25 No. 6 Ohio Prob. L.J. NL 10

Ohio Probate Law Journal
Volume 25, Issue 6
July/August 2015
Probate Law Journal Of Ohio

Portability: Estate Planning in the New Frontier

By Patrick J. Saccogna, Esq. [a0]

Introduction

Nearly five years have passed since President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"), on December 17, 2010. [1] The 2010 Act, among other things, birthed the estate planning concept of portability, which is the subject of this article. [2]

With portability and many of the other provisions of the 2010 Act set to expire on December 31, 2012, President Obama signed into law the American Taxpayer Relief Act of 2012 (the "2012 Act") on January 2, 2013. [3] The 2012 Act made permanent the portability provisions of the 2010 Act (with one minor technical modification). [4] Additionally, the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "IRS") released final regulations (and removed the temporary regulations) on portability effective as of June 12, 2015. [5]

This article focuses on the estate planning implications of portability and the profound changes that portability will continue to have in the estate planning for married couples. [6] Detailed additional background, other information, and illustrative examples concerning (i) the concept of portability, (ii) the calculation of a surviving spouse's estate tax applicable exclusion amount under various scenarios applying portability, (iii) the application of portability for federal gift and generation-skipping transfer ("GST") tax purposes, and (iv) the requirements for making a valid portability election, are outlined in Shearer and Saccogna, *Portability: Now It's For Real*, 23 PLJO 208 (May/June 2013).

Estate Planning Implications Of Portability

Portability's Tenure. Portability, like many other provisions of the 2010 Act, was originally scheduled to sunset on December 31, 2012. However, the 2012 Act "permanently" extended portability. [7] Portability's permanency is a very important phenomenon that creates major issues for consideration in the estate planning of virtually all married couples.

Summary of Portability. As a result of the 2010 Act (as extended by the 2012 Act), the Internal Revenue Code was amended to allow for the portability of the deceased spouse's unused basic exclusion amount for a surviving spouse of a decedent who dies after 2010 if the executor of the deceased spouse's estate makes a proper election on a timely filed IRS Form 706 that calculates the deceased spousal unused exclusion amount (the "DSUE amount"). [8] The surviving spouse can use the DSUE amount by making lifetime gifts (beginning immediately after the death of the deceased spouse) or by utilizing the DSUE amount at the surviving spouse's death for federal estate tax purposes. [9] A surviving spouse can only use the DSUE amount of his or her "last deceased spouse," the identity of whom can change over time. [10]

The Decision to Use Portability versus Traditional Credit Shelter Trust Planning is Complicated. From a client's standpoint, the decision to use portability versus traditional credit shelter trust planning might appear to be quite straightforward. This is because portability works with simple "I Love You" Wills leaving outright all of a married individual's assets to his or her

spouse, without all the complications of credit shelter trust planning. From the estate planner's point of view, however, this is a complex decision that must take into account a number of important factors. Therein lies the irony of portability. While lawmakers intended for portability to simplify the estate planning process for married couples, quite the opposite is true. Thus, it is up to the estate planner to fully apprise clients of the many planning alternatives and their respective pros and cons so that the clients can make informed decisions that best fit the clients' individual circumstances, goals, and objectives.

Ultimately, the clients' decision as to whether to use credit shelter trusts, on the one hand, or portability, on the other, will often include an analysis of several key factors, *including* (a) sheltering from federal estate tax the appreciation on assets between the death of the first spouse to die and the death of the surviving spouse, (b) achieving an income tax basis step-up on *both* spouses' deaths, (c) asset protection, (d), administrative costs and complexities, (e) the desired level of control of the surviving spouse over the assets, (f) the identity of the beneficiaries after the first spouse's death (*e.g.*, the surviving spouse only or the surviving spouse, children and/or others), (g) the importance of GST tax planning to the married couple, and (h) the presence of state death and/or income tax issues.

Additional important factors that could play a role in the clients' decision-making process include the following that might not be knowable until the death of the first spouse to die: (i) the age, life expectancy, and state of residence of the surviving spouse, (ii) whether assets are expected to appreciate beyond the surviving spouse's consumption rate, (iii) the expected turnover rate of the asset portfolio during the surviving spouse's lifetime, and (iv) the states where the beneficiaries live and such states' respective estate and income tax rates.

