



WADE ASH

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NEWSLETTER

November 2009

NEWS OF THE FIRM

Jim Wade recently attended the National College of Probate Judges meeting at Samoset Resort in Rockport, Maine as Liaison from the Real Property, Probate and Trust Law Section of the American Bar Association. He also attended a meeting of the Joint Editorial Board for Uniform Trust and Estate Laws, of which he is a member.

In addition, Mr. Wade was a presenter on the topic of the Irrevocable Family Trust at the Family Law Institute's Domestic Relations Law in Times of Economic and Family Crisis Conference in Breckenridge, Colorado in August, 2009; he was also a presenter on the Uniform Probate Code at The New Massachusetts UPC Conference in Boston, Massachusetts in March, 2009.

Herb Tucker and Marc Darling recently attended the Annual Meeting and Black Tie Weekend of the International Network of Boutique Law Firms at The Broadmoor in Colorado Springs, Colorado.

Marc Darling will be presenting at a seminar in December, 2009 on the changes to the Uniform Probate Code, to be sponsored by CLE in Colorado, Inc. (the non-profit educational arm of the Denver and Colorado Bar Associations). He is also Chair of the Subcommittee of the Trust and Estate Section of the Colorado Bar Association that has drafted a new compensation structure for the Colorado Probate Code.

Herb Tucker is in the process of writing a new Chapter for The Colorado Estate Planning Handbook concerning Estate and Trust Litigation. Josie Faix is updating the Chapter on Non-Probate Transfers.

Spencer Crona was a presenter on the topic of Litigating Contested Guardianships and Conservatorships at the First Annual Elder Law Retreat which was co-sponsored by the Colorado Chapter of the National Academy of Elder Law Attorneys, the Elder Law Section of the Colorado Bar Association and CLE in Colorado, Inc. in Breckenridge, Colorado in October, 2009.

DESIGNATED BENEFICIARY AGREEMENTS

In our summer 2009 Newsletter, we alerted you to the passage of House Bill 09-1260 by the Colorado legislature, permitting unmarried individuals to sign a "Designated Beneficiary Agreement" in order to name each other as beneficiaries for certain purposes. We recommended that generally, you continue to rely upon executing a valid Will to name your executor (personal representative) and beneficiaries of your estate, General Durable Power of Attorney for financial purposes, and a Medical Durable Power of Attorney for health care decisions. Further, if you wish to add someone as a joint owner of real or personal property, or as a beneficiary under a contract such as an annuity, IRA or life insurance policy, you must execute the appropriate separate documents to carry out those designations; the Designated Beneficiary Agreement would not be effective to make those changes on its own. There are two instances that cannot be accomplished except through the Designated Beneficiary Agreement: naming someone to be able to sue for Wrongful Death benefits who is not already authorized by Colorado statute (generally, spouse, children and

parents), and applying for Workers Compensation benefits. Therefore, we have prepared a shortened form for the Designated Beneficiary Agreement to just address those two issues. If you wish to obtain a copy of this form, give us a call. Also keep in mind that if you sign the longer form set out in the statute or available on-line, BOTH PARTIES MUST initial "Withhold" next to each power EXCEPT wrongful death and workers compensation.

FIRM'S DURABLE GENERAL POWER OF ATTORNEY FORM

As we mentioned in our summer 2009 Newsletter, Colorado adopted the Uniform Power of Attorney Act, effective July 1, 2009, although it is not mandatory until January 1, 2010. We have revised and updated our firm's Durable General Power of Attorney form to incorporate changes in the Act. Your current forms executed prior to these revisions will continue to be effective, but the Act requires certain powers to be specifically included in more expanded form than had been true under Colorado's prior statutes. Gifting powers for the agent must be much more detailed, and specific authority to change beneficiary designations or to title property in joint tenancy must be included, if such powers are desired. Because fiduciary duties are imposed on the agent once the agent "accepts" the appointment, we now recommend not signing an Acceptance until the power of attorney is actually needed. The affidavit at the end of the powers of attorney has also changed in form. If you wish to have us prepare new powers of attorney for you on the updated forms, just give us a call.

