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THE MARITAL DEDUCTION DILEMMA OF THE RENOUNCING SPOUSE

INTRODUCTION

For the purposes of calculating the federal estate tax imposed by section 2001 of the Internal Revenue Code of 1954, the taxable estate is determined in part by deducting from the gross estate an amount equal to the value of any interests in the gross estate that have passed to the surviving spouse.¹ This deduction is the marital deduction. The maximum amount of this marital deduction permitted under section 2056(c) is fifty percent of the value of the adjusted gross estate. The interest passing to the surviving spouse may be a bequest, devise, dower interest or statutory forced share.² While the forced share of the surviving renouncing spouse may be eligible for the marital deduction,³ state law will determine whether the renunciation share is reduced by federal or state succession, legacy or inheritance taxes.⁴ A distinct problem arises if the renunciation share is burdened with federal estate and state succession taxes. If the renunciation share is reduced by the federal estate tax, and if the federal estate tax is calculated with reference to that reduced share, a circuitous computation with interrelated data is necessary in order to calculate the renunciation share.⁵

The Illinois Legislature has enacted a new probate code which went into effect on January 1, 1976.⁶ Section 2-8 of the new code provides that the renouncing spouse is entitled to a certain fraction of the testator's estate after the payment of

1. INT. REV. CODE OF 1954, § 2056(a).

2. *Id.*, § 2056(e) (1), (2), (3).

3. *Id.*, § 2056(e) (3).

4. See *Riggs v. Del Drago*, 317 U.S. 95 (1942). The Court in *Riggs* upheld the constitutionality of the New York Apportionment Act (N.Y. DECEDENT ESTATE LAW, ch. 709, § 124, Laws of 1930). In addition the Court noted that the determination of the final impact of the federal estate tax was to be predicated on state law. 317 U.S. at 97-98.

5. To calculate the renunciation share if that interest is burdened by the federal estate tax, the decedent's gross estate is first reduced by funeral expenses, expenses of administration and claims against the estate, including the federal estate tax. A percentage of this remainder is the renunciation share. See, e.g., ILL. REV. STAT. ch. 3, § 2-8 (1975).

The value of the federal estate tax used in this computation is determined by subtracting from the decedent's gross estate certain deductions including the marital deduction. See INT. REV. CODE OF 1954, § 2056. In the case of a surviving renouncing spouse, the renunciation share may well be the entire marital deduction. The computation is therefore circuitous involving interrelated data.

6. ILL. REV. STAT. ch. 3, §§ 1-1 *et seq.* (1975).

all just claims.⁷ Section 18-10 of the new code provides that the federal estate tax is a claim against the testator's estate.⁸ In addition to Illinois, eighteen states have statutes that define the renunciation share as a portion of the gross estate reduced by claims including the federal estate tax.⁹ Fourteen states have statutes that do not define the renunciation share as a portion of the gross estate reduced by claims against the estate such as the federal estate tax.¹⁰

7. *Id.*, § 2-8 (1975).

8. *Id.*, § 18-10 (1975). See also *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951).

9. The following states define the renunciation share either by statute or by case law modifying a statute as a portion of the decedent's gross estate less claims against the estate, including the federal estate tax: Alaska (ALAS. STAT. §§ 13.11.070, 13.11.075 (1973) and ALAS. STAT. § 13.16.470 (Supp. 1975)); Colorado (COLO. REV. STAT. tit. 15-12-805(d) (1973) and COLO. REV. STAT. tit. 15-11-201, tit. 15-11-202 (Supp. 1975)); Florida (FLA. STAT. ANN. §§ 732.207, 733.707 (Supp. 1975)); Hawaii (HAWAII REV. STAT. § 533-14 (1968) and HAWAII REV. STAT. §§ 533-1, 533-16 (Supp. 1973) and *In re Glover*, 45 Hawaii 569, 371 P.2d 361 (1962)); Illinois (ILL. REV. STAT. ch. 3, § 2-8(1975) and *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 601 (1951)); Kansas (KAN. STAT. ANN. § 59-502 (1964) and KAN. STAT. ANN. § 59-2233 (Supp. 1975)); Kentucky (KY. REV. STAT. § 392.020 (1970) and KY. REV. STAT. § 392.080 (Supp. 1974) and see *Ruh's Executors v. Ruh*, 270 Ky. 792, 110 S.W.2d 1097 (1937)); Maine (ME. REV. STAT. ANN. tit. 18, §§ 851, 1001 (1964) and ME. REV. STAT. ANN. tit. 18, §§ 852, 1057 (Supp. 1975) and *Old Colony Trust Co. v. McGowan*, 156 Me. 138, 163 A.2d 538 (1960)); Mississippi (MISS. CODE ANN. §§ 91-5-25, 91-5-29 (Supp. 1975) and *Banks v. Junk*, 264 So. 2d 387, 392 (Miss. 1972) and *Gordon v. James*, 26 Miss. 719, 39 So. 18 (1905)); Montana (REV. CODE OF MONT. tit. 91-A-2-201, 91-A-2-202, 91-A-3-805 (1975)); New Hampshire (N.H. REV. STAT. ANN. § 557:22 (1974) and N.H. REV. STAT. ANN. § 560:10 (Supp. 1974)); North Carolina (N.C. GEN. STAT. § 29-2(5) (1965) and N.C. GEN. STAT. §§ 30-1, 30-3, 28A-22-1, 28A-19-6 (Supp. 1975) but in the event there are no lineal descendants see N.C. GEN. STAT. § 30-3 (Supp. 1975) and *First Union Nat'l Bank v. Melvin*, 259 N.C. 255, 130 S.E.2d 387 (1963)); North Dakota (N.D. CENT. CODE ANN. §§ 30.1-05-01, 30.1-05-02, 30.1-19-05 (Supp. 1975)); Ohio (OHIO REV. CODE ANN. §§ 2107.39 and Comment, 2117.25 (1968) and OHIO REV. CODE ANN. § 2107.39 (Supp. 1974)); Oregon (ORE. REV. STAT. tit. 12, §§ 114.105, 114.125, 115.125 (1973)); Utah (UTAH CODE ANN. §§ 75-2-201, 75-2-202, 75-3-805 (Supp. 1975) effective July 1, 1977); Vermont (VER. STAT. ANN., tit. 14, §§ 401, 1260 (1974)); Virginia (CODE OF VA. §§ 64.1-16, 64.1-11, 64.1-157 (1973)); West Virginia (W. VA. CODE §§ 42-3-1, 42-2-1 (1974) and W. VA. CODE § 44-2-21 (Supp. 1975)).