Estate planners must discuss with their clients the concepts of portability, credit shelter trusts, and hybrid approaches, and the various factors (including the relative advantages and disadvantages of each of the approaches) impacting the clients' decision as to which approach to take. Planners should also document their discussions with their clients on these issues.

***Factors Favoring Credit Shelter Trusts Over Portability*.** There is a number of important reasons for married couples to continue to employ credit shelter trusts at the first spouse's death instead of planning to utilize portability:

a. Appreciation on Assets. The appreciation on the assets of a credit shelter trust held for the surviving spouse is excluded from the gross estate of the surviving spouse at his or her death, but the appreciation on the assets that the surviving spouse receives from the deceased spouse via portability is *not* excluded from the gross estate of the surviving spouse. Put more simply, there is no "credit shelter" aspect to portability! Thus, the credit shelter trust may be particularly attractive in this regard if the first spouse to die will fund the trust with discounted assets (*e.g*., family partnership/LLC interests or stock in a closely-held corporation expected to grow dramatically over time), and the surviving spouse is expected to have a long over-life.

> EXAMPLE 1—Estate Tax Implications of Post-Death Appreciation: Portability Plan—Assume that Wife and Husband are married, but Husband dies in February 2011 with an estate of $3,000,000, all of which passes outright to Wife under an "I Love You" will portability plan. Husband's DSUE amount would be $5,000,000 (since all of his assets passed to Wife and were covered by the marital deduction). Assume further that Wife has $5,430,000 of her own assets. If, after Husband's death, the assets passing to Wife appreciate to $10,000,000, then, when Wife dies in December 2015, her gross estate would be valued at $15,430,000 (*i.e.,* $5,430,000 of her own assets, plus $10,000,000 she received from Husband). Wife's applicable exclusion amount would be $10,430,000 (*i.e.,* $5,430,000 of her basic estate tax exclusion amount plus $5,000,000 of DSUE amount that was ported to her from Husband). Under these facts, Wife's estate will incur a substantial federal estate tax under this portability plan.

> EXAMPLE 2—Estate Tax Implications of Post-Death Appreciation: Credit Shelter Trust Plan—Assume the same facts as Example 1, *except that* Husband establishes a credit shelter trust to hold and administer his assets (*i.e.,* his $3,000,000) after his death.

As a result, the appreciation in the value of these assets (*i.e.,* $7,000,000, or $10,000,000 minus $3,000,000) would be entirely excluded, or "sheltered," from Wife's gross estate at her subsequent death. Because her basic exclusion amount (*i.e.,* $5,430,000) would cover her individual assets (*i.e.,* $5,430,000), her estate would *not* incur a federal estate tax under this credit shelter trust plan.

b. GST Tax Planning. A credit shelter trust plan is superior to a portability plan from a GST tax planning standpoint, because portability does *not* apply to the federal GST tax exemption. Thus, the remaining GST tax exemption of the first spouse to die could be wasted with portability. Credit shelter trusts, on the other hand, can be and often are designed to utilize the remaining GST tax exemption of the first spouse to die.

EXAMPLE 3—Portability Plan and the GST Tax Exemption—Assume that Husband and Wife are married, but Husband dies in June 2011 with a DSUE amount of $4,000,000 and an unused GST tax exemption amount of $5,000,000. Assume further that Wife dies in November 2015 with a gross estate of $9,430,000, all of which passes to her *grandchildren* (and all of her children are then living). Because Wife's applicable exclusion amount is $9,430,000 (*i.e.,* $5,430,000 of her basic estate tax exclusion amount plus the $4,000,000 DSUE amount she received from Husband), her entire estate is protected from the federal estate tax. However, because the assets in her estate will pass to skip persons (*i.e.,* her grandchildren), the GST tax comes into play. Wife can utilize her $5,430,000 GST tax exemption amount to cover only a portion of her assets, and thus there would be a GST tax liability.