FEDERAL TAX UPDATE

Estate Taxes. The federal estate tax exemption is \$3.5 million for persons dying in 2009. Congress has not yet taken action on the exemption for 2010, but we expect an “extender” bill to be enacted in December, simply applying the 2009 exemption and tax rate (45% of the excess over the exemption) to 2010. If no bill is enacted, then under current law the exemption would be “unlimited” in 2010 because there would be no estate tax, and then the exemption would be reduced to \$1 million in 2011. We would also no longer have a “stepped up (or down)” basis starting in 2010, and instead estates and beneficiaries would have a “carryover” basis from the decedent’s basis. A bipartisan bill has been introduced in the House to repeal the 2010 repeal of estate tax and carryover basis, increase the estate tax and gift tax exemptions, and reduce the tax rate to 35%. We will try to keep you posted when (and if) legislation is passed by Congress.

Gift Taxes. The gift tax exemption is still \$1 million for lifetime gifts in excess of the \$13,000 annual exclusion. The gift tax annual exclusion will stay the same for 2010 (no increase for cost of living this year). Remember to make your 2009 annual exclusion gifts before the end of the year, if you have not already done so, and then you can make your 2010 annual exclusion gifts in January. Such gifts can take advantage of relatively low current values due to the recent economic troubles.

Minimum Required Distributions. Remember that MRDs are waived for 2009, and are not required to be withdrawn from retirement accounts. In Notice 2009-82, the IRS recently gave plan participants until November 30, 2009 to roll over any inadvertent 2009 MRDs already withdrawn, to avoid being taxed on them. Ordinarily, mistaken withdrawals would be required to be rolled into a retirement account within 60 days to avoid taxation.

Roth IRA Conversions. In 2010, there will no longer be an income limit to determine whether a taxpayer may convert a traditional IRA to a Roth IRA. Therefore, anyone may consider such a conversion. The conversion is treated as a distribution of the traditional IRA, so will be included in the taxpayer’s income. If you are considering making such a conversion in 2010, you might want to accelerate other taxable income into 2009.

IRA Contribution to Charity. Unless Congress extends this provision, the opportunity for a taxpayer at least age 70-1/2 to withdraw up to \$100,000 from an IRA followed by a contribution to a public charity, without having to recognize the withdrawal in taxable income will end December 31, 2009.

Conservation Easements. Congress had extended the favorable tax treatment for conservation easements put in place by December 31, 2007 to December 31, 2009. Due to the increased scrutiny of such easements by the IRS after some scandals involving inflated appraisals, fewer easements are being put in place, and they may take longer to conclude. Our experience is that at least six months is necessary, so you will probably not be able to take advantage of the increased deductions if you did not start the process last summer. However, even after 2009, a conservation easement is still a valuable method for protecting one’s land and obtaining a tax deduction in the process, either during lifetime or directed in your Will to be accomplished after your death.

Worker, Homeownership, and Business Assistance Act of 2009: President Obama signed this bill on November 6, 2009. Among other tax changes, it extends the first-time homebuyer tax credit that would have ended November 30, 2009 to April 30, 2010. For those entering into a binding contract before May 1, 2010, closing can occur by June 30, 2010. In addition to first-time homebuyers, the new law now authorizes a credit up to \$6,500 for taxpayers who have owned and used the same residence as their principal residence for 5 out of the last 8 years (the so-called “move up” homebuyer credit).

THE NEW UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

Financial fraud of senior citizens has become a tragically pervasive social problem. One significant method of such exploitation is nicknamed “granny snatching.”

Understandably perceived by its victims as a form of kidnapping, granny snatching occurs where the fraudster induces a vulnerable senior citizen into a change of dwelling that will facilitate easier and more concealable further acts of exploitation. The idea is that once the physical move is effectuated, the typically cognitively compromised victim will be more susceptible to, and compliant with, “gifts,” alterations in title to assets, “forgiveness” of debts, submission to court proceedings and execution of legal documents benefiting the fraudster. Caught suddenly in unfamiliar, perhaps disorienting, surroundings, while totally dependent on the fraudster or his/her family, the victim usually is much less able to resist further influence. It is hard to say no when you need help from your “captors” to re-establish your living routine in a new environment.

