

# THE DUFFORD WALDECK QUARTERLY

A NEWSLETTER FOR OUR CLIENTS

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FIRST QUARTER

DUFFORD, WALDECK, MILBURN & KROHN, L.L.P.

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## THE DEATH OF ESTATE PLANNING

by William H. T. Frey

In January, Congress extended the \$5 million estate and gift tax exemption “permanently” and adjusted it for inflation (for 2013 the exemption amount is \$5.25 million). In addition, Congress extended the portability of the exemption between spouses. In brief, if a spouse dies without having done any planning, the estate tax exemption of the deceased spouse can be transferred to the surviving spouse, basically allowing the surviving spouse to shelter \$10.5 million from estate taxes. Does the ability to transfer the exemption of the first spouse to die eliminate the need for estate planning? In brief, no; it provides relief for those couples who do no planning prior to a spouse’s death, but there are risks in relying upon the portability of the exemption as a substitute for estate planning.

From a practical standpoint, if people avoid estate planning because they think the tax issues are no longer a factor in their need to plan, they may well miss planning opportunities that involve non-tax issues and are normally discussed and documented as part of the estate planning process. These issues include who will administer their estate, division of personal effects, planning for the transition of control of their family business, determining who will handle their affairs if they are disabled, and providing protection for beneficiaries who are minors or otherwise incapable of handling their affairs. Even if you believe estate taxes will not be a factor in your estate plan, there are many non-tax issues involved in passing your estate to your heirs; a failure to plan can result in avoidable expense, family disputes, and a failure to carry out your desires.

However, even from a tax standpoint, the large exemption and portability create risks that are not often appreciated. Here is a chart illustrating the benefits and risks of relying upon portability of the exemption instead of the traditional family trust (also sometimes called the credit shelter, bypass or “B” trust) structure.

	Portability	Family Trust
Amount Protected (2013)	\$5.25 million	\$5.25 million
Appreciation Protected	No	Yes
Costs of Trust Administration (such as Trustee fees and additional tax returns)	No	Yes
Planning Required (Documents and Asset structure)	No	Yes
Creditor Protection	No	Yes
Dissipation Protection	No	Yes
GST Exemption Utilized	No	Possible
Loss of Exemption	Possible	No
Change of Law Protection	No	Yes
Estate Tax Return Filing	Yes	Maybe Not

It would take a lengthy article to detail the pros and cons of each issue raised above, but if you ignore the issues and rely blindly upon portability, your plan may fail or not provide all the protections you desire. Although it is attractive to avoid the cost of planning and the need to consider your

own mortality, there are possible costs to ignoring the options available.

From a strictly tax standpoint, the four main risks in the above table are the following.

1. If you rely upon portability of the exemption, the amount of exemption available to the first spouse to die is “frozen” at the amount available to his or her estate. For instance, if a spouse dies today and has no plan in place, the exemption of \$5.25 million can be passed to the surviving spouse but never increases, even if the assets that pass to the surviving spouse appreciate before the survivor dies. If the deceased spouse provided instead for that \$5.25 million to pass into a family trust, any appreciation in the value of the assets in the family trust would not be subject to estate tax in the survivor’s estate. This can make a huge difference in the estate tax on the estate of the surviving spouse.

2. The portable exemption can be lost. If the surviving spouse remarries and the second spouse also predeceases, the exemption from the first spouse may be lost. What might have been placed into an estate tax exempt trust for the benefit of the children of the first marriage may instead bear substantial estate taxes if the second spouse’s exemption is used to shelter assets for his or her children. Additionally, the ability to use the exemption of a deceased spouse may not be a vested right and could be changed by Congressional action; if a family trust is funded at the first death, those assets are not assets of the surviving spouse and should be immune from Congressional action to raise additional revenue through changes to the estate tax laws.

3. To claim the portable exemption, an estate tax return must be filed for the first spouse to die. If a timely estate tax return is not filed, the surviving spouse will not have the benefit of the estate tax exemption of the deceased spouse. It may be tempting to avoid the cost and disclosures required to file an estate tax return if it appears the assets of the couple will never exceed the exemption amount, but that opportunity will be lost if the estate tax return is ignored.

4. The portable exemption does not include the deceased spouse’s generation skipping transfer (GST) tax exemption. If you want to maximize the utilization of the GST tax exemption, a family trust structured to utilize the GST tax exemption must be in place when the first spouse dies or that spouse’s GST tax exemption will be lost.

In addition, without planning, the non-tax benefits of the family trust may be lost. These include the ability to protect the trust assets from creditors of the surviving spouse, to prevent the surviving spouse from dissipating the assets if the surviving spouse is a spendthrift, or to prevent the

diversion of the trust assets to unwanted beneficiaries such as a second spouse in the event of remarriage or someone exercising undue influence over the surviving spouse.

It is true that there is a cost to planning to use and later administering a family trust as part of your estate plan; but in many circumstances those costs are worth the benefits and peace of mind that can be obtained. We have witnessed first hand the rapidly shifting landscape of estate taxes that can be changed at the whim of Congress; a failure to plan will leave your heirs at the mercy of future Congressional action.

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## **ATTORNEY WILLIAM S. DEFORD NAMED PARTNER**

by Matt Montgomery



Dufford, Waldeck, Milburn & Krohn, LLP, is pleased to announce that William S. DeFord has become a partner of the firm.

Willie’s practice will continue to focus on general civil litigation, including trials and appeals. Willie represents both plaintiffs and defendants in disputes involving sales contracts, leases, mineral rights, water rights, business torts, adverse possession, easements, shareholder liability, implied covenants in mineral development, mechanics’ liens, construction contracts, oil and gas royalty accounting, and other general civil matters.

The current vice president of the Colorado Canyons Association, Willie enjoys recreating and volunteering his time in support of local conservation lands. As past president of the Pro Bono Project of Mesa County, Inc., Willie helped ensure that low income victims of domestic violence had access to legal counsel and representation.

We look forward to Willie’s continued success advocating for clients in Western Colorado as a partner of the firm.