

Federal Estate Tax Spousal Portability: An Enormous Leap or a Short Step?

Since 1976, Congress has allowed a credit against the estate tax imposed by section 2001 of the Internal Revenue Code,<sup>1</sup> and until now the credit only applied to the individual decedent's taxable estate.<sup>2</sup> The credit's lack of transferability presented difficulties for married couples where the first spouse died without adequate estate planning resulting in the loss of the first spouse's credit amount. Since President George W. Bush's 2001 and 2003 tax cuts, the debate over estate taxes has been fueled by the complexity of EGTRRA and the temporary estate tax repeal in 2010.<sup>3</sup> The American Bar Association and the American College of Trust and Estate Counsel supported portability of the applicable exclusion amount to a surviving spouse as a way to simplify the estate tax.<sup>4</sup> Spousal portability has been described as an "enormous leap" for surviving spouses whose spouse died without properly utilizing their exemption amount,<sup>5</sup> as consistent with the tax policy concept of a married couple as a single economic unit, and as a way to simplify estate planning for married couples.<sup>6</sup> Spousal portability became a reality in December 2010 when President Barack Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Tax Relief Act of 2010) into law.<sup>7</sup>

Spousal portability has been hailed as a way to simplify estate planning for married couples that is consistent with the underlying goals of treating a married couple as a single economic unit.<sup>8</sup> Spousal portability's claim to simplicity in estate planning for married couples rests on the argument that reliance on trusts and strategic reallocation of assets may no longer be needed for married couples, and more aggressively would "eliminate the need for many married individuals to have estate planning."<sup>9</sup> The single economic unit argument rests on spousal portability's mirroring the unlimited marital deduction to allow a larger exemption for the last spouse to die.<sup>10</sup> While these are legitimate goals for spousal portability, the mechanics of the Tax

Act of 2010 allow us to determine if Congress accomplished either. This paper argues while the spousal portability provision in the Tax Relief Act of 2010 furthers these goals it fails to fully accomplish either while creating further complexity and uncertainty in federal estate taxes.

For the first time, we can critically analyze spousal portability within a legislative framework to determine whether it accomplishes the goals of continuity and simplicity. Questions abound with spousal portability, and the first is whether this will be a short-lived temporary provision or a permanent provision. As discussed elsewhere, the uncertainty of the estate tax may provide for good politics,<sup>11</sup> but it undermines the public's perception of government's competence,<sup>12</sup> and limits the public's ability to properly arrange their affairs.<sup>13</sup> This paper examines spousal portability in its current state, a temporary two-year provision.<sup>14</sup>

Part I of this paper explores the legislative history of the Tax Relief Act of 2010. As the legislative history will reveal, Congress' rationale for spousal portability remains hidden beneath the standard rhetoric surrounding the estate tax. Previous legislative attempts allow for additional comparisons with the current law. Part II examines the current law, its statutory construction and operation, and spousal portability in action through the Joint Committee on Taxation's examples. Part III analyzes whether spousal portability achieves the policy goals of continuity and simplicity. Part IV discusses other concerns such as revenue implications, transitional inequity created for pre-2011 estates, unfairness to single individuals and same-sex couples, and offers suggestions for aligning spousal portability with the policy goals of continuity and simplicity.

### Part I – A Short Legislative History of Spousal Portability

#### Part I–A: Public Law 111 – 312

The Tax Relief Act of 2010 was the result of two weeks of intense political maneuvering and compromise during the Congressional lame duck session. During the session, President

Obama and Senate Democrats crafted a deal to promote the President's agenda on extending unemployment benefits, ratifying the New START treaty,<sup>15</sup> "Don't Ask, Don't Tell,"<sup>16</sup> the DREAM Act,<sup>17</sup> and extension of the Bush era tax cuts. Senator John Kyl was the lead negotiator for the Senate Republicans and sought permanent estate cuts or repeal.<sup>18</sup> President Obama and Senate Majority Leader Harry Reid attempted to persuade Senate Republicans to support their legislative agenda by making estate tax cut concessions.<sup>19</sup> One representative called the resulting compromise a "Porkapalooza" that could only occur in Washington.<sup>20</sup> Spousal portability was not in H.R. 4853 when it left the House on December 2, 2010, rather § 303, the spousal portability provision first appeared in Senate Amendment 4753 (S.A. 4753).<sup>21</sup> On December 9, 2010, Senate Majority Leader Harry Reid introduced S.A. 4753 with Senate Minority Leader Mitch McConnell, which included expansion of the Bush era estate tax cuts, and § 303.<sup>22</sup> On December 10, 2010, the Joint Committee on Taxation provided a technical explanation of H.R. 4853 with provisions on portability of unused exemption between spouses.<sup>23</sup>

The Senate debated H.R. 4853 and S.A. 4753 as amended over the next several days. The estate tax debate largely focused on the exclusion amount, the rate, and the length of the extension.<sup>24</sup> One Democratic senator called S.A. 4753 a "horrendous proposal,"<sup>25</sup> and another called it "totally outrageous."<sup>26</sup> Senate Republicans framed the estate tax cuts as a way to limit Democratic spending,<sup>27</sup> a way to prevent job cuts,<sup>28</sup> to help small businesses,<sup>29</sup> a way to increase overall revenue,<sup>30</sup> and a step to ultimate repeal.<sup>31</sup> Some senators confused the estate tax provisions and believed the estate tax allowed for an exemption to couples of double the applicable exclusion amount for individuals.<sup>32</sup> Ultimately, many Democratic senators wanted to move forward to other business and put their estate tax concerns aside.<sup>33</sup> On December 15, 2010 the Senate approved H.R. 4853 with S.A. 4753 by a vote of 81 to 19.<sup>34</sup>

On December 16, H.R. 4853 returned to the House with the S.A. 4753 for debate.<sup>35</sup> Two Democratic representatives failed to introduce a modified estate tax provision with a \$3.5 million exclusion and 45% rate.<sup>36</sup> As in the Senate, the House debate centered on raising the applicable exclusion amount to \$5 million, and not on including spousal portability.<sup>37</sup> House Republicans took the position that a higher applicable exclusion amount would benefit small business and farmers,<sup>38</sup> and was a step towards repealing the death tax.<sup>39</sup> Many House Democrats took the position the proposed estate tax cuts were “egregious” in benefiting the wealthiest of estates,<sup>40</sup> that it would create too few jobs with too much debt,<sup>41</sup> and the applicable exclusion amount should remain at \$3.5 million.<sup>42</sup> At midnight, the bill passed the House by a vote of 227 to 148.<sup>43</sup> On December 17, H.R. 4853 was sent to President Obama for signature, and Public Law 111-312 was signed into law. The Congressional record reveals only the standard estate tax rhetoric, and shows many Congress members believed the Tax Relief Act of 2010 was better than nothing.<sup>44</sup>

#### Part I–B: Previous Legislative Attempts

H.R. 4853 was the fourth time spousal portability appeared in tax reform legislation since 2006. An earlier attempt was made in the Permanent Estate Tax Relief Act of 2006 (H.R. 5638).<sup>45</sup> The spousal portability provision in H.R. 5638, which passed the House, was similar to H.R. 4853.<sup>46</sup> The primary difference was the applicable exclusion amount included the basic exclusion amount and the aggregate deceased spousal unused exclusion amount.<sup>47</sup> The aggregate deceased spousal unused exclusion amount was defined as:

the lesser of—

- (A) the basic exclusion amount, or
- (B) the sum of the deceased spousal unused exclusion amounts of the surviving spouse.<sup>48</sup>

This clearly indicated that a surviving spouse could benefit from multiple spouses’ deceased spousal unused exclusion amount. Like H.R. 4853, spousal portability would only be permitted

with a qualifying irrevocable election.<sup>49</sup> Also in 2006, the Estate Tax and Extension of Tax Relief Act of 2006 (H.R. 5970) included a provision for spousal portability that was substantially the same to H.R. 5638.<sup>50</sup> H.R. 5970 differed from H.R. 5638 by providing for an increasing basic exclusion amount reaching \$5 million in 2015.<sup>51</sup> The Joint Committee on Taxation's publication on H.R. 5638 and H.R. 5970 interpreted both of these bills to permit the surviving spouse to use the aggregate deceased spousal unused exclusion amount "from all predeceased spouses," and its examples reflected this interpretation.<sup>52</sup>

In March 2009, Senator Max Baucus, Chairman of the Senate Finance Committee, introduced the Taxpayer Certainty and Relief Act of 2009 (S. 722), which included a spousal portability provision.<sup>53</sup> Senator Baucus mentioned the spousal portability provision when he introduced the bill on the Senate floor.<sup>54</sup> Like H.R. 5638, this bill defined the aggregate deceased spousal unused exclusion amount as equaling the lesser of the basic exclusion amount, or "the sum of the deceased spousal unused exclusion amounts computed with respect to each deceased spouse of the surviving spouse."<sup>55</sup> Hence the surviving spouse had the benefit of all of his deceased spouses, whether it was one or ten. S. 722 died in the Senate Finance Committee.

As the legislative history reveals, H.R. 4853 was at least the fourth time in as many years spousal portability had been included in a bill before Congress, and was the third to pass the House, but only the first to pass both the Senate and Congress.

## Part II – Public Law 111-312

### Part II–A: Section 303

Section 303 of the Tax Relief Act of 2010 modified IRC § 2010 to include a provision for "deceased spousal unused exclusion amount."<sup>56</sup> Spousal portability is a two-year provision and expires December 31, 2012.<sup>57</sup> Additionally, Congress increased the basic exclusion amount to \$5

million indexed to a cost-of-living adjustment in multiples of \$10,000.<sup>58</sup>

Important to understanding spousal portability are the defined terms of “deceased spousal unused exclusion amount” and “surviving spouse.” The code obfuscates the mechanics by failing to clearly define surviving spouse or last deceased spouse. The term “surviving spouse” is certainly not new, and prominent in § 2056.<sup>59</sup> Revenue Ruling 76-155 considered the term “surviving spouse” as used by § 2056, and found the term “denotes a legal status that arises from the termination of a lawful marital union by the death of the other mate.”<sup>60</sup> Because Revenue Ruling 76-155 used the ordinary meaning of surviving spouse, and the terminology is long standing it appears certain Congress intended the same meaning for § 2010(c).<sup>61</sup> However, confusion is certain as to whether “surviving spouse” for portability purposes requires the spouse to be a United States citizen at the date of the deceased spouse’s death or their own,<sup>62</sup> or whether property must be in some qualified form.<sup>63</sup> Also, open to confusion whether “last deceased spouse” means the last spouse that died, or the last spouse of the surviving spouse.<sup>64</sup> As the IRS does not issue rulings on the prospective application of the estate tax to living persons,<sup>65</sup> it will be some time until guidance is provided on these issues, and even longer till the IRS drafts regulations in accordance with the statute.<sup>66</sup> Until then it is unclear as to what these terms mean other than their traditional and ordinary meanings.