As a result of the perniciousness of granny snatching, and the inability of court systems to address the problem effectively on an interstate basis, Colorado last year joined a number of other states in enacting the Uniform Guardianship and Protective Proceedings Jurisdiction Act (the “Act”). In essence, the Act provides: (1) a statutory basis for a Colorado court to act in an emergency to protect the “granny” who has been “snatched” from another state, and (2) a clear protocol for determining, in non-emergency circumstances, what state’s court will have the power to protect granny going forward.

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**THE NEW UNIFORM
GUARDIANSHIP AND
PROTECTIVE PROCEEDINGS
JURISDICTION ACT (CONTD.)**

Colorado's version of the Act defines an emergency as "a circumstance that likely will result in substantial harm to [the person's] health, safety, or welfare, and for which the appointment of a guardian is necessary. . . ." In such circumstance, the Act empowers the Colorado court to appoint an emergency guardian for a term not exceeding sixty days for such a person who is physically present in the state, and to issue a "protective order" with respect to the person's property located in Colorado, or to appoint a guardian or conservator for the person where an order from another state to transfer protective proceedings to Colorado has been issued. By way of distinction, a conservator is appointed to identify and safeguard money and property, whereas a guardian typically concerns him/herself with the care and protection of the person's personal affairs, safety and health care, although in emergency circumstances a guardian may be vested by the court with limited protective authority over assets.

The key to determining what state may act in non-emergency circumstances is found in the Act's protocols for defining the "home state" and/or the "significant-connection state." Under the Act, "home state" means (in its simplest terms) "the state in which the [person] was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian . . ." If no petition has been filed, then the home state is the state in which the [person] was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

"Significant-connection state" means "a state, other than the home state, with which a [person] has a significant connection other than mere physical presence and in which substantial evidence concerning the [person] is available."

In determining significant connection, the court must consider the location of the person's family, the length of time the person at any time was physically present in such state, the location of the person's property and the extent to which the person has ties to the state such as voter registration, state or local tax return filings, vehicle registration, driver's license, social relationships and/or receipt of services.

