

D R A F T
FOR APPROVAL

UNIFORM ESTATE TAX APPORTIONMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ESTATE TAX APPORTIONMENT ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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UNIFORM ESTATE TAX APPORTIONMENT ACT**

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UNIFORM ESTATE TAX APPORTIONMENT ACT

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1 **UNIFORM ESTATE TAX APPORTIONMENT ACT**
2
3
4

5 **SECTION 1. SHORT TITLE.** This [Act] may be cited as the Uniform Estate Tax
6 Apportionment Act.
7

8 **SECTION 2. DEFINITIONS.** In this [Act]:

9 (1) "Apportionable estate," means with respect to an estate tax, the value of the gross
10 estate for the estate tax reduced by:

11 (A) any claim or expense allowable as a deduction for purposes of the tax;

12 (B) the value of any interest in property that, for purposes of the tax, qualifies for a
13 marital or charitable deduction or otherwise is deductible or exempt; and

14 (C) any amount added to the decedent's gross estate for a gift tax on transfers made
15 before death.

16 (2) "Estate tax" means a federal, state, or foreign tax imposed because of the death of an
17 individual and interest and penalties associated with the tax. The term does not include an
18 inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping
19 transfer tax incurred on a direct skip.

20 (3) "Gross estate" means, with respect to an estate tax, all interests in property subject to
21 the estate tax.

22 (4) "Person" means an individual, corporation, business trust, estate, trust, partnership,
23 limited liability company, association, or joint venture; government; governmental subdivision,
24 agency, or instrumentality; public corporation, or any other legal or commercial entity.

25 (5) "Ratably" means apportioned or allocated pro rata according to the relative values of
26 interests in property to which the term is to be applied.

27 (6) "Time-limited interest" means an interest in property which terminates on a lapse of
28 time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of

1 discretion that could transfer a beneficial interest to another person. The term does not include a
2 cotenancy unless the cotenancy itself is a time-limited interest.

3 (7) "Value" means fair market value of an interest in property as finally determined for
4 purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by
5 the interest without reduction for taxes paid or required to be paid or for any special valuation
6 adjustment.

7 Preliminary Comments

8
9 The starting point for calculating the apportionable estate is the value of the gross estate.
10 Since the properties included and deductions allowed for determining different taxes can differ,
11 the apportionable estate figure may not be the same for different taxes.

12
13 Property not included in the apportionable estate for an estate tax typically will not bear any
14 of that tax. However, the recipients of such property will bear part of an estate tax to the extent
15 that the assets of the apportionable estate are insufficient to pay the tax. See Sections 6(c) and
16 9(d). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those
17 transfers from the allocation of that tax to the extent that properties of the apportionable estate
18 are sufficient. In addition to considerations of equity, the insulation from tax of the recipient of a
19 deductible transfer will prevent the deduction from being reduced.

20
21 A gift tax paid by the decedent on a gift that was made by the decedent or the decedent=s
22 spouse within three years of the decedent=s death is added back to the decedent=s gross estate for
23 federal estate tax purposes by Internal Revenue Code ' 2035(b). A State or foreign estate tax may
24 have a similar provision or effect. Section 2(1)(C) excludes any such gift tax from the
25 apportionable estate.

26
27 The value of the apportionable estate is reduced by expenditures of the estate, including the
28 payment of claims, that are allowable estate tax deductions whether or not allowed. For example,
29 administrative expenses that could have been claimed as estate tax deductions, but instead are
30 taken as income tax deductions, will reduce the apportionable estate. When a decedent=s estate
31 includes property in more than one State, the apportionable estate for each State=s estate tax will
32 be reduced by the expenses and claims that are deductible for purposes of that tax. Where an
33 expenditure cannot be identified as pertaining to property in the gross estate of only one State
34 tax, the expenditure is to be apportioned ratably among the taxes of the States in which the
35 relevant properties are located, in accordance with the values of those properties.

36
37 A spouse=s elective share of a decedent=s estate is excluded from the apportionable estate to
38 the extent that the spouse=s share qualifies for an estate tax deduction. In virtually all cases, a
39 spouse=s elective share will qualify for a marital deduction for federal estate tax purposes. A
40 statutory claim against a decedent=s estate for someone whose interest does not qualify for an
41 estate tax deduction (for example, a pretermitted heir) is included in the apportionable estate.

42
43 The term "estate tax" is defined in the Act to include all estate taxes and certain generation-
44 skipping taxes arising because of an individual=s death. The term estate tax does not include any
45 inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a
46 taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping

1 tax that is incurred because of a direct skip that takes place because of the decedent's death is
2 included in the term "estate tax."

3
4 Currently, no United States income tax is imposed on the unrealized appreciation of a
5 decedent's assets at the time of death. While Canada and some other foreign countries impose an
6 income tax at death, those income taxes are not apportioned by the Act.

7
8 Some States impose an inheritance tax on recipients of property from a decedent. This Act
9 does not apportion those taxes because State law causes inheritance taxes to be borne by the
10 recipients of the property giving rise to the tax.

11
12 This Act does not provide for the apportionment of the income tax payable on the receipt of
13 Income in Respect of a Decedent (IRD). If a decedent held an installment obligation the payment
14 on which is accelerated by the decedent's death, the income tax incurred thereby is not
15 apportioned by the Act.

16
17 If a donor pays a gift tax during the donor's life, the amount paid will not be part of the
18 donor's assets when the donor dies; and so the gift tax will not be subject to apportionment
19 among the persons interested in the donor's gross estate. This consequence is consistent with the
20 typical donor's wish that the gifts made during life pass to the donee free of any transfer tax. If all
21 or part of a gift tax was not paid at the time of the donor's death and is subsequently paid by the
22 donor's personal representative, the burden of the gift tax should lie with the same persons who
23 would have borne it if the donor had paid it during life, typically, the residuary beneficiaries. A
24 gift tax liability is not apportioned by this Act, but is treated the same as any other debt of the
25 estate. A gift tax deficiency that becomes due after the decedent's death also is treated as a debt
26 of the decedent's estate.

27
28 The kinds of death benefits included in a gross estate depends upon the particular estate tax to
29 be apportioned and may not be the same for each tax. For example, some State death taxes will
30 have an exemption for a homestead; some will exclude life insurance proceeds and pensions. In
31 determining the gross estate for such taxes, the property excluded from the tax will also be
32 excluded from the gross estate for that tax. Property that is deductible under an estate tax, such as
33 property that qualifies for a marital or charitable deduction, is nevertheless "subject to" that tax
34 and included in the gross estate. Once the value of the gross estate for an estate tax is determined,
35 the reductions described in Subsection (1) are applied to ascertain the apportionable estate.

36
37 A "time-limited interest" includes a term of years, a life interest, a life income interest, an
38 annuity interest, an interest that is subject to a power of transfer, a unitrust interest, and similar
39 interests, whether present or future, and whether held alone or in cotenancy. The fact that an
40 interest that otherwise is not a time-limited interest is held in cotenancy does not make it a time-
41 limited interest.

42
43 If a debt is secured by more than one interest in property, the value of each such interest is the
44 fair market value of that interest less a ratable portion of the debt that it secures.

45
46 If the beneficiary of an interest in property is required by the terms of the transfer to make a
47 payment to a third party or to pay a liability of the transferor, that obligation constitutes an
48 encumbrance on the property for purposes of this subsection, but does not necessarily reduce the
49 value of the apportionable estate. If the obligation is to make a transfer or payment to a third
50 party, other than an obligation to satisfy a debt of the decedent that is based on money or money
51 worth's consideration, the right of the third person to that payment constitutes an interest in the
52 apportionable estate and so is subject to apportionment.

