Title

In the estate-tax-apportionment space, Trust A's beneficiary and Trust B's beneficiary can find themselves in an involuntary debtor-creditor relationship and the trustee of one of the trusts in an involuntary agency relationship

Text.

Assume the settlor of a funded domestic revocable inter vivos trust has just deceased. There being no personal representative in the picture, it falls to the trustee to prepare and file the estate-tax return. Assume assets of an offshore trust comprise a part of the "apportionable estate" for estate-tax purposes, and that the offshore assets are physically inaccessible to the domestic trustee. The Uniform Probate Code provides that the domestic trustee may satisfy the offshore trust's domestic estate-tax obligation with domestic-trust property. See UPC §3-9A-106(c). The non-consenting disadvantaged beneficiary of the domestic trust then becomes a personal, direct creditor of the advantaged beneficiary of the offshore trust to the extent of the forced advancement. See UPC §3-9A-106, §3-9A-110. The disadvantaged beneficiary may elect to compel the domestic trustee on behalf of the disadvantaged beneficiary to seek enforcement of the personal right of reimbursement against any future distributions from offshore. See UPC § 3-9A-110(b). This forced property-advancement statutory scheme is in derogation of two core principles of fiduciary doctrine: (1) An agency is voluntary on the part of both principal and agent and (2) A trustee, *qua* trustee, is not an agent of the beneficiary.

How the trustee is to be compensated for his services as collection agent is unclear. Under the Uniform *Trust* Code, the trustee is entitled to be reimbursed out of the trust property for expenses properly incurred "in the administration of the trust." See UTC § 709(a)(1). The UPC, however, would seem to make the rights and liabilities incident to the forced advancement a matter that is external to the trust's administration. As there is no statutory time limitation on the disadvantaged beneficiary's statutory right to compel the trustee to "take reasonable steps" to enforce this private and personal right of reimbursement, presumably laches doctrine somehow comes into play. The disadvantaged beneficiary who delays in directing the domestic trustee to act as the disadvantaged beneficiary's personal collection agent until after final distributions have been made from the domestic trust, for example, may have waited too long in the eyes of equity to force the trustee to be his personal collection agent.

The apportionment of an estate tax liability between and among trust beneficiaries is taken up generally in §8.20 of *Loring and Rounds: A Trustee's Handbook* (2019), which section is reproduced with enhancements below:

Appendix

§8.20 Tax Apportionment Within and Without Trust [from *Loring and Rounds: A Trustee's Handbook* (2019), with enhancements].

> *Indeed, in Swallen, the court found that the will seemed full of that impossible dream of exonerating all of the beneficiaries: "The will thus seems to evince an intent to burden no one with taxes—a feat that many aspire to, but few achieve legally."*[1]

[1]Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 Real Prop. Prob. & Tr. J. 671, 687 (2007) (citing to Estate of Swallen v. Comm'r, 98 F.3d 919, 924 (6th Cir. 1996)).

Determining the trust's share of the apportionable estate. Property that is the subject of an inter vivos trust under which the settlor has reserved to himself a general inter vivos power of appointment, such as a right of revocation, can generate a federal estate tax upon the death of the settlor.[2] Assume the terms of an inter viovs trust contain no direction as to the apportionment of estate taxes. Neither do the terms of the pour over will. There are two views concerning liability for estate taxes under such circumstances, the first being that liability falls entirely on the probate estate, the second being that "…[non-probate]…assets not forming a part of the decedent's probate estate but nevertheless includible in his or her taxable estate abate proportionally to pay the federal estate tax liability owed by the…non-probate assets." The latter approach, the "equitable-apportionment" approach, is endorsed by the Restatement (Third) of Property (Wills and Other Donative) Transfers (see §1.1, comment g) and codified in the Uniform Estate Tax Apportionment Act (2003), (see §4(1)), whose provisions have been incorporated into the Uniform Probate Code (see §3-9A-104).

