In re Estate of Gowling and In re Estate of Grant: The Limits of Equitable Apportionment

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NOTES

_In re Estate of Gowling and In re Estate of Grant:_ The Limits of Equitable Apportionment

**INTRODUCTION**

The federal estate tax\(^1\) is a tax imposed upon the transfer of property at death.\(^2\) The tax attaches to the estate before distribution, and is imposed upon the decedent's right to transmit his property.\(^3\) The extent of federal estate tax liability depends upon the character of the property interest being transferred, and that character is largely determined under state law.\(^4\) With a few specific exceptions,\(^5\) federal law does not address how the federal estate tax should be distributed within an estate. Instead, state law determines which estate sources will bear the burden of the tax.\(^6\)

Although a number of gifts which pass outside of probate are included in valuing a decedent's gross estate\(^7\) and computing his

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3. Young Men's Christian Ass'n v. Davis, 264 U.S. 47 (1923); New York Trust Co. v. Eisner, 256 U.S. 345 (1921). Since the federal estate tax is, as an estate tax, a tax on the transfer of property, rather than an inheritance tax based on the ownership of property, Eisner deemed the tax indirect, not requiring apportionment, and hence constitutional.
5. The exceptions found in the Internal Revenue Code provide for proportional recovery of tax payments from life insurance beneficiaries, and recipients of property over which the decedent had a power of appointment. I.R.C. §§ 2206, 2207. The Economic Recovery Tax Act of 1981 provides, in new I.R.C. § 2207A, for proportional recovery from certain property for which a marital deduction has been previously allowed [hereinafter referred to as Economic Recovery Tax Act].
7. The law of property distinguishes between probate and nonprobate property, while the law of federal taxation is concerned with the concept of the gross estate. Probate prop-
estate tax, Illinois law has traditionally required that, absent directions from the decedent, the estate tax be paid from the residuary probate estate. Under this approach, sometimes referred to as the burden on the residue rule, nonprobate bequests are not burdened and reduced by federal estate taxes. However, in the January, 1978 decision of Roe v. Estate of Farrell, the Illinois Supreme Court adopted the principle of “equitable apportionment” in holding

8. The burden on the residue rule requires that intestate assets and residuary assets under the will (that is, all of the property not disposed through specific or general bequests, or through nonprobate transactions) be the primary sources called upon to satisfy the federal estate tax liability, where a decedent has expressed no indication to the contrary in his will. First Nat’l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943); In re Estate of Fairchild, 21 Ill. App. 3d 459, 315 N.E.2d 658 (1974); In re Estate of Phillips, 1 Ill. App. 3d 659, 275 N.E.2d 685 (1971).


10. Equitable apportionment is a multi-faceted doctrine under which the burden of the federal estate tax is equitably distributed among various estate assets. Equitable apportionment has been adopted judicially in several jurisdictions, but is more often a creature of statute. Its meaning thus varies in nearly as many ways as there are jurisdictions which embrace it. For a general discussion of the questions raised by equitable apportionment, see Carroll, The Interplay of Probate Assets and Nonprobate Assets in the Administration of a Decedent’s Estate, 25 De Paul L. Rev. 363 (1975); Fleming, Apportionment of Federal Estate Taxes, 43 ILL. L. REV. 153 (1948); Powell, Ultimate Liability for Federal Estate Taxes, 1958 WASH. U.L.Q. 327 (1958).

In general terms, a jurisdiction which has adopted equitable apportionment will apply either “partial” or “total” apportionment. With “partial” apportionment, tax liability of the nonprobate estate is determined and apportioned pro rata, but taxes for which the probate estate is liable are drawn strictly from residuary sources, or according to local rules of abatement. Where apportionment is “total,” every asset, whether probate or nonprobate, contributes pro rata to the payment of taxes.
that, in intestate estates, nonprobate assets will contribute to the payment of taxes. In *In re Estate of Gowling* and *In re Estate of Grant*, two conflicting decisions involving property passing to surviving spouses, the court again addressed the issue of equitable apportionment. *Gowling* and *Grant* further defined and limited the doctrine of equitable apportionment in Illinois.

This comment will examine and assess the current status of the law of equitable apportionment in Illinois. The *Roe* decision will be reviewed, and some of the questions it left unanswered will be identified. The *Gowling* and *Grant* decisions will be examined and compared, focusing on whether the conclusions drawn are reconcilable. Finally, some conclusions will be drawn regarding the present and future state of the law of equitable apportionment in Illinois.

**BACKGROUND**

The burden on the residue rule requires that intestate or residual assets be the primary source for the payment of taxes where a decedent has expressed no contrary direction in his will. Because certain lifetime transfers are included in determining federal estate tax liability, application of the rule often meant that a testator could intentionally or unintentionally disinherit residuary takers by omitting directions in his will regarding the payment of taxes. Indeed, in an estate rich in nonprobate assets, general and even specific bequests would abate in order to pay the tax generated by nonprobate gifts.

A similar result occurs in the intestacy context. If a decedent made substantial lifetime transfers and then died intestate, traditional Illinois law required that his probate (intestate) estate would bear the burden of the federal tax, although its liability was largely based on the lifetime nonprobate transfers. Thus, heirs-at-law under the statute of descent and distribution could be effectively disinherited, in that their shares could be completely consumed through the payment of taxes on nonprobate gifts.


11. 82 Ill. 2d 15, 411 N.E.2d 266 (1980).
13. *See* note 7 supra.
14. *See* note 52 infra.
was the context of *Roe v. Estate of Farrell*.

*Roe v. Estate of Farrell*

In *Roe v. Estate of Farrell*, the decedent died intestate, leaving considerable property in joint tenancy. The federal estate tax due exceeded the value of the intestate probate assets. The administratrix sought proportionate contribution from the joint tenants for taxes which the probate assets could not possibly cover. Her request was not without precedent, for in a similar case four years earlier, the First District in *In re Estate of Van Duser* had granted such an apportionment. Following this precedent, the supreme court held that, in intestate estates, nonprobate assets would contribute pro rata to the payment of tax liabilities they generated. The court affirmed the circuit court's order of equitable apportionment of the estate tax between the joint tenants and the heirs-at-law of the intestate estate.

Three factors were key to the *Roe* analysis: the doctrine of equitable contribution, legislative intent, and reliance upon and acceptance of the *Van Duser* holding. With respect to the doctrine of equitable contribution, the *Roe* court cited *Van Duser*, which held that "logic, reason, and simple justice dictate that . . . the doctrine of equitable contribution should be invoked as to nonprobate assets to fairly distribute the federal estate tax burden." It was significant to the *Roe* court that the nonprobate assets generated a large part of the tax liability. In its application of the doc-

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15. 69 Ill. 2d at 528, 372 N.E.2d at 663.
16. *Id.*
17. *Id.* The executor is liable for payment of the estate tax. I.R.C. § 2002.
19. 69 Ill. 2d at 532, 372 N.E.2d at 665.
20. The keystone of the equitable principles as expressed by the *Roe* court was found in a section from J. POMEROY, EQUITY JURISPRUDENCE, § 411 (5th ed. 1942); equality is equity. The *Roe* court stated:

This doctrine is evidently based upon the notion that the burden in all cases should be equally borne by all the persons upon whom it is imposed, and its necessary effect is to equalize that burden whenever one of the parties has, in the pursuance of his mere legal liability, paid or been compelled to pay the whole amount, or any amount greater than his proportionate share.

69 Ill. 2d at 532, 372 N.E.2d at 665-66.
21. *Id.* at 530-32, 372 N.E.2d at 665.
22. *Id.* at 532, 372 N.E.2d at 665.
23. *Id.*, quoting *In re Estate of Van Duser*, 19 Ill. App. 3d at 1023, 313 N.E.2d at 229.
trine of equitable contribution, the *Roe* court recognized the frequent confusion surrounding the imposition of the federal estate tax, as compared to the imposition of an inheritance tax. Although the federal estate tax is conceptually a tax upon the transfer of the "corpus" of the estate, its practical effect is similar to that of an inheritance tax. Even though an heir or beneficiary does not directly pay the tax, because it is a tax upon the decedent's transfer and not upon the beneficiary's receipt, the payment of the tax has the practical effect of reducing distributive shares. Invoking the principle that "equality is equity," the court pointed to pro rata contribution from the beneficiaries' shares as the equitable way of distributing the estate tax burden.\(^4\)

In examining legislative intent, the *Roe* court first looked to section 18-14 of the Illinois Probate Act,\(^2\) which charges all of a decedent's real and personal estate with the estate tax. The appellate court had construed this section to require an exhaustion of probate assets before nonprobate sources could be used to pay taxes.\(^2\) The Illinois Supreme Court, however, concluded that this section did not manifest any legislative intent that the federal estate tax burden must invariably fall upon the probate assets.\(^7\) Rather, in the court's view, the section simply abolished an archaic distinction between a decedent's real and personal property in estate administration.\(^2\) The court then examined section 18-10, which classifies the priority of claims made against a decedent's estate.\(^2\) The *Roe* court held that this section was "completely unrelated to the question of whether the burden of the federal estate tax should be apportioned."\(^30\) The court concluded that since the legislature had

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24. See note 20 supra. The meaning of "equality is equity" would change, however, as it was applied subsequently to different situations.

25. Section 18-14 of the Illinois Probate Act provides:
   
   All the real and personal estate of the decedent and the income therefrom during the period of administration are chargeable with the claims against the estate, expenses of administration, estate and inheritance taxes and legacies without distinction except as otherwise provided in this Act. . . .
   

26. 69 Ill. 2d at 530-31, 372 N.E.2d at 665.

27. 69 Ill. 2d at 531, 372 N.E.2d at 665.

28. Id.

29. Id. ILL. REV. STAT. ch. 110 ½, ¶ 18-10 (1979) provides:
   
   "All claims against the estate of a decedent are divided into classes in the manner following . . . .
   3rd: Debts due the United States."