EXAMPLE 4—Credit Shelter Trust Plan and the GST Tax Exemption—Assume the same facts as Example 3, *except that* Husband left his assets to a credit shelter trust and his executor allocated his remaining GST tax exemption to the trust. As a result, there would be no GST tax liability at Wife's subsequent death, because all of her assets would be exempt from the GST tax.

c. Inflation. The DSUE amount is fixed and thus is not indexed for inflation. [11]

d. Risk of Loss of DSUE Amount on "Anytime" Audit. There is no statute of limitations on IRS challenges of the DSUE amount, so, in theory at least, there is always a "risk of loss" as to the unaudited DSUE amount that the surviving spouse has to work with. [12] In contrast, the value of the assets funding a credit shelter trust is subject to a standard (*i.e.*, three years, six years regime) statute of limitations period that will eventually expire. [13] Thus, a credit shelter plan affords more certainty than a portability plan in this regard.

e. Risk of Loss of DSUE Amount on Remarriage of Surviving Spouse. The surviving spouse will lose the entirety of the DSUE Amount received from a predeceased spouse if the surviving spouse remarries another spouse who then predeceases the surviving spouse with a DSUE amount that is *less than* the DSUE Amount of the surviving spouse's preceding predeceased spouse. This is because, again, only the "last deceased spouse" of the surviving spouse matters for these purposes. (Note, however, that the risk of losing the DSUE amount of the preceding predeceased spouse may be avoided if the surviving spouse makes lifetime gifts of assets equal to the preceding predeceased spouse's DSUE amount *prior to* the death of a subsequent spouse.)

f. Blended Families. A credit shelter trust provides more dispositive planning certainty after the death of the first spouse to die than does an "I Love You" portability plan. A credit shelter trust also avoids the prospect of a portability election "dual"

between the surviving spouse (who may favor making the portability election) and the deceased spouse's children from a prior marriage (who may not).

g. Identity of Beneficiaries. A credit shelter trust plan permits the deceased spouse to provide for the surviving spouse *and* other beneficiaries (*e.g.*, the couple's lineal descendants) during the lifetime of the surviving spouse, whereas a portability plan generally limits the beneficiary to the surviving spouse.

h. State Death Tax Planning. Portability does *not* apply to any state death tax exemption amount. Thus, clients living in states with a death tax and a death tax exemption may wish to fund a credit shelter trust with the state death tax exemption amount. Using portability instead will cause a waste of the state death tax exemption amount of the first spouse to die. (On the other hand, a credit shelter trust funded with the full amount of the federal estate tax exemption amount might cause a state death tax on the first death that could otherwise have been avoided via portability.)

i. General Advantages of Trusts. There exist other, general, advantages of trusts with the credit shelter trust approach, of course, including investment management, asset protection, and restrictions on distributions. (These advantages might be realized, however, via a portability plan using a QTIP-eligible trust, which trust is explained in greater detail below.)

***Factors Favoring Portability Over Credit Shelter Trusts*.** There is also a number of important reasons for married couples to choose to leave all their assets outright to the surviving spouse and rely on portability instead of using credit shelter trusts at the first spouse's death:

a. The "Double Basis Step-Up": Income Tax Basis Step-Up at Surviving Spouse's Death. The married couple may wish to achieve a second (*i.e.*, "double") income tax basis step-up on the surviving spouse's death. Portability easily affords this basis step-up, because, with portability, *all* of the couple's remaining assets will be included in the gross estate of the surviving spouse. [14] With traditional credit shelter trust planning, contrarily, the assets of the credit shelter trust will *not* be included in the gross estate of the surviving spouse and thus will *not* receive an income tax basis step-up at the surviving spouse's death. [15]

This income tax basis step-up at the surviving spouse's death may be particularly important if the remainder beneficiaries (*e.g.,*the couple's children) reside in high income tax states.

Note, however, that with special tuning of a credit shelter trust plan, a second income tax basis step-up *can* be achieved on all or a portion of the appreciated assets remaining in the credit shelter trust at the death of the surviving spouse. For example, special language could be included in the trust instrument that would grant to the surviving spouse a formula contingent testamentary general power of appointment over that portion, if any, of the appreciated credit shelter trust assets that would *not* cause a federal or state estate tax to be incurred by the surviving spouse's estate. This approach might be termed the "Have Your Cake and Eat It Too" plan.