Apportioning internally between and among the interests in a trust's pro rata share of the apportionable estate. *In the absence of an apportionment direction in the terms of the particular trust*. With respect to estate-tax obligations that are allocated to a portion or all of the trust property, how is the burden internally allocated when the governing instrument is silent on the subject? It depends. The Uniform Estate Tax Apportionment Act (2003)'s official commentatry explains: "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, …[the tax is to be paid]…from principal."[1] Otherwise, the estate tax is "apportioned ratably to each person that has an interest in the apportionable estate."[2]

What if a portion of the equitable interest accrues to one or more charities upon the serttlor's death? Let us take a revocable inter vivos trust that divides into two equal shares upon the death of the settlor. One share is held for the benefit of a charity and the other for the benefit of the settlor's children. Let us also assume that the settlor intends to fund the trust with all of his or her property before death. If there is no provision in the governing instrument explaining which class of beneficiary is to bear the economic burden of the estate taxes, just a general direction that the trust estate is to bear the tax burden, then the trustee will have to fall back on an estate-tax apportionment statute, if any. Such statutes are not always models of clarity.[6] Unless there is some statute that clearly addresses the issue,[7] the question will be whether the estate taxes must be paid "off the top" *or* paid out of the children's share after division.[8] The policy argument for charging estate taxes to the children's share is that the children's share is generating the tax, the charity being entitled to a charitable deduction.[9] In other words, the doctrine of equitable apportionment applies.[10] The UPC would dock the children's share for the full amount.[11] So also if the other share qualified, instead,

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[2]*See generally* §8.9.1 of this handbook (the federal estate tax).

[1] *See* Uniform Estate Tax Apportionment Act (2003) §4, cmt.

[2] *See* UPC §3-9A-104(1).

[6]*See, e.g.*, The First Nat'l Bank of Boston v. Judge Baker Guidance Ctr., 13 Mass. App. 144, 431 N.E.2d 243 (1982).

[7]The Uniform Estate Tax Apportionment Act (2003), see the commentary accompanying §3, specifically calls for an equitable apportionment in such a situation.

[8]*See, e.g., In re* Menchhofer Family Trust, 765 N.W.2d 607 (Iowa Ct. App. 2009) (unpublished table decision) (court ordering inheritance taxes to be paid "off the top" of a trust with charitable and noncharitable beneficiaries).

[9]*See, however*, Estate of Boder, 850 S.W.2d 76 (Mo. 1993) (calling for taxes to be paid "off the top" before division, thus causing the charitable interests to bear a portion of the tax burden).

[10]*See generally* §8.15.62 of this handbook (doctrine of equitable apportionment). *Cf. In re* Estate of Pyle, 570 A.2d 1074 (Pa. Super. Ct. 1990) (a case involving charitable and noncharitable residuary takers under a will, where the noncharitable taker was saddled with the entire burden of the estate taxes).

[11]*See* UPC § 3-9A-103(b)(2).

for the marital deduction.[3]

The children will argue that the governing instrument, taken in its totality, reveals an intention to put the interests of family members at least on a par with the charity. Accordingly, taxes should be paid "off the top."[12] If the taxes are paid "off the top," then the charity of course gets less than it would otherwise get if the noncharitable interests alone were to bear the tax burden. This is because the charity is sharing some of the burden of the tax. But there is an added twist: An "off the top" payment will require a circular tax computation to accommodate the corresponding reduction in the charitable deduction occasioned by the reduced amount passing to the charity.[13] "Section 2055 … [of the Internal Revenue Code]… provides an estate tax deduction for charitable contributions, but section 2055(c) reduces the deduction by the amount of death taxes payable from … [what passes to the charity]…"[14] Had there been no general direction in the trust instrument that the trust estate shall bear the tax burden, the UPC calls for the taxes to be paid not "off the top" but from the children share, the charity's share not being a part of the "apportionable estate."[15] Message: The settlor's intentions with respect to the apportionment of estate taxes between charitable and noncharitable interests should be fully and unambiguously addressed in the tax clause of the governing trust instrument.

Internal tax apportionment questions can arise not only when there are charitable and noncharitable equitable interests but also when there are classes of noncharitable interests.[16] Let us take a funded revocable inter vivos trust that calls for the trustee, upon the death of the settlor, to carve out $1 million for the settlor's children from his first marriage and to distribute the "trust residue" to the children from his second marriage. There is no will in the picture. Who bears the burden of the estate taxes when the governing instrument is silent on the subject? If this were a will, the common law default rule (which the UPC rejects[4]) is that the estate tax liability would be borne by the portion passing to the children of the second marriage, with the children of the first marriage receiving the full $1 million undiminished by estate taxes. "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."[17] But this is not a will. Thus it is likely that the doctrine of equitable apportionment would be applicable, with each class of beneficiary bearing its pro rata share of the economic burden of the taxes.[18] The UPC is in accord.[5]

On the other hand, if the "trust residue" were to pass to the second wife outright or into a marital deduction trust, QTIP or otherwise, for her benefit, would there still be an apportionment of the tax burden

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[3] *See* UPC § 3-9A-103(b)(2).

