1942).

27. 317 U.S. 95 (1942).

28. *Id.* at 97. See *supra* note 26 for a discussion of the New York Court of Appeals' reasoning.

29. 317 U.S. at 98.

30. Such statutes, often modeled after the Uniform Estate Tax Apportionment Act, 8 U.L.A. 159 (1972), free spouses and charities from contribution, since property passing to these parties generates no estate tax. Among the states adopting the Uniform Estate Tax Apportionment Act are Hawaii, HAWAII REV. STAT. §§ 236A-1 to -9 (1976); Maryland, MD. EST. & TRUSTS CODE ANN. § 11-109 (1974); North Dakota, N.D. CENT. CODE § 30.1-20-16 (1976); Oregon, OR. REV. STAT. §§ 116.303 to .383 (1981); Rhode Island, R.I. GEN. LAWS §§ 44-23.1-1 to -12 (1956); and Vermont, VT. STAT. ANN. tit. 32, §§ 7301-7309 (1981). An earlier version of the Uniform Act was adopted by Alaska, ALASKA STAT. § 13.16.610 (1973); Michigan, MICH. COMP. LAWS ANN. §§ 720.11 to .21 (West 1968); Montana, MONT. CODE ANN. §§ 72-16-601 to -612 (1979); New Hampshire, N.H. REV. STAT. ANN. §§ 88-A:1 to :12 (1970); and Wyoming, WYO. STAT. §§ 2-10-101 to -110 (1977). Apportionment provisions are also contained in the Uniform Probate Code, 8 U.L.A. 478 (1972), adopted as of 1981 by 15 states. 8 U.L.A. 114 (Supp. 1982) (list of states adopting apportionment provisions). For a list of other apportionment and non-apportionment statutes, see 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 8340.16 (1977).

31. *E.g.*, Bragdon v. Worthley, 155 Me. 284, 153 A.2d 627 (1956) (inter vivos transferees are liable for contribution when transfers are included in gross estate for federal estate tax purposes).

32. *E.g., In re* Atwell, 85 Cal. App. 2d 454, 193 P.2d 519 (1948) (federal estate tax is an expense of administration, chargeable against gross estate in same category as any other charge executor or administrator must pay from probate estate).

the probate estate need not contribute to the tax,[33] but that the burden remains on other property in the probate estate. Another interpretation is that only assets in the taxable estate must contribute, whether probate or nonprobate.[34] Requiring only assets in the taxable estate to contribute would exempt bequests to spouses and charities, since those testamentary transfers are nontaxable.[35]

Oklahoma law was apparently first interpreted by the Tenth Circuit Court of Appeals in *Thompson v. Wiseman*.[36] The Tenth Circuit first found that estate taxes were an "expense of administration" and then applied title 84, section 3 of the Oklahoma Statutes.[37] Thus, the burden of the estate tax fell on the residue, causing the wife's share of the residue to bear its proportionate share of tax, despite the fact that the share qualified for the marital deduction and was not part of the taxable estate.[38] *Thompson* was extensively quoted with approval in *In re Estate of Rettenmeyer*,[39] the first Oklahoma Supreme Court case to consider the ultimate burden of federal estate taxes.[40] In *Rettenmeyer*, the court affirmed the trial court's holding that a spouse's bequest from the residue should share the tax burden equally with other shares of the residue.[41] *Thompson* and *Rettenmeyer* are factually distinguishable from *Bovaird* as both involved bequests in a will, not forced shares.[42]

The following year, in *Tapp v. Mitchell*,[43] the Oklahoma Supreme

33. *See* Northern & Wachter, *The Ultimate Burden of the Federal Estate Tax in Kansas—A Dilemma for Executors*, 17 WASHBURN L.J. 231, 237-41 (1977).

34. The Uniform Estate Tax Apportionment Act requires contribution from nonprobate assets. 8 U.L.A. 159 (1972). See *supra* note 30 for a list of states which have adopted the Uniform Act.

35. The marital, charitable, and any other allowable deductions are subtracted from the gross estate to reach the taxable estate. I.R.C. § 2051 (Supp. V 1981).

36. 233 F.2d 734 (10th Cir. 1956).