1 A decedent's direction by will or other dispositive instrument that property controlled by that
2 instrument is to be used to pay a debt secured by an interest in property is an additional bequest
3 to the person who is to receive the interest securing the debt.
4

5 Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the
6 property or payable by the recipient of the property, do not reduce the value of the property for
7 purposes of apportioning estate taxes by this Act.
8

9 The date on which gross estate property is to be valued for federal estate tax purposes (and
10 for some other estate tax purposes) is either the date of the decedent's death or an alternate
11 valuation date elected by the decedent's personal representative pursuant to the estate tax law. An
12 estate tax value that is determined on the alternate valuation date is not, as such, a "special
13 valuation adjustment." A "special valuation adjustment" refers to a reduction of the valuation of
14 an item included in the gross estate pursuant to a provision of the estate tax law. See the
15 Comment to Section 7.
16

17 If a person has a right by contract or by the decedent's will or other dispositive instrument to
18 purchase gross estate property at a price below its estate tax value, the estate tax value of the
19 property is the amount included in the value of the decedent's gross estate. The difference or
20 discount between the purchase price and the estate tax value of the property can be viewed as an
21 interest which the decedent passed to that person. If the right to purchase is exercised, the amount
22 of the discount is the value of that person's interest in the apportionable estate.
23

24 The value of a person's interest in the apportionable estate can depend upon the value of the
25 apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the
26 amount of allowable deductions which, under this Act, reduce the apportionable estate, but will
27 not be reduced by expenditures that are not allowable deductions for that estate tax. The formula
28 for allocating estate taxes in Section 4(a) utilizes a fraction of which the numerator is the value of
29 a person's interest in the apportionable estate rather than the value of the person's interest in the
30 net estate or in the taxable estate. Since the denominator of the fraction is the value of the
31 apportionable estate, the sum of the numerators of all persons having an interest in the
32 apportionable estate will equal the denominator, and so 100% of the estate taxes will be
33 apportioned. Consider the following examples.
34

35 Ex. (1) D dies leaving a gross estate with a value of \$10,150,000 and makes no provision for
36 apportionment of taxes. D's will makes pecuniary devises totaling \$1,000,000, and gives the
37 residue to A and B equally. There are no claims against the estate and no marital or charitable
38 deductions are allowable. The funeral expenses are \$10,000, and the estate incurs administrative
39 expenses of \$140,000, all of which are allowable as federal estate tax deductions. The personal
40 representative elects to claim the administrative expenses as federal income tax deductions rather
41 than as estate tax deductions. Nevertheless, those expenses are allowable as estate tax deductions
42 and so reduce the gross estate in determining the apportionable estate. For purposes of the federal
43 estate tax, the apportionable estate is \$10,000,000 of which the residuary beneficiaries together
44 have interests valued at \$9,000,000 or 90%. The value of the two residuary beneficiaries'
45 interests in the apportionable estate is equal to the difference between the entire apportionable
46 estate of \$10,000,000 and the \$1,000,000 that was devised to the pecuniary beneficiaries. So, for
47 purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the
48 apportionable estate valued at \$4,500,000, which constitutes 45% of the apportionable estate of
49 \$10,000,000. Forty-five percent of the federal estate taxes are apportioned each to A and B, and
50 10% of the federal estate taxes are apportioned to the pecuniary beneficiaries.
51

52 Ex. (2) The same facts as those stated in Ex. (1) except that the administrative expenses total

1 \$240,000 of which, while all were allowed as administrative expenses by the State probate court,
2 \$100,000 was disallowed by the Service for a federal estate tax deduction on the ground that
3 \$100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul.
4 77-461 and TAM 7912006. The personal representative elected to deduct the remaining
5 \$140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax
6 purposes, the apportionable estate is equal to the difference between the gross estate
7 (\$10,150,000) and the allowable deductions of \$150,000 (\$140,000 deductible administrative
8 expenses and \$10,000 deductible funeral expenses); and so the apportionable estate is
9 \$10,000,000. As noted in Ex. (1), the value of the two residuary beneficiaries interests in the
10 apportionable estate is equal to the difference between the entire apportionable estate of
11 \$10,000,000 and the \$1,000,000 that was devised to the pecuniary beneficiaries. While the
12 residuary beneficiaries will not receive any part of the \$100,000 of administrative expenses for
13 which no federal estate tax deduction is allowable, that expense does not reduce the gross estate
14 in determining the apportionable estate, and so does not affect the value of their residuary
15 interests for the purpose of apportioning the federal estate tax. So, just as was true in Ex. (1), for
16 purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the
17 apportionable estate valued at \$4,500,000, which constitutes 45% of the apportionable estate of
18 \$10,000,000. Forty-five percent of the federal estate taxes are apportioned each to A and B, and
19 10% of the federal estate taxes are apportioned to the pecuniary beneficiaries.

20
21
22 **SECTION 3. APPORTIONMENT BY WILL OR OTHER DISPOSITIVE**
23 **INSTRUMENT.**

24 (a) To the extent that a provision of a decedent's will expressly directs or precludes the
25 apportionment of an estate tax, the tax must be so apportioned.

26 (b) Any portion of an estate tax not apportioned pursuant to subsection (a) must be
27 apportioned in accordance with any provision of a revocable trust of which the decedent was the
28 settlor which expressly directs or precludes the apportionment of an estate tax. If conflicting
29 apportionment provisions appear in two or more revocable trust instruments, the provision in the
30 most recently dated instrument prevails. For purposes of this subsection:

31 (1) a revocable trust is a trust that was revocable immediately after the trust
32 instrument was executed, even if the trust subsequently becomes irrevocable; and

33 (2) the date of an amendment to a revocable trust instrument is the date of the
34 amended instrument only if the amendment contains an apportionment provision.

35 (c) If any portion of an estate tax is not apportioned pursuant to subsection (a) or (b), a
36 provision in a dispositive instrument which expressly directs that any of the property disposed of

1 by the instrument is or is not to be applied to the payment of the estate tax attributable to the
2 property disposed of by the instrument controls the apportionment of the estate tax to that
3 property.

4 (d) If a decedent gives a direction valid under subsection (a), (b), or (c) that a person
5 receiving an interest under an instrument is to be exonerated from the responsibility to pay an
6 estate tax that would otherwise be apportioned to the interest, absent express language to the
7 contrary, the tax attributable to the exonerated interest must be apportioned among the other
8 persons receiving interests passing under the instrument or, if the values of the other interests are
9 less than the tax attributable to the exonerated interest, the deficiency must be apportioned
10 ratably among the other persons receiving interests in the apportionable estate that are not
11 exonerated from apportionment of the tax.

12 (e) If, pursuant to subsection (a),(b), (c), or (d), a decedent gives a valid direction that an
13 estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital
14 or charitable deduction, unless the decedent's direction expressly provides that the tax be
15 apportioned among holders of the deductible portion of the interest, the estate tax must first be
16 apportioned ratably among the holders of the portion that does not qualify for a marital or
17 charitable deduction and then apportioned ratably among the holders of the deductible portion to
18 the extent that the value of the nondeductible portion is insufficient.

19 (f) Unless the decedent's direction expressly provides otherwise, except as otherwise
20 provided in subsection (g), if a direction valid under subsection (a), (b), (c), or (d) requires that
21 an estate tax be paid from an interest in property in which there are one or more time-limited
22 interests, the tax must be paid from the principal of that property, regardless of the deductibility
23 of some of the interests in that property.

