WEATHERFORD THOMPSON
Est. 1875 ATTORNEYS AT LAW

130 WEST 1ST AVE.
P.O. BOX 667
ALBANY, OR 97321

PHONE: (541) 926-2255
FAX: (541) 967-6579
E-MAIL: scowgill@wtlegal.com
WEBSITE: www.wtlegal.com

April 3, 2025

House Committee on Revenue

RE: Testimony on HB 3934 - Estate Tax Portability

I am an attorney with 10 years of experience practicing estate planning and administration in Albany. I am writing in support of HB 3934 and the substantially similar bill HB 3688.

The concept of estate tax portability allows a first deceased spouse to transfer his or her unused estate tax exclusion to a surviving spouse. Under Oregon law a married couple should be able to exclude $2 million from the Oregon estate tax; however, most couples need to employ complex estate planning to actually use both of their $1 million exclusions. This portability bill would eliminate the need for most Oregonians to adopt a complex estate plan and align Oregon law with Federal law, which has allowed portability since 2011.

The Current Problem

Almost all of my married clients have substantially similar estate distribution plans: upon the first spouse's death, they direct that all of the deceased spouse's assets pass to the surviving spouse, and upon the surviving spouse's death, all of the assets pass to their children.

This common desire is recognized under both the Federal and Oregon estate tax laws in that the estate of the first deceased spouse is allowed an unlimited marital deduction for property passing to a surviving spouse. 26 U.S.C. § 2056. Meaning that we recognize a marital duty and desire for a deceased spouse to provide financial support for a surviving spouse without imposing an estate tax on the transferred assets. Adopting portability would allow the transfer of the first deceased spouse's exclusion along with his or her assets.

When I first meet with married estate planning clients, we discuss the $1 million Oregon estate tax exclusion that is available to each spouse and the implication that they can pass a total of $2 million to their children before paying Oregon estate tax. Despite this implication, many couples end up paying Oregon estate tax even when they pass less than $2 million to their beneficiaries. This occurs because the surviving spouse ends up owning all of the couple's assets but is only able to use his or her $1 million exclusion, while the first $1 million exclusion is completely wasted.

A bypass trust is the current tool used to address this problem. A bypass trust is an irrevocable trust formed from the assets of the first deceased spouse for the purpose

of utilizing his or her $1 million exclusion. The trust typically allows distributions of income to the surviving spouse for his or her lifetime.

Although bypass trusts accomplish their intended purpose, they are very complex and require significant legal and accounting fees to establish and maintain. Additionally, a bypass trust estate plan may not be practically available to a couple depending on the form of their assets. For example, qualified retirement accounts such as IRAs cannot be allocated to a bypass trust without accelerating the required taxable withdrawals.

Oregon should adopt portability so that all couples with less than $2 million in assets are taxed the same, regardless of the form of their assets or the use of a bypass trust.

The average household net worth for households with one person over the age of 55 is between $1.57 million and $1.79 million[1] This implies that most retirement age couples need to have an estate plan that includes a bypass trust in order to fully utilize the $1 million Oregon estate tax exclusion granted to each spouse.

Executor vs. Personal Representative Amendment

Section 2 of the Bill twice refers to the person who files an estate tax return as the "personal representative," instead of the broader and more common term "executor." The bill should be amended to use "executor" for consistency with ORS Chapter 118 and to remove the implied administrative burden of opening unnecessary probates.

For Oregon estate tax purposes, the term "executor" means "the executor, administrator, personal representative, fiduciary, or custodian of property of the decedent, or, if there is no executor, administrator, fiduciary or custodian appointed, qualified and acting, then any person who is in the actual or constructive possession of any property includable in the estate of the decedent for estate tax purposes whether or not such estate is subject to administration." ORS 118.005(4). Federal estate tax law also uses the term "executor" in a similarly broad manner. *See* 26 U.S.C. § 2203.

Most married couples own their property jointly, with beneficiary designations, or in trusts so that a probate is often not necessary after the death of the first spouse. Use of the narrow term "personal representative" implies that *only* a court appointed personal representative may take advantage of the portability election. This would involve opening a "no asset" probate merely to obtain the authority to file an estate tax return to elect portability.

---

[1] ADITYA ALADANGADY, ET AL., BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, CHANGES IN U.S. FAMILY FINANCES FROM 2019 TO 2022 12 (2023).

Features of Federal Portability Not Included in Current Bill

Under Federal law, if a decedent's gross estate is less than the exemption amount and the only purpose for filing an estate tax return is to elect portability, the executor is granted additional flexibility in making a portability election. First, an executor has up to five years to file the estate tax return. Rev. Proc. 2022-32. Second, an executor may estimate the value of estate assets passing to a surviving spouse under the marital deduction. Treas. Reg. § 20.2010-2(a)(7)(ii).

I recommend that the bill be amended to allow the Oregon Department of Revenue to adopt rules to align the Oregon portability election process with the Federal portability election process for estates with assets less than $1 million. This would especially help when the first spouse to die has a modest estate and the surviving executor may not be aware of the need to file an estate tax return to claim a portability election.

Very truly yours,

Scott Cowgill

Scott G. Cowgill