Determination of the source of payment of any estate tax, inheritance tax, generation-skipping transfer tax, or other tax levied or assessed under the laws of Florida or any other state, the United States, any other country, or any political subdivision thereof, imposed as the result of the death of an individual (sometimes hereafter referred to collectively as “Transfer Taxes”) requires reference to the provisions of the Internal Revenue Code (the “Code”), Chapter 198 of the Florida Statutes (the “Estate Tax Law of Florida”) for decedents dying before January 1, 2002, and Chapter 733 of the Florida Statutes (hereafter referred to as the “Probate Code”).

The primary provisions for the apportionment of Transfer Taxes under Florida law are contained in Florida Statutes §733.817. The Florida Legislature amended Florida Statutes §733.817 by substantially rewording it, effective for estates of decedents dying on or after October 1, 1998. Ch. 97-240, §§9, 14, Laws of Fla. Minor changes were made in 2000, 2001 and 2006 in order to confirm the Statute to changes made to other sections of the Probate Code and for stylistic purposes. Ch. 2000-159, §13, Ch. 2001-226, §167 and Ch. 2006-217, §39, Laws of Fla. All references herein are to the current statute, unless otherwise noted.

I. General Rules for Apportionment of Transfer Taxes


B. Federal Estate Tax. The Code imposes liability for payment of federal estate tax on the executor. IRC §2002. The liability applies to the entire federal estate tax on the gross estate (including both probate and nonprobate property), regardless of whether all of the property comes within the possession of the executor. Reg. §20.2002-1.

1. Executor. “Executor” means (a) the executor or administrator of the decedent or (b) if there is no executor or administrator appointed, qualified and acting within the United States, then any person in actual or constructive possession of the property of the decedent. IRC §2203. Any person in actual or constructive possession of any property of the decedent who is
liable for federal estate tax under §2203 of the Code is required to pay the entire tax to the extent of the value of the property in his possession. Reg. §20.2002-1.

2. Other Persons Entitled to Reimbursement. Any person other than the “executor” who pays any part of the federal estate tax (including a transferee or other recipient liable under IRC §6324(a) or §6901(a)) is entitled to reimbursement from the estate or distributees of the estate. IRC §2205.

3. Application. The general rules discussed above apply to the federal estate tax on property included in the gross estate under §2031 and §§2033-2042 of the Code.

C. Additional Federal Estate Tax on Disposition of, or Cessation of Qualified Use of, Qualified Real Property. A qualified heir is liable for the additional tax imposed due to a disposition of, or cessation of qualified use of, qualified real property. IRC §2032A(c)(5).

D. Federal Tax on Generation-Skipping Transfers. The liability for the federal generation-skipping transfer (“GST”) tax is charged to the property constituting the transfer, and is the liability of:

1. The transferee, in the case of a taxable distribution;
2. The trustee, in the case of a taxable termination or direct skip from a trust; or
3. The transferor, in the case if any other direct skip. IRC §2603.

E. Florida Estate Tax. The Estate Tax Law of Florida imposes the liability for payment of Florida estate tax on the personal representative to the full extent of the full value of any property belonging to the decedent or the estate that may come into the personal representative’s hands, custody or control. F.S. §198.23. The term “personal representative” means the executor, administrator, or curator of the decedent, or if there is no executor, administrator or curator appointed, qualified and acting, then any person who is in actual or constructive possession of any property included in the gross estate (as determined under the applicable federal revenue act) of the decedent or any other person who is required to file a return or pay the taxes due under the Estate Tax Law of Florida. F.S. §198.01(2). The Florida estate tax on residents, nonresidents and aliens was based on the credit allowable under Section 2011 of the Code for estate, inheritance, legacy and succession taxes actually paid to a state. F. S. §§198.02, 198.03 and 198.04. The credit for state death taxes under §2011 of the Code was repealed, effective for estates of decedent’s dying after December 31, 2001. P.L. 107-16, §531(b). The Florida estate tax currently does not apply. Unless Congress amends the Code, the repeal of §2011 of the Code will sunset after December 31, 2010. P.L. 107-16, §901(a)(2).

