

## Court Decisions Involving QTIPs and 2207A

Case	Court	Year of Decision	Federal Estate Tax At Issue?	2207A(a)(2) before/after TRA '97	State Estate Tax At Issue?	Direction	Court's final conclusion	Direction in Will or Revocable Trust	Does Will or Rev. Trust call upon itself tax or imposes upon another?
Stark	N.J. App. Ct.	2011	Yes	Before	Yes	None	Surviving spouse's estate has right of recovery	None	None
Gordon	Surrogate's Ct. N.Y.	1986	Yes	Before	Unclear	"I direct that all Estate inheritance and death taxes (including any interest and penalties) imposed by any jurisdiction by reason of my death with respect to any property includable in my estate for the purpose of such taxes, whether such property passes under or outside of my will be paid out of my Residuary Estate as an administration expense, without apportionment."	Clause is insufficient to waive right of recovery	Will	Calls upon itself tax
Miller	Illinois App. Ct.	1992	Yes	Before	Unclear	"I direct my Personal Representative hereinafter named to pay all of my legal debts, including the expenses of my last illness and funeral, and without reimbursement or contribution, all estate taxes, inheritance taxes, death taxes and succession duties assessed by reason of my death by the United States of America, any state thereof, or any foreign government."	Court says tax clause is not ambiguous. Surviving spouse's estate must bear all taxes	Will	Calls upon itself tax
Cleveland	Supreme Ct. of AL	1994	Yes	Before	Yes	None	2207A preempts AL law as to federal estate tax but does not preempt AL law as to state estate tax.	None	None
Kramer	N.Y. App.	1994	Yes	Before	Yes	Will contained tax clause that all taxes were to paid from the residue "except for estate taxes resulting from the inclusion of property in my estate for estate tax purposes under Sections 2035, 2039 and 2041 of the Internal Revenue Code, which shall be apportioned among the transferees thereof in accordance with the law of the State of New York...."	Tax clause was not sufficient to waive recovery under 2207A and EPTL 2-1.12	Will	Calls upon itself tax

Case	Court	Year of Decision	Federal Estate Tax At Issue?	2207A(a)(2) before/after TRA '97	State Estate Tax At Issue?	Direction	Court's final conclusion	Direction in Will or Revocable Trust	Does Will or Rev. Trust call upon itself tax or imposes upon another?
Jones	Indiana App. Ct.	1994	Yes	Before		"I direct that all estate, inheritance, succession and other death taxes of any nature, together with any interest and penalties thereon, which may be levied or assessed by reason of my death, by the laws of any state or the United States, with respect to property passing under this Will or any other property, shall be considered a cost of administration of my estate, and that such taxes, together with all debts which I am legally obligated to pay at the time of my death, my last illness and funeral expenses and costs of administration of my estate, (including the cost of a suitable monument at my grave), shall be paid out of my residuary estate without apportionment..."	Will insufficient to waive reimbursement under 2207A	Will	Calls upon itself tax
Branch Banking	N.C. App.	1995	No	Before	Yes, solely at issue	Will directed executor to make claim on QTIP to bear tax.	QTIP's bears additional N.C. estate tax caused by its inclusion.	Will	Imposes on QTIP
Vahlteich	Federal 6th Cir.	1995	Yes	Yes	Yes	"I direct that ... all transfer, estate or inheritance taxes ... imposed by any taxing authority upon or in relation to ... any trust, gift, insurance, annuity, joint property or transfer, included as part of my taxable estate, shall be paid as an expense out of my residuary estate.. without apportionment against the legatees, beneficiaries, donees or transferees therof."	Will insufficient to override Ohio's tax apportionment statute	Will	Calls upon itself tax