24 (g) If, pursuant to subsection (a),(b),(c),(d),(e), or (f), a decedent directs that an estate tax
25 is to be apportioned to the holders of interests in property in which one or more time-limited
26 interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable

1 deduction, unless the decedent's direction expressly provides otherwise, the payment of the tax
2 must first be made, to the extent feasible, from property that has not been distributed to the
3 person entitled to receive that property.

4 (h) A decedent's direction that apportions an estate tax is invalid to the extent that it
5 increases the tax apportioned to a person having an interest in the gross estate over which the
6 decedent had no power to transfer immediately before the decedent executed the instrument in
7 which the apportionment direction was made. For purposes of this subsection, the possession of
8 a testamentary power of appointment is a power to transfer the property that is subject to that
9 power.

10 Preliminary Comments

11
12 A decedent's direction will not control the apportionment of taxes unless it explicitly refers to
13 the payment of an estate tax and is specific and unambiguous as to the direction it makes for that
14 payment. For example, a testamentary direction that "all debts and expenses of and claims
15 against me or my estate are to be paid out of the residuary of my probate estate" is not an express
16 direction for the payment of estate taxes and will not control apportionment. While an estate tax
17 is a claim against the estate, a will's direction for payment of claims that does not explicitly
18 mention estate taxes is likely to be a boiler plate that was written with no intention of controlling
19 tax apportionment. To protect against an inadvertent inclusion of estate tax payment in a general
20 provision of that nature, the Act requires that the direction explicitly mention estate taxes by
21 name.

22
23 On the other hand, a direction that "all taxes arising as a result of my death, whether
24 attributable to assets passing under this will or otherwise, be paid out of the residue of my
25 probate estate" satisfies the Act's requirement for an explicit mention of estate taxes and is
26 specific and unambiguous as to what properties are to bear the payment of those taxes.

27
28 Whether other directions of a decedent that explicitly mention estate taxes comply with the
29 Act's requirement that they be specific and unambiguous is a matter for judicial construction. For
30 example, there is a split among judicial decisions as to whether a direction such as "all estate
31 taxes be paid out of the residue of my estate" is ambiguous because it is unclear whether it is
32 intended to apply to taxes attributable to nonprobate assets. The Act fills the gap for the
33 apportionment of estate taxes to the extent that a decedent fails to do so, but the Act is not
34 designed to provide rules of construction for resolving ambiguities. To the extent that it is
35 determined that a decedent failed to apportion an estate tax, then the Act will apply to apportion
36 that amount of the tax.

37
38 The term "will" is defined in Section 1-201(55) of the Uniform Probate Code.

39
40 If an amendment is made to a revocable trust instrument, and if the amendment itself contains
41 an express provision apportioning an estate tax, the date of the amendment is the date of the
42 revocable trust instrument. However, if an amendment to a revocable trust instrument does not
43 contain an express provision apportioning an estate tax, the date of the revocable trust instrument

1 is the date on which it was executed or the date of the most recent amendment containing an
2 express provision apportioning an estate tax. An express provision apportioning an estate tax
3 includes a provision directing that payment of an estate tax be made from specified property.
4

5 The statutory apportionment rules of the Act are default rules applicable to the extent that the
6 decedent does not make a valid provision as to how estate taxes are to be apportioned. The
7 decedent has the power to determine which recipients of decedent's property will bear the estate
8 taxes and in what proportion. If provisions conflict, it is necessary to determine which prevails. A
9 possible choice would permit the directions in each of the decedent's instruments determine the
10 extent to which property controlled by that instrument bears a share of estate taxes, but having
11 the provisions for an allocation scheme scattered among a number of documents would make
12 decedent's personal representative search multiple instruments to ascertain the decedent's
13 directions. Instead, the Act provides an order of priority for a decedent's provisions for estate tax
14 allocations. To the extent that a decedent makes an express provision by will, that provision will
15 trump any competing provision in another instrument. To the extent that the will does not
16 expressly provide for the allocation of some estate taxes, an express provision in a revocable trust
17 instrument will control. If the decedent executed more than one revocable trust instrument, the
18 express provisions in the instrument that was executed most recently will control. In determining
19 which revocable trust instrument was executed most recently, the date of any amendment
20 containing an express apportionment provision will be taken into account. In the event that the
21 allocation of estate taxes is not fully provided for by the decedent's will or revocable trust
22 instrument, an express provision in other instruments executed by the decedent controls to the
23 extent that the provision applies to the property disposed of in that instrument. An example of a
24 provision in an instrument disposing of property, other than a will or revocable trust instrument,
25 is a provision in a designation of a beneficiary of life insurance proceeds either that the proceeds
26 will or will not be used to pay a portion of estate taxes. A designation of that form will be
27 honored if there is no conflicting provision in a will or revocable trust instrument.
28

29 A provision in decedent's will, revocable trust, or other instrument will not be honored to the
30 extent that it would contravene Section 3(h).
31

32 The exclusivity of the provisions of Section 3 apply only to apportionment rules; they do not
33 prevent a dispositive instrument from making additional gifts; nor do they prevent a governing
34 instrument of an entity from rearranging the internal division of the assets of that entity.
35

36 Ex.(1). On D's death, her will apportioned \$100,000 of estate taxes to the holders of interests
37 in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is
38 divided into two separate shares: the William Share, and the Franklin Share, each of which is for
39 a different child of D. The trust instrument provides that any taxes apportioned to the holders of
40 interests in the trust or to any share of the trust are to be paid from the William Share. The effect
41 of that trust provision is to require that taxes reduce the size of the William Share and do not
42 reduce the Franklin Share. The apportionment provision in D's will established the source from
43 which D's personal representative can obtain the funds to pay the estate tax. The amount
44 apportioned to the D Family Trust makes all of the assets of that trust liable for that amount.
45 Since the trust instrument of the D Family Trust can shift trust assets from one share of the trust
46 to another, the direction in the trust to require the William share to bear the entirety of the tax
47 cost is valid as a trust provision shifting trust assets from the William Share to the Franklin
48 Share.
49

50 Ex. (2). The same facts as those stated in Ex. (1) except that D's will apportioned the
51 \$100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing
52 the burden of the tax on the William Share is valid as a provision shifting trust assets from the

1 William Share to the Trust Share.

2
3 The federal estate tax laws enable a decedent's personal representative to collect a portion of
4 the decedent's federal estate tax from the recipients of certain nonprobate property that is
5 included in the decedent's gross estate. See e.g., " 2206 to 2207B of the Internal Revenue Code.
6 There is a conflict among the courts as to whether those federal provisions preempt a State law
7 apportionment provision. Choosing the position that there is no federal preemption, the Act
8 apportions taxes without regard to the federal provisions. The federal provisions are not
9 apportionment statutes; rather, they simply empower the personal representative to collect a
10 portion of the estate tax that is attributable to the property included in the decedent's gross estate
11 and do not direct use of the collected amounts by the personal representative. The rights granted
12 to the personal representative by federal law for the collection of assets from nonprobate
13 beneficiaries do not conflict either with the apportionment of taxes by State law or with other
14 rights of collection granted by State law. For that reason, this Act does not include a direction as
15 to whether federal or State law takes priority when they are in conflict.

