



*Estate Portability:
A Significant Decision for
Married Couples*

Estate Portability - The Most Significant Decision for Married Couples

There was a significant legislative change included in the American Taxpayer Relief Act of 2012 that is still not widely understood by most taxpayers. If your estate documents are more than five years old you should discuss with your attorney the most significant decision married couples will make as it pertains to their estate distribution plan -- leaving assets outright to the surviving spouse or creating and funding trusts at the first spouse's death (possibly Credit Shelter "Bypass" Trusts or QTIP Trusts).

Following the Tax Cuts and Jobs Act of 2017, the maximum federal estate tax rate is 40 percent with an annual inflation-adjusted \$10 million exclusion per U.S. citizen (2018 level is \$11.2MM). While this doubled estate, gift and GST tax exemption will "sunset" after 2025 and revert to 2017 levels (if not changed with new legislation before then), there is a permanent extension on the **portability provision between spouses**. This means the last spouse to die will receive the benefit of the previous spouse's unused exclusion amount (referred to as "DSUE") as long as they file a timely federal estate tax return Form 706 after the first spouse's death. Rev. Proc. 2017-34 grants remedy to request portability up to the second anniversary of decedent's date of death. Translation: many clients who previously implemented Credit Shelter Trust provisions in their Wills or Living Trusts may want to rethink and possibly amend their estate documents to simplify their plan at death. *Without taking action now to amend your Living Trust or Last Will and Testament you could be costing your heirs time and money in the future!*

For most couples well below the federal estate exemption, bypass trusts will actually be an adverse strategy, given the administration costs of creating and accounting for these trusts and the negative income tax consequences such as compressed trust tax rates during life and the loss of a step-up in cost basis at the second spouse's death. In community property states such as Texas, cost basis is a huge factor since any jointly owned property (with right of survivorship or community property) receives a FULL step-up in cost basis at first spouse's death, as opposed to only 50% step-up in common law states. Furthermore, if assets are owned individually by the surviving spouse rather than a bypass trust there will be a **second step-up in basis** when the surviving spouse ultimately passes away. This would remove any taxable gains to heirs (excludes IRD assets, IRA, annuity) under current income tax laws.

Bypass trusts remain relevant in some family situations thanks to their ability to shelter future growth from estate taxation for very high net worth couples and to preserve the GST exemption. In addition, non-tax reasons such as protecting children's inheritance from a previous marriage, trustee managed accounts and spendthrift or asset protection enhancement may warrant the trust structure over direct payout to spouse. But with portability now in place, most couples may not need the additional complexity of trusts.

Specific action items required

- 1) Review your Will or Living Trust to see what structure is currently in place.
- 2) Use this time to reflect on other documents such as Powers of Attorney and Healthcare Directives.
- 3) Meet with an Estate Attorney to review this topic and add flexibility into your disposition plan.
- 4) Change your account titling or beneficiary designations (if necessary) based on your course of action.
- 5) Do not delay - this could be the most important task you do to enhance your legacy.

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