F. Florida Tax on Generation-Skipping Transfers. The Estate Tax Law of Florida also imposes a GST tax based on the amount allowed as a credit for state legacy taxes under IRC §2604. F. S. §§198.021 and 198.031. The person liable for the federal GST tax is liable for the Florida GST tax. F.S. §198.155. The credit under IRC §2604 does not apply to generation-skipping transfers after December 31, 2004. IRC §2604(c), P.L. 107-16, §532(c)(10). The Florida GST tax currently does not apply. The repeal of the credit under §2604 of the Code,

G. Liability of the Probate Estate. The Probate Code provides that all real and personal property of the decedent, except the protected homestead, within Florida and the rents, income, issues and profits from it shall be assets in the hands of the personal representative to be used first for payment of devises, statutory entitlements, estate and inheritance taxes, claims, charges, expenses of the administration and obligations of the decedent’s estate. F. S. §733.608(1)(a). Federal estate and GST taxes have third priority, after (i) costs, expenses of administration, and compensation of the personal representative, and fees awarded attorneys who have rendered services to the estate and (ii) reasonable funeral, interment, and grave marker expenses, not to exceed $5,000, and before all other expenses of administration and obligations of the decedent’s estate. F. S. §733.707(1). Florida Statutes §733.817 (which governs the apportionment of estate taxes) is applied before Florida Statutes §733.805 (which governs abatement). F. S. §733.805(3).

1. Probate Code Right of Contribution from Certain Trusts. If after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent’s estate are insufficient to pay the expenses of administration and obligations of the decedent’s estate, the personal representative is entitled to payment from the trustee of a trust described in Florida Statutes §733.707(3), in the amount the personal representative certifies in writing to be required to satisfy the insufficiency. F. S. §733.607(2). The liability is imposed on any portion of a trust with respect to which a decedent who is the grantor has at the decedent’s death a right of revocation, either alone or in conjunction with another person. F. S. §733.707(3). A right of revocation is a power retained by the decedent, in any capacity, to either (1) amend or revoke the trust and revest the principal of the trust in the decedent or (2) withdraw or appoint the principal of the trust to or for the decedent’s benefit. F. S. §733.707(3)(e). There are limited exceptions to the liability for the expenses of administration and obligations of the decedent’s estate that is imposed on a trust described in Florida Statutes §733.707(3). See, F. S. §733.707(3)(a)-(d). (For convenience, a trust described in Florida Statutes §733.707(3) is hereafter referred to as a “Revocable Trust.”)

2. Trust Code Obligation to Contribute to Probate Estate. The Trust Code contains the companion provision, which provides that the trustee of a Revocable Trust shall pay the personal representative of the settlor’s estate any amounts the personal representative certifies in writing are required to pay the expenses of administration and obligations of the settlor’s estate. Unless otherwise provided in the trust instrument, payments must be charged as expenses of the trust without contribution (i.e., payments are made off the top, before division and distribution). The interests of all beneficiaries of the Revocable Trust included in the settlor’s gross estate for federal estate tax purposes are subject to the charge, except for assets proscribed under Florida Statutes §733.707(3)(a)-(d). F. S. §736.05053(1). The Trust Code gives preference to the expenses of trust administration, including compensation of trustees and attorneys of the trustees, before payment of the expenses of the administration and obligations of the settlor’s estate. F. S. §736.05053(4).
3. **Common Instrument Concept.** Finally, in determining contributions required from a Revocable Trust, the rules for abatement of assets of a decedent’s estate under Florida Statutes §733.805 and the rules for abatement of assets of a Revocable Trust under Florida Statutes §736.05053(2) are applied if the beneficiaries of the estate and the beneficiaries of the Revocable Trust, other than the estate or trust itself, were taking under a common instrument. F. S. §733.805(4).

II. **Exceptions to the General Rules for Apportionment of Transfer Taxes**

A. **Beneficiaries of Life Insurance.** If any part of the gross estate included under §2042(2) of the Code on which federal estate tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from each such beneficiary the portion of the total tax paid as the proceeds paid to the beneficiary bears to the taxable estate (i.e., the average tax). The right of recovery does not apply to proceeds receivable by the surviving spouse to the extent of the marital deduction allowed in respect to such proceeds. IRC §2206. The right of recovery applies unless the decedent directs otherwise in his Will. IRC §2206.

B. **Recipient of Property Over Which Decedent Had Power of Appointment.** If any part of the gross estate on which tax has been paid consists of the value of property included in the gross estate under §2041 of the Code, the executor shall be entitled to recover from each person receiving any such property the portion of the total tax paid as the value of such property received by the person bears to the taxable estate (i.e., the average tax). The right of recovery does not apply to such property received by the surviving spouse except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deduction allowed under §2056 of the Code over the amount of proceeds of insurance on the life of the decedent receivable by the surviving spouse for which a marital deduction is allowed. IRC §2207. The right of recovery applies unless the decedent directs otherwise in his Will. IRC §2207.