16
17 The Act does not permit anyone other than the decedent to override the allocation provisions
18 of the Act. For example, if X created a QTIP trust for Y, the value of the trust assets will be
19 included in Y's gross estate for federal estate tax purposes on Y's death. See ' 2044 of the
20 Internal Revenue Code of 1986. If X's QTIP trust provided that the trust is not to bear any of the
21 estate taxes imposed at Y's death, the direction would be ineffective under the Act because only
22 Y can direct apportionment of taxes on Y's estate. In this regard, it is noteworthy that the right
23 granted to a decedent's estate by ' 2207A of the Internal Revenue Code to collect a share of the
24 federal estate tax from a QTIP included in the decedent's gross estate can be waived only by
25 direction of the decedent in a will or revocable trust instrument. Y is in the best position to
26 determine the optimum allocation of Y's estate taxes among the various assets that comprise Y's
27 gross estate. If Y fails to make an allocation, the default provisions of the Act are more likely to
28 reflect Y's intentions than would a direction of a third person.

29
30 If an instrument transferring property that may be included in the taxable estate of someone
31 other than the transferor directs payment from the transferred property of any part of the estate
32 taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather
33 than an apportionment provision. For example, X creates two trusts, Trust 1 and Trust 2, of
34 which Y is the income beneficiary. Under ' 2044 of the Internal Revenue Code of 1986, both
35 trusts will be included in Y's gross estate for federal estate tax purposes when Y dies. The trust
36 instrument that created Trust 2 provides that on Y's death, the assets of Trust 2 will be used to
37 pay Y's estate taxes that are attributable both to Trust 1 and Trust 2. That provision does not
38 place the burden of taxes attributable to Trust 2 on some other property. Instead, it constitutes a
39 direction of how the assets of Trust 2 are to be distributed or utilized. The provision for the
40 application of Trust 2's assets to pay taxes attributable to Trust 1 does not contravene this Act. If
41 the provision is valid under trust law, the taxes attributable to Trust 1 and Trust 2 should be paid
42 from the assets of Trust 2 as the trust instrument directs. The holders of interests in Trust 1 are
43 beneficiaries of Trust 2 to the extent that the taxes that the beneficiaries of Trust 1 would
44 otherwise have borne are paid out of assets of Trust 2.

45
46 If a decedent makes a valid direction that a person receiving property under a particular
47 disposition is exonerated from payment of an estate tax, the tax that would have been borne by
48 that person will, instead, be borne by other persons receiving interests under the instrument
49 directing the exoneration. Thus, if several assets are disposed of by a governing instrument,
50 which exonerates one or more of those assets from bearing an estate tax, the exoneration will
51 not reduce the amount of estate tax to be allocated to all of the assets disposed of by that

1 instrument, including the exonerated assets. For example, if decedent's will directs that all
2 federal estate taxes attributable to decedent's probate estate be paid from the residuary of his
3 estate, the exoneration of the pre-residuary devise will not affect the total amount of federal
4 estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by
5 the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is
6 insufficient to pay the estate taxes, the difference will be payable by other persons receiving
7 interests in the apportionable estate that are not exonerated from apportionment of the tax.

8
9 If a decedent directs that estate taxes be paid from properties, some of which qualify for a
10 marital or charitable deduction, the provision making that direction may designate the extent to
11 which the charitable or marital interests will or will not bear a portion of the tax. If the decedent
12 makes no provision as to whether the marital or charitable interests bear a portion of the tax, the
13 Act provides a default rule that exempts the marital or charitable interests from payment of the
14 tax to the extent that it is feasible to do so. The default rule maximizes the size of the marital or
15 charitable deduction and thus maximizes the size of the distributable estate. An example of when
16 this circumstance arises is when the decedent's will makes a residuary devise, a portion of which
17 qualifies for a marital or charitable deduction and a portion of which does not. If the decedent
18 provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default
19 provision of the Act will require the payment to be made first from the nondeductible interests in
20 the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in
21 property in which there is a time-limited interest; the tax allocated to any interest in that property
22 is to be paid from the principal of the property unless the decedent expressly directed otherwise.

23
24 If a decedent created a trust during life the value of which is included in the decedent's gross
25 estate at death, if immediately after decedent's death, there were one or more time-limited
26 interests in the trust that did not qualify for an estate tax deduction, and if one or more charities
27 held a remainder interest in the trust that otherwise qualified for an estate tax charitable
28 deduction, the charitable deduction for the remainder interests may be lost if the estate taxes
29 generated by the nondeductible time-limited interests are to be paid from assets in the trust. See
30 Rev. Rul. 82-128, Rev. Proc. 90-30 (" 4 and 5), and Rev. Proc. 90-31 (" 5 and 6). It is possible
31 that if the payment of an estate tax is made from funds that, while directed to be added to the
32 trust's assets, had not been distributed to the trust before payment of the estate tax, the payment
33 will not disqualify the charitable deduction. There are numerous instances in which estate taxes
34 are required to be paid from a charitable remainder trust that was created inter vivos. Subsection
35 (g) is an attempt to protect the deduction in such cases by establishing a rule of construction
36 requiring that funds directed to be added to the trust be used to pay any required estate tax before
37 assets already in the trust itself are used. It seems unlikely that a decedent would wish to negate
38 this construction of decedent's direction, but the decedent has the power to do so by including an
39 express statement to that effect in a will or revocable trust instrument.

40
41 If a decedent had made an irrevocable transfer during his life, and if that transfer is included
42 in the decedent's gross estate for estate tax purposes, a portion of the estate tax will be
43 apportioned to the transferee unless the decedent effectively provides otherwise in a will,
44 revocable trust or other instrument. While, by an express provision in the appropriate
45 instrument, a decedent can reduce the amount of tax apportioned to such inter vivos transfers,
46 the decedent is not permitted to increase the amount of tax apportioned to such a transferee. If a
47 decedent attempts to do so, whether directly by apportioning more estate tax to the inter vivos
48 transfer or indirectly by insulating some person interested in the gross estate from all or part of
49 that person's share of the estate tax, the amount of estate tax that is apportioned to the transferee
50 of an irrevocable inter vivos transfer will not be greater than the amount that would have been
51 apportioned to that transferee if the decedent had made no provision for apportionment in

1 another instrument.

2
3 This subsection (h) does not apply to a decedent's provision that no estate tax be
4 apportioned to the recipient of an interest who would be excluded from apportionment by this
5 Act in the absence of a contrary direction by the decedent. For example, a decedent's provision
6 that no estate tax be apportioned to the recipient of property that qualifies for a marital or
7 charitable deduction is not subject to this subsection.

8
9 If a decedent transferred property to a revocable trust prior to executing a will that directs
10 the apportionment of taxes to that trust, the apportionment direction will be valid even if the
11 decedent subsequently released the power of revocation so that the trust became irrevocable
12 prior to the decedent's death. In such a case, Section 3(h) does not invalidate the will's
13 direction.

14
15 If, immediately before the decedent's death, the decedent had a general power of appointment,
16 whether inter vivos or testamentary, the decedent had the power to transfer the property interest
17 within the meaning of this provision.

18
19
20
21
22 **SECTION 4. STATUTORY APPORTIONMENT OF ESTATE TAXES.** To the extent

23 that apportionment of an estate tax is not controlled by an instrument described in Section 3 and
24 except as otherwise provided in Sections 6 and 7, the following rules apply:

25 (1) Subject to paragraphs (2),(3),and(4), the estate tax is apportioned ratably to each
26 person that has an interest in the apportionable estate.

27 (2) A generation-skipping transfer tax incurred on a direct skip is charged to the person to
28 which the interest in property is transferred.