The Act provides for the new defined term of “deceased spousal unused exclusion amount.” Deceased spousal unused exclusion amount is defined as:

the lesser of—

(A) the basic exclusion amount, or

(B) the excess of—

(i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over

(ii) the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse.<sup>67</sup>

Thus the surviving spouse has the benefit of the deceased spouse's basic exclusion amount or that amount reduced by the amount of tentative tax as determined by § 2001(b)(1) on the deceased spouse's estate. If the deceased spouse died with the full amount of her applicable exclusion amount intact this would transfer her to surviving spouse.

The question becomes how does a surviving spouse receive their deceased spouse's deceased spousal unused exclusion amount, or can a surviving spouse use the deceased spousal unused exclusion amount of a spouse who died prior to January 1, 2011? The answer lies partly in § 2010(c)(5) and § 2010(c)(4)(B)(i) as amended. Section 2010(c)(4)(B)(i) includes within the definition of the deceased spousal unused exclusion amount that it will only consider the "basic exclusion amount of the last deceased spouse of such surviving spouse."<sup>68</sup> Thus, the surviving spouse can only use the deceased spousal unused exclusion amount of their last spouse. It is unclear whether the surviving spouse's remarriage would disqualify him or her from using their prior spouse's deceased spousal unused exclusion amount.<sup>69</sup> Section § 2010(c)(5) requires that the deceased spouse's executor to make an election and computation of the deceased spousal unused exclusion amount that may be taken into account by the surviving spouse.<sup>70</sup> This election is irrevocable.<sup>71</sup> By operation of § 2010(c)(5) the deceased spouse must have died after passage of the Act, and the Act clarifies that § 303 shall only apply after December 31, 2010.<sup>72</sup> Thus a pre-January 1, 2011 decedent's estate cannot use the deceased spousal unused exclusion amount, even if it is the full applicable exclusion amount.<sup>73</sup>

#### Part II–B: Section 303 in Action: The JCT's Explanation

The Joint Committee on Taxation's technical explanation provided three examples of how spousal portability works.<sup>74</sup> The first and second examples are straightforward applications,<sup>75</sup> but the third example provides for an interesting application of portability.

Example 2 provides for where Husband 1 dies in 2011 having made taxable transfers of \$3 million and elects to permit Wife to use his deceased spousal unused exclusion amount of \$2 million. Wife subsequently marries Husband 2 who also predeceases Wife. Husband 2's estate makes an election to permit Wife to use his deceased spousal unused exclusion amount of \$1 million. Is Wife allowed to a combined \$3 million deceased spousal unused exclusion amount or limited to Husband 2's \$1 million deceased spousal unused exclusion amount? The example clearly states the available deceased spousal unused exclusion amount is the lesser of the basic exclusion amount or the unused exclusion of the last deceased spouse of the surviving spouse, here Husband 2.<sup>76</sup> Wife is left with an applicable exclusion amount of \$6 million.<sup>77</sup> Thereby Wife lost a net \$1 million deceased spousal unused exclusion amount as a consequence of her marriage to Husband 2. However if Husband 2's deceased spousal unused exclusion amount had been greater than Husband 1's Wife would have increased her applicable exclusion amount.

Example 3 provides an interesting application of the spousal portability. Here the facts are the same as in Example 2, except Wife predeceases Husband 2. Wife has a taxable estate of \$3 million. Wife's executor elects to permit Husband 2 to use her deceased spousal unused exclusion amount, which is calculated at \$4 million.<sup>78</sup> As a result, Husband 2's applicable exclusion amount is \$9 million.<sup>79</sup> Consequently, Husband 2 benefited from Husband 1's deceased spousal unused exclusion amount because Husband 1's election increased Wife's applicable exclusion amount by \$2 million, to \$7 million.<sup>80</sup>

But is Example 3 supported by the law? This question arises from the similarity in language and result between the JCT's example for the Tax Relief Act of 2010 and its examples for H.R. 5638 and H.R. 5970.<sup>81</sup> H.R. 5638 defined the deceased spousal unused exclusion amount as the excess of the "applicable exclusion amount of the deceased spouse" over the



§ 2001(b)(1) tentative tax.<sup>82</sup> The applicable exclusion amount was defined as the basic exclusion amount and the aggregate deceased spousal unused exclusion amount.<sup>83</sup> The “aggregate deceased spousal unused exclusion amount” was defined as the lesser of the “basic exclusion amount, or the *sum* of the deceased spousal unused exclusion amounts of the surviving spouse.”<sup>84</sup> The express language of H.R. 5638 permitted the laddering of deceased spousal unused exclusion amounts by computing the amount from the applicable exclusion amount. The Tax Relief Act of 2010 rejects this “aggregate” definition and defines the deceased spousal unused exclusion amount as the “lesser of the basic exclusion amount, or the excess of the basic exclusion amount of the last such deceased spouse of such surviving spouse” over the § 2001(b)(1) tentative tax.<sup>85</sup> This statutory language limits the surviving spouse to a maximum deceased spousal unused exclusion amount of the basic exclusion amount of the last deceased spouse.

Whereas the results of Example 3 permit the laddering of the deceased spousal unused exclusion amount by calculating it from Wife’s applicable exclusion amount, the Tax Relief Act of 2010 leads to different results. Under the law, if Husband 1 ported a \$2 million exclusion amount to Wife her applicable exclusion amount would be \$7 million. If Wife married Husband 2 and then died with a taxable estate of \$3 million then there would be \$4 million of credit remaining. H.R. 5638 would have permitted porting the full \$4 million amount ported to Husband 2.<sup>86</sup> The 2010 Act limits the ported amount to \$2 million.<sup>87</sup> The 2010 law results in ignoring the deceased spousal unused exclusion amount of Wife when calculating Husband 2’s applicable exclusion amount because the tentative tax is applied to the basic exclusion amount of Wife rather than her applicable exclusion amount. Thus it appears that the statute does not support Example 3. Both Example 3 and the Tax Relief Act of 2010 could lead to remarriage situations to increase the deceased spousal unused exclusion amount,<sup>88</sup> but the current law does

not permit carrying over from a prior spouse to benefit a later spouse.

### Part II–C: Applying Spousal Portability to Gifts?

This question arises as a function of the Joint Committee on Taxation’s explanation states “[a] surviving spouse may use the predeceased spousal carryover amount in addition to such surviving spouse’s own \$5 million exclusion for taxable transfers made during life or at death.”<sup>89</sup> Additionally, Example 1 and Example 2 conclude that the Wife’s applicable exclusion amount may be used “for lifetime gifts or for transfers at death.”<sup>90</sup>

Sections 303 and 302 of Pubic Law 111-312 modifies both § 2010(c) and § 2505(a).<sup>91</sup> Section 2505(a) is modified to include “the applicable credit amount in effect under section 2010(c) which would apply if the donor died as of the end of the calendar year.”<sup>92</sup> Thereby, the surviving spouse is permitted to use the deceased spousal unused exclusion amount of his or her predeceased spouse as a credit against lifetime taxable transfers.<sup>93</sup> This permits the surviving spouse to use as his or her unified credit against gift tax the sum of the basic applicable exclusion amount and any deceased spousal unused exclusion amount, reduced by the sum of the amount allowable as a credit to the individual under § 2505 for all preceding calendar periods.<sup>94</sup> It is unclear whether the deceased spousal unused exclusion amount must be used before any basic gift exclusion amount, which would create a first in first out rule. Also unclear are the effects if the gift exclusion amount changes in the future, and whether any clawback would apply.<sup>95</sup>

The Act amends § 2631(c) to allow for a generational skipping tax exemption amount equal to the “basic applicable exclusion amount” under § 2010(c), in contrast to the applicable exclusion amount as determined by § 2010(c).<sup>96</sup> Spousal portability does not apply to the GST.

### Part III – Spousal Portability: An Enormous Leap?

As the discussion on the mechanics of spousal portability reveal there are questions left

unanswered, and uncertainties remain. On April 3, 2008 the Senate Finance Committee conducted hearings on estate tax reform and ideas to simplify wealth transfer planning, and Shirley L. Kovar the chair of the Transfer Tax Study Committee of the American College of Trust and Estate Counsel testified on spousal portability.<sup>97</sup> Kovar presented four reasons for portability: simplify transfer tax planning and after-death administration; satisfy client desires to provide security and flexibility for the surviving spouse; achieve greater consistency with existing tax policy that treats a married couple as a unit; and accomplish the same results that a married couple may achieve by complicated planning and estate administration.<sup>98</sup> The first, second and fourth rationales relate to estate planning considerations and should be considered together, and the third rationale concerns broader policy goals. Our inquiry is whether Congress realized those goals or underachieved with spousal portability.

#### Part III–A: Married Couple as Single Economic Unit

Spousal portability has been hailed as achieving a consistent policy goal with the unlimited marital deduction by recognizing a married couple as a single economic unit.<sup>99</sup> In 1981, Congress made the marital deduction for transfers between spouses unlimited because “it believed that an individual generally should be free to pass his or her entire estate to a surviving spouse without the imposition of any estate tax.”<sup>100</sup> The 2006 legislative proposals failed to further this policy by permitting transfer of the unused exemption amount outside of spousal units, but while the Tax Relief Act of 2010 limits this policy conflict it is not fully consistent with the single economic unit policy goal.

