# Fiduciary Duty To Elect Portability for the Benefit of a Surviving Spouse

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Since Congress introduced the concept of portability with the 2010 Tax Relief Act, attorneys preparing premarital and property-settlement agreements have been attempting to preserve their clients' rights to utilize the deceased spousal unused exclusion ("DSUE") for fear of what could happen in the event the deceased spouse's child from a prior marriage, or another person serving as executor in lieu of the surviving spouse, refuses to make the requisite election. The Oklahoma Supreme Court recently considered this issue in Matter of Estate of Vose, 390 P.3d 238 (Okla. 2017), ultimately concluding that despite the purported discretion granted to executors under federal law regarding whether to make the election, the administrator had a fiduciary duty to preserve the assets of the estate and to safeguard the surviving spouse's interest in the DSUE. This article discusses the issues addressed by the Vose court, considers the impact of the decision and offers suggestions to practitioners going forward.

For 2017, the combined amount one person can transfer during life or at death without incurring any liability for federal gift or estate tax is $5.49 million (the "Exclusion Amount"). Historically, if an individual did not take full advantage of his or her Exclusion Amount, the unused portion would be wasted. Recent changes in the estate tax laws, however, afford a unique benefit to married couples referred to as "portability" of the Exclusion Amount – the ability of the first spouse to die to shift the unused portion of his or her Exclusion Amount to the surviving spouse at death.

In order for the surviving spouse to take advantage of the deceased spouse's unused Exclusion Amount, the deceased spouse's executor must elect portability on a timely filed federal estate tax return. However, the election is permissive, not mandatory, meaning that ostensibly, an executor may exercise his or her discretion and decide not to make the election, which would forfeit the estate's opportunity to elect portability. The law does not permit a non-executor surviving spouse to file his or her own estate tax return for purposes of making the election. In harmonious families, this distinction may be of little or no importance because the deceased spouse frequently names the surviving spouse as the primary beneficiary and the executor of the estate. On the other hand, complex issues can arise in situations where the interest of the surviving spouse in the decedent's unused Exemption Amount must be balanced with the interests of other estate beneficiaries.

For example, consider a second marriage situation where the decedent's children, and not the surviving spouse, are the primary beneficiaries of the estate and the surviving spouse is not the executor. In such a case, the children may object to the time and expense required to file an estate tax return solely for the purpose of electing portability. Admittedly, the filing is of no benefit to the estate. The potential conflict is exacerbated in situations where familial relationships have deteriorated to the point where the estate beneficiaries are unwilling to provide any benefit to the surviving spouse unless compelled to do so under the law.

Since Congress introduced the concept of portability with the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (the "2010 Tax Relief Act"), attorneys preparing premarital and property-settlement agreements have been attempting to preserve their clients' rights to utilize the deceased spousal unused exclusion ("DSUE") for fear of what could happen in the event the deceased spouse's child from a prior marriage, or another person serving as executor in lieu of the surviving spouse, refuses to make the requisite election. The Oklahoma Supreme Court recently considered this issue, ultimately concluding that despite the purported discretion granted to executors under federal law regarding whether to make the election, the administrator had a fiduciary obligation to preserve the assets of the estate and to safeguard the surviving spouse's interest in the DSUE. The case resulted in a court order compelling the administrator to file a federal estate tax return for purposes of irrevocably electing portability of the decedent's DSUE.

In *Matter of Estate of Vose*, 390 P.3d 238 (Okla. 2017), the decedent's surviving spouse was initially appointed as administrator of her estate. The surviving spouse was subsequently removed and replaced by the decedent's son from a previous marriage when an antenuptial agreement manifesting the surviving spouse's waiver of his right to be appointed was produced. Paragraph 6.1 of the antenuptial agreement provided as follows:

Except as otherwise specifically provided in this Agreement, [Surviving Spouse] and [Decedent] mutually waive, discharge, and release each other to the fullest extent lawfully possible from any and all claims and rights, actual, inchoate, vested, or contingent, in law or equity, which he or she may acquire [sic] in or to the separate property, income, assets and liabilities of the other by reason of their marriage, under the laws of any state or the United States, including but not limited to . . . [t]he right to a distributive share in the estate of the other should he or she die intestate pursuant to Title 84 Okla. Stat. § 213, or otherwise.

In addition to a number of other petitions to the probate court, the surviving spouse requested a court order compelling the decedent's son to "timely prepare and file a federal estate tax return for purposes of irrevocably electing portability of the decedent's" DSUE. The decedent's son opposed the request, arguing that (1) the probate court lacked subject matter jurisdiction to order him to make the portability election, (2) deprivation of his choice regarding whether to elect portability implicated the federal preemption doctrine, (3) as a result of the surviving spouse's waiver of the right to any distributive share to the decedent's estate, the surviving spouse lacked standing to bring his request, and (4) the antenuptial agreement barred the surviving spouse from claiming any interest in the portability of the decedent's DSUE.