30. 69 Ill. 2d at 531, 372 N.E.2d at 665.
not in fact addressed the apportionment issue, there was nothing in the statute to preclude the court from requiring the surviving joint tenants to contribute their proportionate share of the estate tax.\textsuperscript{31}

The third key aspect of the \textit{Roe} analysis was the reliance upon the \textit{Van Duser} decision throughout the legal profession.\textsuperscript{32} The court found that this reliance, as evidenced by numerous treatises and handbooks for practicing lawyers, "has not been misplaced, and that the \textit{Van Duser} court was correct in making an equitable apportionment."\textsuperscript{33} In \textit{Roe}, therefore, the Illinois Supreme Court officially sanctioned the equitable apportionment of federal estate taxes between probate and nonprobate assets.

The adoption of equitable apportionment in \textit{Roe} left unanswered many questions as to the application of this concept in varying fact situations. First, the decision did not address the question of whether apportionment would apply between probate and nonprobate assets in a testate estate. Second, it left unclear whether, and to what extent, equitable apportionment would modify the rule that the tax burden should fall upon an estate's residuary assets.\textsuperscript{34} Third, the court did not specifically address how apportionment would affect the share passing to a surviving spouse, which typically generates no federal estate tax.\textsuperscript{35}

In two 1980 apportionment cases, \textit{In re Estate of Gowling}\textsuperscript{36} and \textit{In re Estate of Grant},\textsuperscript{37} the Illinois Supreme Court supplied some answers to these questions. \textit{Gowling} left no doubt that apportionment between probate and nonprobate assets would apply in tes-
tate estates, but at the same time did not completely dismiss the burden on the residue rule. Although Gowling exempted the share passing to the surviving spouse from contribution toward the federal estate tax, Grant demonstrated that this exemption would not apply in all cases.

_In re Estate of Gowling_

_In re Estate of Gowling_ involved a decedent who left a will which contained no express provision for the payment of the federal estate tax. Decedent's gross estate was valued at close to one-half million dollars. Probate assets represented only a minor portion of this amount.\(^{38}\) The will provided for specific bequests to decedent's surviving (second) wife and to his son, and granted a small residuary share to his daughter.\(^{39}\) The bulk of the estate consisted of nonprobate remainder interests in real estate passing to the testator's son and daughter,\(^{40}\) although some miscellaneous nonprobate property also passed to the surviving spouse.\(^{41}\) Federal tax liability, assessed at over $72,000, was attributable primarily to the nonprobate property.\(^{42}\) This tax assessment far exceeded the value of the residuary assets under the will; indeed, it exceeded the total value of the probate estate.\(^{43}\)

After a hearing, the circuit court ruled that federal estate taxes should be paid from probate assets to the extent such assets were sufficient.\(^{44}\) The circuit court never reached the issue of apportionment because it reasoned that a provision in the decedent's will giving his executor power to "settle claims in favor of or against my estate" meant that the testator wished his estate tax to be paid entirely by probate assets.\(^{45}\) Since, under section 18-10 of the Illinois Probate Act, "amounts due the federal government" represented a class of claims against the estate, the court concluded that the testator's grant of power to the executor to settle claims implicitly meant that he intended that probate assets be used to pay

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38. 82 Ill. 2d at 18, 411 N.E.2d at 267.
40. Id.
41. 82 Ill. 2d at 18, 411 N.E.2d at 267; 77 Ill. App. 3d at 550, 396 N.E.2d at 83. The remainder interests in real estate comprised approximately eighty percent of the gross estate.
42. 82 Ill. 2d at 18, 411 N.E.2d at 267. See note 41 supra.
43. Id. Probate property totalled about $70,000; the residue amounted to about $1,200.
44. Id. at 19, 411 N.E.2d at 268; 77 Ill. App. 3d at 550-51, 396 N.E.2d at 84.
45. 77 Ill. App. 3d at 550, 396 N.E.2d at 84. The appellate court thought the question was one of first impression in Illinois. 77 Ill. App. 3d at 551-53, 396 N.E.2d at 85.
estate taxes.\textsuperscript{46}

The spouse appealed the circuit court’s order, seeking an equitable apportionment of the taxes between the probate and nonprobate estate, and at the same time arguing that she be exempted from such apportionment. The spouse contended that she should not required to contribute to the payment of any federal estate tax, since her interest qualified for the marital deduction,\textsuperscript{47} and thus did not generate any tax liability.\textsuperscript{48}

\textit{The Appellate Court Decision}

The appellate court agreed with the spouse, and reversed the circuit court’s holding.\textsuperscript{49} Rejecting the contention that the testator had expressed any direction for the payment of taxes, the court held that, with the exception of any property qualifying for the marital deduction, both probate and nonprobate assets should be charged with the federal tax liability.\textsuperscript{50}

In re-examining the burden on the residue rule, the court held that the rule was still applicable for any tax attributable to probate assets. Thus, the residue would be charged first with any taxes apportioned to the probate estate.\textsuperscript{51} The court then held that, if residuary assets were extinguished by taxes, the balance would be paid from the remaining probate assets in accordance with the traditional rules of abatement.\textsuperscript{52} Faced with bearing virtually the entire burden of the federal tax, the recipients of the remainder interests in real estate appealed the appellate court

\textsuperscript{46} 82 Ill. 2d at 19, 411 N.E.2d at 268.
\textsuperscript{47} Id. at 20, 411 N.E.2d at 268.
\textsuperscript{48} 77 Ill. App. 3d at 553-54, 396 N.E.2d at 86.
\textsuperscript{49} 77 Ill. App. 3d 548, 396 N.E.2d 82.
\textsuperscript{50} Id. at 554, 396 N.E.2d at 86.
\textsuperscript{51} Id.
\textsuperscript{52} Id. The rules of abatement are tied to the concept that legacies under a will are defined by classes, the most important being specific bequests, and secondly, general bequests. A specific bequest is one which is unique, or which is capable of identification from all other things of the same kind. A general bequest is usually of money, and can be satisfied from any estate source, or through delivery of something of corresponding value. Specific bequests are therefore of a higher class than general bequests. The rules of abatement provide that when any given class of legacies must abate because of an insufficiency, all bequests within that class abate pro rata. Baker v. Baker, 319 Ill. 320, 150 N.E. 284 (1925); \textit{In re Estate of Fleer}, 21 Ill. App. 3d 56, 315 N.E.2d 260 (1974). See also ILL. REV. STAT. ch. 110\textsuperscript{4/}, § 24-3(b) (1979) which provides:

Unless otherwise provided by will, if the estate of a testator is insufficient to pay all legacies under his will, specific legacies shall be satisfied pro rata before general legacies, and general legacies shall be satisfied pro rata, without any priority in either case as between real and personal estate.
decision.

The Supreme Court Decision

The Illinois Supreme Court faced the same issues on appeal as had the appellate court. First, the court had to determine whether the doctrine of equitable apportionment between probate and nonprobate assets, as established by Roe, should apply to testate estates. Second, assuming apportionment applied, the court then had to determine whether property which qualified for the marital deduction, passing in both the probate and nonprobate estates, should be included in that apportionment; that is, whether it should be charged with estate taxes which it had not generated.

Equitable Apportionment

The supreme court affirmed the appellate court on all three issues.53 It first rejected the circuit court's reasoning that the testator's giving his executor "power to settle claims in favor of my estate" meant that taxes be paid entirely from probate assets, observing that this rationale had been rejected in Roe v. Farrell.54 Finding that the testator had in fact expressed no direction as to how taxes were to be paid, the Gowling court thus confronted the issue of how estate taxes should be allocated in a testate estate.

Since the court in Roe had already construed sections 18-10 and 18-14 of the Probate Act55 and found that the statutory language did not preclude application of the doctrine of equitable apportionment, it was clear to the Gowling court that legislative intent presented no obstacles to applying the doctrine to testate estates.56 The court held that Roe was applicable, and that in the absence of directions from the decedent, a proportionate share of federal es-

54. Id. at 19, 411 N.E.2d at 268. The court's analogy to Roe can be criticized because there it was construing the intentions of the legislature, and here it was construing the intentions of a testator. Although the Roe rationale can obviously be employed to set down a rule of law in circumstances where the testator has not spoken, it hardly seems appropriate to use this rationale as evidence that the testator has not spoken.
55. See notes 25-31 supra and accompanying text.
56. 82 Ill. 2d at 19, 21, 411 N.E.2d at 268, 269.
tate tax liability should be borne by nonprobate assets.\textsuperscript{57} The effect of this holding was that the nonprobate assets, consisting largely of remainder interests in real property and representing the bulk of the taxable transfer, would bear most of the taxes.\textsuperscript{58}

Marital Deduction Property

The second essential question presented in \textit{Gowling} was whether probate and nonprobate shares transferred to the surviving spouse should be included in apportionment. The \textit{Gowling} widow received probate as well as nonprobate property which qualified for the marital deduction.\textsuperscript{59} Such transfers are deductible from the adjusted gross estate in determining the taxable estate, and effectively generate no federal tax liability.\textsuperscript{60}

The supreme court did not require contribution from the spouse's share, but preserved it intact. In reaching its decision, though, the \textit{Gowling} court offered little original analysis. The court relied heavily on the Court of Claims holding in \textit{Farley v. United States}.\textsuperscript{61} Citing \textit{Farley}, the \textit{Gowling} court added dimension to the "equality is equity" principle in Illinois apportionment doctrine. The court agreed that it would be "inequitable to require a widow whose property generated no tax to contribute to the payment of tax generated by property received by others."\textsuperscript{62} Again citing \textit{Farley}, the court observed that Illinois statutory and judicial policies had traditionally protected the widow's interest from competing

