

- Even if a person has been widowed several times, he or she can only use the portable exclusion from the *last* deceased spouse (in other words, the surviving spouse cannot accumulate multiple portable exclusions).
- The portable exclusion can't be any larger than the indexed exclusion in effect at the deceased spouse's death.

So that is a brief overview of portability. How can a married couple use it? Here is a possible approach:

John and Abby are long-time New Yorkers who have been married for years. They have two children and three grandchildren to whom they've never made more than annual exclusion gifts (currently \$14,000 per year to as many people as they want, or \$28,000 if they agree to split the gift). They've tried to be smart with their planning, but have been nonplussed at the transfer tax uncertainty, wondering where the exclusion was going to land, and whether there would even be an estate tax when they died. Concerned that they weren't getting any younger, John and Abby finally redid their wills in 2009, and followed their lawyer's advice: let the survivor decide what makes the most sense, tax-wise, when the first of them dies.

John's will therefore gives everything to Abby. If she "disclaims," or refuses to accept some of this property, it will pass to a trust that acts like a credit shelter trust by providing for Abby, but passing estate-tax free at her death to their children (Abby's will has similar provisions). John dies at the beginning of 2013, and leaves his \$10 million estate to Abby.

*The problem:* if Abby disclaims the entire amount of John's exclusion – \$5.25 million – she'll take full advantage of what John can protect from *federal* estate tax, but will trigger at least \$420,800 of New York estate tax. If Abby doesn't disclaim anything, there will be no tax at John's death, but she will have wasted John's \$1 million New York exclusion. This could mean that unnecessary New York tax will be payable at her death.

*The solution:* Abby disclaims \$1 million worth of property to take advantage of John's New York exclusion; this goes into the disclaimer trust for her. Abby accepts the rest of the property, and thanks to portability, receives the balance of John's unused exclusion: \$4.25 million. Between this and her own \$5.25 million exclusion amount, Abby can protect \$9.5 million from gift or estate tax.

Abby feels financially comfortable (she has a large IRA and assets of her own that help provide for her), and decides to give her two children the balance of the \$4.25 million portable exclusion from John (\$2.125 million each). Portability has allowed Abby to take full advantage of John's exclusion amount, yet save the significant New York estate tax that a fully funded disclaimer trust otherwise would have incurred. This current gift also forces the IRS to look at the amount of John's leftover exclusion *now*, rather than waiting until Abby's death, when records about John's estate and hard-to-value property could have long since disappeared. In the meantime, Abby's remaining \$5.25 million exclusion will continue growing because of inflation-indexing.

So that is an easy and highly simplified example of portability. But what if John and Abby weren't comfortable leaving everything outright to each other, and preferred leaving property in trust? After all, John was afraid that Abby would fall prey to her importuning siblings after his death, and Abby thought it possible that John might remarry after her death, and even start a new family! What would become of their children's inheritance then? Trusts offer control, which both of them desire.

Let us therefore change the facts a bit: