THE EFFECT OF THE 2010 TAX ACT ON ESTATE PLANNING WITH RETIREMENT PLAN BENEFITS

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I. INTRODUCTION

Estate planning attorneys have to take many factors into consideration when determining the best way to prepare a client's estate plan. Many of the considerations are practical ones, such as who should act as a trustee under a trust or as an attorney-in-fact under a Durable Power of Attorney. Some are based upon the varying state laws, such as the amount of assets a surviving spouse is entitled to under an elective share, while others are based on tax implications, such as whether it is more beneficial economically to transfer property to children during lifetime or at death. Oftentimes, the most difficult issues for attorneys are the ones that concern taxation due to the complicated, ever-changing, and unpredictable nature of the tax code.[1]

At issue in this article are the planning considerations and tax implications that exist when retirement plan benefits make up part of a client's assets. This article examines the 2010 Tax Act and how it has affected or is likely to affect estate planning decisions when a majority of a client's assets consist of retirement plan benefits. Section II of this article will look at the transfer tax law prior to the enactment of the 2010 Tax Act and survey the law's evolution to its current state. Section III will discuss how the increased exemption amounts, decreased tax rates, and the addition of the concept of portability can be utilized in a beneficial way when dealing with retirement plan benefits to reduce taxes and increase accumulation. It will highlight the advantages of using portability as opposed to a credit-shelter trust when retirement plan benefits are a significant asset. Section IV will discuss the pitfalls of the 2010 Tax Act in relation to retirement plan benefits. It will look at the possibility of portability not being extended, the effect of exemption amounts

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*The author would like to offer a special thanks to Professors Joe Price and Christopher Hoyt (UMKC School of Law) for their invaluable assistance and guidance with the research and drafting of this article. This article was written prior to the date that the 2010 Tax Act was set to expire. As many now know, the 2010 Tax Act did in fact sunset; however, on January 2, 2013 President Obama signed into law the American Taxpayer Relief Act of 2012 (hereinafter, the 2012 Tax Act) which retroactively reinstated many of the same provisions that were in effect under the 2010 Tax Act. The 2012 Tax Act made the FET, Gift Tax, and GST Tax provisions permanent as of December 31, 2012. It also reset the FET, Gift Tax, and GST Tax exemptions at five million dollars (currently 5.25 million dollars reflecting the adjustment for inflation), increased the FET rate from 35% to 40%, and made portability permanent. Despite these changes, many of the estate planning concepts discussed in this paper still hold true.

[1] *See generally* UMB Bank, Planning and Drafting in an Uncertain World – Flexible Solutions for Estate Planning 9 (Nov. 17, 2011) (unpublished CLE outline) (on file with author) (showing the unpredictability of Congress and the tax code by suggesting that most estate planning attorneys and scholars would not have conceived the idea that in 2010 the Federal Estate Tax would completely be repealed by the sunset provisions of EGTRRA).

falling below the current amount, the possibility of clawback, and the re-marriage problem. Further, Section IV will discuss how the use of a credit shelter trust may, in some instances, be more beneficial than using portability as an estate planning tool. The article will conclude that portability can be a useful tool for estate planning attorneys, especially when retirement plan benefits are an asset. Estate planners should use caution when relying on portability and weigh out the benefits of portability against other estate planning vehicles that allow more predictability and asset protection.

II. 2010 TAX ACT

A. The Precursor

Wealth can be transferred by way of *inter vivos* gift, at death through intestacy, or by legal instruments such as wills or trusts. When wealth is transferred it is generally subject to at least one of the following taxes: Federal Estate Tax (hereinafter FET), Gift Tax, and/or the Generation-Skipping-Tax (hereinafter GST).[2] It is no wonder then why they are collectively referred to as transfer taxes.[3] The FET is a tax on the wealth that passes from a decedent, at his date of death, to his heirs.[4] It was first enacted in 1916 with the purpose of reducing the concentration of wealth.[5]

