"DSUE" IT OR LOSE IT! REPLACING THE PORTABILITY ELECTION SCHEME WITH MANDATORY PORTABILITY OF THE DECEASED SPOUSE'S UNUSED EXCLUSION AMOUNT

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I. INTRODUCTION

Traditionally, the law has ensured that surviving spouses are provided for after their spouse has passed away. States have many provisions that are favorable to the surviving spouse. For example, in Texas, the homestead, home furnishings, and other property needed to survive are exempt from the decedent's creditors.[1] Texas law also provides that the court may grant the surviving spouse a family allowance if the spouse does not have enough

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1. *See* TEX. EST. CODE ANN. § 353.051 (West 2015); TEX. EST. CODE ANN. § 42.002 (West 2001).

separate property on which to survive.[2] The federal Employment Retirement Income Security Act (ERISA) entitles the surviving spouse to 50% of the spouse's retirement benefits.[3] In the federal tax arena, portability continues this tradition of providing for the surviving spouse.

Portability allows the surviving spouse to use the deceased spouse's unused exclusion (DSUE) amount, which will prevent wasting any unused DSUE amount. The surviving spouse could potentially have more than a $10 million exclusion amount. Ultimately, portability decreases the aggregate amount of estate tax a married couple may owe.[4] Additionally, portability provides more opportunity and planning tools to married couples giving couples greater flexibility. Portability also allows couples to fix deficiencies in their estate plan after the fact. However, if the election is not made, the surviving spouse cannot use the DSUE amount, and the failure to properly plan will result in higher estate taxes.

In instances where the surviving spouse is the personal representative of the deceased spouse's estate, the surviving spouse has the ability to make the election. But the surviving spouse may not always serve as the personal representative. In that case, the surviving spouse does not have the ability to autonomously make the election, even though an election would be most advantageous for the surviving spouse. Because the personal representative owes a fiduciary duty to the estate and to the beneficiaries, the personal representative may not make the election if it is detrimental to the other beneficiaries or to the estate itself. For example, the cost of preparing a Form 706 may deter the personal representative from making the election. When the will or marital agreement requires that the personal representative make the portability election, the election may not transpire because a beneficiary may contest those agreements in court and litigation may not resolve before the deadline.

Many commentators hoped that when the Internal Revenue Service (IRS or Service) issued the final portability regulations in the summer of 2015, the regulations would expand upon when an appointed and non-appointed personal representative may file the estate tax return to make the election.[5]

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2. TEX. EST. CODE § 353.101 (West 2014). Similarly, in Louisiana, when a spouse dies much wealthier in comparison to the surviving spouse, Louisiana law entitles the surviving spouse to claim a marital portion from the succession of the deceased spouse. LA. CIV. CODE ANN. art. 2432 (West 2015).

3. 29 U.S.C.A. § 1055 (West 2014).

4. The Joint Committee on Taxation projected in late 2010 when portability was enacted that portability would have a negative effect on the budget. *Estimated Budget Effects of the "Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010," Scheduled for Consideration by the United States Senate*, JOINT COMM. ON TAX'N (Dec. 10, 2010), https://www.jct.gov/publications.html?func=startdown&id=3715 [https://perma.cc/75LN-QAD7].

5. *Comments to the Proposed and Temporary Regulations on the Portability of the Deceased Spousal Unused Exclusion Amount*, N.Y.C. B. ASS'N, (Sept. 14, 2012); *Comments on Proposed Regulations and Temporary Regulations Under Internal Revenue Code Sections 2001, 2010, and 2505*, AM. B. ASS'N (Oct. 5, 2012); *Comments on Reg-141832-11 and TD 9593 regarding Guidance on Portability, Notice of Proposed Rulemaking*, AM. INST. CERTIFIED PUBLIC ACCOUNTANTS (Sept. 14,

In other words, if the deceased spouse did not directly appoint the surviving spouse as the personal representative, in what situations could the surviving spouse make the election?[6] However, the Treasury Department did not address this in the final regulations, stating in the preamble "that any consideration of what, if any, state law action might bring the surviving spouse within the definition of executor under section 2203 is outside of the scope of this regulation."[7] Consequently, a surviving spouse remains in an uncertain position, relying on the personal representative whose duty is both to the estate and to all its beneficiaries.

Therefore, this comment proposes that the current portability election scheme should be discarded in favor of making portability mandatory.[8] By making portability mandatory, the surviving spouse would always benefit from any DSUE amount.[9] Mandatory portability would provide certainty to married couples and allow them to rest assured that they can remedy any deficiency in their estate plan.[10] There would be no question as to whether a personal representative should make the portability election.[11] No more election would be required.[12] Thus, estates not otherwise required to file an estate tax return would no longer be required to do so.[13] Instead, the surviving spouse, who benefits from the DSUE amount, would be required to file a shorter version of Form 706 to compute the DSUE amount.[14] By making portability mandatory and by requiring a filing to compute the DSUE amount, the portability election is decoupled from the computation of the DSUE amount.[15]

First, this comment will discuss the enactment of portability, as well as the applicable Internal Revenue Code and Treasury Regulation provisions that govern portability, including the requirements to make the election.[16] Second, this comment will discuss the differences between a traditional estate plan versus a portability plan.[17] Third, this comment will explore the current problems the surviving spouse faces under the current portability election scheme.[18] And finally, this comment will propose not only to eliminate the

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2012); *Comments on the Proposed and Temporary Regulations on the Portability of a Deceased Spousal Unused Exclusion Amount*, N.Y. ST. SOC'Y CERTIFIED PUBLIC ACCOUNTANTS (Sept. 4, 2012).

6. *Id.*

7. Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. 34279-01, 34281 (June 12, 2015).

8. *See infra* Part V.

9. *See infra* Section V.A.1.

10. *See infra* Section V.A.1.

11. *See infra* Section V.A.4.

12. *See infra* Section V.B.

13. *See infra* Section V.B.

14. *See infra* Section V.B.

15. *See infra* Section V.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

portability election in favor of making portability of the DSUE amount mandatory but to also impose a new filing requirement for surviving spouses in order to compute the DSUE amount.[19]

II. THE PORTABILITY ELECTION

In 2010, after years of discussion, Congress created portability when it amended I.R.C. section 2010, The Unified Credit Against Estate Tax to include the DSUE amount.[20] The DSUE amount allows the surviving spouse to add the deceased spouse's unused exclusion amount to the surviving spouse's own amount.[21] In 2012, Congress made portability permanent.[22] After requesting comments on portability in Notice 2011-82, the IRS issued temporary regulations in 2012.[23] And in 2015, the IRS issued final regulations.[24]

Generally, each taxpayer has about a $5,000,000 exclusion amount, allowing the taxpayer to transfer about $5,000,000 of assets gift or estate tax-free throughout the taxpayer's lifetime.[25] This exclusion amount is converted into a credit that is applied against any gift or estate tax due on those transfers.[26] This credit is called the applicable credit amount, and it is equal to the amount of tax that would be computed on the applicable exclusion amount under section 2001(c).[27] The applicable exclusion amount is equal to the basic exclusion amount plus the DSUE amount, if any.[28] The basic exclusion amount is equal to $5,000,000, and is adjusted annually for inflation.[29] The DSUE amount is equal to the lesser of the basic exclusion amount in effect in the year of the decedent's death or the last deceased spouse's applicable exclusion amount less any amount previously applied against gift and/or estate taxes.[30] For example, not considering inflation, if the basic exclusion amount is $5,000,000 and there is no DSUE amount, then the credit amount would be equal to the tax computed on $5,000,000 under section 2001(c) which is $345,800 on the first million plus 40% on the next

19. *See infra* Part V.

20. *See* Ashley P. Alderman, *Estate Tax Exclusion Portability: Policy to Planning Ideas*, 39 EST. PLAN.1, 8 (2012) (detailing a historical view of portability); Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010).

21. I.R.C. § 2010(c)(2) (West 2013).

22. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

23. Treas. Reg. §§ 20.2010-1T, -2T, -3T.

24. Treas. Reg. §§ 20.2010-1, -2, -3.

25. I.R.C. § 2010(a),(c)(3)(A); 2505(a). Note, there is no portability allowed for the GST exemption.

26. *Id.* § 2010(c)(1).

27. *Id.*; Treas. Reg. § 20.2010-1(d)(1) (2015).

28. I.R.C. § 2010(c)(2); Treas. Reg. § 20.2010-1(d)(2).

29. I.R.C. § 2010(c)(3). For 2015, the basic exclusion amount is $5,430,000. Rev. Proc. 2014-61, § 3.33 2014-2 C.B. 860.

30. I.R.C. § 2010(c)(4); Treas. Reg. § 20.2010-2(c). The term "last deceased spouse" refers to the most recently deceased individual who was married to the surviving spouse. Treas. Reg. § 20.2010-1(d)(5).

$4,000,000 or $1,600,000 for a total applicable credit amount equal to $1,948,800.