37. *Id.* at 737. OKLA. STAT. tit. 84, § 3 (1981), quoted in full at *supra* note 5, designates which property in the probate estate must bear the debts of the estate. The Tenth Circuit held that the same order applied to administration expenses, including estate taxes. 233 F.2d at 737 n.3. The Oklahoma Supreme Court later confirmed that estate taxes are an administration expense in Tapp v. Mitchell, 352 P.2d 900, 905 (Okla. 1960).

38. 233 F.2d at 736.

39. 345 P.2d 872, 880 (Okla. 1959).

40. While *Rettenmeyer* was the first Oklahoma Supreme Court case on the burden of federal estate taxes, the court had already ruled that the burden of the Oklahoma estate tax fell on the residue, reasoning that since the lien of the tax was on the entire estate, "it is the executor or administrator, rather than the beneficiaries of such devisees (sic) or legacies, that is primarily liable for payment of the tax." Ward v. Oklahoma Tax Comm'n, 322 P.2d 172, 177 (Okla. 1957). The federal estate tax lien also falls on the entire estate; thus this reasoning would also apply to the federal tax. However, *Ward* was not discussed in *Rettenmeyer*, 345 P.2d 872.

41. 345 P.2d at 880.

42. *Id.*; 233 F.2d at 736.

43. 352 P.2d 900 (Okla. 1960).

Court overruled an attempt to charge nonprobate property with its proportionate share of estate tax and held that "the entire estate tax burden, whether occasioned by property within or dehors probate, falls upon the estate."[44] The court also stated that *Rettenmeyer* was an express rejection of the "equitable doctrine of estate tax apportionment."[45] In a 1962 case,[46] the Oklahoma Supreme Court reaffirmed *Rettenmeyer*, holding that, absent direction in the will, estate taxes were to be paid out of the residue of the probate estate.[47]

In 1965, the Oklahoma Legislature passed the Uniform Estate Tax Apportionment Act,[48] which requires complete apportionment. The Act apparently reversed the rule in *Rettenmeyer*, but it was repealed in 1969[49] without having been interpreted by the Oklahoma Supreme Court. With repeal of the Act, presumably the previous judicially established rule of *Rettenmeyer* and *Tapp* again became the law of Oklahoma. This presumption was confirmed in a 1977 decision,[50] in which the Oklahoma Court of Appeals, relying on *Tapp*, held that all "debts, estate taxes and costs of administration" must be allocated in accordance with title 84, section 3 of the Oklahoma Statutes.[51]

Thus, Oklahoma courts consistently rejected equitable apportionment of federal estate taxes until the 1982 case, *In re Davidson Trust*,[52] in which the Oklahoma Supreme Court applied equitable principles of apportionment, holding that a charity need not contribute to payment of federal or state estate taxes.[53] The court did not mention *Ret-*

44. *Id.* at 905. It is unclear from the opinion whether *Tapp v. Mitchell* involved federal as well as state estate taxes; the court did use *Rettenmeyer*, 345 P.2d 872, as precedent. 352 P.2d at 905.

45. 352 P.2d at 905.

46. *In re* Fullerton's Estate, 375 P.2d 933 (Okla. 1962).

47. *Id.* at 947. As with Tapp v. Mitchell, 352 P.2d 900, it is unclear whether federal estate taxes were involved. It was not important to distinguish federal and Oklahoma estate taxes in these cases until 1973, when the Oklahoma Legislature added provisions to the Oklahoma estate tax laws which were used by the Oklahoma Supreme Court in *In re* Davidson Trust, 641 P.2d 1110 (Okla. 1982), to apportion both the federal and Oklahoma estate taxes. *Id.* at 1113; 1973 Okla. Sess. Laws ch. 206, § 7 (codified at OKLA. STAT. tit. 68, § 825 (1981)). All of the cases discussed thus far were decided before the statutory change. The court's discussion of the new law in *Davidson* is at 641 P.2d at 1113; *see infra* text accompanying notes 52-58.

48. 1965 Okla. Sess. Laws ch. 271, §§ 1-12 (codified at OKLA. STAT. tit. 58, §§ 2001-2011 (Supp. 1965)).

49. 1969 Okla. Sess. Laws ch. 97, § 1.

50. *In re* Estate of Murray, 579 P.2d 203 (Okla. App. 1977).

51. *Id.* at 205.

52. 641 P.2d 1110 (Okla. 1982).