Alternatively, but similarly, the provisions of the trust instrument could permit a trust advisor or trust protector to affirmatively grant such a power of appointment to the surviving spouse at some point after the deceased spouse's death. Another alternative involves a plan to allow the surviving spouse to trigger the "Delaware tax trap" in order to achieve an income tax basis step-up on the appreciated credit shelter trust assets at the surviving spouse's death. Furthermore, post-mortem planning after the death of the first spouse to die may also facilitate a second basis step-up at the death of the surviving spouse. For example, the trustee of a credit shelter trust could take advantage of broad distribution standards and distribute all or a portion of the appreciated credit shelter trust assets to the surviving spouse before the surviving spouse's death. This approach, however, involves a mortality risk in that if the surviving spouse were to die before the trustee distributes the appreciated assets to him or her, then such assets would *not* receive a basis step-up at the surviving spouse's death.

b. Keep It Simple! The married couple may have an overriding desire for simplicity in their estate planning. Relying on portability via "I Love You" wills and thus forgoing trusts of any sort is about as simple as estate planning gets for married

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

individuals. (Note that relying on portability via a QTIP-eligible trust, however, discussed in greater detail below, is not so simple and not without risk.) With portability, then, the surviving spouse is in complete control over the couple's assets after the deceased spouse's death.

> EXAMPLE 5—The "Do No Harm" Approach—Portability might be most useful for married couples with a combined estate between about $5,000,000 and about $10,000,000. When a married couple's combined estate falls within this range, the couple could, for example, employ simple wills (and/or other simple arrangements such as jointly held assets or other contractual benefits, like retirement accounts) leaving all of their assets to the survivor of them, use portability to avoid federal estate tax completely on their combined estate, avoid the complexities associated with credit shelter trusts, and ensure an income tax basis step-up at both spouses' deaths. Some planners refer to this alternative as the "do no harm" approach. (Of course, appreciation on the couple's assets after the death of the first spouse may possibly result in some federal estate tax liability at the second spouse's death that could have otherwise been avoided with the use of a credit shelter trust plan.)

c. Retirement Account Assets. Portability facilitates the use of the deceased spouse's DSUE amount without requiring the use of retirement account assets to fund a credit shelter trust. Thus, federal estate tax savings are achieved with portability while preserving all of the income tax benefits of naming the surviving spouse as the primary beneficiary of the retirement account assets.

d. Retitling of Assets *Not* Required. By choosing to rely on portability, married individuals need not retitle their assets in order to make full use of their respective federal estate tax exemptions. Thus, for example, the propertied spouse need no longer worry about transferring large amounts of difficult-to-value assets (*e.g.*, closely held business interests) to the non-moneyed spouse. Prior to the advent of portability, the asset retitling issue was often a stickler in traditional credit shelter trust planning, and in some cases resulted in married couples "blowing" the federal estate tax exemption of the first spouse to die by not "funding" their credit shelter trusts. Note, however, that even with portability, asset retitling may still be necessary in order for the married couple to take advantage of any state estate tax exemption if the poorer spouse dies first.

e. Traditional Trust Benefits May Not Apply or May Not Be Important. The portability plan may emerge as the favored approach in those cases where the benefits of a traditional trust solution are not present. For example, (i) both spouses may be astute money managers who do not need professional asset management services, (ii) the spouses may believe that their assets are not, and will never be, of a type (*e.g.*, growing business) or magnitude (*e.g.*, the "Over $10 Million Crowd") to generate federal estate taxes, (iii) the spouses may believe that the consumption rate of the survivor of them will be greater than the growth rate of their remaining assets, and/or (iv) the married couple may believe that the administrative and/or income tax costs of a trust solution outweigh the benefits of the credit shelter trust.

f. Traditional Family Situation. A simple portability plan might make more sense than a credit shelter trust plan for "traditional" family situations (*e.g.*, first marriages, or situations where neither spouse has any children from a prior marriage) than for blended family situations.

g. Portability via QTIP-Eligible Trust May Solve GST Tax Planning Issue. Some planners now employ a single QTIP-eligible trust as a vehicle to use portability for their married clients. The idea behind this approach is to have the first spouse to die leave all of his or her assets to a single QTIP-eligible trust for the benefit of the surviving spouse and then have the executor of the deceased spouse's estate (i) make an IRC Section 2056(b)(7) QTIP election over the entire trust, (ii) make a reverse QTIP election to utilize the deceased spouse's remaining GST tax exemption, [16] and (iii) make a portability election in order to port the deceased spouse's DSUE amount to the surviving spouse. In this way, the planner seeks to solve for all of the key

estate, GST, and income tax problems by porting the DSUE amount of the deceased spouse to the surviving spouse, utilizing the remaining GST tax exemption of the deceased spouse, and achieving a second income tax basis step-up on the appreciated QTIP assets remaining in the trust at the surviving spouse's death.