C. **Right of Recovery in the Case of Certain Marital Deduction Property.** If any part of the gross estate consists of property the value of which is includible by reason of §2044 of the Code (qualified terminable interest property (“QTIP”)), the decedent’s estate shall be entitled to recover from the person receiving the property the amount by which (A) the total federal estate tax which has been paid exceeds (B) the total federal estate tax which would have been payable if the value of such property had not been included in the gross estate (i.e., the marginal tax). IRC §2207A(a)(1). The right of recovery does not apply with respect to any property to the extent the decedent in his Will (or a revocable trust) specifically indicates an intent to waive any right of recovery under Subchapter C - Miscellaneous, of Chapter 11 - Estate Tax (§§2201-2210 of the Code) with respect to such property. IRC §2207A(a)(2).

D. **Right of Recovery Where Decedent Retained Interest.** If any part of the gross estate on which tax has been paid consists of property the value of which is included by reason of §2036 of the Code (transfers with retained life estate), the decedent’s estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the total
federal estate tax which has been paid to as (A) the value of such property bears to (B) the taxable estate (i.e., the average tax). IRC §2207B(a)(1). The right of recovery does not apply with respect to any property specifically indicates an intent to waive any right of recovery under Subchapter C - Miscellaneous, of Chapter 11 - Estate Tax (§§2201-2210 of the Code) with respect to such property. IRC §2207B(a)(2).

E. Additional Federal Estate Tax under §2032A(c) of the Code. There is no statutory exception to the additional federal estate tax imposed by §2032A(c) of the Code on the disposition of, or cessation of qualified use of, qualified real property.

F. Federal GST Tax. The federal GST Tax is charged to the property constituting the transfer subject to the tax, unless otherwise directed pursuant to the governing instrument by specific reference to the tax imposed by Chapter 13 - Tax on Generation-Skipping Transfers. IRC §2603(b).

III. Determining the Net Tax Attributable to Interests Included in the Measure of the Tax

The first step in apportionment is to determine the net tax attributable to the various interests included in determining the amount of tax. The interests could include property passing under the decedent’s Will, under the terms of a trust not created under the decedent’s Will, by intestacy, and by survivorship, as well as, insurance, property in which the decedent held a reversionary or revocable interest, and annuities.

A. Proportionate Apportionment. The net tax attributable to interests included in the measure of the tax is determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax, with the exceptions discussed in III B through E below. F. S. §733.817(3).

1. Tax. “Tax” means any estate tax, inheritance tax, generation-skipping transfer tax or other tax levied or assessed under the laws of Florida or any other state, the United States, any other country or any political subdivision of the foregoing, as finally determined, which is imposed as a result of the death of decedent.
   a. Includes any interest and penalties imposed in addition to the tax.
   b. Unless the context indicates otherwise, the term “tax” means each separate tax. F. S. §733.817(1)(n).

2. Net Taxes; Credits. “Net taxes” means the net tax payable after taking into account all credits against the applicable tax, except as provided in Florida Statutes §733.817. With respect to federal estate tax, net tax is determined after taking into account all credits (i.e., credits are taken off the top) except the credit for foreign death taxes (discussed in III B 2 below). F. S. §733.817(1)(f).

The credits against federal estate tax include -
a. The unified credit or applicable credit amount under §2010 of the Code.
b. The credit for gift tax paid under §2012 of the Code.
c. The credit for estate tax paid on prior transfers under §2013 of the Code.

3. Included in the Measure of the Tax. “Included in the measure of the tax” means that for each separate tax, only interests included in the measure of that particular tax are considered.

   a. The term does not include any interest, whether passing under the Will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest.

   b. An interest is initially deductible only if any required election for deductibility is allowed.

   c. The term does not include interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts. F. S. §733.817(1)(d).

B. Net Tax on Former QTIP Determined First. The net tax attributable to interests included in the measure of the tax by §2044 of the Code (QTIP) is determined in the manner provided in §2207A of the Code (i.e., the marginal tax) and the amount so determined shall be deducted from the tax to determine the net tax attributable to all remaining interests included in the measure of the tax. F. S. §733.817(3)(a).