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\item 57. \textit{Id.} at 22, 411 N.E.2d at 269.
\item 58. A troublesome aspect of such a rule is that it will sometimes work, as in \textit{Gowling}, upon non-cash property, and require recipients to satisfy the tax liability with cash from the sale of that property or from outside sources.
\item 59. I.R.C. § 2056(a) provides that: "[T]he value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse. . . ."
\item 60. \textit{Id.} See note 76 infra.
\item 61. 581 F.2d 821 (Ct. Cl. 1978). Decided shortly after \textit{Roe}, \textit{Farley} sought to interpret \textit{Roe}'s principles of equitable contribution in light of a spouse's election against her husband's will. It asked whether, under Illinois law, a spouse's elective share would be estimated before or after taxes had been charged against the estate. Under the rule of Northern Trust Co. v. Wilson, 344 Ill. App. 508, 101 N.E.2d 604 (1951), Illinois law required that the spousal share be calculated after the estate was reduced by taxes. \textit{See notes 87-91 infra} and accompanying text.
\item 62. 82 Ill. 2d at 23, 411 N.E.2d at 270, citing \textit{Farley v. United States}, 581 F.2d 821, 834 (Ct. Cl. 1978).
\end{itemize}
Equitable Apportionment

claims to her husband’s estate.⁶³ The Gowling court further noted that Congress intended that a portion of a decedent’s property pass to his spouse “free of the burden of federal estate tax.”⁶⁴

The Gowling decision made clear that the federal tax liability would be apportioned pro rata between both probate assets and nonprobate assets, but that shares qualifying for the marital deduction would not be charged with federal estate taxes. A third related question, however, was ignored by the supreme court. Although the court exempted marital deduction shares from apportionment, the court did not address which assets should bear the tax burden allocated to the probate estate. Unlike the appellate court, the supreme court in Gowling made no comment on the continued viability of the burden on the residue rule.

Burden on the Residue Rule

The appellate court in Gowling had reviewed the burden on the residue rule, and concluded it was very much alive.⁶⁵ The appellate court stated that although the residuary estate could no longer be charged with tax generated by nonprobate assets, “[a]s between the various probate assets distributed by the testator, Illinois follows the rule [that] the burden of federal estate taxes falls on re-

63. Id.
64. Id. citing 581 F.2d at 835. The court further supported its findings with an impressive list of citations from other jurisdictions. Id. at 23-24, 411 N.E.2d at 270. In doing so, the court declared that it thereby joined “those courts which have held that a surviving spouse is entitled to the benefits of the marital deduction undiminished by any part of the Federal estate tax liability.” Id. at 23, 411 N.E.2d at 270. Most of the cases cited by the court, however, were not on point. Many involved the marital deduction in the context of shares descending through intestacy. Estate of Whipple v. United States, 419 F.2d 494 (6th Cir. 1969); In re Estate of Collins, 269 F. Supp. 633 (D.D.C. 1967); First Nat’l Bank v. United States, 233 F. Supp. 19 (D. Kan. 1964); Byars v. Mixon, 292 Ala. 657, 299 So. 2d 259 (1974); In re Estate of Marks, 129 N.J. Super. 276, 322 A.2d 860 (1974).

The applicability of the marital deduction to intestate estates in Illinois differs from its applicability to bequests under a will. See notes 135-147 infra and accompanying text.


The court’s reference to these authorities in Gowling had no impact upon the decision regarding the marital deduction and statutory renunciation in Illinois. See notes 99-113 infra and accompanying text.

65. 77 Ill. App. 3d at 552-53, 396 N.E.2d at 85-86. It referred to In re Estate of Fairchild, 21 Ill. App. 3d 459, 315 N.E.2d 658 (1974) and In re Estate of Phillips, 1 Ill. App. 3d 813, 275 N.E.2d 685 (1971), earlier instances where contribution had been sought from nonprobate assets, and had been rejected in favor of the rule that the total liability is borne by the residuary estate.
Perhaps the supreme court did not discuss the burden on the residue rule because it assumed the continued viability of the rule, or, alternatively, because it was not essential for deciding the facts of Gowling. The Gowling residuary estate was so small that it would be extinguished by taxes, and the rules of abatement would apply. The abatement rules provide that when any given class of legacies within the probate estate must abate because of an insufficiency, all bequests within that class abate pro rata. In Gowling, application of these rules would have meant that when the residue was exhausted, the next class of legacies—the bequests to the surviving spouse and the son—would be proportionately charged with estate tax.

Abatement of the spouse's probate bequest pursuant to the burden on the residue rule must be squared, however, with the exemption granted by Gowling for marital deduction property. Although the court did not expressly address how the two rules fit together, Gowling may simply be viewed as a gloss on the rules of apportionment and the rules of abatement. That is, residuary assets will contribute to taxes apportioned to the probate estate to the extent possible; when these are exhausted, apportionment will follow the scheme of pro rata abatement, with an exception carved out for qualified marital deduction bequests.

While Gowling did not expressly discuss the burden on the residue rule, neither did it disavow the rule. Viewed in this manner,
the court’s analysis remains consistent with that rule and provides a new dimension for the rules of apportionment and abatement in Illinois.

The appellate court opinion in *Gowling*, as affirmed, represents two different rules to be applied to testate estates, absent a direction in the will regarding the payment of taxes. First, like *Roe*, it provides that “to the extent nonprobate assets exist which generate estate tax liability contribution may be sought on a proportionate basis.” It also delineates a second new rule that “[t]he proportionate share of tax attributable to the probate assets of the estate (excluding the property qualifying for the marital deduction) shall be borne to the extent possible by the residue. . . .”

All questions regarding equitable apportionment in Illinois, however, were not answered by *Gowling*. The equitable doctrine first favored contribution from nonprobate takers under *Roe*; it then precluded contribution from a spouse whose bequest qualified for the marital deduction under *Gowling*. Still unclear, however, was whether the doctrine would apply to a spouse who renounces the will, and takes her share under the statute. The *Grant* case provided the Illinois court with an opportunity to test the limits of *Gowling’s* holding regarding the marital deduction in this new context.

**In re Estate of Grant**

**Background**

The expansive principles of equity underlying the portion of the *Gowling* decision regarding the marital deduction suggested that the court would be active in further developing the equitable apportionment doctrine. Equitable apportionment was hailed as a dramatic change in estate administration, and predictions were made as to its application to intestacy, forced heirship, and gifts to charity. Among these speculations was the important question of whether the share of a surviving spouse who elects to take against a deceased spouse’s will would be charged with federal estate tax liability, where the elective share did not generate any of that liability.
Illinois law provides that regardless of whether a testator has made any provision for his spouse in his will, his widow may renounce that will and take a statutory share of one-third or two-thirds of his entire estate, depending upon whether or not the testator left a descendant. This elective share qualifies for the marital deduction, so that the amount passing to the surviving spouse can be deducted from the adjusted gross estate in arriving at the taxable estate. The question raised in *Grant*, however, was the meaning of “entire estate” as expressed in the statute. In answering this question, the *Grant* court did not focus on the statutory language as it related to property concepts of probate and nonprobate assets, but rather on how the words “entire estate” interfaced with tax concepts: one-third of the “entire estate” could mean one-third before provision had been made for taxes, or one-third after taxes had been allocated. For the sake of convenience, the two interpretations the court considered could be referred to as a spousal share based on the adjusted gross estate, or one based on the net estate. In subsequent references to these two approaches, an estate consisting entirely of probate assets is assumed.

73. *Ill. Rev. Stat.*, ch. 110 1/4, ¶ 2-8(a) (1979) provides:

If a will is renounced by the testator’s surviving spouse . . . the surviving spouse is entitled to the following share of the testator’s estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant.


75. The adjusted gross estate is determined after subtracting from the gross estate such expenses as funeral and administrative expenses, claims against the estate, certain state and foreign death taxes, and losses. I.R.C. §§ 2053, 2054.

76. The value of the taxable estate is determined by deducting from the gross estate specific deductions allowed under the Internal Revenue Code. I.R.C. § 2051. The most important of these are the marital and charitable deductions allowed under I.R.C. §§ 2056 and 2055.

77. After the value of the taxable estate has been determined, see note 76 supra, the value of the aggregate amount of taxable gifts made by the decedent after 1976, which have not been included in valuing his gross estate, is added to the value of the taxable estate. I.R.C. § 2001(b)(1). A tentative tax is computed based on this amount, which is then offset by the amount of gift tax the decedent has paid on his post-1976 gifts. The result is the gross estate tax. A number of credits are then applied to the gross estate tax, the most important of which is the unified credit. I.R.C. § 2010. The other four credits include the credits for state and foreign death taxes, the credit for federal estate taxes paid on certain prior transfers, and the credit for gift taxes paid on gifts made before 1977 which have been included in valuing the gross estate. I.R.C. §§ 2011, 2014, 2013, 2012. The net estate tax is arrived at after these credits have been taken. The net estate is that which remains after this net estate tax has been paid. See generally *H.R. Rep.* No. 94-1380, 94th Cong., 2d Sess. 11-12 (1976).

78. It is necessary to assume a gross estate consisting entirely of probate assets because
Equitable Apportionment

Computation Based on the Adjusted Gross Estate

If “entire estate” is construed to mean the gross or adjusted gross estate, the surviving spouse receives the largest possible fractional share, all of which can be claimed by the estate as a deduction from the federal tax. The remaining one-half or two-thirds share of the adjusted gross estate becomes the basis for the taxable estate. The ultimate consequence of using the gross or adjusted gross estate for figuring the spouse’s fractional share is that the property received upon renunciation, as well as the amount the estate can claim as a marital deduction, is maximized. Since this usually translates into a diminished tax bill for the estate, the spouse, and the estate as a taxable entity, are the primary beneficiaries of this approach.

The beneficiaries under the will, however, do not generally benefit by so maximizing the marital deduction because the tax burden, although diminished, must be borne by them alone; that is, the tax must be carried by property that is not passing to the spouse. The federal statute does not permit property for which a deduction has been taken to bear any part of the estate tax; it provides that the estate deduct only that amount actually received by the spouse. Therefore, although figuring the fractional share from the gross or adjusted gross estate maximizes the share for the spouse, and minimizes the estate’s tax liability as a whole, it is disadvantageous for beneficiaries under the will. Having no doubt been disappointed by the spouse’s election, beneficiaries are further dismayed to see their bequests shrink further to pay taxes.