53. *Id.* at 1114. Although the asset in question was a nonprobate asset, specifically a power of appointment, the executrix sought to force the charities to pay under I.R.C. § 2207 (1976). See *supra* note 24 for the text of the section.

tenmeyer and refused to accept *Thompson v. Wiseman* as precedent,[54] relying on title 68, section 825 of the Oklahoma Statutes as authority for apportioning both federal and Oklahoma estate taxes, stating, "[W]e need not respond to appellant's contention that estate taxes shall be paid out of the residue of the estate, that law having been supplemented by § 825."[55]

The portion of section 825 quoted as authority by the *Davidson* court reads:

> Unless the will otherwise provides, the tax shall be apportioned among lineal and collateral persons.
>
> The tax on interests passing to collateral persons shall be apportioned in the proportion that the value of interest received by each collateral person bears to the total of the interests passing to all collateral persons.
>
> The tax on interests passing to lineal persons shall be apportioned in the proportion that the value of interest received by each lineal person bears to the total of all interests passing to lineal persons.[56]

Relying on this section as authority for apportioning federal estate taxes presents several problems. First, the purpose of section 825 is to set forth the rates for the Oklahoma estate tax. The words "the tax" in section 825 clearly refer to the Oklahoma estate tax; there is neither a reference to the federal estate tax nor to taxes in the plural. Second, the section only apportions among lineal and collateral heirs—a distinction which does not exist in the federal estate tax laws.[57] Third, the language apportions according to the value of the interest passing, not according to the share of the taxable estate. Charities and spouses are not exempt from contribution under such a provision, since assets passing to them have value. Conceptual difficulties like these, and the court's reference to equitable principles as grounds for apportionment,[58] meant that *Davidson* left Oklahoma law somewhat uncertain. *Bovaird*, decided little more than a month later, also left many questions unanswered.

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54. 641 P.2d at 1113-14. This was apparently a case of first impression in Oklahoma. *Id.* at 1114.

55. *Id.* at 1113.

56. OKLA. STAT. tit. 68, § 825 (1981).

57. All beneficiaries except the spouse receive the same treatment under the federal tax. I.R.C. § 2056 (1976 & Supp. V 1981). The Oklahoma estate tax provides for lower tax rates on bequests to lineal heirs. OKLA. STAT. tit. 68, § 825 (1981).

58. 641 P.2d at 1114.

IV. THEORIES OF THE CASE

In *Bovaird*, the Oklahoma Supreme Court explicitly affirmed the trial court's holding that the widow's forced share was not residue and therefore was not liable for estate taxes.[59] The court also adopted the principles of equitable apportionment.[60] Since either of these holdings would have freed Mrs. Bovaird from contribution to federal estate taxes, the court's adoption of both makes the future application of this decision unclear.

The court reasoned that the forced share was non-residue because it passes by operation of law and therefore comes out of the probate estate before the residue.[61] The consequence of this holding, standing alone, is that a surviving spouse who receives a bequest from the residue would contribute to the federal estate tax, while a spouse electing against the will would not contribute. Although the court was not explicit about its reasons for adopting equitable apportionment, this result, which is clearly inequitable, may explain the decision.

The court based its acceptance of equitable apportionment, and the concurrent relief for a surviving spouse, on two ideas: simple fairness and congressional intent in passing the marital deduction.[62] The court reasoned that since a marital share, which qualifies for the marital deduction,[63] does not create tax liability, it should not bear any burden of payment of the tax. The court assumed that Congress' intent was to free the marital share from tax liability, as well as to exclude it from the taxable estate.[64]

These two theories, the forced share as non-residue and the adoption of equitable apportionment, have created uncertainty for practi-

59. 645 P.2d at 503.
60. *Id.* at 505.
61. *Id.* at 502-03.
62. *Id.* at 504.
63. I.R.C. § 2056 (1976 & Supp. V 1981). The marital deduction was formerly limited to $250,000 or one-half the gross estate, whichever was greater. It is now unlimited as a result of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 171 (codified at scattered sections of the I.R.C. (Supp. V 1981)).
64. 645 P.2d at 504. The court cited a line of cases at 67 A.L.R.3d 199, 217-22 (1981). At least one court takes the opposite view—that the purpose of the marital deduction is to benefit the entire estate by lessening the overall tax burden. *In re* Mosby's Estate, 554 P.2d 1341, 1344 (Mont. 1976) (spouse taking elective share must contribute to estate taxes because marital deduction is for benefit of entire estate). Undoubtedly the main goal of Congress was to equalize treatment of couples living in common-law and community property jurisdictions. Several states, including Oklahoma, had passed community property laws to take advantage of favorable estate tax treatment, but most of the statutes, including Oklahoma's, were repealed after the marital deduction was passed. Note, *supra* note 10, at 385-86.