To transfer the DSUE amount to the surviving spouse, the deceased spouse's estate must make an election.[31] The personal representative of the estate must make the election on behalf of the decedent's estate.[32] The personal representative is defined as one who "is appointed, qualified, and acting within the United States."[33] However, if there is no appointed representative, any person who is in actual or constructive possession of any of the decedent's property may make the election.[34] Furthermore, the personal representative can only make the election if the decedent was a U.S. citizen at the time of death.[35]

The personal representative files a timely estate tax return on Form 706 to make the election.[36] The return is due nine months after the decedent's death plus an additional six-month extension.[37] Consequently, if the return is filed late, the election cannot be made.[38]

The election is automatic upon filing of the estate tax return, unless the personal representative affirmatively states otherwise.[39] Once made, the election is irrevocable.[40] When the personal representative files the estate tax return but does not want to make the portability election, the personal representative must state "affirmatively on a timely filed estate tax return, or in an attachment to that estate tax return, that the estate is not electing portability under section 2010(c)(5)."[41] Alternatively, the personal representative could simply not file the return.

Making the election subjects the gift tax returns of the deceased spouse to a possible IRS audit to determine the correct amount of DSUE.[42] Regardless of the statute of limitations on the deceased spouse's returns, the Service may examine those returns to determine whether the amount of DSUE the surviving spouse claimed on the return is correct.[43] If the IRS wishes to make any changes to the DSUE amount claimed on the surviving spouse's return, it must do so within the section 6501 statute of limitation period.[44]

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31. I.R.C. § 2010(c)(5)(A); Treas. Reg. § 20.2010-2(a).
32. Treas. Reg. § 20.2010-2(a)(6).
33. *Id.* § 20.2010-2(a)(6)(i).
34. *Id.* § 20.2010-2(a)(6)(ii).
35. *Id.* § 20.2010-2(a)(5).
36. I.R.C. § 2010(c)(5)(A)(West 2013); Treas. Reg. § 20.2010-2(a).
37. I.R.C. § 6081(a); Treas. Reg. §§ 1.6081-6(a), 20.2010-2(a)(1).
38. I.R.C. § 6081(a); Treas. Reg. §§ 1.6081-6(a), 20.2010-2(a)(1).
39. Treas. Reg. § 20.2010-2(a)(2).
40. I.R.C. § 2010(c)(5)(A).
41. Treas. Reg. § 20.2010-2(a)(3)(i).
42. I.R.C. § 2010(c)(5)(B); Treas. Reg. § 20.2010-3(d).
43. I.R.C. § 2010(c)(5)(B); Treas. Reg. § 20.2010-3(d).
44. Treas. Reg. § 20.2010-3(d).

Once the election is made, surviving spouses can use the DSUE amount against gifts made during their life as well as at their death.[45] If the surviving spouse remarries, the surviving spouse retains the DSUE amount from the former deceased spouse.[46] If the new spouse also predeceases the surviving spouse, then the surviving spouse loses the DSUE amount from the first deceased spouse.[47] Thus, when making inter vivos gifts, the surviving spouse will want to apply the DSUE amount first.[48] If the second deceased spouse's estate makes the election, then the surviving spouse can inherit the second deceased spouse's unused exclusion amount.[49] If the surviving spouse predeceases the second spouse, then the surviving spouse's estate can apply the surviving spouse's DSUE amount from the first spouse against the estate first, allowing the surviving spouse to transfer any of the unused basic exclusion amount to the second spouse.[50]

III. THE BASICS OF TRADITIONAL PLANNING VERSUS PORTABILITY PLANNING

Without portability, a couple would have to engage in more complicated estate planning to use each spouse's lifetime exclusion to their fullest extent.[51] For example, in a traditional plan that does not use portability, when

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45. I.R.C. §§ 2010(a), 2505(a); *see* Treas. Reg. § 20.2010-3(c).

46. I.R.C. § 2010(c)(4); Treas. Reg. §§ 20.2010-1(d)(5), -3(a)(1), -3(a)(3).

47. I.R.C. § 2010(c)(4); Treas. Reg. §§ 20.2010-1(d)(5), -3(a)(1).

48. Howard M Esterces, *Portability – A Dramatic Estate Tax Change*, 90 PRAC. TAX STRATEGIES 253. For example, "Mary marries H2 after H1 dies. While H2 is alive, H1 will still be Mary's *last* deceased spouse even though she is now married to H2. Mary can protect her DSUE received from H1 by making large gifts before H2 dies. Additionally, the DSUE of Mary's *last* deceased spouse (H1) will be applied first against gifts she makes, before any of her own exclusion amount is used." *Id.*

49. I.R.C. § 2010(c)(4); Treas. Reg. §§ 20.2010-1(d)(5), -3(a)(1). Section 20.2010-3(b) provides a special rule to compute the DSUE amount of a surviving spouse at death when the surviving spouse previously applied DSUE amount from multiple spouses.

50. This rule comes from an example the Joint Committee on Taxation published in a technical explanation, Staff of Joint Comm. on Tax'n, Technical Explanation of the Revenue Provisions Contained in the "Tax Relief…Act of 2010" Scheduled for Consideration by the United States Senate (JCX-55-10) at 54, Ex. 3 (Dec. 10, 2010). However, the example did not jive with the statute. Alderman, *supra* note, at 12 (citing Akers, *Estate Planning Effects and Strategies Under the Tax Relief…Act of 2010*, Bessemer Trust (Jan. 10, 2010)). The reason the example did not jive with the statute is because § 2010(c)(4) describes the DSUE amount as the basic exclusion amount or the excess of the ***basic exclusion amount*** of the last deceased spouse over the tentative tax of the estate. As a result, the Joint Committee on Taxation published an errata, suggesting that "basic exclusion amount" should be replaced with "applicable exclusion amount." Staff of Joint Comm. on Tax'n, Errata "General Explanation of Tax Legislation Enacted in the 111th Congress" (JCX-20-11) at 1 (Mar. 23, 2011). In response, the Treasury Department adopted the Committee's position and made the correction in Treas. Reg. § 20.2010-2(c), which describes the DSUE amount as the basic exclusion amount or the excess of the ***applicable exclusion amount*** over the tentative tax of the estate.

51. STEPHEN R. LEIMBERG ET AL., THE TOOLS AND TECHNIQUES OF ESTATE PLANNING 283 (15th ed. 2011); *see also* U.S. TRUST, WEALTH STRATEGY REPORT: PORTABILITY OF A DECEASED SPOUSE'S UNUSED EXCLUSION AMOUNT 1–2 (2013), *available at* http://www.ustrust.com/Publish/Content/application/pdf/GWMOL/UST-WSR-Portability-of-estate-tax-exemption.pdf [https://perma.cc/R2LL-89W8] (discussing aspects of traditional estate planning) [hereinafter U.S. TRUST]; *see also* Lester B. Law

the first spouse dies, his or her assets are put into a trust—called a by-pass trust—up to the balance of the exclusion amount, thereby avoiding estate taxes and by-passing the surviving spouse's estate.[52] Typically, the surviving spouse will be the beneficiary of the trust.[53] Any excess assets over the exclusion amount either pass outright to the surviving spouse, or they are placed in a marital trust for the benefit of the surviving spouse for which a Qualified Terminable Interest Property (QTIP) election is made.[54] Either scenario qualifies for the marital deduction and avoids estate taxes.[55] The surviving spouse's gross estate will include those assets at death under section 2033 for assets left outright or section 2044 as to the assets subject to the QTIP election.[56] In planning for this, the couple needs to ensure that there are sufficient assets in each of their names in order to use their exemption amounts to the fullest extent.[57] Thus, "the law rewards sophisticated planning and constant reallocation of wealth, but does not offer the same benefits to couples who do not engage in sophisticated planning or whose assets do not lend themselves to appropriate allocation."[58] This type of plan can be costly and burdensome to implement.[59] In addition to retitling assets, each spouse must ensure that his or her testament would properly carry out the above plan.[60] Moreover, couples must actively manage their estate plan from year to year, particularly if they purchase new assets or their wealth changes.[61] Once a spouse dies, the estate would not only incur the costs of administering the succession but would also incur additional costs for setting up and maintaining the trusts.[62] While a traditional estate plan can effectively maximize the exclusion amount, such a plan can become cumbersome to draft, execute, and manage.[63]

By contrast, portability planning can accomplish the same results more simply.[64] In a basic portability plan, each spouse leaves all assets outright to

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& Andrew T. Huber, *Estate Planning with Portability in Mind, Part I*, 86 FLA. B. J. 29 (2012); *see also* Esterces *supra* note 48; *see also* Alderman, *supra* note 20.

52. *E.g.*, LEIMBERG, *supra* note 51.

53. *E.g.*, *id.*

54. *E.g.*, *id.*, at 283–84.

55. *E.g.*, *id.*

56. *E.g.*, *id.*

57. *E.g.*, U.S. TRUST, *supra* note 68, at 1–2; Esterces, *supra* note 1, at 253–54; Alderman, *supra* note 35, at 8 & 13. Special consideration should be given to couples who reside in a community property state such as Texas and Louisiana.

