



FUN WITH ESTATE TAX PORTABILITY

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Estate Tax Portability

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- CURRENT ESTATE TAX RULES

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- PORTABILITY RULES

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- FILING ISSUES

The 2013 Estate Tax Environment

- **FEDERAL:**

- **\$5.25 million exclusion amount**
(Inflation adjusted)
- **FLAT 40% rate**
- **Full step-up in basis**
- **Portability of estate exemption**

- **ILLINOIS:**

- **\$4 million exclusion amount**
- **Illinois QTIP Election**

- ***Relative Certainty of Estate Tax Laws!!!***

Combined Federal & IL Estate Taxes

<u>Tentative Taxable Estate</u>	2013	
	IL Marginal Rates Over \$4M	Fed & IL Marginal Rates Over \$5.25M
\$4,000,000	N/A	
\$5,250,000	28.57%	
\$6,000,000		76.49%
\$7,000,000		59.39%
\$8,000,000		54.85%
\$9,000,000		52.82%
\$10,000,000		51.71%
\$20,000,000		49.35%

2013

Federal Exclusion = \$5.25M

Illinois Exclusion = \$4M

THE BENEFIT OF ESTATE TAX PLANNING

(For Illustrative purposes presuming NO Illinois Estate taxes)

COMBINED ASSETS 2ND TO DIE	40% Estate Tax - No Planning (Joint Tenancy Plan)	Estate Taxes Credit Shelter Trust Plan	Estate Taxes Portability Plan
\$5,250,000	\$0	\$0	\$0
\$6,000,000	\$300,000	\$0	\$0
\$7,000,000	\$700,000	\$0	\$0
\$8,000,000	\$1,100,000	\$0	\$0
\$10,500,000	\$2,100,000	\$0	\$0

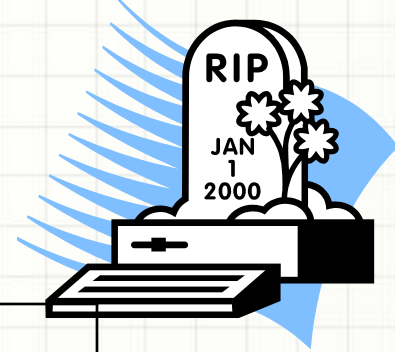
Credit Shelter & Portability Planning

- Similar Objectives:



- Avoid “stacking” – Less estate taxes if both estate tax exclusions are used

CREDIT SHELTER TRUSTS (“CST”) VS. PORTABILITY



CREDIT SHELTER TRUST (Traditional Planning)	<u>Major Advantages</u>	<u>Major Disadvantages</u>
	Appreciation in CST Avoids Estate Taxes	No Basis “Step Up” upon Death of Surviving Spouse
	Asset Protection & “Control”	

ESTATE TAX PORTABILITY (Everything to Spouse)	<u>Major Advantages</u>	<u>Major Disadvantages</u>
	Avoids “Hassle” of Splitting Assets btw Spouses	<ul style="list-style-type: none"> • Wasteful GST Planning • Need to File 706
	Full Basis “Step-up” of Assets in Surviving Spouse’s Estate	Wasteful IL Estate Tax Planning

Deal Killer ←

RELYING SOLELY ON PORTABILITY WILL INCREASE IL ESTATE TAXES

(\$4M IL Estate Tax Exemption Amount)

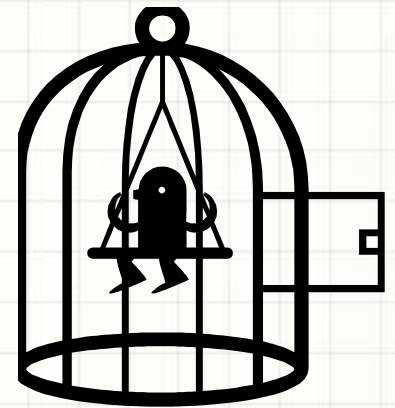
COMBINED ASSETS 2 ND TO DIE	IL Estate Taxes Credit Shelter Trust Plan	IL Estate Taxes Portability Plan
\$5,250,000	\$0	\$357,143
\$6,000,000	\$0	\$456,071
\$7,000,000	\$0	\$565,603
\$8,000,000	\$0	\$680,634