tioners, who must determine what interests are subject to the *Bovaird* rationale. The typical estate has no adversary to monitor the executor or the attorney, upon whom the executor normally relies in technical matters, such as apportioning federal estate taxes. Thus, the attorney, as well as the executor, walks an ethical tightrope when dealing with uncertain legal issues such as this. The executor is personally liable on his fiduciary bond for mistakes.[65] Other parties also have a substantial stake in reaching the correct result. The beneficiaries of the estate, who are often unsophisticated parties, face large gains or losses depending on who must bear the burden of federal estate taxes. Since probate judges must approve accounts before estates can be distributed and must approve the net size of each distributive share, they indirectly supervise the payment of federal estate taxes.[66] The remainder of this Note attempts to predict how Oklahoma courts might handle the issues which have been presented as they arise in the practice of estate attorneys in the future and suggests the fairest, most convenient, and most correct result.

V. THE FORCED SHARE AS NON-RESIDUE

A number of possible results might be inferred from the first holding in *Bovaird*, that the forced share of a surviving spouse is not residue. First, the circular estate tax computation, which increases the total tax due and reduces the marital share, is avoided.[67] If the spouse

65. OKLA. STAT. tit. 58, § 173 (1981) (bond conditioned on faithful execution of trust); *id.* § 288 (personal representative liable for failure to return inventory); *id.* § 491 (personal representative liable for misconduct in sale of estate property); *id.* § 597 (personal representative liable for failure to pay creditors claims when ordered by court).

66. *Id.* § 632 (court must name persons and proportions or parts to which each is entitled); *id.* § 634 (court must be satisfied all Oklahoma estate taxes are paid before allowing distribution). Since federal estate taxes affect the share of each beneficiary, allocation of the ultimate burden of federal taxes is of concern to the probate judge. No Oklahoma statute specifically requires that the judge supervise payment of federal estate taxes. *But cf.* Tapp v. Mitchell, 352 P.2d 900, 905 (Okla. 1960) (federal estate taxes classed as debts or administration expenses in Oklahoma); Van Hoozer v. Myers, 98 Okla. 243, 247-48, 224 P. 977, 982 (1924) (all taxes, including federal income taxes, are debts of estate and must be paid before distribution of probate estate); Oklahoma Title Examination Standards, OKLA. STAT. tit. 16, ch. 1, app. §§ 17.1-.3 (1981) (duration and priority of federal estate tax lien).

67. When a spouse's share pays part of the tax, the share of the spouse becomes smaller. Since the marital share is smaller, the marital deduction is smaller and the amount of tax paid becomes larger. The spouse must then pay part of the increase in the tax, further decreasing her share, and so on. The Internal Revenue Service accepts two mathematical solutions to this dilemma, both of which involve complex operations and require a great deal of expensive legal and accounting expertise. *See* INTERNAL REVENUE SERV., PUBLICATION 904 (1980). However, these solutions do not alter the result—more tax is due.

does not contribute to payment of the federal estate tax, the computation is not necessary and less tax is due.

A second significant result is that the forced share will be free of contribution to the debts of the estate and expenses of administration. Oklahoma statutes provide that the residue of the estate is to be used to pay debts and expenses before resorting to specific bequests and devises,[68] and the forced share should now join specific bequests and devises as the properties of last resort for payment of these expenses.[69] While this result follows logically from the rule in *Tapp v. Mitchell*[70] that taxes are an administration expense, it is not particularly equitable since it has the effect of increasing the electing spouse's net share in relation to the intestate share.[71]

A third possibility is that any other property in the probate estate, which passes by operation of law rather than under the will, may be considered non-residue and free from contribution to estate taxes. Two examples are the share taken by a child omitted from a will[72] and property subject to homestead rights.[73] If the property is free of estate taxes, it might also be free of contribution to debts and other administration expenses. The share taken by an omitted child serves the same purpose as the forced share of a surviving spouse; it carries out the social policy that property should be left to the immediate family.[74] The child's share is currently fully taxable,[75] and therefore there is no reason to favor an omitted child over other heirs in paying the taxes. But under the *Bovaird* rationale, if the share is not residue, it should be exempt.