Computation Based on the Net Estate

The widow’s fractional share of the “entire estate” can alternatively be based on a fraction of the net estate, or of what remains after provision has been made for the payment of taxes. Basing the fractional share on the net estate effectively means that the spouse participates in tax apportionment, since the value of the

nonprobate gifts will have bearing on the value of both the gross and the net estate. See notes 7 and 77 supra. An Illinois forced heir cannot generally claim a share in nonprobate assets. See note 129 infra. Thus, the Illinois Supreme Court in Grant passed over a significant opportunity to determine whether the words “entire estate” were meant to bring both probate and nonprobate assets within the scope of the elective share. Such a question does not appear to have been before the court, however.

79. I.R.C. § 2056(b)(4)(A) requires that the value of the interest passing to the surviving spouse be reduced by any death taxes payable out of the spouse’s interest.

80. See notes 76-78 supra.
net estate reflects that which remains after taxes have been provided for. 81 Because the spouse's fractional share of the net estate qualifies for the marital deduction, its value will have been subtracted from the gross estate in determining the taxable estate, but will at the same time have to accurately reflect the precise amount received by the spouse. 82 Thus, use of the net estate approach requires that determination of the spouse's share be interrelated with a working estimate of the ultimate amount of tax liability. The value of the marital deduction must decrease to reflect the fractional amount of the net estate, increasing the value of the net estate, and ultimately the amount of taxes to be paid. 83 The size of the net estate from which the marital deduction fractional share is to be determined reduces correspondingly. An adjustment of the size claimed as a marital deduction must again be made; the process repeats itself until an equilibrium is reached between one-third of the amount of the net estate, and the amount actually claimed as a marital deduction. 84

Use of a net estate approach to determine the spouse's renunciative share thus translates into a smaller share passing to the spouse, and greater tax liability for the estate as a whole. Such an approach is usually more advantageous for beneficiaries under the will. Because the spouse participates in tax apportionment, the beneficiaries contribute proportionately less to the overall federal tax burden. It was this approach, utilizing the value of the net estate as the computational basis for the spouse's fractional share, which Illinois adopted judicially with the Northern Trust Co. v. Wilson decision. 85

Northern Trust Co. v. Wilson

In Northern Trust Co. v. Wilson, the First District interpreted

81. See note 77 supra.
82. See notes 76 and 79 supra.
83. The process is further complicated by the credit against the tentative tax given by I.R.C. § 2011 for any state death taxes paid. See note 77 supra. As the size of the spousal share varies, so too will the amount to be paid out of it for state inheritance tax. This amount taken as a credit will also reduce the value of the share passing to the spouse, and thus, the amount allowed to be claimed as a marital deduction. See note 79 supra.
84. The quantum of liability can be determined through using a trial and substitution method, or an algebraic formula. For an explanation of the two techniques, see I.R.S. Publication 904, (Rev. Nov. 1979), Computing the Interrelated Charitable, Marital, and Orphans' Deductions and Note, Estate and Gift Tax: Federal Estate Tax—Burden of the Marital Share, 33 Okla. L. Rev. 384 (1980).
the Illinois statute for forced heirship in light of the then newly enacted marital deduction provision; the court concluded that the fractional share must be computed from the value of the net estate, that is, the value of the estate as reduced by taxes.

*Wilson* involved a widow who argued that her statutory share in lieu of dower, which qualified for the marital deduction, should be calculated before any taxes were subtracted from the estate. In examining the relevant section of the Probate Act, the court emphasized that the spouse was entitled to her share "after payment of all just claims." The focus of the inquiry was whether the federal estate tax constituted a "just claim." Noting that the Probate Act classified "debts due the United States" as a third class claim, the court elaborated upon Illinois precedents which treated estate tax as a debt or an expense of administration that falls upon the corpus of the estate. The court in *Wilson* thus inferred that the statute mandated that the tax be subtracted before determining distributive shares, therefore necessitating a net estate approach.

*Wilson* remained settled law for almost thirty years. In its own time, and later, it was considered an "equitable apportionment" decision, and a first step toward developing that doctrine in Illinois. However, as the doctrine developed outside of Illinois, "equitable apportionment" in the context of a surviving spouse renouncing a will typically meant that her share would be based upon a fraction of the gross, rather than the net, estate.

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86. ILL. REV. STAT. ch. 3, § 168 (1939) provided:

When a will is renounced by the testator's surviving spouse . . . the surviving spouse is 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 of which the testator died seized and in which the surviving spouse does not perfect his right to dower . . .


88. *Id.* at 513-14, 101 N.E.2d at 606-07. The *Wilson* court, as would the *Grant* court, relied upon First Nat'l Bank v. Hart, 383 Ill. 489, 50 N.E.2d 461 (1943) for the proposition that the tax fell on the corpus of the estate. Actually, in classifying the federal tax as an "item of expense," the *Hart* court was merely clarifying the difference between an estate tax and an inheritance or succession tax. 383 Ill. at 497, 50 N.E.2d at 464-65.


90. That is, although jurisdictions were split on the question, those invoking "equitable apportionment" would often find contrary to *Wilson*; that is, the spouse would be exempted from apportionment by finding that her forced share was a fraction of the gross estate. See,
because, under the net estate approach, the spouse in effect participates in the apportionment of the tax.\textsuperscript{91} The equitable principles developed in \textit{Roe v. Farrell} required that one’s share only contribute to paying taxes in proportion to the extent it has generated them.\textsuperscript{92} Therefore, after \textit{Roe v. Farrell}, courts and commentators began to question whether, almost thirty years later, \textit{Wilson} was still sound.

\textit{Farley v. United States}\textsuperscript{93} was the first case after \textit{Roe} to challenge \textit{Wilson}, and suggest that \textit{Wilson} had been overruled. The Third District court in \textit{In re Estate of Comstock}\textsuperscript{94} agreed with the court in \textit{Farley}.

Has Wilson Been Reversed? \textit{In re Estate of Comstock}

\textit{In re Estate of Comstock} involved a spouse who sought an elective share free from federal tax contribution, that is, based upon the gross estate. The circuit court, following \textit{Northern Trust Co. v. Wilson}, ruled that she was entitled to a fraction of the net estate. On appeal, the spouse argued that \textit{Roe} supported apportionment based on the gross probate estate, and the Third District Court agreed.

The \textit{Comstock} court viewed the statute as defining property rights in the spouse which pass subject to the claims of creditors. That is, the statute established that the spouse was entitled to one-half or one-third of an “entire estate,” and required that title to that property pass subject to all claims.\textsuperscript{96} According to \textit{Comstock}, the statute’s only express direction as to computation was with respect to computing one-half or one-third for the elective share out of the entire estate; the statute specifically did not direct how taxes were to be computed.\textsuperscript{98} The language “after payment of all just claims” was not a direction that taxes be paid before computing the forced heir’s share, but merely was a condition delaying the time for distribution.\textsuperscript{97}

\begin{itemize}
  \item \textit{Note 80-85 supra} and accompanying text.
  \item \textit{Note 20-24 supra} and accompanying text.
  \item 581 F.2d 821 (Ct. Cl. 1978).
  \item 78 Ill. App. 3d 933, 397 N.E.2d 1240 (1979).
  \item \textit{Id.} at 939, 397 N.E.2d at 1244.
  \item \textit{Id.}
  \item \textit{Id.} at 938, 397 N.E.2d at 1244.
\end{itemize}
Thus, the court held that the elective share of the surviving spouse be computed before payment of all just claims, or based upon the value of the gross estate, with the consequence that the spouse not be required to contribute to federal estate taxes. However, the appellate court and supreme court, considering *In re Estate of Grant*, reached the opposite conclusion.98

**Grant Ratifies the Wilson Approach**

*In re Estate of Grant* involved a surviving husband who elected to take against his wife's will, and sought to have his statutory share calculated based upon the value of the entire gross estate. Thus, federal taxes would be paid only from that portion that remained after he claimed his forced share. Although the circuit court found for the spouse, the appellate court reversed, holding that the spouse's share should be based upon the net estate, that is, the amount remaining after federal estate tax had been paid.

The Illinois Supreme Court Decision

In this case, the Illinois Supreme Court considered the tax impact of the elective share statute for the first time since the enactment of the marital deduction. The court affirmed *Grant*,99 thereby reversing *Comstock*. At the outset, the *Grant* court noted that *Roe* had recognized only two obstacles to the application of equitable apportionment: a manifestation of contrary intent by the legislature, or by the decedent in his will.100 While the *Roe* court had found nothing to prevent apportionment in section 18-10 and 18-14 of the Probate Act, the court had not considered the significance of the Illinois forced heir statute.101

The *Grant* court carefully and comprehensively construed the elective share statute. Although the principles of equitable apportionment set forth in *Roe* and extensively relied upon in *Gowling* are conspicuously absent in the court's analysis, other important elements of the *Roe* decision remain: the court's careful deference to the legislature's perogatives, and its concern for stability in the law as perceived by the legal profession.

The current statute providing for spousal renunciation bears a strong resemblance to the predecessor statute construed in *Wilson*;

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98. 77 Ill. App. 3d 866, 396 N.E.2d 872 (1979); 83 Ill. 2d 379, 415 N.E.2d 416 (1980).
100. Id. at 382, 415 N.E.2d at 417.
101. Id.
“the surviving spouse is entitled to the following share . . . after payment of all just claims. . . .”102 The Grant court concluded that, almost thirty years later, the Illinois statute as amended still manifests clear legislative intentions that the spouse’s share be calculated based on the value of the net estate.103 “After payment of all just claims” was construed as limiting the spouse’s share to the value of a fraction of the net estate, rather than delaying distribution of a larger share.104 With this conclusion, the court rejected the interpretation of the statute set forth in Comstock.

