



PORTABILITY

The concept of Portability, which was first introduced in law in 2011, was made permanent in early January 2013. This tax legislation allows a surviving spouse to "pick up" the unused estate tax exemption of his or her deceased spouse who died after 2010, provided an estate tax return is filed within two years of the first spouse's death. The current estate tax exemption is approximately \$11.58 million (2020), but by filing such a return on the first death, a surviving spouse could potentially have a \$23+ million exemption.

This concept of being able to use a deceased spouse's unused exemption is referred to as "Portability." Thus, the use of a credit shelter trust, sometimes called a "B Trust" or "Family Trust", is no longer needed for estate tax planning for most married couples.

Although the deceased spouse's unused exemption (referred to as "DSUE") can be used against both gift and estate taxes, it does not increase the surviving spouse's generation skipping transfer tax exemption. To maximize the value of such exemption, a credit shelter trust would still be required. Also, if there are children by a prior marriage, the credit shelter trust can protect their inheritance better than leaving everything outright to a surviving spouse, even if a Contract to Will is signed. There may be certain creditor protection and other reasons for using a credit shelter trust which should be discussed with your attorney.

Because the law states that this added exemption is limited to the unused exemption of the survivor's last spouse, a remarriage would cause a surviving spouse to lose that increased exemption if the new spouse predeceases that surviving spouse.

The IRS has issued regulations regarding portability and, consequently, simplified the estate tax return filing requirements when the filing is not otherwise required because the deceased spouse had an estate in excess of the exemption amount. With respect to property passing to the surviving spouse, appraisals are no longer needed; in fact, values are omitted from each schedule. The executor filing the return is required to make a reasonable estimate of the total value of property passing to the surviving spouse, and then round such value up to the nearest \$250,000.

IRS regulations require that the estate tax return be signed by a court appointed executor or, if none is so appointed, by anyone in possession of the decedent's estate. Usually, it is the surviving spouse who signs and files the estate tax return to elect "portability." We prepare such returns for our clients, so contact us if you think it may be desirable to file an estate tax return for your deceased spouse.