



LEGALLY SPEAKING

Wills, Trusts & Estates: Plain And Simple

What Is Estate Tax Portability?

By Patricia C. Marcin, Esq. ©2016

Every U.S. citizen may gift during life and/or bequeath at death cash and/or assets to persons who are not his or her spouse (ex., children) free of federal estate or gift tax up to an aggregate amount -- \$5,450,000 in 2016, frequently called the "unified credit." Prior to 2011, if one spouse died without having used some or all of his or her unified credit (by making taxable gifts during life, and/or making bequests to children and/or grandchildren at death) any unused unified credit amount was lost, i.e., use it, or lose it.

To protect against the loss of unused unified credit, a standard estate planning tool was to draft a will which included a "credit shelter trust" for the benefit of one's spouse and children (which does not qualify for the estate tax marital deduction) in an amount equal to one's unused unified credit. While the assets held in the trust are still available for the use of the surviving spouse, the assets in the trust, and any appreciation of those assets, are not included in the surviving spouse's estate and

can pass to children and grandchildren free of estate tax. The surviving spouse can then use his or her own unified credit on additional assets that can pass to children and grandchildren free of gift and/or estate tax.

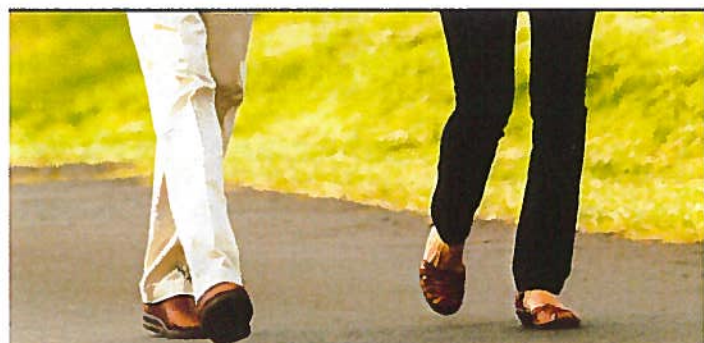
The federal estate tax law was amended in 2013 to permit the executor of the estate of the first deceased spouse to "give" any unused unified credit to the surviving spouse. This is called "portability." The executor makes the portability election by filing a federal estate tax return for the first deceased spouse.

Now that we have portability, is it still necessary to have a credit shelter trust? It depends, and each person should consider his or her particular circumstances carefully before deciding whether or not to rely on portability and foregoing the opportunity to create a credit shelter trust. Circumstances to consider include the following:

- o There is no portability concept for the NY unified credit amount (which is \$3,125,000 prior to April 1, 2016, rising to \$4,187,500 thereafter through March 30, 2017);
- o The type and size of your assets and the probability of appreciation;
- o The assets in the trust can grow exempt from estate tax;
- o The trust may provide "re-marriage" protection that portability does not;
- o The trust may provide creditor protection for the surviving spouse, which portability does not.
- o The income tax consequences upon sale in connection with holding the assets in trust versus having the assets pass directly to the surviving spouse.

A simple "compromise" position is to create what is known as a "disclaimer" trust in the will of each spouse. In this case, the will provides that everything passes outright to the surviving spouse, except to the extent the surviving spouse disclaims (i.e., says he or she does not want specifically identified assets outright.) The disclaimed assets are then held in a credit shelter trust. This gives the surviving spouse the opportunity to consider all circumstances at the time of the first spouse's death for maximum flexibility to decide whether to fund the disclaimer/credit shelter trust, or rely partly or wholly on portability. If there is a trusts or estates topic that you would like to know more about, please feel free to email me at pmarcin@farrellfritz.com with your suggestion and I will do my best to cover it in a future column.

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"I'm so glad we updated our wills. Farrell Fritz helped us understand all the recent changes and the best part is, we minimized our estate taxes. I feel so much more secure about our family's future."



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