# When the First Spouse Dies

## A Word to All Wise Probate Attorneys, Tax Planners, and Advisors

By Lorraine F. New

A few weeks ago, I completed a private letter ruling request for a personal representative to allow her father to make use of her mother's deceased spousal unused exemption amount. She had been named personal representative one day before the filing due date for an estate tax return for her mother. The probate attorney never mentioned portability to her, even though her father's estate will exceed the estate tax exclusion amount. Her mother's estate was small, but filing for portability will save the family an enormous amount of tax. This is why you should know about portability elections, discuss them with personal representatives, and document your files.

Before portability, tax and estate planners recommended separate revocable trusts for each person in a married couple and often advised dividing assets somewhat equally so each could take advantage of the estate tax exclusion amount. If one spouse with few assets died, his or her unused estate tax exclusion amount and ability to avoid future estate tax was

lost. After portability came into being on January 1, 2011, the unused estate tax exclusion amount could be "ported" to the surviving spouse for use in making gifts and sheltering his or her own estate.[1] The 2016 exclusion amount is $5.45 million, meaning a married couple could shield $10.9 million from federal estate and gift taxes. It can be done by creating two roughly equal trusts holding $5.45 million in assets, or by using portability.

To elect portability at the first death, the executor of the decedent must file federal estate tax return Form 706. This form lists all the assets of the deceased spouse and indicates their value and to whom they go. The executor then makes a portability election of the unused estate tax exclusion amount on the return. Form 706 is due nine months after death and can receive one six-month extension to file if requested during that nine-month window.

If portability is not elected during this period, it is barred unless a private letter ruling is requested. To get such a ruling, the estate must be below the estate tax exclusion amount. The personal representative generally has to pay an advisor to go through Revenue Procedure 2016-1 (or the first procedure for the current year) for private letter rulings—currently more than 100 pages of detailed instructions with a five-page checklist. There are multiple required enclosures, including affidavits from the requesting parties and a check to the IRS for at least $2,200 (or more, depending on the income of the estate). Statements must include relevant facts and provide research of options indicating approval or disapproval of the request. For example, there have been at least 39 private letter rulings in which a filing deadline extension has been approved. There was at least one that was not approved because the estate was large enough that it required filing. My understanding is that at least two requests were withdrawn after the IRS told the estates that a negative ruling was to be issued. Getting a ruling takes about a year even when the issue is cut and dried. Perhaps the worst aspect is that taxpayers must meet reasonableness and good-faith standards and indicate that the relief will not prejudice the government's interest.

The issued private letter rulings do not give factual details, but indicate that the estate did not have to file a Form 706 and did not file within the designated period. The rulings indicate that a request for relief under Section 301.9100-3 (the private letter ruling) will be granted when the commissioner is satisfied with evidence establishing that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interest of the government. They go on to say, "Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied" and "the rulings…are based upon information and representations submitted by the taxpayer and accompanied by a penalty statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination."

Typically, the excuses that the IRS finds acceptable to decide that a taxpayer (the executor, in this case) acted reasonably and in good faith yet failed to make an election are:

- The executor discovered the error and requested relief before the IRS discovered the error (although it is unlikely that the IRS would ever "discover" an unfiled return unless a spouse tried to use a deceased spousal unused exemption amount for which a return had not been filed).
- Intervening events beyond the executor's control such as serious illness, disability, or death prevented the timely filing.
- The executor was unaware of the need to make the election despite reasonable diligence after considering the taxpayer's experience and the complexity of the issue.
- The executor relied on written advice of the IRS (a possible, but not likely, excuse).
- The executor reasonably relied on the advice of a qualified tax professional who failed to make the election or advise the executor to do so.

**Fast Fact**

**Alerting surviving spouses to portability during the first nine months following a death might avoid the need to request a private letter ruling and could save future gift and estate taxes.**


The last excuse has been relied on in almost all private letter rulings. In most, the executor realized or discovered portability after the time limit for filing had expired. We can't tell from the private letter rulings whether the practitioner did not ask the right questions or the executor failed to give pertinent facts; if providing a corroborating affidavit, the practitioner might have to state that he or she failed to give advice about filing for portability. Additionally, private letter rulings have accepted that the executor was unaware of the need to make the election despite acting diligently in other administration of the estate. However, as the general public's knowledge about portability increases, the IRS may be less likely to approve requests on this basis. Clearly, the idea is not to give executors who previously decided to skip filing for portability another chance to do so.

In general, the interest of the government is not harmed by allowing portability, as the government does get a Form 706 and information about the estate, unless you consider that it is losing future gift tax and estate tax. That has not been addressed in the private letter rulings.

Previously, the IRS provided an opportunity for estates for persons who died between December 31, 2010, and December 21, 2013—including those in same-sex marriages after *United States v Windsor*[2]—to file for portability using Revenue Procedure 2014-18, IRB 513 (2/10/14). Lest one conclude that the IRS is relaxed about obtaining portability relief, those who filed late returns using that procedure but neglected to write on the top of the return the required language of "FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)" had their 706 forms returned to them with a letter indicating that their request was denied and they could consider filing a private letter ruling.

Here are five tips for dealing with the issue of portability in your practice:

(1) When the first spouse dies, check the estate of the surviving spouse to see if it is or might become one that needs to file an estate tax return or if the spouse wants to make large gifts.

(2) Check the surviving spouse's state of mind; dementia or other serious illness might prevent the initial desire to file for portability, even if advisable for tax reasons.

(3) Provide the client with a basis cost analysis of Form 706 preparation versus 706 preparation, private letter ruling fee, attorney's time involved in private letter ruling, and expected wait for a decision.

(4) In your estate-planning documents, consider giving the surviving spouse a right to request the executor to file for portability with the spouse paying the cost. A family of the first marriage might not want to spend the money to provide portability to the second spouse, for example.

(5) Document the discussions you have with surviving spouses and executors to avoid misunderstandings that could later arise with heirs who believe portability should have been elected.

In dealing with the time constraints faced following a death, remember that an automatic six-month extension for filing Form 706 is available by filing Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, before the end of the nine-month filing period. It may give you the necessary time to pursue the portability question with the surviving spouse and the executor and avoid the private letter ruling request. ■

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## ENDNOTES

1. 26 USC 2010.
2. *United States v Windsor*, 570 US ___; 133 S Ct 2675; 186 L Ed 2d 808 (2013).