

What Is the New York Estate Tax Exemption Portability Myth?

Understanding the critical differences between federal and New York law could save your family millions.



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The drastic difference between estate tax portability rules under U.S. federal law and New York law often create confusion for families across Long Island and beyond. Many people believe they can automatically transfer any unused estate tax exemption between spouses, but New York's approach differs significantly from federal law. This common misconception can lead to significant unnecessary taxes for families. Understanding these differences becomes critical when developing comprehensive estate

planning strategies that protect your family's wealth.

Current Federal Estate Tax Exemption vs. New York Estate Tax Exemption

Under federal law, in 2026, an individual can transfer up to \$15 million in assets to their beneficiaries at death without the estate incurring federal estate tax. In contrast, under New York law, in 2026, an individual can only transfer up to \$7.35 million at death without triggering New York estate tax. Clearly, this means that many more estates may face New York estate tax exposure even if there is no federal estate tax concern.

For many married couples, their estate plan often involves the desire to leave their estate to the surviving spouse. In most cases, there are no federal or New York estate tax consequences upon the first spouse's death due to the unlimited marital deduction. However, this just defers estate tax issues until the surviving spouse's death when the combined assets are to pass to other family members such as children or grandchildren. By leaving assets directly to the surviving spouse, the deceased spouse's estate tax exemptions under federal and New York law are not utilized unless specific planning steps are taken. As a result, this can lead to unforeseen estate tax consequences upon the surviving spouse's death. Federal and New York law have drastically different approaches to the treatment of a deceased spouse's unused estate tax exemption. It's important to understand these differences because they have significant implications for a married couple's overall estate planning strategy.

Federal Portability vs. New York Reality

Federal law allows surviving spouses to claim any unused portion of their deceased spouse's federal estate tax exemption. Therefore, if a spouse passes away without fully using their exemption, the remaining exemption amount can be added or "ported" to the surviving spouse's own exemption, which reduces or eliminates estate taxes on the surviving spouse's death. This concept of "portability" effectively increases the exemption amount available to the surviving spouse – potentially up to twice the individual amount depending on how much exemption the first spouse left unused. To take advantage of portability, the executor of the deceased spouse's estate must file a timely federal estate tax return (Form 706), even if no estate tax is owed. Many couples mistakenly assume that New York follows this same concept.

New York law does NOT allow for portability of any unused estate tax exemption from a deceased spouse. Instead, New York has a "use it or lose it" approach. What does this mean in reality? This means that if the first spouse to die does not fully utilize their estate tax exemption, the unused portion is effectively lost and cannot be transferred to the surviving spouse. Therefore, the surviving spouse cannot take advantage of any unused exemption and must rely on their own individual estate tax exemption. However, a properly structured estate plan can help couples in New York maximize both spouses' exemptions and reduce or eliminate potential estate tax exposure.

This significant difference between federal and state law can create a trap for wealthy families who rely solely on federal portability elections. They may face substantial New York estate taxes that could have been avoided with proper estate planning techniques.

The Real Cost of Misunderstanding and Improper Planning

Consider a married couple who live in Suffolk County with \$10 million in combined assets, including their Northport waterfront home and investment portfolio. Under the current federal law, they might feel comfortable simply relying on portability to shelter their wealth from estate taxes. With properly elected portability, they could currently pass up to \$30 million to their children without any federal estate tax concerns.

Although they may not have a federal estate tax concern, they easily face punishing New York estate taxes if they simply leave their estate outright to the surviving spouse and do not have proper planning in place. Their combined estate of \$10 million exceeds the current \$7.35 million New York estate tax threshold. New York's estate tax rates start at 3.06% and climb as high as 16% for the largest estates. Remember, New York does not allow for portability of the deceased spouse's unused exemption. This means the surviving spouse would only be able to utilize his or her own \$7.35 million estate tax exemption at his or her death if a well-designed plan is not in place. This would mean the surviving spouse's estate is \$2.65 million over the New York threshold and the entire estate would be taxed.

If this couple has a solid estate plan in place which contemplates future estate tax issues, they can eliminate or drastically reduce estate tax liability for their loved ones upon the surviving spouse's death.

Common Planning Strategies to Preserve Estate Tax Exemptions

Without portability in New York, there are different approaches to creating a smart New York estate plan that will help preserve both spouse's estate tax exemptions. Including a traditional credit shelter trust (also known as a bypass trust) as part of the plan remains an extremely valuable tool for New York residents, even when federal considerations might suggest more simplistic strategies. This trust can hold assets equal to the first spouse's available New York estate tax exemption (e.g., currently, \$7.35 million) which effectively utilizes the deceased spouse's exemption and allows the surviving spouse access to trust funds under appropriate circumstances. Upon the surviving spouse's death, whatever assets are left in the credit shelter trust pass to the desired beneficiaries, estate tax-free; essentially, these trust assets are removed from the surviving spouse's estate which reduces or eliminates estate taxes.

Another planning approach involves lifetime gifting strategies to remove assets out side of the estate. This requires careful coordination

with federal and state gift tax and estate tax laws but can achieve favorable tax results for many New York families.

It is important to note that even with a properly drafted estate plan, the time to make certain choices and/or elections is critical. If the limited window to implement the legal strategy is missed, the surviving spouse's options moving forward become significantly limited.

Geographic Considerations for Long Island Families

Simply owning real estate on Long Island creates unique challenges for estate planning, especially considering the substantial increase in property values over the last several years. A family home in the Hamptons or Sag Harbor can easily be worth several million dollars, which automatically consumes a large portion of the New York estate tax exemption.

These high property values, combined with retirement accounts, business interests, and investment portfolios, quickly push Long Island families into estate tax territory under New York law, even when federal estate taxes are irrelevant.

Additionally, the seasonal nature of some Long Island properties adds complexity. Families with vacation homes might face questions about property valuation, particularly for properties with limited seasonal access or unique characteristics.

Why Professional Guidance is Essential

Estate planning mistakes compound over time. Families who discover portability limitations after the first spouse's death face restricted options and potentially higher costs.

The interaction between federal and New York rules creates genuine complexity that requires specialized knowledge. General or basic estate planning approaches may miss state-specific opportunities or create unintended consequences.

We encourage families with substantial assets to address these issues proactively. Early planning provides more options and typically achieves better results than crisis-driven strategies implemented after problems arise.

Each family's situation presents different challenges and opportunities. Asset types, family dynamics, charitable interests, and business considerations all influence the optimal planning approach. Professional guidance can align planning strategies with your specific circumstances while eliminating potential missteps driven by misconceptions about state estate tax rules.



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Law Partner Jaclyn Kramer primarily practices in the areas of Elder Law, Estate Planning and Medicaid planning at Futterman Lanza, LLP. Jaclyn Kramer assists families in preparing for any eventuality using asset protection, will preparation, revocable and irrevocable trusts, Powers of Attorney, Health Care Proxies and Living Wills. This compassionate and attentive attorney generates a sense of calm and understanding in her relationships with clients and their families. Jaclyn works mainly in the Smithtown office.

Futterman Lanza, LLP is an elder law and estate planning law firm with staffed offices in Smithtown, Melville and Garden City, New York with over 20 years of experience and dedication to the community. You can learn more about Jaclyn and the firm by visiting www.trustedattorneys.com