10. The following states define the renunciation share either by statute or by case law modifying a statute as a portion of the decedent's gross estate less certain claims exclusive of the federal estate tax: Alabama (CODE OF ALA. tit. 61, § 18 (1973)); Delaware (DEL. CODE ANN. tit. 12, §§ 901, 902 (1975)); Indiana (IND. STAT. ANN. tit. 29-1-3-1 (1974) and *Seymour Nat'l Bank v. Heideman*, 133 Ind. App. 104, 178 N.E.2d 771 (1961)); Iowa (IOWA CODE ANN. § 633.238 (1975)); Maryland (ANN. CODE OF MD., Estates & Trusts, §§ 3-203, 3-102(b), (f), 11-109 (1974)); Massachusetts (ANN. LAWS OF MASS. ch. 191, § 15 (1974)); Missouri (VERNON'S ANN. MO. STAT. § 474.160 (1975) and *In re Estate of Hough*, 457 S.W.2d 687 (Mo. 1970) and *Hammond v. Wheeler*, 347 S.W.2d 884 (Mo. 1961)); Nebraska (REV. STAT. OF NEB. § 30-103.01 (1975)); New York (N.Y. DECED. ESTATE LAW § 5-1.1 (1965)); Pennsylvania (PURDON'S PA. STAT. ANN. tit. 20, § 2508 (1975)); Rhode Island (GEN. LAWS OF R.I. §§ 33-6-22, 33-4-1 (1975)); Tennessee (TENN. CODE ANN. §§ 31-606, 31-607 (Supp. 1975)); Wisconsin (WIS. STAT. ANN. § 861.05 (1971)); and Wyoming (WYO. STAT. tit. 2, § 2-47 (Supp. 1975)).

This comment will explore the policy of congressional and state legislation, and case law, regarding the propriety of burdening the renunciation share with the federal estate tax, and provide the practitioner with a reliable method of calculating the renunciation share when that interest is reduced by the federal estate tax.

THE FEDERAL ESTATE TAX AND THE RENUNCIATION SHARE

Three years after the adoption of the federal estate tax in 1916, the United States Attorney General ruled that the executor of a decedent domiciled in a community property state need only include one-half of the community property in the gross estate for federal estate tax purposes.¹¹ This ruling was predicated on the notion that each spouse in a community property state was regarded as owning one-half of the property throughout the marriage.¹² In 1948 Congress passed the split income tax pro-

See also 67 A.L.R.3d 199 (1975) for an excellent treatment of case law interpreting the renunciation provisions of several states.

Apportionment statutes or decisions may provide that federal estate taxes are not to be apportioned against the renunciation share. See, e.g., COLO. REV. STAT. 15-12-805(d) (1973) and COLO. REV. STAT. 15-11-201, 15-11-202 (Supp. 1975). Such statutes apportioning the federal estate tax among the interests in the decedent's gross estate other than the marital deduction should be read in conjunction with the definitional statutes providing for the calculation of the renunciation share. See note 65 *infra*.

The remaining twelve states are either community property states and have no provision for a statutory forced share because of the automatic statutory community property share, or they are common law states that have no provision for a statutory forced share: Arizona, California, Georgia, Idaho, Louisiana, Nevada, New Mexico, Oklahoma, South Carolina, South Dakota, Texas and Washington.

The District of Columbia subjects the renunciation share to the federal estate tax: D.C. CODE ANN. § 19-113 (1975) and *Del Mar v. U.S.*, 390 F.2d 466 (D.C. Cir. 1968).

11. T.D. 2450, 19 TREAS. DEC. 38 (1917).

12. See *Poe v. Seaborn*, 282 U.S. 101 (1930). Seaborn and his wife were residents of the state of Washington. They accumulated real estate, stocks, bonds and other personal property. The parties' income was comprised of the husband's salary, interest on bank deposits and bonds, dividends, and profits from sales of real and personal property. The Commissioner determined that all of the income should have been reported in the husband's income tax return for the year 1927. The taxpayer reported only one-half of the income, while his wife reported the other one-half. The U.S. Supreme Court, in construing sections 210(a) and 211(a) of the Revenue Act of 1926, held that under the statutes of Washington, a husband and wife were entitled to file separate income tax returns and each could therefore treat one-half of the community income as his or her respective income.

With the ruling of the Attorney General and the *Seaborn* decision, several states began to adopt the community property system despite the lack of historical connection with Spanish law. The states adopting community property laws were Michigan, Nebraska, Oklahoma, Oregon and Pennsylvania. These statutes were repealed, however, when the U.S. Supreme Court ruled in *Commissioner v. Harmon*, 323 U.S. 44 (1944) that optional systems of community property law, not dictated by state policy as an incident of matrimony, could not bring the husband or wife within the reach of *Seaborn*. The Court noted that the existence of such an option would result in a marital property arrangement similar to that

vision, the split gift provision, and the estate and gift tax marital deduction provision.¹³ These provisions were designed to end differences between community property states and other states with respect to the taxation of income, gifts and estates, regardless of historical property notions and geographical happenstance.

A portion of the Revenue Act of 1948 relating to estate taxation permits a deduction from the gross estate called the marital deduction. The marital deduction is an amount equal to the value of all interests included in the gross estate of the dece-

attempted in *Lucas v. Earl*, 281 U.S. 111 (1930) wherein the taxpayer attempted to assign one-half of his future income to his spouse by contract so as to lessen his federal income tax liability. 323 U.S. at 46. The Court in *Harmon* distinguished *Seaborn* by noting that in *Seaborn* "the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State." 323 U.S. at 46. Mr. Justice Douglas dissented, in an opinion joined by Mr. Justice Black, arguing that while he does not intend to defend the *Seaborn* result, he feels that the Court should not permit the income-splitting arrangement authorized by *Seaborn* to become a vested interest of only a few states. 323 U.S. at 56.

The concern voiced by Douglas and Black was heeded by Congress four years later when it enacted the split income tax provision, the split gift provision, and the estate and gift tax marital deduction provision. Revenue Act of 1948, ch. 168, §§ 301 *et seq.*, 62 Stat. 110, 114.

13. Revenue Act of 1948, ch. 168, §§ 301 *et seq.*, 62 Stat. 110, 114. Criticism of the holding in *Poe v. Seaborn*, 282 U.S. 101 (1930) included the realization by the critics that the husband's control over both halves of the community property during coverture was usually so substantial so as to make it more appropriate to include the entire property in his gross estate if he were the first to die. See Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court*, 3 TAX L. REV. 395, 538-40 (1948). In 1942 Congress first moved to equalize the estate tax consequences of common law and community property states on the grounds that the legal and economic differences between the two systems did not warrant the substantial difference in their federal tax burdens. See Revenue Act of 1942, ch. 619, § 402(b), 56 Stat. 798, 942.

The Revenue Act of 1942 relating to the estate and gift tax consequences was upheld by the Supreme Court under constitutional attack in *Fernandez v. Wiener*, 326 U.S. 340 (1945). See also *Francis v. Comm'r*, 8 T.C. 822 (1947) and *Beavers v. Comm'r*, 165 F.2d 208 (5th Cir. 1947). The Revenue Act of 1942, however, did not cover the income tax advantages of community property states. As such, the community property concept began to spread. See note 12 *supra*.

