

## ABOUT THE AUTHOR



Terry LaBant leads our Wealth Strategies team.

Terry has 20 years of experience consulting with clients in six core

areas that influence the creation, preservation and protection of family wealth. They include: tax planning, business planning, succession planning, estate planning, retirement planning and asset protection.

## Is Portability a Panacea for Estate Planning?

The 2010 Tax Act brought back the estate tax with higher exemptions and lower tax rates. It also provided for portability of the estate tax exemption between spouses for the first time.

We met with a client recently who asked two questions on many of our clients' minds. Does portability mean that clients no longer need estate planning? Or, can clients at least postpone estate planning for awhile longer?

While portability offers some advantages for married couples, it hardly provides the cure-all for those who hope to avoid estate planning while awaiting future legislation.

### Estate Tax Exclusion

Historically, each taxpayer has had an exclusion amount that could be used to shelter some assets from estate tax. During the Bush tax cut years, this amount increased to a high of \$3.5 million.

For married couples, their separate exclusion amounts created a "use it or lose it" dilemma for planning purposes. Each spouse would need to engage in separate estate planning or risk losing the estate tax exclusion of the first spouse to die. Amounts passing to a spouse outside of a trust would qualify for the estate tax marital deduction. This would result in no tax but a loss of exclusion and increase of estate taxes payable later at the death of the surviving spouse.

Under the 2010 Tax Act, each taxpayer now has an estate tax exclusion amount that will shelter \$5 million of assets from estate tax. The 2010 Tax Act also expanded the definition of the estate tax exclusion amount. It now includes the sum of the taxpayer's exclusion amount and the unused portion of the deceased spouse's unused exclusion amount ("DSUEA").

If the deceased spouse leaves everything to his surviving spouse and uses none of his separate exclusion amount, then it all could be available for the surviving spouse. This would allow married couples to shelter \$10 million of assets from estate tax on a combined basis.

# Is Portability a Panacea for Estate Planning?

Essentially, portability may provide a cure of the “use it or lose it” dilemma that married couples faced under prior law when they each had to use or lose their estate tax exclusion amounts separately.

*“Since portability is not automatic, it contains traps for the unwary client and professional in terms of qualifying and maintaining use of portability as a planning tool.”*

## Portability Requirements

In order to take advantage of portability under the 2010 Tax Act, however, the following conditions must be met:

- Both spouses must die after 12/31/2010;
- An estate tax return must be filed by the estate of the first spouse to die; and
- The surviving spouse is limited to using the DSUEA of the last deceased spouse.

So, do married couples still need estate plans if their combined assets are less than \$10 million? Unfortunately, the answer is still probably yes.

## Concerns About Portability

As currently written, portability is not going to last past December 31, 2012 under the 2010 Tax Act. Many commentators believe that it may be extended, but we currently do not have final guidance from Congress about any extension.

It’s also important to note that portability in its current form is not automatic. The DSUEA must be identified on a timely filed estate tax return of the first spouse. This creates a bit of a trap for the unwary. There may be no estate tax due when the first spouse dies; however, the surviving spouse still must file a timely estate tax return to preserve the DSUEA of the first spouse.

Perhaps more importantly, the DSUEA is not automatically preserved forever. That is, the DSUEA would be lost if the surviving spouse would remarry. And, the DSUEA is not cumulative. So, a surviving spouse cannot remarry multiple times and accumulate the DSUEA of each predeceased spouse. I understand that entertainers may be organizing to lobby against this latter provision.

Clients also have many non-tax reasons for creating estate plans, including probate avoidance, creditor protection for beneficiaries, privacy and long term incentive trusts for family members. An estate plan provides the best means to choose who will (or will not) inherit from you.

Estate planning also provides the first spouse with a chance to shelter assets from estate tax and protect the appreciation of those assets from future estate tax. Finally, an estate plan will provide the first spouse with a means to protect the children's inheritance in the event the surviving spouse would remarry.

### Considerations

Since portability is not automatic, it contains traps for the unwary client and professional in terms of qualifying and maintaining use of portability as a planning tool. Relying on portability (as opposed to a traditional estate plan) also does nothing to shelter asset growth and appreciation over time from future estate tax.

Although portability does not do away with the need for an estate plan, it does offer supplemental planning benefits. Many estate planners are including portability provisions in new or updated estate planning documents. These provisions are drafted often as a backup plan to preserve estate tax exclusion for later use in the event the first spouse underfunded a trust or had less assets in her individual name.

*Note: The 2010 Tax Act provided for an inflation adjustment that increased the applicable exclusion amount to \$5.12 million for 2012.*

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