Spousal portability goes further than the marital deduction because it creates a valuable interest in the deceased spouse’s exemption amount. The marital deduction permits an unlimited deduction for qualifying transfers at death to the surviving spouse; these transfers must qualify as

to prevent tax avoidance at the surviving spouse's death.<sup>101</sup> Previously, if a person left all of his estate to his or her spouse the estate exemption would be of no value to him or her because of the marital deduction. Now, the exemption becomes a valuable interest because it can permit greater tax avoidance for assets transferred outside of the marital unit. As such, spousal portability becomes a quasi tax credit available only to married couples. Additionally, the surviving spouse receives a step-up in basis in the decedent spouse's estate, and these assets would receive another step-up in basis at the surviving spouse's death.<sup>102</sup> The marital deduction supports the notion that the marital unit ceases to exist at the death of the deceased spouse by allowing the tax-free transfer of assets to the surviving spouse.<sup>103</sup> However, spousal portability allows the surviving spouse to benefit from the deceased spouse's exemption amount at a potentially distant time. Spousal portability under the earlier attempts and Example 3 appears more akin to the exchange of accrued tax credits permitted by business entities than to the marital deduction,<sup>104</sup> because the credit could pass outside of the marital unit.

The JCT acknowledged that spousal portability presents policy issues in multiple marriage situations.<sup>105</sup> The JCT asked "[i]f a surviving spouse is predeceased by more than one spouse, should that surviving spouse be allowed to use the full amount of unused exemption of all predeceased spouses."<sup>106</sup> If the results of Example 3 were correct,<sup>107</sup> then the law would permit the accumulation of the deceased spousal unused exclusion amount through remarriage. Current law addresses this problem by capping the applicable exclusion amount at twice the basic exclusion amount,<sup>108</sup> and limiting the deceased spousal unused exclusion amount to the "last such deceased spouse of such surviving spouse."<sup>109</sup> This eliminates the cumulative portability amounts possible in previous legislation,<sup>110</sup> but provides uncertainly as to how it is applied. In the case of a remarried surviving spouse, Wife, do we determine the ported amount

against her applicable exclusion amount, or her basic exclusion amount? For example if Wife has a taxable estate of \$7 million at her death and an applicable exclusion amount of \$8 million, would the amount she could port to Husband 2 be \$1 million or zero? To calculate the available amount the law looks to the excess of the basic exclusion (\$5 million) amount over the tentative tax (\$7 million); this leaves Husband 2 with a deceased spousal unused exclusion amount of zero.<sup>111</sup> However, if Husband 2 predeceased Wife with a deceased spousal unused exclusion amount of \$1 million then her applicable exclusion amount would be \$6 million rather than \$7 million because the law looks to the last deceased spouse of the surviving spouse.<sup>112</sup> With these results Congress successfully solved the multiple marriage situations by preventing the accumulation of ported exemption amounts, but at the cost of uncertainty for a remarried surviving spouse as a remarried spouse can use the ported amount from a deceased spouse while married to their second spouse only if they predecease their second spouse.

By determining the deceased unused spousal exemption amount by looking to the basic exclusion amount rather than the applicable exclusion amount Congress accepted a structure that differentiates between the surviving spouse's own exemption and the ported exemption.<sup>113</sup> An alternative would limit the amount of the exemption to the lesser of the combined value of the married couple's assets at the death of the first spouse's death, or the unused exemption amount of the first spouse to die.<sup>114</sup> This would limit the overall portability amount, but would require valuation of the surviving spouse's estate at a time he or she would not normally be taxed.<sup>115</sup> Difficult administrability issues arise if a tracing rule was required because the ported exemption amount at the deceased spouse's death becomes relevant at the second surviving spouse's death, which may be years or decades later.

To eliminate the use of spousal portability to transfer assets out of the marital unit tax

free, spousal portability could be eliminated upon remarriage.<sup>116</sup> Eliminating spousal portability upon remarriage would further the single economic unit theory, because the surviving spouse can use the ported amount if she predeceases her new husband, which permits comingling of their exemption amounts.<sup>117</sup> A compromise would be to permit the surviving spouse to use the deceased spouse's ported exemption amount for lifetime transfers upon remarriage. This would apply a first-in first-out rule to the inter vivos transfers.

Professor Mildred Robinson at the University of Virginia has pointed out that spousal portability combined with QTIP transfers can undermine the status of the less propertied spouse.<sup>118</sup> This is because the incentive to make inter vivos transfer of interests to the less-propertied spouse to maximize the estate exemption for the marital unit would disappear.<sup>119</sup> Professor Robinson suggested portability should be predicated upon property ownership, rather than combining it with QTIP transfers as to empower the surviving spouse.<sup>120</sup> Indeed, combining a QTIP and spousal portability all but eliminates the need to perform inter-spousal transfers to maximize estate exemption utilization.<sup>121</sup> The current law permits the use of a QTIP election to qualify for the marital deduction, and says nothing as to spousal portability. One way to incentivize inter vivos spousal transfers is to limit the ported exemption amount to the value of the surviving spouse's estate at the deceased spouse's death. Here, if the surviving spouse only had \$1 million in assets at the deceased spouse's death, then the deceased spouse could only port \$1 million to his surviving spouse. This would require filing estate tax returns for both the surviving spouse and the deceased spouse, which creates a significant burden on the surviving spouse, and additional administrative compliance on the Service.<sup>122</sup>

Previous legislative attempts would have failed to achieve consistency with the prior policy goals of a single economic unit by permitting the transfer of the ported exemption amount

outside of the marital unit in multiple marriage situations.<sup>123</sup> The current law limits the accumulation of ported exemption amounts,<sup>124</sup> but still permits the use of the ported exemption amount in remarriage situations, and effectively eliminates the need for lifetime inter-spousal transfers. The current law also allows the more propertied spouse to avoid providing outright for the less propertied spouse through a combination of QTIP and spousal portability. Therefore the current spousal portability provision achieves mixed results when analyzing it through the single economic unit policy underlying the marital deduction.

#### Part IV–B: Eliminating the Need for Estate Planning?

Estate planning can be Byzantine, and simplicity for individuals and married couples is a highly desirable goal, but does spousal portability really eliminate the need for estate planning?<sup>125</sup> Simplicity through spousal portability can be defined as either reducing reliance on family bypass trusts,<sup>126</sup> or fulfilling the desire to leave all assets to the surviving spouse.<sup>127</sup> While often related these are two different benchmarks for determining whether spousal portability leads to estate planning simplicity. This part examines the statutory complexities, the tax and non-tax considerations of spousal portability, and whether portability achieves simplicity.

Spousal portability as enacted in the Tax Relief Act of 2010 creates three statutory traps for the uninformed. The first major trap for spousal portability is that it is a temporary provision.<sup>128</sup> Unadvised couples may not realize the spouse must have died after December 31, 2010 and before December 31, 2012 to utilize portability. If spousal portability is not extended beyond 2012 and couples continue to rely on portability they will be disappointed when the tax bill comes due. The temporary nature of portability leaves open the question of what will happen in 2013 if the law reverts back to a \$1 million exemption where the first spouse elected portability. Under the current law, if Husband dies in 2011 and ported a \$5 million dollar estate

to his Wife who dies in 2013, her exemption will only be \$1 million rather than the anticipated \$10 million.<sup>129</sup> The second and third traps for the uninformed are the irrevocable election and computation requirements.<sup>130</sup> The election requirement requires the executor of the deceased spouse to file an estate tax return on which the deceased spousal unused exclusion amount is computed.<sup>131</sup> This election must be timely and is irrevocable.<sup>132</sup> Individuals may assume that spousal portability is automatic and fail to provide for whether they want to elect for spousal portability, or even fail to file a tax return to elect for portability.<sup>133</sup> Both the election and computation requirements were recommended against by the ACTEC as being “burdensome and a trap for the unwary.”<sup>134</sup> The calculation requirement places a burden on the executor to comply with the law by computing the spousal portability amount, which is not subject to the § 6501 period of limitations for re-examination by the IRS.<sup>135</sup>

One possible trap with the current law is a phase out of the deceased spousal unused exclusion amount when the deceased spouse has a taxable estate. This occurs because the portability amount is calculated against the basic exclusion amount,<sup>136</sup> which means any taxable estate above \$5 million will zero out the deceased spouse’s ability to port their unused exclusion amount. For example, if Husband has a \$20 million estate and transfers \$12 million to Wife, which is protected from tax by the marital deduction, and transfers \$8 million into a family trust Husband is taxed on \$3 million. As a result, Husband can only port a \$2 million deceased spousal unused exclusion amount to Wife. Husband had a taxable estate of \$5 million then nothing would be available for portability, because the taxable estate exceeds \$5 million, the basic exclusion amount.<sup>137</sup> This possible phase out would also occur where the Husband leaves \$5 million to Wife, but the bequest does not qualify for the marital deduction.<sup>138</sup> This would void the ability of Husband to port an unused exclusion amount to Wife.<sup>139</sup>



If the client's goal is transfer his or her estate outright to the surviving spouse then spousal portability achieves simplicity.<sup>140</sup> Here portability makes use of both the deceased and surviving spouse's exemption to increase the surviving spouse's exemption amount.<sup>141</sup> This plan achieves simplicity because it is simple itself. It relies on outright transfer of assets to the surviving spouse, which may not be the client's desires. With the rate or remarriage,<sup>142</sup> and blended families the decedent may want assets to pass to the children from a prior marriage,<sup>143</sup> and to protect the assets if their surviving spouse remarries.<sup>144</sup> Additionally, the outright transfer to a surviving spouse does nothing to deter estate taxes at the surviving spouse's death.