Congress then acted in 1948 to halt this spread of community property due to the remaining income tax advantages in the 1942 Act by repealing the 1942 Act and enacting in its place the Revenue Act of 1948. The 1948 Act equalized the estate, gift and income tax consequences of both community property and common law states.

The thrust of the 1948 Act was actually the converse of the 1942 Act. The 1942 Act required the entire amount of the community property to be included in the gross estate of the first spouse to die less that amount proven to have been received through the sole efforts of the surviving spouse. See Revenue Act of 1942, ch. 619, § 402(b), 56 Stat. 798, 942. As such, the 1942 Act did not permit the common law states, to which the Act was not addressed, to split in half the estate taxation of the first spouse to die; the 1942 Act instead altered the established community property theories developed over hundreds of years. While the constitutionality of the 1942 Act was upheld, the 1942 Act was a less than satisfactory solution. See S. REP. No. 1013, 80th Cong., 2d Sess., reprinted in 1948-1 C.B. 285, 304-05 for a discussion of the arguments of the Senate Committee on Finance in favor of adopting the opposite approach of the 1942 Act.

dent and his spouse which pass to the surviving spouse, but not in excess of one-half of the adjusted gross estate of the decedent spouse.¹⁴ The statutory forced share is an interest that is considered as passing from the decedent to the surviving spouse.¹⁵ If this interest qualifies for the marital deduction,¹⁶ then that amount is subtracted from the decedent's gross estate along with all other permissible deductions.¹⁷ The balance is termed the taxable estate,¹⁸ and the appropriate tax rate is then applied to this figure to arrive at the federal estate tax due.¹⁹

The uniform taxation of income, gifts, and estates as between community property and common law jurisdictions was a motive behind the enactment by Congress of both the 1942 and 1948 Revenue Acts.²⁰ The result of this equalization is that the taxable estates of persons residing in common law states should approximate the taxable estates of persons residing in community property states. Theoretically, there should be a uniform treatment of all persons required to file estate tax returns. However, this standardization in estate tax treatment is to a large extent frustrated by state laws which prescribe that the marital deduction share be reduced by federal or state succession taxes. Election statutes that require the renunciation or elective share to be computed after the payment of debts and claims against the estate prevent this standardization of estate taxation.

This frustration of the purpose of section 2056 has been recognized, and some courts have refused to permit the renuncia-

14. INT. REV. CODE OF 1954, § 2056(a), (c). The adjusted gross estate is determined by subtracting from the gross estate the deductions of sections 2053 and 2054, which are all expenses, taxes, debts and losses of the decedent. *Id.*, § 2056(c)(2). Property that has passed or that passes to the surviving spouse includes that property that is includible in the decedent's gross estate, including insurance benefits, gifts in contemplation of death, and joint tenancy property. See Treas. Reg. 20.2056(e)-1.

15. INT. REV. CODE OF 1954, § 2056(e)(3).

16. To qualify for the marital deduction, (1) the property must have been included in the decedent's gross estate, (2) the property must have "passed" by will, operation of law or otherwise to the surviving spouse and (3) the interest must not be a terminable interest, i.e., the interest in the property may not terminate before the death of the surviving spouse and will therefore not be excluded from the gross estate of the surviving spouse. *Id.*, § 2056.

17. *Id.*, § 2051.

18. *Id.*

19. *Id.*, § 2101.

20. See *United States v. Stapf*, 375 U.S. 118, 122 (1963). The Court in *Stapf* decided the question of to what extent a marital deduction is permissible in a community property state if the property devised to the surviving spouse exceeds the value the testator required the surviving spouse to relinquish in order to take under the will. In *Stapf* Justice Goldberg noted that "[t]he 1948 tax amendments were intended to equalize the effect of the estate taxes in community property and common-law jurisdictions." *Id.* at 128. He continued to note that the primary thrust of the Revenue Act of 1948 is to extend to taxpayers in common-law states the advantage of "estate-splitting" otherwise available exclusively in community property jurisdictions. *Id.*

tion share to be reduced by such taxes.²¹ Other courts have approached the problem differently, believing that the marital deduction should not be burdened by the federal estate tax since it is not included in the taxable estate.²² These courts theorize that inasmuch as Congress intended the marital deduction to be a tax-exempt interest, subsequent taxation of that interest would violate the intent of Congress.

Notwithstanding the inherent frustration of section 2056 and the non-contributory nature of the marital deduction to the taxable estate, it is also unfair to impose estate tax liability on an interest that did not contribute to that liability.²³ Because the marital deduction is subtracted from the gross estate in arriving at the taxable estate, the marital deduction decreases estate tax liability and does not increase it. It does not seem proper to require that interest, in the form of a forced share, to bear a proportionate burden of the federal estate tax.²⁴

Although not directly related to a frustration of the purpose of section 2056, perhaps the most persuasive argument against burdening the renunciation share with federal estate taxes is found in the structure of the forced share statutes. The dower, curtesy and forced share statutes are designed to protect the sur-

21. Many jurisdictions have recognized such a frustration of congressional intent and have refused to permit the depletion of the marital deduction. In *Lincoln Bank & Trust Co. v. Huber*, 240 S.W.2d 89 (Ky. Ct. App. 1951), the court said that the renunciation share of the surviving spouse should not be burdened with federal estate tax liability and held that it was to pass to the surviving spouse undiminished by succession taxes. The court noted that the apparent purpose behind the enactment of the Revenue Act of 1948 was to equalize community property and non-community property estate taxation. See also *In re Fuchs' Estate*, 60 So. 2d 536 (Fla. 1952). The Florida legislature in 1949 enacted an apportionment statute that exempted the marital deduction from contribution to the federal estate tax. The court in *Fuchs'* noted that the apportionment act was passed one year after the Revenue Act of 1948. The court then held that the marital deduction and other deductions and exemptions should not bear the burden of the federal estate tax because the 1949 Apportionment Act must be read in conjunction with the Revenue Act of 1948.

22. See, e.g., *In re Fuchs' Estate*, 60 So. 2d 536, 538 (Fla. 1952).

23. See *Lincoln Bank & Trust Co. v. Huber*, 240 S.W.2d 89, 90 (Ky. Ct. App. 1951); see also *In re Fuchs' Estate*, 60 So. 2d 536 (Fla. 1952). The court in *Fuchs'* noted that the legislature intended to exempt from the impact of the estate tax those assets of the decedent's estate not includible in the taxable estate. *Id.* at 537.

24. See *Lincoln Bank & Trust Co. v. Huber*, 240 S.W.2d 89 (Ky. Ct. App. 1951) (the court said that because the surviving spouse's share would not add to the amount of the tax, it should not therefore be burdened with it); *Pitts v. Hamrick*, 228 F.2d 486 (4th Cir. 1955) (the court said that it would be unfair and unjust to require the renunciation share to bear any portion of the estate tax because the estate receives the benefit of the deduction of the interest passing from the gross estate); *Hammond v. Wheeler*, 347 S.W.2d 884 (Mo. 1961). The surviving spouse in *Hammond* entered into a contract with the heirs of the deceased to distribute a share of her stock in kind and then to sell the balance. The court felt that it would be unfair and unjust to require the surviving spouse to pay a portion of the federal estate tax on an interest which does not cause or contribute to any part of the tax. *Id.* at 893.

living spouse. The traditional notion of dower was that of giving the wife a guaranteed share of her husband's realty in the event that he either transferred the property to another or failed to provide properly for the wife after his death. The forced share statutes presumably are similarly designed. If that guaranteed interest is later subject to diminution by another state statute authorizing the deduction of death taxes therefrom, the purpose of the forced share statute is partially frustrated.