In 2001, the year George W. Bush took office, Congress introduced the Economic Growth and Tax Relief Reconciliation Act of 2001 (hereinafter EGTRRA) to the tax regime with the purpose of, among other things, completely phasing out the FET by 2010.[6] EGTRRA was scheduled to sunset on December, 31, 2010 and be replaced by the provisions that preceded the act.[7] In 2001 the estate tax exemption amount was set at $675,000, and any wealth transferred at death would be taxed at 55% with a 5% surtax.[8] Between the years 2001 and 2009 the FET exemption amount continued to rise and the rate at which it was

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[2] Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1051 (2004).
[3] *Id.*
[4] *Id.* at 1050.
[5] *Id.* at 1050-51.
[6] *Id.* at 1046.
[7] Richard L. English, *Estate Tax Law Update*, 2011 ESTATE PLANNING INTERNSHIP PROGRAM (UMKC/CLE 20119) 1, 5 (2011).
[8] Christopher R. Hoyt, Planning for Maximum Tax Benefits From Lifetime Charitable Gifts, 17 (2011) (unpublished manuscript), http://www1.law.umkc.edu/Faculty/Hoyt/CharPlanGiv/1STCLASS-Charitable-Giving-Estate-Planning.pdf. This assumes that the amount over the exemption amount does not qualify for a marital deduction or is being hit with the GST.

taxed either remained constant or decreased, until 2010, the year in which the FET was set to be completely repealed under EGTRRA.[9]

1. The Enactment

Much uncertainty enveloped estate planning professionals who did not know whether Congress was going to reinstate the FET and make it apply retroactively, or if it would allow the estates of wealthy decedents to pass free of the death tax in 2010. When it seemed as though the latter would occur, President Barack Obama signed into law the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 (hereinafter 2010 Tax Act) to reinstate the FET and to reinstate the step-up basis rules that had been eliminated for 2010 under the language of EGTRRA.[10] The 2010 Tax Act raised the FET exemption to $5 million and set the tax rate at a flat 35% for the years 2010, 2011, and 2012[11] and also "introduced the law of portability for estates of married decedents to the federal estate tax paradigm."[12] The FET exemption amount increased to $5,120,000 for the year 2012; however, the tax rate and portability provisions have remained the same. Perhaps due to possible constitutional issues that would be raised if the 2010 Tax Act applied retroactively, Congress decided to make the FET optional for decedents who died in 2010.[13] The executor of a decedent dying in the year 2010 could either elect the rules of EGTRRA or the amendments of the 2010 Tax Act.[14] Under the EGTRRA rules no FET would be payable, but the step-up in basis one could make use of was limited; under the amendment of the 2010 Tax Act the exemption was limited to $5 million, but the step-up in basis was not limited.[15]

The 2010 Tax Act is scheduled to sunset December 31, 2012, so by January 1, 2013 the provisions and amendments of the code modified by EGTRRA or the 2010 Tax Act will be treated as though they never existed and the law will revert back to the law that existed prior to the enactment of EGTRRA.[16] In essence, if Congress does nothing and allows the 2010 Tax Act

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[9] *Id.* However, although EGTRRA completely repealed the FET for the year 2010, it also eliminated the step-up in bases that was allowed for property that passed at death. *See* Diane L. Mutolo, *Effect of Reinstated Estate Tax on Basis Rules and Estates of 2010 Decedents*, 2011 EMERGING ISSUES 5565, 1 (2011).
[10] Mutolo, *supra* note 9, at 1.
[11] Hoyt, *supra* note 8, at 17.
[12] Christopher R. Hoyt, *Retirement Assets to Surviving Spouses – Rollovers & Portability are Your First Choice*, PROB. & PROP., Jan./Feb. 2012, at 21.
[13] *See* English, *supra* note 7, at 6.
[14] *Id.*
[15] *Id.* If the EGTRRA rules were elected, the property acquired from a decedent would be subject to the modified carryover basis rules under I.R.C. § 1022 (repealed 2010), which generally allows for $1.3 million to be stepped-up in basis. *See* Mutolo, *supra* note 9, at 1.
[16] UMB Bank, *supra* note 1, at 25.

