



WADE ASH

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NEWSLETTER

July 2011

NEWS OF THE FIRM

Marc Darling and Greg Washington spoke at the 2011 Colorado Bar Association Estate Planning Retreat in Santa Fe, New Mexico. Their presentation, "You've Decided It's Broke, Now How Are You Going to Fix It?" covered will and trust reformation, modification, termination and construction, along with changes associated with the new UPC III regulations.

Laurie Hunter recently presented a Colorado Bar Association Continuing Legal Education seminar on Estate Planning for Blended Families. She also updated the 2011 supplement to the *Gifts to Minors* monograph which will soon be published by CLE of Colorado, Inc. Laurie also spear-headed the changes made to the General Power of Attorney form (due to recent changes in the law), which will be republished as part of the *Colorado Estate Planning Forms* (the "Orange Book") through CLE of Colorado, Inc.

Herb Tucker, Laurie Hunter and Josie Faix recently updated, respectively, Chapter 48 (Will Contests), Chapter 1 (Estate Planning) and Chapter 8 (Nonprobate Transfers) of the *Colorado Estate Planning Handbook*, which will be published by CLE in Colorado, Inc.

Laurie Hunter, Josie Faix, Lisa Clore and Sharon De Luca also prepared the 2011 update for Judge Stewart's *Colorado Estate Planning, Will Drafting and Estate Administration Forms* which is published by LexisNexis.

Jim Wade recently spoke to the Assembly of Massachusetts Probate Judges regarding implementation of the new Massachusetts version of the Uniform Probate Code. He shared his 1977 experience as Judge of the Denver Probate Court in implementing the Code in Colorado.

Through the efforts of Alison Zinn, as a Co-Chair of the Legal Services Committee of the Colorado Women's Bar Association, The Center for Work



Education and Employment ("CWEE") recognized the CWBA as its "Community Partner of the Year" at its 28th Annual Awards Luncheon held in April, 2011. CWEE provides individualized job training, placement and retention programs that give participants the skills and competencies to raise their confidence, improve their earning potential, and move their families toward economic self-sufficiency. Congratulations Alison!

Congratulations to Lisa Clore, one of our attorneys, who recently had a baby girl!

2011 COLORADO LEGISLATIVE CHANGES

The Colorado legislature passed a number of bills that may affect your estate plan.

1. Trust & Estate Section Omnibus Bill. SB 11-083 included legislation proposed by the Trust & Estate Section of the Colorado Bar Association. The Act will generally be applicable August 10, 2011.

a. Compensation and Cost Recovery. This bill consolidates into one area of our probate code, all of the circumstances in which compensation in probate cases can be paid or disputed. It sets forth one set of rules and standards to govern all fiduciaries including personal representatives, trustees, agents under powers of attorney, custodians of transfers to minors and custodial trusts, guardians and conservators. It does not include

trustees under pension, profit sharing or retirement plans.

The new statutes reaffirm the general rule that beneficiaries and their lawyers are generally not entitled to compensation from an estate or trust but in special circumstances may receive such compensation if their services result in a demonstrable benefit to the estate or trust. Examples of such benefits would be services that result in a significant increase in the size of an estate or the prevention of a significant decrease in an estate, services that prevent or expose a material breach of duty by the fiduciary administering the estate or trust, and services that clarify or uphold a decedent's or respondent/ward or protected person's, or a settlor's or principal's "intent" on a material issue in dispute.

For the first time since Colorado enacted its version of the Uniform Probate Code in 1974, we will have probate specific factors for our courts to consider when determining the reasonableness of a probate fee. Clients and their counsel also will now have a better ability to agree in a governing instrument (such as a will or trust), what the basis for the fiduciary's or lawyer's compensation will be at a future point in time, and the document that specifies that agreement will now be one of the factors that the courts can consider when reviewing the reasonableness of the fees charged in accordance with that document. The probate factors that will be part of the new statutes will include the life expectancy and needs of the beneficiaries, the adequacy of any billing statements supporting the charges that are made, whether any litigation has occurred and, if so, what the results of that litigation are, whether the action taken by the fiduciary was reasonable and cost effective under the circumstances existing at the time the services were rendered and whether the fiduciary has had any prior experience administering an estate similar to the estate in question.