Case	Court	Year of Decision	Federal Estate Tax At Issue?	2207A(a)(2) before/after TRA '97	State Estate Tax At Issue?	Direction	Court's final conclusion	Direction in Will or Revocable Trust	Does Will or Rev. Trust call upon itself tax or imposes upon another?
Cooney	Supreme Court of WI	1995	Yes	Before	Yes	"I also direct my personal representative to pay expenses of administration of my estate and all valid inheritance and estate taxes payable by reason of my death, including any interest or penalties, without seeking reimbursement from or charging any person...."	Not sufficient to waive right of recovery for federal estate tax; as for state estate tax, clause insufficient to waive tax being imposed on residue	Will	Calls upon itself tax
Adair	Supreme Ct. of NJ	1997	No	Before	Yes	"All estate, inheritance, succession and other death taxes, including any interest or penalties thereon, imposed or payable by reason of [Mrs. Adair's] death with respect to all property comprising his [sic] gross estate for death tax purposes, whether or not such property passes hereunder, shall upon the written request of the Personal Representative of [Mrs. Adair's] estate [sic] be paid to such Personal Representative .. out of the principal of the trust estate."	Tax clause is not sufficient clear to direct against Florida's tax apportionment statute.	Trust	Yes
Klarner	Supreme Ct. of CO	2005	No	After	Yes	"The Trustee is authorized, but not directed, to pay any expenses of the last illness, funeral and burial of Settlor; legally enforceable claims against Settlor or Settlor's estate; expenses of administering Settlor's estate;... and the balance of all estate taxes, and inheritance or other death taxes payable by reason of Settlor's death, together with interest and penalties thereon."	Court holds that 2207A preempts state law as to state estate tax. Court holds tax clause is insufficient to waive state estate tax under 2207A specificity requirement.	Trust	Calls upon itself tax
Forrester	Supreme Ct. of AL	2005	No	After	Yes	None	Court holds that the will of the surviving spouse is the operative document. Will was silent.	None	None

Case	Court	Year of Decision	Federal Estate Tax At Issue?	2207A(a)(2) before/after TRA '97	State Estate Tax At Issue?	Direction	Court's final conclusion	Direction in Will or Revocable Trust	Does Will or Rev. Trust call upon itself tax or imposes upon another?
Lee	N.J. App. Ct.	2006	Yes	After	Yes	None, case concerns inside QTIP apportionment	Court holds that grantor's will directs that estate taxes on preresidual devises of the QTIP Trust be paid by the residue of the QTIP.	N/A	N/A
Eisenbach	Wash. App. Ct.	2007	Yes	After	Not clear	"The Trustee shall pay out of principal, to the extent that this trust shall be included in the gross estate of either Settlor for the purposes of determining federal estate taxes or Washington estate taxes, a ratable share of such taxes determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the settlor (after exemptions and deductions are taken) as determined for estate tax purposes by the authority assessing the tax."	Court held Trust tax clause was sufficient to waive 2207A(a)(2). QTIP had to bear pro rata share of the estate tax rather than additional estate tax. Court holds 2207A(a)(2) does not require reference to QTIP or to 2207A.	Trust	Directs prorata
Blauhorn	Supreme Court of NE	2008	Yes	After	No	"Federal or state estate tax payable by Settlor's estate shall be allocated as follows with no right of reimbursement from any recipient or beneficiary of any such property whether or not such property passes under this Will."	Not sufficient to waive right of recovery for federal estate tax; state estate tax not at issue	Trust	Calls upon itself tax
McLemore	Supreme Court of MS	2011	Yes	After	Unclear	Surviving spouse's will was silent as to tax apportionment and right of recovery. Her late husband's will required surviving spouse's estate to bear tax.	The relevant "decedent" for purposes of 2207A and MS statute is surviving spouse.	None	None

Refers to Property Passing Outside Will (or Trust)?	Directs against re-imbursement	Direction Refers to QTIP Trust?	Direction Refers to 2207A?	Direction Refers to 2056?	Direction Refers to 2044?	Outside or Inside Apport.	Refers to <i>Riggs</i> ?	Refers to 2207A(a)(2)	Examines case law in State
None	None	None	None	None	None	Outside	Yes	Yes	Yes
Yes	No	No	No	No	No	Outside	No	Yes	Yes
No	Yes	No	No	No	No	Outside	No	Yes	Yes, as to admission of extrinsic evidence.
None	None	None	None	None	None	None	Yes	Yes	No
Yes	No	No	No	No	No	Outside	No	Yes	Yes, Gordon