The distinguishing characteristic of the view that it is improper to burden the renunciation share with federal estate taxes is that, in theory, section 2056 and forced share statutes should be read in conjunction with one another. This may not necessarily be true. Some courts have said that the federal estate tax is an excise tax on the transfer of the entire estate.²⁵ The purpose of the federal estate tax is not to tax specific legacies and bequests *per se*, but rather to tax the estate as an entity upon the death of the decedent.²⁶ The argument proceeds that the federal estate tax serves a separate and distinct function from any state statutes relative to a surviving spouse. While it provides for taxation of the decedent's estate, the federal estate tax does not exempt the renunciation share from taxation.

The independence of section 2056 from a forced share statute is also evident from a literal reading of the section. Section 2056 does not specifically exempt the surviving spouse's share from estate taxation.²⁷ In the absence of such an exemption, it is argued that section 2056 expressly negatives any intent by Congress to exempt the share of the renouncing spouse from estate tax liability.²⁸ Indeed, a close reading of section 2056 may

25. See *Seattle-First Nat'l Bank v. Macomber*, 32 Wash. 2d 696, 203 P.2d 1078 (1949). In *Macomber* the court said that the estate tax is a tax upon the entire estate and not upon any particular devise, bequest or distributive share. *Id.* at 700, 203 P.2d at 1081.

26. See *Seattle-First Nat'l Bank v. Macomber*, 32 Wash. 2d 696, 203 P.2d 1078 (1949) wherein the court said:

The estate tax is upon the entire estate, payable as an expense of administration, and not upon the particular devise, bequest or distributive share of the individual beneficiary.

Id. at 700, 203 P.2d at 1081.

27. Section 2056 is limited to a description of the qualifying interests that are deemed to be interests that pass to the surviving spouse for purposes of federal estate taxation. Section 2056 does not provide that those interests which qualify for the marital deduction are also to be exempt from ultimately contributing to the final death tax.

28. See *Will of Uihlein*, 264 Wis. 362, 371, 59 N.W.2d 641, 645 (1953). The *Uihlein* court noted that section 2056(b)(4)(A) (formerly section 812(e)(1)(E)(i) when *Uihlein* was decided) provides that for purposes of valuing the marital deduction, there must be taken into account the effect the federal estate tax has on the net value given to the surviving spouse. See INT. REV. CODE OF 1954, § 2056(b)(4)(A). The *Uihlein* court uses this language to reach the conclusion that Congress intended that the surviving spouse's interest bear some burden of the federal estate tax liability. 264 Wis. at 378, 59 N.W.2d at 649.

warrant such a conclusion.²⁹

Regardless of the intent of Congress in promulgating the marital deduction provisions, some courts have argued that such intent is irrelevant to the ultimate calculation of the surviving spouse's interest.³⁰ Because the Revenue Act of 1916 creating the federal estate tax did not direct who was to bear the burden of the federal estate tax, Congress intended to leave that determination to each state.³¹ This contention may have merit because of its simplistic approach to the problem, but such a disposition of the issue may be unwise. Although Congress was silent with respect to the ultimate burden of the tax, that silence is not conclusive as to the issue of what interests may be used to satisfy the liability for payment of the tax. Each court must go further and reach a logical solution regarding the propriety of burdening the renunciation share. Taking the dicta in *Riggs v. Del Drago*³² as a premise that each state may determine who is to bear the burden of the tax, the conclusion, that the intent of Congress in adopting the marital deduction is irrelevant to the calculation of the federal estate tax, is not inexorable. Such congressional intent may be crucial to a proper resolution of this marital deduction dilemma.

POSSIBLE CONSTRUCTIONS OF THE ILLINOIS RENUNCIATION STATUTE

The Illinois Renunciation Statute provides that the surviving spouse may elect to take either a one-half or one-third fraction of the decedent's entire estate after the payment of all just claims, depending on the survival of other descendants.³³ Since one such claim is the federal estate tax,³⁴ the Illinois forced share statute requires the renunciation share to bear a proportionate

29. INT. REV. CODE OF 1954, § 2056(b)(4)(A).

30. *Riggs v. Del Drago*, 317 U.S. 95, 98 (1942).

31. Revenue Act of 1916, ch. 463, § 200, *et seq.*, 39 Stat. 756, 777. The United States Supreme Court in *Riggs* concluded that because the Revenue Act of 1916 did not undertake to specify who was to bear the burden of the tax, Congress must have felt that the Government would not be interested in the distribution of the estate after the estate tax was paid. 317 U.S. at 98. See also *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 514, 101 N.E.2d 604, 607 (1951).

32. 317 U.S. 95 (1942).

33. ILL. REV. STAT. ch. 3, § 2-8(a) (1975):

If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: $\frac{1}{2}$ of the entire estate if the testator leaves a descendant or $\frac{1}{2}$ of the entire estate if the testator leaves no descendant.

See also *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951).

34. ILL. REV. STAT. ch. 3, § 18-10 (1975); see also *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951).

burden of the federal estate tax.³⁵ The Illinois approach is thus one of the many positions taken since *Riggs* that apparently frustrates both the section 2056 marital deduction, as well as the protective purpose of the forced share statute.

The Illinois Renunciation Statute has been held by a state appellate court to require that the surviving spouse take the statutory fraction of the decedent's estate after a deduction of federal estate taxes.³⁶ This decision in *Northern Trust Co. v. Wilson*³⁷ was predicated on an interpretation of the 1939 Illinois Probate Act³⁸ which is substantially similar to that of the present 1975 Illinois Probate Act.³⁹ *Northern Trust* has retained its vitality and is a current statement of the law in Illinois.

However, there is still a question of whether Illinois courts will ever attempt to re-interpret section 2-8 to reflect the intent of section 2056 as well as the inherent purpose of the forced share provision. While Illinois has not so ruled, other jurisdictions have concluded that similar forced share statutes do not require a deduction for federal estate taxes.⁴⁰ Indeed, there are other

35. The renunciation share is said to bear a proportionate burden of the federal estate tax because of the manner in which the interest is determined. For example, the Illinois statute provides that the renunciation share is one-third of the entire estate if the testator leaves a descendant after the payment of all just claims, or one-half of the entire estate if there are descendants. ILL. REV. STAT. ch. 3, § 2-8 (1975). The entire estate may be construed to be all of the real and personal probate and non-probate property of the testator. All of the testator's debts and claims against his estate must then be deducted from this gross figure. The statutory one-third or one-half fraction is then applied to the balance. The renunciation share is therefore reduced by a proportionate amount of all of the testator's claims, including the federal estate tax.

