

Practitioners Describe Way Around ‘Black Widow’ Gift Tax Limitation

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By Jonathan Curry

Wealthy widows and widowers on the lookout for other partners can multiply their estate and gift tax exclusions thanks to taxpayer-friendly regulations that Congress has declined to reverse so far.

“Congress was worried about the ‘black widow’ who kept marrying people to accumulate basic exclusion amounts and applicable exclusion amounts, so they said you can only use the applicable exclusion amount of your last deceased spouse,” said Mickey R. Davis of Davis & Willms PLLC April 25, at an American Law Institute Continuing Legal Education estate planning conference in Austin, Texas.

“But the IRS seems to give us a much more generous interpretation of that,” he said, and Congress did not use the Tax Cuts and Jobs Act ([P.L. 115-97](#)) or other opportunities to change the statute.

“Presumably Congress has tacitly approved these regulatory interpretations,” which are “incredibly taxpayer-favorable,” a presentation from Davis & Willms concluded.

Portability rules applicable to the estate and gift tax allow a widowed spouse to add or “port” the deceased spouse’s unused basic exclusion amount to their own exclusion amount, called the deceased spousal unused exclusion (DSUE) amount. [Section 2010\(c\)\(4\)\(B\)\(i\)](#) says that if a widow/widower marries again and their second spouse then also dies, they typically can claim additional DSUE only from the last deceased spouse, preventing them from “stacking” exemptions from multiple spouses.

However, that doesn’t mean that an enterprising widow or widower, through careful timing of gifts, can’t use up the extra DSUE amounts from multiple deceased spouses, according Melissa J. Willms, also of Davis and Willms.

“The key part about it is you can have a surviving spouse remarry, but they’re still going to hold onto any DSUE that they got ported from the previous marriage,” said Willms.

That means that until the second spouse dies, the widow/widower will continue to hold onto the additional DSUE amount from their first spouse and can make gifts that — thanks to taxpayer-friendly reg. [section 25.2505-2\(b\)](#) — first use up that additional exclusion amount before using up their own basic exclusion amount, according to Willms. If, however, they do not take advantage of the extra DSUE from their first deceased spouse to make gifts and then their second spouse dies, then their DSUE shifts to whatever unused exclusion amount the second spouse had, Willms said.

Davis observed that a person with DSUE doesn't even have to wait for the deceased spouse's executor to file an estate tax return to start making gifts because the DSUE stems from the date of death. "You can [make gifts] on the way back from the funeral if you want to," Davis said, before adding, "Well, maybe you ought to wait a little bit longer than that." He explained that if the executor doesn't file an estate tax return with the portability election, "it could get a little dangerous."

Davis also said that there has been some research done into the best way for clients who can afford to make gifts using DSUE to do so, which indicates that the surviving spouse should give as much of the DSUE amount away as soon as possible into a generation-skipping-transfer-tax-exempt grantor trust. "By having it in a grantor trust, the grantor gets to pay the income tax on the trust's income tax bill. It's a very, very effective way to shift wealth quickly and effectively by using that DSUE amount sooner rather than later," he said.

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