to sunset, then the FET exemption will drop to $1 million and the tax rate will rise to 55%.[17]

As mentioned above, the 2010 Tax Act also introduced the "new concept of portability for decedents dying in 2011 and 2012."[18] The basic concept of portability is to give the surviving spouse the ability to utilize the unused portion of the FET exemption amount of the first to die spouse (hereinafter First Spouse).[19] Section 303 of the 2010 Tax Act sets out a formula to compute how much of an FET exemption a surviving spouse is entitled to.[20] "[T]he applicable exclusion amount is the sum of (A) the basic exclusion amount, and (B) in the case of a surviving spouse, the deceased spousal unused exclusion amount [(hereinafter DSUEA)]."[21] The basic exclusion amount is set at $5 million but is inflation adjusted for years after 2011.[22] The DSUEA is computed by taking 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."[23] The language that defines DSUEA allows a surviving spouse to re-marry without affecting the amount of DSUEA from the First Spouse that would go to the surviving spouse, as long as the second spouse does not predecease the surviving spouse.[24] However, since the surviving spouse is limited to using the DSUEA of the "last" deceased spouse, if after re-marriage the second spouse also predeceased the original surviving spouse, the surviving spouse is limited to the DSUEA of the second deceased spouse.[25]

The following example illustrates how portability can be used effectively: if the First Spouse died in 2011 without utilizing any of his "basic exclusion amount" because he used the marital deduction to pass all of his assets to his wife, and the wife later dies in 2012, she would (assuming Congress does not amend any provisions of the 2010 Tax Act) have a $10 million exemption or "applicable exclusion amount." Five million dollars would be her own "basic exclusion amount" and the other $5 million would be the DSUEA.

There is one more important caveat in order for portability to be applicable. In order for a surviving spouse to utilize the DSUEA, the executor of the First Spouse's estate must file a timely estate tax return and make an irrevocable election to allow the surviving spouse to utilize the unused exemption

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[17] *Id.* at 8.
[18] *Id.* at 26.
[19] *Id.*
[20] Hoyt, *supra* note 12, at 21.
[21] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3303 (2010).
[22] *Id.*
[23] *Id.*
[24] UMB Bank, *supra* note 1, at 28.
[25] REGIS W. CAMPFIELD ET. AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 32 (24th ed. 2012).

amount.[26] If the estate tax return is not filed on time, then portability is lost to that deceased spouse.[27]

III. THE BENEFITS OF THE 2010 TAX ACT IN RELATION TO RETIREMENT PLAN BENEFITS

The 2010 Tax Act, with its low tax rate, its high exemption amounts, and its new concept of portability, offers several tax advantages to wealthy clients, especially those with a significant portion of their estate composed of retirement plan benefits. Since retirement plan benefits are generally tax deferred, more complicated tax planning exists when dealing with these assets because income tax is taxable in the year that the distributions are made.[28] Usually, leaving retirement plan benefits to a surviving spouse outright offers the best income tax advantages.[29] However, prior to the 2010 Tax Act, clients with large taxable estates and significant retirement plan benefits have been precluded from leaving assets outright to a spouse because they did not want to waste the FET exemption of the First Spouse and leave the surviving spouse with a large taxable estate.[30] Instead, clients were forced to use up the First Spouse's FET exemption by leaving retirement plan benefits to other beneficiaries or to the surviving spouse in trust, both of which received less favorable income tax treatment than leaving the benefits outright to a surviving spouse.[31] Portability allows for the retirement plan benefits to be left outright to the surviving spouse in order to receive the most favorable income tax treatment, while also allowing the surviving spouse to utilize the DSUEA of the deceased spouse to offset the negative FET consequences of leaving the benefits outright to the surviving spouse.[32]

There are several advantages to leaving retirement plan benefits to a surviving spouse outright. A surviving spouse is entitled to use special minimum distribution rules, and special rollover rules.[33] Most of the special rules require the spouse to be a "sole beneficiary."[34] A surviving spouse has the ability to (1) keep the plan in the name of the deceased spouse as an "inherited plan," (2) rollover the benefits to her own plan as participant, or (3) elect to treat it as her

