JEFFREY BURR
ESTATE PLANNING & PROBATE ATTORNEYS

ESTATE & TAX MATTERS

PORTABILITY
Preserving Now for Later

"Portability" was added to the Internal Revenue Code ("IRC") in 2010 by Congress for the 2011 and 2012 tax years. In 2013 the American Taxpayer Relief Act was signed into law which made portability permanent for 2013 and future years. Portability allows a surviving spouse to utilize his or her deceased spouse's unused "Applicable Exclusion Amount" ("AEA") during the surviving spouse's lifetime or at death. Notably, each spouse's AEA will be $11.4 million in 2019 and is expected to increase year after year by the rate of inflation. Accordingly, portability can be a very useful estate planning tool as it can effectively shield $22.8 million from estate tax for married couples where one spouse passes away in 2019.

In order to take advantage of portability and ensure that the exemption amount that belonged to the first spouse to die, officially known as the "Deceased Spouse's Unused Exemption Amount" ("DSUEA"), is preserved, certain requirements must be met. In particular, the executor of the estate of the deceased spouse (usually the surviving spouse) must make a portability election on a timely filed Estate Tax Return (Form 706). This is the case even if an Estate Tax Return is not otherwise required to be filed.

The Tax Cuts and Jobs Act of 2017, which provides for the high AEA of $11.4 million per person in 2019, will sunset January 1, 2026, if a new law is not passed to extend it. It is anticipated that if the law is not extended, the AEA will be reduced back to its pre-2018 amounts of roughly $5.45 million, adjusted for inflation.

The high exemption for 2019 provides a unique planning opportunity for families, where a surviving spouse can preserve an additional AEA of $11.4 million for use during his or her lifetime or at death even if he or she passes away after the AEA is reduced back to its pre-Tax Cuts and Jobs Act of 2017 levels on January 1, 2026. In essence, the surviving spouse can get an $11.4 million estate-tax free 'coupon' to use in addition to his or her own to make gifts during life or at death.

For example, John and Mary Smith had a community estate worth $20 million dollars in 2019. Neither had used any AEA during their lifetimes. Mary Smith passes away on January 1, 2019. The value of Mary's one-half of the estate was $10 million dollars. Because her estate was less than the AEA of $11.4 million, no Form 706 is required to be filed and because the estate all went to John Smith as her husband, no tax was due because of the unlimited marital deduction.

John is a prudent investor and in 2028, when he passes away, his estate is worth $30 million. John and Mary's three children were the beneficiaries of John's estate.

NO PORTABILITY

Because Mary's estate was less than the AEA, John does not file a Form 706 to elect portability in 2019. When John dies in 2028, with an estate of $30 million, the AEA had been reduced to $6 million and the estate tax rate was 40%.

Over...

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...continued.

With exemption = $24 million, $24 million - $9.6 million ($24 million x 40% estate tax rate) = $14.4 million + $6 million AEA = $20.4 million.

WITH PORTABILITY

John, with the help of his advisors, elects to file a Form 706 for portability in 2019 when Mary passes away, preserving her unused $11.4 million AEA. When John dies in 2028, with an estate of $30 million, the AEA had been reduced to $6 million and the estate tax rate was 40%.

With both his and Mary's AEA available, John's children received $24.96 million at his death – $4.56 million more than if John had not filed the Form 706 to preserve Mary's unused AEA at her death, calculated as follows: $30 million total estate - $17.4 million exemption (John's $6 million plus Mary's $11.4 million) = $12.6 million, $12.6 million - $5.04 million ($12.6 million x 40% estate tax rate) = $7.56 million + $17.4 million AEA = $24.96 million.

Thus, even if no Estate Tax Return (Form 706) is required at a first spouse's death because that first spouse's AEA falls below $11.4 million in 2019, advisors and families should discuss the benefits and potential millions of dollars' worth of savings that may be preserved through filing a form 706 to preserve portability.

To discuss the planning opportunities surrounding portability, please give our office a call today and set up a complimentary consultation with one of our experienced attorneys.◆

[1]*26 C.F.R. § 20.2010-2T(a)(2).*
[2]*This number is for illustration purposes only, assuming that no law is passed to extend the Tax Cuts and Jobs Act of 2017 and the AEA reverts back to its pre-Tax Cuts and Jobs Act of 2017 levels adjusted for inflation.*

ARETHA FRANKLIN: QUEEN WITHOUT A WILL

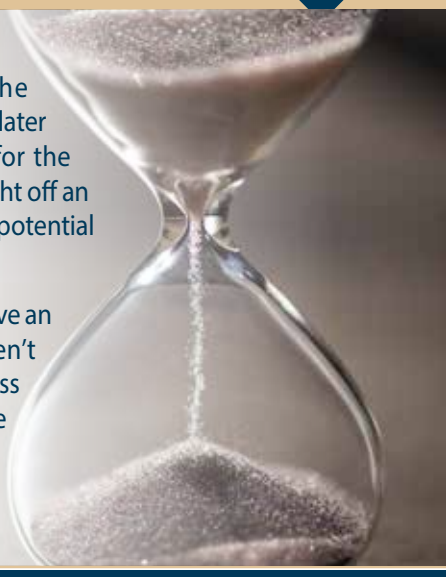
Aretha Franklin, the Queen of Soul who died August 16, 2018 at the age of 76 of pancreatic cancer, was worth approximately $80 million dollars. She had no Will or Trust in place.

Ms. Franklin was not married and is survived by her four sons, one of whom has special needs.

With someone with such a large estate as Ms. Franklin's, oftentimes people surface claiming their fair share of the estate. This can create quite a mess, such as it did with Prince's estate when he passed away in 2016.

According to the Washington Post, her lawyer of almost three decades, Don Wilson, tried convincing her to not just do a Will, but a Trust as well. He indicated she never said no, she just didn't get around to doing it. The problem with "doing it later" is later never comes. Planning now for the inevitable can help lift the weight off an heir's shoulders and avoid any potential messy battles.

If you have clients who don't have an estate plan because they haven't "gotten around to it," please pass on our contact information. We would be happy to give them a free 30-minute consultation and peace of mind.◆



TAX CONTROVERSY

The United States federal tax system is perhaps one of the most complicated, ever-evolving systems in the country. The State of Nevada, of course, has its own tax system. Both have ramifications for individuals and businesses. With that comes extreme complexity, yielding plenty of room for tax controversies. The attorneys at JEFFREY BURR navigate these complexities every day, helping clients with very important issues to best possible outcomes. Tax controversy and resolution involve a number of topics. If your clients have a tax issue, please urge them to contact Derek Hatch, Esq. at 702-433-4455.◆

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