[12]*See, e.g.*, Estate of Bradford v. Comm'r, T.C. Memo 2002-238, 84 T.C.M. (CCH) 337, 346 (T.C. 2002) (the court ordering that taxes be paid "off the top," the trust agreement having directed that "any death taxes … are to be paid before the trust property is allocated to the two trust beneficiaries and, thus, before the share of the charitable beneficiary is determined").

[13]*See* Treas. Reg. §20.2055-3(a)(2) (providing that the charitable deduction amount can be calculated either "by a series of trial-and-error computations, or by a formula" and noting that "[i]f, in addition, interdependent State and Federal taxes are involved, the computation becomes highly complicated").

[14]Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 Real Prop. Prob. & Tr. J. 671, 689 (2007).

[15]UPC §3-9A-104(1).

[16]*See, e.g.*, Folger v. Hillier, No. A100401, 2003 WL 21916367 (Cal. Ct. App. Aug. 12, 2003) (unpublished) (holding an internal trust tax apportionment provision bestowing discretion on the trustee to pay estate taxes "without proration" to be ambiguous, the result being that the tax burden must be shared pro rata by all beneficiaries—none of whom were charities—as required by the applicable default law).

[4] *See* UPC § 3-9A-104(1).

[17]Uniform Estate Tax Apportionment Act (2003), pref. n.

[18]*See generally* §8.15.62 of this handbook (doctrine of equitable apportionment).

[5] *See* UPC §3-9A-104(1).

to the trust residue? Probably not. The UPC is in accord.[6] "As a general rule, equitable apportionment statutes do not apportion taxes to the marital share because that share does not generate any estate tax liability."[19] If the governing documentation had explicitly called for an apportionment, calculating the marital deduction would then require a "circular tax computation." Why? Because "[u]nder Section 2056(b)(4)… [of the Internal Revenue Code,]… the marital deduction must reflect the effect of any death taxes on the net value of property passing to the surviving spouse."[20]

Rather than having to grapple with some estate-tax apportionment statute after the settlor's death, the prudent prospective trustee of a trust under which the settlor is to reserve a right of revocation will insist that the settlor's intentions with respect to the apportionment of estate taxes be fully and unambiguously spelled out in the governing trust instrument.

The terms of the trust may apportion the trust's internal estate-tax obligations between and among the equitable interests. The settlor may specify in the governing trust instrument which equitable interests are to shoulder the economic burden of satisfying any estate-tax obligations that are generated by (and which must be paid from) the trust property.[3] The Uniform Estate Tax Apportionment Act (2003), now §3-9A of the UPC, is in accord,[7] assuming the pour-over will, if there is one, lacks an express and unambiguous apportionment direction. If there is a will in the picture, all bets may be off, a topic we take up further on in this section of the handbook.[8] If conflicting apportionment provisions appear in two or more revocable trust instruments, the Act provides that "the provision in the most recently dated instrument prevails."[9] The instrument of a *revocable* inter vivos trust that provides for both charitable and noncharitable equitable interests and/or under which there are dispositions qualifying for the marital deduction[4] particularly deserves a tax-apportionment clause that touches all bases and is unambiguous.[5]

Apportioning the general estate-tax payment obligation when there are multiple instruments each of which is governing how a portion of the apportionable estate is to be administered/distributed post-mortem. The estate and generation-skipping tax apportionment clause of the revocable inter vivos trust[21] and the corresponding tax apportionment clause of the pour-over will should cleanly dovetail.[22] They

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[6] UPC § 3-9A-102(1)(B) and § 3-9A-104(1).

[19]Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 Real Prop. Prob. & Tr. J. 671, 681 (2007).

[20]Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 Real Prop. Prob. & Tr. J. 671, 681–682 (2007).

[3]*Cf.* Estate of Miller v. Comm'r, 209 F.3d 720 (5th Cir. 2000), *aff'g per curiam* T.C. Memo 1998-416 (T.C. 1998) (resolving apparently conflicting tax provisions in will and revocable inter vivos trust).

[7] *See* UPC § 3-9A-103(a)(2).

[8] *See* UPC § 3-9A-103(a)(1) ("To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment fo an estate tax, the tax must be apportioned accordingly.").

[9] *See* UPC § 3-9A-103(a)(2).

[4]*See generally* §8.9.1.3 of this handbook (the marital deduction).