BUT CST PLANNING & PORTABILITY ARE FULLY COMPATIBLE

CST FUNDING	Portability "Amount"	Portability Election
\$0	\$5,250,000	???
\$2,000,000	\$3,250,000	???
\$3,000,000	\$2,250,000	???
\$4,000,000	\$1,250,000	???
\$5,000,000	\$250,000	???

**Viability of Portability Election Depends on
Projected Assets of Surviving Spouse**

Malpractice Trap?



ARE ESTATE PLANNERS UNDER AN OBLIGATION TO ADVISE ALL MARRIED CLIENTS OF ESTATE TAX PORTABILITY UPON THE 1ST TO DIE, EVEN FOR THOSE WHO SEEMINGLY WOULD NOT BENEFIT FROM SUCH ELECTION?

PORTABILITY CONCEPTS



- **Deceased Spousal Unused Exclusion (“DSUE”)**
- **“Last Deceased Spouse” Rule**
- **Form 706 Filing Requirement**

Deceased Spousal Unused Exclusion “DSUE”



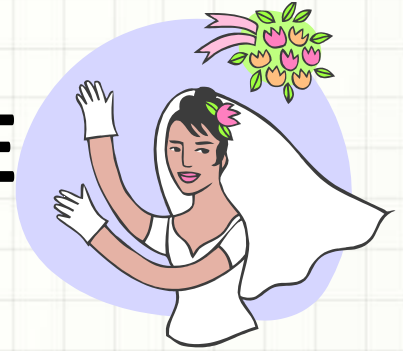
DSUE

$$= \frac{\text{Excess Applicable Exclusion Amount}}{\text{Taxable Estate \& Prior Nontaxable Gifts}}$$

<u>Applicable Exclusion Amt.</u>	<u>Taxable Estate</u>	<u>Prior Gifts</u>	<u>DSUE</u>
\$5.25M	(\$3M)	\$0	\$2.25M
\$5.25M	(\$3M)	(\$1M)	\$1.25M
\$5.25M	(\$3M)	(\$2M)**	\$1.25M

**Includes \$1M Gift which generated Gift Taxes

LAST DECEASED SPOUSE RULE



- Can only use DSUE from your Last Deceased Spouse
- **Remarriage Complexities:**
 - Death of “New” Spouse = **“New” DSUE**
(which may be higher or lower than “Old” DSUE)
 - If Federal Estate Taxes likely, consider Making Gifts to use “Old” DSUE

Example #1

- Husband (“H1”) in 2008 makes **\$1 M** gift (paying no gift tax)
- H1 dies in 2013, survived by Wife:
 - H1’s Taxable Estate = **\$1M**
 - AEA (Applicable Exemption Amount) is **\$5.25**
 - What is DSUE???

<u>Applicable Exclusion Amt.</u>	<u>Taxable Estate</u>	<u>Prior Gifts</u>	<u>DSUE</u>
\$5.25M	(\$1M)	(\$1M)	\$3.25M

- Same results if \$2M gift in \$2008, paying gift taxes on \$1M
- If Wife **marries H2** & H2 dies, H2 is “Last Deceased Spouse”
 - H1’s “Old” DSUE of \$3M is cancelled
 - “New” DSUE is based on H2’s estate tax calculation

Successive Marriages – Advantages of DSUE Gifting

(or “Drew Peterson Estate Planning”)



- ***Drew is Worth \$15.75M***
- ***Marries 3 “Pauper” Wives***
- ***For each Wife:***
 - ***Drew Kills Wife, to get her \$5.25M DSUE***
 - ***Gifts \$5.25M DSUE to Children***
 - ***Marries new Wife & Repeats Cycle***
- ***Drew has Non-Taxable Estate***
 - ***\$15.75M in DSUE from 3 spouses utilized***
 - ***If No Gifting, DSUE is only \$5.25M***

Example #2 – The “Famous” JCT Ex #3

- Wife has **\$2M DSUE** from Deceased Husband (“H1”)
- Wife Marries H2, and Wife dies in 2012 with \$3.25M taxable estate
- What is Wife’s DSUE (for the benefit of H2)?