Refers to Property Passing Outside Will (or Trust)?	Directs against re-imbursement	Direction Refers to QTIP Trust?	Direction Refers to 2207A?	Direction Refers to 2056?	Direction Refers to 2044?	Outside or Inside Apport.	Refers to <i>Riggs</i> ?	Refers to 2207A(a)(2)	Examines case law in State
Yes	No	No	No	No	No	Outside	No	Yes	No
Yes	None	Yes	No	No	No	Outside	No	No	Yes
No	None	No	No	No	No	Outside	Yes	No	

Refers to Property Passing Outside Will (or Trust)?	Directs against reimbursement	Direction Refers to QTIP Trust?	Direction Refers to 2207A?	Direction Refers to 2056?	Direction Refers to 2044?	Outside or Inside Apport.	Refers to Riggs ?	Refers to 2207A(a)(2)	Examines case law in State
No	Yes	No	No	No	No	Outside	Yes, in fn. 3	Yes, quotes 2207A(a)(2)	Notes no cases examining 2207A; analyzes several WI cases which required clear indication
No	None	No	No	No	No	Outside	Yes	Yes	Yes, examines case law in Florida (surviving spouse died a resident of FL) and FL's tax apportmt. Stat.
No	No	No	No	No	No	Outside	Yes	Yes	Yes, under Colorado case law, "intent to shift burden of the estate tax must be clear and unambiguous."
None	None	None	None	None	None	None		Yes	Cleveland

Refers to Property Passing Outside Will (or Trust)?	Directs against re-imbursement	Direction Refers to QTIP Trust?	Direction Refers to 2207A?	Direction Refers to 2056?	Direction Refers to 2044?	Outside or Inside Apport.	Refers to Riggs ?	Refers to 2207A(a)(2)	Examines case law in State
N/A	N/A	N/A	N/A	N/A	N/A	Inside	Yes	Yes	Court notes that N.J. case law established doctrine of probable intent. Examines N.J. case law.
No	None	No	No	No	No	Outside	Yes	Yes	No
Yes	Yes	No	No	No	No	Outside	Yes, in fn. 11	Yes, quotes 2207A(a)(2) and quotes 2207A(a)(2) prior to TRA ;97	Analyzes no case law in Nebraska
None	None	None	None	None	None	None	Yes	Yes	No



Quotes from Opinion	Out of State Court References	Standard Established by Opinion	If State Estate Tax Apportionment Examined, Considered Separately?	Type of State Tax	Does state have statutory apportionment?
"State law controls the apportionment of state estate tax liability."	Yes	2207A governs right to recovery federal estate tax. New Jersey law controls apportionment of New Jersey estate tax.	Yes	Estate	Yes
	No		No	Estate	Yes, and QTIP recovery statute
"We see nothing in this illustration [one given in Treas. Reg. in which surviving spouse's will does not contain a tax clause], however, which purports to require direct reference to section 2207A of the Internal Revenue Code ... before an 'otherwise' direction clause in a tax-exonerating provision will be effective."	No	2207A does not require a specific reference to the statute.	No		Not mentioned
"Section 2207A clearly preempts § 40-15-18 [Alabama tax apportionment statute] with regard to the payment of federal estate taxes attributable to Q-TIP property; however, § 2207A makes no specific provision for the apportionment of state estate taxes."	No		Yes	Estate	Yes, all taxes to residue
	No	QTIP Trust must be expressly mentioned in the tax apportionment clause	No	Estate	Yes

Quotes from Opinion	Out of State Court References	Standard Established by Opinion	If State Estate Tax Apportionment Examined, Considered Separately?	Type of State Tax	Does state have statutory apportionment?
	No		Not At Issue		
	No	Expression is clear	Solely at issue	Estate	Yes
<p>"State law controls the apportionment of federal estate tax liability. Riggs v. De. Drago."</p> <p>"The plain reading of Section 2118.86(1) clearly requires explicit reference in the testamentary document to at least one of three makers and not the mere inclusion of the term 'any trust' in a boilerplate list of possible testamentary interests."</p>	Gordon, Kramer			Estate	Yes