Under Oklahoma law, standing in a probate proceeding requires that the party in question have a pecuniary interest in the estate of the decedent. In *Vose*, the court held that the surviving spouse's interest in portability of the DSUE was independent of his ability to take as an heir, implying that an interest in the DSUE was "pecuniary" because the portability election would result in an increase to the surviving spouse's Exclusion Amount. One scholar has suggested that this analysis suggests the court's adoption of "a new legal theory that the portability election is not an estate asset, but that it allows the equivalent of a tax credit to the surviving spouse, gives the surviving spouse a pecuniary interest in the estate, and that failing to make this election wastes this asset." Howard M. Zaritsky, *Portability Reaches the State Courts with Surprising Results*, Koren Estate, Tax, and Personal Financial Planning Update (Apr. 2017).

In practice, this raises interesting issues regarding what consideration the executor should demand in return for his or her agreement to file the estate tax return solely for the purpose of electing portability. At a minimum, the executor should insist that the surviving spouse pay for any costs incurred in connection with the preparation and filing of the return, especially in situations where the surviving spouse is not the sole beneficiary of the estate. At a maximum, the DSUE would not be worth more than the amount of the unified credit ($2,141,800) to the surviving spouse.[i]

The antenuptial agreement in *Vose* was obviously silent as to portability because it was executed in 2006, long before portability was first enacted by the 2010 Tax Relief Act. The decedent's son argued that portability of the DSUE was encompassed by the language in the antenuptial agreement waiving "any and all claims and rights . . . which he or she may acquire [sic] . . . by reason of their marriage." Despite its opinion that the decedent and the surviving spouse "clearly intended a comprehensive waiver of their marital rights under the law as it existed at the time," the court held that portability was an unforeseeable change in the law. The court held that because an effective waiver requires the waiving party to have actual or constructive knowledge of the right he or she intends to waive, the surviving spouse's interest in the DSUE was not barred by the antenuptial agreement.

An interesting fact that was apparently not raised in this case is that the concept of portability was suggested to Congress in 2004 in a published Report on Reform of Federal Wealth Transfer Taxes prepared by the Tax Force on Federal Wealth Transfer Taxes, which was comprised of representatives from the American Bar Association's Section of Real Property, Probate and Trust Law, the American Bar Association's Section of Taxation, the American College of Tax Counsel, the American College of Trust and Estate Counsel, the American Bankers Association, and the American Institute of Certified Public Accountants. This report subsequently led to the first legislative proposal regarding portability, which was introduced in July of 2006 – the Estate Tax and Extension of Tax Relief Act of 2006 § 102 (HR 5970). With this in mind, another court might very well conclude that the language at issue is effective to waive the surviving spouse's interest in the DSUE because the enactment of portability was reasonably foreseeable at the time the agreement was executed.

Finally, the court noted that the surviving spouse had agreed to pay any costs associated with preparing the *Vose* estate tax return. Although the decedent's son argued that filing an estate tax return would extend the audit window for the estate, the court affirmed the district court's determination that any such risk was outweighed by the administrator's fiduciary duty to "preserve the assets of the estate and safeguard [the surviving spouse's] interest in the DSUE." Some have argued that an executor should not owe a fiduciary duty to a surviving spouse who is not a beneficiary of the estate. The Arkansas Supreme Court, however, has described an executor's fiduciary role as follows:

An executor or an administrator acts in a representative capacity, representing and acting for all parties and all interests in the estate. It is said that he occupies a double role, being not only the personal representative of decedent, but also, to a very great extent, the representative of the creditors, and of the heirs, legatees, or distributees.

Hobbs v. Cobb, 232 Ark. 594, 601, 339 S.W.2d 318, 322 (1960). Without a specific agreement to the contrary, it appears that the Arkansas courts would likely agree with the *Vose* court on this point.

In light of the issues raised by the *Vose* case, practitioners should consider the following:

1. Addressing their clients' wishes regarding the portability election in their last wills and testaments.
2. Encouraging clients to nominate independent trustees if the relationships among other family members are strained.
3. Revisiting previously drafted premarital agreements that attempt to waive rights that may be acquired in the future.

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[i] For 2017, the base amount of tax on taxable estates of $1 million and above is $345,800, and anything over $1 million is taxed at a rate of 40 percent (40%). For a taxable estate of $5.49 million (Exclusion Amount), $4.49 million would be taxed at the 40 percent (40%) rate ($1,796,000). $1,796,000 plus the base amount of $345,800 equals $2,141,800.