Some planners, though, are concerned that a 2001 revenue procedure issued by the IRS ("Rev. Proc. 2001-38") might prevent this approach in connection with portability, at least in cases where a QTIP election is not necessary to reduce the estate tax liability of the estate of the deceased spouse to zero. [17] This is because Rev. Proc. 2001-338 provides that the IRS will ignore a QTIP election that is not necessary to reduce the estate tax liability of a decedent's estate to zero. [18] Thus, for example, if the deceased spouse's estate is under the exemption amount, and if a portability election is made, then a QTIP election is not needed to reduce the estate tax liability to zero (because it's already zero), and thus Rev. Proc. 2001-38 could literally apply to preclude the QTIP election.

There exist several reasons, however, that suggest that a QTIP election is possible even where a portability election is made. [19] First, the purpose of Rev. Proc. 2001-38 is to provide relief to a decedent's estate by preventing an inadvertent or erroneous QTIP election from undermining the proper creation and funding of a credit shelter trust designed to utilize the decedent's remaining estate tax exemption where a QTIP election was not necessary to zero out the estate tax. Second, it is questionable whether the IRS may rely on a revenue procedure to negate an election (*i.e.*, the QTIP election) that is set forth under statute. [20] Third, the portability temporary regulations expressly mentioned a QTIP election made on the same federal estate tax return on which a portability election is made where the return is not otherwise required to be filed. [21] Finally, the language of Rev. Proc. 2001-38 itself seems to suggest that the application of the procedure is triggered by the estate of the decedent producing sufficient evidence showing that the estate is entitled to relief, and not by the IRS.

Commentators and practitioners had hoped that Treasury and the IRS would provide guidance on this question in the final portability regulations. But Treasury and the IRS instead punted, stating that they intend to provide guidance, by publication to the Internal Revenue Bulletin, to clarify whether a QTIP election made under IRC Section 2056 (b)(7) may be disregarded and treated as null and void when an executor has elected portability of the DSUE amount under IRC Section 2010(c)(5)(A). [22]

h. Grantor Trust Planning for Surviving Spouse. Portability might be desirable for even very substantial estates where the surviving spouse subsequently makes gifts of *both* the DSUE amount received from the deceased spouse *and* his or her own basic exclusion amount to one or more grantor trusts as to the surviving spouse. The power of this technique magnifies if the gifted assets are discounted. (This planning option is also possible if a QTIP-eligible trust is used for portability purposes, assuming that the trustee or other fiduciary has broad discretion to make principal distributions to the surviving spouse.)

***Beyond Credit Shelter Trusts and Portability: Alternative Approaches*.** Instead of a married couple deciding *now* as to whether to use a credit shelter trust plan or rely on portability, the couple could *defer* the decision until the death of the first of them to die. This deferral could be structured in one of three different major ways. First, the married couple could implement a "traditional" type of disclaimer approach. Second, the married couple could employ a single QTIP-eligible trust for the benefit of the surviving spouse. Third, the married couple could pursue a "hybrid" type of disclaimer approach that also involves a QTIP-eligible trust.

a. The "Traditional" Disclaimer Approach. The traditional disclaimer approach involves a disclaimer provision leaving everything by outright bequest to the surviving spouse (to facilitate a portability election, if desired, upon the death of the first spouse to die), but then also allows the surviving spouse to disclaim such bequest. Any disclaimed assets would pass to a credit shelter trust. If the surviving spouse fails to properly disclaim the assets, then the executor of the deceased spouse's estate would make a portability election.

The primary advantages of this kind of disclaimer approach include (i) the married couple is able to maintain flexibility in the plan to "go either way" at the first spouse's death—either a portability election *or* a credit shelter trust (or even *both)*, (ii) the

"tried and true" simplicity of the approach relative to some of the other approaches, and (iii) the possibility that the surviving spouse could disclaim via a formula designed to prevent disclaiming so much as to cause a federal estate tax at the first death. [23]

