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From Howard M. **Zaritsky**

## A Few More Questions about Electing Portability

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My November 2022 column discussed how [Rev. Proc. 2022-32, 2022-30 I.R.B. 101](#) (July 25, 2022) permits a decedent's estate to elect portability up to five years after the decedent's date of death, if the estate was not otherwise required to file an estate tax return because it was below the filing threshold. **1** This ruling gives a decedent's fiduciary an extended time within which to decide whether (a) to file an estate tax return and elect portability, or (b) to refrain from filing the return, to forego the surviving spouse's increased applicable exclusion amount, and to save the administration costs associated with filing an estate tax return.

Perhaps someday it will become clear why portability was made elective, rather than automatic. One must accept that some surviving spouses are unlikely ever to have an estate large enough to require the Deceased Spouse's Unused Exclusion Amount (DSUE Amount), but the possibility of a legislative reduction in the basic exclusion amount or a substantial growth in the surviving spouse's net wealth tend to favor making the portability election. **2**

As noted in the 2022 column, the cost of filing an estate tax return only to elect portability ought to be fairly modest, since the return is not required to obtain formal appraisals of the value of assets it reports. **3** Thus, it may be most practical for a fiduciary to file an estate tax return in order to elect portability, even if it does not immediately appear that the additional applicable exclusion amount will be of use to the surviving spouse.

Yet, many estate fiduciaries still question whether they should file an otherwise-unnecessary estate tax return in order to elect portability. This question raises several drafting and nontax issues.

## Compelling the Executor to Elect Portability

Portability can be elected only by the estate's executor. <sup>4</sup> For this purpose, the term "executor" includes both an executor who is "appointed, qualified, and acting within the United States" (an appointed executor) and one who is in actual or constructive possession of any of the decedent's assets in the absence of an appointed executor (a non-appointed executor). <sup>5</sup> A surviving spouse who is not also an executor cannot elect portability on his or her own initiative.

If portability is not elected by an executor within the five-year period provided under [Rev. Proc. 2022-32](#), (or within the ordinary filing period, including extensions, if the estate is over the filing threshold), the surviving spouse's only redress will be a suit against the executor of the first spouse's estate or, possibly, against the attorney or accountant who advised the executor not to file.

It is not uncommon in second (or later) marriage situations for the surviving spouse to be the beneficiary of all or a substantial portion of the deceased spouse's estate, but for one or more of the decedent's children by another spouse to be named as executor. In such cases, it is also not uncommon for the executor to wish not to file an estate tax return electing portability simply because he or she dislikes the surviving spouse and wants to do nothing that could be of benefit to the surviving spouse.

This appears to have been the situation in *In re Matter of the Estate of Anne S. Vose v. Lee*, <sup>6</sup> in which the Supreme Court of Oklahoma, in what appears to be a case of first impression nationally, required the personal representative of a decedent's estate to make a portability election (on a

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timely filed federal estate tax return). The surviving spouse was required to pay the costs of filing the Form 706 and was also required to provide any information the personal representative needed to properly prepare the return.

In *Vose*, the decedent and her fiancé entered into a premarital agreement waiving their individual rights to be the personal representative of the other's estate. Nine days later, the couple married. 10 years later, the decedent died. The decedent's son became personal representative of the estate.

The surviving spouse believed that the son would not make a timely portability election and filed an "Application to Compel Administrator to Timely Prepare and File a Federal Estate Tax Return for Purposes of Irrevocably Electing Portability of Decedent's Deceased Spousal Unused Exclusion Amount (DSUE Application)." The trial court (a) denied the surviving spouse's request for a special administrator to file the federal estate tax return; (b) ordered the decedent's son to provide the surviving spouse with a list of records that would be needed to prepare the federal estate tax return properly; (c) ordered the surviving spouse to provide the records that the decedent's son was ordered to request; (d) ordered that if the DSUE amount were available, the decedent's son, as personal representative, must to prepare a federal estate tax return electing portability and provide a draft to the surviving spouse at least 60 days

before the return was required to be filed (for the surviving spouse's review); and (e) ordered the surviving spouse to pay for the filing of the estate tax return if the DSUE was available.

The son appealed and the Oklahoma Supreme Court upheld the lower court's order. The court held that the surviving spouse had

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standing to require that the estate elect portability, because he had a pecuniary interest in the estate. The court agreed that the spouse had waived all interests in the estate but held that the right to the decedent's DSUE was itself a pecuniary interest.

The court emphasized that the personal representative has the duty to "preserve the estate ... from damage waste and injury" and that this precluded wasting the DSUE. The DSUE is valuable only to the surviving spouse, however, so perhaps the personal representative should be allowed to demand consideration from the surviving spouse in exchange for making the election.

It is unclear whether the DSUE is always an "asset of the estate." It does not benefit the estate; it benefits the surviving spouse and his or her potential transferees. Yet, it is certainly a commodity for which someone may be willing to pay.

Remunerating the estate for expenditures to make the election cannot realistically be viewed as an asset because the estate's net value did not increase whether an election was made or not. The surviving spouse's agreement to pay any costs associated with preparing the necessary return appears to have helped persuade the Vose court to require that the election be made. Effectively, the estate was not harmed because the surviving spouse paid the costs to make the election, and without the election, the surviving spouse would otherwise lose a benefit.

The Vose court recognized that filing a return creates a risk of audit and adjustment, but that "any risk to the estate was outweighed by [the son's] fiduciary obligation to preserve assets of the estate and safeguard [the surviving spouse's] interest in the DSUE."

