

Offices in  
Portsmouth and  
Virginia Beach, Virginia  
Tel: 757-399-7506  
Fax: 757-397-1267  
Web: [www.oasthook.com](http://www.oasthook.com)



MEMBER



*Special needs require special lawyers.*

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Editor  
Sandra L. Smith,  
Certified Elder Law Attorney

## TAX RELIEF FOR WIDOWS AND WIDOWERS

The Mortgage Forgiveness Debt Relief Act of 2007 is best known for its provisions regarding income tax treatment of mortgage debt forgiveness. This Act also changed the rules governing the exclusion of gain realized on the sale or exchange of a principal residence. A taxpayer generally can exclude \$250,000 of such gain (\$500,000 for certain married couples filing joint income tax returns). The taxpayer has to have owned the residence and used it as a principal residence for at least two years of the five-year period ending on the date of the sale or exchange.

For an unmarried taxpayer whose spouse is deceased on the date of sale of the property, the period that the unmarried individual owned and used the property includes the period the deceased spouse owned and used the property before death. Under the previous law, a surviving spouse could exclude \$500,000 of gain only if the following conditions were met:

1. The sale occurred in the year of the deceased spouse's death;
2. The surviving spouse and the deceased spouse's executor or personal representative filed a joint return for the year of death;
3. Either the surviving spouse or the deceased spouse met the two-year ownership requirements with respect to the property immediately before the spouse died;
4. Both spouses met the two-year use requirements with respect to the property immediately before the spouse died; and
5. Neither spouse was ineligible for the benefits of the exclusion with respect to the property by reason of the one sale every two years rule.

This could present problems when the spouse died late in the year and the survivor wanted to sell the family residence. The surviving spouse would have to quickly sell the house in order to preserve the \$500,000 exclusion. If, however, the deceased spouse owned the house outright, the surviving spouse

would receive the benefit of a full step-up in basis to the date of death or alternate valuation date value, and there would be no rush to sell the house before the end of the year of death.

The new law, effective for sales or exchanges after December 31, 2007, gives the surviving spouse additional options with respect to selling the residence after the deceased spouse's death. The taxpayer can still qualify for the \$500,000 exclusion by meeting the conditions listed in items 1 through 5 above. The taxpayer can also qualify for the exclusions if the sale occurs not more than two years after the date of death of the spouse, and the conditions listed in items 3 through 5 listed above are met. If the sale meets these requirements, then the gain on the sale is treated in the same manner as if the spouses had sold the residence immediately before the deceased spouse's death. The new law should generally provide the greatest tax benefit for a surviving spouse who owned the residence in his or her own name before the death of the deceased spouse, and both the deceased and surviving spouse used the residence. In this case, the residence would not receive a step-up in basis to the fair market value at the date of death or alternate valuation date, but the taxpayer could exclude up to \$500,000 of gain.

If the surviving spouse remarried before the residence is sold or exchanged, this new section will not apply because the sale or exchange has to be made by an unmarried individual in order to qualify for the higher exclusion. If the gain on the sale or exchange would exceed \$250,000, and the taxpayer intends to sell the residence, then he or she should consider doing so before remarrying.

The attorneys at Oast & Hook are available to assist clients with their estate and tax planning, as well as estate and trust administration.

### **Speakers**

If you are interested in having an elder law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

### **Oast & Hook**

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at [www.oasthook.com](http://www.oasthook.com).

Oast & Hook is a Virginia member of the Special Needs Alliance, a nationwide network of disability attorneys. As members of this alliance, we assist personal injury attorneys in resolving their cases to

enhance the judgments and awards of their disabled clients and to maintain the eligibility of these clients for SSI and Medicaid. We are experienced in protecting the public benefits of persons with special needs and in assisting with the management of their assets. For more information about the Special Needs Alliance, visit its website at [www.specialneedsalliance.com](http://www.specialneedsalliance.com). The Special Needs Alliance has begun publication of an informative e-newsletter called *The Voice*. The purpose of this newsletter is to provide information and answers about special needs planning for family members and professionals. To subscribe to *The Voice* go to [www.specialneedsalliance.com/subscribe.aspx](http://www.specialneedsalliance.com/subscribe.aspx).

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