

With portability, you are not as concerned with the problem of the first spouse not having money. In fact, the best portability comes from an insolvent estate of the first spouse. They got no use of their exemption. The only problem is convincing them to file a return. A little tricky. Somebody has to pay for preparing the return. The problem of 1014(e) was addressed by Alan Gassman and a couple of other lawyers in a series of articles - where they created what they call "The Joint Estate Step Up Trust" (or "JEST"). Okay, I kind of like that acronym. I am not a big fan of acronyms, but at least it is a word. DSUEA is not a word, and I really do not like using it. At least JEST is something.

But the concept here looks a great deal like the tax basis revocable trust, with one very clever distinction, and that is that the assets of the donor surviving spouse that are includible only because of the General Power of Appointment (where the first spouse to die does not have enough assets to fully fund their exemption) to bring the estate up to the exemption amount, which are thus includible only because of 2041, and are attributable to the property that was owned by and contributed by the surviving spouse, will go into a non-marital trust that the surviving spouse is not a beneficiary of, and the rest is for marital deduction funding. That absolutely ought to work in terms of 1014(e).

You still have the question of whether the spousal gift is the moment before or the moment after, and when you are explaining the technique to the client in writing, you need to point out this one little tiny item of uncertainty. You can state that you think it unlikely that this will be a problem - that all the private rulings take favorable positions. All of them. There are none taking an unfavorable position. That's something. We can cite them, but we can't rely on them, but it is still something. And if you ever look at any of my recent development outlines, the first footnote involves a long thing about what courts have said - they always say they are not precedent, but we will rely on them anyway. So they have some significance.

Once the client can get past that one little piece of risk, I think the JEST is a great technique for what it is seeking to do. It is a way to minimize the problems of 1014(e). I commented earlier that you can accomplish the same concept if you are dealing with an inter-spousal gift within one year of death, you say "fine, the access I was given within one year of death are a little different - non-marital trust. It is a great technique-- - the cases I mentioned about the - whether or not it is really a general power - I had a debate with Mitch Ganns, who said - the rulings don't really say that, and I went back and read them, and said, yes they do really say in my opinion they really do say that, and while Mitch is one of those people I usually defer to in judgment - I really disagree on this one.

So, the JEST actually is a workable technique to get the basis step-up on the estate of the spouse to die, when they don't have money or enough money. It is a way around 1014(e) - the tax basis revocable trust - not so much.

The JEST is a material improvement.