UNIFORM ESTATE TAX APPORTIONMENT ACT (2003)

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UNIFORM ESTATE TAX APPORTIONMENT ACT (2003)

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2003 REVISION OF UNIFORM ESTATE TAX APPORTIONMENT ACT

PREFATORY NOTE

The Internal Revenue Code (IRC) places the primary responsibility for paying federal estate taxes on the decedent’s executor and empowers, but does not direct, the executor to collect from recipients of certain non-probate transfers included in the taxable estate a prorated portion of the estate tax attributable to those types of property. In the absence of specific contrary directions of the decedent, the IRC generally provides as to other transfers that taxes are to be borne by the persons who would bear that cost if the taxes were paid by the executor prior to distributing the estate. The determination of who should bear the ultimate burden of the estate taxes is left to state law.

If a state does not have a statutory apportionment law, the burden of the estate taxes generally will fall on residuary beneficiaries of the probate estate. This means that recipients of many types of nonprobate assets (such as beneficiaries of revocable trusts and surviving joint tenants) may be exonerated from paying a portion of the tax. Also, it generates a risk that residual gifts to the spouse or a charity may result in a smaller deduction and a larger tax. A number of states have adopted legislation apportioning the burden of estate taxes among the beneficiaries.

The new UETAA replaces the former UETAA, which was promulgated in 1958 and revised in 1964 and 1982. It is incorporated into the Uniform Probate Code as Part 9A of Article III.

The new UETAA continues to advance the principle of the former UETAA that the decedent’s expressed intentions govern apportionment of an estate tax. Statutory apportionment applies only to the extent there is no clear and effective decedent’s tax burden direction to the contrary. Under the statutory scheme, marital and charitable beneficiaries generally are insulated from bearing any of the estate tax, and a decedent’s direction that estate tax be paid from a gift to be shared by a spouse or charity with another is construed to locate the tax burden only on the taxable portion of the gift. The new UETAA provides relief for persons forced to pay estate tax on values passing to others whose interests, though contributing to the tax, are unreachable by the fiduciary. The new UETAA also addresses the allocation of the burden incurred because of several federal transfer tax provisions that did not exist when the former UETAA was adopted.

UNIFORM ESTATE TAX APPORTIONMENT ACT (2003)

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Estate Tax Apportionment Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

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

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

(C) any amount added to the decedent’s gross estate because of a gift tax on transfers made before death.

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

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

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

(5) “Ratable” means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. “Ratably” has a corresponding meaning.

(6) “Time-limited interest” means an interest in property which terminates on a lapse of

time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest.

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

Comment

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

Property not included in the apportionable estate for an estate tax typically will not bear any of that tax. However, the donee recipients of such property will bear part of an estate tax to the extent that the available assets of the apportionable estate are insufficient to pay the tax. See Sections 6(c) and 9(b). Since deductible transfers will not generate any estate tax, it is appropriate to insulate those transfers from the allocation of that tax to the extent that properties of the apportionable estate are sufficient.

A gift tax paid by the decedent on a gift that was made by the decedent or the decedent's spouse within three years of the decedent's death is added back to the decedent's gross estate for federal estate tax purposes by Internal Revenue Code §2035(b). A state or foreign estate tax may have a similar provision or effect. Paragraph (1)(C) excludes any such gift tax from the apportionable estate.

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

A spouse's elective share of a decedent's estate is excluded from the apportionable estate to the extent that the spouse's share qualifies for an estate tax deduction. Other statutory claims against a decedent's estate that do not qualify for an estate tax deduction (for example, a pretermitted heir) do not reduce the apportionable estate.

The term "estate tax" is defined in the UETAA to include all estate taxes and certain generation-skipping taxes arising because of an individual's death. The term estate tax does not include any inheritance taxes, income taxes, gift taxes, or generation-skipping taxes incurred because of a taxable termination, a taxable distribution, or an inter vivos direct skip. A generation-skipping tax that is incurred because of a direct skip that takes place because of the decedent's death is included in the term "estate tax."

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

Some states impose an inheritance tax on recipients of property from a decedent. The UETAA does not apportion those taxes.

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

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

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

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

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

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

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

Taxes imposed on the transfer or receipt of property, regardless of whether a lien on the property or payable by the recipient of the property, do not reduce the value of the property for purposes of apportioning estate taxes by the UETAA.

