The 2003 Revised Uniform Estate Tax Apportionment Act

Douglas A. Kahn
University of Michigan Law School, dougkahn@umich.edu
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Editors' Synopsis: This Article describes the significant sections of the 2003 Uniform Estate Tax Apportionment Act (the "2003 Uniform Act"). The Article explains the purpose and operation of the 2003 Uniform Act's various sections and notes some of the differences between the 2003 Uniform Act and its prior version.

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* Paul G. Kauper Professor of Law, University of Michigan School of Law. The author teaches Tax Planning for Business Transactions, Individual Income Tax, Corporate Tax, Partnership Tax, and Legal Process. He has written extensively on taxation, and he served as the reporter of the National Conference of Commissioners on Uniform State Laws' draft of the revised Uniform Estate Tax Apportionment Act.
I. INTRODUCTION

A federal estate tax has been in effect continuously since 1916. The tax is imposed on transfers of a decedent's property at death, but it also is imposed on certain transfers that the decedent made prior to death. The estate tax rates are graduated. In addition to the federal tax, a number of states impose an estate tax.

On the death of a decedent, the federal and state estate taxes must be paid. Typically, the decedent's personal representative will pay the tax, but the question then is from where does the personal representative obtain the funds to pay the tax, and how is the burden of the tax to be apportioned among the beneficiaries of decedent's estate and other recipients of property from the decedent. Since 1958 there has been a uniform act dealing with the apportionment of taxes for the consideration of adoption by state legislatures. In August 2003 the National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted a revised version of that uniform act. This Article describes the significant parts of the 2003 Uniform Estate Tax Apportionment Act, explains the purpose and opera-

1 The federal estate tax also applies to certain properties that the decedent never owned. For example, the tax is imposed on property over which the decedent possessed a general power of appointment at death or over which the decedent had previously held a general power of appointment but had released that power under certain conditions prior to his death. See I.R.C. § 2041 (1986). Another example is that the federal estate tax applies to "qualified terminal interest property" (QTIP), for which a marital deduction had been allowed to the decedent's spouse. See I.R.C. § 2044. References to "Code" in this Article are to the Internal Revenue Code of 1986.

2 See, e.g., I.R.C. §§ 2036-2038.

3 See I.R.C. § 2001(c).

4 See UNIF. ESTATE TAX APPORTIONMENT ACT (2003) [hereinafter 2003 Uniform Act]. The 2003 Uniform Act, as drafted and approved by NCCUSL at its August 2003 annual
tion of those parts, and notes some of the differences between the 2003 Uniform Act and its prior version.

Distinguishing an estate tax from an inheritance tax is important. Because the estate tax has graduated rates, the larger the decedent’s taxable estate, the greater the marginal rate of tax; the number of persons who are beneficiaries of the estate does not affect the amount or rate of tax.\footnote{If property left to a person qualifies for a deduction, such as the marital or charitable deduction, that property will not be taxed and will not affect the tax rate applied to other properties. \textit{See generally} 2003 Uniform Act, prefatory note.} On the other hand, an inheritance tax is imposed on a person’s receipt of property from a decedent. If the tax has graduated rates, the aggregate amount of inheritance tax will be reduced if the decedent’s property is divided among a larger group of beneficiaries. The graduated rates will be applied separately to each beneficiary, so the number of beneficiaries will affect the aggregate amount of tax.

While the federal government does not impose an inheritance tax, some states do. Furthermore, most states have an estate tax. Federal tax law places the primary responsibility for paying the federal estate tax on the decedent’s personal representative.\footnote{\textit{See I.R.C. § 2002.} (placing responsibility on the “executor”).} The personal representative typically is responsible for paying the state estate taxes and even the state inheritance taxes. The question then arises how the burden of those taxes is to be allocated among the several beneficiaries of the decedent’s estate (i.e., how much of the tax is to be borne by each of the beneficiaries). No difficulty arises when allocating the state inheritance taxes because state laws provide that they are borne by the recipients of the property that generated the tax. But, determining how the federal and state estate taxes are to be apportioned proves to be more challenging. Federal law provides some guidance in a few circumstances in which it authorizes the personal representative to collect a portion of the federal estate tax from certain beneficiaries.\footnote{For example, the Code authorizes the personal representative to collect a portion of the estate tax from: life insurance beneficiaries when the proceeds of the insurance are included in the decedent’s taxable estate, recipients of property over which the decedent had a general power of appointment, and the recipients of QTIP property that was included in the decedent’s gross estate under Code section 2044. \textit{See I.R.C. §§ 2206-2207A.}} However, those provisions only cover a few of the beneficiaries of decedent’s property, and they merely authorize collections from those beneficiaries and do not describe how the tax ultimately will be

\footnote{conference, is available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (last updated Oct. 29, 2003).}
apportioned. The apportionment of the tax is left to state law to determine.

If a state has no apportionment statute, the burden of the tax typically will fall on the residuary of the decedent’s probate estate. In that case, the beneficiaries of the nonprobate assets will be exonerated from sharing any of the estate tax except to the extent that federal law allows the personal representative to collect from some of those beneficiaries. This method of allocation has become especially undesirable in light of the modern trend to use nontestamentary devices—such as a revocable trust or joint ownership with survivorship rights—to avoid probate for much of a decedent’s assets.

To deal with this problem, states have adopted apportionment statutes that determine how estate taxes are to be allocated. Because of the mobility of modern society, it is especially desirable that those apportionment statutes be uniform among the states so that testators can rely on the application of the same provisions no matter where the testator resides at the time of death or where the testator’s real property is located.

The first Uniform Estate Tax Apportionment Act was adopted by NCCUSL in 1958. The 1958 Uniform Estate Tax Apportionment Act was superseded by a revised version in 1964. The 1964 version, in turn, was replaced in August 2003. The 1964 version was incorporated into the Uniform Probate Code (UPC) at section 3-916, which was slightly altered in 1982. Upon adoption in 2003, NCCUSL also incorporated the 2003 Uniform Act into UPC section 3-916 in substitution of the old version.