Tax considerations for a family trust rest primarily on a trust's ability to preserve the exemption of the deceased spouse by eliminating estate taxes on the appreciation of the assets at the decedent's death.<sup>145</sup> The credit shelter trust freezes appreciation from further estate tax, but the unused exemption amount becomes less valuable the longer the surviving spouse lives because it is not indexed for inflation.<sup>146</sup> Also, the credit shelter trust may provide better for the deceased spouse's children, and even the surviving spouse.<sup>147</sup>

A comparison of the use of spousal portability and a credit shelter trust will show whether the same results are achieved. Assume Husband dies on April 15, 2011 and Wife dies on April 15, 2012, and the Husband's only asset is real property worth \$5 million that appreciates to \$7 million by Wife's death.<sup>148</sup> At death Husband A places the \$5 million property in a credit shelter trust,<sup>149</sup> and does not make a spousal portability election.<sup>150</sup> In contrast, at death Husband B's estate makes a timely spousal portability election for the full \$5 million. The affects of appreciation will cause significant differences between Wife A and Wife B. Without Husband A's election Wife A's applicable exclusion amount is her basic exclusion amount, \$5 million. With Husband B's election Wife B's applicable exclusion amount is Husband B's deceased

spousal unused exclusion amount, \$5 million, plus her basic exclusion amount for a total of \$10 million. If Wife A and Wife B both had a taxable estate of \$3.5 million in addition to the \$7 million dollar parcel of land, then different estate tax results would occur. Wife A would be able to exclude the full \$3.5 million with her basic exclusion amount. Wife B would be taxed on the \$500,000 in assets exceeding her \$10 applicable exclusion amount. Wife B receives less estate tax benefit from Husband B's portability election because her estate includes the appreciation. With outright ownership Wife B could lose the property to her creditors or a new husband.

Because spousal portability permits the step-up in basis at both the first spouse's death and at the surviving spouse's death both Wife A and Wife B received a step-up in the real property's basis at their Husband's death.<sup>151</sup> This can lead to significant income tax benefits for the surviving spouse.<sup>152</sup> In the example, if the property's cost basis was \$1 million neither Wife A nor Wife B would recognize capital gains taxes for income tax purposes on if they sold the property for \$5 million.<sup>153</sup> As the examples show, very different results can occur with the use of credit shelter trusts and spousal portability. These differences are most apparent with appreciated property, and because the deceased spousal unused exclusion amount is not indexed for inflation a credit shelter trust can be the more effective tool in eliminating estate taxes at the surviving spouse's death.<sup>154</sup>

Non-tax considerations are certain to complicate an estate plan, but are a part of the realities facing many American families.<sup>155</sup> Credit shelter trusts provide significant non-tax benefits such asset protection,<sup>156</sup> assurance that the trust assets will pass to the beneficiaries,<sup>157</sup> protection from spendthrift inclinations,<sup>158</sup> and can provide support during the surviving spouse's life to other beneficiaries.<sup>159</sup> In our example above, assume the Husband's asset was \$5 million in liquid assets. If Wife A remarries and subsequently spends \$1 million on matching Bentleys

for her and her paramour, the credit shelter trust's assets remain unaffected. If Wife B does the same, then Husband B's decedents will be up in arms, as they have no insurance she will not continue to spend their inheritance. If Wife A and Wife B are practicing surgeons and are subsequently sued for malpractice; Wife A's reachable estate is limited to \$3.5 million, but Wife B's would be \$8.5 million, and could be lost in its entirety.

Weighted against these non-tax benefits is the disadvantaged income tax position of trusts.<sup>160</sup> However, the credit shelter trust can permit tax-free distributions of corpus to the beneficiaries.<sup>161</sup> In our example, if Wife A was the trustee then she could distribute the corpus of the credit shelter trust tax-free to the beneficiaries.<sup>162</sup> Because the real property was transferred outright to Wife B she is limited to the annual gift tax exclusion amount to make tax-free distributions, or limited to her gift tax exclusion amount.<sup>163</sup>

The potentially most complicating factor on spousal portability comes from the interaction with state estate taxes.<sup>164</sup> Disparate results may occur in states that are decoupled from federal estate taxes,<sup>165</sup> and those that impose separate estate tax regimes.<sup>166</sup> The gift tax complicates planning because of the inclusion of the deceased spousal unused exclusion amount in the gift tax exemption.<sup>167</sup> Use of the ported exclusion amount during the lifetime of the surviving spouse provides a tremendous planning opportunity, at least for two years.

Spousal portability provides estate tax simplicity for couples with taxable estates no greater than twice the federal applicable exclusion amount.<sup>168</sup> Portability will provide some relief for couples where the first spouse to die failed to completely utilize their basic exclusion amount, assuming the statutory requirements are met.<sup>169</sup> Additionally, spousal portability will affect estates relying on complex specialized estate tax provisions.<sup>170</sup> But the higher basic exclusion amount creates even less need for estate tax planning for moderately wealthy individuals.<sup>171</sup>

Contrary to the claim, spousal portability can lead to very different results and may not be the best option from an asset protection, income tax, or estate tax standpoint.<sup>172</sup> Spousal portability should be weighed against using a trust for asset protection and for estate tax reduction purposes, which would require the assistance of an estate-planning attorney.<sup>173</sup> Howard Zaritsky has suggested these misconceptions may lead to a growth in the estate planning repair industry.<sup>174</sup> While spousal portability may be a powerful instrument in the estate planner's toolkit, as discussed, there are several disadvantages and concerns about spousal portability that is best dealt with through planning.<sup>175</sup>

#### Part V – Other Concerns and Suggestions

In addition to the concerns of simplicity and consistency are the concerns of lost revenue and fairness. While Congress has improved upon earlier attempts, spousal portability can be made fairer to taxpayers by extending its reach; however, spousal portability is likely to cause significant revenue loss and any expansion would further decrease revenue.

The JCT stated “the full benefits of portability would not be seen until portability had been in effect for several decades,” because a surviving spouse may continue to live for many years.<sup>176</sup> The JCT's estimates assumed that if the exemption decreased more taxpayers would benefit from portability.<sup>177</sup> The JCT's estimates showed a benefit rate of 3.9 percent in the first year with an exemption of \$3.5 million.<sup>178</sup> In 2009 42.9 percent of all returns had a gross estate greater than \$3.5 million, but only 24.58 percent of all returns had a gross estate greater than \$5 million.<sup>179</sup> Assuming these percentages remain consistent in 2011 and 2012 and with the higher basic exclusion amount of \$5 million the benefit rate from portability will be less than 3.9 percent in 2011.<sup>180</sup> This rate will grow substantially over time, and the JCT estimated some 54.34 percent of estates would benefit from portability after ten years.<sup>181</sup> Portability's usage rate in

2011 and 2012 would be much higher than 3.9 percent.<sup>182</sup> As the benefit rate increases revenues will decrease accordingly.

Spousal portability creates new holes in the tax base, and will exacerbate revenue loss resulting from the higher basic exclusion amount. Where Treasury won when the first spouse died without adequate tax plan now through postmortem planning those estate taxes are deferred and potentially eliminated at the second spouse's death through portability. The Congressional Budget Office and the JCT both estimated the Temporary Estate and Gift Relief included in S.A. 4753 would cost \$67.5 billion in the years 2011 to 2015, and some \$32.59 billion just in the years 2011 and 2012.<sup>183</sup> These numbers are only 3 percent of the estimated \$892 billion cost of the Tax Relief Act of 2010, but are substantial when considering the United States budget and deficit situation.<sup>184</sup> The CBO and JCT did not break out the costs for spousal portability, and it is unclear what the costs of spousal portability will be. After 2007 when the United Kingdom permitted the transferability of the nil-rate band for its inheritance tax,<sup>185</sup> the UK saw a remarkable 37 percent drop in net receipts from the inheritance tax over two years,<sup>186</sup> also the number of trusts holding assets on its ten-year anniversary dropped dramatically after 2007.<sup>187</sup> The large basic exclusion amount will act to decrease the total number of estate returns, but spousal portability's election and calculation requirement will require filing returns solely to claim the portability amount.<sup>188</sup> Once this data is compiled it will be possible to more accurately determine portability's affect on revenue, the benefit rate and usage rate.

To limit portability's affect on revenue Congress could apply a modified basis step-up, or require the portability exemption amount to be used for lifetime transfers. The modified basis step-up could work similarly to § 1014(e) or the short-lived § 1022. The law could provide for standard § 1014 basis adjustment at the deceased spouse's death, but limit basis step-up at the

surviving spouse's death to the lesser of the adjusted basis to the surviving spouse, or the fair market value of the property at the surviving spouse's death. This limitation would only apply to the value of property that avoided estate taxes through portability.<sup>189</sup> Congress could require portability to be used for inter vivos transfers where the surviving spouse remarries. This would maintain greater consistency with the single economic unit theory, but would discourage remarriage by the surviving spouse. The current calculation requirement would prevent additional compliance costs as the portability amount has been determined, but the difficulty would come in determining what property receives the basis adjustment and that which does not.

The current law creates transitional inequity because it only affects decedents dying after December 31, 2010, and creates tremendous unfairness and arbitrary tax results for many families. Consequently the law fails to remedy the situation for estates with a deceased spouse who died prior to 2011 with a currently living surviving spouse. If Husband died in 2009 with a \$2 million estate and Wife died in 2011 with a \$6 million estate. Wife would not be able to use Husband's \$1.5 million unused exemption amount, and would be taxed on \$1 million. However if Husband died in 2011 prior to Wife's death in late 2011 and he made an election for Wife to use his deceased spousal unused exclusion amount, then Wife would be able to completely shelter her estate, and no tax would be due. Importantly, the law completely ignores the plight of the small business owner who died in 2007 with an estate who used his unlimited marital deduction to shelter the business from estate tax. If the business has grown in value, then the surviving spouse cannot use her Husband's unused exemption from 2007 to further protect the family business. The United Kingdom grandfathered in the transferable nil-rate band for its inheritance tax for decedents' estates after April 1975, when the inheritance tax was implemented.<sup>190</sup> Like the United Kingdom, Congress should grandfather in estates with decedents dying after July 7,

2001 (when President Bush signed EGTRRA), or even as far back as September 8, 1913 (when the estate tax was first enacted).<sup>191</sup> Grandfathering in estates would further a policy of treating equal wealth equally, and help alleviate some of the arbitrary results of EGTRRA.