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

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

The value of a person's interest in the apportionable estate can depend upon the value of the apportionable estate. So, the value of a residuary interest in a decedent's estate will reflect the amount of allowable deductions which, under the UETAA, reduce the apportionable estate, but will not be reduced by expenditures that are not allowable deductions for that estate tax. The formula for allocating estate taxes in Section 4(1) utilizes a fraction of which the numerator is the value of a person's interest in the apportionable estate rather than the value of the person's interest in the net estate or in the taxable estate. Since the denominator of the fraction is the value of the apportionable estate, the sum of the numerators of all persons having an interest in the apportionable estate will equal the denominator, and so 100% of the estate taxes will be apportioned. Consider the following example.

Example. D died leaving a gross estate with a value of $10,150,000 and made no provision for apportionment of taxes. D's will made pecuniary devises totaling $1,000,000, and gave the residue to A and B equally. There are no claims against the estate and no marital or charitable deductions are allowable. The funeral expenses are $10,000, and the estate incurred administrative expenses of $240,000 of which, while all were allowed as administrative expenses by the state probate court, $100,000 was disallowed by the Service for a federal estate tax deduction on the ground that $100,000 of the expenses was not necessary for the administration of the estate. See Rev. Rul. 77-461 and TAM 7912006. The personal representative elected to deduct the remaining $140,000 of administrative expenses as a federal estate tax deduction. For federal estate tax purposes, the apportionable estate is equal to the difference between the gross estate ($10,150,000) and the allowable deductions of $150,000 ($140,000 deductible administrative expenses and $10,000 deductible funeral expenses); and so the apportionable estate is $10,000,000. The value of the two residuary beneficiaries' interests in the apportionable estate is equal to the difference between the entire apportionable estate of $10,000,000 and the $1,000,000 that was devised to the pecuniary beneficiaries. While the residuary beneficiaries will not receive any part of the $100,000 of administrative expenses for which no federal estate tax deduction is allowable, that expense does not reduce the gross estate in determining the apportionable estate, and so does not affect the value of their residuary interests for the purpose of apportioning the federal estate tax. So, for purposes of apportioning the federal estate taxes, each residuary beneficiary has an interest in the apportionable estate valued at $4,500,000, which constitutes 45% of the apportionable estate of $10,000,000. Forty-five percent of the federal estate taxes is apportioned each to A and B, and 10% of the federal estate taxes is apportioned to the pecuniary beneficiaries.

SECTION 3. APPORTIONMENT BY WILL OR OTHER DISPOSITIVE INSTRUMENT.

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

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

(3) If any portion of an estate tax is not apportioned pursuant to paragraph (1) or (2), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(b) Subject to subsection (c), and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) If an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest,

(A) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument, or

(B) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(2) If an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the

deductible portion to the extent that the value of the nondeductible portion is insufficient.

(3) Except as otherwise provided in paragraph (4), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under Section 7, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

(c) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

Comment

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

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

Whether other directions of a decedent that explicitly mention estate taxes comply with the UETAA's requirement that they be specific and unambiguous is a matter for judicial construction. For example, there is a split among judicial decisions as to whether a direction such as "all estate taxes be paid out of the residue of my estate" is ambiguous because it is unclear whether it is intended to apply to taxes attributable to nonprobate assets. To the extent that it is determined that a decedent failed to apportion an estate tax, then the UETAA will apply to apportion that amount of the tax.

If an amendment is made to a revocable trust instrument, and if the amendment itself contains an express and unambiguous provision apportioning an estate tax, the date of the amendment is the date of the revocable trust instrument. However, if an amendment to a revocable trust instrument does not contain an express and unambiguous provision apportioning an estate tax, the date of the revocable trust instrument is the date on which it was executed or the date of the most recent amendment containing an express and unambiguous provision apportioning an estate tax. An express and unambiguous provision apportioning an estate tax includes a provision directing that payment of an estate tax be made from specified property.

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

A provision in decedent's will, revocable trust, or other instrument will not be honored to the extent that it would contravene subsection (c).

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

Example (1). On D's death, her will apportioned $100,000 of estate taxes to the holders of interests in the D Family Trust, an irrevocable trust created by D during her life. The D Family Trust is divided into two separate shares: the William Share, and the Franklin Share, each of which is for a different child of D. The William Share is for the benefit of William, and the Franklin Share is for the benefit of Franklin. The trust instrument provides that any taxes apportioned to the holders of interests in the trust or to any share of the trust are to be paid from the William Share. The effect of that trust provision is to require that taxes reduce the size of the William Share and do not reduce the Franklin Share. The apportionment provision in D's will established the amount of estate tax that the trust must bear; the amount apportioned to the D Family Trust makes all of the assets of that trust liable for that amount. Since the decedent's will did not direct how the trust's burden should be allocated between the two shares of the trust, the direction in the trust instrument is not inconsistent with the will provision and so can control the allocation of taxes between properties disposed of in the trust instrument under subsection (c). Even if the direction in the trust instrument were deemed not to be permitted by subsection (c), the direction would be effective as a disposition of trust assets as explained in Example (2).

