

Welcome to the inaugural issue of our *IPB Tax, Trusts & Estates* newsletter!

For over 80 years, the Tax, Trusts & Estates attorneys at Ivins, Phillips & Barker have been helping clients navigate increasingly complex federal, state and international tax and non-tax laws as they transfer wealth to succeeding generations. This periodic publication will highlight developments and trends from a practical viewpoint based on our experience. Our goal is to share our insights with wealth and philanthropy advisors, corporate fiduciaries, accountants and other advisors in a way that is accessible and actionable. We welcome your feedback or suggested additions to our mailing list (ipb@ipbtax.com).

Meet Ivins [Tax, Trusts & Estates Attorneys](#). We have broad experience with high net worth client matters, family businesses and domestic and international tax issues:

Eric R. Fox • Family Businesses / Wealth Planning

H. Carter Hood • Estate, Gift, Income and GST Tax Planning / Family Businesses / Post-Mortem Planning

Brenda Jackson-Cooper • Estate, Gift and GST Tax Planning / Family Businesses / Same-Sex Couples

Douglas M. Andre • International Tax/Estate Planning and Administration / Business Planning

Kasey A. Place • Estate Planning and Administration / Tax Returns / Foundation Formation and Compliance

Linda Kotis • Estate, Gift, and Charitable Planning / Trust Administration / Real Property Transfers

A NOTE ON (POSSIBLE) ESTATE TAX REPEAL

New year, new administration, new Congress, and a new tax code? Perhaps. News reports indicate renewed interest in repealing the federal estate tax as part of broader tax reforms being considered by Congress. Our colleague, Hank Gutman (IPB Corporate Tax), shares his wisdom on corporate tax reform [here](#). Whether or not changes are made to the estate tax, other tax and non-tax issues continue to be of importance to our private wealth clients. Advisors should remain aware of the significance of state estate and inheritance taxes, income tax planning, international taxes, trust and probate administration, post-mortem planning, and family dynamics, regardless of the existence of a federal estate tax.

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PORTABILITY AND SIMULTANEOUS DEATH BY KASEY A. PLACE

The advent of portability, which became permanent in 2013, fundamentally changed the way we do estate planning. Portability allows an individual to transfer any unused federal estate tax exemption to his or her surviving spouse at death. Prior to portability, almost every wealthy couple's estate plan incorporated both a credit shelter trust and a marital deduction bequest. Now, many plans rely on portability and leave everything to the surviving spouse outright or in a single marital trust.

Portability only works if one spouse is survived by the other. Under virtually every state's default rule, if spouses die in a common disaster and the order of death cannot be determined, there is no surviving spouse. Each individual's spouse is deemed to predecease him or her with respect to that individual's property. As a result, portability may be unavailable.

Imagine that Husband's (H's) will leaves all of his property (worth \$1 million) to Wife (W), if she survives him and W's will leaves all of her property (worth \$9.98 million) to H if he survives her. H and W are in a massive car crash with no witnesses. Both are dead when paramedics arrive on the scene and there is no way to prove who died first.

If state law applies, neither H nor W has a surviving spouse and it is possible that neither of their estates qualifies for portability. The couple could owe nearly \$1.8 million more in federal estate tax than anticipated. State estate tax could be higher as well.

Luckily, state law default rules can be avoided with proper drafting. For portability to work correctly the spouses' wills and revocable trusts should include a provision naming one of the two as survivor in the event of simultaneous death. H's documents might say "[i]f my Wife and I die simultaneously or under such circumstances that the order of our deaths cannot be determined, my Wife shall be deemed to have survived me." W's documents would say the opposite: "[i]f my Husband and I die simultaneously or under such circumstances that the order of our deaths cannot be determined, my Husband shall be deemed to have predeceased me."

Prior to portability, documents often named the less wealthy spouse as survivor to ensure he or she had enough property to use his or her estate tax exemption. After portability, the reasons for naming the less wealthy spouse as survivor are less compelling and, in many cases, the tax results will be the same no matter which spouse is named as survivor, as long as one spouse is so named.

There are a surprising number of considerations that go into drafting simultaneous death provisions. Your clients should review these provisions with their attorneys to ensure they function properly in light of portability.

STATE ESTATE TAX ALERT

New Jersey increased its state estate tax exemption to \$2 million from \$650,000, effective January 1, 2017. The estate tax will be eliminated for decedents dying on or after January 1, 2018. The inheritance tax, which applies to bequests to individuals who are not a decedent's children, grandchildren or more remote descendants, remains intact. The new law provides an opportunity for residents and non-residents who own New Jersey property to consider changing their estate plans and title to assets to take advantage of the reduction in state taxes.