[5]*See, e.g., In re* Estate of Baltic, 946 N.E.2d 244, 247 (Ohio Ct. App. 2010) ("Moreover, although the trust agreement is unclear as to how estate taxes are to be paid, it provides language directing how estate taxes are not to be paid, *i.e.*, they are not to be paid from the property of the estate that 'would be excluded' from the estate 'for federal estate tax purposes.' Thus, the trust prohibits taxes from being paid out of … [distributions]… to charitable institutions.").

[21]*See, e.g.*, Estate of Lurie v. Comm'r, T.C. Memo. 2004-19 (T.C. 2004) (as trust tax clause caused marital trust to bear some of the burden of the estate tax liability, the marital deduction must be reduced to reflect the diversion of assets from the marital trust to the taxing authorities).

[22]*See* Patterson v. United States, 181 F.3d 927 (8th Cir. 1999) (applying Kansas law, which requires that the will and the trust instrument be considered and construed together in determining which document shall govern the apportionment of death taxes, the court found that a mandatory tax payment

should not be in conflict, or appear to be in conflict,[23] for the trustee can never be sure that the trust will contain all the settlor's property at the time of his or her death.

Nor should the scrivener without due consideration insert into a pour-over will, or into any will for that matter, a provision allocating all taxes occasioned by the testator's death to the probate residue, particularly as in some jurisdictions such a provision could well trump language to the contrary in the recipient revocable trust, a phenomenon that we will consider in more detail in the next paragraph.[25] The UPC provides that a decedent's general direction to the fiduciary to pay claims against him or his estate "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."[10] As one commentator has noted: "With respect to competing taxable shares, the questions is … Did the inclusion of what is often boilerplate language mean that the testator or settlor intended the residuary beneficiary to bear the brunt of the tax liability, even if it completely consumes all benefit to him?"[26]

The UPC favors the will's tax clause. Take a pour-over will and the recipient revocable inter vivos trust whose tax clauses are in conflict. How would the UPC resolve the conflict? UPC §3-9A-103(a)(1) provides as follows: " 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." The official commentary seems to confirm that a contrary or elaborating provision in the trust instrument is to be ignored: "To the extent that a decedent makes an express and unambiguous provision by will, that provision will trump any competing provision in another instrument." In other words, the two governing instruments are not to be construed as a unit, are not to be read together. This extreme deference to the will, this elevation of form over intent that would turn equity's signature intent-over-form maxim on its head,[11] would seem inconsistent with a critical goal of the UPC, namely to effect a unification of the law of probate and nonprobate transfers.[12] It also would seem inconsistent with (1) the UPC's generous will-

provision in the will and a discretionary tax payment provision in the trust instrument, taken together, express the decedent's intent that the trust provision preempt the will provision).

[23]*See, e.g., In re* Estate of Brownlee, 654 N.W.2d 206, 212 (S.D. 2002), *remanded on another issue sub nom.* Wagner v. Brownlee, 713 N.W.2d 592 (S.D. 2006) (in the face of "two thoroughly conflicting clauses within the testator's estate plan, the Will and the Trust," the court fell back on a codified version of the doctrine of equitable apportionment). *See generally* §8.15.62 of this handbook (doctrine of equitable apportionment).

[25]*See generally* Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 62 U. Miami L. Rev. 767, 773 (2008) (noting that the Uniform Estate Tax Apportionment Act (2003), specifically §3(a)(1), provides that "if a will unambiguously provides the method for apportionment then the will provision will control without regard to any inconsistent provision in a revocable trust").

[10] UPC §3-9A-103(a)(1) & (2).

[26]Wendy C. Gerzog, *Equitable Apportionment: Recent Cases and Continuing Trends*, 41 Real Prop. Prob. & Tr. J. 671, 675–676 (2007). *Cf. In re* Estate of Williams, 853 N.E.2d 79 (Ill. App. Ct. 2006) (the court equitably apportioning the estate tax obligation occasioned by the death of the surviving spouse between her probate estate and the assets of her late husband's marital deduction trust for her benefit, although her will expressly provided for the payment of estate taxes from her probate residue and his trust lacked a tax clause).

[11] *See generally* §8.12 of this handbook (equity's maxims).