Another unfair provision is that only married couples can use spousal portability. Spousal portability could become truly portably and made to apply to non-spouse family members and same-sex partners.<sup>192</sup> The United Kingdom permits the transfer of the unused nil-rate band to a civil partner.<sup>193</sup> Allowing a deceased person to appoint to another person their deceased taxpayer unused exclusion amount would alleviate the inequality between married and single taxpayers. This familial portability could be accompanied with an unlimited deduction for domestic partners to ensure greater tax equality for same-sex couples.<sup>194</sup> This would also eliminate some of the preferred status of married couples by extending portability to same sex-partners.<sup>195</sup> This would require a broader application of marriage-based benefits to same-sex couples.<sup>196</sup> At its furthest extension, Congress could even permit individuals to purchase excess estate tax exemptions in a portability exchange market.<sup>197</sup>

Rather than creating a trap for the weary by requiring an irrevocable election Congress could apply an automatic election. This automatic election should be applied with the retroactive application of spousal portability. The automatic election would further align with automatically qualifying deductible interests for the marital deduction.<sup>198</sup>

The easiest way to accomplish the goals of simplified estate planning and maintaining a policy of supporting small business, and the single economic unit: create a higher exemption amount. The single most important estate tax aspect of the Tax Relief Act of 2010 is the \$5 million exemption amount indexed for inflation. Rather than using a complicated spousal portability structure that effectively allows for an individualized credit a higher exemption

amount would eliminate the estate tax burden on even more estates.

Part VI – Conclusion

Spousal portability under the Tax Relief Act of 2010 is more consistent with prior policy than earlier attempts, but fails to provide significant certainty and simplicity for estate planning. Currently, the uncertainty surrounding spousal portability limits its effectiveness as an estate planning tool, and as such standard credit shelter trust planning will continue.<sup>199</sup> Because spousal portability may disappear in 2013 one should take great pause before relying on it as an estate plan. Traditional planning offers advantages over spousal portability in both tax and non-tax aspects. As discussed, spousal portability can be complex in its application and in determining whether it is the best option. The current law leaves some unanswered questions such as who can be a surviving spouse, whether the deceased spousal unused exclusion amount can be used for lifetime transfers, and what will happen after 2012. Spousal portability leaves many taxpayers out in the cold and if made permanent should be expanded to provide greater fairness.

While the legacy of spousal portability will take time to fully unravel it is certain that the Tax Relief Act of 2010 will be remembered for its temporary nature. Rather than fundamentally reforming the estate tax, or any part of the tax code, the Tax Relief Act of 2010 provided a two-year extension to the Bush tax cuts. Federal estate taxes need consistency and permanency, and while the temporary nature of the 2010 Act may make political sense it continues to make estate taxation and planning uncertain, if not arbitrary.<sup>200</sup> In Washington a temporary tax break may become permanent, but that is certain not to provide comfort to those estates that select spousal portability only to see it disappear in 2013.<sup>201</sup> The current budget proposals have different results for spousal portability and the estate tax. President Obama's 2011 budget would make spousal portability permanent with a \$3.5 million exemption.<sup>202</sup> Whereas the Republican 2012 budget



under Representative Ryan would eliminate the estate tax entirely.<sup>203</sup> If the legislative history and compromise of the Tax Relief Act of 2010 is any indication of the 2012 budget battle then the estate tax is in for more uncertainty.

Spousal portability as enacted in the Tax Relief Act of 2010 provides for more consistent policy results than previous legislative attempts, and will simplify estate planning for many middle class taxpayers. But it could be improved to further the single economic theory, and to generate greater fairness by encompassing more taxpayers. Only if spousal portability becomes a permanent fixture will we know if Congress has taken an enormous leap or a short hop.

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<sup>1</sup> Tax Reform Act of 1976, Pub. L. 94-455, § 2001(a)(2), 90 Stat. 1520 (codified as amended at 26 U.S.C. § 2010 (2006)). This credit was phased in to \$47,000. *Id.*

<sup>2</sup> I.R.C. § 2010 (LexisNexis 2011).

<sup>3</sup> Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 VA. TAX REV. 369, 371–81 (2008); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994). While the estate tax provides a relatively small amount of revenue, its repeal could affect the ability of the federal government to govern, and the estate tax should remain a part of the United States' revenue structure. *See Gilding the Elite*, ECONOMIST, Jun. 10, 2006. For an in depth discussion on the history of the federal estate tax see, Jeffrey A. Cooper, *Ghost of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875 (2010) (arguing Congress passed the Revenue Act of 1932 as a way to “balance the federal budget without further stifling economic growth.”). Beyond the debate over estate taxes are the fundamental questions of inheritance, and wealth transfer taxes role in a democratic government. *See* Letter Thomas Jefferson to James Madison (Sept. 6, 1789).

<sup>4</sup> TASK FORCE ON FEDERAL WEALTH TRANSFER TAXES, AM.BAR ASS'N, REPORT ON REFORM OF FEDERAL WEALTH TRANSFER TAXES 99–101(2004) *available at* <http://www.abanet.org/tax/pubpolicy/2004/04fwtt.pdf>; *Tax Code Complexity: New Hope for Fresh Solutions: Hearing Before the Committee on Finance 107th Cong.* 45 (2001) [hereinafter “*Tax Code Complexity*”] (statement of Richard M. Lipton, Chair, Section on Taxation, Am. Bar Ass'n.).

<sup>5</sup> *Outside the Box on Estate Tax Reform: Reviewing Ideas to Simplify Planning: Hearing Before the S. Comm. on Finance*, 110th Cong. 12 (2008) [hereinafter “*Outside the Box*”] (statement of Shirley Kovar).

<sup>6</sup> Shirley L. Kovar, *Estate Planning – An Oxymoron? Thinking About Retroactivity Or Repeal in 2010 and Estate Tax With Portability*, 36 ACTEC J. 245 (2010).

<sup>7</sup> Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010) [hereinafter “*Tax Relief Act of 2010*”].

<sup>8</sup> TASK FORCE, *supra* note 4, at 99; *Tax Code Complexity*, *supra* note 4, at 45 (statement of Richard M. Lipton) (“This proposal would greatly simplify estate planning for married couples

by reducing the complexity of pre-death planning and the cost associated with trust administration. It would eliminate the need for the division and reallocation of assets between spouses solely for tax purposes. In addition, it is consistent with one of the underlying goals of the unlimited marital deduction to treat spouses in common law and community property jurisdictions in a similar fashion.”).

<sup>9</sup> *Outside the Box*, *supra* note 5, at 3 (statement of Dennis Belcher).

<sup>10</sup> TASK FORCE, *supra* note 4, at 100. ([Congress] can simulate a credit shelter plan by its [sic] allowing portability.”).

<sup>11</sup> Edward J. McCaffery, *Through the Looking Glass: The Politics of Estate Tax Reform*, 35 ACTEC J. 121, 122 (2009).

<sup>12</sup> Oliver Hart, *Economists Have Abandoned Principle*, WALL ST. J., Dec. 3, 2008. available at <http://www.economics.harvard.edu/faculty/hart/files/Economists%20Have%20Abandoned%20Principle%20-%20WSJ11.pdf>. For an argument on of how temporary legislation improves government accountability see, George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174 (2009).

<sup>13</sup> *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (Learned Hand, J.) (“Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.”).

<sup>14</sup> Tax Relief Act of 2010 § 303.

<sup>15</sup> The Senate consented to the ratification of the START Treaty with Russia on December 22, 2010. The Treaty was approved by a vote of 71 to 26. 156 CONG. REC. S10982 (daily ed. Dec. 22, 2010).

<sup>16</sup> President Obama signed the Don't Ask, Don't Tell Repeal Act of 2010 on December 22, 2010. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

<sup>17</sup> The DREAM Act failed in the Senate. See Julia Preston, *Immigration Vote Leaves Policy in Disarray*, N.Y. TIMES, Dec. 19, 2010, at A35.

<sup>18</sup> See Joseph Berger, *G.O.P. Leader Sees Outline of Tax Deal*, N.Y. TIMES (Dec. 5, 2010) <http://www.nytimes.com/2010/12/06/us/politics/06talkshows.html>; David M. Herszenhorn, et. al., *Tax Deal Suggest New Path for Obama*, N.Y. TIMES (Dec. 6 2010) <http://www.nytimes.com/2010/12/07/us/politics/07cong.html>; David M. Herszenhorn, et. al. *Estate Tax Cutoff Draws Special Fire in Congress*, N.Y. TIMES (Dec. 11, 2010).

<sup>19</sup> In the end, President Obama succeeded on passing the START Treaty, but the estate tax cuts were not enough for Senator Kyl who voted against the treaty. Peter Baker, *Obama's Gamble on Arm Pact Pays Off*, N.Y. TIMES, Dec. 23, 2010, at A6.

<sup>20</sup> Kurt Schrader, *Porkpalooza – D.C. Style*, POLITICO (Dec. 16, 2010., 1:23 PM), <http://www.politico.com/news/stories/1210/46486.html>.

<sup>21</sup> 156 CONG. REC. S8721 (daily ed. Dec. 9, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> STAFF OF J. COMM. ON TAXATION, 111TH CONG., TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS CONTAINED IN THE “TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010” SCHEDULED FOR CONSIDERATION BY THE UNITED STATES SENATE (Comm. Print 2010) [hereinafter “JCT TAX RELIEF ACT OF 2010”].

<sup>24</sup> See 156 CONG. REC. S8735–81 (daily ed. Dec. 10, 2010) (statement of Sen. Bernard Sanders (I-Vt.)).