68. OKLA. STAT. tit. 84, § 3 (1981) (order in which property to be used to pay estate taxes). See *supra* note 5 for text of this section. Tapp v. Mitchell, 352 P.2d 900 (Okla. 1960), is the leading case holding that taxes are an administrative expense. *See also* OKLA. STAT. tit. 58, § 591 (1981) (order of payment of debts); *id.* § 594 (time for payment of certain expenses).

69. OKLA. STAT. tit. 84, § 3 (1981) (order of resort to property for debts of estate). See *supra* note 5 for the text of the section.

70. 352 P.2d 900, 905 (Okla. 1960).

71. On the other hand, since the spouse is usually in an adverse position to the personal representative when she is electing against the will, and often must hire her own attorney, it may seem fair that she should not have to help pay the personal representative's fee and the fee of the attorney for the estate.

72. Children born after a will is signed or who are unintentionally omitted from it may claim their intestate share of the probate estate. OKLA. STAT. tit. 84, §§ 131-132 (1981). The intestate succession law is codified at *id.* § 213.

73. *Id.* tit. 31, §§ 1-5 (1981).

74. *See, e.g., id.* tit. 84, § 44 (spouse cannot be disinherited); *id.* §§ 131-132 (child must be explicitly disinherited).

75. The federal Orphan's Deduction, I.R.C. § 2057 (1976), which was only available when no parent survived, was repealed in the Economic Recovery Tax Act of 1981, effective as to estates of decedents dying after Dec. 31, 1981. Pub. L. No. 97-34, § 427, 95 Stat. 171, 318-19 (1981) (codified at scattered sections of the I.R.C. (Supp. V 1981)).

Homestead property is subject to certain rights of the surviving spouse,[76] but is currently subject to sale for taxes and receives no special estate tax treatment.[77] Nevertheless, the argument can be made that the spouse's rights take homestead property out of the residue, since the survivor has the right to occupy the homestead and the right of occupancy is not subject to administration proceedings.[78]

While freeing a forced share from payment of debts and administration expenses or freeing the share of an omitted child from contribution to estate taxes may not seem particularly fair, these results follow logically from the first holding in *Bovaird*. Since the policy behind *Bovaird*, exempting a nontaxable share from paying taxes, does not apply to omitted children and homestead property, the Oklahoma Supreme Court will probably refuse to extend the non-residue rationale to other shares of the estate.

VI. EQUITABLE APPORTIONMENT

The second holding in *Bovaird* adopts equitable apportionment of federal estate taxes.[79] As pointed out above,[80] "equitable apportionment" is not a doctrine with a precise meaning. The two most likely meanings of the phrase as used by the court in *Bovaird* are relief from contribution for the spouse, with the burden falling on the probate estate, and complete apportionment among the holders of property included in the taxable estate.[81] To determine which of these or several other possibilities[82] will eventually be the rule, it is necessary to look at the Oklahoma Supreme Court's use of policy and precedent. An examination of the arguments for and against these potential outcomes should assist personal representatives and their attorneys in carrying out their duties properly.

A. *Relief for a spouse taking a forced share; burden still on the probate estate.*

The narrowest possible interpretation of the court's opinion im-

76. OKLA. STAT. tit. 31, § 1 (1981).
77. *Id.* § 5.
78. *Id.* tit. 58, §§ 311-318; *see generally* R. HUFF, OKLAHOMA PROBATE LAW AND PRACTICE §§ 301-307 (1982) (general discussion of homestead laws).
79. 645 P.2d at 505.
80. *See supra* text accompanying notes 33-35.
81. *See* Susman & Fourticq, *supra* note 4, at 1366-81 (general discussion of some of the possible meanings of equitable apportionment).
82. *See supra* text accompanying notes 33-35.

plies that a bequest out of the residue to a spouse would not be free of contribution to federal estate taxes, while a widow's forced share would be free of contribution. The effect of this interpretation is to give a spouse whose husband has attempted to cut her out of the will a larger share than that of a spouse whose husband either makes a proper bequest of at least one-third of the residue or dies intestate.[83] Since in each of these situations the marital share qualifies for the marital deduction and creates no tax liability, there is no equitable reason to favor a forced share over a bequest or an intestate share. However, the reasoning in *Bovaird* can be read to imply that this is what the Oklahoma Supreme Court means by "equitable apportionment" in this context. This conservative reading is plausible for several reasons. First, the children in *Bovaird*, relying on *Thompson v. Wiseman*,[84] argued that "it is illogical that a one-third *bequest* of residue to a spouse (as in *Thompson*) would be treated any differently than a one-third *forced share* of an estate . . . ."[85] But the court, noting that "they cite no authority for that argument in logic,"[86] rejected their argument. In fact, *Thompson* itself distinguishes between a forced share and a bequest. *Thompson* involved a bequest of residue[87] and the Tenth Circuit rejected arguments for apportionment based on cases dealing with forced shares, saying that they presented "a problem different from whether a residuary devise to the wife under the will should share the debt and tax burden."[88]