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[26] § 303(a)(5).
[27] UMB Bank, *supra* note 1, at 29. That does not prevent someone from going out and looking at nursing homes for a poor person to marry that is likely to die soon in order to take advantage of their DSUEA.
[28] NATALIE B. CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS 122 (7th ed. 2011). However, Roth IRAs are not tax deferred and thus income tax is not due in the year distributions are made as long as it is a qualified distribution. *Id.* at 128.
[29] *See id.* at 208.
[30] Hoyt, *supra* note 12, at 21.
[31] *Id.*
[32] *Id.* at 22.
[33] CHOATE, *supra* note 28, at 87-88.
[34] *Id.* at 87.

"own retirement plan" if it is a Traditional IRA or Roth IRA[35]; by contrast, if the plan is bequeathed to another beneficiary or to the surviving spouse in trust, it has to be treated as an "inherited plan."[36] If the surviving spouse receives the benefits in an inherited plan and is the sole beneficiary, or is deemed to be the sole beneficiary by the beneficiary finalization date, then she may elect a later required commencement date (the date upon which she has to start taking minimum required distributions) if the participant dies prior to his required beginning date.[37] Additionally, the surviving spouse is able to utilize the recalculation method of determining the applicable distribution period factor, which provides a longer payout than the alternative method used for other beneficiaries.[38] Both the later required commencement date and recalculation method are available to certain trusts if the surviving spouse is considered the sole beneficiary of them.[39] Having a later required commencement date and longer payout allows for more tax deferred accumulation and helps insure that the benefits will last throughout the surviving spouse's actual life and perhaps longer for the benefit of remainder beneficiaries.[40]

More favorable income tax treatment and accumulation potential is possible if the surviving spouse rolls over the plan into her own plan as a participant or if she elects to treat it as her own if it is a Traditional IRA (or Roth IRA).[41] To be able to elect to treat an IRA as her own, the surviving spouse would have to be a sole beneficiary of the IRA, and the IRS has stated that this rule is not satisfied if a trust is named as beneficiary, even if the spouse is a sole beneficiary of the trust.[42] In order for a surviving spouse to roll over the benefits into a plan in her own name, she does not have to be the sole beneficiary.[43] However, the law is unclear whether benefits left in trust for a surviving spouse can be rolled over into her own plan as a participant.[44] The advantages of having a retirement plan treated as her own are the following: she will not have to start taking minimum required distributions until she turns seventy and one half (actually not until her required beginning date),[45] she will be able to use the Uniform Lifetime Table to determine her minimum required distributions instead

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[35] A Traditional IRA is a "private, one person retirement account" and is located in § 408 of the Internal Revenue Code. *Id.* at 540. Traditional IRAs are generally tax deferred, meaning the distributions are taxable. *Id.* at 121. A Roth IRA (§ 408A) is also a private retirement account, however, the major difference is that the distributions from a Roth IRA are generally tax-free as opposed to tax deferred. *Id.* at 318.
[36] *See id.* at 208 (emphasis removed).
[37] *Id.* at 93.
[38] *Id.* at 91.
[39] *Id.* at 98-99.
[40] Hoyt, *supra* note 12, at 22.
[41] CHOATE, *supra* note 28, at 90.
[42] *Id.* at 98.
[43] *Id.* at 211.
[44] *Id.* at 98, 220.
[45] *Id.* at 50. Her required beginning date would be the April 1st of the year following the year she turned seventy and one half. *Id.* at 55.

of the Single Life Expectancy Table (which allows her to take much smaller minimum required distributions and will ensure that the account balance will never reach zero),[46] she will have more control over naming successor beneficiaries, and the successor beneficiaries may have more favorable distributions.[47] One situation in which it would not be favorable for a surviving spouse to rollover a plan into her own would be if she is under the age of fifty-nine and one half, and plans to withdraw funds prior to attaining age fifty-nine and one half, because of the 10% penalty on distributions to participants under that age.[48] To plan around this, if there is a chance the surviving spouse will need to take money from the plan, the surviving spouse should still be named the sole beneficiary and should keep it as an inherited plan (enabling her to take distributions if she wants, but not requiring so), until she reaches fifty-nine and one half at which point she can roll the plan over into her own plan as participant.[49]