[12] *See generally* UPC § 2-503, cmt.

reformation provision that is otherwise marginalizing the plain-meaning rule[13] and (2) at least the spirit of the UPC's harmless-error rule, whose literal focus, granted, is limited to the will-execution formality. [14]

The pre-deceased spouse's QTIP trust. The tax clause of the will[27] and the revocable trust[28] also should be coordinated with the tax clause of the pre-deceased spouse's QTIP trust.[29] A QTIP trust can create external tax apportionment uncertainties upon the death of its beneficiary, unless there is adequate coordination among the governing instruments.[30] Assume the wife of the settlor of a revocable trust predeceases the settlor. An estate-tax-deferring QTIP trust is established under her estate planning documents for his benefit. His revocable trust makes general provision for the payment of "all estate taxes occasioned by the settlor's [his] death." Ordinarily, the portion of the estate tax liability occasioned by his subsequent death that is allocable to her QTIP trust would be absorbed by the QTIP trust itself, unless his will or revocable trust by *specific* provision were to shift that burden elsewhere, such as onto his probate estate.[31] The UPC is in accord.[15] Massachusetts has a statute to that effect.[32] In Colorado, a general tax payment provision in a revocable trust was held to cover *state* estate taxes attributable to QTIP property, but, because of its lack of specificity, not the federal estate tax liability attributable thereto.[33] That burden, pursuant to the applicable state default law, remained on the QTIP property. On appeal, however, the federal specificity requirement was held applicable to the *state* estate tax liability as well.[34] Who is to bear the burden of the QTIP tax liability can become an unpleasant pocketbook issue, for example, when the QTIP remaindermen are the children of a first marriage and those who take under the revocable trust are the children of a second marriage.[35]

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[13] *See generally* UPC § 2-805.

[14] *See generally* UPC § 2-503

[27]*See, e.g., In re* Estate of Cord, 58 N.Y.2d 539, 449 N.E.2d 402, 462 N.Y.S.2d 622 (1983) (involving conflicting tax clauses, one in a self-settled irrevocable trust with a retained life estate and the other in the deceased settlor's will).

[28]*In re* Estate of Klarner, 98 P.3d 892 (Colo. Ct. App. 2003); *In re* Estate of Klarner, 113 P.3d 150 (Colo. 2005) (involving conflicting tax clauses, one in a QTIP trust and the other in the revocable trust of the surviving spouse of settlor of QTIP trust, the surviving spouse now having died).

[29]*See, e.g.*, Lurie v. Comm'r, 425 F.3d 1021 (7th Cir. 2005), *aff'g* T.C. Memo. 2004-14 (T.C. 2004).

[30]*See, e.g., In re* Blauhorn Revocable Trust, 275 Neb. 256, 746 N.W.2d 136 (2008) (tax clause in husband's revocable inter vivos trust, which made no specific reference to his predeceased wife's QTIP trust, though generally expansive, held not to impose on those who took under the husband's trust [which had one set of remainder beneficiaries] the burden of the estate taxes attributable to his wife's trust [which had a different set of remainder beneficiaries], this because of the lack of such a specific reference).

[31]I.R.C. §2207A(a)(2) provides that a QTIP trust established by the first-to-die-spouse shall bear its pro rata share of estate taxes owed at the death of the surviving spouse, unless the surviving spouse in his or her will or revocable trust has "specifically indicated an intent" that the QTIP trust be relieved of that burden.

[15] *See* UPC §3-9A-104(3) (note also that under the UPC apportionment of estate taxes against QTIP property upon the surviving spouse's death is based on the marginal estate tax rate, not the average tax rate.).

[32]Mass. Gen. Laws ch. 190B, §2-704.

[33]*In re* Estate of Klarner, 98 P.3d 892 (Colo. Ct. App. 2003).

[34]*In re* Estate of Klarner, 113 P.3d 150 (Colo. 2005).

[35]*Cf. In re* Estate of Cord, 58 N.Y.2d 539, 449 N.E.2d 402, 462 N.Y.S.2d 622 (1983) (involving conflicting tax apportionment clauses, one in a non-QTIP *irrevocable* trust whose beneficiaries were decedent-settlor's children by a prior marriage and the other in decedent's will of which decedent's surviving husband was the executor and a beneficiary, the corpus of the trust having been included in the decedent's gross estate for tax purposes due to her retained life interest in the trust income).

