

**PORTABILITY UNDER THE 2010 TAX RELIEF ACT:
DOES IT END THE NEED FOR COMPLICATED ESTATE PLANNING?
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Under the 2010 Tax Relief Act passed in the closing days of 2010, a new concept known as “portability” between spouses of their Federal Estate Tax Exemption was introduced.

Beginning in 2011, the new estate tax law allows widows and widowers to inherit the remainder of their spouse’s unused lifetime Federal Estate Tax Exemption. In other words, an estate tax exemption not used by the first decedent’s spouse could be added to the surviving spouse’s total exemption, and in many cases, double the amount a couple could shield from federal estate taxes.

These changes have some married clients thinking that portability now eliminates the need for more complex estate planning, particularly plans involving a “By Pass” or “credit shelter” trust. However, this belief does not take into account a number of important considerations.

- State Estate Taxes-For starters, portability only applies to the Federal estate tax- not state estate tax laws. Minnesota, for example, taxes all of the surviving spouse’s assets in excess of \$1 Million, and will not allow portability of the \$1 Million exemption of the first spouse to die. Therefore a By Pass trust established in a couple’s estate plan would be required to take advantage of both spouses’ \$1 Million exemption, for Minnesota estate tax purposes.
- Expiration of the Portability Provision-The federal portability provision is set to expire at the end of 2012. The new law’s short time frame makes estate planning in reliance upon it risky.
- Portability Requires Tax Filing-The portable exemption is only available to the surviving spouse if an election is made and the exemption is calculated on a timely filed federal estate tax return following the first spouse’s death. The estate tax return must be filed even if no federal return is otherwise required.
- Additional Tax Benefits-There are some additional tax benefits offered by By Pass trusts, which include:
 - a.) estate tax-free appreciation of the assets placed in the trust, which appreciation can be significant if the surviving spouse lives on for many years; and
 - b.) the generation-skipping tax of the first spouse to die is **not** portable under the new law and would be lost unless a By Pass trust is used to preserve that exemption.

- Non-Tax Benefits-By Pass trusts also provide lawsuit and creditor protection for the assets in the trust along with protection from loss of assets by a divorce award if the surviving spouse remarries. In addition, placing assets in the By Pass trust can help ensure that the assets in the trust will pass to the couple's children and not to a new spouse of the surviving spouse.

In summary, if you are married and both spouses' assets, including life insurance death benefits, exceed \$1 Million, consider reviewing the need for an estate plan which includes a By Pass trust with your advisor.