Quotes from Opinion	Out of State Court References	Standard Established by Opinion	If State Estate Tax Apportionment Examined, Considered Separately?	Type of State Tax	Does state have statutory apportionment?
<p>"The rules for construction of provisions in a will are clearly established in Wisconsin. ... The determination of testamentary intent is a question of state law....The federal tax system regularly looks to state laws for application of a variety of provisions of the tax code, and § 2207(a)(2) is no exception. There are no Wisconsin cases interpreting what constitutes an 'otherwise direction' clause under § 2207A(a)(2), nor has the state legislature addressed the issue."</p>	<p>Yes, E/O Gordon (quotes tax clause); E/O Miller (quotes tax clause)</p>	<p>Direction must be: "clearly expressed;" "clear and specific indication of testamentary intent"</p>	<p>Yes</p>	<p>Estate</p>	<p>No, tax imposed on residue under common law</p>
<p>"State law controls the apportionment of state estate tax liability."</p>	<p>Gordon</p>	<p>To override FL's tax apportionment statute, direction must be clear and unequivocal</p>	<p>Only tax at issue</p>	<p>Estate</p>	<p>Yes, requires clear and unequivocal direction</p>
<p>"By its terms, section 15-12-916 [Colorado tax apportionment statute] applies to both federal and state estate taxes. However, where state and federal law govern the same matter, the applicability of the state statute is void to the extent that it conflicts with federal law." "Section 2207A indisputably preempts Colorado law with respect to application of federal taxes.... In order to achieve the coordinating effect envisioned under the Colorado statutes themselves, we conclude that section 2207A preempts conflicting Colorado law, even as to state estate taxes."</p>	<p>Vahlteich, Adair, Gordon, Branch Banking. Noting following cases are inapposite: Cleveland, Cooney, Haydel</p>	<p>2207A preempts state law as to federal and state estate taxes</p>	<p>No</p>	<p>Estate</p>	<p>Yes, equitable apportionment</p>
	<p>McAleer</p>	<p>Court upholds its earlier decision in Cleveland which held that 2207A does not preempt AL law with respect to apportionment of AL estate tax.</p>	<p>Yes, solely at issue</p>	<p>Estate</p>	<p>Yes, charges estate tax to residue</p>

Quotes from Opinion	Out of State Court References	Standard Established by Opinion	If State Estate Tax Apportionment Examined, Considered Separately?	Type of State Tax	Does state have statutory apportionment?
<p>"There can be no dispute that 26 U.S.C.A. § 2207A applies to the question before us, and preempts state law regarding the payment of federal estate taxes attributable to QTIP property." "While the trial court's analysis of probable intent may not have been relevant to the issue of federal estate taxation attributable to the charitable beneficiaries of the QTIP trusts, construction of a will is a matter of state law, and state law governs the allocation of the tax burden in the absence of congressional intent to the contrary... To that end, in interpreting a will, courts in this State endeavor to 'ascertain the intent of the testator.' The doctrine of probable intent is long established in New Jersey's jurisprudence."</p>	<p>McAleer; Cleveland</p>	<p>Federal law preempts but state law establishes intent</p>	<p>Yes</p>	<p>Estate</p>	<p>Yes</p>
<p>"Federal law controls the determination of the obligation to pay and the total amount of federal estate tax. However, state law generally retains its traditional role of determining testamentary intent regarding the impact of the estate tax on beneficiaries and distribution of the estate." "Congress amended § 2207A to require a settlor to specifically waive recovery, reasoning that 'persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP. Congress attempted to avoid this confusion by requiring specific reference to the Internal Revenue Code section or the QTIP. The amendment was to ensure that the testator's intent effectively controlled. Nowhere in the legislation or in its legislative history is there any suggestion that a clear statement of testamentary intent regarding the allocation of the tax burden is to be displaced by the provisions of the statute."</p>	<p>E/O Klarner, Cooney, Gordon, Kramer</p>	<p>2207A does not require the use of "magic words" if intent is clear</p>	<p>Not clear</p>	<p>Estate</p>	<p>Not mentioned</p>
<p>"As an initial matter, we note Congress' general intent with respect to the federal estate tax is that it be governed by state law and that absent contrary congressional enactments, state law governs the allocation of tax burden. However, we conclude that § 2207A directly applies to the question presented by this appeal and, as such, is a contrary congressional enactment. As a result, we conclude that § 2207A preempts any applicable state law to the extent that state law might purport to deal with payment of federal estate tax attributable to QTIP."</p>	<p>Yes, E/O Gordon, Cooney, Miller, Klarner, Adair</p>	<p>Notes, 2207A(a)(2) requires specific indication to waive right of recovery under this "subchapter"</p>	<p>Not At Issue</p>	<p>Inheritance</p>	<p>Not mentioned</p>
<p>"We find that the dispute over the precedence of federal and state tax laws is moot, as the statutes are not in conflict."</p>	<p>Yes, Cleveland, Eisenbach</p>	<p>No</p>	<p>Not At Issue</p>	<p>Estate</p>	<p>Yes</p>