C. Foreign Tax Credit. The foreign tax credit allowed for federal estate tax purposes is allocated among the recipients of interests finally charged with the payment of foreign tax in reduction of any federal tax chargeable to the recipients of the foreign interests, whether any federal estate tax is attributable to the foreign interests. Any excess of the foreign tax credit is applied to reduce proportionately the net federal estate tax chargeable to the remaining recipients of the interests included in the measure of the federal estate tax. F. S. §733.817(3)(b).

D. Tax Paid to Other States. The reduction in the Florida tax on the estate of a Florida resident for tax paid to other states is allocated as follows.

   a. If the net tax paid to another state is greater than or equal to the tentative Florida tax attributable to property subject to tax in the other state, none of the Florida tax is attributable to that property. F. S. §733.817(3)(c)1.

   b. If the net tax paid to another state is less than the tentative Florida tax attributable to property subject to tax in the other state, the net Florida tax attributable to the property subject to tax in the other state is the excess of the amount of the tentative Florida tax
attributable to the property over the net tax payable to the other state with respect to the property. F. S. §733.817(3)(c)2.

c. Any remaining net Florida tax is attributable to property included in the measure of the Florida tax exclusive of property subject to tax in other states. F. S. §733.817(3)(c)3.

d. The net federal tax attributable to the property subject to tax in the other state shall be determined as if it were located in the state. F. S. §733.817(3)(c)4.

e. For property located in another state, if there is a conflict between Florida Statutes §733.817 and the apportionment laws of the other state, Florida applies the law of the decedent’s domicile. In re Bernay’s Estate, 7 So.2d 444 (Fla. 1942).

4. Tax on Temporal Interest. The net tax attributable to a temporary interest (e.g., life estate, term of years, etc.) shall be regarded as attributable to the principal that supports the temporary interest. F. S. §733.817(3)(d).

E. Homestead Property is Exempt from Apportionment. An interest in protected homestead is exempt from the apportionment of taxes. F. S. §733.817(2). Protected homestead is a decedent’s homestead property that passes to any person described in Florida Statutes §732.103 (descent of the intestate estate to heirs) and to whom inures the decedent’s exemption from forced sale under the Florida Constitution. Snyder v. Davis, 699 So.2d 999 (Fla. 1997).

IV. Apportionment of Tax Apportioned Under the Code

Except as otherwise effectively directed by the governing instrument, if the Code, including but not limited to §§2032A(c)(5), 2206, 2207, 2207A, 2207B and 2603, apportions federal tax against recipients of certain interests, all net taxes, including taxes levied by Florida, shall be apportioned against the recipients of all interests of that type in the proportion that the value of each interest of that type included in the measure of the tax bears to the total of all interests of that type included in the measure of the tax. F. S. §733.817(4)(a).

A. Governing Instrument. “Governing instrument” means a Will, trust agreement or any other document that controls the transfer of an asset or the occurrence of an event with respect to which the tax is being levied. F. S. §733.817(1)(b).

V. Apportionment of Taxes Not Apportioned Under the Code

Unless the governing instrument directs otherwise, for taxes not apportioned under the Code, the net taxes attributable to interests includable in the measure of the tax are apportioned among the property comprising the various types of interests as provided in Florida Statutes §733.817(5). The apportionment to property within the interests takes place after taking into account the credits, deductions and other considerations discussed above.

A. Property Passing Under Decedent’s Will.
1. **Nonresiduary Devises.** The net tax attributable to nonresiduary devises is charged to and paid from the residuary estate whether or not all interests in the residuary estate are included in the measure of tax. The application of this provision could result in tax being charged to and paid from interests in the residuary estate that are not included in the measure of the tax (e.g., interests passing to the surviving spouse or charity that are initially deductible). If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devises, the balance of the net tax attributable to nonresiduary devises is apportioned among the recipients of the nonresiduary devises in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax. F. S. §733.817(5)(a)1.

   a. In a case decided under the pre-October 1, 1998 version of Florida Statutes §733.817, a sum paid to a recipient from an estate pursuant to a mediated settlement agreement that provided the recipient would “receive a $38,500 credit from the estate as a specific bequest” was a nonresiduary devise that had to pay estate taxes proportionately with all other nonresiduary devises where the residuary estate was insufficient to pay all estate taxes. *Sheets v. Palmer*, 917 So.2d 246 (Fla. 1st DCA 2005). The result would be the same under current Florida law.

   b. “Nonresiduary devise” means any devise that is not a residuary devise. F. S. §733.817(1)(g).