58. TASK FORCE ON FED. WEALTH TRANSFER TAXES, AM. BAR ASS'N, REPORT ON REFORM OF FEDERAL WEALTH TRANSFER TAXES 99 (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/04fwtt.authcheckdam.pdf.

59. Law & Huber, *supra* note 51 at 30.

60. *E.g.*, U.S. TRUST, *supra* note 51, at 1–2; Alderman, *supra* note 20, at 13.

61. *See* Alderman, *supra* note 20, at 13.

62. *See* Law & Huber, *supra* note 51, at 30.

63. *See* Alderman, *supra* note 20, at 13.

64. "[A] married couple can side-step the complexities of a credit shelter trust plan which include a will or trust that contains a complicated formula to maximize use of the exemption, which only an estate planner or other professional can understand." *Outside the Box on Estate Tax Reform: Reviewing Ideas to*

the other spouse.[65] When a spouse dies, all of his or her assets pass to the surviving spouse free of estate taxes via the marital deduction.[66] The portability election transfers the decedent spouse's unused exclusion amount to the surviving spouse.[67] When the surviving spouse dies, the assets pass outright to the surviving spouse's descendants free of estate taxes up to the combined exclusion amount.[68] Because multiple trusts are not needed, portability planning at its basic configuration may be less expensive than traditional planning.[69]

Further, the assets left to the surviving spouse will get a step-up in basis upon the death of the surviving spouse.[70] In a traditional plan, assets are generally placed in the trust at their fair market values at the date of the first spouse's death.[71] Assets that appreciate in value between the death of the first spouse and the surviving spouse do not get a step-up in basis when the surviving spouse dies.[72] But in basic portability planning, the surviving spouse receives the decedent spouse's assets outright with a fair market value basis measured at the time of the first spouse's death.[73] Then, when the surviving spouse dies, the heirs will receive a fair market value basis in all of the assets measured at the survivor's death, including the assets that the surviving spouse inherited at the first spouse's death.[74]

Simplify Planning: Hearing Before the Subcomm. on Finance, 110th Cong. 5 (2008) (statement of Shirley L. Kovar, Attorney, Branton and Wilson, APC, San Diego, CA) [hereinafter *Hearing*]; Senator Baucus, in a press release, commented on portability: "Under current law, couples have to do complicated estate planning to claim their entire exemption (currently $7 million for a couple). The proposal allows the executor of a deceased spouse's estate to transfer any unused exemption to the surviving spouse without such planning." Press Release, Senate Committee on Finance Chairman Max Baucus, Baucus Introduces Bill to Permanently Cut Middle-Class Taxes, Extend Job-Creating Tax Cuts for Businesses, Families, Workers (Dec. 2, 2010), *available at* http://www.finance.senate.gov/imo/media/doc/12022010%20Baucus%20Introduces%20Middle%20Class%20Tax%20Cut%20Bill.pdf [hereinafter Baucus Press Release].

65. *E.g.* Jonathan G. Blattmachr, et al., *Portability or No: The Death of the Credit Shelter Trust?*, 118 J. TAX'N 232, 233 (2013); Law & Huber, *supra* note 51; U.S. Trust. *supra* note 51.

66. *E.g.*, Blattmachr, et al., *supra* note 65, at 233.

67. *E.g.*, *id.*

68. *E.g.*, *id.*

69. Law & Huber, *supra* note 51; *but see* U.S. TRUST, *supra* note 51, at 4 *and* Blattmachr, et al., *supra* note 65 (discussing the use of portability and more complex planning involving trusts).

70. I.R.C. § 1014(a)(1), (b)(1) (West 2015); *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 234.

71. I.R.C. § 1014(a)(1), (b)(1); *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 5.

72. *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 5.

73. I.R.C. § 1014(a)(1), (b)(1); *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 234.

74. I.R.C. § 1014(a)(1), (b)(1); *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 234.

Further, portability planning provides more flexibility to couples.[75] Even if the assets are unbalanced between spouses, portability will ensure that the unused exclusion amount gets used.[76] And with portability, even if everything is left to the surviving spouse and nothing to a trust, the ability to port the deceased spouse's unused exclusion amount to the surviving spouse prevents waste.[77] Through portability, Congress has allowed spouses to accomplish via statute what many couples already do through more complicated ways, such as through credit shelter trusts.[78]

IV. PROBLEMS WITH THE CURRENT PORTABILITY ELECTION SCHEME

Despite all the flexibility and simplicity that a portability plan provides, the current portability election scheme poses many problems for married couples in implementing an estate plan based on portability. Even if a couple carefully plans the distribution of their assets at death, an estate plan based on portability hinges on the personal representative making the election. Ultimately, if the election is not made, the surviving spouse suffers by possibly incurring more estate and gift tax.

First, if the will or marital agreement does not require the personal representative to make the election, then there is no guarantee that the election will be made when the surviving spouse is not the personal representative. The personal representative has a fiduciary duty to the estate and beneficiaries.[79] Given the potential cost of making the election and the fact that it will only benefit the surviving spouse, the personal representative may not make the election.[80] Further, this situation is escalated when the surviving spouse does not have a good relationship with the other beneficiaries, particularly if the beneficiaries are children from a different marriage.[81] In that situation, the beneficiaries will not want to front the cost of filing a return just to make an election for a surviving spouse for whom

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75. Esterces, *supra* note 48, at 254 (noting that in traditional planning, a "[l]ack of planning was often a trap for the unwary or for those who simply wanted to leave everything outright to a surviving spouse without suffering adverse tax effects").

76. *E.g.*, Law & Huber, *supra* note 51, at 30; U.S. TRUST, *supra* note 51, at 2; Alderman, *supra* note 20, at 13 (stating that "portability provides the opportunity to do estate planning after death").

77. *E.g.*, U.S. TRUST, *supra* note 51; Alderman, *supra* note 20, at 13.

78. *Hearing*, *supra* note 64, at 5 (statement of Shirley L. Kovar, Attorney, Branton and Wilson, APC, San Diego, CA) ("A third compelling reason to make portability a reality is that a married couple can already use both exemptions with the use of a credit shelter trust. The impact of portability then would simply accomplish by statute what now requires careful and sophisticated lifetime planning.").

79. *See infra* Section V.A.4 (discussing the personal representative's fiduciary duty).

80. *See infra* Section V.A.3 (discussing the costs of making the election); Howard M. Zaritsky, *The DSUE Amount as an Estate Asset with Value*, 41:5 EST. PLAN. 46, 48 (2014) ("The personal representative owes a fiduciary duty to treat all of the estate beneficiaries fairly and equally; the cost of filing a federal estate tax return is a detriment to all of the beneficiaries, but the act of filing a return in such a case is a benefit only to the surviving spouse.").

81. *Id.* at 46.

they do not care for.[82] And the surviving spouse is really out of luck when the surviving spouse is neither a beneficiary nor the personal representative; the personal representative will not owe the surviving spouse any fiduciary duty and will be even less inclined to file a return just to make the election for the surviving spouse.[83]

Further, even if the surviving spouse is able to negotiate with the personal representative to make the election, the surviving spouse may have to front the costs of doing so.[84] Because the personal representative has a duty to the estate and the beneficiaries, the personal representative may require the surviving spouse to pay the costs of filing the return.[85] The personal representative may also require additional payments given the possibility that the IRS may examine the deceased spouse's gift tax returns to determine whether the surviving spouse is claiming the correct DSUE amount.[86]

But even planning in advance to ensure that the portability election will be made at the first spouse's death is no guarantee that the election will be made. A decedent can try to ensure that the election will be made by including a provision in the will or marital agreement that the personal representative is to file the estate tax return for the sole purpose of electing portability, even if a return is not otherwise required.[87] By doing so, there is no question whether the personal representative should make the election or not; as a result, the personal representative does not have to balance the burden of filing the return with the benefits of doing so.[88] However, a provision in a marital agreement or will that requires the personal representative to make the portability election does not guarantee that they will make the election. For example, if the validity of the agreement or will is contested in court and the deadline to file the election passes while the litigation is ongoing, the personal representative cannot make the election even if the court determines the agreement was valid because the deadline to make the election passed.[89] Again, the portability election scheme places an additional burden on the surviving spouse in requiring that spouse to fight the

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82. *Id.*

83. *Comments to the Proposed and Temporary Regulations on the Portability of the Deceased Spousal Unused Exclusion Amount*, N.Y.C. B. ASS'N, (Sept. 14, 2012)

84. Zaritsky, *supra* note 80, at 48.

85. *Id.*

86. *Id.*

87. *Id.*; *see* George D. Karibjanian, *Portability and Prenuptials: A Plethora of Preventative, Progressive, and Precautionary Provisions*, 38:2 EST., GIFTS, & TR. J. 175, 175–77 (Mar. 14, 2013) (describing various clauses to put in a marital agreement or will to ensure that the portability election will be made).