**Notes**

Surviving spouse's will was silent.

Right of recovery granted by 2207A and EPTL 2-1.12. Both statutes however provide that there shall be no right of recovery "if decedent otherwise directs by will."

Because decedent's will was silent, her estate was entitled to recover from the QTIP Trust all of the additional federal estate taxes caused by its inclusion in her federal gross estate. As to the Alabama estate taxes, because decedent's will was silent, all of the Alabama estate taxes were borne by the residue of her estate.

Both 2207A and EPTL 2-1.12 permit recovery from QTIP Trust and permit waiver of that right. EPTL 2-1.12 provides that a general direction to pay all taxes is insufficient. Court did not consider separately 2207A from EPTL. It appears that court permitted more stringent standard of EPTL to bleed over into 2207A.

**Notes**

Court makes no mention of federal preemption. Rather only applies 2207A. However, court permitted state law - Florida - to determine whether extrinsic evidence was admissible to determine decedent's intent. Court also note that tax clause in decedent's trust was not operative because 2207A at the time required the direction otherwise to be in the decedent's will.

Unclear what N.C. tax apportionment statute provides. Court clearly holds that the surviving spouse's will contains a clear direction that QTIP trust bear the tax. No mention of 2207A or Riggs.

Ohio Sec. 2113.86 grants executors right to recovery additional estate tax on QTIP unless "decedent provides otherwise in his will or another governing instrument and the will or instrument refers to either section mention in this division [2044, Ohio Sec. 2118.86] or to qualified terminable interest marital deduction property." No mention of 2207A in the Tax Court opinion at T.C. Memo 1994-168 or in the appellate decision. Court is not clear as to whether federal estate tax is at issue or whether the case only involves Ohio estate tax.

**Notes**

Court states tax clause "made no express reference to her husband's QTIP trust or to § 2207A of the Internal Revenue Code, nor does it express any indication of an intention to benefit the beneficiaries of the QTIP trust, or to exonerate them from contributing their share of the estate taxes. Court holds tax clause is not clear and therefore does not waive right to recovery federal tax. As to state estate tax, tax clause not clear to waive common law rule imposing state estate tax on residue.

Since the court held FL law governs apportionment of FL estate tax rather than 2207A, this case really is just an examination of FL's tax apportionment statute.

Colorado tax apportionment statute states that "if the liabilities of persons interested in the estate as prescribed by this code differ from those which result under the federal estate tax law, the liabilities imposed by the federal law shall control." Appears the statute explicitly differs to state law.

While court states 2207A preempts Alabama apportionment statute, the comment is dicta since federal estate tax was not at issue. Only apportionment of Alabama estate tax was at issue. Since surviving spouse's will did not contain a tax clause, AL statute controls and apportions AL estate tax to residue of surviving spouse's estate.

**Notes**

Both federal and New Jersey law would not impose estate taxes on charitable devisees since the devises do not give rise to tax; however, in this case, the issue is whether the estate taxes on preresidual devises should be borne by the residue. The residue passed to charity. Court holds that the grantor's probable intent expressed an intent to have preresidual devises pass free of tax. Note, that the surviving spouse's will did not waive statutory apportionment.

Tax clause contained in Joint Trust Agreement.

"Section 2207A provides that 'an intent to waive any right of recovery under this subchapter' must be specifically made. A plain reading of the language shows that some reference to 'this subchapter,' in other words, § 2207(a), is necessary in order to show a testator's intent to waive the right to recovery." No reference in tax clause to § 2207A, or to QTIP Trust