A second factor supporting this result is that the Oklahoma Supreme Court did not explicitly overrule *Thompson* in *Bovaird*. Rather, the court said, "[W]e prefer to come down on the side of the widow and hold that her forced share shall be treated preferentially

83. OKLA. STAT. tit. 84, § 44 (1981) provides in part, "No spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law." Oklahoma courts have enforced this provision by allowing the surviving spouse to choose between the provisions in the will and the intestate share. *See supra* note 14.

84. 233 F.2d 734, 738 (10th Cir. 1956).

85. 645 P.2d at 503 (emphasis in original).

86. *Id.*

87. 233 F.2d at 737.

88. *Id.* at 738. There is little difference between a forced share and a bequest with regard to estate taxes. Neither a forced share nor a bequest creates tax liability for the estate. As a practical matter, of course, in those cases in which estate taxes on nonprobate property greatly deplete the probate estate, the share available to the surviving spouse could be destroyed. If this happens to a bequest, it could be argued that the testator intended depletion of the fund. But the public policy favoring a forced share suggests that the testator should not be allowed to do indirectly what he cannot do directly—defeat the forced share.

. . . ."[89] Third, the court looked to *Spurrier v. First National Bank*,[90] a Kansas case which also involved a forced share, as a guide.[91] In *Spurrier*, the Supreme Court of Kansas, while freeing a forced share from contribution, confirmed its earlier holdings that "in the absence of anything in the will to the contrary, the burden of federal estate taxes falls on the residuary estate."[92] The Kansas Supreme Court later extended the holding to include a residuary bequest to a spouse.[93]

While such an outcome may seem arbitrary, it is the only outcome directly supported by the facts and analysis in *Bovaird*.[94] The conservative approach is to read "equitable apportionment" in *Bovaird* as applying only to the forced share of a spouse.[95]

B. *Relief for all property interests passing to the spouse which qualify for the marital deduction; burden still on the probate estate.*

If the court's purpose in *Bovaird* is to carry out the congressional intent in creating the marital deduction,[96] it should not matter whether the spouse takes by bequest, by intestacy, or by election against the will. All qualify for the marital deduction; none cause any tax liability. If the intent of Congress is to allow spouses to transfer property to one another without tax consequences, all these transfers should be exempt from contribution to federal estate taxes.

Simple fairness to all spouses also supports this second view. Unless the goal is to punish a testator for his violation of public policy in leaving so little property to a spouse, there seems to be no reason to treat a forced share more favorably. It is also doubtful that many testators understand that they are burdening their spouses with a portion of

89. 645 P.2d at 503.

90. 206 Kan. 406, 485 P.2d 209 (1971).

91. 645 P.2d at 503.

92. 206 Kan. at —, 485 P.2d at 212.

93. Jackson v. Jackson, 217 Kan. 448, —, 536 P.2d 1400, 1404-05 (1975); *see also* Northern & Wachter, *supra* note 33 (discussion of difficulties posed for executors by a limited holding such as *Bovaird* or *Spurrier*).

94. Although *Bovaird* only addressed the issue of a spouse's forced share, charities were previously exempted from contribution to the ultimate burden of federal estate taxes under *In re* Davidson Trust, 641 P.2d 1110 (Okla. 1982).

95. The *Bovaird* court cited an *Oklahoma Law Review* Note suggesting it is illogical to distinguish statutory and testamentary shares, but pointing out that Montana makes this distinction. Note, *supra* note 10, at 390 n.47, *citing In re* Mosby's Estate, 554 P.2d 1341 (Mont. 1976). See *supra* text accompanying notes 84-88 for the *Bovaird* court's discussion of this distinction.