The Grant court examined the meaning of “entire estate” in the context of the statute’s grant of “one-third of the entire estate.”105 Referring to earlier statutes, the court determined that that phrase was not meant to distinguish a “gross” from a “net” estate, but it had simply been substituted for references made to real and personal property.106

Since no new meaning was derived from “entire estate,” the court looked to prior Illinois statutes in order to compare the types of property interests that the forced heir took. Former statutes of dower gave the spouse a life estate free from the claims of creditors, whereas now, upon renunciation, the spouse takes “a fee interest which is subject to claims against the estate.”107 Similarly, earlier Illinois statutes in lieu of dower only gave the spouse a fractional share after payment of all just debts and claims.108 Having determined that the spouse took her share subject to all just claims, the next inquiry was whether the federal estate tax was such a “just claim.”

Turning to the Probate Act, the court’s analysis strongly resembles that of Wilson; indeed, it cites many of the same authorities. First, the current Probate Act, like the earlier act construed in Wilson, classifies “[d]ebts due the United States” as third class claims against the estate.109 Secondly, Illinois case law indicates that these debts “fall upon the corpus of the estate and [should]
be considered an item of expense."110 Like Wilson, the Grant court interpreted these factors as mandating that such debts be paid before computing the forced heir's fractional share.

Finally, focusing on legislative intent, the court noted that the judicial construction given the statute by Wilson had long been followed.111 Yet, the court continued, despite the many amendments to the Probate Act since 1951, the legislature had seemingly neglected to enact any changes which could implement the tax advantage of the marital deduction for the forced heir statute.112 Therefore, the court concluded, Wilson must accurately reflect the intentions of the Illinois General Assembly.113

Grant's Analogy to the Statute of Descent

In reaching its conclusion regarding the net estate versus the gross estate basis for computing the spouse's fractional share, the Grant court analogized to the statute of descent and distribution.114 That analogy suggests that the supreme court may have dismissed the gross estate approach espoused by Comstock too lightly.

The court noted that Comstock had interpreted "after payment of all just claims" as merely delaying the time for distributing fractional shares based on the gross estate, rather than requiring that fractional shares be based on the value of the net estate.115 The Grant court believed that such an interpretation would break down in the context of the similarly-worded statute of descent. That is, the court thought that if the effect of "after payment of all just claims" was merely to delay distribution of a spouse's and the descendants' respective one-half property interest in the intestate's gross estate, nothing would remain in the estate from which claims against the estate could be satisfied.116 However, this is not necessarily so. As an estate tax, the federal tax is laid upon the transfer of the estate, and therefore necessarily attaches before distribution.117 Although typically the tax is indeed paid upon distribution,

111. Id. at 387, 415 N.E.2d at 420.
112. Id. at 388, 415 N.E.2d at 420.
113. Id. at 387-88, 415 N.E.2d at 420.
115. 83 Ill. 2d at 381, 415 N.E.2d at 418.
116. Id.
117. See note 3 supra and accompanying text.
the amount of the tax is necessarily computed based upon the size and character of the distributive shares; that is, it is based upon property interests adjudicated under state law. Therefore, the value of the shares descending under state law must be determined prior to, or concurrently with, the amount of the tax.

Thus, a one-third/two-thirds determination under the statute of descent and distribution would merely constitute a property determination under state law to which the federal tax would affix. The tax would then be calculated based upon these respective rights. If the spousal share met the limitation requirements of the marital deduction, the estate could deduct the full amount. The remaining two-thirds share would comprise the taxable estate, and would therefore be responsible for paying any consequent taxes. Distribution would thus take place, as in most estates, after payment of all just claims.

To summarize, respective property rights would be determined before federal tax liability was even considered; and because the federal tax is determined "by the fact distribution is about to begin," this seems a reasonable interpretation. By requiring that the tax be identified before determining the spouse's share, the court seems to employ a fiction. It requires that the spouse's share not be determined until after the payment of taxes, in a situation where taxes cannot be determined until the spouse's property right has crystallized. Because state property interests and federal tax liability therefore become interrelated, their determination must take place simultaneously.

Summary

The court considered two potential interpretations of the statute: an interpretation based on a fractional share of the gross estate, or one based on a fraction of the net estate. Consistent with the 1951 Northern Trust Co. v. Wilson decision, the court opted for the net estate approach. In doing so, the court effectively concluded that the spouse's property interest is based upon a tax which is assessed upon the property interest. The conclusion seems illogical and was perhaps not one the court was compelled to reach, ignoring the precedent of Wilson as generally accepted law for

118. See note 4 supra.
119. See note 35 supra.
121. See notes 79-89 supra and accompanying text.
thirty years. Its logic aside, Grant represents a valid identification of the property interest being transferred, and federal tax liability will be based upon this state identification of that interest.\textsuperscript{122}

\textbf{Reconciling Grant with Gowling}

Although Gowling and Grant both dealt with the interplay between the marital deduction and the determination of the surviving spouse's property rights in probate, the two cases' results seem to contradict each other. Of the three elements of analysis evident in varying degrees in the Roe and Gowling decisions, equitable contribution, legislative intent, and stability in the administration of estates, only the latter two appear in any degree in the Grant decision. The principles of equity which dominated the court's holding in Gowling were completely absent in Grant. The Illinois court was willing to upset the status quo in Gowling, but was unwilling to do so in Grant. Whether the decisions can be reconciled can be determined by focusing on four aspects of the tax apportionment issue: the source of the spouse's property rights, established legislative and judicial policy in Illinois, the principle of "equality is equity," and the intent of Congress in enacting the marital deduction. The latter two aspects of the apportionment issue appear to have been totally ignored by the Grant court.

\textbf{The Source of the Spouse's Rights}

The respective sources of the surviving spouses' rights partially explain the apparent inconsistency between the two apportionment cases. The Gowling widow took under a will; the Grant widower took under the elective share statute. In determining the quantum of these respective rights, the court was obliged to construe the intentions of the grantor of such rights. In Gowling, the court construed a will; in Grant, it construed a statute. Different rules of construction apply in each case.\textsuperscript{123} While pragmatic considerations

\textsuperscript{122} See note 4 supra. There is some administrative inconvenience in determining tax liability and the spouse's distributive share through the algebraic formulae necessitated by Grant. See note 84 supra. Some commentators have pointed to that inconvenience as a reason for not computing the elective share in this manner, and at least one court has considered this in its analysis. Dodd v. United States, 345 F.2d 715 (3d Cir. 1965). Nevertheless, the inconvenience in arriving at the valuation of a property interest through algebra does not render it invalid, nor does it indicate that the statute is being improperly construed. Harrison v. Northern Trust Co., 317 U.S. 476, 481 (1942) dispelled any assumption that "algebraic formulae are not likely to be imputed to legislators."

\textsuperscript{123} The construction of a will resembles that of a statute in the sense that plain and ordinary meaning are assigned to words, and the document is examined as a whole. Feder v.
may occasionally influence a court's determination of the intentions of a single testator, its latitude is arguably more limited when it inquires into the intentions of the legislature. Even when determining legislative intent, however, courts in some states have construed language similar to the Illinois forced heir provision, and have passed the statutory share to the spouse free from the burden of taxes. Other jurisdictions, however, have construed such lan-


On the other hand, where a statute has been judicially construed and the legislature has done nothing subsequently to merit revision of that interpretation, Illinois courts assume that that construction is accurate. People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840, cert. denied, 402 U.S. 972 (1970). This rule of construction strongly influenced the Grant court. 83 Ill. 2d at 388, 415 N.E.2d at 420, citing, Union Elec. Co. v. Illinois Commerce Comm'n, 77 Ill. 2d 364 (1979).

Nevertheless, other rules of construction suggest that the supreme court in Grant might have been more flexible in its interpretation. Construing a statute as a whole has meant that each section is considered in terms of the statute's general purpose. Miller v. Department of Registration and Educ., 75 Ill. 2d 76, 387 N.E.2d 200 (1979). Similarly, proper interpretation is based, not simply on language, but on the "nature, objects and the consequences which would result construing it one way or another." Andrews v. Foxworthy, 71 Ill. 2d 13, 26, 373 N.E.2d 1335, citing Carrigan v. Illinois Liquor Comm'n, 19 Ill. 2d 230, 233, 166 N.E.2d 576 (1960). Considering these rules, one wonders whether the supreme court could have approached Grant in a more functional mode.

124. The Gowling court in effect created a presumption in favor of the surviving spouse to be applied in cases where tax consequences have been ignored or forgotten in the will. Although the court did not indicate that it was basing its holding on any assessment of the testator's intent, it presumably was inferring that apportionment in favor of the spouse was what the testator intended. An inference that the testator would wish to maximize the marital deduction, both for his spouse and his estate, has been key in ordering apportionment which favors the spouse. See, e.g., Dodd v. United States, 345 F.2d 715 (3d Cir. 1965); see also note 155 infra and accompanying text.


In Spurrier; Heideman, and Huber, the courts further based their decisions for apportionment in favor of the dissenting spouse on their powers as courts of equity. The Illinois forced heir statute, ILL. REV. STAT. ch. 110 ½, § 2-8(d)(1979) grants a court power to "abate from or add to the legacies in such a manner as to apportion the loss or advantage brought
guage as Illinois has in Grant. Regardless of how the Grant court could have construed the statute, the statutory source of the property right, as well as the rules of construction applied when interpreting that right, provides some basis for reconciling the Gowling and Grant decisions.

**Underlying Policy Considerations**

The policies underlying the Gowling decision were apparently contradicted by the Grant finding. In exempting the surviving spouse of a testate decedent from participating in federal estate tax apportionment, the Gowling court relied on two premises of Illinois law. One was that the “[p]rotection of the interest of the widow . . . has been a part of Illinois statutory and judicial policy since 1787;” another was that “it is inequitable to require a widow whose property generated no tax to contribute to the payment of tax generated by property received by others.” If these principles were applicable in maximizing a spouse’s share where the decedent died testate, but left no direction as to how taxes were to be paid, it seems that these underlying premises should be equally applicable in evaluating and implementing statutory forced heirship.