Tax apportionment language in the life insurance beneficiary designation form. The UPC provides that if neither the terms of the pour-over will nor the terms of the revocable inter vivos trust make "express and unambiguous" provision for the payment of estate taxes generated by the proceeds of a life insurance contract on the life of the decedent, a direction in the policy's beneficiary-designation form or elsewhere that estate taxes attributable to the proceeds shall be paid from those proceeds shall be honored and enforced.[16]

Also there is an irrevocable trust under which decedent had reserved an inome interest only. Assume that before the decedent had executed his *revocable* inter vivos trust he had established a funded *irrevocable* trust, reserving to himself an equitable life estate only. No other equitable interest and no powers were reserved. Upon his death the trust corpus, say, passes outright and free of trust to X. Because of the reserved equitable life estate, the corpus of the irrevocable trust is a part of the decedent's apportionable estate for estate-tax liability purposes. May the terms of the revocable trust apportion an estate-tax liability against X's distribution that exceeds the distribution's pro rata contribution to the estate-tax liability? Under the UPC the answer is no.[17]

Tax collection. *The Internal Revenue Code*. The decedent's personal representative is generally charged by law with preparing and filing the decedent's estate tax return. What if all the decedent's assets were held in a revocable inter vivos trust? In that case it would be the responsibility of the trustee to prepare and file the return, which is a topic that is taken up in §8.16 of this handbook. Four sections of the IRC, §§ 2206, 2207, 2207A and 2207B, administratively deal with the allocation of the burden of the federal estate tax among those who take by will and will substitute. "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…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."[18] For a discussion of the interaction of these sections of the IRC and the apportionment statutes of the various states, the reader is referred to Ira Mark Bloom.[36]

The Uniform Probate Code. Assume a trustee charged with preparing and filing a decedent's estate tax return is unable to collect the estate tax that is apportioned to someone, say, the beneficiary of another trust, perhaps one that is offshore. Under the UPC, the domestic trustee may satisfy the deficiency from the portion of the apportionable estate that the domestic trustee does control.[19] This can be done without the consent of those to whom that portion equitably belong.[20] (The UPC defines apportionable estate as the value of the gross estate "as finally determined for purposes of the estate tax to be apportioned" reduced by the value of interests that qualify for the marital deduction, the charitable deduction, and the like.[21])

A beneficiary who is compelled to pay an estate tax greater than what he owes has a right of reimbursement that is enforceable against whomever has benefited from the forced advancement.[22] This is a rare instance in which a beneficiary, *qua* beneficiary, can incur personal liability. The topic of beneficiary liability is taken up generally in §5.6 of this handbook.

A trustee may defer a distribution of entrusted property until he is satisfied that adequate provision for

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[16] *See* UPC § 3-9A-103(a)(3).

[17] See UPC §3-9A-103©

[18] Uniform Estate Tax Apportionment Act (2003) §3, cmt.

[36] *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform,* 60 U. Miami L. Rev. 786–806 (2008).

[19] *See* UPC § 3-9A-109.

[20] *See* UPC § 3-9A-110(a).

[21] *See* UPC § 3-9A-102(1).

[22] *See* UPC § 3-9A-110(a).

payment of the estate tax has been made.[23]The rights duties and obligations of a trustee of a trust that is terminating is taken up generally in §8.2.3 of this handbook.

Conflict of Laws. Estate-tax apportionment rules also can differ from state to state.[37] Thus, if the settlor of a funded revocable trust dies domiciled in a state other than the one in which the trust is being administered, which jurisdiction's default tax-apportionment rules are applicable? There is not a lot of helpful law out there.[38] One commentator proffers the following advice:

> Proper resolution of cases of this sort, however, is not to be achieved by mechanically applying either the law of the situs of the nonprobate assets or that of the decedent's domicil, but instead by trying to ascertain what the decedent, in view of all the circumstances, would probably have preferred. In this inquiry, any number of factors may prove relevant. As we have seen, the fact that the tax attributable to nonprobate assets is very large in comparison with the fund out of which it might under the law of one of the relevant states be payable seems almost undeniably relevant in determining what the decedent actually or presumably intended. This is especially so when it appears that the decedent did not realize how large the taxes were, or that nonprobate assets woud be part of the gross estate.[24]

Apportioning the generation-skipping transfer tax obligation. Under the UPC**,** a generation-skipping transfer tax incurred on a direct skip taking effect at death, a topic that is taken up in §8.9.2 of this handbook, would be charged to the transferee.[25]

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[23] See UPC § 3-9A-108(a).

[37]*See generally* 7 Scott & Ascher §45.3.11 (Allocation of Estate Taxes/Conflict of Laws); §8.5 of this handbook (conflict of laws).

[38]*See* 7 Scott & Ascher §45.3.11.

[24] 7 Scott & Ascher §45.3.11.

[25] *See* UPC §3-9A-106(2).