

CHAPTER 159  
FORMERLY  
SENATE BILL NO. 26

AN ACT TO AMEND TITLE 12 OF THE DELAWARE CODE RELATING TO APPORTIONMENT OF ESTATE TAX LIABILITY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 29, Title 12 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 2901. Short Title ~~Proration of state and federal estate taxes; method.~~

~~(a) Whenever it appears upon any accounting or in any appropriate action or proceeding that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity (or individually) has, after April 2, 1947, paid an estate tax levied or assessed under Chapter 15 of Title 30 providing for a tax known as "Delaware Estate Tax" or under any law amendatory thereof or supplemental thereto or under any other law hereafter enacted providing for the same or a different estate tax or under any estate tax law of the United States, upon or with respect to any property required to be included in the gross estate of a decedent under any such law, the amount of the tax so paid shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues.~~

~~(b) Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate except that in making such proration allowances shall be made for any exemptions granted by the law imposing the tax and for any deductions allowed by such law for the purpose of arriving at the value of the~~

~~net estate and except that in cases where a trust is created or other provision made whereby any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates.~~

~~(c) For the purposes of this chapter the term "persons interested in the estate" shall with respect to both state and federal taxes include all persons who may be entitled to receive or who have received any property or interest which is required to be included in the gross estate of a decedent or any benefit whatsoever with respect to any such property or interest, whether under a will or intestacy or by reason of any transfer, trust, estate, interest, right, power or relinquishment of power taxable under any of the aforementioned laws providing for the levy or assessment of estate taxes.~~

This Act may be cited as the Estate Tax Apportionment Act of Delaware.

§2902. Definitions ~~Duty of executor, administrator or other fiduciary to pay tax before distribution~~

~~The tax shall be paid by the executor, administrator or other fiduciary out of the estate before its distribution.~~

In this Act:

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

- (1) any claim or expense allowable as a deduction for purposes of the tax;
- (2) the value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and
- (3) any amount added to the decedent's gross estate because of a gift tax on transfers made before death.

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

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

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

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

(f) "Time-limited interest" means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include:

(1) a cotenancy unless the cotenancy itself is a time-limited interest; or

(2) an interest in property to the extent outright distribution to the beneficiary is within the sole power of the beneficiary.

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

~~§ 2903. Apportionment by Will or Other Dispositive Instrument. Recovery of proportionate tax from persons receiving taxable property which did not come into possession of executor or administrator; jurisdiction of Court of Chancery.~~

~~(a) Where any property required to be included in the gross estate does not come into the possession of the executor, administrator or other fiduciary, the executor, administrator or other fiduciary shall recover from whoever is in possession or from the persons interested in the estate the proportionate amount of such tax payable by the persons interested in the estate with which such persons are chargeable under this chapter.~~

~~(b) The Court of Chancery of the county in which any such accounting has been made or in which any such appropriate action or proceeding is pending may, by order, direct the payment of such amount of tax by such persons to the executor, administrator or other fiduciary, in accordance with subsection (a) of this section.~~

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

(1) To the extent that a provision of a decedent's will specifically indicates an intent to direct the apportionment of an estate tax, the tax must be apportioned accordingly.

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

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

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

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

(b) Subject to subsection (c), and unless the decedent in a will or revocable trust specifically indicates an intent to waive the application of this statute, the following rules apply:

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

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

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

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

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

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests. No tax shall be paid from a charitable remainder annuity trust or a charitable remainder unitrust described in Section 664 of the Internal Revenue Code and created during the decedent's life.

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

§ 2904. Statutory Apportionment of Estate Taxes. ~~Executor's or administrator's obligation to distribute property before person entitled has paid pro rata tax or furnished security.~~

To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 2903 and except as otherwise provided in Sections 2906 and 2907, the following rules apply:

(a) Subject to paragraphs (b), (c), and (d), the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

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

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

(d) Except as otherwise provided in Section 2903(b)(4) and except as to property to which Section 2907 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

§ 2905. ~~Credits and Deferrals.—Jurisdiction of and proceedings in the Court of Chancery; petition, order, parties, hearings; appointment of guardians.~~

(a) ~~The Court of Chancery has jurisdiction and all power necessary to make the prorations and the orders directing the payment of amounts of tax contemplated by this chapter.~~