The statutory source of the dissenting spouse’s right apparently presents different questions of policy from those raised where a spouse takes under a will. Forced heirship is a right given in spite of a testator's wishes and in this sense is in conflict with the testator’s right to dispose of his property however he wishes. Illinois law as articulated in the Grant court could have reached a different conclusion.

126. In re Estate of Mosby, 170 Mont. 463, 554 P.2d 1341, 1342 (1976) (“two-thirds of the husband’s net estate, real and personal, after the payment of creditors, claims, expenses of administration and any and all taxes, including state and federal inheritance and estate taxes”); In re Estate of Hurlbut, 126 Vt. 562, 238 A.2d 68, 69 (1967) (“not less than a third, after payment of debts, funeral charges and expenses of administration”); In re Estate of Glover, 45 Haw. 569, 371 P.2d 361, 362 (1962) (“one-third after . . . after the payment of all his just debts”); Old Colony Trust Co. v. McGowan, 156 Me. 138, 163 A.2d 538, 540 (1960) (“The personal estate . . . shall be applied first to the payment of his debts, funeral charges and charges of settlement; and the residue shall be distributed . . . ½ to the widow”); Guaranty Nat’l Bank v. Mitchell, 111 S.E.2d 494, 495 (W. Va. 1959) (“one-third after payment of funeral expenses, charges of administration and debts”); Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695, 697 (1954) (“one-half of the net estate”); In re Uihlein’s Will, 264 Wis. 362, 59 N.W.2d 641, 648 (1953) (“one-third part of his net personal estate”).

127. 82 Ill. 2d at 23, 411 N.E.2d at 270, citing Farley v. United States, 581 F.2d at 834. See notes 61-64, supra and accompanying text.

nois interpretations of the spouse's right of forced heirship have to some extent recognized this tension, and have only moderately protected the forced heir's share. In this way, Grant remains

129. A review of Illinois statutory and judicial policy regarding forced heirship exceeds the scope of this note. For a review of this policy, as well as a recommendation for model legislation, see Note, A Response to Johnson v. LaGrange State Bank: Restoring Forced Share Protection for the Surviving Spouse, 1980 ILL. L.F. 277. This article evaluates Johnson v. LaGrange, 73 Ill. 2d 342, 382 N.E.2d 185 (1978), where the question was raised whether the assets of various inter vivos trusts could be reached in reckoning a spouse's forced share. Johnson rejected the "intent to defraud spouse's rights" test of Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937), thus precluding the inclusion of nonprobate assets for determining the one-third share.

One should note, however, that although that author urged that the legislature ought to overrule the test of "retained control" and hence extend more protection to the forced share through the Lifetime Transfers of Property Act, ILL. REV. STAT. ch. 110 1/2, ¶ 601 (1979), the Johnson v. LaGrange court prospectively interpreted that statute, and read it as the legislature's rejection of the fraud on spouse's rights theory. Johnson v. LaGrange, 73 Ill. 2d at 358-59, 383 N.E.2d 197.

One might assume, therefore, that although the legislature is sympathetic to the needs of the widow, it still wishes to defer somewhat to the testator, despite the fact that his intentions are irrelevant when the spouse takes her share. This would explain the approach taken by the Illinois Supreme Court in Grant, in interpreting the tax treatment of the forced share provision. See note 78 supra.


Regardless of whether the Grant approach is desirable, it should be noted that other decisions, not dealing with the rights of the dissenting spouse, have to a limited extent had a favorable tax impact upon her share. By requiring that the tax generated by nonprobate assets be apportioned to them, Gowling has somewhat limited the frequency of tax disinheritance of the renouncing spouse. Such disinheritance would occur by operation of the burden on the residue rule: since the dissenting spouse's share is limited to a fraction of the probate estate, and the burden on the residue rule required that probate assets bear the tax burden generated by the transfer of nonprobate assets, the probate estate could be completely exhausted before the spouse could take her share. Nonetheless, Gowling's benefits to the renouncing spouse, of apportionment between probate and nonprobate assets, can be avoided by the drafting of a will which directs that all taxes be paid from the probate estate.

In this sense the tax situation of the renouncing spouse is now worse than it was at the time of Northern Trust Co. v. Wilson. The Tax Reform Act of 1976 sought to unify the structure of the estate and gift taxes by adding to the value of the taxable estate the aggregate amount of taxable gifts made by the decedent after 1976, which have not been included in valuing his gross estate. See note 77 supra. A testator could avoid paying tax on these transfers, and leave a will directing that all taxes be paid from his probate estate. It would appear that the forced heir's share, which after Johnson v. LaGrange is limited to a portion of the probate estate, could then only be taken out of that which remains after the taxes on
consistent with Illinois forced heir policy. Policy considerations therefore provide some basis for reconciling *Grant* with *Gowling*.

**Equality is Equity**

The principle of “equality is equity,” enunciated in *Roe* and applied in *Gowling*, was not applied in *Grant*, and does not provide a basis for reconciling *Grant* with *Gowling*. In *Gowling*, the court applied this principle to hold that a surviving spouse should not contribute to estate taxes when his or her share did not generate any tax.\(^1\) In *Grant*, however, the principle was not even mentioned, and the court in effect required a spouse to contribute to estate taxes not generated by his or her share. This action by the court raises the question of whether equality is equity remains a valid rationale for equitable apportionment. One Illinois appellate court since *Gowling* has suggested that it does not. The court stated that any argument that a gift should be exonerated from contributing to the estate tax, simply because it was a deductible transfer, had been “expressly disapproved” by the supreme court in *Grant*.\(^1\) Thus, the equality is equity maxim upon which *Gowling* is based has been severely undermined, and does not provide any basis upon which to reconcile the *Gowling* and *Grant* decisions.

**Congressional Intent**

The intent of Congress in enacting the marital decision, “to allow a portion of the property of a decedent to pass free of the estate tax,”\(^1\) similarly does not provide a basis upon which to rec-

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10. See notes 53-58 supra and accompanying text.
11. *In re Estate of Maddux*, 93 Ill. App. 3d 435, 438, 417 N.E.2d 266, 269 (1981). In *Maddux*, the Fifth District faced the issue of whether charitable residuary legatees were exempted from contributing to the estate tax. Under I.R.C. § 2055, a deduction from the gross estate is allowed for the value of property passing to qualified charities. Applying *Gowling*’s equality is equity rationale, qualified charities would not be obliged to participate in tax apportionment, as courts in other jurisdictions had concluded. *In re Estate of Rankin*, 169 N.J. Super. 317, 404 A.2d 200 (1979); *In re Estate of Wahlin*, 505 S.W.2d 99 (Mo. App. 1973).

*Maddux* rejected this rationale, and its conclusion seems correct. Regardless of the dangers of inferring what the intent of “most testators” would be, one might suggest that as between the two motivations a testator might typically have in naming a charitable beneficiary in his will—a desire to benefit charity, and also a desire to obtain a general benefit to his estate through the use of the § 2055 deduction—one might agree that under ordinary circumstances charities are not as logical an object of the testator’s bounty as is the spouse.
12. See note 64 supra and accompanying text. The intent of Congress argument, as set forth in *Gowling*, maintains that, since the marital deduction was designed to correct the inequities between common law and community property states, any judicial doctrine which
oncile Gowling with Grant. Although congressional intent has been invoked in other states as a means of maximizing the marital deduction in a forced heir context,\textsuperscript{133} congressional intent is irrelevant to a state law determination of property rights.\textsuperscript{134}

The sources of spousal rights and the differing policy considerations relevant to them provide the apparent bases for reconciling Grant and Gowling. As demonstrated, however, the maxim "equality is equity," and the intent of Congress to protect a surviving spouse were weak rationale supporting the Gowling decision, and apparently did not survive it.\textsuperscript{135}

THE IMPACT OF GOWLING AND GRANT

Gowling and Grant may represent the outer limits to which Illinois courts will go in establishing rules of judicial apportionment. The decisions have implications in three specific areas: the Illinois statute of descent and distribution, the burden on the residue rule, and forced heirship as it applies to estate planning.

The Illinois Statute of Descent and Distribution

Because the supreme court in Roe and Gowling recognized that equitable apportionment is permissible only where it does not defy the intentions of a testator or of the legislature, the Grant court was compelled to proceed with caution when it entered areas where property rights are based upon statute. For this reason, the Grant court's analogy to the statute of descent and distribution\textsuperscript{136} has ob-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{133} See, e.g., In re Burnett's Estate, 50 N.J. Super. 482, 142 A.2d 695 (1958); In re Rosenfeld's Estate, 376 Pa. 42, 101 A.2d 684 (1956); Lincoln Bank & Trust Co. v. Huber, 240 S.W.2d 89 (Ky. App. 1951).
\item \textsuperscript{134} See note 4 supra. The intent of Congress argument is appealing because its acceptance would spawn uniformity among states as to the treatment of the marital share. In contrast, state determination of property rights can result in the spousal share varying markedly from state to state. Congress, however, has recognized this. It has provided that, where as in Illinois the spouse's share is tied to determination of taxes, any tax imposed upon it must be taken into account in determining the value of the share for purposes of the marital deduction. See note 79 supra.
\item \textsuperscript{135} The apparent differences resulting in various interpretations of the applicability of the federal tax to forced heir provisions do not offend the concept of geographic uniformity in taxation; the Supreme Court has long recognized that tax liability would vary based on differences in the laws of descent and distribution, and did not consider these variances unconstitutional. New York Trust Co. v. Eisner, 256 U.S. 345 (1921); Knowlton v. Moore, 178 U.S. 41 (1899).
\item \textsuperscript{136} See notes 114-121 supra and accompanying text.
\end{enumerate}
\end{footnotesize}
vious implications for spouses taking their shares through intestacy. The language of the intestacy provision is remarkably similar to that of the elective share provision.137 Furthermore, the court’s statement that “plainly under section 2-1 . . . the legislature intended that claims be paid and the respective interests be calculated from the net estate” forecloses any argument that apportionment should be applied differently to spouses of intestate decedents than it currently does to spouses who take against a will.138 Therefore, in light of the court’s construction of the elective share provision, it seems clear that when a spouse takes under the intestacy statute, her fractional share will be based on the net estate because “all just claims” will be paid before distributive shares will be determined.

