

THE NEW PORTABILITY: WHAT ALL SURVIVING SPOUSES MUST KNOW

BY JESSICA GALLIGAN GOLDSMITH

When the Federal government enacted the 2010 Tax Relief Act, significant changes were made to the estate tax law.

In particular, the 2010 Tax Relief Act increased the federal estate tax exemption (also known as the Federal credit shelter amount or "CSA") to \$5 million per person and permitted portability of the first spouse's CSA. The CSA is the amount that one can bequeath free of Federal estate tax to person(s) other than a spouse or charity (no estate tax is imposed on marital or charitable bequests). Both of these changes were extremely favorable.

Prior to January 1, 2011, the CSA was \$3.5 million and was not portable. Under this regime, if a married person bequeathed all of his or her assets to a surviving spouse, the CSA of the

deceased spouse was lost forever. In addition, marital property held jointly did not qualify as part of the CSA of the first spouse to die. Therefore, before 2011, the first spouse to die had to (a) own separate property, and (b) leave this property directly to the children (or in a trust for the spouse and/or children) in order to use his or her CSA and pass such property to the children free of estate tax. This made estate planning challenging for even moderately wealthy couples.

For example, prior to Jan. 1, 2011, if a married couple each owned \$3.5 million of separate property, then each of them could bequeath his or her own property directly to the children utilizing both CSAs. In this scenario, the children received the entire \$7 million from their parents and owed no federal estate tax. Alternatively, if the wife died and left her property to her husband, the

wife's CSA was lost. When the husband subsequently died, the \$7 million in his estate passed to the children with only his CSA available to shelter the assets. In this instance, the children received the same \$7 million in property, this time subject to more than \$1 million in Federal estate tax.

However, thanks to the 2010 Tax Relief Act, beginning on Jan. 1, 2011 each spouse's CSA is now portable to the surviving spouse. This means that if the first spouse dies and does not use his or her CSA, the second spouse can still use the first spouse's CSA in his or her estate. Therefore, it no longer matters whether the first spouse owns any separate property or leaves all of his or her property to the surviving spouse outright. Since the CSA is now \$5 million per person and portable, if the first spouse does not use his or her CSA, the children can still receive a total of \$10 million from the surviving spouse (even if this property was acquired by the surviving spouse after the death of the first spouse) without owing any Federal estate tax.

Portability is a significant advantage for the married taxpayer. However, there are some caveats. First, portability is not available under state law. Thus, couples may still owe state estate tax on the death of the surviving spouse. Second, portability is currently only available under federal law to heterosexual married couples. Third, if one remarries and

is widowed again, the portability from the first spouse is lost. This may give some people pause before remarrying. Finally, in order to qualify for portability, one must timely file a federal estate tax return for the estate of the first spouse. Thus, many estates that currently fall below the \$5 million filing threshold will need to file a federal estate tax return in order to maintain this option for the surviving spouse.

The federal estate tax return is due nine months from the date of death, however the due date may be extended by another six months if an extension is filed before the original due date. federal estate tax returns for January 2011 estates, the first estates that qualify for portability, are due this month. Anyone wishing to take advantage of portability should be sure to file a Federal estate tax return before the respective due date so as not to lose this unique opportunity to avoid the imposition of federal estate tax.

Protect your loved ones by protecting your assets.

No one wants to be a burden to their family. Planning ahead is the best way to safeguard your loved ones.

I can provide you the experienced and caring legal help that will enable you to protect and preserve your assets for your children and grandchildren. I can help ensure



Jessica Galligan Goldsmith is a partner and co-chair of the trusts and estates department of Kurzman Eisenberg

Corbin & Lever, L.L.P. in White Plains. Reach her at jgoldsmith@kelaw.com.