

**BROOKS
&
BROOKS, LLP**



FEDERAL ESTATE TAX EXCLUSION PORTABILITY **NOW MADE PERMANENT!!**

(Or as permanent as any estate tax law has been for the past 10 years.)

Portability is using the federal Deceased Spouse's Unused Exemption Amount (DSUEA) to "port" to the Surviving Spouse's estate for federal estate tax purposes. To do this, an election must be made in the first spouse's estate - DSUEA is available to the surviving spouse only if the decedent's "executor" timely files an estate tax return and makes an election. If there is no appointed executor, any person in actual or constructive possession of property may file the estate tax return on behalf of the decedent and elect portability or elect not to have portability apply. The election is made by filing a "complete and properly prepared" estate tax return unless the executor states affirmatively on the return that the estate is not electing portability.

Portability only applies to the "last deceased spouse"; which one would think does not need a stated definition, but is defined in the law to mean "the most recently deceased individual who, at that individual's death after December 31, 2010, was married to the surviving spouse."

PLANNING OPPORTUNITY: If the surviving spouse makes gifts any time after the last deceased spouse's death, the applicable federal exclusion amount used to determine the gift tax unified credit will include the DSUEA. This means that an individual can take advantage of DSUEA from multiple spouses, as long as that individual makes a taxable gift to utilize the DSUEA from a deceased spouse before that individual is predeceased by another subsequent spouse.

NOTWITHSTANDING PORTABILITY - There are ten distinct advantages of using By-Pass Trusts (also called Credit Shelter Trusts) at the first spouse's death instead of portability:

1. DSUEA is not indexed for inflation and appreciation in the assets is included in the gross estate of the surviving spouse, unlike the growth in a bypass trust, which is excluded.
2. No portability of state estate tax exemption amounts.
3. First spouse's DSUEA will be lost if the surviving spouse remarries and survives his or her next spouse.
4. No portability of the GST exemption.

Brooks' Blast

The "Blast" is a one to two page blast of information designed to assist financial consultants and other attorneys with estate and asset protection planning, estate administration and tax information. The "Blast" is produced periodically as we discover information that would be helpful to others in the financial and legal community.

5. No statute of limitations on values for purposes of determining the unused exclusion amount that begins to run from the time the first deceased spouse's estate tax return is filed whereas the statute of limitations does run on values if a bypass trust is funded at the first spouse's death.
6. Beneficiaries other than just the surviving spouse can use the assets that could be left to a By-Pass trust.
7. The risk in a "blended family" that the surviving spouse might make gifts to persons other than the first decedent's family is avoided.
8. Filing an estate tax return for the first estate might be avoided if the estate and By-Pass trust are small enough.
9. Not clear that survivorship, and thus eligibility to use the DSUE amount, is governed by a survivorship presumption in the wills or other governing instruments of spouses who die "simultaneously," as the creation of a By-Pass trust would be.
10. Other standard benefits of trusts - asset protection, providing management, and restricting transfers of assets by the surviving spouse.

ONE ADVANTAGE OF PORTABILITY - If a husband or wife has a very large retirement account (into the millions of dollars), portability may be helpful to eliminate federal estate tax, while keeping the retirement accounts intact and simplify the administration of and access to the account(s) by the surviving spouse.

As a Private Client Law Firm, we have limited our practice to concentrate in estate and tax planning, asset protection planning and trust and estate administration.

We would welcome any referral for your clients' planning needs.

We would be honored to serve your clients with their estate and asset protection planning desires and goals. We are available not only at our office, but at yours and the client's home. We regularly serve clients in all eight counties of Western New York and the westerly Finger Lakes region as well.

Kameron Brooks, Brooks & Brooks, LLP

207 Court Street, Little Valley, NY 14755

tel: 716-938-9133; fax: 716-938-6155

kbrooks@brookslaw.biz

brookslaw.biz