88. Zaritsky, *supra* note 80, at 48.

89. *See Comments on the Proposed and Temporary Regulations on the Portability of a Deceased Spousal Unused Exclusion Amount*, N.Y. ST. SOC'Y CERTIFIED PUBLIC ACCOUNTANTS (Sept. 4, 2012); *Comments on Proposed Regulations and Temporary Regulations Under Internal Revenue Code Sections 2001, 2010, and 2505*, AM. B. ASS'N (Oct. 5, 2012).

validity of an agreement and hope such litigation is over before the deadline passes; such a scenario is unlikely as the deadline is nine months after the date of death plus the additional six month extension.[90]

Another problem with the current scheme, as alluded to above, is failing to file the estate tax return by the filing deadline.[91] The election cannot be made if the personal representative fails to file the estate tax return by the deadline.[92] The due date for the return, and thus the due date to elect portability, is nine months after the date of the decedent's death plus the additional six month extension.[93]

If the personal representative missed the filing deadline, then Treasury Regulation § 301.9100-3 may offer relief.[94] For returns that are required to be filed, Treasury Regulation § 301.9100-3 does not offer relief because the statute, not the regulation, governs the election.[95] However, for returns that are filed just to make the portability election, relief may be available under Treasury Regulation § 301.9100-3.[96] To seek relief, the taxpayer must provide evidence of acting reasonably and in good faith, and that the grant of relief will not prejudice the interest of the government.[97] To request relief, Revenue Procedure 2016-1 requires that the user pay a $9,800 fee.[98] Additionally, the Revenue Procedure lays out what the user must include in the request.[99] In addition to the fee paid to the IRS, the taxpayer must also pay attorney fees for drafting the request for relief. Thus, the process for requesting relief is cumbersome, and relief is not guaranteed.

A final problem with the current portability scheme is remarriage.[100] The exclusion amount is of the *last* deceased spouse of the surviving spouse.[101] Thus, if a surviving spouse remarries and the new spouse predeceases the surviving spouse, the surviving spouse loses the first deceased spouse's unused exclusion amount.[102] The surviving spouse will incur the same issues as already discussed when trying to make the portability

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90. *See Comments on the Proposed and Temporary Regulations on the Portability of a Deceased Spousal Unused Exclusion Amount*, N.Y. ST. SOC'Y CERTIFIED PUBLIC ACCOUNTANTS (Sept. 4, 2012); *Comments on Proposed Regulations and Temporary Regulations Under Internal Revenue Code Sections 2001, 2010, and 2505*, AM. B. ASS'N (Oct. 5, 2012); I.R.C. § 6081(a) (West 2015); Treas. Reg. §§ 1.6081-6(a), 20.2010-2(a)(1)(2011).

91. *See supra* Part II (discussing filing deadlines).

92. I.R.C. § 2010(c)(5)(A); Treas. Reg. § 20.2010-2(a).

93. I.R.C. § 6081(a); Treas. Reg. §§ 1.6081-6(a), 20.2010-2(a)(1).

94. Treas. Reg. § 20.2010-2(a)(1).

95. *Id.*

96. *Id.*

97. Treas. Reg. § 301.9100-3 (explaining what reasonable action, good faith, and prejudices to the interest of the government are).

98. Rev. Proc. 2016-1, 2016-1 I.R.B. 1, Appendix A (2015).

99. *See generally* Rev. Proc. 2016-1, 2016-1 I.R.B. 1 (2015) (discussing request requirements).

100. *See supra* Part II (discussing remarriage provisions).

101. I.R.C. § 2010(c)(4) (West 2015); *see supra* Part II.

102. I.R.C. § 2010(c)(4); Treas. Reg. § 20.2010-1(d)(5), -3(a); *see supra* Part II.

election for the second deceased spouse.[103] While this comment is not arguing against the remarriage provision, this comment is arguing that the current portability election scheme continues to place a burden on the surviving spouse for merely remarrying. The mandatory portability regime would automatically port over the second deceased spouse's DSUE amount.

V. MANDATORY PORTABILITY: DECOUPLING THE PORTABILITY ELECTION FROM THE DSUE COMPUTATION

Under the current portability election scheme, the portability election and the computation of the DSUE amount are two separate concerns that are intertwined, one dependent on the other. The computation of the DSUE amount and the surviving spouse's subsequent use depends on the deceased spouse's personal representative actually making the election.[104] Consequently, this dependent relationship creates problems for married couples relying on portability planning and ultimately for the surviving spouse as previously outlined and places unnecessary burdens on a device that was originally touted as simplifying estate planning.[105] Mandatory portability will alleviate these unnecessary burdens and provide certainty for married couples. Under mandatory portability, the surviving spouse is guaranteed the unused exclusion amount. However, that unused exclusion amount still must be computed. Because the surviving spouse is the only person that will benefit from the DSUE amount, the surviving spouse would need to file a short Form 706, Form 706-DSUEA (Deceased Spouse Unused Exclusion Amount). This filing would ensure that the DSUE amount is computed at the time of the first spouse's death. Mandatory portability and the required computation of the DSUE amount will allow both the deceased spouse and the surviving spouse to rest assured that any unused exclusion amount will transfer to the surviving spouse.

A. Mandatory Portability

Mandatory portability will ensure that married couples can divest themselves of their assets mostly, if not completely, gift and estate tax free when their assets move out of the marital regime. Ultimately, mandatory portability protects the surviving spouse by ensuring that he or she will be able to divest themselves of their assets during life and at death-mostly, if not completely-tax free regardless of whether the couple relied on a portability plan or no estate plan at all.

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103. *See supra* Part III.
104. *See supra* Part II; I.R.C. § 2010(c)(5)(A); Treas. Reg. § 20.2010-2(a).
105. *See supra* Part IV.

As already discussed, portability benefits the surviving spouse as the first spouse to die has his or her exemption amount at hand plus the unlimited marital deduction to move assets out of his or her estate tax free; whereas, the surviving spouse *only* has his or her own exemption amount. Accordingly, the greatest advantage of portability is that it prevents the wasting of any unused DSUE amount of the deceased spouse which in turn allows the surviving spouse to make more tax-free gifts during life and at death. However, the surviving spouse benefits from portability at the expense of the estate. Unless otherwise provided in a marital agreement or will, the estate bears the burden and the cost of making the election. It is this tension between the estate and the surviving spouse that necessitates mandatory portability rather than leaving portability to the discretion of the personal representative.

1. Mandatory Portability Provides Certainty

Mandatory portability furthers the original goal of portability: to simplify estate planning for married couples.[106] When compared with traditional planning, portability planning provides married couples with a simpler, more flexible approach to estate planning.[107] In fact, Ms. Kovar testified before the Senate Finance Committee and said that, "The first reason then that we favor portability is that it satisfies client desires to transfer the estate of a deceased spouse outright to the surviving spouse, while at the same time making use of the exemption of both the deceased spouse and the survivor."[108] Yet, the current portability election scheme acts as a barrier to couples who wish to use portability planning, which makes the use of portability planning not so simple. Requiring the personal representative to make an election to implement a portability plan not only places additional burdens on the deceased spouse's estate, but it also provides uncertainty to married couples and ultimately to the surviving spouse. Failure to make the election, for whatever reason, will not only inhibit a couple's estate plan that relies on the use of portability, but will also penalize couples who fail to plan

106. AMERICAN BAR ASSOCIATION, PORTABILITY – PART ONE, 8 [hereinafter "ABA"] (noting that "portability promotes federal tax policies of simplifying estate planning for the middle class").

107. *Compare Comments to the Proposed and Temporary Regulations on the Portability of the Deceased Spousal Unused Exclusion Amount*, N.Y.C. B. ASS'N, (Sept. 14, 2012)("believe[s] that the correct policy result should be to encourage the use of the portability election to ensure fairness and the availability of the benefits of portability as an option to more complicated estate planning alternatives."), *with* Alderman, *supra* note 20, at 8 (noting that "[t]his new concept of portability provides certain advantages for married couples, as well as planning opportunities for practitioners, but it is not without significant risks") *and* Blattmachr, et al., *supra* note 65, at 232 (suggesting that "[a]lthough touted as a simplification, portability will make planning more complex for many clients because it is yet another option that requires analysis to determine whether relying on it, or at least preparing an estate plan that makes relying on it possible, is beneficial").

108. *Hearing*, *supra* note 64, at 5 (statement of Shirley L. Kovar, Attorney, Branton and Wilson, APC, San Diego, CA).

properly. Mandatory portability would restore certainty to married couples, ensuring that each spouse's exclusion amount will be used to the fullest extent no matter how the couple owns their assets.[109] Regardless of how the deceased spouse decides to dispose of the assets, the surviving spouse should benefit from whatever exclusion amount is leftover.