- <sup>25</sup> 156 CONG. REC. S8735–36 (daily ed. Dec. 10, 2010) (statement of Sen. Bernard Sanders (I-Vt.)).
- <sup>26</sup> 156 CONG. REC. S8745 (daily ed. Dec. 10, 2010) (statement of Sen. Mark Udall (D-Colo.)).
- <sup>27</sup> 156 CONG. REC. S8838–39 (daily ed. Dec. 13, 2010) (statement of Sen. Mitch McConnell(R-Ky.)) (“Taxes are going to stay right where they are for the next 2 years, and until we did that, Democrats in Washington were never going to be serious about cutting spending or debt. As long as more revenue was coming in, they would always have an excuse to spend more.”).
- <sup>28</sup> 156 CONG. REC. S8966 (daily ed. Dec. 14, 2010) (statement of Sen. Jon Kyl (R-Ariz.)) (“Should death tax reform not occur and the rate rise to 55 percent, small businesses could be forced to reduce their payrolls by more than 500,000 workers over the next 10 years, according to a former CBO Director, Douglas Holtz-Eakin. Think of that. That is a half million people whose jobs could be threatened.”).
- <sup>29</sup> 156 CONG. REC. S10252 (daily ed. Dec. 15 2010) (statement of Sen. Orion Hatch (R-Utah)) (“I also want to mention the death tax--an insidious tax that disproportionately hits small businesses and family farms.”).
- <sup>30</sup> 156 CONG. REC. S8979 (daily ed. Dec. 14, 2010) (statement of Sen. John Isakson (R-Ga.)).
- <sup>31</sup> 156 CONG. REC. S8971 (daily ed. Dec. 14, 2010) (statement of Sen. Kay Bailey Hutchinson (R-Tex.)) (“I think the inheritance tax should be done away with completely because it is money that has already been taxed; it has been taxed in the system again and again and again. Every time something is earned, you pay a tax. So there is no policy reason for a death tax.”); Senator Jim DeMint submitted SA 4804 to repeal EGTRRA’s sunset. 156 CONG. REC. S9024 (daily ed. Dec. 14, 2010).
- <sup>32</sup> 156 CONG. REC. S8977 (daily ed. Dec. 14, 2010) (statement of Sen. Kent Conrad (D-N.D.)) (“I support the continuation of the 2009 level with an estate tax exemption of \$3.5 million for an individual, \$7 million for a couple, and a rate of 45 percent.”).
- <sup>33</sup> 156 CONG. REC. S8970 (daily ed. Dec. 14, 2010) (statement of Sen. Barbara Boxer (D-Cal.)); 156 CONG. REC. S8976–78 (daily ed. Dec. 14, 2010) (statement of Sen. Kent Conrad (D-N.D.)); 156 CONG. REC. S10237 (daily ed. Dec. 15, 2010) (statement of Sen. Bill Nelson (D-Fla.)).
- <sup>34</sup> Rollcall Vote No. 276 Leg., 156 CONG. REC. S10255 (daily ed. Dec. 15, 2010) (five Republicans voted no).
- <sup>35</sup> 156 CONG. REC. H8545 (daily ed. Dec. 16, 2010).
- <sup>36</sup> 156 CONG. REC. H5893–94 (daily ed. Dec. 16, 2010).
- <sup>37</sup> See 156 CONG. REC. H8568–69 (daily ed. Dec. 16, 2010) (statement of Rep. Sheila Jackson Lee (D-Tex.)) and 156 CONG. REC. H8557 (daily ed. Dec. 16, 2010) (statement of Rep. Geoff Davis (R-Ky.)).
- <sup>38</sup> 156 CONG. REC. H8553 (daily ed. Dec. 16, 2010) (statement of Rep. Dave Camp (R-Mich.)) (“It also protects family farms, ranches and businesses from being hit by the destructive death tax.”).
- <sup>39</sup> 156 CONG. REC. H8557 (daily ed. Dec. 16, 2010) (statement of Rep. Geoff Davis (R-Ky.)).
- <sup>40</sup> 156 CONG. REC. H8556 (daily ed. Dec. 16, 2010) (statement of Rep. George Miller (D-Cal.)).
- <sup>41</sup> 156 CONG. REC. H8547 (daily ed. Dec. 16, 2010) (statement of Rep. Peter Welch (D-Vt.)).
- <sup>42</sup> See 156 CONG. REC. H8554 (daily ed. Dec. 16, 2010) (statement of Rep. Earl Pomeroy (D-N.D.)).
- <sup>43</sup> Roll No. 647, 156 CONG. REC. H8594–95 (daily ed. Dec. 16, 2010).

<sup>44</sup> 156 CONG. REC. H8557 (daily ed. Dec. 16, 2010) (statement of Rep. Steny Hoyer (D-Md.)) (“[T]here probably is nobody on this floor who likes this bill; and therefore, the judgment is: Is it better than doing nothing?”).

<sup>45</sup> Permanent Estate Tax Relief Act of 2006, H.R. 5638, 109th Cong. (2006).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at § 3(a)(2).

<sup>48</sup> *Id.* at § 3(a)(4).

<sup>49</sup> *Id.* at § 3(a)(6)(A).

<sup>50</sup> Estate Tax and Extension of Tax Relief Act of 2006, H.R. 5970, 109th Cong. § 102(a)(5) (2006).

<sup>51</sup> *Id.* at § 102(a)(3).

<sup>52</sup> STAFF OF J. COMM. ON TAXATION, 110TH CONG., TAXATION OF WEALTH TRANSFERS WITHIN A FAMILY: A DISCUSSION OF SELECTED AREAS FOR POSSIBLE REFORM (Comm. Print 2008) [hereinafter “JCT WEALTH TRANSFERS 2008”].

<sup>53</sup> Taxpayer Certainty and Relief Act of 2009, S. 722, 111th Cong. (2009).

<sup>54</sup> 155 CONG. REC. S3291 (daily ed. March 26, 2009) (statement of Sen. Max Baucus (D-Mont.)) (“This bill would also allow a decedent spouse to transfer any unused exemption to the surviving spouse. This is known as portability. I believe that this bill is just the beginning.”).

<sup>55</sup> S. 722, § 302.

<sup>56</sup> I.R.C. § 2010 (LexisNexis 2011).

<sup>57</sup> Tax Relief Act of 2010 § 304 (2010).

<sup>58</sup> *Id.* at § 303(a) (to be codified at I.R.C. § 2010(c)).

<sup>59</sup> *See* Treas. Reg. § 20.2056(c)-2.

<sup>60</sup> Rev. Rul. 76-155. Currently, the Defense of Marriage Act (DOMA) bars the recognition of same sex marriage for federal tax purposes. 1 U.S.C. § 7 (2006). Recently, the Department of Justice has announced, at the determination of President Obama, it will no longer defend DOMA. Letter from Eric Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, H.R. (Feb. 23, 2011) *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

<sup>61</sup> Rev. Rul. 76-155.

<sup>62</sup> I.R.C. § 2056(d)(4) (2006).

<sup>63</sup> I.R.C. § 2056(d); Treas. Reg. § 20.2056A-1.

<sup>64</sup> The JCT explanation indicates the plain meaning applies and it is the last spouse that died of the surviving spouse. This means the deceased spouse’s portability amount is not lost on remarriage. JCT TAX RELIEF ACT OF 2010, *supra* note 23, at 52.

<sup>65</sup> Rev. Proc. 2011-3, § 4.

<sup>66</sup> Tax Relief Act of 2010 § 303(a)(6).

<sup>67</sup> *Id.* at § 303(a) (to be codified at I.R.C. §2010(c)(4)).

<sup>68</sup> Tax Relief Act of 2010 § 303(a) (to be codified at I.R.C. § 2010(c)(4)(B)(i)).

<sup>69</sup> Of course the new spouse may have his or her maximum deceased spousal unused exclusion amount, to which the surviving spouse may use. Thus it is conceivable of where Wife A has \$15 million in assets and to maximize estate exclusion: Wife A dies in 2011 with only her \$5 million basis exclusion amount remaining, but transferring via § 2056 the remaining \$10 million to Husband. Husband marries Wife B, who he marries for love. Wife B dies with her full applicable exclusion amount remaining (\$5 million). Thus Husband has now renewed the ability to transfer \$10 million to his heirs tax-free, and Husband and Wife A have successfully transferred \$15

million tax free. Under the current law, all three deaths would have to occur between January 1, 2011 and December 31, 2012. But the possibility of marriage for one's applicable exclusion amount becomes more of a possibility if the law is extended.

<sup>70</sup> Tax Relief Act of 2010 § 303(a) (to be codified at I.R.C. § 2010(c)(5)).

<sup>71</sup> If Husband 1 elects for Wife to use it; Wife remarries and is predeceased by Husband 2, then Husband 1's ported amount is lost. *Id.* at § 303(a)(4)(B)(i) (to be codified at I.R.C. § 2010(c)(4)(B)(i)).

<sup>72</sup> *Id.* at § 303(c).

<sup>73</sup> If Wife died on December 30, 2009 with a deceased spousal unused exclusion amount of \$3.5 million and Husband died on January 2, 2011 with an applicable exclusion amount of \$5 million the Husband's maximum applicable exclusion amount would be \$5 million. If Wife died on December 30, 2011 with a deceased spousal unused exclusion amount of \$3.5 million and Husband died on January 2, 2012 with an applicable exclusion amount of \$5 million the Husband's applicable exclusion amount would be \$8.5 million. A gross inequity is created between estates with decedents dying prior to the law and after.

<sup>74</sup> JCT TAX RELIEF ACT OF 2010, *supra* note 23, at 52–53.

<sup>75</sup> *Id.* at 52.

<sup>76</sup> *Id.* The example also states that the last deceased spouse limitation applies whether or not the last deceased spouse has any unused exclusion, or makes a timely election. *Id.* at 52, n. 57.

<sup>77</sup> Her basic exclusion amount of \$5 million and Husband 2's deceased spousal unused exclusion amount of \$1 million. *Id.* at 52.

<sup>78</sup> The calculation is used using Husband 1's deceased spousal unused exclusion amount of \$2 million. Wife's \$7 million applicable exclusion amount less \$3 million taxable estate. *Id.* at 53.

<sup>79</sup> Husband 2's basic exclusion amount of \$5 million and Wife's deceased spousal unused exclusion amount of \$4 million. JCT TAX RELIEF ACT OF 2010 *supra* note 23, at 53.

<sup>80</sup> This may not have been Husband 1's desire.

<sup>81</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 10.

<sup>82</sup> Permanent Estate Tax Relief Act of 2006, H.R. 5638, 109th Cong. § 3(a)(5) (2006).

<sup>83</sup> *Id.* at §3 (a)(2).

<sup>84</sup> *Id.* at §3(a)(4) (2006) (emphasis added).

<sup>85</sup> Tax Relief Act of 2010 § 303(a)(4) (to be codified at I.R.C. § 2010(c)(4)).

<sup>86</sup> The lesser of the basic exclusion amount (\$5 million), or the sum of the deceased spousal unused exclusion amounts of the surviving spouse (\$7 million).

<sup>87</sup> The lesser of the basic exclusion amount (\$5 million), or the excess of the basic exclusion amount of Wife (\$5 million) over the tentative tax (\$3 million).