96. I.R.C. § 2056 (1976 & Supp. V 1981). See *supra* text accompanying notes 62-64 for the *Bovaird* court's discussion of congressional intent.

the federal estate tax when they make residuary bequests without directions for apportioning the tax.[97] Freeing all spouses from contribution also avoids the circular estate tax computation and lowers the total amount of tax due.[98]

Exemption of all property which qualifies for the marital deduction can be inferred from the *Bovaird* opinion. The court cites a 1980 *Oklahoma Law Review* Note which suggests that all property passing to the spouse should be free from contribution to estate taxes as "the modern trend of thought."[99] In addition, the court quoted from several cases freeing forced shares from contribution[100] and from one case involving a spouse's intestate share,[101] and stated, "We agree with the 'logic, justice and equity' of the above cases and hold that to the extent a spouse's property qualifies as a marital deduction, she will not be required to contribute to the federal estate tax."[102] This language may be read narrowly, however, since none of the cases discussed free a bequest to a spouse from contribution to federal estate taxes.

C. *Complete equitable apportionment based on the taxable estate.*

Complete apportionment is specifically adopted in the Uniform Estate Tax Apportionment Act,[103] which requires all assets in the taxable estate, including nonprobate assets, to contribute to payment of estate taxes.[104] Many of the arguments for consistent treatment of all marital shares also apply to complete apportionment among all assets in the taxable estate, whether probate or nonprobate. Since the Note cited by the court suggests that complete apportionment is the fairest procedure,[105] this is another possible result of the *Bovaird* decision.

Some commentators feel that the arguments against equitable apportionment are generally weak.[106] One argument is that it is more

97. Susman & Fourticq, *supra* note 4, at 1364.

98. See *supra* note 67 for an explanation of the circular estate tax computation.

99. 645 P.2d at 505 (discussing Note, *supra* note 10).

100. The court relied on cases at 67 A.L.R.3d 199, 217-22 (1981), *quoting* Seymour Nat'l Bank v. Heideman, 133 Ind. App. 104, 178 N.E.2d 771 (1961); Lincoln Bank & Trust Co. v. Huber, 240 S.W.2d 89 (Ky. 1951); Hammond v. Wheeler, 347 S.W.2d 884 (Mo. 1961).

101. Pitts v. Hamrick, 228 F.2d 486 (4th Cir. 1955).

102. 645 P.2d at 504.

103. 8 U.L.A. 159 (1972). See *supra* text accompanying notes 48-49 for the history of this Act in Oklahoma.

104. 8 U.L.A. at 160, § 2.

105. Note, *supra* note 10, at 390. It is possible to free the marital share and charities without bringing in nonprobate assets. *See supra* text accompanying notes 96-98.

106. *See* Susman & Fourticq, *supra* note 4, at 1360-65. Before Riggs v. Del Drago, 317 U.S. 95 (1942), other arguments were made, such as that "it is anomalous to impose on a beneficiary a

convenient for the personal representative, who must file the return,[107] to pay the taxes out of the residue, since the only assets readily accessible to him are probate assets under his control. To compel nonprobate beneficiaries to contribute a proportionate share of the taxes might require court action.

Since the will at issue in *Bovaird* expressly exempted nonprobate property from contribution to taxes, the court did not reach the issue of whether, absent direction in the will, nonprobate property must contribute to federal estate taxes.[108] However, the opinion does have language supporting complete apportionment. The court stated, "We apply principles of equitable apportionment, and overrule those portions of *Rettenmeyer* that conflict herewith."[109] The court also mentioned that, in *Davidson*,[110] "We approached the issue of equitable apportionment. . ."[111] and cited a Missouri case[112] for the proposition that "the burden of federal estate tax (falls) on the property which generates the tax, and exonerates therefrom property which does not."[113] Since the Oklahoma Supreme Court cited this case, which applies the Missouri rule of complete equitable apportionment,[114] perhaps *Bovaird* may be interpreted to imply that complete equitable apportionment is now the rule in Oklahoma.

D. *Relief for property eligible for credits against estate taxes.*

The Uniform Estate Tax Apportionment Act[115] indicates that an even broader interpretation of equitable apportionment is possible.

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tax computed with a rate graduated according to the amount left by the testator"; that the tax is an administration expense; and that Congress intended non-apportionment. Note, *Apportionment of Federal Estate Taxes: Which Funds Bear the Burden*, 40 COLUM. L. REV. 690, 699-700 (1940).