Example (2). The same facts as those stated in *Example (1)* except that D's will apportioned the $100,000 of estate taxes to the Franklin Share of the D Family Trust. The trust provision placing the burden of the tax on the William Share cannot qualify as an apportionment direction since it is in conflict with the will provision allocating all of the trust's share of the estate tax to the Franklin Share. But the settlor has the power to direct trust assets to whomever the settlor pleases. The direction in the trust instrument that assets of the William Share are to be used to pay any taxes apportioned to the Franklin Share is a gift to Franklin of assets from the William Share. The direction is valid as a provision shifting trust assets from the William Share to the Franklin Share, which is a permissible disposition of a trust instrument.

The federal estate tax laws enable a decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain nonprobate property that is included in the decedent's gross estate. See e.g., §§2206 to 2207B of the Internal Revenue Code. There is a conflict among the courts as to whether those federal provisions preempt a state law apportionment provision. Choosing the position that there is no federal preemption, the UETAA apportions taxes without regard to the federal provisions. The federal provisions are not apportionment statutes; rather, they simply empower the personal representative to collect a portion of the estate tax that is attributable to the property included in the decedent's gross estate and do not direct use of the collected amounts by the personal representative. The rights granted to the personal representative by federal law for the collection of assets from nonprobate beneficiaries do not conflict either with the apportionment of taxes by state law or with other rights of collection granted by state law. Since there is no conflict, the UETAA does not include a direction as to whether federal or state law takes priority.

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

If an instrument transferring property that may be included in the taxable estate of someone other than the transferor directs payment from the transferred property of any part of the estate taxes of the other person, the direction affects the size of the gift, and so is a dispositive rather than an apportionment provision, and is not subject to the UETAA.

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, the tax that would have been borne by that person will, instead, be borne by other persons receiving interests under the instrument directing the exoneration. Thus, if several assets are disposed of by a governing instrument, which exonerates one or more of those assets from bearing an estate tax, the exoneration will not reduce the amount of estate tax to be allocated to all of the assets disposed of by that instrument, including the exonerated assets. For example, if decedent's will directs that all federal estate taxes attributable to decedent's probate estate be paid from the residuary of his estate, the exoneration of the pre-residuary devises will not affect the total amount of federal estate tax apportioned to the beneficiaries of the probate estate, all of which tax will be borne by the residuary beneficiaries if the residuary is sufficient. If the value of the other interests is insufficient to pay the estate taxes, the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction, the provision making that direction may designate the extent to which the charitable or marital interests will or will not bear a portion of the tax. If the decedent makes no provision as to whether the marital or charitable interests bear a portion of the tax, the UETAA provides a default rule that exempts the marital or charitable interests from payment of the tax to the extent that it is feasible to do so. An example of when this circumstance arises is when the decedent's will makes a residuary devise, a portion of which qualifies for a marital or charitable deduction and a portion of which does not. If the decedent provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the UETAA will require the payment to be made first from the nondeductible interests in the residuary. The default rule does not apply to an allocation of tax to a holder of an interest in property in which there is a time-limited interest; the tax allocated to any interest in that property is to be paid from the principal of the property unless the decedent expressly directed otherwise or unless Section 7 applies to the property.

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

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

Subsection (c) does not apply to a decedent's provision that no estate tax be apportioned to the recipient of an interest who would be excluded from apportionment by the UETAA in the absence of a contrary direction by the decedent. For example, a decedent's provision that no estate tax be apportioned to the recipient of property that qualifies for a marital or charitable deduction is not subject to subsection (c).

If a decedent transferred property to a revocable trust prior to executing a will that directs the apportionment of taxes to that trust, the apportionment direction will be valid even if the decedent subsequently released the power of revocation so that the trust became irrevocable prior to the decedent's death. In such a case, subsection (c) does not invalidate the will's direction.

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

SECTION 4. STATUTORY APPORTIONMENT OF ESTATE TAXES. To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 3 and except as otherwise provided in Sections 6 and 7, the following rules apply:

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

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

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

(4) Except as otherwise provided in Section 3(b)(4) and except as to property to which Section 7 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

Comment

The value of an interest in the apportionable estate is determined in accordance with Section 2(7) of the UETAA.

