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Portability: An Update for Estate Planners

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**Why Estate Planners Should Consider a New Framework in Light of
Portability's Permanence**

By

Richard S. Franklin
McArthur Franklin PLLC
Washington, D.C.

Lester B. Law
Abbot Downing
Naples, Florida

“With portability’s permanence, the ‘traditional’ by-pass trust generally does not achieve the best income and estate tax results. Thus, other than for non-tax reasons, the use of ‘traditional’ by-pass trusts may not be the best estate planning vehicle.”

Richard Franklin and **Lester Law** provide commentary on why an estate planning advisor should consider a new framework for estate planning in light of portability’s permanence. Richard and Lester have previously contributed to **LISI** and have written on this topic extensively.

Richard Franklin, Esq., is a member of **McArthur Franklin PLLC** in Washington, D.C. He focuses on estate planning, trusts and estate administration. He is a member of the District of Columbia and Florida Bars, is a Fellow of the American College of Trust and Estate Counsel, and is Co-chair of the ABA RPTE Section’s Estate and Gift Committee. He serves on the ACTEC Transfer Tax Study Committee and on the Steering Committee for the DC Bar’s Estates, Trusts & Probate Law Section. Richard was one of the primary authors of the articles published by the ABA-RPTE Section, titled *Portability – The Game Changer*, *Portability – The Regulations*, and *Portability – Part One*, and one of the major contributors to four sets of ABA-RPTE’s comments to Treasury on portability. He has also published articles on portability, been quoted in various publications on the subject, and spoken on portability for many CLE conferences, estate planning councils and other groups.

Lester Law is a director at **Abbot Downing**, a **Wells Fargo** business, who is responsible for the delivery of multi-family office, and estate and financial planning services to ultra-high-net-worth clients. Lester is board certified by the Florida Bar as a specialist in Wills, Trusts and Estates Law. Lester is the co-chair of the ABA RPTE Section’s Income and Transfer Tax Group’s Estate and Gift Tax Committee. Lester is also the co-chair of the IRA and Insurance Committee for the Florida Bar’s Real Property Probate and Trust Law Section. Lester has written and presented on portability extensively. Lester co-authored *Portability - The Game Changer*, *Portability – The Regulations* and *Portability – Part One*. Lester lead the effort with Richard Franklin on writing comments to Treasury before and after the new proposed and temporary proposed regulations were promulgated. Lester has spoken

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on portability at CLE conferences and meetings of the RPTE Section of ABA, numerous bar associations, ACTEC, estate planning councils and other groups.

Here is their commentary:

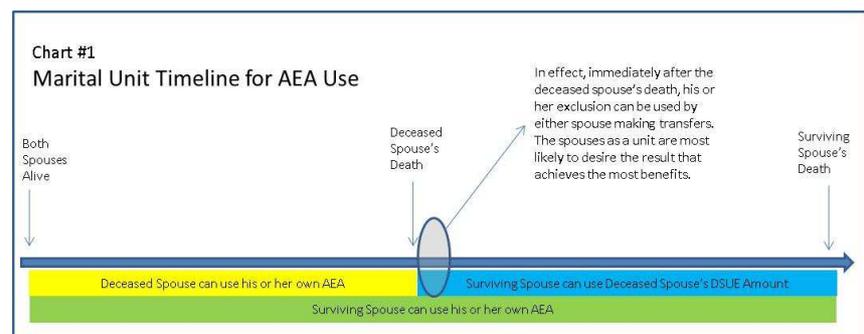
EXECUTIVE SUMMARY:

With the permanency of portability, a married couple can use their combined applicable exclusion amounts at any time before the surviving spouse dies (see Chart #1). This article proposes a new framework for estate planning built upon the freedom of exclusion-use that portability provides. A “marital unit” approach to exclusion-use is suggested, which is consistent with the mindset of most married couples. As the desire to achieve favorable tax results drove the historical development of ‘traditional’ by-pass trust planning,¹ the desire to achieve even better estate and income tax results is driving estate planning towards portability planning, with its more efficacious tax results.

COMMENT:

Before plunging into this new framework, a three preliminary points are apropos.

1. A ‘traditional’ by-pass trust² does not achieve the best income and estate tax result anymore. There are two primary reasons for this.



- First, for couples whose aggregate estate is well below the couples' aggregate exclusions (i.e., \$10.5 million in 2013 and \$10.68 million in 2014), a portability plan offers the advantage of enabling a basis adjustment for the combined aggregate estate without any increase in estate taxes.³ A traditional by-

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pass trust that escapes estate taxes upon the surviving spouse's death offers no tax benefit since the combined estate will be less than their combined applicable exclusions. Rather, the traditional by-pass trust is burdened with providing assets to the successor beneficiaries having an unadjusted basis upon the surviving spouse's death.

- Second, for couples whose aggregate estate is likely to exceed the couples' aggregate exclusions, a more complex portability plan will produce greater income and estate tax results than a traditional by-pass trust plan. At the end of 2011, we developed the concept that portability could be affirmatively used as a planning tool to create greater income and estate tax benefits, without losing the non-tax benefits of a by-pass trust. This is a strategic approach beyond the view of portability as a technique to salvage an otherwise poorly crafted estate plan.⁴ Our March 2012 article, *Portability's Role in the Evolution Away from Traditional By-Pass Trusts to Grantor Trusts*,⁵ explained a new intentional use of portability to take advantage of transferring the deceased spouse's unused exclusion (DSUE) amount to the surviving spouse, who could then use the DSUE amount to immediately make gifts to an irrevocable grantor trust for the descendants. This approach garners the benefits of grantor trust status that a by-pass trust does not provide. Let's call this the "Surviving Spouse (SS) Gift Plan."⁶

To confirm that the SS Gift Plan is superior to the by-pass trust, we modeled the various trust strategies.⁷ The modeling is compelling and it demonstrates there is a great deal of flexibility to the SS Gift Plan. For example, the SS Gift Plan works to improve the income and estate tax results (i.e., over the results obtained with a traditional by-pass trust) even if it's employed for only part of the deceased spouse's exclusion. The modeling supports widespread use of this strategy. The SS Gift Plan has achieved acceptance as a viable estate planning strategy. For couples who are subject to the Federal estate tax, it's hard to overstate the tremendous benefits of using grantor trusts.