2. The Current Portability Election Serves No Purpose

The current portability election scheme serves no purpose other than to affect the transfer of the DSUE amount and compute the DSUE amount. The portability election is purely a benefit inuring to the benefit of the surviving spouse. Aside from the collateral effects of making the election, there are no real consequences to weigh when deciding whether or not to make the election, unlike other spousal elections.

For other spousal elections, such as the ability to file a joint return or to split gifts, the choice of making the election has real consequences. In the joint return context, making the election to file a joint return could create tax savings for the couple. For example, in a single income household, a couple can file a joint return and use both of their personal exemptions against the working spouse's income.[110] As a result, the couple's income tax liability is reduced.[111] However, if the couple decides not to file jointly, the couple will lose the personal exemption of the non-working spouse.[112] The spouse who has income would have a greater tax liability because only one personal exemption is available to use against the income. In addition to tax liability, couples consider many other factors when deciding whether or not to file a joint return.[113] Similarly, in the gift-splitting context, making the election to split gifts or not to split gifts has real consequences. For example, if a spouse makes a gift in an amount greater than $14,000, the annual exclusion, to a person other than a spouse, such as a grandchild, the first $14,000 is excluded from gift tax.[114] Anything over $14,000 is taxed.[115] Any tax generated is then applied against the spouse's lifetime exclusion amount.[116] By contrast, if a couple agrees to split the gift, both spouses can apply their exclusions

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109. In 2010, Senator Baucus proposed portability in his bill, the Middle Class Tax Cut Act of 2010, among many other tax provisions. In a press release discussing the bill, the senator commented on the bill as a whole, "When families and businesses know what to expect from our tax system, they can plan, they can spend and they can expand. Our legislation cuts taxes and provides certainty to families, individuals and investors, giving them confidence to help our economy grow." Baucus Press Release, *supra* note 64.

110. I.R.C. § 151(b).

111. *See id*.

112. *Id.*

113. For instance, spouses may not want to file jointly if their spouse takes risky positions on the return.

114. I.R.C. § 2503(b) (West 1998); Rev. Proc. 2014-61.

115. I.R.C. § 2503(a), (b).

116. *Id.* at § 2505(a) (West 2011).

against the gift.[117] Now, the spouse can make up to a $28,000 gift before any tax is due.[118] Again, like the joint return, the gift splitting election has real consequences.

However, there are no real consequences to weigh in deciding to make the portability election because it is purely a benefit. The only consequence of making the election is that the surviving spouse has a higher exclusion amount to make transfers that avoid estate and gift taxes. The consequence of not making the election is that the surviving spouse does not gain additional exclusion amount, possibly subjecting the surviving spouse to more estate and gift taxes. As to the deceased spouse, the deceased spouse is dead; consequently, after applying his or her lifetime exclusion amount to his or her estate, he or she will not be using any remaining exclusion amount. He or she is dead! The deceased spouse does not care if the election is made or not because it does not affect him or her. Making the election does trigger other consequences—such as requiring the estate to file the estate tax return and subjecting the deceased spouse's gift tax returns to possible audit—but those are only collateral effects of making the election. Thus, if the election to transfer the unused exclusion amount to the surviving spouse is not made, the unused exclusion amount is wasted and lost forever. From both spouses' perspective, there are no reasons to not make the election.

Although the surviving spouse only benefits from portability, there are some instances in which an estate planner should not rely on portability in planning. Under current law, there are instances in which an estate planner may argue against making the election because the estate planner does not believe it is wise to leave the assets outright to the surviving spouse.[119] But whether an estate planner decides to incorporate portability into an estate plan has no bearing on whether portability should be mandatory. Mandatory portability would not force a decision on couples who would not otherwise want to make the election. Furthermore, mandatory portability would not prevent a couple from using traditional estate planning.

To illustrate this point, consider the marital deduction.[120] The marital deduction is available for couples to use if they wish to leave property outright to their surviving spouse, shifting the estate tax to their surviving spouse.[121] However, there are situations where a spouse may not want to leave property outright to a surviving spouse, thereby not utilizing the marital deduction.[122] Similarly, mandatory portability merely provides the estate

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117. *Id.* at § 2513(a) (West 2015).

118. *Id.* § 2503(b); 2513(a); Rev. Proc. 2014-61.

119. *E.g.*, Alderman, *supra* note 20 (discussing the disadvantages and risks of incorporating portability in an estate plan); Blattmachr, et al., *supra* note 65 (discussing the disadvantages of using portability as an estate plan).

120. *See* I.R.C. § 2056 (West 1997).

121. *See id.*

122. For example, if a surviving spouse has creditors, the deceased may not want to leave assets outright to the surviving spouse because the creditors may be able to seize the assets. Or if the surviving

planner with another tool to use, but the estate planner must still evaluate whether to use that tool in a client's specific circumstances. Just because portability is available does not mean the estate planner has to use it. Regardless of whether an estate planner actively incorporates portability into a plan, a surviving spouse will still benefit from any unused exclusion amount, allowing assets to move out of the surviving spouse's estate relatively tax-free—depending on the amount of exclusion amount available—because of the combined exclusion amounts.

For example, a deceased spouse may not want to rely on portability where a surviving spouse has creditors.[123] Here, using a portability plan where the assets are left outright to the surviving spouse will expose the assets to the surviving spouse's creditors.[124] In this situation, it may be safer for the deceased spouse to fund a trust with the surviving spouse as a discretionary beneficiary, which makes it more difficult for the surviving spouse's creditors to reach the assets.[125] When the assets left to the surviving spouse do not qualify for the marital deduction, more of the deceased spouse's exclusion amount will be used, which leaves less exclusion amount to transfer to the surviving spouse. Consequently, a personal representative may be less likely to make the portability election if there is not much of an exclusion amount leftover to transfer to the surviving spouse after the cost and the benefits are weighed. However, mandatory portability will allow the surviving spouse to benefit from *any* unused exclusion amount, no matter how small.

Alternatively, the personal representative may elect to treat the assets placed in trust as QTIP.[126] Placing the assets in trust limits creditor access.[127] Making the QTIP election allows the transfer to qualify for the marital deduction thereby not using any of the exclusion amount.[128] However, when the surviving spouse dies, the assets are taxed to the surviving spouse's estate under section 2044. Consequently, it is imperative that the personal representative makes the portability election to protect against the estate tax imposed under section 2044. The election ensures that the assets move out of the surviving spouse's estate tax-free because of the combined exclusion amounts.

However, Revenue Procedure 2001-38, which Congress issued before portability was enacted in 2010, provided a procedure in which the IRS could nullify a QTIP election when the QTIP election was not necessary to reduce

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spouse is likely to remarry, the deceased spouse may not want to leave the assets outright to the surviving spouse to ensure the assets stay in the family. *See* U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 236

123. *See* U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 236.

124. U.S. TRUST, *supra* note 51, at 5; Blattmachr, et al., *supra* note 65, at 236.

125. U.S. TRUST, *supra* note 51, at 5.

126. Blattmachr, et al., *supra* note 65 at 237.

127. *Id.*

128. I.R.C. § 2056(b)(7) (West 1997).

the estate tax liability to zero.[129] A surviving spouse could petition the IRS to nullify the QTIP election, thereby avoiding the implications of the QTIP election to the surviving spouse.[130] One such implication is that when property subject to the QTIP election is disposed of during life, it will be subject to gift tax under section 2519. Another implication is that any of the surviving spouse's property that is subject to the QTIP will be included in her or her estate under section 2044 at death. It remains uncertain whether the surviving spouse must invoke the procedure or whether the Service can use it to nullify any QTIP election it deems unnecessary under the parameters of the Revenue Procedure.[131] But now, with portability, there are many instances where a personal representative might intentionally make both a QTIP election and the portability election.[132] Recently, the IRS issued Revenue Procedure 2016-49 which allows both the QTIP election and the portability election to be made, even where there is no reduction in taxes.[133] Under a regime of mandatory portability, the same principle would have to apply.

In another example, the estate may not want to rely on portability planning if there is a possibility that the surviving spouse might remarry. The deceased spouse may not want to leave his or her assets outright to the surviving spouse in order to keep the assets in the family.[134] Again, the deceased spouse could place the assets in trust and make the QTIP election.[135] Because of inclusion in the surviving spouse's estate under section 2044, it is imperative that the personal representative makes the portability election to ensure that the assets are not subject to taxes. However, if the personal representative is a child, but is not a child of the surviving spouse and bad feelings exist between the child and the surviving step-parent, the personal representative may place the assets in a QTIP trust and refuse to make the

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129. *See* Rev. Proc. 2011-38, 2001-1 C.B. 1335 (2001). Section 1 of the Revenue Procedure describes its purpose: "This revenue procedure provides relief for surviving spouses and their estates in situations where a predeceased spouse's estate made an unnecessary qualified terminable interest property (QTIP) election under § 2056(b)(7) of the Internal Revenue Code that did not reduce the estate tax liability of the estate. This revenue procedure describes the circumstances in which these QTIP elections will be treated as a nullity for federal estate, gift, and generation-skipping transfer tax purposes, so that the property will not be subject to transfer tax with respect to the surviving spouse." *Id.*

130. *See id.*

131. REAL PROP., TRUST & ESTATE LAW INCOME & TRANSFER TAX GRP., ESTATE & GIFT TAX COMM., AM. BAR. ASS'N, Comments on Proposed Regulations & Temporary Regulations Under Internal Revenue Code Sections 2001, 2010, & 2505 14 (2012) [hereinafter COMMENTS ON PROPOSED REGULATIONS] (questioning the use of the Revenue Procedure).

