Decoupled states – uh-oh. Now toss in a decoupled state: if Husband dies a New Yorker, for example, and his will uses a formula that creates a credit shelter trust equal to his maximum federal exclusion – currently $5.25 million – he could trigger at least $420,800 of New York estate tax, since New York's exclusion is only $1 million. A similar problem can exist if Husband and Wife live in a state with no estate tax, but own property in a decoupled state, such as New York. Consider the following example:

> Lance and Gwen are married and have retired to Florida, which has no state estate tax. They still own an $800,000 condo in New York's Hamptons, where they like to summer. They own the condo jointly, and anticipate that it will automatically pass estate-tax free to the survivor. They're surprised when their nosy neighbor tells them they may have a New York estate tax problem since their condo is considered New York real property. Impossible, they think, it's under New York's $1 million exclusion amount! As to their wills, Lance and Gwen take full advantage of their respective $5.25 million exclusions to create a credit shelter trust for the survivor of them. Lance dies earlier this year. To Gwen's unhappy surprise, the Hamptons condo triggers New York estate tax: New York's estate tax calculation treats Lance as a New York resident for purposes of determining what the maximum New York tax would be if his *entire* taxable estate (the $5.25 million credit shelter trust) were subject to New York tax. Because the condo represents 10% of Lance's total estate, Lance's New York tax is 10% of his hypothetical (full) New York tax (i.e., 10% of the New York tax on $5.25 million).
>
> Could Lance and Gwen have prevented this? They could have put their condo into an LLC (limited liability company) of which they, and perhaps their children, were members…in the hope that this would convert the condo into intangible property that would not be subject to New York tax.

Here's the point: full use of the federal exclusion can trigger *state* estate tax, even if the deceased individual doesn't live in a decoupled state, but simply owns property in it. This is even more of an issue as the federal exclusion amount continually increases.

"Portability." Portability lets the surviving spouse effectively "inherit" the unused exclusion of the deceased spouse. It is designed to simplify planning for married couples, so that they don't need to bother with the "credit shelter trust" mentioned above. In other words, it is predicated on the notion that married couples would prefer to simply leave everything outright to the other, but for that pesky marital deduction that trumps – and therefore wastes – the exclusion amount of the first spouse to die. Yet that is not necessarily the case. Nevertheless, when portability was temporary in 2011 and 2012, most people – both professional advisors and married couples who were being advised – didn't pay much attention to it. Now that portability is permanent, however, it is important to understand it, and recognize that portability may play a role for married couples and their wealth planning. But first, some portability basics:

- To claim portability, the deceased spouse's executor must file an estate tax return within nine months of that spouse's death, even if the estate is under the filing threshold ($5.25 million in 2013), and a return is otherwise not required.
- The executor elects portability by merely filing a timely estate tax return; if portability is not desired, the executor can affirmatively opt out of it by checking a box on the estate tax return.
- The surviving spouse can use the portable exclusion for gift or estate tax purposes.
- The IRS has an unlimited amount of time to question the amount of the portable exclusion, even if it is too late to assess gift or estate tax against the deceased spouse's estate.
- Portability doesn't apply to any *state* exclusion amount (for states with their own estate tax) or to the generation-skipping transfer tax (GST) exemption. Thus, to ensure that these benefits are not wasted at the first spouse's death, planning is generally required, and typically involves trusts.