II. THE 2003 UNIFORM ACT—GENERAL RULES

A. Taxes Apportioned by the 2003 Uniform Act

The 2003 Uniform Act apportions all taxes imposed because of the death of an individual, whether the tax is imposed by the federal, government, a state government, or a foreign government, including interest and penalties thereon. However, the 2003 Uniform Act does not apportion inheritance taxes, gift taxes (including gift taxes payable after the decedent’s death), income taxes, or generation-skipping taxes other than a generation-skipping tax incurred on a direct skip that takes effect at death. Some foreign countries impose an income tax on capital appreciation at death. Those taxes are not apportioned by the 2003 Uniform Act. The

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9 See 2003 Uniform Act § 2(2).
federal income tax imposed upon income in respect of a decedent is not apportioned by the 2003 Uniform Act, nor is the income tax on an installment obligation the principal of which becomes due on the death of the debtor. All of the taxes that are apportioned by the 2003 Uniform Act, including interest and penalties, are referred to as “estate taxes” regardless of the actual name of the tax.\textsuperscript{10}

The 1964 Uniform Act apportions the federal estate tax and state death taxes, including inheritance taxes, and interest and penalties thereon.\textsuperscript{11} The 1964 version does not apportion foreign death taxes or the generation-skipping tax on direct skips.

B. Primacy of Decedent’s Directions

The 2003 Uniform Act establishes a statutory scheme for apportionment of estate taxes. However, the statutory rules are merely default rules that apply only if the decedent fails to make a valid direction for apportionment of some or all of the taxes to be apportioned.\textsuperscript{12}

The 1964 Uniform Act also permits a decedent to direct the apportionment of death taxes, but the decedent can do so only in the decedent’s will.\textsuperscript{13} One problem with that limitation is that much of a decedent’s estate planning is implemented through documents other than a will (e.g., inter vivos trusts, especially revocable trusts, life insurance designations, deeds transferring property into joint tenancy, and designation of beneficiary for deferred compensation funds). The 2003 Uniform Act provides greater flexibility by permitting the decedent to utilize a number of different types of documents to direct the apportionment of taxes, and establishing an order of priority as to which direction prevails if the directions conflict.\textsuperscript{14} The decedent’s will takes priority over any other designation. Next, a designation in a revocable trust instrument will control apportionment of taxes not apportioned by decedent’s will. If directions set forth in more than one revocable trust instrument conflict, the direction in the most recently executed instrument will control. Finally, directions can be made in another instrument disposing of property, but only as to the property

\textsuperscript{10} See id.
\textsuperscript{11} See 1964 Uniform Act § 1(6).
\textsuperscript{12} See 2003 Uniform Act §§ 3-4.
\textsuperscript{13} See 1964 Uniform Act § 2 (deeming it desirable to have all of the decedent’s apportionment directions contained in one document so that the personal representative would be spared the task of searching through multiple documents).
\textsuperscript{14} See 2003 Uniform Act § 3.
disposed of in that instrument and only if the tax has not been apportioned by the decedent’s will or revocable trust instrument.

A direction for apportionment can be made in the form of directing the amount of tax to be borne by specified properties, or it can be exculpatory and preclude the apportionment of taxes to certain properties. Note that a direction in an irrevocable trust instrument cannot control the apportionment of taxes to properties not part of that trust’s assets. However, if a decedent made a direction in a revocable trust instrument, and the instrument subsequently became irrevocable prior to the decedent’s death, the instrument will continue to be treated as a revocable trust instrument for these purposes.\(^\text{15}\)

The decedent’s power to direct apportionment is subject to a specific limitation: the decedent cannot increase the tax apportioned to property over which he had no power of disposition at the time he made the direction.\(^\text{16}\) To the extent that a decedent’s direction would have that effect, the direction will be invalid. There is no comparable provision in the 1964 Uniform Act. Consider the following example.

\(D\) transferred property to an irrevocable trust in which he retained an income interest for life, with the principal of the trust to be distributed equally among \(X\), \(Y\), and \(Z\) upon \(D\)’s death. Because \(D\) retained an income interest for life, the value of the trust’s assets was included in \(D\)’s gross estate at his death under Code section 2036.\(^\text{17}\) On \(D\)’s death, his will directed that no estate tax be apportioned to the devise he made to \(P\). The tax that otherwise would have been allocated to \(P\) will have to be borne by other beneficiaries of the taxable estate. Because one of the beneficiaries of the estate is the irrevocable trust that \(D\) had created, that trust would be charged with the payment of part of the estate tax that is attributable to property received by \(P\). But, because the trust was irrevocable, \(D\) had no power to alter the interests of \(X\), \(Y\), and \(Z\). Therefore, \(D\) should not be allowed to affect the size of the interests of \(X\), \(Y\), and \(Z\) by directing the insulation from tax of another’s interest, and the 2003 Uniform Act does not permit him to do so. As a result of the exoneration in \(D\)’s will, the estate tax

\(\begin{align*}
\text{\(^\text{15}\) See id. § 3(b)(1).} \\
\text{\(^\text{16}\) See id. § 3(h).} \\
\text{\(^\text{17}\) Note that federal tax law grants to the decedent’s personal representative the right to collect a part of the estate tax from the person or persons receiving the trust property. See I.R.C. § 2207B.}
\end{align*}\)
that \( P \) would have had to pay will be paid by beneficiaries of \( D \)'s taxable estate other than \( X, Y, \) and \( Z \).

C. Express and Unambiguous Direction

The 1964 Uniform Act permits a decedent to direct the apportionment of taxes by a provision in the decedent's will, but says nothing about how specific the decedent's direction must be to be valid.\(^{18}\) The 1964 Uniform Act's silence in this area led to litigation over whether a decedent actually directed the apportionment of taxes because the decedent's will made a general provision as to the payment of all of the debts of the decedent, the decedent's estate, or some similar provision. Because the estate tax is a debt of the estate, an issue arose as to whether a general "payment of all debts" provision should be construed to include the estate tax; the courts divided on the question.

The 2003 Uniform Act addresses the issue by providing that a decedent's direction is valid only if made "expressly and unambiguously."\(^{19}\)

The comments to the 2003 Uniform Act elaborate by stating: "For example, a testamentary direction [in decedent's will] 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 and unambiguous direction for the payment of estate taxes..."\(^{20}\) A direction of that nature often is inserted as a boilerplate provision with no thought given to its potential application to estate taxes. The 2003 Uniform Act requires that the direction be both express and unambiguous to prevent an inadvertent payment of estate taxes out of residuary from completely distorting a plan of disposition.\(^{21}\)

The comments to the 2003 Uniform Act also provide: "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... [statutory] requirement" that the direction be express and unambiguous.\(^{22}\) The decedent need not have mentioned the estate tax by name, but the reference to the tax to be apportioned must clearly and unambiguously include estate

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\(^{18}\) See 1964 Uniform Act § 2.
\(^{19}\) 2003 Uniform Act § 3.
\(^{20}\) Id. § 3, cmt.
\(^{21}\) See id.
\(^{22}\) Id.
It is obvious that the reference to "taxes arising as a result of my death" in the quoted direction above was intended to include estate taxes.

D. Disposition Versus Apportionment

Distinguishing between an apportionment direction and a disposition of the decedent's property is important. The shifting of the tax burden from one person to another is one means of affecting the amount of the decedent's property that passes to those persons. But, while the decedent's apportionment of taxes may be regarded as a subcategory of property disposition, it is a special category with specific rules and should be isolated when analyzing issues that arise. Therefore, applying the apportionment rules and dispositive provisions separately is crucial. The following two examples, which are drawn directly from the comments to section 3 of 2003 Uniform Act, illustrate the separation of those two concepts.

Ex. (1) On D's death, her will apportioned $100,000 of estate taxes to the holders of interests in the D Family Trust, a revocable 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 [2003 Uniform Act § 3(c)] . . . . Even if the direction in the trust instrument were deemed not to be permitted by [section 3(c)], . . . . the direction would be effective as a disposition of trust assets as explained.

23 Id. § 3.
in Example (2).

Ex. (2) The same facts as those stated in Ex. (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. 24

The Act does not permit anyone other than the decedent to override the allocation provisions of the Act. For example, if X created a QTIP trust for Y, [and if Y did not transfer the life income interest before death,] 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 Act 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 Act 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

24 2003 Uniform Act § 3, cmt., exs. 1, 2.
taxes of the other person, the direction affects the size of the gift [to that person who is liable for that tax], and so is a dispositive rather than an apportionment provision. For example, X creates two trusts, Trust 1 and Trust 2, of which Y is the [life] income beneficiary[, and a QTIP election is made for both trusts]. Under § 2044 of the Internal Revenue Code of 1986, both trusts will be included in Y's gross estate for federal estate tax purposes when Y dies. The trust instrument that created Trust 2 provides that on Y's death, the assets of Trust 2 will be used to pay Y's estate taxes that are attributable both to Trust 1 and Trust 2. That provision does not place the burden of taxes attributable to Trust 2 on some other property. Instead, it constitutes a direction of how the assets of Trust 2 are to be distributed or utilized. The provision for the application of Trust 2's assets to pay taxes attributable to Trust 1 does not contravene the [2003 Uniform Act]. If the provision is valid under trust law, the taxes attributable to Trust 1 and Trust 2 should be paid from the assets of Trust 2 as the trust instrument directs. The holders of interests in Trust 1 are beneficiaries of Trust 2 to the extent that the taxes that the beneficiaries of Trust 1 would otherwise have borne are paid out of assets of Trust 2.25

E. Federal Preemption

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. The courts are in conflict as to whether those federal provisions preempt a state law apportionment provision. Choosing the position that there is no federal preemption, the 2003 Uniform Act . . . 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 [the] use of the collected amounts by the personal representative.26

26 2003 Uniform Act § 3, cmt.
Unless the decedent waives the federal rule, the personal representative has a fiduciary obligation to collect the amounts authorized by federal law. But, the ultimate disposition of the collected amounts is subject to the direction of the decedent or, if none, to the state’s statutory apportionment rules. "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." For that reason, the 2003 Uniform Act does not include a direction as to whether federal or state law takes priority when they are in conflict; no conflict exists.

The 1964 Uniform Act takes an entirely different position on this issue and provides that when the federal imposition of liability differs from the 1964 Uniform Act's apportionment scheme, the tax should be borne according to the federal provision.

F. Apportionment of Tax Attributable to an Exonerated Interest

If a decedent makes a valid direction that a person receiving property under a particular disposition is exonerated from payment of an estate tax, [and the decedent makes no other provision concerning that exoneration, the 2003 Uniform Act provides a rule of construction:] 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 [(i.e., the total amount of estate tax apportioned to the properties disposed of in that instrument will be the same amount as it would have been if none of the interests in those properties had been exonerated)]. 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

27 Id.
28 See id.
beneficiaries if the residuary is sufficient.\textsuperscript{30}

If the value of the non-exonerated interests in property controlled by that instrument is insufficient to pay the estate taxes apportioned to those interests "the difference will be payable by other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax."\textsuperscript{31}

This provision does not apply to exonerated interests that qualify for a marital or charitable deduction. Because deductible interests are not subject to the estate tax, the exclusion of the recipients of those interests from estate tax apportionment, whether effected by the 2003 Uniform Act or by the decedent's direction, will not cause any other beneficiary to bear an increased amount of the tax.\textsuperscript{32}

G. Apportionment of Tax to Property in Which There Are Time-Limited Interests

As the term is used in the 2003 Uniform Act, a "time-limited interest" is "an interest in property that terminates on a lapse of time or on the occurrence or nonoccurrence of an event," or which is subject to a power of transfer.\textsuperscript{33} Examples of time-limited interests are a term of years, a life interest, a life income interest, an annuity interest, and an interest subject to a discretionary power of transfer. A cotenancy is not a time-limited interest unless it is held in a time-limited interest.

If a tax is apportioned to property in which a time-limited interest exists, then regardless of whether the apportionment is directed by the decedent or by the default provisions of the 2003 Uniform Act, and unless the decedent expressly directs otherwise, the tax will be paid from the principal of that property.\textsuperscript{34} This rule applies even if one of the interests in the property is a deductible interest because it qualifies for a marital or charitable deduction and even if the payment from principal will reduce the amount of deduction allowable to the decedent's estate. However, if

\textsuperscript{30} 2003 Uniform Act § 3, cmt. The 1964 Uniform Act does not contain a comparable provision.
\textsuperscript{31} 2003 Uniform Act § 3, cmt.
\textsuperscript{32} See id. § 3.
\textsuperscript{33} Id. § 2(6).
\textsuperscript{34} See id. §§ 3(f), 4(4). In its default statutory apportionment rules, section 6 of the 1964 Uniform Act contains a similar provision. However, the 1964 Uniform Act makes no provision for the construction of a direction by a decedent apportioning taxes to property in which there is a time-limited interest.
the principal of the property cannot be reached because of legal or practical restrictions, this rule will not apply and, instead, a set of rules described later in this Article will apply.\textsuperscript{35} The 1964 Uniform Act contains no comparable provision.

H. Apportionment of Tax to Property in Which Some Interests are Deductible but Which Does Not Contain Time-Limited Interests

If a decedent directs that estate taxes be paid from properties, some of which qualify for a marital or charitable deduction [and some of which do not], 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 express provision as to whether the marital or charitable interests bear a portion of the tax, [and if no time-limited interests exist in the disposition, the 2003 Uniform Act] 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.\textsuperscript{36}

The 1964 Uniform Act contains no comparable rule. The default rule in the 2003 Uniform Act maximizes the size of the marital or charitable deduction and thus maximizes the size of the distributable estate.

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 [expressly] provides that estate taxes are to be paid from the residuary, unless directed otherwise, the default provision of the [2003 Uniform Act] . . . 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. . . .\textsuperscript{37}

\textsuperscript{35} See id. § 6.
\textsuperscript{36} 2003 Uniform Act § 3, cmt.
\textsuperscript{37} See id. See also supra Part II.G. (discussing the apportionment of tax to property with time-limited interests). If the residuary contains a time-limited interest, this default rule would be inapplicable, and the estate tax would be payable from the principal of the residuary unless the decedent expressly directed otherwise.
If a decedent created an inter vivos trust . . . 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 [possibly] may be lost if the estate taxes generated by the nondeductible time-limited interests are to be paid from assets in the trust.  

If so, arguably, the payment will not disqualify the remainder interest for a charitable deduction if 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. "There are numerous instances in which estate taxes are required to be paid from a charitable remainder trust that was created inter vivos." The 2003 Uniform Act seeks "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." This provision is a kind of "safety play"—it can do no harm and could possibly preserve a deduction that might otherwise be lost. "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." The 1964 Uniform Act contains no comparable provision.

III. DEFAULT STATUTORY APPORTIONMENT UNDER THE 2003 UNIFORM ESTATE ACT

A statutory apportionment of taxes applies to the extent that the decedent fails to make a valid direction to apportion those taxes—these are statutory default apportionment rules. The preceding material dealt pri-

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38 2003 Uniform Act § 3, cmt.
39 Id.
40 Id.
41 A safety play is a term used in the game of bridge to describe a play of the cards that can do no harm to the player's contract, but which protects the player from losing the contract if an unlikely division of the outstanding cards between the two opponents is such that the contract would be defeated if the safety play were not adopted.
42 See 2003 Uniform Act § 3, cmt.
marily with apportionment directed by the decedent; although parts of that material dealt with some statutory default apportionment rules and rules of construction for the application of a decedent’s direction.

A. Equitable Apportionment

The 2003 Uniform Act adopts a system of equitable apportionment under which the taxes are apportioned ratably to all persons having an interest in what is called the “apportionable estate.” A fraction of the tax will be apportioned to each person who has an interest in the apportionable estate unless that person is exonerated; the fraction will equal the percentage that the value of that person’s interest represents to the value of the apportionable estate. Because the initial calculation of the tax to be apportioned to a person turns on the percentage interest that person has in the apportionable estate, the determination of the apportionable estate is the starting point in making default statutory apportionments; but, as we shall see, adjustments must be made.

The determination of the values of a decedent’s gross estate and apportionable estate depends upon the tax that is to be apportioned. For each tax to be apportioned (and all such taxes are referred to in the 2003 Uniform Act as estate taxes), the properties to be included in the gross and apportionable estate may not be identical, and a separate apportionment calculation must be made for each tax.

Similarly, because the fair market value of an item of property determines the tax that is to be apportioned, the same item might have a different value for the purpose of determining the apportionment of different taxes. The value of an item is not reduced for any taxes attributable to that item, nor is it reduced for any special valuation adjustment that the tax law provides. However, the value of an item is reduced by the amount of any encumbrance on the property.

If the recipient of an asset is required as a condition of obtaining the

43 See id. § 4(1). See also infra Part III.A.1. for a discussion on the meaning of apportionable estate.
44 See 2003 Uniform Act § 4(1).
45 See id. § 2(7).
46 See id. See also infra Part III.C. for a discussion of special valuation adjustments. Those adjustments arise from tax provisions that, through various devices, intentionally allow a reduced value for a specially qualified item of property. An election provided by a tax law to use a special valuation date is not a special valuation adjustment, so the value of the item on that date is the value for that tax.
47 See 2003 Uniform Act § 2(7).
property to make a payment to another person, that requirement does not reduce the value of the property. Instead, the required payment reduces the value of the nominative recipient's interest, and the amount paid is treated as a separate disposition by the decedent to the payee.

If a person has an option, created by contract or by the decedent's will or other dispositive instrument, to purchase gross estate property at a lower price than the estate tax value of that property, apportionment will be based on the estate tax value of the property. The grant of an option to purchase at a discount will be viewed as an interest in the estate that the decedent passed to the person possessing the option. If the option is exercised, the amount of the discount likely will be deemed to be the value of that person's interest in the apportionable estate.