132. *See id.* at 13–16 (providing a detailed scenario where both a QTIP election and the portability election would want to be made); Blattmachr, et al., *supra* note 65, at 244–46 (discussing the implication of a QTIP election, portability election, and Rev. Proc. 2001-38).

133. Rev. Proc. 2016-49, I.R.B. 2016-42 (Sept. 27, 2016).

134. *E.g.*, Esterces, *supra* note 48, at 257 ("Portability is also dangerous in the context of a second marriage when assets are left outright to the survivor. Under these circumstances, there is no foolproof way to control how the survivor will dispose of those assets.").

135. *E.g., id.*

portability election, thus sticking the surviving spouse with the estate tax upon death. If portability is mandatory, then the surviving spouse is not penalized for a QTIP election made in the deceased spouse's estate.

And in another example, the estate may not want to make the portability election because of the possibility of an audit. The filing of the portability election gives the IRS the authority to examine the estate and gift tax returns of the deceased spouse to determine that the surviving spouse is claiming the correct amount of the deceased spouse's unused exclusion amount.[136] The personal representative and surviving beneficiaries will bear the burden of maintaining valuation records in the chance that the service wishes to inspect the deceased spouse's returns.[137] The personal representative and surviving beneficiaries may not want this burden, particularly when the surviving spouse is not a beneficiary.[138] Requiring the surviving spouse to compute the DSUE amount shifts the burden from the personal representative to the surviving spouse, who is the one and only person who benefits from the DSUE amount. In issuing the final regulations for portability, the IRS rejected a proposal to limit examination to issues of the reporting and valuation of assets.[139] However, notwithstanding the personal representative making the portability election, any return filed has the possibility of being audited.

The above scenarios present situations where formulating a pure portability plan may not be in the best interests of the assets. But even though a decedent may not leave assets outright to a surviving spouse, the surviving spouse may still benefit from any unused exclusion amount. It is not the porting of the unused exclusion amount that creates the problem; rather, it is leaving the assets outright to the surviving spouse that creates the issues. Mandatory portability would ensure that the surviving spouse would get the benefit of any unused exclusion amount existing at death even if the estate plan does not rely on portability.

3. Mandatory Portability Reduces Costs

Mandatory portability would reduce costs. Under the current portability election scheme, the surviving spouse benefits from the portability election at the estate's expense. The portability election is costly to the estate. Regardless of whether the personal representative decides to make the portability election or not, the estate will still incur costs related to "analyzing, explaining, and documenting the decision" of whether or not to

136. I.R.C. § 2010(c)(5)(B) (West 2014); *see supra* section II.

137. *See* ABA, *supra* note 105, at 33.

138. *See id.*

139. Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. 34279-01, 34,279 (June 12, 2015).

make the election in the first place.[140] This involves consultation of legal counsel, accountants, and appraisers, as well as meetings with the surviving spouse. The personal representative must have a complete understanding of the assets involved in the deceased spouse's estate including their fair market values. Moreover, the personal representative will need to investigate and consider many other aspects. For example, the personal representative will need to analyze whether portability is necessary to move those assets to the heirs' estate tax-free at the surviving spouse's death. The personal representative will also need to consider the surviving spouse's position at the time of death: will the surviving spouse remarry; will the surviving spouse inherit a large sum from a relative; or will the surviving spouse incur substantial appreciation in assets? What is the likelihood of one or more of these events occurring? And if they do, is the DSUE amount necessary to offset any estate tax? All of this takes time and money—accountant fees, attorney fees, and appraisal fees.

If the personal representative ultimately decides to make the election when filing an estate tax return is not otherwise required, the personal representative must file a Form 706, Estate and Gift Tax Return, to make the election.[141] The filing of the return itself will incur some costs, particularly to small estates; the Form 706 itself is thirty-one pages.[142] Remember, to make the election, the personal representative must file "a complete and properly prepared estate tax return."[143] This can take some time, driving up costs and expose the personal representative to some personal liability.[144]

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140. Law & Huber, *supra* note 51, at 30. For example, "[t]he surviving spouse may elect to forgo the benefit of the portability rule to avoid the bother of preparing and filing the initial estate tax return. In this type of situation, it is critical that the advisor obtain something in writing from the surviving spouse confirming the surviving spouse knew about the portability rule but chose not to utilize it. Otherwise, it is likely the children will later question the advisor's actions, and the surviving spouse will no longer be around to confirm that he or she, rather than the advisor, chose to forgo the portability option." Scott Blakesley, *Careful Planning Still Important Under American Taxpayer Relief Act*, *in* LEADING LAWYERS ON NAVIGATING RECENT LEGISLATION & UNDERSTANDING ITS IMPACT ON ESTATE PLANS (2013).

141. I.R.C. § 2010(c)(5)(A);Treas. Reg. § 20.2010-2(a) (2015).

142. Form 706.

143. Treas. Reg. § 20.2010-2(a)(2).

144. In the instructions to Form 706, the IRS provided the following time estimates for preparing Form 706:

4. Mandatory Portability Removes the Decision of Whether to Elect Portability from the Personal Representative

Mandatory portability would remove the decision of whether or not to elect portability out of the personal representative's hands. The personal representative has a fiduciary duty to the estate and its beneficiaries and not solely to the surviving spouse. Under Texas law, a personal representative is considered the trustee of the estate's property and as such is held "to the high fiduciary standards applicable to all trustees."[145] Those fiduciary duties include "a duty to protect the beneficiaries' interest by fair dealing in good faith with fidelity and integrity."[146] Further, the fiduciary duties "include the use of the skill and prudence which an ordinary, capable, and careful person will use in the conduct of his own affairs as well as loyalty to the trust's beneficiaries."[147] Accordingly, personal representatives who make the

Form	**Recordkeeping**	**Learning about the law or the form**	**Preparing the form**	**Copying, assembling, and sending the form to the IRS**
706	1 hr., 25 min.	1 hr., 50 min.	3 hr., 42 min.	48 min.
Schedule A	- - - -	15 min.	12 min.	20 min.
Schedule A-1	33 min.	31 min.	1 hr., 15 min.	1 hr., 3 min.
Schedule B	19 min.	9 min.	16 min.	20 min.
Schedule C	19 min.	1 min.	13 min.	20 min.
Schedule D	6 min.	6 min.	13 min.	20 min.
Schedule E	39 min.	6 min.	36 min.	20 min.
Schedule F	26 min.	8 min.	18 min.	20 min.
Schedule G	26 min.	21 min.	12 min.	13 min.
Schedule H	26 min.	6 min.	12 min.	13 min.
Schedule I	13 min.	30 min.	15 min.	20 min.
Schedule J	26 min.	6 min.	16 min.	20 min.
Schedule K	13 min.	9 min.	18 min.	20 min.
Schedule L	13 min.	4 min.	15 min.	20 min.
Schedule M	13 min.	34 min.	25 min.	20 min.
Schedule O	19 min.	12 min.	21 min.	20 min.
Schedule P	6 min.	15 min.	18 min.	13 min.
Schedule Q	- - - -	12 min.	15 min.	13 min.
Worksheet for Schedule Q	6 min.	6 min.	58 min.	20 min.
Schedule R	19 min.	45 min.	1 hr., 10 min.	48 min.
Schedule R-1	6 min.	46 min.	35 min.	20 min.
Schedule U	19 min.	26 min.	29 min.	20 min.
Schedule PC	- - - -	2 min.	12 min.	20 min.
Continuation Schedule	19 min.	1 min.	13 min.	20 min.

INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, INSTRUCTIONS FOR FORM 706 51, *available at* https://www.irs.gov/pub/irs-dpf/i706.pdf [https:/perma.cc/VH8Y-F86R].

145. Humane Society of Austin and Travis County v. The Austin National Bank, Executor of the Estate of Mary Mayfield Gutsch, 531 S.W. 2d 574, 577 (Tex. 1975).

146. *Id.*

147. Herschbach v. City of Corpus Christi, 883 S.W. 2d 720, 735 (Tex. App.—Corpus Christi 1994). Fiduciaries are also held to a similar standard in Louisiana: a personal representative "is a fiduciary with

portability election may be violating their duty as a prudent administrator. For example, the personal representative may find it is not a prudent decision to make the election and file the Form 706 given the cost.[148] But mandatory portability would no longer require the personal representative to decide whether or not portability should be elected, which effectively circumvents the personal representative's fiduciary duty.