<u>Applicable Exclusion Amt.</u>	<u>Taxable Estate</u>	<u>Prior Gifts</u>	<u>Wife’s DSUE</u> <i>(For Benefit of H2)</i>
\$7.25M*	(\$3.25M)		\$4M

**Includes H1’s \$2M DSUE, plus Wife’s Unused \$5.25M Exclusion)*

- H2 Benefits from H1’s unused \$2M Exclusion Amount
- IRC 2010(c)(4) was amended to obtain this result

MAKING the Portability Election



- “Elect In” or “Elect Out” on Timely Filed Form 706

(simplified reporting for small estates with marital/charitable gifts)

- Timely Filing of a “complete Form 706” with a surviving spouse = Deemed Election
- Unlimited Statute of Limitations for IRS to challenge DSUE Computation
(Record Keeping Obligation)

WHO CAN MAKE PORTABILITY ELECTION?

1. **Appointed Executor** (priority)

2. The **“Non-Appointed Executor”**

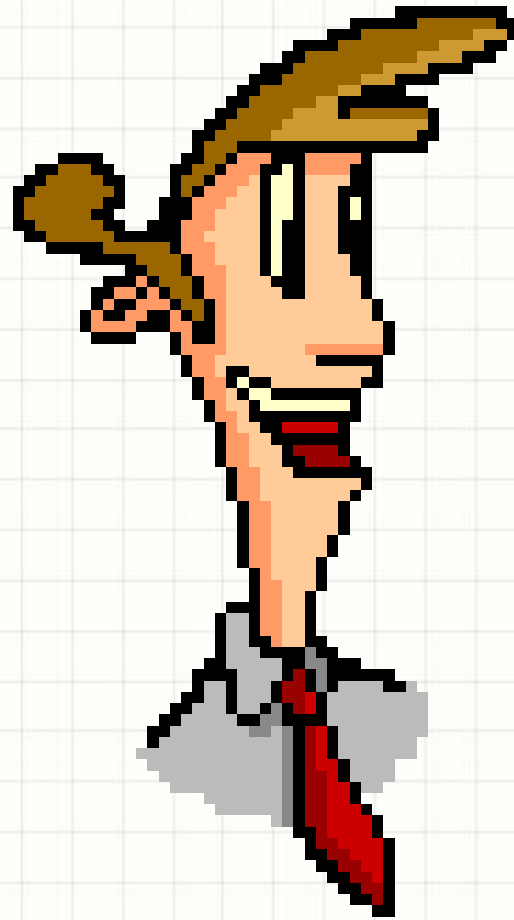
- *“Any person in actual or constructive possession of any property of the decedent”*
- **Election Irrevocable**
- **“Race” to make election?**

The 2nd Marriage Blues



- **What if Decedent's Executor Refuses to make Portability Election?**
 - Afraid of Record Keeping Burden & Potential Liability?
 - Legal Action to Compel Election?
- **What if Trustee of Decedent's Living Trust Refuses to make Portability Election?**
 - "Non-Appointed Executor" files 706 and Elects Portability?
(Record Keeping and Information problems?)
 - "Friendly" Executor appointed to Make Election?
- **NEGOTIATE THIS ISSUE BEFOREHAND!!!**
 - Trust/Will Provisions directing Trustee/Executor to Elect Portability
 - Have Surviving Spouse benefitting from Election:
 - Pay 706 filing costs;
 - Possibly bequeath poorer spouse some property, such as an interest in a "QTIP" Marital Trust as the *quid pro quo*

THE END



Questions?