36. *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951).

37. *Id.*

38. ILL. REV. STAT. ch. 3, § 16 (1939).

39. *Id.*, § 2-8 (1975).

40. *Robertson v. U.S.*, 281 F. Supp. 955 (N.D. Ala. 1968). The Alabama forced share statute provided in pertinent part that if the decedent died leaving a surviving spouse and other descendants, then the surviving spouse was to take one-half of the personal estate "after the payment of debts and charges against the estate." ALA. CODE, tit. 16, § 10 (1940) (Recomp. 1958). In *Robertson* the court held that the widow's share was to be computed before a deduction for federal estate taxes. 281 F. Supp. at 963. Furthermore, the Alabama legislature had provided that all estate taxes, state or federal, were to be paid out of the residue of the estate. ALA. CODE, tit. 51, § 449(1) (1940) (Recomp. 1958). Illinois has similarly required that, absent a tax payment clause in the will, the burden of the federal estate tax falls on the residue of the probate estate. See *First Nat'l Bank v. Hart*, 383 Ill. 489, 50 N.E.2d 461 (1943).

See also *Hammond v. Wheeler*, 347 S.W.2d 884 (Mo. 1961). The applicable Missouri statute stated in essence that the surviving spouse was to receive one-half of the real and personal estate of the decedent belonging to the decedent at death subject to the payment of the decedent's debts. ANN. MO. STAT. § 474.160 (1974). The *Hammond* court held that the word "debts" could not include the federal estate tax because the Missouri legislature did not intend that the federal estate tax was to be apportioned inequitably. Rather, the court felt that the renunciation share should not bear a proportionate burden of the federal estate tax

possible interpretations of section 2-8 which could be employed by the Illinois courts if the issue of *Northern Trust* is presented again.

AN ALTERNATIVE INTERPRETATION OF SECTION 2-8

The first renunciation statute in Illinois was enacted in 1829. That statute essentially provided that the surviving spouse was to take one-third of the real estate for life, the widow's dower, and one-third of the personalty forever, "which remains after the payment of debts."⁴¹ The language of the 1829 statute was altered somewhat in 1872 and again in 1874. The 1874 chapter on dower provided that the surviving spouse was entitled to "one-half of all the real and personal estate which shall remain after the payment of all just debts and claims against the estate of the deceased husband or wife."⁴² In the Probate Act of 1939, the phrase "just debts and claims" was shortened to "just claims."⁴³ In 1949 the structure of this section was again altered. The statute then provided that the surviving spouse was "entitled to the following share of the testator's estate after payment of all just claims: (a) If the testator leaves a descendant, one-third of the personal estate and one-third of each parcel of real estate. . . ."⁴⁴ If the testator left no descendants, then the surviving spouse was entitled to one-half of the personal estate and one-half of each parcel of real estate after the payment of all just claims.⁴⁵ In 1971, the form of the 1949 language was retained, but the phrase "entire estate" was substituted for the former "personal estate and . . . each parcel of real estate."⁴⁶ The 1971 language was completely reenacted in the 1975 Probate Act.⁴⁷

In all of these provisions for the surviving spouse, there is a reference to a fraction of the decedent's "estate" and to the

because to do so would be to create an injustice in view of the purpose of section 2056 of the Internal Revenue Code. 347 S.W.2d 884, 889.

See also *Robinson v. U.S.*, 518 F.2d 1105 (9th Cir. 1975). The *Robinson* case in essence tested the adoption by Montana of a modified form of the Uniform Probate Act which provided that the surviving spouse upon renunciation was to take one-third of the "augmented estate." The augmented estate is the estate of the decedent reduced by funeral and administration expenses, certain allowances, and "enforceable claims." MONT. REV. STAT. §§ 91A-2-201, 91A-2-202 (1975). The Ninth Circuit Court of Appeals held that a prior Montana case, *Marans v. Newland*, 143 Mont. 388, 390 P.2d 443 (1964), did not require equitable apportionment to bequests that do not enlarge federal estate tax liability, such as the marital deduction. The court felt that such deductions need not be reduced by any part of the federal estate tax.

41. Act of July 1, 1829, § 40, [1829] Ill. Laws 204.

42. ILL. REV. STAT. ch. 41, § 12 (1874).

43. *Id.* ch. 3, § 168 (1939).

44. *Id.* ch. 3, § 16 (1949).

45. *Id.*

46. *Id.*, § 16 (1973).

47. *Id.*, § 2-8 (1975).

time for calculating that fractional interest.⁴⁸ The statutes provide for a fraction of either the realty and the personalty of the deceased, or for a fraction of the "entire estate" of the deceased. Prior to the abolition of dower and curtesy in Illinois in 1971,⁴⁹ the forced share provisions made reference to both the realty and personalty of the testator.⁵⁰ The reason given for substitution of the words "entire estate" for the phrase "personal estate and . . . each parcel of real estate" is the abolition of dower and curtesy.⁵¹

However, there is also a reference in each of the prior Illinois renunciation statutes to the time for calculating the renunciation share. One may infer from these present and former statutes two times for this calculation: after all debts and claims against the estate have been paid, or before all debts and claims against the estate have been paid. The first permissible inference corresponds to the current Illinois position regarding the time and manner of determining the renunciation share.⁵² The position

48. See notes 41-47 *supra*.

49. ILL. REV. STAT. ch. 3, § 18 (1973).

50. The 1829 Act gave the surviving spouse one-third of the real estate for life and one-third of the personalty forever. Act of July 1, 1829, § 40, [1829] Ill. Laws 204. The 1874 Act gave the surviving spouse one-half of "all of the real and personal estate" of the deceased. ILL. REV. STAT. ch. 41, § 12 (1874). The 1949 language gave the surviving spouse one-third or one-half of each parcel of real estate of which the testator died seized, the exact fraction depending on the presence or absence of descendants.

51. Under the common-law notion of dower, a widow could elect to take her dower interest in lieu of provisions for her in her deceased husband's will. That interest amounted to a life estate in the husband's realty rather than a fee simple interest therein. In *Braidwood v. Charles*, 327 Ill. 500, 159 N.E. 38 (1927), the Illinois Supreme Court gave the surviving spouse the right to take a one-third interest in fee simple of the husband's realty in lieu of the dower interest. The statute was amended accordingly to read:

[H]e or she shall also receive as his or her absolute estate, in lieu of dower therein, one-third of each parcel of real estate of which the intestate died seized and in which such widow or surviving husband shall waive his or her right to dower.

H.B. 799, 53rd Gen. Assembly, 1923 Sess. at 325.

With the abolition of the estates of dower and curtesy in Illinois in 1972, the statute was again altered to read "the entire estate" rather than distinguishing between realty and personalty. ILL. REV. STAT. ch. 3, § 16 (1973). See also JAMES, ILLINOIS PROBATE LAW & PRACTICE § 16 (Supp. 1975).