(b) ~~Such jurisdiction may be invoked by petition filed in the Court of Chancery by an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity or any other person having such an interest as may in the judgment of the Court entitle such person to file such a petition.~~

(c) ~~The Court of Chancery, upon making a determination as provided in § 2901 of this title, shall make a decree or order directing the executor, administrator or other fiduciary to charge the prorated amounts against the~~

~~persons against whom the tax has been so prorated, insofar as such person is in possession of property or interests of such persons against whom such charge has been made, and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor, administrator or other fiduciary or to another person who has paid such tax.~~

~~(d) Every petition under subsection (b) of this section shall make all living interested persons parties defendant to the proceeding and they shall be summoned or otherwise notified as provided by the rules of the Court of Chancery relating to partition causes.~~

~~(e) The Court may appoint a guardian or guardians ad litem to represent the interests of persons who by reason of their minority or other cause are incompetent or of unborn or unascertainable persons who may have an interest in the estate.~~

~~(f) The Court may hear the cause upon oral testimony of witnesses or otherwise.~~

Except as otherwise provided in Sections 2906 and 2907, the following rules apply to credits and deferrals of estate taxes:

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

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

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

§ 2906. Insulated Property: Advancement of Tax. ~~Limitation on application of chapter.~~

~~The foregoing provisions of this chapter shall not apply where and to the extent that a testator provides in the testator's will for another method of apportionment or allocation of the taxes referred to in § 2901 of this title or where and to the extent that the written terms of an inter vivos transfer provide for another method of apportionment or allocation of such taxes which may be imposed with respect to the specific fund so transferred. Such provision in a will or in the terms of an inter vivos transfer may be in the form of a direction or of a grant of discretion to an executor or trustee to apportion or allocate such taxes or to pay such taxes out of the residuary estate under a will or from any other portion or portions of the estate passing under the will or out of the property transferred inter vivos.~~

(a) In this section:

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

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

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

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

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

(b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests in uninsured property subject to a time-limited interest other than property to which Section 2907 applies, the tax must be advanced, without further apportionment, from the principal of the uninsured property.

(c) Subject to Section 2909(b) and (d), an estate tax attributable to interests in insulated property must be advanced ratably by uninsured holders. If the value of an interest in uninsured property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably

by the persons holding interests in properties that are excluded from the apportionable estate under Section 2902(a)(2) as if those interests were in uninsulated property.

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

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

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

#### § 2907 Apportionment and Recapture of Special Elective Benefits

(a) In this section:

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

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

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

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

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

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

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

#### § 2908. Securing Payment of Estate Tax from Property in Possession of Fiduciary

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

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

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

#### § 2909. Collection of Estate Tax by Fiduciary

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

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

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

(2) any other person having an interest in the apportionable estate; (3) any person having an interest in the gross estate.

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

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

#### § 2910. Right of Reimbursement

(a) A person required under Section 2909 to pay an estate tax greater than the amount due from the person under Section 2903 or 2904 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 2903 or 2904 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Section 2909(b).

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

#### § 2911. Jurisdiction of Court of Chancery; Action to Determine or Enforce Act

(a) The Court of Chancery has jurisdiction and all power necessary to make the prorations and the orders directing the payment of amounts of tax contemplated by this Act.

(b) Such jurisdiction may be invoked by petition filed in the Court of Chancery by an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, transferee, beneficiary of the gross estate, or any other person having such an interest as may in the judgment of the Court entitle such person to file such a petition.

(c) The Court of Chancery, upon making a determination as provided in this Act, shall make a decree or order directing the executor, administrator or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated, insofar as such person is in possession of property or interests of such persons against whom such charge has been made, and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor, administrator or other fiduciary or to another person who has paid such tax.

#### § 2912. Uniformity of Application and Construction

In applying and construing this Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact similar legislation.

#### § 2913. Severability

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

#### § 2914. Delayed Application

(a) Sections 2903 through 2907 do not apply to the estate of a decedent who dies on or within three years after the effective date of this Act, nor to the estate of a decedent who dies more than three years after the effective date of this Act if the decedent continuously lacked testamentary capacity from the expiration of the three-year period until the date of death.

(b) For the estate of a decedent who dies on or after the effective date of this Act to which Sections 2903 through 2907 do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before the effective date of this Act.

#### § 2915. Effective Date

This Act takes effect for decedents dying on or after January 1, 2014.

Approved August 05, 2013