

THE DUFFORD WALDECK QUARTERLY

A NEWSLETTER FOR OUR CLIENTS

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HAVE YOU LOST A \$5,000,000 TAX BENEFIT?

by William H.T. Frey

A portable exclusion from estate taxes is available to the surviving spouse of any decedent, no matter how large the estate of the decedent. Portability is one of the changes to the estate tax that has resulted in most families in America now being exempt from estate tax (see my article "The Death of Estate Planning" in the First Quarter, 2013, edition of this Newsletter). However, to utilize the portable exclusion a timely estate tax return must be filed and, even after that, the exclusion may be lost if there is a remarriage.

The deceased spouse's unused exclusion amount (referred to as the DSUE by the IRS) can be up to \$5,250,000 for persons dying in 2013. If it is properly passed to the surviving spouse, the spouse can add that amount to their own estate exclusion amount (allowing a combined estate of up to \$10,500,000 to pass free of federal estate tax if both spouses die in 2013). Not all surviving spouses, however, have been accurately informed of the rules to protect the DSUE. I have worked with numerous spouses who have been advised by attorneys and tax-preparers that they do not need to file estate tax returns for a decedent's estate, even though the size of the estates may be, or may become by the time of their deaths, large enough to benefit from the DSUE. If the survivor's estate is large enough, the failure to protect the DSUE could cost the survivor's estate more than \$2,350,000 of avoidable estate taxes.

Currently, the IRS will allow a surviving spouse who has missed the deadline to file an estate tax return to file a claim for relief from the timely filing requirement. Under current IRS rules, this requires the filing of a request for a private letter ruling and the payment of a user fee to the IRS. However, the problem of people not being aware of the filing requirement has become so prevalent that the American Bar Association (ABA) has asked

the IRS to offer a one time window for people to file for relief without the need to obtain a private letter ruling or pay a fee to IRS. If these suggestions are adopted by the IRS, it will provide a short six month window to obtain relief without the need for the private letter ruling process. If you are a surviving spouse of someone who died after 2010, you should consider speaking to an attorney about the options available for obtaining the DSUE. The relief available under the private letter ruling process must be requested promptly after you become aware of the problem, and, at this point, it is still unknown whether, and to what extent, the IRS will adopt the ABA's proposal.

In addition, even those who have filed an estate tax return to obtain the DSUE are at risk of losing it if they remarry and survive the new spouse or the law changes. If you have a DSUE from your spouse and want to avoid those risks, the IRS has clarified that any gifts made by the surviving spouse will use the DSUE first before using up their own estate tax exclusion. If you have a DSUE and are planning to remarry, you may want to consider gifting an amount to use some or all of the DSUE before the remarriage; or you may want to consider a gift even if you are not remarrying to assure the DSUE is utilized and is not impacted by a subsequent law change.

The possibility of a DSUE being available to a surviving spouse, regardless of the size of the estate of the first spouse to die, requires additional planning considerations in drafting your will. If you are devising assets to beneficiaries in addition to your spouse, should you add a specific provision that the estate will incur the expense to do an estate tax return (that is not legally required and will benefit only the surviving spouse) to assure there is no challenge to the actions of the Personal Representative if that cost is incurred? Also, to avoid the possible loss of the DSUE if the surviving spouse remarries, should younger couples (where remarriage is a more likely possibility) consider the use of the normal family trust arrangement to assure the exemption of the first spouse to die is not wasted without requiring the surviving spouse to make substantial gifts prior to remarriage to protect the DSUE? Lastly,

because the DSUE is not indexed for inflation, using a family trust may be a better alternative than relying on the DSUE because any growth in the family trust will be shielded from estate tax in the survivor's estate.

While the DSUE is an important planning tool that will make most estates free of estate tax, it does create new traps for those who are unaware of it or misinformed about its requirements. It also opens new planning issues to be discussed in the context of the preparation of your will or other estate planning documents.

DWMK ATTORNEY ANNIE MURPHY TO GIVE PRESENTATION IN SEPTEMBER AND OCTOBER

Annie Murphy will be presenting a workshop titled "Shared Air: Addressing Tobacco and Marijuana Smoke in Multi-unit Housing" with Pete Bialick, President of GASP (Group to Alleviate Smoking Pollution) of Colorado, and Jennifer Kovarick, Tobacco Education & Prevention Partnership Program Coordinator for Boulder County Public Health, at the annual Housing Colorado NOW! Conference in Vail on October 10. The annual conference is Housing Colorado's signature event, a four-day conference drawing over 600 participants throughout Colorado and the Rocky Mountain region. This event, guided by the Conference Planning Committee, showcases 35+ educational sessions, and is one of the largest of its kind. In 2013, the conference will be celebrating its 25th anniversary. For more information and to register, please visit www.housingcolorado.org.

On September 30, 2013, Annie Murphy will be conducting a clinic titled "Hot Issues in Landlord/Tenant Law." The class will be held from 9:00 a.m. to 11:30 a.m. in the Garden Room at the Commons, 625 27½ Road, Grand Junction. Topics that will be discussed include the new marijuana law, the eviction process, increasing tenant rent, repairs to a rental property, addressing crime, service animals, and security deposits. To register for this free clinic, please call (970) 424-5748.

Annie Murphy will be assisting the Grand Junction Police Department in offering owners and managers of rental properties crime free multi-housing certification. This is a three step program, the first of which is a two-day class. This class will be held October 21 and 22 at the Grand Junction Police Department, 555 Ute Avenue, from 1:00 p.m. to 5:00 p.m. both days. Annie's portion of the program will include training on drafting crime free lease provisions, drafting legal notices in response to criminal activity, and eviction procedure. For more information about the International Crime Free Multi-Housing Association and to register for the program, visit <http://www.eventbrite.com/event/8152276679>, or call (970) 549-5331.

PRO BONO PROJECT WELCOMES BACK TRYSETTE AND FIONA JOY HAWKINS



On November 6, 2013, the Aussie artists Trysette and Fiona Joy Hawkins return to the Moss Performing Arts Center in Grand Junction. The pair will also be joined by local singer-songwriter and recording artist, Paul Jensen. The concert is a fundraiser for the Pro Bono Project of Mesa County.

Trysette, a popular indie artist in her native Australia, is about to release her fourth album, which she recorded in Los Angeles with singer-songwriter Bob Malone.

Fiona Joy Hawkins, an ARIA Finalist (the Australian Grammys), will debut pieces from her brand new album *600 Years in a Moment*, currently the #1 album on the ZMR charts.

Paul Jensen recently returned from a recording trip to Vermont where he worked on his next album with Grammy-Award winning artist and producer, Will Ackerman.

The Pro Bono project administers a program through which Mesa County attorneys provide free legal services to low-income residents of Mesa County and to victims of domestic violence.

For tickets (\$15) and more information about the show, please visit the Pro Bono Project's office at 619 Main Street, Grand Junction, or call Dufford Waldeck's Barbara Butler at 970-248-5857.