   c. “Residuary devise” means a devise of the assets of the estate which remains after the provision for any devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount. If the Will contains no devise described above, “residuary devise” or “residue” means a devise of all assets remaining after satisfying the obligations of the estate. F. S. §733.817(1)(j); F. S. §731.201(34).

   d. “Recipient” means, with respect to property or an interest in property included in the gross estate, an heir at law in an intestate estate, devisee in a testate estate, beneficiary of a trust, beneficiary of an insurance policy, annuity or other contractual right, surviving tenant, taker as a result of the exercise or in default of the exercise of a general power of appointment, person who receives or is to receive the property or interest in a property, or person in possession of the property, other than a creditor. F. S. §733.817(1)(i).

   e. “Value” means the pecuniary worth of an interest involved as finally determined for purpose of the applicable tax after deducting any debt, expense or other deduction chargeable to it for which a deduction was allowed in determining the amount of the applicable tax.

      i. A lien or other encumbrance is not regarded as chargeable to a particular interest to the extent that it will be paid from other interests.
      
      ii. The value of an interest is not reduced by reason of the charge against it of any part of the tax. F. S. §733.817(1)(q).
2. Residuary Devises. The net tax attributable to residuary devises is apportioned among the recipients of the residuary devises included in the measure of the tax in the proportion that the value of each residuary devise included in the measure of the tax bears to the total of all residuary devises included in the measure of the tax. F. S. §733.817(5)(a)2.

a. The apportionment of any portion of the net tax attributable to nonresiduary devises to an interest in the residuary estate that is initially deductible (e.g., interests that qualify for the federal estate tax marital deduction or charitable deduction) will increase the tax, but will not cause the interest to be included in the measure of the tax for apportionment purposes, because the determination of whether an interest is initially deductible from the gross estate is made without regard to any subsequent reduction of the deduction by reason of the charge of any part of the tax to the interest. F. S. §733.817(1)(d).

b. If the residuary estate is insufficient to pay the net tax attributable to all residuary devises and all nonresiduary devises, the balance of the net tax is apportioned among the recipients of the other property passing under the decedent’s Will, i.e., the nonresiduary devises, in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax. F. S. §733.817(5)(a)(1).

c. In a case decided under the pre-October 1, 1998 version of Florida Statutes §733.817, a provision in a Will directing “that all my just debts, estate taxes, and expenses... be paid out of my estate” was a sufficient direction against apportionment to require residuary charitable beneficiaries to bear a proportionate share of the estate taxes despite the fact that they were not included in the measure of the tax. In re Estate of Collin, 368 So.2d 1350 (Fla. 4th DCA 1979). The result would probably be the same under current law.

B. Property Passing Under the Terms of Any Trust Other Than a Trust Created in the Decedent’s Will. This provision could apply to a revocable trust, irrevocable trust or a trust created by the decedent or another person.

1. Nonresiduary Interests. The net tax attributable to nonresiduary interests is charged to and paid from the residuary portion of the trust, whether or not all interests in the residuary portion are included in the measure of the tax. (See discussion in IV A 1 above concerning the effect of this provision on interests that qualify for the marital deduction or charitable deduction.) If the residuary portion of the trust is insufficient to pay the net tax attributable to all nonresiduary interests, the balance of the net tax attributable to nonresiduary interests shall be apportioned among the recipients of the nonresiduary interests in the proportion that the value of each nonresiduary interest included in the measure of the tax bears to the total of all nonresiduary interests included in the measure of the tax. F. S. §733.817(5)(b)1.

a. “Nonresiduary interest” in connection with a trust means any interest which is not a residuary interest. F. S. §733.817(1)(h).

b. “Residuary interest” in connection to a trust means an interest in the assets of a trust which remain after provision for any distribution that is to be satisfied by
reference to a specific property or type of property, fund, sum or statutory amount. F. S. §733.817(1)(k).

2. Residuary Interests. The net tax attributable to residuary interests shall be apportioned among the recipients of the residuary interests included in the measure of the tax in the proportion that the value of each residuary interest included in the measure of the tax bears to all residuary interests included in the measure of the tax. F. S. §733.817(5)(b)2.

   a. The effect of the apportionment of any portion of the net tax attributable to nonresiduary interests to a residuary interest that is initially deductible is the same as discussed in IV A 2 a above.

   b. If the residuary portion of the trust is insufficient to pay the net tax attributable to all nonresiduary interests and all residuary interests, the balance of the net tax is apportioned among the recipients of the other property passing under the trust, i.e., the nonresiduary interests, in the proportion that the value of each nonresiduary interest included in the measure of the tax bears to the total of all nonresiduary interests included in the measure of the tax. F.S. §733.817(5)(b)(1).