Property values subtracted from the decedent's gross estate in determining the apportionable estate under Section 2(1) are excluded from the apportionable estate, and beneficiaries of those properties do not have any estate tax apportioned to them because of their interest in those properties. This treatment is consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers §1.1, comment g (1998). The UETAA adopts a method of equitable apportionment of estate taxes, but does not follow the Restatement method which allocates taxes apportioned to probate assets first to the residuary beneficiaries and invites preferential treatment for beneficiaries of specific and pecuniary gifts by will over beneficiaries of gifts by various non-probate transfer methods.

A "direct skip" is defined in §§ 2612(c) and 2613 of the Internal Revenue Code. Section 2603(b) of the Internal Revenue Code states that, unless directed otherwise in the governing instrument, the tax on a generation-skipping transfer is charged to the property constituting the transfer. Section 2603(a)(3) of the Internal Revenue Code imposes the duty of paying the tax on a direct skip on the transferor of the property. Under paragraph (2), the decedent's personal representative will pay the generation-skipping tax on a direct skip out of the transferred property (or the proceeds from a sale of all or some of that property). To the extent that it is not feasible or practical to pay the tax from the transferred property, the transferees are to pay their proportionate share of the shortfall. Paragraph (2) is consistent with the treatment provided by federal law.

The property to which paragraph (3) applies is sometimes referred to as "QTIP property" since § 2044 of the Internal Revenue Code of 1986 deals with "qualified terminable interest property." See §§ 2044(b)(1), 2056(b)(7), and 2523(f) of the Internal Revenue Code of 1986. Although the general rule of apportionment in the UETAA is to apportion estate taxes on the basis of the average rate of tax, the tax apportioned to the holders of interests in QTIP property by the UETAA is based on the marginal rate of tax. Note that federal estate tax law grants the decedent's fiduciary the power to collect from the holders of the QTIP property the estate tax generated by that property at the marginal estate tax rate of the decedent's estate. The UETAA tracks the federal law in this respect.

It would be harsh to collect the estate tax from persons holding discretionary or contingent interests in property since they may not obtain possession for many years, if at all. Hence, when the tax is apportioned to persons holding interests in property in which there are time-limited interests, paragraph (4) requires the tax to be paid from principal. This provision does not apply to property for which a special elective benefit (as described in Section 7) has been elected.

An estate tax that is apportioned to an interest in property that cannot be reached because of legal or practical obstacles but is not subject to a time-limited interest is to be collected from the interest holder to the extent feasible. In that circumstance, since there is no time-limited interest, the tax will not be apportioned to a person who may not receive property for many years if at all.

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, paragraph (4) 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 the beneficiary.

(3) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral 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.

Comment

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 the UETAA. See Section 2(7). The UETAA 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 paragraph (3) are to be allocated ratably among persons in accordance with the amount of deferral or extension attributable to their interests in the apportionable estate.

SECTION 6. INSULATED PROPERTY: ADVANCEMENT OF TAX.

(a) In this section:

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

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

(3) "Insulated property" means property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

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

(5) "Uninsulated property" means property included in the apportionable estate other than insulated property.

(b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests in uninsulated property subject to a time-limited interest other than property to which Section 7 applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

(c) Subject to Section 9(b) and (d), an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under Section 2(1)(B) as if those interests were in uninsulated property.

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

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

(f) Upon a distribution of insulated property for which, pursuant to subsection (d), the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder.

Comment

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

Subsection (b) applies to property in which at least one person has a time-limited interest and which property can be reached by the personal representative of the decedent. In such cases, an estate tax that is payable as an advanced tax under subsection (c), is charged against the principal of the property, and is not apportioned among the several interests in that property.

While there is no express apportionment of the advanced tax to the time-limited interests in the property, the holders of the time-limited interests will bear a share of the tax burden in that the resulting reduction of the value of the principal will reduce the value of the time-limited interests, except that it will not reduce the value of a dollar annuity interest. So, the holder of a dollar annuity interest will be exonerated from sharing in the burden of estate taxes.