As demonstrated above, there are numerous favorable advantages to bequeathing the retirement plans to a surviving spouse outright. Not only are there income tax advantages, but also tax deferred accumulation advantages that allow the original participant's benefits to be preserved for future generations. Portability allows these advantages to be utilized without the adverse FET consequences that existed prior to the enactment of portability. It allows for a better alternative compared to the use of credit shelter trusts, that while generally solve FET issues, when combined with retirement plan benefits, frustrate income tax issues since generally trusts receive the worst payout methods and allow little opportunity for accumulation.[50]

In addition to portability, low tax rates, and high exemption rates, the 2010 Tax Act also extended the ability of IRA owners aged seventy and one half or older to make gifts up to $100,000 per year from their IRAs to a qualified charity and have it count towards their minimum required distribution.[51] It only extended through December 31, 2011 and has yet to be extended further.

There has been some congressional support towards changing the minimum required distribution rules and making a mandated five-year payout period for all inherited plans, subject to some limited exceptions.[52] Although the Senate Committee on Finance did not approve the portion of the bill dealing with the changes to minimum required distributions, if a similar bill were passed in the

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[46] *Id.* at 46-47. Of course, the balance could reach zero if distributions above the minimum required distributions were taken.
[47] *Id.* at 86.
[48] *Id.* at 219.
[49] Hoyt, *supra* note 12, at 23.
[50] *Id.* at 21-22.
[51] *From ERISA to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*, Fed. Income Tax'n Retirement Plans (MB) § 1.01, [3][z.3] (2011).
[52] *See* STAFF OF J. COMM. ON TAXATION, 112TH CONG., DESCRIPTION OF THE CHAIRMAN'S MODIFICATION TO THE PROPOSALS OF THE "HIGHWAY INVESTMENT, JOB CREATION AND ECONOMIC GROWTH ACT OF 2012", JCX-11-12, at 15 (Feb. 7, 2012).

future, one likely exception to a mandated five-year payout requirement would be leaving the inherited plan to surviving spouses.[53] If such a bill were passed, portability would be even more beneficial than it is under the current minimum required rules.

IV. THE PITFALLS OF THE 2010 TAX ACT IN RELATION TO RETIREMENT PLAN BENEFITS

Despite all of the benefits that exist from the 2010 Tax Act, there are a number of pitfalls. The most detrimental pitfall is that it is set to sunset on December 31, 2012, thus making it difficult to rely on the current tax law when planning a client's estate plan.[54] What makes the situation worse is that it is an election year, which makes it unlikely that Congress will even address the issue and more likely that the 2010 Tax Act will sunset. If it sunsets, then not only will the exclusion amount drop to back down to $1 million and the tax rate increase to 55%, but portability will cease to exist.[55] If portability does not continue, then the only way for clients to be able to take advantage of it (besides utilizing lifetime gifts) is if both spouses die during 2011 or 2012, while portability exists.[56] Due to the uncertainty of whether or not it will be extended, it is difficult to rely on portability as a vehicle for an estate plan.[57] The issue of using portability to make larger lifetime gifts transfer tax free does not come into play when a majority of a client's assets consist of retirement plan benefits, since they cannot be gifted during life to another individual.

Assuming that portability gets extended, there are additional concerns with relying on its use. The following hypothetical will illustrate those concerns: (Hypo 1) *The First Spouse leaves an IRA of $9 million to the surviving spouse solely and outright, utilizing the marital deduction to pass it transfer tax free and relying on the idea that the surviving spouse will be able to utilize his left over DSUEA ($5 million) when he dies along with her own basic exclusion amount. The surviving spouse (wife) then re-marries another man (Second Spouse) who also predeceases her but uses up his entire basic exclusion amount.* This situation would leave her with no DSUEA, since she would only be entitled to the DSUEA of the Second Spouse, and cause her to have a taxable estate at her death.[58] If the assets were not retirement plan benefits, a credit shelter trust would have been more advisable in the planning stages if re-marriage were