The disclaimer approach's major disadvantages include (i) the possibility that the surviving spouse will ultimately refuse to disclaim the assets even in a case where a disclaimer would clearly be desirable for tax or other reasons, (ii) the possibility that the surviving spouse will unintentionally "blow" the disclaimer by failing to act in accordance with the disclaimer rules (*e.g.*, by accepting the benefits of the assets prior to attempting the disclaimer or by making an untimely disclaimer) [24] , (iii) the existence of a mortality risk in that the surviving spouse could die before executing a valid disclaimer, (iv) the possibility in some states that the disclaimer will be disallowed under the fraudulent conveyance laws with respect to the disclaiming spouse's creditors [25] , and (v) the fact that the surviving spouse cannot be given a limited power of appointment over the disclaimed assets, which reduces flexibility in dispositive planning. [26]

b. The QTIP-Eligible Trust Approach. With the QTIP-eligible trust approach, the deceased spouse leaves everything to a single QTIP-eligible trust for the sole benefit of the surviving spouse. The executor of the estate of the deceased spouse would then have 15 months to decide whether or not to make a QTIP election with respect to the trust and, if so, the portion of the trust as to which the election will apply. Any portion of the trust for which the executor does *not* make a QTIP election would pass to a credit shelter trust under the "Clayton provisions." [27]

Some important advantages of the QTIP-eligible trust approach include (i) the fact that the executor has up to 15 months to study the situation before acting (in contrast to the 9-month period usually involved with disclaimers), (ii) the fact that the QTIP election can be made by formula, thus assuring that no federal estate tax would be caused at the first death, (iii) if the QTIP election is made, the ability of the executor to also make a "reverse QTIP" election and thereby allocate (and thus not waste) the deceased spouse's unused GST tax exemption to the trust, even if portability is elected, (iv) if applicable state law provides for a state-only QTIP election, the ability of the executor to make a state QTIP election and thus zero-out state death taxes while utilizing the state death tax exemption of the deceased spouse, and (v) the surviving spouse's ability to hold a testamentary limited power of appointment over the assets of both the QTIP trust and the assets of any Clayton credit shelter trust (because no disclaimer is involved).

Some disadvantages of the QTIP-eligible trust approach include (i) its inherent complexity, particularly from the clients' point of view, and (ii) as previously discussed, the potential application by the IRS of Rev. Proc. 2001-38 to thwart the QTIP election.

In drafting the trust instrument for this approach, note that the surviving spouse should not serve as executor making the QTIP election if there is a resulting Clayton credit shelter trust, because the IRS could claim that if the spouse makes the election, then spouse has made a gift of some or all of the assets that would otherwise have passed to the QTIP trust. [28] Thus, uncertainty would exist as to whether the surviving spouse has made a gift and whether that causes estate inclusion issues for part of the credit shelter trust as to the surviving spouse. [29] It might also be wise to utilize a trust protector with authority to decide how much is subject to the QTIP and reverse QTIP elections.

c. The "Hybrid" Disclaimer Approach Involving a QTIP-Eligible Trust. As an alternative to the foregoing two deferral approaches, the married couple's plan could provide that the surviving spouse could disclaim some or all of the outright bequest, with the disclaimed assets passing to a QTIP-eligible trust. The executor would then have up to 15 months after the deceased spouse's death to make a QTIP and reverse QTIP elections with respect to the trust assets. To the extent that a QTIP election is not made, the unelected portion could pass to a credit shelter trust. The executor would make the portability election for the deceased spouse's DSUE amount.

Planning for Making the Portability Election. Regardless of which of the forgoing planning alternatives (*i.e.*, basic (outright bequest) portability plan, credit shelter trust plan, "traditional" disclaimer approach, QTIP-eligible trust portability plan,

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

"hybrid" disclaimer and QTIP-eligible trust approach) the married couple decides to pursue, it is important to properly address the portability election in the clients' respective Wills.

There are different options in dealing with this issue. The Will could, for example, *require* the executor to make the portability election in all cases. This approach, of course, is simple, but might prove inflexible or just plain wrong. On the other hand, the Will could be drafted to provide the executor with the *discretion* to make the portability election. Alternatively, the clients could employ a hybrid approach that would require the executor to make the portability election (a) *unless* the surviving spouse (and/or one or more other individuals, *e.g.*, a majority of the competent lineal descendants of the testator/testatrix) directs the executor *not* to make the election in a signed writing delivered to the executor within a certain reasonable period of time prior to the due date of the IRS Form 706, or (b) *but only if* the surviving spouse directs the executor to do so in a signed writing delivered to the executor within a certain reasonable period of time prior to the due date of the IRS Form 706, or (c) *but only if* the surviving spouse pays for the costs associated with making the election. These issues may be particularly "hot" in blended family situations. Query whether the surviving spouse is a proper choice to serve as executor in such cases.