The 2003 Uniform Act makes no distinction between probate and nonprobate assets for purposes of making the initial calculation of apportionment. The 1964 Uniform Act also adopted an equitable apportionment system, but as will be discussed later, the two versions have notable differences.

The NCCUSL committee that drafted the 2003 Uniform Act gave considerable attention to whether the equitable apportionment concept of apportioning taxes to all persons interested in the apportionable estate should be modified. The committee considered a proposal to provide that taxes apportioned to probate assets are to be charged first to the residuary beneficiaries of the probate estate, and only to the extent that the assets of the residuary are insufficient would any of the tax be borne by the preresiduary beneficiaries. A similar provision would have been made applicable to the residuary beneficiaries of a revocable trust as to taxes apportioned to that trust. A number of attorneys who work in the estate planning arena expressed the view that their clients typically desired an allocation of that sort, and they drafted their clients' dispositive documents accordingly. Nevertheless, the committee rejected that approach and adopted a pure equitable apportionment system instead. The committee made that choice because the adoption of a program that insulates the pre-residuary devises from tax can, in certain circumstances, cause consequences that frustrate a testator's intentions. If a large preresiduary devise is made, the tax generated by that devise could consume most or even all of the residuary. Consider the following illustration.

_ D_ died in 2003 leaving a taxable estate of $5 million. _ D_'s estate

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48 See 1964 Uniform Act § 2.
did not qualify for any estate tax deductions or credits (D drowned in the middle of the ocean so there were no funeral expenses, and all of the administrative expenses were taken as income tax deductions). In D's will, he made pecuniary devises of $300,000 each to 10 relatives and close friends, and he devised the residue of his estate to his daughter, R. D's estate did not contain any nonprobate assets. The federal estate tax on D's estate is a little more than $1,900,000. Before taxes, the aggregate amount of the pecuniary bequests is $3 million, and the value of R's residuary devise is $2 million. If all of the taxes were to be paid out of the residuary, which is what the proposal would require, R would have less than $100,000 remaining after taxes. It is very unlikely that D intended to leave so little to R. Of course, if D had been aware of this consequence, D could have directed that estate taxes be paid from the preresiduary devises; if he failed to do so, the default provisions of the statute would greatly distort his dispositive plan.

Under the pure equitable apportionment scheme adopted in the 2003 Uniform Act, a little more than $760,000 of the estate tax would be apportioned to R, who therefore would retain $1,240,000 after taxes. It seems virtually certain that this result comports far more closely with D's dispositive plan than would the result reached under the proposed modification.

The committee determined that it is preferable to adopt a default provision that avoids a serious distortion of some testators' dispositive plans than to adopt a provision that, while comporting with the wishes of a majority of testators, would totally frustrate the plans of some other testators. An equitable apportionment of the tax on probate assets might depart from the wishes of a number of testators, but it would not be a major deviation and would not frustrate the accomplishment of the testators' broad testamentary goals.

After making that choice, the NCCUSL committee members received a letter from an attorney reinforcing their confidence in their adoption of a pure equitable apportionment system. The attorney represented an estate in a state that has an apportionment provision placing the burden of paying the tax apportioned to a decedent's probate assets entirely on the residuary beneficiaries. In planning his testamentary dispositions, the decedent had not taken into account the size of the tax generated by the preresiduary devises. As a result, nearly all of the residuary was eaten up by taxes, and the testator's dispositive plan was vitiated.
1. Apportionable Estate

The apportionable estate is defined in the 2003 Uniform Act as the gross estate reduced by three categories of deductions.49

a. Deduction of Value of Marital and Charitable Interests

The value of any property that qualifies for a marital or charitable deduction is deducted in determining the apportionable estate. Because those properties do not generate any estate tax, the persons receiving them should not bear any of the tax, and the properties should not affect the allocation of taxes to other parties. As noted above, the percentage of tax apportioned to the recipient of a nondeductible interest is equal to the percentage of that person's interest in the apportionable estate, and that system of calculation insures deductible interests do not influence the amount of tax apportioned to others. The 1964 Uniform Act accomplishes the same result using a different device.52

b. Deduction of Gift Tax Added to Gross Estate

The amount of gift tax that the decedent or his estate paid on a gift 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 by Code section 2035(b). A foreign or state death tax may have a similar provision.

If the gift tax that is added back to the gross estate were included in the apportionable estate, and the donees of the gift that engendered that gift tax were not included as persons having an interest in the apportionable estate, the 2003 Uniform Act would apportion less than one hundred percent of the estate tax. One solution to this problem is to include the donees of the gift as persons to whom apportionment of the tax is to be made. But, for two good reasons, the NCCUSL committee that drafted the 2003 Uniform Act rejected this solution. The first reason was to avoid including in the 2003 Uniform Act the very complex statutory language that would be required to implement that provision. The second reason is that in many cases it would be difficult to collect the tax due from the donees. Accordingly, the 2003 Uniform Act eliminates the

49 The properties included in the gross estate may differ for different taxes that are to be apportioned. See 2003 Uniform Act § 2(3).
50 See id. § 2(1).
51 See id. § 4(1).
52 See 1964 Uniform Act § 5.
The 2003 Revised Uniform Estate Tax Apportionment Act added gift tax from the apportionable estate by deducting it from the gross estate. This means that persons interested in the apportionable estate bear the estate tax payable on the amount of gift tax that is added back, and those persons will not be reimbursed by the donees. The 1964 Uniform Act contains no provision dealing with this issue.

c. The Amount of Claims and Expenses for Which the Tax in Question Allows a Deduction

The beneficiaries of the residuary of the probate estate or sometimes the residuary beneficiaries of an inter vivos trust bear the expenses incurred by the estate and the satisfaction of valid claims against the estate. Only those expenses and claims that are allowable deductions for the tax to be apportioned are deductible in determining the apportionable estate. To be allowable, the deductions need only be permissible; they need not be claimed and allowed as well. The test is not whether a deduction was allowed, but whether it was allowable.