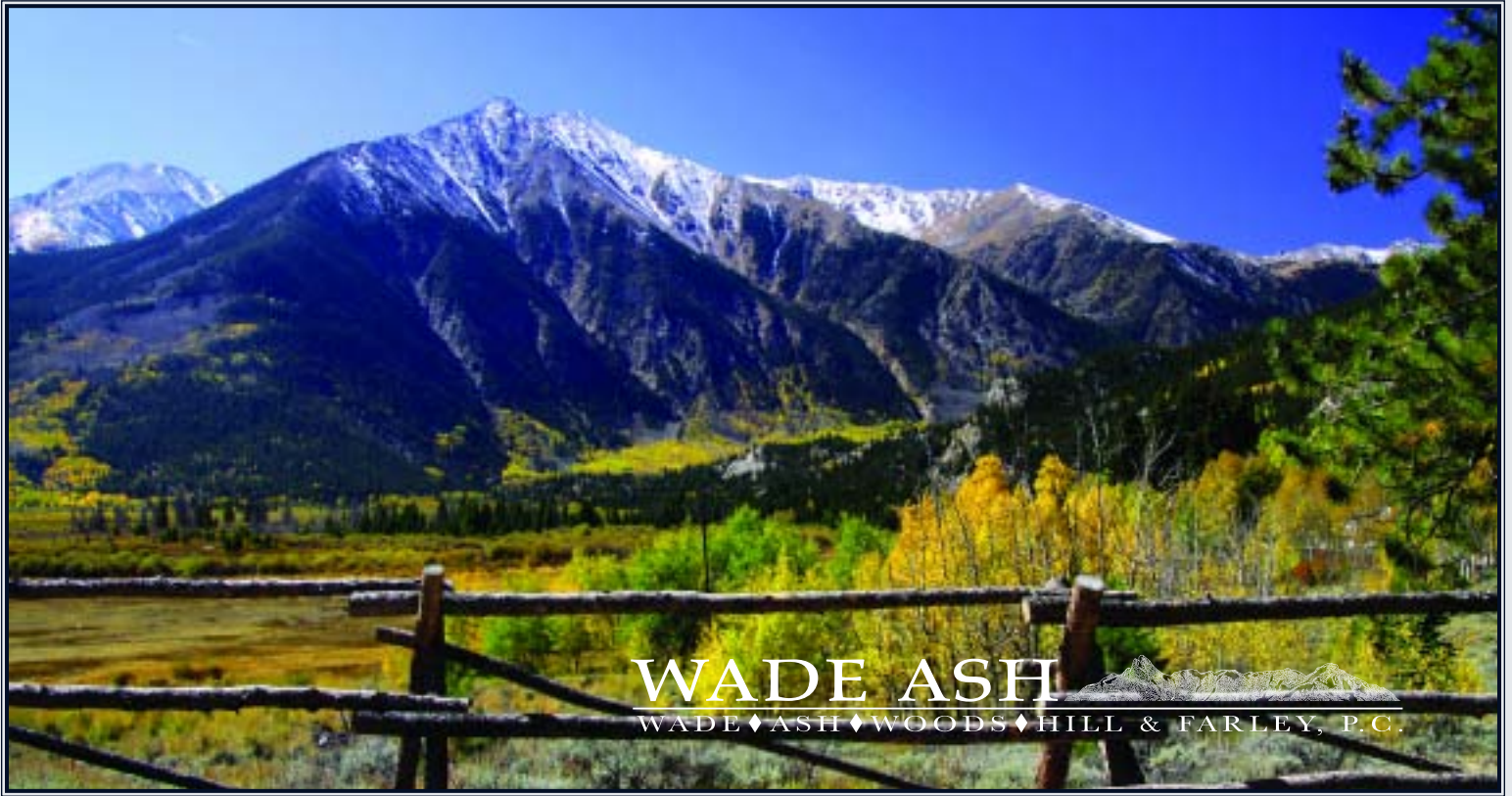
So, in brief, if "granny" is "snatched" and brought to Colorado in "non-emergency" circumstances, a district court in Colorado has jurisdiction to appoint a guardian or issue a protective order if: Colorado is either granny's home state, or Colorado is a significant-connection state and granny either has no home state or has a home state but no petition for her protection is pending in either that state or a significant-connection state. Again, under emergency circumstances, or where another state declines to exercise jurisdiction, a Colorado court may act to protect the person in question.

In situations where protective proceedings have been filed in the court in another state (because that state is a home-state or significant-connection state), and there is no concurrent jurisdiction in Colorado (Colorado is not a home state or significant-connection state), the Act requires the court in Colorado to stay, or suspend, any proceedings filed in Colorado and communicate with the court in the other state. If the court in the other state does have jurisdiction, the Act requires the

Colorado court to dismiss any petition filed in Colorado unless the court in the other state has determined that the Colorado court is a more appropriate place to hear the matter of protection of the person. Such dismissal provision of the Act is designed to discourage fraudsters from bringing a person from another state into Colorado, against his or her will or through deception, for the purpose of instigating a court proceeding in Colorado by which the fraudster could pursue appointment of him/herself as conservator or guardian for the person. Also, the requirement of court communication enables a court in Colorado to determine whether it should find emergency circumstances and appoint a guardian or order the return of the person to his/her home state or significant-connection state.

By way of notice, if a petition for appointment of a guardian or conservator is brought in Colorado, and Colorado was not the person's home state on the date of filing the petition, the Act requires notice of the petition to be given to all persons whom Colorado procedures would require to be afforded notice. That would include close relatives of the person and fiduciaries of the person, if any, and others with an interest in the person's welfare.

Colorado's Guardianship and Protective Proceedings Jurisdiction Act contains many features, and an attorney is likely needed to analyze the Act's applicability in particular circumstances. It is a complex statute that will require close reading and attention by both judges and counsel for an accurate assessment of its applicability in a specific scenario. Nevertheless, it does represent a legal foundation by which more protection can be afforded to the vulnerable person who has been moved from one state to another, either by force or deception, for purposes of financial exploitation.



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