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[53] *See* Heather M. Rothman, *Senate Panel OKs Transportation Funding, But IRA Tax Provision Will Not Survive*, COMMUNITY FOUNDATION (Feb. 9, 2012), http://www.yourcommunityfoundation.org/index.cfm?fuseaction=news.details&ArticleId=95&returnTo=resources.
[54] *See* discussion *supra* Part II.A.
[55] *See* discussion *supra* Part II.B.
[56] Marc S. Bekerman, *Credit Shelter Trusts and Portability – Does One Exclude the Other?*, PROB. & PROP., at 11 (May/June 2011).
[57] UMB Bank, *supra* note 1, at 9-10.
[58] *See* discussion *supra* Part II.B.

likely.[59] Since retirement plan benefits are at issue in the previous hypothetical, the client and attorney have more difficult planning decisions to make and would have to carefully analyze the benefits and pitfalls of each course of action.[60] Using a credit shelter trust to utilize the first to die spouse's exclusion amount may have the negative income tax consequences mentioned above.[61] If dealing with retirement plan benefits, it may be desirable to rely on portability and advise the surviving spouse of the negative consequences of re-marrying (especially if to a wealthy person).

(Hypo 2) *Assume the same facts from the above hypothetical (and that portability still exists), except instead of a re-marriage situation, assume the exclusion amount falls to $1 million in the year of the surviving spouses death.* If this happened, then the DSUEA would be limited to $1 million.[62] Such a risk could cause many clients to choose a credit shelter trust over hoping portability is extended and the exclusion amount does not drop, even if retirement plan benefits encompass a large amount of the assets.

Besides the uncertainty of whether portability will be extended and whether the exclusion amount will drop, there is also uncertainty of how portability is applied. For example, can a surviving spouse utilize the DSUEA of a deceased spouse by making a $5 million lifetime gift (it would have to be a gift of a non-retirement plan benefit), re-marry and survive another spouse, then utilize the second spouse's DSUEA plus her own basic exclusion amount to exempt an IRA of $10 million (assuming basic exclusion amounts are at or above $5 million) from FET? It is uncertain whether the initial lifetime gift would come from the DSUEA or from her own basic exclusion amount first.[63] Additionally, in such a situation where a client makes a lifetime gift within the gift tax exemption amount at the time of the gift but the basic exclusion amount is reduced in the year of the client's death, does "clawback" come into play causing unexpected transfer tax?[64] If "clawback" does in fact happen, then it could cause beneficiaries of a decedent's estate to incur the transfer tax that is attributable to a lifetime gift.[65] Many respected estate planners do not believe

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[59] *See* Hoyt, *supra* note 12.
[60] *Id.*
[61] *See supra* Part III.
[62] UMB Bank, *supra* note 1, at 26-27; *see supra* Part II.B.
[63] Bekerman, *supra* note 56, at 13.
[64] English, *supra* note 7, at 16.
[65] Michael J. Jones, *Who's Afraid of (Gasp!) CLAWBACK?*, WEALTHMANAGEMENT.COM (Jan. 18, 2012), http://wealthmanagement.com/financial-planning/who-s-afraid-gasp-clawback; *see also* Ann B. Burns, *They Say You Can't Take it With You – But How Do You Give It Away? Using the $5 Million Exclusion Amount*, 46 ANN. HECKERLING INST. ON EST. PLAN., 4-1,4-4 (2012). One possible solution may be to apportion the tax that may become due at the decedent's death from a prior lifetime gift to the beneficiary of the lifetime gift. *Id.* at 4-5 – 4-6.

that there will be a "clawback" and have found ways to counter the negative effects of it if it does happen.[66]

Of concern also, in order for the surviving spouse to be entitled to the DSUEA of the first to die spouse, the executor of the estate of the deceased spouse must make an affirmative, irrevocable, timely election on an estate tax return (Form 706).[67] If such an election is not made, the DSUEA is forever lost.[68] Of course, if the election was missed, nothing would prevent someone from finding a new spouse to marry that was poverty stricken and near death in order to take advantage of their DSUEA. One other problem associated with filing an estate tax return is the high costs of getting one prepared by an attorney or CPA. The costs could range anywhere from $3,000 to $10,000 (or possibly even higher) depending on the complexity of the return and who prepares it.[69] The IRS has not made any guidelines allowing a taxpayer who is below the filing threshold, but wants to take advantage of portability, to file a shortened form.[70] Even worse, if portability does not get extended and no filing requirement existed, then that money spent on a return is wasted.