5. Mandatory Portability Furthers the Policy of Treating Married Couples as a Single Economic Unit

Mandatory portability furthers the policy of treating married couples as a single economic unit.[149] Together, a married couple could give away about $10,000,000 worth of assets estate and gift tax-free. Similarly, many other provisions throughout the Internal Revenue Code treat spouses as one unit.[150] For example, section 6013 allows a husband and wife to make a single joint return for income tax purposes even if one of the spouses does not have income or deductions.[151] In another instance, section 1041 allows spouses to transfer property between themselves during their lifetime without the recognition of gain or loss.[152] These transfers are treated as acquired by gift; accordingly, the transferee spouse takes the transferor's basis in the property.[153] In the gift tax area, section 2513 allows a married couple to elect gift splitting, thereby allowing a couple to combine their annual exclusions.[154] When a married person makes a gift to a person who is not a spouse, the couple can elect to treat that gift as though one spouse made one-half and the

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respect to the succession, and shall have the duty of collecting, preserving , and managing the property of the succession in accordance with the law. He shall act at all times as a prudent administrator, and shall be personally responsible for all damages resulting from his failure so to act." LA. CIV. CODE ANN. art. 3191(A) (West 2015).

148. "[T]he fiduciaries of very small estates are not likely to incur the cost. [. . .] Sure, the surviving spouse may win the lottery or remarry a very wealthy individual in which events the inherited exclusion amounts would have utility, but in the real world clients make decisions based on realistic probabilities. The probabilities of winning the lottery or finding a rich 'Prince Charming' are not likely to drive many actions carrying an upfront economic cost to pursue, such as filing a Form 706."ABA, *supra* note 105, at 30.

149. "[T]he modern Internal Revenue Code has increasingly moved, with a few exceptions, toward the recognition of the husband and wife as one, single marital unit. The enactment of the concept of 'portability' in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 is a further extension of this policy." Alderman, *supra* note 20, at 8. .

150. "[P]ortability promotes the federal tax policies of . . . treating married individuals as a single economic unit, consistent with the provisions of the Code allowing gift-splitting, the unlimited marital gift and estate tax deductions, and the filing of 'married filing jointly' income tax returns." ABA, *supra* note 146, at 8 ; Alderman, *supra* note 20, at 8 (describing provisions in the Code that treat a married couple as a single unit).

151. I.R.C. § 6013(a) (West 2003)

152. *Id.* § 1041(a)(1) (West 1988).

153. *Id.* § 1041(b).

154. *Id.* § 2513.

other spouse made the remaining half.[155] In the estate tax area, the deceased spouse has an unlimited marital deduction on his or her return for the full amount of property left outright to the surviving spouse or property for which a QTIP election is made.[156] In her testimony to the Senate Finance Committee, Ms. Kovar noted that "[e]nacting portability . . . would fulfill the promise of combining the exemptions of a married couple that was implicit in the policy forming the basis of the unlimited marital deduction."[157] Thus, the marital deduction allows couples to move property from one spouse to the other at death; portability ensures that no tax consequences will occur until the property moves out of the single economic unit of marriage at the surviving spouse's death, preserving the single economic unit of marriage.[158]

Mandatory portability replaces an election scheme that accomplishes nothing other than the computation of the DSUE amount. Mandatory portability will ensure that the surviving spouse will have the benefit of the deceased spouse's unused exclusion amount. This will assure the surviving spouse of the DSUE amount without having to worry about whether the personal representative will make the election, particularly in instances in which the surviving spouse is not the personal representative of the estate. Mandatory portability takes the decision out of the personal representative's hands, meaning the personal representative no longer has to balance the fiduciary duty owed to the estate and beneficiaries with the demand of the surviving spouse to make the election. Instead, under mandatory portability, Congress will have decided to make the election. Finally, mandatory portability ensures that the deceased spouse and the surviving spouse will continue to be treated as one economic unit.

B. The Filing Requirement

Just like mandatory portability ensures that the surviving spouse is able to utilize the deceased spouse's unused exclusion amount, a filing requirement will ensure computation of the DSUE amount. To compute the DSUE amount, the surviving spouse would have to make a filing of the DSUE amount computation on Form 706-DSUEA, a new, shorter version of Form 706.

It is critical to compute the DSUE amount soon after the deceased spouse's death. As time passes after the deceased spouse's death, it is more likely that paperwork is lost and computing the DSUE amount will become

155. *Id.* § 2513(a)(1).

156. *Id.* § 2056 (West 1997).

157. *Hearing*, *supra* note 64, at 5 (statement of Shirley L. Kovar, Attorney, Branton and Wilson, APC, San Diego, CA).

158. Through portability, "Congress has again extended the concept of a husband and wife as one marital unit by truly taxing the marital unit at the death of the second spouse." Alderman, *supra* note 20.

more difficult.[159] Consequently, it would be very difficult, if not impossible, to determine the DSUE amount years later. Imposing a filing requirement going forward would ensure that the DSUE amount is computed.

The surviving spouse should have the responsibility of computing the DSUE amount because the surviving spouse is the only beneficiary of portability and the DSUE amount. For example, if the surviving spouse makes a large gift, it is the surviving spouse, not the estate, who will use the DSUE amount against any gift tax owed on the gift. Similarly, when the surviving spouse passes, it is the surviving spouse's estate that will use the DSUE amount against any estate tax owed.

The filing the surviving spouse makes to compute the DSUE amount is in addition to any filing requirement for the estate of the deceased spouse. Estates with a gross value over the exclusion amount would be required to file an estate tax return on Form 706 just as they are currently required to under section 6018(a)(1). However, the filing of this form would no longer elect portability because an election is no longer required under mandatory portability. Under current law, estates that have a gross value under the exclusion amount are not required to file Form 706, unless those estates want to make the portability election.[160] Accordingly, under a mandatory portability scheme, the personal representative does not need to make an election, and thus, these estates would no longer need to file a Form 706.

Instead of filing a full estate tax return on Form 706, as currently required to make the portability election, the spouse could now use a shorter version of Form 706, Form 706-DSUEA.[161] The Form 706-DSUEA would simply require the surviving spouse to show the amount of the gross estate as defined under section 2031 less deductions. The tax would then be computed on the net amount at the applicable estate tax rate. The available exclusion amount would then be applied against the tax due to establish the DSUE amount going forward. The Form 706-DSUEA could present its DSUE

159. For example, the accountant who prepared the gift tax returns may no longer have copies of the returns because the statute of limitations has run on those returns.

160. I.R.C. § 6018(a)(1).

161. The AICPA suggested the use of a similar form, Form 706-EZ. Letter from The Am. Inst. Of Certified Pub. Accountants on Comments on Reg-141832-11 and TD 9593 regarding Guidance on Portability, Notice of Proposed Rulemaking, to Douglas H. Shulman, Jeffrey Van Hove, William Wilkins, and Curtis G. Wilson, Department of the Treasury (June 18, 2012). The AICPA suggested the use of a Form 706-EZ in its 2012 comments on the proposed regulations. *Id.* The AICPA suggested, "For many estates of decedents who passed away in 2011 and who have or will pass away in 2012, the sole reason for filing Form 706 is to take advantage of portability of the DSUE amount. In order to facilitate these filings in a cost-efficient manner, we recommend that the IRS provide a Form 706-EZ. The sole purpose of this form would be for taxpayers to fulfill their responsibility of filing an estate tax return to elect portability and to detail the calculation of the DSUE amount. The AICPA would be pleased to assist the IRS in developing such a form." *Id.*

calculation similar to what is used on the current Form 706, Section C of Part 6.[162] For instance:

Line 1: Basic Exclusion Amount plus the DSUE amount from prior spouses

Line 2: Value of cumulative lifetime gifts on which tax was paid or payable

Line 3: Add lines 1 and 2

Line 4: Adjustment to the applicable credit amount: For gifts made between September 8, 1976 and before January 1, 1977, for which the decedent claimed a specific exemption, the applicable credit amount on this estate tax return must be reduced.

Line 5: Divide the line 4 amount by 40%

Line 6: Subtract line 5 from line 3

Line 7: Taxable Estate plus adjusted taxable gifts

Line 8: Subtract line 7 from line 6

Line 9: DSUE amount equal to the lesser of line 8 or the basic exclusion amount

This form would allow for deductions. The computation would allow for the marital deduction as it is one of the critical elements in portability planning.[163] Oftentimes in portability planning, the deceased spouse leaves all property to the surviving spouse. Leaving property to the surviving spouse qualifies the deceased spouse's estate to take a marital deduction for the value of the assets left to the surviving spouse.[164] If most, if not all, of the assets are left to the surviving spouse, the deduction will reduce the deceased spouse's estate to zero, utilizing none of the exclusion amount. A portability election is then made to transfer the DSUE amount to the surviving spouse. The disposition of the assets outside of the marital regime is then made at the surviving spouse's death. Further, other deductions, such as funeral expenses and attorney's fees, may have a significant impact on lowering the amount of estate tax due thus increasing the DSUE amount; funeral expenses and attorney's fees are often quite expensive.