If the DSUE amount is an estate asset, then the personal representative should be able to negotiate for compensation from the surviving spouse in an amount that reflects the value of the additional applicable exclusion amount, rather than the mere cost of making the election. In practice, if the surviving spouse offers a reasonable sum to the executor for the DSUE amount, it becomes much more difficult for the executor to claim that it is not an estate asset.

## **Drafting**

Until courts establish a clearer rule on this type of situation, it remains important to deal with these issues in the planning and drafting phases to avoid waste, both financial and emotional. One may choose any of four approaches, depending upon what the client desires and what the practitioner

believes most appropriate.

First, one could direct the executor to make the portability election, but charge the cost of doing so against the share passing to the surviving spouse. If the spouse is not also an estate beneficiary, the executor could be directed to make the election conditioned upon the surviving spouse's payment of the costs of preparing and filing the estate tax return electing portability.

Sample Language # 1.

Deceased Spousal Unused Exclusion Amount Election. I direct that my executor shall do all things necessary to make a valid election to allow my surviving spouse to have the benefit of my deceased spousal unused exclusion amount, to the greatest extent permitted under applicable federal estate tax law. My executor shall charge the costs of preparing my federal estate tax return solely against my surviving spouse and shall reduce the amounts otherwise passing to my surviving spouse by such costs. If the costs of preparing my federal estate tax return are greater than the amounts passing to my surviving spouse under my will, my executor shall prepare such return only after receiving payment from my surviving spouse adequate to reimburse my estate for the costs of preparing such return. No equitable adjustment shall be made with respect to the dispositions under my estate because my executor has made this election.

Second, if the decedent does not wish to burden the surviving spouse with the costs of making the portability election, the document can direct the executor to elect portability but specify that the costs of such an election will be charged generally against the estate, rather than against any share passing to the surviving spouse.

Sample Language # 2.

Deceased Spousal Unused Exclusion Amount Election. I direct that my executor shall do all things necessary to make a valid election to allow my surviving spouse to have the benefit of my deceased spousal unused exclusion amount, to the greatest extent permitted under applicable federal estate tax law. My executor shall pay the cost of preparing my federal estate tax return as a general expense of the administration of my estate and shall charge it solely against my residuary estate and not against the share of any specific person or persons who are beneficiaries of my estate. No equitable adjustment shall be made with respect to the dispositions under my estate because my executor has made this election.

Third, where the executor is likely not to oppose making the portability election, such as where the executor is an independent third-party, the documents may authorize, but not direct, the executor to make the portability

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election. This permits the fiduciary to consider all facts that exist during the five years after the decedent's death (if the estate is open that long), and make whatever decision appears most appropriate. This clause may either require the surviving spouse to pay any costs associated with making the portability election, or direct that these costs be paid generally from the estate, as the client desires and the practitioner deems advisable.

Sample Language # 3A.

Deceased Spousal Unused Exclusion Amount Election. My executor may, but shall not be required to, do all things necessary to make a valid election to allow my surviving spouse to have the benefit of my deceased spousal unused exclusion amount as permitted under applicable federal estate tax law. My executor shall charge any costs of preparing my federal estate tax return solely against my surviving spouse and shall reduce the amounts otherwise passing to my surviving spouse by such costs. If the costs of preparing my federal estate tax return are greater than the amounts passing to my surviving spouse under my will, my executor shall prepare such return only after receiving payment from my surviving spouse adequate to reimburse my estate for the costs of preparing such return. No equitable adjustment shall be made with respect to the dispositions under my estate because my executor has made this election.

Sample Language # 3B.

Deceased Spousal Unused Exclusion Amount Election. My executor may, but shall not be required to, do all things necessary to make a valid election to allow my surviving spouse to have the benefit of my deceased spousal unused exclusion amount as permitted under applicable federal estate tax law. My executor shall pay the cost of preparing my federal estate tax return as a general expense of the administration of my estate and shall charge it solely against my residuary estate and not against the share of any specific person or persons who are beneficiaries of my estate. No equitable adjustment shall be made with respect to the dispositions under my estate because my executor has made this election.

Finally, the fiduciary may be prohibited from electing portability. This is a possible provision in the governing instrument, though there seems to be no logical reason to deny the fiduciary the ability to make the portability election, unless making it is expected to be such a sensitive issue that allowing it to be made is certain to engender ill-will and probable litigation.

Sample Language # 4.

Deceased Spousal Unused Exclusion Amount Election. My executor shall not elect to allow my surviving spouse to have the benefit of my deceased spousal unused exclusion

amount as permitted under applicable federal estate tax law. I have discussed with my attorney the fact that this will deprive my surviving spouse of a significant federal tax advantage while not gaining any tax advantages for the benefit of any other beneficiaries of my estate, but I have concluded that I still do not wish my surviving spouse to have the benefit of my unused exclusion amount.

**1** [Zaritsky](#), "IRS Permits Portability Election Up to Five Years After Decedent's Death," 49 ETPL 43 (Nov. 2022).

**2** Making the portability election does waive the statute of limitations on a future audit of the first deceased's spouse's estate to the extent it the audit results in an adjustment in the surviving spouse's available DSUE amount. See [I.R.C. Section 2010\(c\)\(5\)\(B\)](#) . However, failing to elect portability creates an effective DSUE amount of zero for the surviving spouse, so it is difficult to see how such an audit could have a worse tax result than that created by failing to elect portability.

**3** [Reg. 20.2010-2\(a\)\(7\)\(ii\)\(A\)](#) .

**4** [I.R.C. Section 2010\(c\)\(5\)\(A\)](#) ; [Reg. 20.2010-2\(a\)\(6\)](#) .

**5** [Reg. 20.2010-2\(a\)\(6\)](#) .

**6** 390 P3d 238 (Okla. S. Ct. 2017).