Since the estate tax apportioned to the owners of insulated property cannot be collected from the property, the tax is to be paid (as an advancement) by persons having interests in other assets of the estate (uninsulated holders), provided however that the total tax attributed to and advanced by an uninsulated holder cannot exceed the value of that person's interest in the uninsulated property. See Section 9(d). If the amount of the aggregate tax apportioned to and to be advanced by an uninsulated holder exceeds the value of that holder's interest in the uninsulated property, then the deficiency shall be apportioned to the holders of interests in properties that otherwise qualify for charitable or marital deductions. In such cases, those charitable and marital properties are reclassified as uninsulated properties, and so the beneficiaries of those properties will be uninsulated holders who will have a right of recovery from the distributees of insulated properties for which they paid a portion of the estate tax.

It would be harsh to make persons holding future interests in insulated property pay tax on properties that they will not receive until years later and may never receive. If they were required to pay the tax at the time of decedent's death, that could give rise to widespread disclaimers of interests. Also, it would be difficult to value the interests of discretionary beneficiaries. For that reason, with one exception set forth in subsection (d), the tax attributable to insulated properties is reallocated to uninsulated holders who are required to advance the funds to pay the tax.

The tax attributable to the insulated property that is required to be paid by the uninsulated holders is referred to as an "advanced tax." To permit the uninsulated holders who bear the advanced tax to be reimbursed, the UETAA effectively provides the uninsulated holders with a phantom percentage interest in the property whose transfer is the source of the advanced tax. While the phantom percentage interest of the uninsulated holder remains constant, its value will increase or decrease as the value of the property changes. The phantom percentage interest is determined by dividing the advanced tax by the aggregate value of insulated properties as determined for purposes of the estate tax. When a distribution of insulated property is made, a percentage of that distribution must be paid over to the uninsulated holders; and this is a personal obligation of the distributee. If it were not for this section, the uninsulated holders would have had a right of reimbursement under Section 10 for the amount of their outlay from the distributees; but instead, subsection (e) gives them a right to a fraction of the distributed amount rather than to a fixed dollar amount. The amount collected from a distributee is divided among the uninsulated holders according to the percentage of the advanced tax that they paid.

It is important to note that the uninsulated holders do not have an actual interest in the insulated property and have no lien or security interest in that property while it is in the possession of the trust or fund. The uninsulated holders only have a claim against the persons who receive distributions from the trust or fund which holds the insulated property. The only exception is where previously insulated property loses its insulation so that it can be reached by the uninsulated holders without violating any prohibition against alienation of interests. Once insulated property is in the hands of a distributee, subsection (f) permits the uninsulated holders to seek a lien on the distributee's property for the amount owed to them; but there is no lien or other encumbrance on the insulated property while it is in the possession of the trust or fund.

The operation of this section is illustrated in the following examples.

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

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

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

Example (2). X dies leaving a taxable estate of $10,000,000 on which a federal estate tax of $5,000,000 is payable (for convenience of computation, we treat all of X's estate as subject to a tax at a 50% marginal rate). X's estate has no marital or charitable deductions. X left

$4,000,000 of assets in an offshore trust that cannot be reached by X's personal representative and so constitutes insulated property. The federal estate tax attributable to that property is $2,000,000. X had other nonprobate assets having an aggregate value of $2,000,000 and a residuary estate of $4,000,000. The holders of the nonprobate assets will have $1,000,000 in federal estate taxes apportioned to them, and the holders of the residuary interests will have $2,000,000 of federal estate taxes attributed to them. But, the personal representative must also pay the $2,000,000 of federal estate taxes attributable to the offshore assets. If the holders of interests in those assets cannot be reached, and if the UETAA did not apply, the personal representative would have to pay the $2,000,000 from the residuary of the estate, thereby wiping it out completely. Under the UETAA, 1/3 of the $2,000,000 of federal estate tax attributable to the offshore assets ($666,667) will be paid by the holders of the other nonprobate assets, and the remaining $1,333,333 of that tax will be paid by the beneficiaries of the residuary estate. Under the UETAA, the holders of the other nonprobate assets will have to bear their proportionate share of the tax on the offshore assets. When distributions are made of the offshore assets, the distributees will be personally liable to pay a portion of their distribution to the persons who paid the estate tax on the offshore fund.

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

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

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 reduced 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 must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations, and exclusions 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 for the additional tax under the law providing for the recapture.

Comment

As of the 2003 approval of the UETAA, the types of special elective benefits at which this provision was aimed were 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 for its required purpose, an additional estate tax will be imposed to recapture some of the estate tax reduction that was obtained through the election. The purpose of this section is to define how the benefit of an estate tax reduction of this or a similar type will be allocated and how any additional estate tax imposed to recapture some of that tax benefit will be allocated.