There is, however, a patent ambiguity in the phrase "the entire estate." While it may refer to a combination of the realty and personalty of the deceased as previously mentioned, the phrase could also refer to the deceased's gross estate for federal estate tax purposes. If the phrase is interpreted to refer to the gross estate of the testator, then a valid conclusion from that premise is that the renunciation share should not be first reduced by the federal estate tax prior to the calculation of that interest. If a court was to adopt such an interpretation, then neither the purpose of section 2056 nor the protective design of forced share statutes generally would be frustrated.

52. *Northern Trust Co. v. Wilson*, 344 Ill. App. 508, 101 N.E.2d 604 (1951). The court in *Northern Trust* said that the federal estate tax is to be considered an item of expense, such as debts and funeral expenses,

announced in *Northern Trust Co. v. Wilson*⁵³ is that the renunciation share must be calculated after the claims against the decedent's estate have been deducted from the decedent's gross estate.⁵⁴ The justification for that inference is based on the statutory construction and implication from the phrase: "the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims"⁵⁵ The surviving spouse's share is arguably determined after the payment of the just claims against the estate.⁵⁶

While the first permissible inference to be drawn from section 2-8 is perhaps the more obvious one, the second possibility is equally plausible and perhaps more logical. It is simply that the language of section 2-8 and its predecessors implies that the size of the surviving spouse's renunciation share is to be determined before any reduction in the decedent's estate. For example, the 1874 statute provided that "the surviving husband or wife may, if he or she should so elect, have . . . one-half of all the real and personal estate which shall remain after the payment of all just debts and claims"⁵⁷ The language "which shall remain" may arguably refer to the survival of this one-half interest after the payment of all just debts and claims. In other words, the one-half interest of all real and personal property "shall remain" after the satisfaction of claims.

Section 2-8 of the 1975 Probate Act may also be interpreted in a similar fashion. The pertinent language of section 2-8 is that "the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: $\frac{1}{3}$ of the entire estate if the testator leaves a descendant or $\frac{1}{2}$ of the entire estate if the testator leaves no descendant."⁵⁸ The inference which may be drawn from that language is that the surviv-

and must therefore come within the classification of claims under section 202 of the Illinois Probate Act (now section 18-10). The court then concluded that the renunciation share is "subject to the 'payment of all just claims.'" 344 Ill. App. 508, 515, 101 N.E.2d 604, 607. The court did not expressly state that section 16 (now section 2-8) implicitly required the calculation of the renunciation share to be made *after* the payment of the claims against the estate. Such an inference, however, was clearly one of the premises adopted by the court in reaching its conclusion.

53. 344 Ill. App. 508, 101 N.E.2d 604 (1951).

54. *Id.* at 514-15, 101 N.E.2d at 607.

55. ILL. REV. STAT. ch. 3, § 2-8 (1975).

56. A similar interpretation can be made with reference to the 1872 and 1874 acts. Those acts essentially provided that the surviving spouse was to take a one-third or one-half interest of all the realty and personalty of the decedent "which shall remain after the payment of all just debts and claims against the estate" ILL. REV. STAT. ch. 41, § 12 (1874). One could clearly infer that the realty and personalty which remains after the payment of the decedent's claims is the size of the estate to which the surviving spouse's fraction is applied.

57. ILL. REV. STAT. ch. 41, § 12 (1874).

58. *Id.* ch. 3, § 2-8 (1975).

ing spouse is entitled to the one-third or one-half interest of the entire estate at all times, regardless of the necessary payments or expenses by the decedent's estate.

Therefore, one resolution to the marital deduction dilemma in Illinois is to interpret section 2-8 to require the calculation of the renunciation share before the payment of any claims of the estate. Another solution is to apportion the federal estate tax between those interests contributing to the tax burden.

APPORTIONMENT OF FEDERAL ESTATE TAXES⁵⁹

The first federal estate tax enacted in 1916 required the executor of the deceased's estate to pay the federal estate tax.⁶⁰ The New York State Legislature in 1930 enacted an apportionment statute requiring all persons entitled to property included in the decedent's gross estate to pay a proportionate share of the federal death taxes.⁶¹ The New York statute was adopted in response to a series of state court decisions holding that the residue of the decedent's estate should bear the burden of the federal estate tax.⁶² In *Riggs v. Del Drago*⁶³ the United States Supreme Court upheld the constitutionality of the New York apportionment statute and noted that the determination of the final impact of the federal estate tax was to be predicated solely on state law.⁶⁴ Some state legislatures followed the New York position and promulgated apportionment statutes providing for the calculation of the surviving spouse's renunciation share. Usually the statutes express the intention of the legislature to exonerate the forced share from contribution, but where that intention is not expressed, it may be implied from the statute's silence.⁶⁵

Some courts have followed the suggestion of the Supreme Court in *Riggs* and have developed theories on apportionment in the absence of legislative enactments.⁶⁶ The essence of this approach is to impose federal estate tax liability on all interests

59. See Kahn, *The Federal Estate Tax Burden Borne by a Dissenting Widow*, 64 MICH. L. REV. 1499 (1966) for an excellent treatment of apportioning federal estate taxes against the renunciation share.

60. Revenue Act of 1916, ch. 463, § 207, 39 Stat. 779.

61. N.Y. DECEDENT ESTATE LAW, ch. 709, § 124, Laws of 1930.

62. See *Farmers Loan & Trust Co. v. Winthrop*, 238 N.Y. 488, 144 N.E. 769 (1924) and *YMCA v. Davis*, 106 Ohio St. 366, 140 N.E. 114 (1922), *aff'd* 264 U.S. 47 (1924).

63. 317 U.S. 95 (1942).

64. *Id.* at 97-98.

65. See *In re Rosenfeld's Estate*, 376 Pa. 42, 101 A.2d 684 (1954). But see *Moorman v. Moorman*, 340 Mich. 636, 66 N.W.2d 248 (1954).

See *Estate Tax Reporter*, ¶ 120,026 (Prentice-Hall) at 120,033 for a consolidation of state apportionment statutes and court decisions relating to the apportionment of federal estate taxes.

66. *Ramsey v. Nordloh*, 143 Colo. 526, 354 P.2d 513 (1960); *Myers v. Sinkler*, 235 S.C. 162, 110 S.E.2d 241 (1959).

passing from the decedent's *taxable* estate. Only those interests contributing to the taxable estate are required to satisfy the estate tax liability because those are the only interests that benefit from the payment of the federal estate tax.

The apportionment of liability among the interests in the taxable estate is analogous to the notion of liens on property. Persons interested in removing liens and other burdens on property ought to take coextensive obligations in the removal of those encumbrances. Once the property is free from all restraints, then all persons interested therein may take their respective shares. The federal estate tax imposes a lien for unpaid taxes on all assets comprising the decedent's gross estate.⁶⁷ Every taker of an interest includible in the decedent's gross estate is therefore personally liable for the satisfaction of his or her lien.⁶⁸ All persons taking from the decedent's gross estate benefit from the removal of the federal estate tax lien to the extent of his property interest and proportionate share of the federal estate tax. Apportioning the burden of paying the death tax between those interests is argued to be a more equitable method of satisfying federal estate tax liability than requiring the residuary estate to pay the entire estate tax.⁶⁹ Under this interpretation, however, the surviving spouse should contribute to relieve the lien imposed on the marital deduction.