<sup>88</sup> Dan Holbrook, *Federal Estate Tax Portability: Making Sense of Changes in Estate Tax Law*, 47 TENN. B.J 16, 17 n.4 (2011). Whereas Example 3 would permit the laddering, the Tax Relief Act of 2010 encourages remarrying an ill pauper to maximize the applicable exclusion amount.

<sup>89</sup> JCT TAX RELIEF ACT OF 2010, *supra* note 23, at 52.

<sup>90</sup> *Id.*

<sup>91</sup> Tax Relief Act of 2010 § 303.

<sup>92</sup> *Id.* at § 303(b).

<sup>93</sup> There is certainly to be confusion as to whether a couple can use one spouse's gift and estate tax exclusion while both spouses are alive. However, the unified credit against gift tax is limited

to the deceased spousal unused exclusion amount as determined in § 2010(c), which requires the election, only possible after death.

<sup>94</sup> Tax Relief Act of 2010 § 303(a) (to be codified at I.R.C. § 2505(a)). If a surviving spouse were eligible to use the predeceased spouse's deceased spousal unused exclusion amount, it would be advisable for the surviving spouse to use the deceased spousal unused exclusion amount during the surviving spouse's lifetime as a hedge against a repeal or modification of spousal portability.

<sup>95</sup> *Gift Tax Clawback a Myth, Practitioner Says*, 2011 TAX NOTES TODAY 29-5 (Feb. 10, 2011).

<sup>96</sup> Tax Relief Act of 2010 § 303(a) (to be codified at I.R.C. § 2010(c)).

<sup>97</sup> *Outside the Box*, *supra* note 5, at 120 (testimony of Shirley L. Kovar).

<sup>98</sup> *Id.* at 121.

<sup>99</sup> *Tax Code Complexity*, *supra* note 4, at 45 (statement of Richard M. Lipton).

<sup>100</sup> STAFF ON THE J. COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 233 (Comm. Print 1981).

<sup>101</sup> I.R.C. § 2056(b) (2006).

<sup>102</sup> I.R.C. § 1014 (2006).

<sup>103</sup> See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (2005).

<sup>104</sup> See Warren B. Lubliner & Paul Westbrook, *An Added Incentive: The Transferability of Tax Credits and Other Benefits*, 13 J. OF MULTISTATE TAX'N AND INCENTIVES 8 (2003).

<sup>105</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 12.

<sup>106</sup> *Id.*

<sup>107</sup> See Part III-A.

<sup>108</sup> Tax Relief Act of 2010 §303(a)(2) (to be codified at § 2010(c)(2)).

<sup>109</sup> *Id.* at §303(a)(4) (to be codified at § 2010(c)(4)).

<sup>110</sup> See Part I-B.

<sup>111</sup> Tax Relief Act of 2010 § 303(a)(4) (to be codified at § 2010(c)(4)).

<sup>112</sup> See JCT TAX RELIEF ACT OF 2010, *supra* note 23, at 52.

<sup>113</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 12.

<sup>114</sup> *Id.* at 10; TASK FORCE, *supra* note 4, at 100.

<sup>115</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 10.

<sup>116</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 12. One example of losing tax benefits on remarriage is the exclusion of up to \$500,000 in gain from the sale of principle residence within two years of death of the spouse. This applies to unmarried surviving spouses, and not to remarried surviving spouses. I.R.C. § 121(b)(4) (2006).

<sup>117</sup> Tax Relief Act of 2010 § 303(a)(4)(B)(i) (to be codified at § 2010(c)(4)(B)(i)).

<sup>118</sup> See Mildred W. Robinson, *Transfer Tax Reform After EGTRRA-2001: Reconstruction or Further Deconstruction?*, 28 VA. TAX REV. 391, 410 (2008). For a broader discussion on the policy of QTIP see Wendy Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995), and Joseph Dodge, *A Feminist Perspective of the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729 (1998).

<sup>119</sup> Robinson, *supra* note 118, at 408, n. 62.

<sup>120</sup> *Id.* at 410.

<sup>121</sup> *Tax Code Complexity*, *supra* note 4, at 45 (statement of Richard M. Lipton) (“[Spousal

portability] would eliminate the need for the division and reallocation of assets between spouses solely for tax purposes.”).

<sup>122</sup> Jane Gravelle, *CRS Updates Estate Tax Options Report*, 2010 TAX NOTES TODAY 114-23 (June 15, 2010).

<sup>123</sup> JCT TAX RELIEF ACT OF 2010, *supra* note 23, at 52.

<sup>124</sup> Tax Relief Act of 2010 §303(a)(4) (to be codified at § 2010(c)(4)).

<sup>125</sup> *Outside the Box*, *supra* note 5, at 3 (statement of Dennis Belcher) (“[P]ortability, . . . will eliminate the need for many married individuals to have estate planning.”).

<sup>126</sup> *Tax Code Complexity*, *supra* note 4, at 45 (statement of Richard M. Lipton).

<sup>127</sup> Kovar, *supra* note 6, at 249.

<sup>128</sup> Tax Relief Act of 2010 § 304.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at § 303(a)(5) (to be codified at I.R.C. § 2010(c)(5)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Questions abound on executor liability.

<sup>134</sup> *Outside the Box*, *supra* note 5, at 125 (testimony of Shirley Kovar).

<sup>135</sup> Tax Relief Act of 2010 § 303(a)(6) (to be codified at § 2010(c)(6)).

<sup>136</sup> Tax Relief Act of 2010 § 303(a)(4) (to be codified at I.R.C. § 2010(c)(4)).

<sup>137</sup> *Id.*

<sup>138</sup> I.R.C. § 2056 (2006). In the language of the Regulations this \$5 million is a nondeductible interest. Treas. Reg. § 20.2056(a)-(2)(a)

<sup>139</sup> Tax Relief Act of 2010 § 303(a)(4) (to be codified at I.R.C. § 2010(c)(4)).

<sup>140</sup> Kovar, *supra* note 6, at 248.

<sup>141</sup> *Outside the Box*, *supra* note 5, at 121 (testimony of Shirley L. Kovar).

<sup>142</sup> According to the Center for Disease Control and Prevention, approximately 35% of first marriages will not last beyond 10 years. Center for Disease Control and Prevention, *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 2 (2002) of the National Survey of Family Growth*, Vital Health Statistics, Series 23, No. 28, page 12 (2010), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_028.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf).

<sup>143</sup> There are many common estate planning tools for transferring wealth to children one such is through family limited partnerships (FLP) or family limited liability companies (FLLC). These entities are used to generate valuation discounts, provide for some asset protection, and permit some retention of control by the family patriarch. See Stan & D. Scott Schrader, *Most Recent Tax Court Cases Provide Roadmap for Designing FLP/FLLC Plans That Work*, 10 J. PRACTICAL ESTATE PLANNING 15 (2008) and Tony Garvy, *Recent Cases Shed Light on the Use of Valuation Discounts*, 37 ESTATE PLANNING 27 (2010).

<sup>144</sup> Marc S. Bekerman, *What Portability Means to Trust & Estate Professionals*, 23 PROBATE & PROPERTY 39, 41 (2009).

<sup>145</sup> See Bertram L. Levy & Michelle L. Harris, *Estate Equalization: Fully Funding the Wealthier Spouse’s Exemption*, 37 ESTATE PLANNING 21 (2010), and Bertram L. Levy & Michelle L. Harris, *Estate Equalization In the Face of Jumbo Exclusions*, 37 ESTATE PLANNING 16, 16–17 (2010).

<sup>146</sup> Bekerman, *supra* note 145, at 41.

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<sup>147</sup> The trust could be drafted to limit the predilections of the children and the surviving spouse and prevent waste. Of course, combining a QTIP trust with spousal portability can accomplish the same.

<sup>148</sup> Statistically men have shorter life expectancy than women, and are thus more likely to predecease their wives. Social Security Administration, *Life Tables for the United States Social Security*

*Area 1900-2100—Actuarial Study No. 120*, available at

[http://www.ssa.gov/oact/NOTES/as120/images/LD\\_fig2a.html](http://www.ssa.gov/oact/NOTES/as120/images/LD_fig2a.html).

<sup>149</sup> Under § 1012 the basis of property shall be the cost of such property as adjusted by § 1016. I.R.C. § 1012 (2006). Depreciation deductions under § 167 are common adjustments to basis. Section 1015(b) governs inter vivos transfers to trust, which would take the basis of the grantor, here \$1 million. I.R.C. § 1015(b) (2006). If this were a revocable trust then § 1014(b)(2) would provide for the basis step up. I.R.C. § 1014(b)(2) (2006). If the trust was funded at Husband A's death, then § 1014(b)(1) would provide the basis step up. I.R.C. § 1014(b)(1) (2006). Under § 1014(a)(1) the basis of property in the hands of a person acquiring property from a decedent is the fair market value of the property at the date of the decedent's death. I.R.C. § 1014(a)(1) (2006).

<sup>150</sup> I.R.C. § 2010(c)(2) (LexisNexis 2011).

<sup>151</sup> I.R.C. § 1014(a), (b)(10) (2006).

<sup>152</sup> Edwin G. Fee, Jr., *Portability of the Federal Estate Tax Exemption*, 42 MD. B. J. 34, 37 (2009).

<sup>153</sup> I.R.C. § 1001(a) (2006).

<sup>154</sup> Fee, *supra* note 152, at 37.

<sup>155</sup> One such important consideration is the care for a special needs child. *See* Sebastian V. Grassi, Jr., *Estate Planning for a Family With a Special Needs Child*, 23 PROBATE & PROPERTY 14 (2009).

<sup>156</sup> In addition to post mortem asset protection twelve states currently allow for domestic asset protection trusts (DAPT). A DAPT is an irrevocable trust created by a settlor for the settlor's benefit. The DAPT must include a spendthrift provision which limits outside creditors, but the DAPT can allow the settlor retain interests. *See* David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 ACTEC J. 293 (2009). Currently Oklahoma is the only state to allow a DAPT to be revocable. OKLA. STAT. tit. 31, § 13 (LexisNexis 2011). *See also*, Michael A. Passananti, *Domestic Asset Protection Trusts: The Risks and Roadblocks Which May Hinder Their Effectiveness*, 32 ACTEC J. 260 (2006) (discussing situations that can erode DAPT protection).