C. Tax Attributable to Protected Homestead. The net tax attributable to an interest in protected homestead is apportioned among the recipients of other interests in the estate or passing under any revocable trust in the following order -

   Class 1. Recipients of interests not disposed of by the decedent’s Will or revocable trust that are included in the measure of the federal estate tax.
   Class 2. Recipients of residuary devises and residuary interests that are included in the measure of the federal estate tax.
   Class 3. Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.

The net tax apportioned to a Class is apportioned among the recipients in the class in the proportion that the value of the interest of each bears to the total value of all interests included in that class. F. S. §733.817(5)(c).

D. Common Instrument Concept. In the application of 733.817(5), the net tax attributable to property passing under the decedent’s Will, the net tax attributable to property passing under the terms of any trust other than a trust created in the decedent’s Will, and the net tax attributable to an interest in protected homestead shall be apportioned to the recipients of the estate and the decedent’s revocable trust as if all recipients, other than the estate or trust themselves, were taking under a common instrument. F. S. §733.817(5)(d). The concept is similar to that applied to the abatement of beneficial interests for contribution to pay the expenses of the administration and obligations of the decedent’s estate under Florida Statutes §§733.607(2), 733.805(1)-(3) and 736.05053(2) by Florida Statutes §733.805(4).
E. Unapportioned Tax. The net tax that is not apportioned under the provision discussed in IV A through C above, including, but not limited to, the net tax attributable to interests passing by intestacy, jointly held interests passing by survivorship, insurance, properties in which the decedent held a reversionary or revocable interest, and annuities is apportioned among the recipients of the remaining interests that are included in the measure of the tax in the proportion that the value of each such interest bears to the total value of all the interests included in the measure of the tax. F. S. §733.817(5)(f).

F. Equitable Apportionment of Interest and Penalties. If court finds that it is inequitable to apportion interest, penalties, or both, in the manner provided in IV A through E above, the court may assess liabilities for the payment thereof in the manner it finds equitable. F. S. §733.817(5)(g).

VI. Provisions in a Governing Instrument Overriding Statutory Apportionment

A. Assets Passing Pursuant to the Governing Instrument. To be effective as a direction for payment of tax in a manner different from that provided in Florida Statutes §733.817, the governing instrument must direct that the tax be paid from assets that pass pursuant to that governing instrument, except as otherwise provided. F. S. §733.817(5)(h)1. Provisions in a governing instrument against apportionment of federal taxes must also comply with the requirements of §§2206, 2207, 2207A, 2207B or 2603 of the Code, if applicable.

B. Incorporation of Tax Apportionment Provision of Revocable Trust Into Will. If the decedent’s Will provides that the tax shall be apportioned as provided in the decedent’s revocable trust by specific reference to the trust, the direction in the revocable trust shall be deemed to be a direction contained in the Will and shall control with respect to payment of taxes from assets passing under both the Will and revocable trust. F. S. §733.817(5)(h)2. Remember that in order to waive apportionment under §2206 of the Code (Life Insurance) and §2207 of the Code (General Power of Apportionment) the decedent must direct otherwise in his Will. If the tax apportionment provisions in a decedent’s revocable trust, including a waiver of apportionment under §2206 of the Code or §2207 of the Code, is deemed to be contained in the decedent’s Will under Florida law, it should be effective for federal estate tax purposes.

C. Direction in Will to Pay Tax from Revocable Trust. A direction in the decedent’s Will to pay tax from the decedent’s revocable trust is effective if a contrary direction is not contained in the trust agreement. F. S. §733.817(5)(h)3. In a case decided under the pre-October 1, 1998 version of Florida Statutes §733.817, a provision in a Will that stated “I authorize my personal representative to request payment of...taxes from the Trustee of the [Revocable Trust]” was not a “clear and unequivocal” direction against apportionment between the estate and trust required under prior law. Nationsbank, N.A. v. Brenner, 756 So.2d 203 (Fla. 3d DCA 2000). The authorization to request payment probably would not be considered a direction under current law.
D. Direction to Pay Tax on Property Not Passing Under the Governing Instrument. For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must (i) expressly refer to Florida Statutes §733.817 or (ii) “expressly indicate” that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. F. S. §733.817(5)(h)4.