107. I.R.C. § 2002 (1976).

108. It is not clear whether a testator may, in his will, require property not passing under the will to bear some portion of the estate tax. Since nonprobate assets do not pass under the will, some courts have held the testator powerless, absent a statute allowing him to do so, to burden nonprobate property with estate taxes. Susman & Fourticq, *supra* note 4, at 1366-75.

109. 645 P.2d at 505. In *Rettenmeyer*, the Oklahoma Supreme Court required a bequest to a spouse to contribute to federal estate taxes. 345 P.2d 872, 880 (Okla. 1959). Overruling *Rettenmeyer* suggests that *Bovaird* is not limited to forced shares.

110. *In re* Davidson Trust, 641 P.2d 1110 (Okla. 1982) (charities exempt from contribution to federal estate taxes).

111. 645 P.2d at 504.

112. *In re* Estate of Wahlin, 505 S.W.2d 99 (Mo. Ct. App. 1973).

113. 645 P.2d at 504 (quoting *Wahlin*, 505 S.W.2d 106).

114. 505 S.W.2d at 112. In *Wahlin*, the Missouri Court of Appeals freed several charities, whose bequests were exempt from taxation, from contribution to estate taxes and required apportionment among nonprobate assets. *Id.* at 103, 112.

115. 8 U.L.A. 159 (1972).

The Act provides that "allowances shall be made for any . . . credits allowed by the law imposing the tax."[116] One example of such a credit is the Credit for Prior Transfers allowed by the I.R.C.[117] The Uniform Act also allows deductions to be apportioned.[118] Deductions attributable to a particular property may affect the amount of contribution for that property.

Making allowance for both deductions and credits could become quite complicated since deductions are subtracted before reaching the taxable estate, while credits are allowed against the actual tax liability.[119] Since the *Bovaird* court did not discuss any factual situations other than a forced share, a personal representative should wait until the Oklahoma Supreme Court further clarifies its holding before applying equitable apportionment to this extent.

VII. CONCLUSION

The decision in *Bovaird* to free a widow's forced share from contribution to federal estate taxes is a significant reversal of Oklahoma law and leaves many questions unanswered. The scope of the decision is unclear and will create great uncertainty among fiduciaries, many of whom are personally liable for failure to carry out their duties correctly. Whether all marital shares are included, whether nonprobate assets are included, and whether deductions and credits are to be used in the computations are open questions after *Bovaird*. Since it is unclear which of the two alternative theories of the case will serve as the basis for future holdings in this area, it is difficult to predict how Oklahoma courts will treat these cases.

The Oklahoma Supreme Court could have avoided these problems by either specifying which property interests are subject to the holding or by simply affirming the trial court's ruling that the forced share of a

116. *Id.* § 5(a) at 163.

117. I.R.C. § 2013 (1976). A credit is allowed against the federal estate tax for a portion of estate taxes paid in a previous estate on property later included in the taxable estate of a second estate. The credit is 100% of taxes paid from the first estate if the second death occurs within two years; thereafter, it declines to 20% at ten years and afterwards is withdrawn. The purpose of the credit is to avoid a heavy tax load when decedents die in close succession, the first transferring the property to the second and each being forced to pay estate tax. *See generally* 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 6150 (1977); 3 EST. PLANNING & TAX'N COORDINATOR (RIA) ¶ 45,251 (1982) (explanation of the credit).

118. UNIF. EST. TAX APPORTIONMENT ACT § 5(a), 8 U.L.A. 163 (1972).

119. I.R.C. § 2051 (1976) defines the taxable estate as the gross estate less allowable deductions. Section 2001 applies the tax to the taxable estate. Sections 2010-2015 provide for various credits against the tax.

surviving spouse is not residue. Since the court did neither, the prudent personal representative and his attorney will follow the narrowest possible holding and do as Mrs. Bovaird did: seek the guidance of the probate court under the Declaratory Judgment Act.[120] It seems unlikely that equitable apportionment in Oklahoma will be limited to the forced share of a surviving spouse; the result is simply too unfair to too many spouses. Furthermore, because both *Bovaird* and *Davidson*[121] were unanimous decisions, there appears to be strong support for equitable apportionment on the Oklahoma Supreme Court. But only future cases can clarify the extent to which the court will move towards complete equitable apportionment.

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120. OKLA. STAT. tit. 12, §§ 1651-1657 (1981).
121. 641 P.2d 1110 (Okla. 1982).