The patent fairness of the apportionment approach appears to be perhaps the most equitable solution. It is certainly more just than the present Illinois posture of burdening the renunciation share solely because of the strict statutory construction of section 2-8. Yet, there are some courts that have reached precisely the opposite conclusion. These courts have adopted the doctrine of equitable apportionment, but have concurrently rejected the proposition that the renunciation share should not be burdened with federal estate taxes.⁷⁰

While the propriety of burdening the renunciation share with estate taxes continues to be an area of controversy, the practitioner must face the reality of calculating that interest, whether or not it is reduced by taxes. The critical problem of determining a renunciation share reduced by federal estate taxes involves computations with interrelated data.

67. INT. REV. CODE OF 1954, § 6324(a)(2).

68. *Id.*

69. *Jones v. Jones*, 376 S.W.2d 210 (Mo. 1964); *Seymour Nat'l Bank v. Heideman*, 133 Ind. App. 104, 178 N.E.2d 771 (1962).

70. See *Old Colony Trust Co. v. McGowan*, 156 Me. 138, 163 A.2d 538 (1960); *Bragdon v. Worthly*, 153 A.2d 627 (Me. 1959); *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954).

CALCULATION OF THE RENUNCIATION SHARE

The interrelationship of the federal estate tax and the renunciation share must be dealt with in order to calculate the forced share in states such as Illinois. The renunciation share is determined by subtracting debts, expenses of administration and claims including the federal estate tax⁷¹ from the gross estate.⁷² The remainder is then multiplied by a statutory fraction,⁷³ and the result is the final renunciation share.

In arriving at the federal estate tax, the marital deduction must first be deducted from the gross estate along with other deductions such as the statutory exemption.⁷⁴ The federal estate tax rate is then applied to this remainder, or taxable estate.⁷⁵ In the case of a renouncing spouse, the marital deduction may well be the value of the renunciation share.⁷⁶ Since the value of the renunciation share is dependent on the value of the federal estate tax, and due to the fact that the federal estate tax is dependent on the renunciation share, a circuitous computation arises.

There are three methods of arriving at the renunciation share when that interest is dependent on the federal estate tax. The first method employs trial figures for the value of the marital deduction from which the federal estate tax is determined. The value of this trial tax is then repeatedly subtracted from the previous trial marital deduction until the taxable estate, marital deduction and trial tax coincide.⁷⁷

A second method of calculating the forced share utilizes a series of linear equations, all of which are expressed in terms of the same unknown. Once the federal estate tax and the state death tax are expressed in terms of this unknown, the two equations can be combined to solve for the unknown. The marital deduction can then be determined from the value of the federal estate tax. The reverse process can then be used as a proof that the value for the federal estate tax was correct. This is accomplished by solving for the federal estate tax using the value of the marital deduction.⁷⁸

The third method of calculating the renunciation interest involves the use of one algebraic equation. This method is preferable because of the simplicity of inserting known values

71. ILL. REV. STAT. ch. 3, § 2-8 (1975).

72. *Id.*, § 18-10.

73. *Id.*, § 2-8.

74. INT. REV. CODE OF 1954, § 2051.

75. *Id.*, § 2001.

76. *Id.*, § 2056(e) (3).

77. See Supplemental Instructions for Internal Revenue Service Form 706 at 7 (Revised February 1974).

78. See Fed. Est. & Gift Tax Reports, ¶ 2090 (Prentice-Hall) at 3456.

into one equation to solve for one unknown. The unknown in this equation is the combination of federal and state death taxes. Once this figure is determined, the renunciation share is readily calculated.

The formula for calculating a renunciation share dependent on federal and state death taxes is:

$$T = \frac{[(D-E)f_s + E-D-X_F] R_F - S_F + \sum_b [(E-D)f_b - X_I] R_I - S_I}{[1 - (R_F \cdot f_s)] + \sum_b (R_I \cdot f_b)}$$

- where, T = Federal and Illinois death taxes
- E = Gross estate
- D = Debts and expenses of administration
- f_s = Statutory fraction to surviving spouse
- R_F = Federal tax rate
- S_F = Federal subtractive term
- ∑_b = Sum (for all beneficiaries) of . . .
- f_b = Statutory fraction to each beneficiary
- X_I = Statutory Illinois exemption
- R_I = Illinois tax rate
- S_I = Illinois subtractive term
- X_F = 60,000 federal estate tax exemption.⁷⁹

The federal and state death tax rates must be estimated to use this expression. This is relatively simple, however, inasmuch as the tax brackets used in the computation of the net estate tax are quite large. Once these tax rates are estimated, every term in the equation is a known value, except "T."

Assume the decedent's gross estate equals \$1,000,000 and that the debts and expenses of administration total \$100,000. The decedent dies leaving a wife and two children, and subsequently the wife is not certain whether it is in her best interests to take the share provided for her by her husband's will or to renounce. By inserting the known values into the formula, T is found to

79. Developed by Paul M. Murphy of The University of Chicago Law School. The derivation is as follows:

$$M = (E-D-T)f_s \text{ (where } M = \text{The Marital Deduction)}$$

$$T = (E-D-M f_s - X_F) R_F - S_F + \sum_b [(E-D-T)f_b - X_I] R_I - S_I$$

$$T = [E-D - (E-D-T)f_s - X_F] R_F - S_F + \sum_b [(E-D-T)f_b - X_I] R_I - S_I$$

$$T = ER_F - DR_F - Ef_s R_F + Df_s R_F + Tf_s R_F + Tf_b R_F - X_F R_F - S_F + \sum_b (Ef_b R_I - Df_b R_I - Tf_b R_I - X_I R_I - S_I)$$

$$T - Tf_s R_F + \sum_b (Tf_b R_I) = [E-D - (E-D)f_s - X_F] R_F - S_F + \sum_b [(E-D)f_b - X_I] R_I - S_I$$

$$T = \frac{[(D-E)f_s + E-D-X_F] R_F - S_F + \sum_b [(E-D)f_b - X_I] R_I - S_I}{[1 - (R_F f_s)] + \sum_b (f_b R_I)}$$

be \$192,438.⁸⁰ This is the total of all federal and state death taxes. To determine the renunciation share, the value of T is

80. \$192,438.00 is determined as follows:

First, calculate the amount of the first expression in brackets found in the numerator of the formula. That expression is: $[(D - E)f_b + E - D - X_F]$. Substitute the known values into the expression: $[(100,000 - 1,000,000) \frac{1}{3} + 1,000,000 - 100,000 - 60,000]$. The expression equals \$540,000.