But what about expenses or claims that are not allowable deductions in determining the tax? Should not those claims and expenses also reduce the apportionable estate? In what respect are they different from expenses that are allowable deductions, but for which no deduction was claimed?

Because the deductions allowed by a tax are one of the elements that goes into the determination of the amount of the tax, it is appropriate that those deductions be taken into account in determining the percentage of interests of beneficiaries in the properties that give rise to the tax. Reflecting those deductions in the apportionable estate accomplishes that goal. While an allowable deduction that is not taken is not reflected in the value of the estate to which the tax is to be applied, it is omitted only because of a tactical judgment that it can serve a more useful purpose if applied to another tax system. An allowable deduction, whether taken or not, is one ingredient in the factors that the drafters of the tax law chose to utilize in determining the amount of tax, and it is appropriate to reflect those items in the apportionable estate. Because expenses and claims that are not allowable deductions are not part of the formula for determining the tax, those items are not reflected in the apportionable estate.

53 See I.R.C. § 642(g). The expenses of administering an estate often can be deducted, at the election of the personal representative, either as an income tax deduction or as an estate tax deduction. If the personal representative elects to take estate administration expenses as income tax deductions, and thereby waives the right to take them as estate tax deductions, they would still be an allowable estate tax deduction. See id.
The following two examples, taken directly from the preliminary Comments to Section 2 of the 2003 Uniform Act illustrate how this provision operates.

Ex. (1) D dies leaving a gross estate with a value of $10,150,000 and makes no provision for apportionment of taxes. D’s will makes pecuniary devises totaling $1,000,000, and gives 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 incurs administrative expenses of $140,000, all of which are allowable as federal estate tax deductions. The personal representative elects to claim the administrative expenses as federal income tax deductions rather than as estate tax deductions. Nevertheless, those expenses are allowable as estate tax deductions and so reduce the gross estate in determining the apportionable estate. For purposes of the federal estate tax, the apportionable estate is $10,000,000 of which the residuary beneficiaries together have interests valued at $9,000,000 or 90%. 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. 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 are apportioned each to A and B, and 10% of the federal estate taxes are apportioned to the pecuniary beneficiaries.

Ex. (2) The same facts as those stated in Ex. (1) except that the administrative expenses total $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 de-
ductible funeral expenses); and so the apportionable estate is $10,000,000. As noted in Ex. (1), 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, just as was true in Ex. (1), 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 are apportioned each to A and B, and 10% of the federal estate taxes are apportioned to the pecuniary beneficiaries.54

2. General Default Statutory Scheme

As noted above, the first step in apportioning a tax is to apportion to each person who has an interest in the apportionable estate a ratable portion of the tax. As will be discussed later, adjustments must be made to accommodate special tax provisions and to deal with collection shortages. One modification is that a generation-skipping tax on a direct skip taking effect at death is charged to the person to whom the property is transferred.55

Another modification, which has already been discussed,56 is that a tax apportioned to property which holds one or more time-limited interests is paid, without further apportionment, from the principal of that property. This rule applies regardless of whether any of the interests in the property are deductible.57 This latter rule not only applies to the default statutory rule, but also applies to a decedent's direction unless the decedent expressly directs otherwise. If the tax were not paid from principal and instead were apportioned to persons who had only a discretionary interest in the property or an interest that they could not enjoy for many

55 See 2003 Uniform Act § 4(2).
56 See discussion supra Part II.G.
years, to require them to pay a tax up front on an interest that they might never receive would be harsh. If required to do so, many of those beneficiaries might disclaim their interest. To avoid such an intrusive consequence, the 2003 Uniform Act requires that principal be used to pay the tax.\(^{58}\) Note, however, that this provision does not apply if the property cannot be reached by the personal representative because of legal or practical obstacles.\(^{59}\) A different set of rules, as will be discussed later, applies in that circumstance.\(^{60}\) Also, this rule does apply to property for which a special elective benefit\(^{61}\) was elected.

If QTIP property is included in a surviving spouse's gross estate under Internal Revenue Code section 2044, the amount of tax apportioned to the recipients of that property is determined by applying the marginal rate of the surviving spouse's estate tax.\(^{62}\) This method contrasts with the ratable allocation that applies to other properties in that a ratable allocation of the tax utilizes an average rate of tax rather than a marginal rate. The reasons for adopting a marginal rate for QTIP property are as follows: (1) the QTIP property can be viewed as being augmented to the spouse's assets, and (2) because the spouse had only an income interest in the property during the spouse's life and typically cannot control to whom the property goes (unless the spouse had been given a power of appointment), to make the spouse's beneficiaries bear a higher rate of tax than if the property had not been included in the spouse's gross estate would be inequitable. Although the 2003 Uniform Act need not follow federal rules in such matters, the federal tax law that authorizes a personal representative of the surviving spouse to collect a portion of the federal estate tax from the recipients of QTIP property utilizes the marginal rate of the spouse's tax to determine the amount to be collected.\(^{63}\) The 2003 Uniform Act tracks the federal tax law in that respect.

The 1964 Uniform Act does not expressly deal with the treatment of QTIP property that is added to a spouse's gross estate. Instead, taxes attributable to such property are apportioned under the general apportionment provision of the 1964 Uniform Act.

\(^{58}\) See id.

\(^{59}\) See id. § 4(4), cmt.

\(^{60}\) See infra Part III.B. (discussing the default statutory apportionment for insulated property).

\(^{61}\) See infra Part III.C. (discussing special elective benefits).

\(^{62}\) See 2003 Uniform Act § 4(3).

\(^{63}\) See I.R.C. § 2207A.
3. Credits and Deferrals

All persons interested in an apportionable estate share ratably in the benefits obtained from any tax credit allowed to the estate for the payment of gift taxes or payment of estate taxes on property previously taxed. The same treatment applies to a credit allowed for the payment of state or foreign estate taxes, except to the extent the tax was paid by a person receiving the property that generated the tax, then the person who paid the tax will receive the benefit of the credit. The estate tax can be paid from the property distributed to a beneficiary or by having the beneficiary pay it directly.