The expenses involved with the executor preparing an IRS Form 706 (that would not otherwise be required but for the portability election) and making the portability election on said form must be borne by someone. Even though the final portability regulations do not require the executor to list the values of the assets passing to the surviving spouse or charity [30], this cost could be substantial. (The regulations do, however, require the executor to include an estimate of the total value of the decedent's gross estate within certain ranges, including the assets passing to the surviving spouse or to charity.) [31] Once again, the individual's Will could specify who (*e.g.*, the estate or the surviving spouse) is responsible for paying the costs involved with making a portability election on a federal estate tax return not otherwise required to be filed. Depending on who pays the expense, the amount of the marital deduction and/or DSUE amount may be impacted.

Planners should also consider including in a premarital agreement provisions as to the making of the portability election and the responsibility for paying for the related expenses.

Conclusion

Portability and the complex estate planning issues it brings with it are here to stay. Estate planners should make portability a point of discussion with virtually all of their married clients. Portability, in theory, is a very appealing concept on account of its apparent simplicity. Planners, however, need to understand and inform their clients about the tax and non-tax advantages and disadvantages of portability versus other credit shelter planning techniques. This is particularly true given the rise in the importance of income tax planning. Planners need also remember to carefully document their discussions with clients regarding these important issues.

a0 Thompson Hine LLP
Cleveland, Ohio
Based on a presentation by Patrick J. Saccogna to the Ohio ACTEC Fellows at the 2015 Ohio ACTEC Meeting on April 19, 2015.

Footnotes

1 Pub. L. 111-312, H.R. 4853, 124 Stat. 3296.

2 Pub. L. 111-312, at §§ 301 et seq.

3 Pub. L. 112-240, H.R. 8, 126 Stat. 2313.

4 Pub. L. 112-240, §§ 101(a)(2), 101(c)(2).

5 T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015).

6 In *Obergefell v. Hodges*, 576 U.S. ________ (2015), decided on June 26, 2015, the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution guarantees a fundamental right to the recognition and provision of same-sex marriage. The case requires all states to (i) issue a marriage license between people of the same gender, and (ii) recognize same-sex marriages that are validly performed in other jurisdictions.

7 Pub. L. 112-240, H.R. 8, 126 Stat. 2313, at §§ 101(a)(2), 101(c)(2).

8 I.R.C. §§ 2010(c)(4), 2010(c)(5).

9 I.R.C. §§ 2010(c), 2505(a).

10 I.R.C. § 2010(c)(4).

11 I.R.C. § 2010(c).

12 I.R.C. § 2010(c)(5)(B), Treas. Reg. § 20.2010-3(d).

13 I.R.C. § 6501.

14 See I.R.C. § 1014.

15 I.R.C. § 1014.

16 I.R.C. § 2652(a)(3).

17 See Rev. Proc. 2001-38, 2001-1 C.B. 1335.

18 Rev. Proc. 2001-38, 2001-1 C.B. 1335.

19 See Franklin, Law & Karibjanian, *Portability—The Game Changer* (American Bar Association Real Property, Trust & Estate Law, January 2013).

20 See Aucutt, ACTEC Capital Letter No. 34, *Priority Guidance Plan Published, Commissioner Nominated* (Aug. 12, 2013).

21 See Temporary Regulation § 20.2010-2T(a)(7)(ii)(A)(4).

22 T.D. 9725, 80 Fed. Reg. 34279 (June 16, 2015), at Section 8 of Supplemental Information.

23 See Treas. Regs. § 25.2518-3(d), Example 20.

24 See *Estate of Chamberlain*, 87 AFTR 2d 2001-2386 (CA 9 2001) , affirming T.C.M. 1999-181.

25 See, e.g., FL. STAT. § 739.402(d).

26 See Treas. Regs. §§ 25.2518-2(e)(2) and 25.2518-2(e)(5).

27 See Estate of Clayton v. C.I.R., 976 F.2d 1486 (5th Cir. 1992); Treas. Regs. § 20.2056(b)-7.

28 See I.R.C. § 2519.

29 See I.R.C. §§ 2519, 2036.

30 Treas. Regs. § 20.2010-2(a)(7)(ii)(A).

31 Treas. Regs. § 20.2010-2(a)(7)(ii)(B).

Westlaw. © 2015 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

25 No. 6 OHPRLJ-NL 10

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.