Next, estimate the federal and state tax rates. To estimate these tax rates, first compute a trial federal tax using only the known values of the taxable estate by referring to Table K (Table K is found in the Supplemental Instructions for Form 706 supplied by the Internal Revenue Service). Compute this tax as follows: First look to Table K opposite \$540,000. The tax rate is 0.310 and the federal subtractive term is 21,700. Next, substitute those values into the first portion of the numerator of the formula as follows:

$$\begin{aligned} T &= [(D - E)f_b + E - D - X_F] R_F - S_F \\ T &= (540,000) (.310) - 21,700 \\ T &= 145,700 \end{aligned}$$

Then, substitute this amount (145,700) into the expression for the taxable estate:

$$\begin{aligned} TE &= 540,000 + (0.5)(T) \\ TE &= 540,000 + (0.5)(145,700) \\ TE &= 612,850 \end{aligned}$$

The expression $(0.5)(T)$ refers to the one-half marital deduction of the new amount of 145,700.

This value of 612,850 is an approximation of the taxable estate and aids in estimating which tax rate to use. In this instance, 612,850 is within the bracket in Table K for which the tax rate is 0.310 and for which the federal subtractive term is 21,700.

The estimated tax rate and federal subtractive term can then be inserted into the formula to arrive at the combination of all federal and state death taxes, or T.

$$\begin{aligned} T &= \frac{[(D - E)f_b + E - D - X_F] R_F - S_F + \sum_b [(E - D)f_b - X_I] R_I - S_I}{[1 - (R_F f_b)] + \sum_b (f_b R_I)} \\ T &= \frac{(540,000) .310 - 21,700 + \sum_b [(1,000,000 - 100,000) \frac{1}{3} - 20,000] .06 - 4000}{[1 - (.310 \cdot \frac{1}{3})] + \sum_b (\frac{1}{3} \cdot 0.06)} \\ T &= \frac{167,400 - 21,700 + \sum_b ((300,000 - 20,000) .06 - 4000)}{1 - 0.103 + \sum_b 0.02} \\ T &= \frac{145,700 + \sum_b 12,800}{.897 + \sum_b 0.02} \\ T &= \frac{145,700 + (12,800) 3}{.897 + (0.02) 3} \\ T &= \frac{184,100}{0.95667} \\ T &= \underline{\underline{192,438.00}} \end{aligned}$$

In the above expression, the values 0.06 and 4000 are the estimated state tax rates and state subtractive terms respectively. These estimated rates are found by referring to the appropriate state death tax or state inheritance tax table. For Illinois, that table in pertinent part is:

Value of Share in Excess of Exemption Up To	Rate	Subtractive Share
50,000	2%	0

inserted in the statutory formula used to arrive at the renunciation share. In Illinois, that formula is:

$$\begin{aligned}\text{Marital deduction} &= f_0(E-D-T) \\ &= 1/3(1,000,000 - 100,000 - 192,438) \\ &= 235,854 = \text{renunciation share.}\end{aligned}$$

The surviving spouse can then easily determine whether it is in her best interests to renounce and take \$235,854, or to take that given her pursuant to her husband's will.

CONCLUSION

The fact that an increasing number of states have exempted the renunciation share from satisfying federal estate tax liability may prompt other states to do likewise. The frustration of the thrust of the marital deduction provisions⁸¹ of the Revenue Act of 1948, the contravention of the protective purpose of forced share statutes,⁸² and the patent unfairness of subjecting a tax-exempt deduction to subsequent taxation⁸³ support such a resolution of the marital deduction dilemma.

There are three options available giving state courts and legislatures the opportunity for such change. One such alternative is simply the adoption of new legislation. A forced share statute could be enacted to provide expressly that the renuncia-

150,000	4%	1,000
250,000	6%	4,000
500,000	10%	14,000
∞	14%	34,000
Proof of \$192,438.00:		
Federal Taxes:		
Gross Estate	.....	1,000,000
Less		
Debts	.....	100,000
Marital deduction	.....	235,854
Statutory Exemption	.....	60,000
		<u>395,854</u>
Taxable Estate	.....	604,146
Taxable Estate × Federal Tax Rate	.....	.310
		<u>187,285</u>
Less Federal Subtractive Term	.....	(21,700)
Equals Federal Estate Tax	.....	<u>165,585</u>
State Taxes: ((Inherited Share - state exemption) × state tax rate - state subtractive term = state taxes)		
Wife:	(235,854 - 20,000).06 - 4000	8,951
Son:	(235,854 - 20,000).06 - 4000	8,951
Daughter:	(235,854 - 20,000).06 - 4000	8,951
		<u>26,853</u>
Federal Taxes + State Taxes = T		
165,585 + 26,853	=	<u>192,438.00 = T.</u>

81. See text accompanying notes 20-21 *supra*.

82. *Id.*

83. See text accompanying notes 22-23 *supra*.

tion share is to be calculated with reference to the gross estate prior to any reduction by the federal estate tax;⁸⁴ or a statutory apportionment scheme could be adopted to provide that all federal and state death, inheritance or succession taxes be apportioned among interests other than the renunciation share.⁸⁵ Such legislative approaches are the most desirable solutions. In the face of such authority, there can be virtually no confusion or contrary construction.

The second option available to exempt the renunciation share from estate taxation is the adoption of an equitable apportionment scheme. A state court could ascertain congressional intent behind the enactment of section 2056 of the Internal Revenue Code, take notice of the purpose of forced share statutes generally in protecting the surviving spouse, and recognize the unfairness of subjecting to estate taxation a deduction that does not contribute or add to estate tax liability. The court could then equitably apportion all estate taxes on interests contributing to the taxable estate. The weakness of this solution is simply that the scheme may be overruled or altered in subsequent cases.

The third alternative is to reinterpret existing statutory authority in accordance with the notion that the renunciation share should be exempt from estate tax liability. This approach can be used in those jurisdictions whose existing statutory provisions are amenable to the conclusion that the renunciation share may be calculated before reducing the gross estate by claims and expenses.⁸⁶ This alternative cannot be adopted by those jurisdictions with forced share statutes that provide expressly for the calculation of the renunciation share after the gross estate has been reduced by claims and expenses. As such, this option is the least desirable of the three available.

By adopting one of the three approaches, the marital deduction dilemma can be resolved pursuant to the congressional intent of section 2056. Although the calculation of that interest subject to estate taxes is simplified by an algebraic formula, the concern over the propriety of so burdening the renunciation share continues. Until those states that require the renunciation share to be reduced by estate taxes adopt the opposite approach, surviving spouses in those states will continue to receive less than they should, and the concept of uniform estate taxation will remain merely a concept rather than a reality.

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84. See, e.g., ANN. CODE OF MD., Estates & Trusts, §§ 3-203, 3-102(b), (f), 11-109 (1974) and WIS. STAT. ANN. § 861.05 (1971).

85. See, e.g., ARK. STAT. ANN. §63-150 (1971).

86. Illinois is one such jurisdiction. See also text accompanying notes 52-59 *supra*.