The 1964 Uniform Act contains similar provisions, except it refers to a “deduction” for property previously taxed rather than to a credit, the relief currently provided by federal tax law.

Federal estate tax law provides a number of instances in which the payment of an estate tax can be deferred. If deferral is elected, interest is payable on the deferred amount. The 2003 Uniform Act provides that the benefit of a deferral passes to the persons whose interest in the property, the tax on which is deferred, caused the apportionment of that tax to them. The burden of any interest payable on that deferral is charged to the same persons, and any benefit derived from a tax deduction for the interest payment or accrual inures to the benefit of those same persons.

B. Insulated Property

What does a fiduciary do if a tax has been apportioned to a recipient of property who cannot be reached because of legal or practical impediments, or for which it would be too costly and time-consuming to reach? The 2003 Uniform Act addresses that circumstance, but prior versions did not.

The 2003 Uniform Act does not make a special provision for when the unreachable property is not subject to a time-limited interest. In that

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64 See 2003 Uniform Act § 5(1). The Code allows a federal estate tax credit for all or a portion of the federal estate tax paid on certain properties included in the taxable estate of a person who died within a relatively short time of the decedent’s death. The credit is sometimes referred to as a “credit for property previously taxed.” See I.R.C. § 2013.
65 See 2003 Uniform Act § 5(2).
66 See 1964 Uniform Act § 5(c).
67 See, e.g., I.R.C. §§ 6161-6166.
circumstance, the recipient of the property is personally liable for the apportioned tax. Even when the recipient cannot obtain present possession of the property, because no time-limited interests exist, the recipient is assured of ultimately obtaining the property, and to require him to pay the apportioned tax is not a harsh result. The recipient likely could sell his interest in the property or borrow against it, if necessary. Accordingly, the 2003 Uniform Act makes no special provision for that person.\(^6\)

The circumstance is quite different if the property is subject to one or more time-limited interests. The 2003 Uniform Act adopts the term "insulated property," which it defines as "property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because [collection is impossible or impracticable]."\(^7\) Other property included in the apportionable estate is referred to as "uninsulated property." Many interests in insulated property, not only a time-limited interest, may be conditional or discretionary; the insulated property itself may never come into the possession of some of the holders of interests or may not come into their possession until many years in the future. To require a holder of such an interest to pay the tax attributable to the present value of that interest up front would be unduly harsh (especially because the valuation often is based on speculative assumptions), and the 2003 Uniform Act prevents this result by excluding (at least temporarily) all holders of interests in the insulated property from that requirement.\(^2\) But then, how is the decedent's personal representative to pay those persons' portions of the estate tax? The solution adopted in the 2003 Uniform Act is the most creative and innovative provision of the 2003 Uniform Act.

The tax apportioned to the holders of interests in insulated property is collected ratably from persons holding interests in uninsulated property, including persons exonerated from tax apportionment by the decedent's valid direction.\(^3\) The amount collected from someone cannot exceed the value of that person's interest in uninsulated properties.\(^4\) If the total of

\(^6\) See infra Part IV for a discussion of how to treat the problem of collection when a fiduciary is unable to collect from someone.

\(^7\) 2003 Uniform Act § 6(a)(3).

\(^7\) See id. § 6(a)(5).

\(^7\) See id. § 6(c).

\(^7\) See id. If payment is due from a person holding an interest in uninsulated property that is subject to a time-limited interest, the payment will be collected from the principal of that property. See id. § 6(b).

\(^7\) See id. §§ 6(c), 9(d).
those obligations is not sufficient to pay the tax, any deficiency is collected ratably from interests that otherwise qualify for marital and charitable deductions.\textsuperscript{75}

The payments required of holders of interests in uninsulated properties are advancements and are to be reimbursed in a unique fashion. The 2003 Uniform Act refers to the tax paid by those advancements as an "advanced tax."\textsuperscript{76} Whenever a distribution of insulated property is made, the distributee is required to pay a fraction of it ratably to each uninsulated holder who paid part of the advanced tax.\textsuperscript{77} The fraction has a numerator equal to the total amount of advanced tax for that insulated property, and the denominator is the value of the interests in the insulated property to which that tax is attributable.\textsuperscript{78} In effect, the persons making an advanced tax payment receive a phantom percentage interest in the insulated property. While the percentage of a person’s phantom interest in the insulated property remains constant, because the value of the insulated property may rise or fall, the value of the percentage interest will increase or decrease accordingly. Although those persons do not own an actual interest in the insulated property, they participate in its appreciation or depreciation. The obligation of the distributee to pay a portion to those who advanced the tax is a personal obligation, but the 2003 Uniform Act authorizes a court to "award an uninsulated holder a recordable lien on the distributee's property to secure the distributee’s obligation to that uninsulated holder."\textsuperscript{79} If undistributed insulated property ceases to be insulated, the persons who advanced the tax can collect their percentage interest from the property at that time.\textsuperscript{80}

In some circumstances, it would be more equitable to collect the tax attributable to an interest in insulated property from the person holding that interest rather than to require an advancement of that amount from others. For example, if a person has an interest in insulated property that is certain to come into that person’s possession in a short time, it would be more equitable to collect the tax from that person. The 2003 Uniform Act accommodates that concern by authorizing a court to order the beneficiary to pay the tax when that would be more equitable than requiring

\textsuperscript{75} See id. § 6(c).
\textsuperscript{76} See id. § 6(a)(2).
\textsuperscript{77} See id. § 6(d).
\textsuperscript{78} See id. § 6(a)(1).
\textsuperscript{79} Id. § 6(f).
\textsuperscript{80} See id. § 6, cmt.
others to advance it.\footnote{See id. \S 6(e).}

C. Special Elective Benefits

Federal estate tax law provides special elective benefits that permit certain real property and business interests to be taxed at lower "values" than their actual fair market value. Currently, three provisions fall within this category: Code sections 2031(c), 2032A, and 2057.