Additionally, the new basis reporting requirements, which require the personal representative to give to the IRS and each beneficiary a statement reporting the value of each interest in property acquired as reported on the estate tax return, do not apply to estate tax returns filed merely to elect portability.[165] It follows then that Form 706-DSUEA would not include the basis reporting requirements.

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162. INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, UNITED STATES ESTATE (AND GENERATION SKIPPING TRANSFER) TAX RETURN (2013), *available at* https://www.irs.gov/pub/irs-pdf/f706.pdf [https://perma.cc/HP2W-GBUU] [hereinafter TAX RETURN].

163. "Enacting portability then would fulfill the promise of combining the exemptions of a married couple that was implicit in the policy forming the basis of the unlimited marital deduction." *Hearing*, *supra* note 81, at 5 (statement of Shirley L. Kovar, Attorney, Branton and Wilson, APC, San Diego, CA).

164. I.R.C. § 2056 (West 1997).

165. I.R.C. § 6035(a) (2015). Treas, Reg. § 1.6035-1(a)(2).

However, the Service disagrees with the idea of a Form 706-DSUEA in the context of the current portability election scheme. In considering the Form 706-EZ proposal put forth by the AICPA, the Service commented that

> taking into account several factors including: The information needed by the IRS to compute and verify the DSUE amount; how such an abbreviated return would differ from a return qualifying for the special rule regarding valuations under [Treasury Regulation] § 20.2010-2(a)(7)(ii); the past experience of the IRS regarding the accuracy of abbreviated returns; the administrative issues in creating and maintaining alternate return forms, and the reasons provided by commenters. The Treasury Department and the IRS have concluded that on balance, a timely filed, complete, and properly prepared estate tax return affords the most efficient and administrable method of obtaining the information necessary to compute and verify the DSUE amount, and the alleged benefits to taxpayers from an abbreviated form is far outweighed by the anticipated administrative difficulties in administering the estate tax.[166]

As to the Service's concern about the information needed to compute and verify the DSUE amount, the Form 706-DSUEA would compute the DSUE amount in a manner similar to the current Form 706 as described earlier. First, like with any return filed, the surviving spouse would have to maintain records to substantiate the values used on the return.[167] Second, under the current election scheme, a Form 706 filed just to make the election is subject to less stringent requirements. For example, Treasury Regulation § 20.2010-2(a)(7)(ii) allows reduced reporting requirements for certain property such as the value of property that is deductible via the marital deduction.[168] If the reporting of the value is not required, then the personal representative need only "exercise[] due diligence to estimate the fair market value of the gross estate."[169] In another example, the estate does not have to comply with the basis reporting requirements.[170] And in fact, the Service questions how much different a Form 706 would differ from a Form 706-DSUEA regarding the basis reporting requirements.[171] Although the Form 706-DSUEA would provide a lot less information to the IRS than the full Form 706 might, the Treasury Department itself, through regulation, has already relaxed the reporting requirements significantly when a Form 706 is filed just to elect portability.[172]

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166. Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. 34279 (June 12, 2015).

167. I.R.C. § 6001.

168. Treas. Reg. § 20.2010-2(a)(7)(ii)(A).

169. *Id.* § 20.2010-2(a)(7)(ii)(B).

170. *Id.* § 1.6035-1(a)(2). I.R.C. § 6035(a).

171. Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. 34279 (June 12, 2015).

172. *See* Treas. Reg. § 20.2010-2(a)(7)(ii).

As to the administrative issues in creating and maintaining alternative forms, the Service has many alternative forms already in existence.[173] For example, if a taxpayer does not wish to take any deductions and is not claiming any dependents, then the taxpayer can file Form 1040-EZ instead of filing Form 1040.[174] Additionally, for tax-exempt organizations, if the exempt organization meets certain qualifications, it can file a Form 990-N, an electronic post card return, in lieu of having to file the full Form 990 return.[175] Moreover, the administrative burden of receiving more returns filed now that all estates would be required to file is nothing new to the IRS.[176] In 2011, the IRS noted in Notice 2011-82 that most couples would want to make the portability election and so "the Treasury Department and the Service anticipate a significant increase in the number of Forms 706 that will be filed."[177] The Service's concerns about the administrative burdens associated with a new form are nothing new—they have dealt with similar issues in the past.

The Form 706-DSUEA, as far as the surviving spouse is concerned, will provide a simple way to ensure the DSUE amount is computed. Preparing the return will cost less than the cost to prepare the Form 706 given the minimal information needed to fill out the return. The gross estate is comprised of all assets whether they go through probate or not. Section 2031(a) provides that "[t]he value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."[178] State law requires that assets subject to probate must be listed on the inventory and that estates must prepare them to effect probate and judgment of possession.[179] Assuming the surviving spouse is a beneficiary, the surviving spouse will receive a copy of the inventory and judgment.[180] The surviving spouse should already know non-probate assets not listed on the inventory, such as: life insurance, retirement benefits, and annuities. It is noteworthy that when the estate is required to file the Form 706 the surviving spouse could potentially "cheat" and use the numbers on the estate tax

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173. *See* Forms & Publications, IRS, https://www.irs.gov/forms-pubs (follow "List of Current Forms & Pubs").

174. *See id.*

175. *See id.*

176. I.R.S. Notice 2011-82, 2011-42 I.R.B. 516.

177. *Id.*

178. The value of property included in the decedent's estate under §§ 2033–2044 is its fair market value at the time of death, unless the alternative valuation date under § 2032A is elected by the personal representative. Treas. Reg. § 20.2031-1(b).

179. TEX. EST. CODE ANN. § 309.051 (West 2015). The personal representative has to file an inventory that includes all of the property that has come into the possession of the personal representative including real property located in the state and all personal property wherever located. *Id.*; *see also* LA. CODE CIV. PROC. ANN. art. 3133 & 3136 (showing similar requirement in Louisiana).

180. *Id.*

return's filing because the value of the gross estate is over the exclusion amount under section 6018.

Aside from the cost to prepare the Form 706-DSUEA, there are no additional costs as there are under the current portability election method. The personal representative will not incur any costs to determine whether or not the portability election should be made because Congress has already made the decision that there will be no election.

Although no tax would ever result with the Form 706-DSUEA, the Service would surely impose some type of penalty for failure to file. However, a surviving spouse's failure to file would not invalidate the mandatory portability of the DSUE amount

Additionally, as with the current portability election scheme, deceased spouse's prior filed gift tax returns would be open for inspection beyond the section 6501 statute of limitations to determine that the amount of DSUE claimed on the Form 706-DSUEA is correct. The deceased spouse's estate would bear such liability. Mandatory portability would not apply to a surviving spouse of a non-citizen, and that spouse would not get any DSUE amount.

Finally, even though portability is mandatory, the surviving spouse would lose the DSUE amount if the surviving spouse remarries and the new spouse predeceases the surviving spouse. Portability would be mandatory upon the new spouse's death, and the surviving spouse would inherit the new spouse's DSUE amount.

VI. CONCLUSION

In 2010, Congress ushered in a new dimension of estate planning when it enacted portability of the deceased spouse's unused exclusion amount to the surviving spouse. The portability of the unused exclusion amount, along with the marital deduction allows married couples to bypass the cumbersome traditional estate planning. Portability enables couples to accomplish the same results as traditional planning through less complicated means. Yet, as simple as a portability plan might seem when compared to a traditional plan, the execution of a portability plan may not always be so simple. Many problems, which may not be foreseeable at the time a plan is drafted, lie in wait to thwart a couple's estate plan such as: failing to make a timely election, litigating the validity of wills and marital agreements and yielding to the fiduciary duty of the personal representative. Consequently, the surviving spouse is left with the burden of fighting through all of these problems just to make the portability election.

Mandatory portability will remedy these problems and ensure that the surviving spouse will receive the unused exclusion amount. Mandatory portability will provide certainty and will relieve the surviving spouse from having to fight to elect portability. Further, mandatory portability removes

the election decision from the personal representative and decreases the costs to the estate because the estate does not have to spend the money to decide whether to make the election. As the surviving spouse is required to compute the DSUE amount on Form 706-DSUEA, the estate does not bear the burden for a benefit that only the surviving spouse will enjoy. The introduction of Form 706-DSUEA reduces the burden of computing the DSUE amount and ensures the computation of the DSUE amount. This will provide certainty to the surviving spouse who knows that the DSUE amount has been computed and will be ready to use when gifts are made.

As the exclusion amount continues to increase year after year, the number of estates required to file a return under section 6018 will decrease; consequently, more personal representatives will have to weigh whether it is worth it to file a return merely to elect portability. Many surviving spouses will experience uncertainty if they are not the personal representative of their deceased spouse's estate. Mandatory portability, however, would take this decision out of the personal representative's hands, freeing portability from the personal representative's fiduciary duty. Congress, through mandatory portability, steps into the shoes of the personal representative to ensure that the portability election will be made so that couples may rest easy.