One would hope, however, that the spouse’s fractional share in an intestacy situation would be based on the gross estate. A net estate reading of the statute seems less plausible for spouses taking through intestacy than it does for spouses taking upon renunciation. The legislature appears to favor the spouse surviving an intestate decedent more than it does one who seeks a forced share. For example, the statute of descent and distribution grants the surviving spouse a greater fraction of the decedent’s estate than that granted by the renunciation statute.139

The surviving spouse’s situation differs from that of a spouse who accedes to property under the intestacy statute in other ways. Although rights of inheritance under both the statute of descent and distribution and the forced heir statute are based solely upon statute,140 forced heirship represents a legislative grant given in

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137. ILL. REV. STAT. ch. 110 ½, § 2-1 (1979) provides:

The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a non-resident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:

(a) If there is a surviving spouse and also a descendant of the decedent: ½ of the entire estate to the surviving spouse and ½ to the decedent’s descendants per stirpes. . . .

See note 73 supra for text of the elective share provision.

138. 83 Ill. 2d at 381, 415 N.E.2d at 418.

139. Under ILL. REV. STAT. ch. 110 ½, § 2-1 (1979) the spouse receives one-half or all of her husband’s estate, depending upon whether he leaves a descendant; under ILL. REV. STAT. ch. 110 ½, § 2-8(a) (1979), the dissenting spouse receives either one-third or one-half. See notes 73 and 137 supra.

140. In re Estate of Leichtenberg, 7 Ill. 2d 545, 131 N.E.2d 487 (1956); Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 342 (1950); People v. McLaughlin, 403 Ill. 493, 87 N.E.2d 637 (1949).
spite of a decedent’s intentions. Although an intestate’s intentions are irrelevant by definition in determining rights under the intestacy statute, its provisions presumably represent some legislative assessment of the decedent’s likely desires, had he died testate. While courts do not generally inquire into the intentions of intestate decedents, they have favored equitable apportionment of the federal estate tax between probate and nonprobate assets in part because they assumed such to be the likely intention of the intestate. In Roe, the supreme court ratified this approach as applied to intestate estates. Similarly, Gowling affirmed the partial apportionment approach in those testates estates where the testator had not spoken. Presumably the Gowling conclusion was also based on some assessment of the intent of “most decedents.”

Thus, the probable intent of most testators, as set forth in Gowling, should arguably influence the construction of the intestacy statute. It seems equally plausible for a court to infer that most intestate decedents would wish their spouses to take property unburdened by the estate tax.

Based on Grant, however, this type of inference, if applied to intestacy, can only be drawn by the legislature. The court’s dictum regarding intestacy, as well as its underlying rationale, suggests that the rule that distributive shares can only be determined after “all just claims” have been paid, is applicable to the statute of intestate descent. Thus, the spouse’s share in intestacy will likely be determined as a fractional share of the net estate.

141. See note 128 supra.
142. The policy that wills are construed to avoid intestacy reflects a solicitude to decedent’s intentions. Schuyler v. Zwiep, 42 Ill. App. 3d 91, 355 N.E.2d 554 (1976). Decedent’s intent, express or implied, is considered, though it will not be decisive when the statute of descent governs. Tilton v. Tilton, 382 Ill. 426, 47 N.E.2d 454 (1943).
143. In In re Estate of Van Duser, 19 Ill. App. 3d 1022, 313 N.E.2d 228 (1974), the court based its conclusion in favor of apportionment between probate and nonprobate assets partially on what it assumed would be the intention of the intestate. Id. at 1024, 313 N.E.2d at 229.
144. See notes 53-58 supra and accompanying text.
145. In testate situations where the decedent did not specifically provide for the payment of taxes, other jurisdictions have inferred that he would wish his estate and his spouse to fully enjoy the benefits of the marital deduction. See note 124 supra. Often this inference has been made in situations where, as in intestacy, the property interest being devised to the spouse was expressed as a fractional share which, when combined with other bequests, added up to 100% of the estate. See notes 155 and 156 infra.
146. See notes 114-121 supra and accompanying text.
147. Id.
148. The spouse of an intestate decedent will benefit from the Roe rule that the tax attributable to nonprobate transfers will be apportioned to those assets. See notes 13-33
The Burden on the Residue Rule and The Marital Deduction

Another area left unclear by the apportionment cases is the interrelationship between the burden on the residue rule and apportionment as it applies to the marital share. That is, if a decedent were to bequeath the residue of his estate to his surviving spouse and make no direction for the payment of taxes, it is arguable that the burden on the residue rule would require that the spousal residual share be the first tapped for the payment of taxes. Such a question was raised by the tax court several years ago, and the result was not favorable to the spouse.149 Gowling’s favorable tax presumption, however, would portend a different result, since the spousal share was relieved from any obligation to contribute to taxes.

Regardless of Gowling’s favorable tax presumption, an uncertainty remains which is an unfortunate consequence of the supreme court’s failure to address the burden on the residue rule. The question of whether the burden on the residue rule could, in such a situation, supercede the Gowling rule protecting the spousal share would depend upon whether Gowling merely represents a gloss on traditional Illinois abatement practice,150 or whether it was in addition creating a tax saving presumption in favor of the spouse which will apply regardless of whether her bequest is specific or residual.

If Gowling was merely glossing traditional Illinois abatement practice, it would be difficult to divert the payment of taxes from a residuary share bequeathed to a surviving spouse to a general or specific bequest made to someone else. The Illinois definition of “residue” militates against this: the residue is the surplus of an estate, that which remains after legacies have been satisfied.151 Traditionally, because residuary legacies ordinarily cover property not otherwise disposed of by will, a residuary legatee cannot call upon general or specific legacies to abate unless the will so pro-

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149. In re Estate of Dawson, 62 T.C. 315 (1974). Since Illinois law charged the residue with claims and expenses, and these charges exceeded the value of the residue bequeathed to the spouse, nothing remained to deduct under I.R.C. § 2056.

150. See note 52 supra.

151. In re Estate of Marti, 311 Ill. App. 237, 35 N.E.2d 696, 698 (1941). The court stated that a specific devise or bequest "shows the testator intends the devisee or legatee shall have a thing certain, while by a residuary devise or bequest, the devisee . . . shall have something that is uncertain or which cannot be described with certainty." Id. at 240, 35 N.E.2d at 698.
vides. In this way, traditional abatement rules would conflict with protecting the residuary marital deduction share and trying to divert the payment of taxes to general or specific bequests.

But Gowling seems to create a tax saving presumption in favor of the surviving spouse which would shift the tax burden from a marital deduction residue to non-spousal takers in a case where the entire residue was bequeathed to the spouse. Whether this would consistently hold true would, of course, depend upon the interpretation of the will involved, since the intent of the testator would be paramount. Nonetheless, an inference that the testator wished to maximize the marital deduction has been applied in another state where the decedent passed the residue of his estate to his wife absolutely, and made no provision for the payment of taxes. Similar inferences have been drawn where a testator has fractionalized his entire estate, and failed to phrase the spousal share in terms of a marital deduction formula. Where the will has passed a fraction of the residue to the spouse, courts in other jurisdictions have elevated the spousal fraction to the status of a general bequest, and deemed that portion passing to the other beneficiaries as the true residue for the payment of taxes. Thus, it

152. 3 JAMES, ILLINOIS PROBATE LAW AND PRACTICE § 291.6 (1951). See also note 52 supra and accompanying text.
153. In re Estate of Maddux, 93 Ill. App. 3d 435, 417 N.E.2d 266 (1981) held that residuary charitable beneficiaries could not divert taxes from themselves to other legatees. The court commented "[t]he burden on the residue rule is an established part of Illinois estate law. If any presumption is to be relied on it should be that established rules as to the administration of estates have been considered and incorporated into a will." Id. at 438, 417 N.E.2d at 269.
154. In Reed v. United States, 316 F. Supp. 1228 (E.D. Mo. 1970), the testator bequeathed the entire residue to his wife absolutely, but included no clause in the will regarding the payment of taxes; the court found no language in the will disclosing that the testator intended the bequest to pass subject to tax. Note, however, that the court felt it was unclear whether Missouri law placed the burden on the residue.

Regardless of any inference a court might draw, it is important to remember that under the rule of Commissioner v. Bosch, 387 U.S. 456 (1967), federal authorities are not bound by determinations made by a state trial court as to the character of the property interest transferred by the decedent under state law, where tax liability turns upon the character of that interest. Thus, to avoid a challenge from the Commissioner, rulings in questionable areas should be obtained from at least an intermediate level state court.
155. In Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964), the court held that no residual estate had been created, and proceeded with an apportionment that exempted the spousal share. See also Jackson v. Jackson, 217 Kan. 448, 536 P.2d 1400, 1402 (1975) ("½ of all my personal property"). Despite the resemblance such a testamentary scheme bears to the statutes of intestacy and forced heirship, there is no reason why such an approach could not be taken were the question to arise in Illinois.
156. Sawyer v. Sawyer, 53 Ohio App. 2d 323, 374 N.E.2d 166, 167 (1977) (½ "of the
would seem consistent with *Gowling* to infer that most testators would intend to maximize the benefits of the marital deduction for their spouses and their estates.

