
Estate Tax Portability - You Can't Take It with You, But Your Spouse Can

By Geoffrey N. Taylor

Prior to estate tax “portability,” if a married couple had or were likely to have a combined net worth in excess of the amount of the exemption from federal estate tax, practitioners typically prepared separate, revocable trusts for them so that each spouse’s estate tax exemption could be used. For example, if the estate tax exemption was \$1 million, the estate tax rate was 50%, and a couple had a combined worth of \$2 million, each spouse would create and fund a separate trust with \$1 million. Upon the death of the first spouse, the deceased spouse’s estate tax exemption was fully utilized and the surviving spouse would benefit from the deceased spouse’s trust in a manner that avoided inclusion of those trust assets in the surviving spouse’s estate. Upon the surviving spouse’s death, the surviving spouse’s exemption would offset the other \$1 million, leaving the entire \$2 million to their beneficiaries free of estate tax. Conversely, under an “I love you” estate plan whereby everything passed outright to the surviving spouse, the exemption of the first spouse to die goes unused, the surviving spouse was taxed on the entire \$2 million, and \$500,000 of estate tax (50% times excess of \$2 million over surviving spouse’s \$1 million exemption) was needlessly incurred.

The portability of unused estate tax exemption is allowed for persons dying on or after January 1, 2011. With portability, any unused estate tax exemption of the first spouse to die can be carried over to and used by the surviving spouse for federal gift and estate tax purposes. The exemption is \$11,400,000 for 2019 and is indexed for inflation.

In order to use the deceased spouse’s exemption (referred to as the “deceased spouse’s unused exclusion” or “DSUE”), the personal representative of the deceased spouse’s estate must prepare and timely file an estate tax return for the deceased spouse and elect DSUE treatment, even though an estate tax return otherwise would not be required.

While portability can provide significant tax savings, there are no clear-cut formulas or circumstances that give absolute guidance with respect to making the

portability election. However, there are a number of relevant factors that should be considered in making the decision, such as: the size of the decedent's gross estate, the size of the decedent's remaining exemption amount at death, the size of the surviving spouse's estate, the age of the surviving spouse, the decedent's estate plan, the cost of preparing and filing the estate tax return, the anticipated growth of the decedent's assets, and current and anticipated estate, gift, and income tax laws.

If you and your spouse have separate trusts, or if your spouse has recently passed, contact a member of the **Maddin Hauser Estate Planning Group** to guide you through portability and other planning issues.