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 \S 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. . . .

Another federal estate tax provision ... [of this type is Code] \S 2057. . . . That provision grants an election to receive a special estate tax deduction for a "qualified family-owned business interest." Under \S 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. . . . The Economic Growth and Tax Relief Reconciliation Act of 2001 repealed \S 2057 for the estates of decedents dying after the year 2003. However, the 2001 Act retains the 10-year recapture provision, and the sunset provision will reinstate \S 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 \S 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 \S 2031(c)(5). A failure to im-
plement that agreement within a specified time will cause the imposition of an additional estate tax to recapture that deduction.82

The 2003 Uniform Act provides for the allocation of the benefits derived from special benefit provisions and determines how the additional taxes incurred to recapture any of those benefits will be borne.83 First, the aggregate tax reduction obtained from all special elective benefits is determined, and then that aggregate amount is allocated 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.84

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 [the 2003 Uniform Act] . . . that the estate tax . . . be paid from the principal of property subject to a time-limited interest does not apply to [specified] properties. . . . The solution [adopted for insulated property] . . . 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

82 2003 Uniform Act § 7, cmt.
83 See id.
84 See id.
the persons who paid the tax. So, that approach was not adopted. Instead, [the 2003 Uniform Act]... apportion[s] the estate tax to the holders of the interests in the properties [and leaves them to determine]... the best method for obtaining the funds to make that payment.\(^{85}\)

If a provision for additional estate taxes is triggered to recapture some of the special benefits, the 2003 Uniform Act follows the allocation of liability imposed by the estate tax law that generated the additional tax.\(^{86}\)

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.\(^{87}\)

The 1964 Uniform Act does not have any provision dealing with special elective benefits or the recapture of those benefits.

**IV. Fiduciary’s Collection of Tax**

The fiduciary responsible for the payment of a tax is authorized to collect it from any person to whom the tax is apportioned or who is required to advance a tax.\(^{88}\) But, what if the fiduciary is unable to collect from one or more of the persons who are obligated to pay?\(^{89}\) In that case, the fiduciary can collect the deficiency 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 . . . ; [and]
3. any person having an interest in the gross estate [that qualifies for a marital or charitable deduction].\(^{90}\)

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\(^{85}\) *Id.*
\(^{86}\) *See id.* § 7.
\(^{87}\) *See id.* § 7, cmt.
\(^{88}\) *See id.* § 9(a).
\(^{89}\) The holders of interests in insulated property are not obligated to pay the tax; instead, other parties are required by section 6 of the 2003 Uniform Act to advance the tax. *See discussion supra* Part III.B.
\(^{90}\) 2003 Uniform Act § 9(b).
Collections must be made, to the extent feasible within each category, in the order listed above. However, within each category, "the fiduciary is not required to collect a deficiency ratably." Instead, the fiduciary can collect all of the deficiency from one or more persons at the fiduciary's discretion. The money to pay the tax must be obtained promptly; collection cannot be delayed by requiring the fiduciary to seek funds from a number of persons and to exhaust his remedies as to all of those persons.

Each person who pays more than his allocated share of the tax has a ratable right of reimbursement from each person who did not contribute the full amount they owed. A person who possesses a right of reimbursement may request the fiduciary to enforce it on his behalf, and the fiduciary will if the burden is not unreasonable.

V. CONCLUSION

The 1964 Uniform Act was adopted almost forty years ago. The newest revision of the 2003 Uniform Act deals with many items that did not exist when the 1964 Uniform Act was adopted, such as QTIP trusts and special elective benefits. Charitable lead and remainder trusts are far more prevalent now than they were forty years ago. The current revision updates the 1964 Uniform Act and provides solutions to problems that were not covered in the earlier version.

The 1964 Uniform Act made no provision for the collection of tax from the recipients of insulated property—property from which collection currently is not possible or is not practical. Personal representatives were left to work out a solution to this collection problem as best they could. The 2003 Uniform Act addresses this problem and provides a commendable solution that is both practical and novel.

The rise in the use of will substitutes was a major factor in the decision to revise the 1964 Uniform Act. The 1964 version permitted a decedent to override the statutory allocation scheme only if the decedent did so in a valid will. The 2003 Uniform Act now permits the decedent to make a valid direction of estate tax apportionment in a revocable trust document because that will be the principal dispositive document for many decedents. In addition, the 2003 Uniform Act now authorizes a decedent to make apportionment directions concerning specific items of property in a document disposing of those items so long as the direction

91 See id. § 9, cmt.
92 See id. § 10(a).
93 See id. § 10(b).
does not contradict one made in a decedent’s will or revocable trust. For example, many persons now have substantial interests in funds derived from pension or profit-sharing plans, and those interests often constitute the major part of a decedent’s estate. It has become a common practice to transfer those interests after a decedent’s demise through a contractual designation that the decedent made during life with the holders of the pension fund. The 2003 Uniform Act permits the decedent to direct in contractual designation the estate tax burden to be borne by those funds.

The 1964 Uniform Act made no provision for the construction of a decedent’s direction for apportionment. If a decedent directed that estate taxes be paid by recipients of property transferred during the decedent’s life, such as property transferred by a revocable trust instrument, and if some of the interests in that property were deductible (i.e., marital or charitable deductions) and some were not, there was no provision for allocating the tax between the deductible and nondeductible interests. The 2003 Uniform Act addresses that issue, and provides that the tax will be apportioned to the nondeductible interests first unless the decedent directs otherwise.

While the federal estate tax is slated for extinction in the year 2010, it is scheduled, phoenix-like, to spring back into existence in 2011. It would be prudent to act on the assumption that a federal estate tax will be with us for many years to come. Moreover, a growing number of states, in anticipation of the possible extinction of the federal estate tax, have recently adopted an independent estate tax (i.e., a tax that does not piggyback on the federal estate tax). One can hope that state legislators will consider the adoption of the 2003 Uniform Act.