It therefore seems doubtful that the burden on the residue rule would ever supercede the *Gowling* rule that spousal bequests qualifying for the marital deduction are not to be burdened with estate taxes.157 Regardless of whether or not this is true, the burden on the residue rule is based upon questionable premises;158 one of these premises is that it represents what most testators would intend.159 Since the rule only comes into play in cases where the decedent has not spoken, this proposition is easy to question, but difficult to contest. The strength of the rule may be a result of its longevity; as noted by some courts, countless wills have been drafted on the assumption that the burden on the residue rule is law.160

Although there are, no doubt, advantages to the rule, its rationale is weak. Perhaps no better rationale could be set forth for a contrary rule, for indeed, it is difficult to infer the intentions of decedents who have not expressed any intentions. Nevertheless, the burden on the residue rule represents an assumption which the Illinois legislature will have to address if it should ever consider statutory treatment for the payment of taxes in decedents' estates.

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157. *But see* text accompanying note 71 *supra*. The appellate court's statement regarding the marital deduction and the burden on the residue rule is ambiguous.

158. The use of residuary clauses in the drafting of wills has changed markedly since the inception of the burden on the residue rule. At the time when wealth was held primarily in land, which was likely to be the subject of specific bequests, a testator's residuary estate was likely to be of little relative value or importance. Now, however, the residuary estate is often used to transmit the greater wealth in a testator's estate, and is in this way the most important bequest. In this sense, a residuary bequest to the surviving spouse, although not framed as a marital deduction formula, would likely deserve a favorable presumption that it not be burdened with the tax.

159. *In re* Estate of Maddux, 93 Ill. App. 3d at 438, 417 N.E.2d at 269; *In re* Estate of Gowling, 77 Ill. App. 3d at 554, 396 N.E.2d at 86; *In re* Estate of Phillips, 1 Ill. App. 3d at 816, 275 N.E.2d at 688.

160. *In re* Estate of Phillips, 1 Ill. App. 3d at 815, 275 N.E.2d at 687; *In re* Estate of Maddux, 93 Ill. App. 3d at 438, 417 N.E.2d at 269.
Forced Heirship by the Spouse

The *Grant* decision suggests a troublesome implication with respect to estate planning. The importance and application of the renunciation statute is not limited to the spouse who has been spitefully disregarded in a will; it is also a practical tool employed where the spouse's interests under the will fail to qualify for the marital deduction.\(^{161}\) A question arises as to what extent the expressed intention of the testator that the spouse's share be given the maximum benefit of the marital deduction should operate in such a potential forced heir situation.

Illinois courts have stated that the purpose of the statutory right of renunciation is to enable the surviving spouse to elect the method of taking most advantageous to her.\(^{162}\) However, this principle has never been considered from a tax perspective. Rather, renunciation is traditionally interpreted as the spouse's rejection of any and all provisions made for her under the will. The remaining provisions of the will remain operative upon the property not included in the statutory share.\(^{163}\) Therefore, a spouse cannot renounce a will and simultaneously retain a tax advantage that it confers. This would also be true where direction for payment of taxes was made without reference to the spouse, such as where the testator ordered that the taxes be paid from a specific nonmarital source. The tax clause would only operate upon the property not included in the statutory share.

Illinois courts have not addressed the precise issue of whether a spouse can renounce a will and still retain a tax advantage it incidentally confers.\(^{164}\) It is extremely doubtful, however, whether the

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161. Letter Ruling 7935063 (May 30, 1979) involved such a case. Testator attempted to devise his spouse a marital deduction gift, but it failed to qualify because it was a terminable interest. The spouse then renounced the will and sought her statutory share free of estate tax; the will had provided that a residuary charitable trust bear the entire burden of the estate tax.

The Internal Revenue Service concluded that the spouse had a right to take her share free of the tax under Illinois law. In doing so, it cited First Nat'l Bank v. McMillan, 12 Ill. 2d 61, 145 N.E.2d 60 (1957) for the proposition that renunciation of the will did not destroy its effectiveness for other beneficiaries, and reasoned therefore that the residuary charitable trust would have to bear the entire burden of the tax. Nevertheless, the Service relied most heavily on the *Farley* decision, note 61 *supra*, which the *Grant* decision overruled.


163. First Nat'l Bank v. McMillan, 12 Ill. 2d at 66, 145 N.E.2d at 64.

164. See note 161 *supra*. 
spouse could do so; courts in other jurisdictions have blocked such results.\footnote{165}

In Illinois, the rights of the spouse are "fixed in the statute by [her] election, and are not effected by claiming or omitting to claim any specific estate upon renunciation."\footnote{166} Because \textit{Grant} effectively held that the spouse's elective right is interrelated with the estate's tax liability,\footnote{167} the testator's direction in the will regarding the payment of taxes is irrelevant in determining the spouse's share. Therefore, the net estate approach of \textit{Grant} will apply in computing the forced heir's share, regardless of whether the testator's will manifests a desire that the surviving spouse and the estate both realize the full benefit of the marital deduction.

\textit{General Implications}

Other, more general implications can be drawn from \textit{Roe}, \textit{Gowling} and \textit{Grant}. \textit{Grant} represents a ratification of the law as established by the appellate court in \textit{Wilson} in 1951, and \textit{Roe} represents an affirmation that the "reliance upon the [1974] holding in \textit{Van Duser} had not been misplaced."\footnote{168} These two decisions could thus be characterized as "status quo" decisions.

\textit{Gowling}, however, broke new ground. \textit{Gowling} indicates that where a testator's will is silent or ambiguous about whether he wishes specific property passing to his spouse to contribute to the payment of taxes, courts may read in a marital deduction savings clause. Thus, the decision is important because it provides an escape valve for situations where tax consequences have been ignored, forgotten, or incorrectly assessed in the drafting stage.

Illinois courts passing on apportionment questions, regardless of whether they have ordered apportionment or not, have generally recognized that ultimately this question is one for the legislature.\footnote{169} For this reason, it is difficult to accept without criticism the

\footnote{165. Merchants Nat'l Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir. 1967) (Indiana law); \textit{In re Estate of Hurlbut}, 126 Vt. 562, 238 A.2d 68 (1967); \textit{In re Uihlein's Will}, 264 Wis. 362, 59 N.W.2d 641 (1953). The tax provisions were construed as made on the spouse's behalf, and thus lost by her election.}

\footnote{166. \textit{In re Estate of Donovan}, 409 Ill. at 202, 98 N.E.2d at 762.}

\footnote{167. \textit{See notes 114-121 supra and accompanying text.}}

\footnote{168. \textit{See notes 32 and 33 supra and accompanying text.}}

\footnote{169. \textit{In re Estate of Maddux}, 93 Ill. App. 3d 435, 417 N.E.2d 266 (1981); \textit{In re Estate of Comstock}, 78 Ill. App. 3d 933, 397 N.E.2d 1240 (1979); \textit{In re Estate of Fairchild}, 21 Ill. App. 3d 459, 315 N.E.2d 658 (1974); \textit{In re Estate of Phillips}, 1 Ill. App. 3d 813, 275 N.E.2d 685 (1971). Since the question is one for the legislature, the Illinois Supreme Court's two 1980 decisions of \textit{Gowling} and \textit{Grant} perhaps signify that Illinois courts are not legislating ad hoc
supreme court's "no reason why not" approach in setting forth new rules of equitable apportionment in the Roe and Gowling decisions, once the court had decided that the legislative intentions presented no obstacle. Even accepting the results of these two cases, the court's rationale does not square with its strong concurrent concern for stability in the law and predictability for the legal profession. The court's approach could hamper legislative action by creating a belief that the task is completed when it is only half complete: the favorable advantage enjoyed by a wife whose husband dies testate should be extended to a spouse who takes under the statutes. But, as properly demonstrated by the court's holding in Grant, this advantage can be conferred only by the legislature.  

CONCLUSION

Roe, Gowling, and Grant suggest that if Illinois courts are to implement changes in the payment of taxes out of decedents' estates, those changes will not occur rapidly, nor will they be radical. Roe implied change, but was at least partially decided in the interests of ratifying for the legal profession a decision made by an appellate court four years earlier. Gowling implemented change, but despite all of the equities favoring its holding, its rationale was suspect, and thus perhaps doomed to break down when put to further test. In a sense, Grant served a purpose similar to Roe, because it ratified an appellate court decision, assuring the legal profession that probate law would enjoy stability.  

Several conclusions regarding the status of Illinois law flow from apportionment principles borrowed from other states.


Others have resisted the idea, or have suggested that judicial apportionment rules would suffice. See, e.g., 2 R. Hunter, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS § 165.1 (2d ed. 1980); Carroll, Interplay of Probate Assets and Nonprobate Assets, 25 De Paul L. Rev. 363 (1975); Flynn, Estate Tax Apportionment and the Marital Share in Illinois, 58 Ill. B.J. 996 (1970). The latter two commentators thought that judicial development of apportionment doctrine would suffice; given the direction that judicial development has gone, their opinions might have changed.

171. Because of this, the Grant opinion is susceptible to criticism. Grant is based upon the status quo of Wilson, which was in turn based upon dictum. See notes 99-113 supra and accompanying text; see also notes 86-92 supra and accompanying text.
this review. Where property rights are derived from a will, the testator’s intentions control. Absent an effective direction as to the payment of taxes, (1) there will be apportionment between probate and nonprobate assets; (2) the tax burden on the probate estate will fall upon residuary assets to the extent they are sufficient; and (3) a gift qualifying for the marital deduction will abate last for payment of taxes, should the residue prove insufficient. Grant strongly undermines Gowling’s holding that a beneficiary’s share should only contribute to taxes to the extent that it generated them by limiting that rule to the facts of Gowling.

Where property rights are derived from statute, taxes will also be apportioned between probate and nonprobate assets. The computation of property rights vis a vis the taxes allocated to probate assets, however, remains unchanged; the forced heir’s share continues to be based upon the net estate, and one can assume that this holds true for intestate succession. No rationale, other than the differing sources of the respective property rights, provides a satisfactory explanation for this disparate treatment. In lieu of a comprehensive apportionment statute for Illinois, the statute of descent and distribution, as well as that of forced heirship, should be amended to accord surviving spouses taking under the statutes the same tax advantage as that enjoyed by those who take under wills.

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