INTERNATIONAL COMPLIANCE CORNER BY DOUGLAS M. ANDRE

The following table highlights filing deadlines for the more commonly filed international information returns. Several deadlines coincide with the taxpayer's income tax return filing deadline while others are filed separately. Note that the deadline for the Foreign Bank and Financial Accounts report has changed beginning for calendar year 2016. Filing a late international information return can result in greater than otherwise applicable penalties and can also extend the limitations period for the entire tax return.

Form and Information Return	Purpose of Form	2016 Tax Year Filing Deadline
Form 3520 Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts	Required by U.S. person to report contributions to or distributions from foreign trusts and large gifts from foreign persons and estates.	Due date is same as taxpayer's income tax return, including extensions. Form 3520 filed for U.S. decedent is due on due date of Form 706 is due (including extensions).
Form 3520-A Annual Information Return of Foreign Trust With a U.S. Owner	Applies to foreign trust with at least one U.S. owner. Required by each U.S. person who is treated as owner of any portion of a foreign trust under grantor trust rules.	March 15, 2017. (6-month extension available by filing Form 7004).
Form 8938 Statement of Specified Foreign Financial Assets	Required by U.S. persons who own "specified foreign financial assets" exceeding certain threshold values.	Attached to taxpayer's annual income tax return and filed by due date (including extensions) for that return.
FinCEN Form 114 Report of Foreign Bank and Financial Accounts ("FBAR")	Required by U.S. persons with a financial interest in or signature authority over certain foreign financial accounts with an aggregate value in excess of \$10,000.	April 18, 2017. FBAR is filed electronically and filing deadline is a "received by deadline." Extension available until October 15.
Form 8621 Information Return by a Shareholder of a Passive Foreign Investment Company ("PFIC")	Required by U.S. person that is a direct or indirect shareholder of a passive foreign investment company.	Attached to taxpayer's annual income tax return and filed by the due date (including extensions) for that return.

NONJUDICIAL SETTLEMENT AGREEMENTS BY LINDA KOTIS

Trust Scenario: Suppose a trust beneficiary calls about a Maryland irrevocable trust created by his father. His father just died and the trust now owns an interest in his father's cattle ranch in Nevada. The current trustee has been satisfactorily handling the securities owned by the trust, but is concerned about managing the interest in the ranch. The beneficiaries (three brothers) would like to add a new co-trustee with specific powers to manage this one asset, because of his extensive experience as the former ranch foreman. The trust is silent on the appointment of co-trustees or a special trustee to manage an active business.

Prior to October 1, 2016, the interested parties would have had to petition the court to add a co-trustee and additional trustee powers. But now, with Maryland's enactment of a new nonjudicial settlement agreement (NJSAs) statute, Md. Code, Est. & Trusts § 14.5-111, there is another solution. All the parties are thrilled to learn they can use the NJSAs to resolve their co-trustee issues, keep their affairs out of the public eye, and avoid the delay and expense of court proceedings.

New Tool: Based on Uniform Trust Code Section 111, the NJSAs statute is a valuable tool for modifying trusts or addressing construction of provisions where a trust is silent or unclear. Maryland joins the ranks of 37 other jurisdictions, including Delaware, Florida, Massachusetts, and New Hampshire, by authorizing such agreements. The NJSAs may cover the following:

- interpretation or construction of a trust;
- approval of a trustee's report or accounting;
- direction to a trustee to refrain from a particular act or granting a specific power to a trustee;
- trustee resignations, appointments, and compensation;
- transfer of place of administration of a trust; and
- liability of a trustee for an action relating to a trust.

This list is non-exhaustive, and thus the agreement may cover additional matters. This is the case as long as the NJSAs does not violate a material purpose of the trust and the court could otherwise approve the terms of the agreement. Interested parties must participate. This could mean current beneficiaries, contingent and remainder beneficiaries, trustees, and settlors.

How to Use NJSAs: It depends on the status of the trust. An attorney drafting a new revocable trust or irrevocable trust could ask his client about adding a clause identifying material purposes of the trust. The settlor could forbid the use of an NJSAs altogether. For an irrevocable trust already in place, the NJSAs could address what may have been overlooked in the initial drafting. Note that there may be potential tax consequences associated with an NJSAs, so parties should consult a qualified practitioner when considering the use of this tool. For more information on NJSAs, see "*Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*," in the March/April 2017 issue of *Probate & Property*. [\[Link\]](#)