<sup>157</sup> *See* Jeffery N. Pennell, *Estate Planning for the Next Generation(s) of Clients: It's Not Your Father's Buick*, Anymore, 34 ACTEC J. 2, 8–12 (2008) (discussing how traditional estate planning assumes the clients does not trust the surviving spouse).

<sup>158</sup> Modern trust law applies the prudent investor rule in asset management, which has lead to more investment in securities. Max M. Schanzenbach & Robert Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314 (2010).

<sup>159</sup> Holbrook, *supra* note 88, at 18.

<sup>160</sup> I.R.C. § 1(e) (2006). For taxable years beginning 2011 a trust hits the highest tax rate of 35% with taxable income of \$11,350. Rev. Proc. 2011-12. The use of grantor trusts can sweep the trust into the grantor's income tax rate to avoid the compressed trust income brackets. Stephen R.



Akers, et. al., *Creating Intentional Grantor Trusts*, 44 REAL PROPERTY, TRUST & ESTATE L. J. 207, 263–67 (2009).

<sup>161</sup> I.R.C. § 102(a) (2006).

<sup>162</sup> *Id.*

<sup>163</sup> Some commentators believe that gifts made in 2011 or 2012 that exceed \$1 million will be subject to a clawback of the gift tax. Holbrook, *supra* note 88, at 18.

<sup>164</sup> Bekerman, *supra* note 145, at 43.

<sup>165</sup> N.C. GEN. STAT. § 105-32.2 (2010).

<sup>166</sup> MASS. GEN. LAWS ch. 65C, §2A (2010) (freezes exemption at \$1 million).

<sup>167</sup> I.R.C. § 2505 (LexisNexis 2011).

<sup>168</sup> Holbrook, *supra* note 88, at 17.

<sup>169</sup> Robinson, *supra* note 118, at 401.

<sup>170</sup> Examples are the special use valuation, I.R.C. § 2057 (2006), and extension for payment of estate tax where estate consists of 35% of closely held business interests. I.R.C. § 6166 (2006). The usage rates for these provisions are remarkably low, and in 2001 only 0.4 percent of all estate elected §6116, and only 0.76% of all estate elected § 2057. Martha Eller Gangi & Brian G. Raub, *Utilization of Special Estate Tax Provision for Family-Owned Farms and Closely Held Businesses*, STATISTICS OF INCOME BULLETIN, Figure M, available at <http://www.irs.gov/pub/irs-soi/spestate.pdf>; *Id.* at Figure B.

<sup>171</sup> *C.f.* Jonathan G. Blattmachr, et. al., *Estate Planning for Persons With Less Than \$5 Million*, 34 ESTATE PLANNING 18 (2007) (discussing estate planning techniques for individuals with modest wealth who cannot afford large lifetime transfers of wealth).

<sup>172</sup> Bekerman, *supra* note 145, at 41.

<sup>173</sup> Jonathan G. Blattmachr, *Looking Back & Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC J. 1, 48 (2010) (“[Portability] will require estate planning lawyers to counsel about “balancing” various aspects of planning, from simplicity (e.g., bequeathing the estate of the spouse dying first to the survivor) to opportunities for asset protection (e.g., using a trust) and for income tax reduction (e.g., using a discretionary trust for the surviving spouse, descendants and, perhaps, others, such as charity so taxable income can be shifted to those in the lowest effective income tax brackets).”).

<sup>174</sup> Howard Zaritsky, *Observations on Estate Planning Provisions of the 2010 Tax Act*, 38 ESTATE PLANNING 48, 47 (2011).

<sup>175</sup> Kovar, *supra* note 6, at 249.

<sup>176</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 13.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Internal Revenue Service, *Estate Tax Returns Filled in 2009 by Tax Status and Size of Gross Estate*, STATISTICS OF INCOME BULLETIN, available at <http://www.irs.gov/pub/irs-soi/09es01fy.xls>.

<sup>180</sup> In 2007 36.21% of estate tax returns were filed by widows or widowers with a gross estate greater than \$3.5 million, and 38.63% of all sizes. Internal Revenue Service, *Tax Returns Filed for 2007 Male Decedents, by Age and Marital Status of Decedent and Size of Gross Estate*, STATISTICS OF INCOME BULLETIN, available at <http://www.irs.gov/pub/irs-soi/07es07yd.xls>; Internal Revenue Service, *Estate Tax Returns Filed for 2007 Female Decedents, by Age and Marital Status of Decedent and Size of Gross Estate*, STATISTICS OF INCOME BULLETIN, available

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at <http://www.irs.gov/pub/irs-soi/07es08yd.xls>. In comparing the 2007 marital status rates to the 2009 estate returns we could assume approximately 8.9% of all estate returns are widows or widowers with a gross estate exceeding \$5 million. This percentage does not account for spouses predeceasing the surviving spouse by more than two years, and as such should be seen as a ceiling estimate. Internal Revenue Service, *supra* note 179.

<sup>181</sup> JCT WEALTH TRANSFERS 2008, *supra* note 52, at 13.

<sup>182</sup> In 2007, 48.49% of all decedents were married and 38.63% were widowed, and thus the usage rate could be similar. Internal Revenue Service, *Male Decedents*, *supra* note 180; Internal Revenue Service, *Female Decedents* *supra* note 180.

<sup>183</sup> Congressional Budget Office, *CBO Estimates of Changes in Revenues and Direct Spending for S.A. 4753, an Amendment to H.R. 4853, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010* (2010), available at [www.cbo.gov/doc.cfm?index=12020](http://www.cbo.gov/doc.cfm?index=12020); STAFF OF J. COMM. ON TAXATION, 111TH CONG., ESTIMATED BUDGET EFFECTS OF THE “TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010,” FISCAL YEARS 2011 – 2020, (Comm. Print 2010), available at <http://www.jct.gov/publications.html?func=select&id=48>.

<sup>184</sup> See National Commission on Fiscal Responsibility and Reform, *The Moment of Truth*, (2010) (“Our nation is on an unsustainable fiscal path.”), available at [http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12\\_1\\_2010.pdf](http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf)

<sup>185</sup> In the United Kingdom an estate is exempt up to £325,000. This is called the nil-rate band. Finance Act of 2008, 2008, c. 9, § 10, sch. 4 (U.K.).

<sup>186</sup> HM Revenue & Customs, *Inheritance Tax: Analysis of Receipts*, Table 12.1 (U.K.), available at [http://www.hmrc.gov.uk/stats/inheritance\\_tax/table12-1.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/table12-1.pdf).

<sup>187</sup> HM Revenue & Customs, *Inheritance Tax: Assets Held In Taxpaying Discretionary Trusts at Ten Year Anniversary*, Table 12.8 (U.K.), available at [http://www.hmrc.gov.uk/stats/inheritance\\_tax/table12-8.pdf](http://www.hmrc.gov.uk/stats/inheritance_tax/table12-8.pdf).

<sup>188</sup> Brian G. Raub, *A Look at Estate Tax Returns Filed for Wealth Decedents Since 2001*, STATISTICS OF INCOME BULLETIN 303 (Fall 2009), available at <http://www.irs.gov/pub/irs-soi/09fallbuletreturn.pdf>.

<sup>189</sup> Example: SS has \$7 million applicable exclusion amount as a result of \$2 million ported from DS. At SS’s death \$5 million in property would receive § 1014(a) treatment, and \$2 million would receive § 1015(a) treatment.

<sup>190</sup> Emily Campbell, *Finance Act Notes: Transfer of Unused Inheritance Tax Nil Rate Band – Section 10*, 2008 B. T. R. 424, 424 (2008).

<sup>191</sup> Revenue Act, Pub. L. No. 64–271, 39 Stat. 756 (1916).

<sup>192</sup> Congress could use the “member of the family” definition from § 2032A(e)(2).

<sup>193</sup> Transferring and Unused Inheritance Tax Threshold, HM Revenue & Customs, <http://www.hmrc.gov.uk/inheritancetax/intro/transfer-threshold.htm>

<sup>194</sup> Cf. Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfers*, 6 FLA. TAX REV. 757, 802 (2004) (arguing Congress should tax transfers between spouses but permit a large credit against the tax because “The tax results of a transfer by one person to another should not depend on the existence of a legalized sexual relationship between a man and a woman.”).

<sup>195</sup> Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851 (2008)

<sup>196</sup> See Jerry Simon Chasen, *Is DOMA Doomed?*, 25 PROBATE & PROPERTY, 22 (2011), and William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399 (2005).

<sup>197</sup> Dan Holbrook, *Are There No Creative Thinkers in Congress?: How About Some Real Reform of the Estate Tax? (On the lighter side)*, 42 TENN. B.J. 28, 28–29 (2006).

<sup>198</sup> Treas. Reg. § 20.2056(a)-1(b).

<sup>199</sup> Bekerman, *supra* note 145, at 41.

<sup>200</sup> Zaritsky, *supra* note 174, at 46. (“The failure of Congress to pass a more permanent set of estate, gift, and GST tax rules represents the most appalling incident of legislative ineptitude in recent memory.”).

<sup>201</sup> See 156 CONG. REC. S8761 (daily ed. Dec. 10, 2010) (statement of Sen. Bernie Sanders (I-Vt.)) (“I have been in Washington long enough to know that when you give a temporary tax break for 2 years, you are, in fact, giving a long-term tax break or maybe even a permanent tax break. Because 2 years from now, the exact same arguments will be made: if you do away with those tax breaks for the rich, you are raising taxes. Do you want to raise taxes, a terrible thing to do? That same argument will be made.”).

<sup>202</sup> Office of Management and Budget, *Fiscal Year 2012 Budget of the U.S. Government*, 26, Table S-8 (2011), available at [http://www.whitehouse.gov/files/documents/budget\\_2012.pdf](http://www.whitehouse.gov/files/documents/budget_2012.pdf)

<sup>203</sup> Paul D. Ryan, *A Roadmap for America’s Future Version 2.0: A Plan to Solve America’s Long-term Economic and Fiscal Crisis*, vi (2011), available at <http://www.roadmap.republicans.budget.house.gov/UploadedFiles/Roadmap2Final2.pdf>.