

## UTBF Trusts and Estates Urgent Legal and Tax Briefings

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**From:** The UTBF Trust & Estates Legal Briefings

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**Subject:** [Protecting Your Heirs From Federal Estate Tax When One Spouse Dies – The IRS Has Extended The Time to File A “Portability Return” From 2 Years to 5 Years. If You Are A Surviving Spouse This Is Vitaly Important to Protecting Your Heirs From Possible Federal Estate Tax At Your Death!](#)

### DOES THIS APPLY TO YOU?

*It might be very important, if you are a surviving spouse, or if you are the child or grandchild with one or more surviving parents with significant assets - many people would do this if their assets, including but not limited to houses, businesses, real estate, retirement, investments and insurance, exceeded \$2 million dollars, and would almost certainly consider it where such assets exceeded \$3.5 million dollars.*

Why?

Well, the current law allows each spouse to make lifetime gifts, or to “will” assets of up to \$12,060,000 dollars without federal estate tax being paid by the heirs. However, this law is set to expire, and the amount protected from taxation might be significantly reduced by the end of 2025.

Furthermore, if one spouse passes away and **does not** use the exemption OR apply to preserve it for his or her spouse, it could be lost. The loss of this exemption might mean a 40% tax for the heirs (at the death of the second spouse) that could have been avoided.

## WHAT SHOULD YOU CONSIDER DOING?

The way to prevent the loss of that exemption (and the resulting tax) is to file a portability return (Form 706) at the death of the first spouse. Ordinarily, this tax return is required to be filed within 9 months of the death of a decedent.

However, when returns are being filed for the sole purpose of “portability,” that is protecting the exemption of the first spouse to die so that it can be used when the second spouse passes, until now the time allowed was 2 years.

In a rare positive change for the taxpayer, the IRS has issued Revenue Procedure 2022-32, in which it extended the time for filing an estate tax return to elect portability without a private letter ruling from two years after death to five years after death.

**While you should consult legal and/or tax counsel about this issue if your spouse has passed within the last few years, this can make a big difference to your heirs.**

As a result, the best practice is to file a portability return (Form 706) whenever there is any reasonable possibility that the surviving spouse’s estate (plus adjusted taxable gifts) might exceed the estate tax exclusion amount at his or her death. This should be calculated, to consider possible future increases in value of assets, the scheduled reversion of the estate tax exclusion amount to pre-2018 levels in January of 2026, and the possibility that the estate tax exclusion amount could be reduced below that level, as has been proposed on numerous occasions.

As for the costs, legal commentator Bruce Steiner has observed (and I agree) that an estate will “likely incur much of the cost of the portability return even if it doesn’t file a portability return.”

Why?

Well, the executor must determine the value of the assets (other than cash or retirement benefits) in order to determine the tax basis. The executor may have to determine the value of the assets for an inventory, for state estate or

inheritance tax returns, or for making distributions. So, in many cases, many of the costs (such as appraisals) will already be incurred.

To the contrary, the costs of **not electing portability** could be substantial if the surviving spouse's estate (plus adjusted taxable gifts) exceeds the estate tax exclusion amount at the time of his or her death.

**Here is a link to the [Revenue Procedure 2022-32](#)** itself. However, your lawyer should be able to explain the details and what needs to be done. While it can be quite expensive to file this return the protection from taxes and benefits to your heirs may be significant.

## **MORE ANALYSIS & RECOMMENDATIONS:**

In the above cited Revenue Procedure, the Internal Revenue Service extended the time for filing an estate tax return to elect portability without a private letter ruling from two years after death to five years after death of the first spouse to die.

However, if the estate is **required** to file an estate tax return (get advice on this from your legal counsel at the death of the first spouse), the election must be made on a timely filed return (within 9 months or 15 months if a timely extension is filed).

Because this requirement is statutory, the IRS cannot extend it.

However, **if the estate is not required to file an estate tax return**, the IRS has discretion to extend the time for filing the return.

Previously, through Rev. Proc. 2017-34, the IRS granted a blanket extension until two years after death to file returns to elect portability but again **ONLY** where an estate was not required to file a return.

Beyond that date, the estate had to apply for a private letter ruling to obtain an extension of time to file a return to elect portability.

However, on July 8, 2022, the IRS issued Rev. Proc. 2022-32, which extends the time to file a portability return to five years from the date of death.

## **What Should You Do?**

**If you have lost a spouse within the last five years, your assets are significant, and you did not open an estate AND file a Form 706 Federal Estate Tax return, you should consult counsel to determine if that is advisable now that the time has been extended.**

## **About The Author Of This Update:**

David M. Frees III, JD is Co-Chairperson of the UTBF Trusts and Estates Department where he exclusively practices law related to trust and estate planning, elder law, and trust and estate administration. He advises multiple banks, trust companies, and individual trustees and executors and serves or has served on both trust committees and as a director of a Pennsylvania and South Dakota Trust Company. He has contributed to many publications including major tax and estate planning publications. He is also a popular seminar presenter and has taught numerous continuing education seminars for lawyers and estate planners.

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