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

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

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

Once the amount of estate tax that is apportioned to the holder of an interest in specified property is determined, it will have to be paid. The holders of interests in a specified property may have difficulty paying that tax. To pay the tax, the holders will have to sell the property, borrow against it, use other funds to pay the tax, or defer the payment of the tax under tax deferral provisions and pay the tax in installments with income produced by the property. If they were to sell the property, the special elective benefit would be lost; so a sale is not a viable option. Accordingly, the requirement of Sections 3(b)(3), 4(4), and 6(b) that the estate tax or an advanced tax be paid from the principal of property subject to a time-limited interest does not apply to properties for which an election for a special elective benefit is made. The solution chosen in Section 6(c) and (e) of having other persons interested in the apportionable estate pay the tax and then collect reimbursement from distributees of the property is not practical here because there would be difficulty in determining what income was derived from the property itself, and there would be no trustee or other fiduciary to see that the amounts were turned over to the persons who paid the tax. So, that approach was not adopted. Instead, Sections 4(1) and this section apportion the estate tax to the holders of the interests in the properties who, facing the obligation to pay, can determine the best method for obtaining the funds to make that payment.

If additional estate taxes are imposed to recapture some or all of a special elective benefit, Section 7 follows the allocation of liability imposed by the estate tax law that generated the additional tax. The burden of the additional estate tax will be borne by the persons who hold interests in the specified property at the time that the additional tax payment is made, and those persons may not be the same ones who held the specified property when the special elective benefit was allowed and so derived the benefit of that election.

SECTION 8. SECURING PAYMENT OF ESTATE TAX FROM PROPERTY IN POSSESSION OF FIDUCIARY.

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

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

(c) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

Comment

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

SECTION 9. COLLECTION OF ESTATE TAX BY FIDUCIARY.

(a) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

(b) Except as otherwise provided in Section 6, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate which is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate;

(3) any person having an interest in the gross estate.

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

(d) The total tax collected from a person pursuant to this [act] may not exceed the value of the person's interest.

Comment

If a fiduciary is unable to collect from a person the estate tax apportioned to that person or to be advanced by that person, the fiduciary is authorized to collect the deficiency from any person interested in the apportionable estate whose interest is not exonerated from tax apportionment. The fiduciary is not obliged to collect the deficiency ratably from such persons. At the fiduciary's discretion, the fiduciary is authorized to collect all of the deficiency from one person or from several persons in any proportion that the fiduciary chooses. The reason that the fiduciary is not required to collect a deficiency ratably is that the payment of the estate tax should not be delayed because of difficulties in collecting from a number of persons.

If the amount collected from persons whose interests in the apportionable estate is not exonerated from tax apportionment is insufficient to make up the deficiency, the fiduciary can then collect any remaining deficiency from persons interested in the apportionable estate whose interests are exonerated from tax apportionment. This class excludes persons holding interests in property that qualified for a marital or charitable deduction since those interests are excluded from the apportionable estate. Again, the fiduciary is not required to collect the remaining deficiency ratably from the persons holding exonerated interests.

Finally, if the amount collected from persons holding exonerated interests is insufficient, the fiduciary can collect the balance from persons holding interests that qualify for a marital or charitable deduction. The fiduciary is not required to make that collection ratably.

Anyone who pays more than his share of an estate tax or an advanced tax has a ratable right of reimbursement from those who did not pay their share. If requested, the fiduciary may assist in collecting that reimbursement.

SECTION 10. RIGHT OF REIMBURSEMENT.

(a) A person required under Section 9 to pay an estate tax greater than the amount due from the person under Section 3 or 4 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 3 or 4 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Section 9(b).

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

Comment

The UETAA does not include a provision for interest on the collection of a reimbursement, and the question of whether interest will be payable is left to the courts to decide.

SECTION 11. ACTION TO DETERMINE OR ENFORCE ACT. A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this [act].

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

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

SECTION 14. DELAYED APPLICATION.

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

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

Comment

Testamentary capacity was chosen as the standard for determining whether the preclusion for applying the UETAA's apportionment rules is extended beyond the statutory period despite the fact that a different standard is employed to determine whether a person has the capacity to execute non-testamentary instruments. Testamentary capacity is employed in the UETAA because it has a well established meaning and will provide a uniform standard. See Restatement (Third) of Property: Wills and Other Donative Transfers, Section 8.1 (2003).

SECTION 15. EFFECTIVE DATE. This [act] takes effect ....

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

(1) ....

(2) ....

(3) ....]