

ESTATE PLANNING FOR MARRIED COUPLES: THE PORTABILITY ELECTION 2024

The American Taxpayer Relief Act of 2012 makes the portability election available to married couples and pertains to the federal estate tax exemptions of each spouse. Each individual has an exemption from federal estate taxation. In 2024, the federal estate tax exemption for each individual is 13,610,000. The portability election allows the surviving spouse to claim the unused portion of the federal estate tax exemption of their deceased spouse and add it to the balance of the surviving spouse's unused estate tax exemption. Therefore, in 2024, a married couple can potentially shelter 27,220,000 from federal estate taxation, but the election must be properly accomplished. President Biden and Congress has called for proposals to significantly reduce these exemptions so we will have to monitor this carefully.

Portability must be affirmatively elected by the Personal Representative of the deceased spouse's estate by filing a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The Form 706 is due on or before nine months after the death of the decedent, but this time may also be extended for 6 months.

A discussion with your advisor should be made regarding the portability election. While it may seem the easy determination to elect portability, there may be situations when the election may not be made. For example, consideration as to whether a second marriage is possible for the surviving spouse is warranted because the portability election will transfer the unused exemption of the decedent to whom that the surviving spouse was last married.

Estate planning documents should at least refer to the availability of the Personal Representative to elect portability. There may be consideration as to whether the portability election must be made and the authority for the Personal Representative to pay for the cost of the preparation and filing of the Form 706. This decision could be adversarial if the surviving spouse is not the Personal Representative and the beneficiaries of the estate of the decedent spouse do not want to incur the cost of filing the Form 706. Especially if the portability election is being considered for an estate that may not otherwise be required to file the Form 706, but for the portability election.