29 (3) If property is included in the decedent's gross estate because of Section 2044 of the
30 Internal Revenue Code of 1986 or any comparable estate tax provision, the difference between the
31 total estate tax for which the decedent's estate is liable and the amount of estate tax for which the
32 decedent's estate would have been liable if the property had not been included in the decedent's
33 gross estate is apportioned ratably among the holders of interests in the property. The balance of
34 the tax, if any, is apportioned ratably to each other person who has an interest in the apportionable
35 estate.

36 (4) Except as otherwise provided in Section 3(g), an estate tax apportioned to persons

1 holding interests in property subject to a time-limited interest must be paid, without further
2 apportionment, from the principal of that property.

3 Preliminary Comments

4
5 The value of an interest in the apportionable estate is determined in accordance with Section
6 2(7) of the Act. The Comment to Section 2 contains two examples illustrating how this subsection
7 operates.

8
9 Properties whose values are subtracted from the decedent's gross estate in determining the
10 apportionable estate under Section 2(1) are excluded from the apportionable estate, and
11 beneficiaries of those properties do not have any estate tax apportioned to them because of their
12 interest in those properties. This treatment is consistent with the position taken in Restatement
13 (Third) of Property: Wills and Other Donative Transfers '1.1, comment g (1998). While the Act
14 does adopt a method of equitable apportionment of estate taxes, the Act does not adopt the
15 method utilized by the Restatement, which allocates taxes apportioned to the probate estate first to
16 the residuary beneficiaries.

17
18 A "direct skip" currently is defined in Sections 2612(c) and 2613 of the Internal Revenue
19 Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the
20 governing instrument, the tax on a generation-skipping transfer is charged to the property
21 constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of
22 paying the tax on a direct skip on the transferor of the property. Under subsection (b), the
23 decedent's personal representative will pay the generation-skipping tax on a direct skip out of the
24 transferred property (or the proceeds from a sale of all or some of that property). To the extent that
25 it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay
26 their proportionate share of the shortfall. Subsection (b) is consistent with the treatment provided
27 by federal law.

28
29 The property to which subsection (c) applies is sometimes referred to as "QTIP property"
30 since ' 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable interest
31 property," commonly referred to as "QTIP property." See " 2044(b)(1), 2056(b)(7), and 2523(f)
32 of the Internal Revenue Code of 1986. Although the general rule of apportionment in the Act is to
33 apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of
34 interests in QTIP property by the Act is based on the marginal rate of tax. Note that federal estate
35 tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property
36 the estate tax generated by that property at the marginal estate tax rate of the decedent's estate.
37 The Act tracks the federal law in this respect.

38
39 It would be harsh to collect the estate from persons holding discretionary or contingent
40 interests in property since they may not obtain possession for many years, if at all. Hence, when
41 the tax is apportioned to persons holding interests in property in which there are time-limited
42 interests, subsection (d) requires the tax to be paid from principal.

43
44 If an estate tax is apportioned to a person having an interest in property that cannot be reached
45 because of legal or practical obstacles but is not subject to a time-limited interest, the tax is to be
46 collected from that person to the extent feasible. In that circumstance, because there is no time-
47 limited interest, the tax will not be apportioned to a person who may not receive property for
48 many years or who, in the case of a conditional interest, may never receive any property.

49
50 When some of the interests in property qualify for a charitable or marital deduction and some

do not, requiring the tax to be paid from the principal of the property may reduce the amount of marital or charitable deduction that is allowable. Although the likely intent of a decedent would be to maximize the marital and charitable deductions available for the estate, the Act provides that the estate tax is to be paid from the principal of the property, a choice that avoids administrative complexity.

SECTION 5. CREDITS, AND DEFERRALS. Except as otherwise provided in Sections 6

and 7, the following rules apply to credits and deferrals of estate taxes:

(1) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(2) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of that beneficiary.

(3) If payment of any part of an estate tax is deferred or extended because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral or extension inures ratably to the persons to which the estate tax attributable to the interest is apportioned; and the burden of any interest charges incurred on a deferral or extension of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

Preliminary Comments

Section 2013 of the Internal Revenue Code of 1986 allows a credit for federal estate taxes paid on certain properties that were included in the taxable estate of a person who died within a relatively short time of the decedent's death. This credit often is referred to as a credit for property previously taxed.

A beneficiary of property attracting a foreign or State death tax may have paid that tax directly or may have paid it indirectly by virtue of the tax's being paid out of the property passing to that person. If that occurs, while the beneficiary's payment of the foreign or State tax reduces the amount that the beneficiary will receive, it will not reduce the value of the beneficiary's interest in the apportionable estate according to the definition of "value" in this Act. See Section 2(6). The Act mitigates the beneficiary's burden by giving the beneficiary the benefit of any estate tax credit allowed for the foreign or State tax and paid by the beneficiary.

The benefits and burdens described in subsection (c) are to be allocated ratably among persons

1 in accordance with the amount of deferral or extension attributable to their interests in the
2 apportionable estate.

3
4
5
6 **SECTION 6. ADVANCEMENT OF TAX APPORTIONED TO PERSONS WHO HAVE**
7 **INTERESTS IN INSULATED PROPERTY.**

8 (a) In this section:

9 (1) “Advanced fraction” is a fraction that has as its numerator the amount of the
10 advanced tax and as its denominator the value of the interests in insulated property to which that
11 tax is attributable.

12 (2) “Advanced tax” means the aggregate amount of estate tax attributable to interests
13 in insulated property which is required to be advanced by uninsulated holders under subsection
14 (c).

15 (3) “Insulated property” means property subject to a time-limited interest which is
16 included in the apportionable estate but is unavailable for payment of an estate tax because
17 collection is impossible or impracticable.

18 (4) “Uninsulated holder” means a person who has an interest in uninsulated property.

19 (5) “Uninsulated property” means property included in the apportionable estate other
20 than insulated property.

21 (b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests
22 in uninsulated property subject to a time-limited interest, the tax must be paid or advanced,
23 without further apportionment, from the principal of the uninsulated property.

24 (c) Subject to Section 9(b) and in the absence of a contrary determination pursuant to
25 subsection (e), an estate tax attributable to interests in insulated property must be advanced ratably
26 by uninsulated holders. If the value of an interest in uninsulated property is less than the amount
27 of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency
28 must be advanced ratably by the persons holding interests in properties that are excluded from the

1 apportionable estate under Section 2(1)(B) as if those interests were in uninsulated property.

2 (d) When a distribution of insulated property is made, each uninsulated holder may
3 recover from the distributee a ratable portion of the advanced fraction of the distribution. To the
4 extent that undistributed insulated property ceases to be insulated, each uninsulated holder may
5 recover from the property a ratable portion of the advanced fraction of the total undistributed
6 property.

7 (e) A court having jurisdiction to determine the apportionment of an estate tax may require
8 a beneficiary of an interest in insulated property to pay all or part of the estate tax attributable to
9 the interest if the court finds that it would be substantially more equitable for that beneficiary to
10 bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

11 (f) Upon a distribution of insulated property for which, pursuant to subsection (d), the
12 distributee becomes obligated to make a payment to uninsulated holders, a court having
13 jurisdiction is authorized to grant the request of an uninsulated holder for a recordable lien on the
14 distributee's property to secure the distributee's obligation to that uninsulated holder.

15 Preliminary Comments

16
17 The term "time-limited interest" is defined in Section 2(6).

