

**Current Developments Update
January 1, 2013**

Current Federal Estate Tax Issues

Currently, the federal estate tax will continue to affect only the richest families in America. In 2013, Congress passed legislation making the estate tax exemption permanent at the 2012 rate of \$5 million and which will be adjusted for inflation each year. Of course, calling the tax law "permanent" does not mean Congress would not change it in the future, but little energy is being directed at estate tax legislation now. If Congress had not acted in 2013, the estate tax exemption would have reverted to \$1 million with a 55% top rate. In raising the federal estate tax exemption to \$5 million, the loss of revenue will cost the government \$396.068 billion over a ten year period, according to an estimate in the Senate Finance Committee's summary of the legislation, which was called the American Taxpayer Relief Act of 2013.

In 2015, the federal estate tax exemption amount is \$5.43 million which means that an individual may make gifts during life or at death cumulatively up to that amount without owing any estate tax. This means that 99.5% of all estates will not owe any federal estate tax or gift tax. The exemption amount will increase each year based upon inflation and unlike legislation enacted in the last several years, there is no sunset provision for these amounts. Thus they will stay in force until Congress changes them again.

One feature of the current estate tax law is that spouses may combine their estate tax exemptions which effectively allows married couples to gift almost \$11 million without owing tax. In 2015, the Deceased Spousal Unused Exclusion ("DSUE") or portability became permanent.

If the first spouse to die does not use up his or her individual gift/estate tax exemption, the executor may elect to have the remaining exemption transferred to the surviving spouse to use at the second death. Portability gives the couple a total exemption of twice the individual exemption amount which provides them the greatest tax benefit. The executors of the estate who are filing to elect portability of DSUE amount to a surviving spouse are not required to report the value of property eligible for the marital deduction or a charitable deduction. However, those assets must be estimated and included in the total amount of the gross estate.

To take advantage of the portability rule, a federal estate tax return must be filed when the first spouse dies, even if no tax will be due. The federal estate tax return filed solely on portability must be completed and timely filed regardless of the amount of the gross estate in order to transfer the portable amount of exemption. If a federal estate tax return is required to be filed and the executor does not elect to transfer the DSUE amount to the surviving spouse, then the executor must affirmatively opt out of portability on the Form 706.

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On very large estates subject to the tax, the gift/estate rate is now 40% which is lower than previous years. This rate also applies to the generation-skipping transfer tax that is imposed on large transfers that skip a generation (for example, a gift from a grandparent to a grandchild) in an attempt to avoid estate tax at the skipped generation's level.

With the current federal estate tax laws, most estate planning lawyers are having to consider more income tax related planning than federal estate tax related planning as most of their clients will not reach the threshold to have estate tax due on death.