Additional disadvantages of relying on portability instead of other estate planning vehicles such as a credit shelter trust may include: DSUEA is not indexed for inflation,[71] growth of assets are included in the surviving spouses gross estate if portability is used (not included if credit shelter trust),[72] portability does not apply to the GST exemption,[73] credit shelter trusts provide better asset protection,[74] in second-marriage situations credit shelter trusts may be more advisable to prevent disinheritance, portability may not apply to same-sex couples (even if the state they live in recognizes same-sex marriages),[75] and relying on portability may cause negative state estate or inheritance tax implications.[76] However, all of those may not be disadvantageous when dealing with retirement plan benefits. For example, certain retirement plan benefits such as a 401(k) cannot be put into a trust without the consent of the non-participant spouse.[77]

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[66] Steve R. Akers, *What Now? Planning Strategies Under the Tax Relief . . . Act of 2012*, 30 ANNUAL KAN. CITY EST. PLAN. SYMP., 13 (2011), *and* Jones, *supra* note 65; *see also* English, *supra* note 7, at 16.
[67] UMB Bank, *supra* note 1, at 29. *See also* Thomas W. Abendroth, *Portability: The New Estate Planning Wonder Drug?*, 46 ANN. HECKERLING INST. ON EST. PLAN, 6-10 (2012).
[68] UMB Bank, *supra* note 1, at 29.
[69] Deborah L. Jacobs, *How to Get the Latest Tax Break Without Spending A Bundle on Legal Fees*, FORBES (Jan. 11, 2012, 8:03 PM), http://www.forbes.com/sites/deborahljacobs/2012/01/11/how-to-get-the-latest-tax-break-without-spending-a-bundle-on-legal-fees/.
[70] Abendroth, *supra* note 67, at 6-18 – 6-19.
[71] Akers, *supra* note 66, at 10; *see also* Abendroth, *supra* note 67, at 6-9.
[72] Akers, *supra* note 66, at 10.
[73] *Id.*
[74] *Id.*
[75] Hoyt, *supra* note 12, at 24; CAMPFIELD ET. AL., *supra* note 25, at 170.
[76] Abendroth, *supra* note 67, at 6-25.
[77] Hoyt, *supra* note 12, at 23-24.

V. CONCLUSION

The 2010 Tax Act provides many advantages to estate planners and their clients; however, extreme caution must be used when relying on portability. If non-retirement plan benefits are major assets, portability might not be the best route, and using a credit shelter trust may be more preferable. However, if retirement plan benefits encompass a large portion of the estate, portability may be more desirable. One possible solution to consider, since one of the major fears estate planners and their clients have with portability is the uncertainty surrounding it, is to build flexibility into the estate plan by using post-mortem planning. During the participant's life, he or she can name the surviving spouse outright as primary beneficiary and have a credit shelter trust be the contingent beneficiary. The purpose of this would be to allow the surviving spouse (and his or her attorney) to reassess the transfer tax situation at the time of the decedent's death. If portability still exists at that time and the circumstances are favorable, he or she may want to accept the whole bequest outright to receive the most advantageous minimum required distribution rules. However, if relying on portability doesn't seem very sensible, the surviving spouse can disclaim either a portion or the entire bequest in order to make use of the decedent's exemption. An estate planner will have to weigh the benefits and pitfalls of relying on portability to carry out the client's objectives. Fully advising the client of the inherent risks of relying on portability as a vehicle of the estate plan and getting informed consent would be a must of any prudent estate planning attorney.