1. Expressly Indicate. There is no definition of the term “expressly indicate” in the Probate Code, however, the next sentence of Florida Statutes §733.817(5)(h)4 provides that a direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is effective to direct the payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument. F. S. §733.817(5)(h)4.

a. In a case decided under Florida Statutes §734.041 (the predecessor to the pre-October 1, 1998 version of Florida Statutes §733.817), the decedent’s 1972 revocable trust provided that the trustee pay all estate tax imposed on the decedent’s “estate or in respect to any interest therein or...any property which shall not come into possession of” the personal representative, to the extent the personal representative requested payment within eight months of the date of death. The decedent subsequently executed a Will in 1973 that contained no reference to the payment of estate taxes. The court ruled that the provision in the revocable trust controlled the appointment of the tax attributable to interests passing under the terms of the trust, but did not control apportionment of the tax attributable to interests passing under the decedent’s Will or otherwise. Because there was no contrary provision in the Will, the tax attributable to the interests passing other than under the terms of the trust, i.e., passing under the Will or in any other manner except under the trust, were subject to statutory apportionment. Guidry v. Pinellas Central Bank and Trust Co., 310 So.2d 386 (Fla. 2d DCA 1975). The result should be the same under current law. The direction in the revocable trust did not expressly indicate that the property passing under the trust would bear the burden of taxation for property not passing under the trust, because the payment was conditional on the personal representative requesting payments within the eight month period.

b. In a case decided under the pre-October 1, 1998 version of Florida Statutes §733.817, a provision in a Will directing “my Executor, ...to pay...all estate, inheritance, succession and transfer taxes which may be assessed by reason of my death” was not a “clear and unequivocal” direction that the estate bear the burden of taxation for property not passing under the Will. Ferrone v. Soffes, 558 So.2d 146 (Fla. 3d DCA 1990). The result would be the same under current law. The direction in the Will did not expressly indicate that property passing under the Will should pay the taxes attributable to property not passing under the Will.

c. In a case decided under the current version of Florida Statutes §733.817, a decedent’s Will that provided the residue of his estate was to pay “estate and inheritance taxes assessed by reason of my death, except that the amount...[payable as a result of §2044 of the Code (QTIP) or §2041 of the Code (Power of Appointment)]” did not expressly
indicate that property passing under the Will should pay the taxes attributable to life insurance not passing under the Will. In re Estate of McClaran, 811 So.2d 799 (Fla. 2d DCA 2002).

d. In a case decided under the current version of Florida Statutes §733.817, a decedent’s Will that provided the Personal Representative was to “pay out of the property which would otherwise become a part of the Residuary Estate, all estate, inheritance, transfer and other succession taxes, …, which may be lawfully assessed by reason of my death” did not expressly indicate that property passing under the Will should pay the taxes attributable to property not passing under the Will. Boulis v. Blackburn et al., 16 So.3d 186 (Fla. 4th DCA 2009).

2. Relation to Federal Statutes. A direction that is effective for purpose of Florida Statutes §733.817(5)(h)4 -

a. Should be effective for purposes of §§2206 and 2207 of the Code, which require only that the decedent direct otherwise in his Will. This should be true if the direction is contained in the decedent’s revocable trust, if the decedent’s Will provides for apportionment as provided in the revocable trust by specific reference to the trust. F. S. §733.817(5)(h)2.

b. Would not be effective for purposes of §§2207A and 2207B of the Code unless the decedent in his Will (or revocable trust) specifically indicates an intent to waive any right of recovery. IRC §§2207A and 2007B.

c. Would not be effective for purposes of §2603 of the Code unless the governing instrument contains a specific reference to the tax imposed by Chapter 13 - Tax on Generation-Skipping Transfers. IRC §2603(b).

E. Resolution of Conflict Between Will and Other Governing Instrument. If there is a conflict as to payment of taxes between the decedent’s Will and a governing instrument, the decedent’s Will controls, except that a direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument shall be effective notwithstanding any conflict with the decedent’s Will, unless the tax provision in the decedent’s Will expressly overrides the conflicting provision in the governing instrument. F. S. §733.817(5)(h)5.b. The governing instrument shall be given effect with respect to any tax remaining unpaid after the application of the decedent’s Will. F. S. §733.817(5)(h)5.a.