18
19 Subsection (b) applies to property in which at least one person has a time-limited interest and
20 which property can be reached by the personal representative of the decedent. In such cases, an
21 estate tax that is payable as an advanced tax under subsection (c), is charged against the principal
22 of the property, and is not apportioned among the several interests in that property. While there is
23 no express apportionment of the advanced tax to the time-limited interests in the property, the
24 holders of the time-limited interests will bear a share of the tax burden in that the resulting
25 reduction of the value of the principal will reduce the value of the time-limited interests, except
26 that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity
27 interest will be exonerated from sharing in the burden of estate taxes.

28
29 Since the estate tax apportioned to the owners of insulated property cannot be collected from
30 the property, the tax is to be paid (as an advancement) by persons having interests in other assets
31 of the estate (uninsulated holders), provided however that the total tax attributed to and advanced
32 by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated
33 property. See Section 9(b). If the amount of the aggregate tax apportioned to and to be advanced
34 by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property,
35 then the deficiency shall be apportioned to the holders of interests in properties that otherwise are
36 excluded from apportionment. In such cases, those properties are reclassified as uninsulated
37 properties, and so the beneficiaries of those properties will be uninsulated holders who will have a
38 right of recovery from the distributees of insulated properties for which they paid a portion of the

1 estate tax.

2
3 If advancements are required of persons holding interests in properties that are excluded from
4 the apportionable estate, there is an order of priority for payment. Advancements are first required
5 of beneficiaries of nondeductible interests, which typically are non-marital and non-charitable
6 interests. Only if those properties are insufficient will advancements be required of marital or
7 charitable beneficiaries whose interests qualify for a deduction. This order of priority is designed
8 to maximize estate tax deductions. Advancement may be repaid when the insulated property is
9 distributed, but the estate tax that might be lost because of the loss of a deduction due to
10 advancements being required to be made by marital or charitable beneficiaries can never be
11 restored.

12
13 It would be harsh to make persons holding future interests in insulated property pay tax on
14 properties that they will not receive until years later and may never receive. If they were required
15 to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of
16 interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that
17 reason, with one exception noted below, the tax attributable to insulated properties is reallocated
18 to uninsured holders who are required to advance the funds to pay the tax.

19
20 However, in certain circumstances, it would be more equitable to require the beneficiary of an
21 interest in insulated property to bear the tax on that interest than to reapportion it to others. For
22 example, if the beneficiary's interest is one that will become possessory in a short period of time,
23 so that the beneficiary will soon have possession of assets from the fund or trust, it would be more
24 equitable to place personal liability on that beneficiary; and the court has discretion to do so. In
25 determining whether a beneficiary is likely to obtain possession of all or a significant part of the
26 beneficiary's interest in the insulated property, the court can consider not only distributions that
27 are required to be made to the beneficiary, but also distributions that, based on an examination of
28 the history of the administration of the fund or trust, are likely to be made in the near future.
29 Subsection (e) provides the court with the discretion to make that determination. While a
30 beneficiary's receipt of a distribution from the trust or fund would make that beneficiary liable to
31 uninsured holders who paid the advanced tax, that places a burden of collection on the
32 uninsured holders; and so, when the distribution is likely to be made to a beneficiary within a
33 short period of time, it would be more equitable to have that beneficiary bear the tax.

34
35 The tax attributable to the insulated property that is required to be paid by the uninsured
36 holders is referred to as an "advanced tax." To permit the uninsured holders who bear the
37 advanced tax to be reimbursed, the Act effectively provides the uninsured holders with a
38 phantom percentage interest in the property whose transfer is the source of the advanced tax.
39 While the phantom percentage interest of the uninsured holder remains constant, its value will
40 increase or decrease as the value of the property changes. The phantom percentage interest is
41 determined by dividing the advanced tax by the aggregate value of insulated properties as
42 determined for purposes of the estate tax. When a distribution of insulated property is made, a
43 percentage of that distribution must be paid over to the uninsured holders; and this is a personal
44 obligation of the distributee. The uninsured holders have a right of reimbursement from the
45 distributees under Section 10, but this subsection gives them a right to an amount determined by a
46 fraction of the distributed amount rather than as a fixed dollar amount plus interest. The amount
47 collected from a distributee is divided among the uninsured holders according to the percentage
48 of the advanced tax that they paid.

49
50 It is important to note that the uninsured holders do not have an actual interest in the
51 insulated property and have no lien or security interest in that property while it is in the possession
52 of the trust or fund. The uninsured holders only have a claim against the persons who receive

1 distributions from the trust or fund which holds the insulated property. The only exception is
2 where previously insulated property loses its insulation so that it can be reached by the
3 uninsured holders without violating any prohibition against alienation of interests. Once
4 insulated property is in the hands of a distributee, subsection (f) permits the uninsured holders to
5 request a court to grant them a lien on the distributee's property for the amount owed to them
6 under this subsection; but there is no lien or other encumbrance on the insulated property while it
7 is in the possession of the trust or fund.

8
9 The operation of this Section is illustrated in the following examples.

10
11 Ex. (1) X dies having a gross estate and an apportionable estate of \$10M and devises his
12 probate property (with a value of \$8M) to A, B and C, with A and B each receiving 40% of the
13 probate estate, and C receiving 20%. In addition to the probate property, X had an interest in a
14 nonqualified pension plan at his death which interest had a value of \$2M. X's contract with the
15 plan provides that an annuity of \$120,000 per year is to be paid to G for life, and upon G's death
16 the remainder of the corpus is to be paid to L. The only estate tax to which X's estate is subject is
17 the federal estate tax. The federal estate tax on X's \$10M gross estate is \$4M. So, the average rate
18 of the estate tax is 40%. Under Section 4(a) of the Act, the estate tax that is attributable to the
19 \$2M pension fund is \$800,000 -- the value of the property interests that G and L hold in the fund
20 (\$2M) is 20% of the \$10M value of the entire apportionable estate, and so 20% of the ~~\$2M~~ \$4M
21 estate tax is attributable to the pension fund. Assume that under local law, the assets of the
22 pension fund cannot be reached by creditors or by the personal representative of X's estate in
23 order to use those funds to pay estate taxes. Under Section 6(c), the personal representative will
24 collect 40% of the \$800,000 (i.e., \$320,000) from A and a like amount from B; and the personal
25 representative will collect \$160,000 from C.

26
27 The advanced fraction for the pension fund is \$800,000 (the amount of the estate tax that was
28 advanced by A, B, and C) divided by the \$2M value of the fund (the insulated property), which
29 division results in a percentage of 40%. Putting it differently, the \$800,000 estate tax attributable
30 to the fund but not paid by those interested in the fund constitutes 40% of the \$2M value of the
31 fund. To compensate A, B and C for paying the advanced tax, they obtain what amounts to a 40%
32 phantom interest in the fund. Their actual interest arises only when distributions are made from
33 the fund or, in the event that the fund loses its insulation from creditors, when that occurs.

34
35 In Year One, the fund pays \$120,000 to G pursuant to the terms of the contract. Forty percent
36 of that distribution (\$48,000) must be paid by G to A, B and C -- 40% or \$19,200 payable to A
37 and another \$19,200 payable to B, and 20% or \$9,600 payable to C, since that is the proportion in
38 which they bore the advanced tax. The next year, the fund distributes another \$120,000 to G, and
39 the same payments must be made to A, B and C. In the third year, G dies, and the fund distributes
40 the remaining principal of \$2,400,000 to L; the value of the principal had increased because of an
41 increase in the value of the investments the fund held. A, B, and C are entitled to 40% of that
42 \$2,400,000, and so L must pay them \$960,000, to be divided among them. A and B will each
43 receive \$384,000 (40% of the \$960,000), and C will receive \$192,000 (20% of \$960,000).

44
45 Ex. (2) X dies leaving a taxable estate of \$10,000,000 on which a federal estate tax of
46 \$5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a
47 tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left \$4,000,000
48 of assets in an offshore trust that cannot be reached by X's personal representative and so
49 constitutes insulated property. The federal estate tax attributable to that property is \$2,000,000. X
50 had nonprobate assets having an aggregate value of \$2,000,000 and a residuary estate of
51 \$4,000,000. The holders of the nonprobate assets will have \$1,000,000 in federal estate taxes
52 apportioned to them, and the holders of the residuary interests will have \$2,000,000 of federal

1 estate taxes attributed to them. But, the personal representative must also pay the \$2,000,000 of
2 federal estate taxes attributable to the offshore assets. If the holders of interests in those assets
3 cannot be reached, and if the Act did not apply, the personal representative would have to pay the
4 \$2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the Act, 1/3
5 of the \$2,000,000 of federal estate tax attributable to the offshore assets (\$666,667) will be paid
6 by the holders of the nonprobate assets, and the remaining \$1,333,333 of that tax will be paid by
7 the beneficiaries of the residuary estate. Under the Act, the holders of the nonprobate assets will
8 have to bear their proportionate share of the tax on the offshore assets. When distributions are
9 made of the offshore assets, the distributees will be personally liable to pay a portion of their
10 distribution to the persons who paid the estate tax on the offshore fund.

11
12 In Sections 4(d) and 6(b), under which an apportioned or advanced estate tax is collected from
13 the principal of the property or funds, the holders of time-limited interests, other than a fixed
14 dollar annuity interest, will bear a share of that tax. The reduction of the principal will result in a
15 smaller amount of income payable to income beneficiaries, and a smaller amount of payment to a
16 holder of a unitrust interest (a person entitled to periodic payments of a stated percentage of the
17 value of the trust's assets). However, a person entitled to receive a specified dollar amount
18 periodically (a fixed dollar annuity) will receive the same amount when the principal is reduced as
19 he would have received if the principal had not been used to pay the tax. So, in the circumstances
20 of Sections 4(d) or 6(b), the annuitant of a fixed dollar annuity interest will not bear any of the
21 burden of paying the apportioned or advanced estate tax (unless the reduction of principal results
22 in an exhaustion of the principal before the annuitant's interest expires). The annuitant in Sections
23 4(d) or 6(b) is permitted to receive the annuity free of estate taxes partly because, in many cases,
24 the decedent will have intended that the annuity payable to the annuitant be a net figure, but
25 primarily because that choice conforms to the goal of administrative simplicity.

26
27 However, in the context of Section 6(c), the annuitant is charged with his share of the
28 applicable estate tax; and so there is a discontinuity in the Act's treatment of annuitants when the
29 principal of the property or funds can be reached and when they cannot. Since the mechanism for
30 allocating the repayment of the advanced estate tax by distributees is part of the scheme of Section
31 6(c) and (d), it does not create any additional complexity to apply that formula to annuitants. To
32 the contrary, it would have substantially increased the complexity of the scheme if annuitants
33 were excluded since the formula to be applied to the other distributees would then be difficult to
34 determine. Once again, easing the burden of administering the provision took precedence over
35 other considerations.

36
37 If undistributed insulated property loses its insulation from claims, the uninsulated holders
38 can collect the balance of their interest from the property at that time.

39
40 The Act permits an uninsulated holder to request a court order granting the uninsulated holder
41 a lien on the distributee's property to secure the debt owed by the distributee. The proper court to
42 grant the lien will be a probate or comparable court. If the distributee resides in a State other than
43 the one in which the decedent resided, it may be necessary to seek an ancillary administration in
44 the distributee's State of residence before requesting a court in that State to impose a lien on the
45 distributee's property.

**SECTION 7. APPORTIONMENT AND RECAPTURE OF SPECIAL ELECTIVE
BENEFITS.**

(a) In this section:

(1) “Special elective benefit” means a reduction in an estate tax obtained by an election for:

(A) a lower valuation of specified property that is included in the gross estate;

(B) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(C) an exclusion from the gross estate of specified property.

(2) “Specified property” means property for which an election has been made for a special elective benefit.

(b) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made is then allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exemption attributable to each holder’s interest bears to the aggregate amount of deductions, reduced valuations, and exemptions obtained by the decedent’s estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(c) An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable under estate tax law for the additional tax.

Preliminary Comments

The types of special elective benefits at which this provision is aimed are currently set forth in " 2031(c), 2032A, and 2057 of the Internal Revenue Code of 1986. Section 2032A provides an election whereby “qualified real property” (real property that is used for a specified purpose and is held by certain parties related to the decedent) will be given a lower valuation for federal estate tax purposes than otherwise would have been true. Under ' 2032A(c), if within 10 years after the decedent’s death the qualified heir disposes of an interest in the qualified realty or ceases to use it

1 for its required purpose, an additional estate tax will be imposed to recapture some of the estate
2 tax reduction that was obtained through the election. The purpose of Section 7 is to define how
3 the benefit of an estate tax reduction of this or a similar type will be allocated and how any
4 additional estate tax imposed to recapture some of that tax benefit will be allocated.

5
6 Another federal estate tax provision to which Section 7 applies is ' 2057 of the Internal
7 Revenue Code of 1986. That provision grants an election to receive a special estate tax deduction
8 for a "qualified family-owned business interest." Under ' 2057(f), if, within 10 years after the
9 decedent's death, one of four listed events occurs, an additional federal estate tax will be imposed
10 in order to recapture some of the tax reduction obtained by electing to take the deduction. Section
11 7 defines how the benefits of the election and the burden of an additional tax will be apportioned.
12 The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed ' 2057 for the estates
13 of decedent's dying after the year 2003. However, the 2001 Act retains the 10-year recapture
14 provision, and the sunset provision will reinstate ' 2057 in the year 2011 unless the repeal is made
15 permanent.

16
17 Section 2031(c) of the Internal Revenue Code of 1986 provides an election whereby a portion
18 of the value of land that is subject to a qualified conservation easement, as defined in ' 2031(c)(8),
19 is excluded from the gross estate. The exclusion does not apply to the value of a retained
20 development right; but if, prior to the date for filing the estate tax return, all the persons who have
21 an interest in the land execute an agreement to extinguish some or all of the development rights,
22 an additional estate tax deduction will be allowed by ' 2031(c)(5). A failure to implement that
23 agreement within a specified time will cause the imposition of an additional estate tax to recapture
24 that deduction. The allocation of the benefits of the exclusion and of the deduction for making the
25 agreement, and the allocation of any additional estate tax, is determined by Section 7.

26
27 The allocation of the aggregate tax reduction obtained from all special elective benefits is
28 made among the holders of interests in specified properties in accordance with the reduction of
29 the decedent's taxable estate that is attributable to each holder's interest. Since the determination
30 of the amount of estate tax benefit is made by applying the marginal rate of estate tax to the
31 reduced value of the gross estate, it is necessary to aggregate the tax reduction obtained from all of
32 the special election benefits so that the greater tax reduction obtained from using a marginal rate is
33 not duplicated by applying that rate to several distinct reductions.