In a case decided under Florida Statutes §734.041 (the predecessor to the pre-October 1, 1998 version of the Florida Statutes §733.817), the decedent’s revocable trust, as amended in 1947, provided that all estate taxes payable “with respect to the property passing under [the trust] be paid out of the principal of the trust.” In his 1967 Will, the decedent directed that all estate taxes on “any property passing under my Will; and also with respect to any property passing outside my Will,…, be paid out of my residuary estate.” The court held that the conflicting apportionment provisions in the Will should override the apportionment provision in the trust under the law in effect at the time. In re Estate of Strohm, 241 So.2d 167 (Fla. 4th DCA 1970).
The result under current law is unclear. The direction in the Will expressly indicated that the property passing under the Will was to bear the burden of taxation of property not passing under the Will. See, F. S. §733.817(5)(h)4. There is, however, a conflict between the Will and the revocable trust. The provision in the revocable trust to pay tax attributable to assets passing pursuant to the trust from the assets passing pursuant to the trust would be given effect unless the provision in the Will was found to expressly override it.

VII. Right to Withhold Distribution from Estate or Require Bond from Recipient

The personal representative or fiduciary is not required to transfer property to a recipient if the property is reasonably anticipated to be necessary for the payment of taxes or the recipient has not paid the tax apportioned to the recipient. Where property is transferred to the recipient prior to the final apportionment of tax, the recipient is required to provide security for his or her share in the amount and form prescribed by the personal representative or fiduciary. F.S. §733.817(6).

VIII. Order of Apportionment

A. Petition for Order of Apportionment. The personal representative may petition the court at any time for an order of apportionment. If administration has not been commenced within 90 days from the decedent’s death, any fiduciary may petition for an order of apportionment in the court in which venue would be proper for administration of the decedent’s estate. Formal notice of the petition must be provided to all interested persons. Finally, any recipient may petition the court for an order of apportionment at any time after 6 months from the decedent’s death. F.S. §733.817(7)(a).

B. Tentative Determination and Retention of Jurisdiction. If the court is unable to make a final determination as to the apportionment of tax, the court must apportion the probable tax due or to become due from all interested persons and retain jurisdiction over the parties and issues to modify the order as appropriate until after the tax is finally determined. F.S. §733.817(7)(b). In any proceeding to enforce an order of apportionment, the court is directed to award taxable costs and reasonable attorney’s fees. Additionally, the court may award penalties and interest on the unpaid tax in accordance with equitable principles. F.S. §733.817(8)(c).

IX. Deficit in Collecting Tax Apportioned to Recipient

A. Collection of Deficit. A personal representative or fiduciary who does not possess sufficient property otherwise distributable to the recipient to pay the tax apportioned to the recipient must recover the deficiency from-

1. The fiduciary, if any, in possession of the property to which the tax is apportioned.

2. Any remaining deficiency must be collected from the recipient of the property to which the tax is apportioned. F.S. §733.817(8)(a).
B. Relief from Duty to Collect. The personal representative or fiduciary charged with recovering the apportioned tax may be relieved of such duty by a court order finding that (i) the estimated costs and attorney’s fees in recovering the tax from the person against whom tax is apportioned will approximate or exceed the amount of the recovery, (ii) the person against whom taxed is apportioned is a resident of a foreign country other than Canada and refuses to pay the apportioned tax, or (iii) it is impracticable to enforce contribution against the person against whom tax is apportioned given the improbability of obtaining a judgment or collecting any judgment that might be obtained. F.S. §733.817(9)(a). Moreover, the personal representative or fiduciary will not be liable for the failure to enforce collection if the personal representative or fiduciary reasonably believes enforcement is economically impracticable. F.S. §733.817(9)(b).

C. Reapportionment of Uncollected Tax. Any uncollected tax is reapportioned according to Florida Statutes §733.817 as if the property to which the tax was apportioned had been exempt. F.S. §733.817(10).

D. Right of Contribution in the Event of Overpayment. A person who ultimately pays more than the tax that he or she is originally apportioned may seek contribution from those who have paid less than the full amount of tax originally apportioned to them. In an action to enforce such contribution, the court shall award taxable costs and reasonable attorney’s fees. F.S. §733.817(11).

E. Taxes Levied by Foreign Country. Unless specifically directed in the will or other instrument under which the personal representative or fiduciary is acting, Florida Statutes §733.817 does not require the personal representative or fiduciary to pay any tax assessed by any foreign country. F.S. §733.817(12).