34
35 Once the amount of estate tax that is apportioned to the holder of an interest in specified
36 property is determined, it will have to be paid. The holders of interests in a specified property may
37 have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow
38 against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral
39 provisions and pay the tax in installments with income produced by the property. If they were to
40 sell the property, the special elective benefit would be lost; so a sale is not a viable option.
41 Accordingly, the requirement of Section 6(b) that the estate tax be paid from the principal of
42 property subject to a time-limited interest does not apply to specified properties. The solution
43 chosen in Section 6(c) of having other persons interested in the apportionable estate pay the tax
44 and then collect reimbursement from distributees of the property is not practical here because
45 there would be difficulty in determining what income was derived from the property itself, and
46 there would be no trustee or other fiduciary to see that the amounts were turned over to the
47 persons who paid the tax. So, that approach was not adopted. Instead, Sections 4(a) and 7
48 apportion the estate tax to the holders of the interests in the properties who, facing the obligation
49 to pay, can determine the best method for obtaining the funds to make that payment.

50
51 For additional estate taxes, the Act follows the allocation of liability imposed by the estate tax
52 law that generated the additional tax. The burden of the additional estate tax will be borne by the

1 persons who hold interests in the specified property at the time that the additional tax payment is
2 made, and those persons may not be the same ones who held the specified property when the
3 special elective benefit was allowed and so derived the benefit of that election.
4
5

6 **SECTION 8. SECURING PAYMENT OF TAX FROM PROPERTY IN POSSESSION**
7 **OF FIDUCIARY.**

8 (a) A fiduciary may defer a distribution of property until the fiduciary is satisfied that
9 adequate provision for payment of the estate tax has been made.

10 (b) A fiduciary may withhold from a distributee the amount of estate tax apportioned to an
11 interest of the distributee.

12 (c) As a condition to a distribution, a fiduciary may require the distributee to provide a
13 bond or other security for the distributee's share of the estate tax.

14 **Preliminary Comments**

15 Section 8 grants a fiduciary discretion either to retain funds or to require a distributee to
16 provide security for payment of that distributee's share of the estate tax. the fiduciary's exercise of
17 that discretion and use of retained properties are subject to the fiduciary's duty to treat the parties
18 fairly.
19
20

21 **SECTION 9. COLLECTION OF TAX BY FIDUCIARY.**

22 (a) A fiduciary responsible for payment of an estate tax may collect from any person to
23 which an estate tax is apportioned the share of the tax apportioned to that person.

24 (b) Except as otherwise provided in Section 6, to the extent that a fiduciary cannot recover
25 under subsection (a) the amount of an estate tax apportioned to a person, the amount not
26 recovered may be collected from any other person receiving an interest in the estate to which tax
27 has been apportioned.

28 (c) Except as otherwise provided in Section 6, to the extent a fiduciary cannot recover an
29 estate tax under subsection (a), or (b), the fiduciary may recover the estate tax ratably from other
30 beneficiaries of the gross estate that hold interests in the gross estate that do not qualify for a
31 marital or charitable deduction. If that recovery is insufficient, the fiduciary may recover the

1 deficiency ratably from interests of beneficiaries in the gross estate that do qualify for the marital
2 or charitable deduction.

3 (d) A domiciliary fiduciary may recover from an ancillary personal representative the
4 estate tax apportioned to the property controlled by the ancillary personal representative.

5 (e) The total tax collected from a person pursuant to the [Act] may not exceed the value of
6 the person's interest.

7 **Preliminary Comments**

8 The "other beneficiaries of the gross estate" in section 9(c) refers to beneficiaries whose
9 interest have been exonerated from tax apportionment either by the decedent's direction or by the
10 terms of the Act. The "other beneficiaries" include beneficiaries of properties that qualify for a
11 marital or charitable deduction since those properties are part of the decedent's gross estate, but
12 collection must first be obtained from persons whose interests in the gross estate are not
13 deductible.

14
15 If a fiduciary is unable to collect from a person the estate tax apportioned to that person, the
16 fiduciary is authorized to collect the deficiency from any beneficiary of the estate whose interest is
17 not exonerated. The fiduciary is not required to collect the deficiency ratably because the number
18 of such persons from whom collection may be obtained might be large and so a ratable collection
19 would impose a significant administrative burden on the fiduciary. Instead, under Section 10, each
20 person who pays more than their share of the deficiency will have a right of reimbursement
21 against other beneficiaries who paid less than their share, and the fiduciary is authorized to collect
22 that reimbursement for the person. If the amount collected from all such beneficiaries is insufficient,
23 the fiduciary can then proceed first to collect the shortfall ratably from exonerated beneficiaries,
24 other than those with a deductible interest, and then ratably from the deductible interest. The
25 reason that these last two collections are to be made ratably is that the number of persons subject
26 to that collection likely will not be large enough to create administrative difficulties.

27 28 29 30 **SECTION 10. RIGHT OF REIMBURSEMENT.**

31 (a) A person required under Section 9 to pay an estate tax greater than the amount
32 apportioned to the person has a right of reimbursement against each other person having an
33 interest in property in the gross estate to the extent the other person has failed to pay the tax
34 apportioned to the other person or has failed to contribute a required ratable portion of the
35 amount collected under Section 9(b) and (c).

36 (b) A fiduciary may enforce the right of reimbursement under subsection (a) on behalf of
37 the person that is entitled to the reimbursement and shall take reasonable steps to do so if

1 requested by the person.

2
3 **SECTION 11. JUDICIAL ACTION TO DETERMINE OR ENFORCE**
4 **APPORTIONMENT.**

5 (a) A fiduciary, transferee, or beneficiary of the gross estate may maintain an action to
6 have a court determine and enforce this [Act].

7 (b) If a court of competent jurisdiction has entered an order relating to the apportionment
8 of an estate tax, a fiduciary or other person may maintain an action in this state to enforce the
9 order. For purposes of the action, the apportionment is presumed to be correct.

10 **Preliminary Comments**

11
12 The presumption that the apportionment ordered by the court is correct is rebuttable.
13
14

15
16 **SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying
17 and construing this uniform act, consideration must be given to the need to promote uniformity of
18 the law with respect to its subject matter among States that enact it.
19

20 **[SECTION 13. SEVERABILITY CLAUSE.** If any provision of this [Act] or the application
21 thereof to any person or circumstance is held invalid, the invalidity does not affect other
22 provisions or applications of this [Act] which can be given effect without the invalid provision or
23 application, and to this end the provisions of this [Act] are severable.]
24

25 **SECTION 14. DELAYED APPLICATION.**

26 (a) Sections 3 through 7 do not apply to the estates of a decedent who dies on or within
27 [three] years after [the effective date of this [Act]], nor to the estate of a decedent who dies more
28 then [three] years after [the effective date of this [Act]] if the decedent continuously lacked
29 testamentary capacity from the expiration of the [three-year] period until the date of death.

1 (b) For the estate of a decedents who dies on or after [the effective date of this [Act]] to
2 which Sections 3 through 7 do not apply, estate taxes must be apportioned pursuant to the law in
3 effect immediately before [the effective date of this [Act]].

4 **Preliminary Comments**

5 Testamentary capacity was chosen as the standard for determining whether the preclusion for
6 applying Act's apportionment rules is extended beyond the statutory period despite the fact that a
7 different standard is employed to determine whether a person has the capacity to execute non-
8 testamentary instruments. Testamentary capacity is employed in the Act because it has a well
9 established meaning and will provide a uniform standard.

10
11
12
13 **SECTION 15. EFFECTIVE DATE.** This [Act] shall take effect _____.

14
15 **[SECTION 16. REPEALS.** The following acts and parts of acts are repealed:

16 (1)

17 (2)

18 (3)]