For the first time in the area of probate law, courts will have a fee dispute resolution process that will be triggered

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whenever an objection is filed in a proceeding to a fiduciary's or anyone else's fees. When that occurs, the proponent of the fees will have 30 days to make available to the objector, all of the documents that the proponent feels are necessary to establish the reasonableness of his, her or its fees and the objector will then have 15 days after they have received those materials to file specific objections to the fees based upon the reasonableness factors that were referred to previously.

Additionally, and again for the first time in the area of probate law, there will be statutory grounds to assess fees against a fiduciary or any other party who acts in bad faith in a probate case. Also, when an objection to fees is made, the court will now have the ability to assess the fees incurred in that dispute against any party to the proceeding. The hope is that by raising the stakes of such a dispute for both sides, it will encourage them to settle their disputes out of court and not carry them through to an actual hearing.

The new compensation and cost recovery statutes will be located in Colorado Revised Statute Sections 15-10-601, *et seq.*

Separately, but negotiated and enacted along with the compensation statutes, changes were made to termination proceedings in guardianships and conservatorships. Those changes now provide that when a ward under a guardianship or a protected person under a conservatorship petitions for the termination of the protective proceeding (that is, the guardianship or conservatorship), the appointed guardian or conservator will not take an active role to oppose the ward or protected person at the hearing on the termination unless the court orders them to. Instead, the fiduciary will file a written report and have the ability to ask the court for instructions as to what, if any, role they will have in the proceeding. It is hoped that this process will reduce the fees and expenses of the hearing and give wards or protected persons a more level playing field when seeking to terminate protective proceedings that restrict, limit, and in some cases do away with fundamental rights that the rest of us enjoy.

b. Effect of Homicide. Under §15-11-803, C.R.S., a person guilty of a felonious killing cannot inherit from the

victim. The revisions clarify certain time periods for bringing a civil proceeding to determine the applicability of this statute. Generally, such a proceeding must be commenced within three years after the decedent's death, but it may be filed up to one year after all rights to appeal have been waived or exhausted following a conviction in a criminal proceeding, subject to applicable principles of tolling of the time period.

c. Effect of Probated Will. Some technical changes were made to statutes concerning the use of a Will to pass title to property.

d. Small Estate Affidavit. Effective for estates of decedents dying on or after August 10, 2011, the limit for collection of personal property by Affidavit and without probate is raised from \$50,000 to \$60,000.

e. Time Period to Provide Reports and Accountings. A 30-day time period was generally added as part of the Compensation provisions summarized above, for a trustee to give information to beneficiaries after receiving a request, and for conservators to give such reports to interested persons requesting information.

f. Provisions Regarding Guardianships and Conservatorships. Also as part of the Compensation provisions, specific proceedings and other requirements were added to the termination or modification of guardianships, and to the termination of conservatorships. If the ward petitions for termination of the guardianship, then the guardian may file a report with the Court in response, within 15 days. Any interested person may file a response to that report within 10 days, and the guardian may respond within another 7 days. The Court may then investigate, schedule hearings and enter orders as appropriate. If the protected person petitions for termination of a conservatorship, then the conservator may file a report with the Court within 15 days. Again, any interested person may file a response within 10 days, and the conservator may respond within another 7 days. The Court may then investigate, schedule hearings and enter orders as appropriate.

g. Power of Attorney Technical Corrections. Some technical corrections were made to Colorado's version

of the Uniform Power of Attorney Act that took effect last year.

2. Uniform Disclaimer of Property Interests Act. SB 11-166 was signed by the Governor on May 23, 2011, and takes effect on August 10, 2011. A "disclaimer" is generally a refusal to receive a gift during the donor's life, or a bequest or joint or beneficial interest passing at someone's death. Colorado's current statute governing disclaimers is §15-11-801, passed in 1995 as part of "UPC II." The new Uniform Act adds §15-11-1201 through §15-11-1218, C.R.S., and much more detail and clarity about the use and applicability of disclaimers. Disclaimers must still be in writing and they are irrevocable. To be a "qualified" disclaimer under the Internal Revenue Code §2518 (and not a taxable gift), the disclaimer must usually be signed and delivered within 9 months, but this time period is not required in the Uniform Act. Therefore, a disclaimer may be valid under Colorado law and effective to transfer an interest, but still be a taxable gift under federal law. A disclaimer affecting real property must be recorded to be effective, so to be a qualified disclaimer it must be recorded within the 9 month time period. Otherwise, so long as the disclaimer is signed within 9 months, it need not actually be filed with the Court or provided to other parties (trustee, personal representative, taker in default, for example) within the 9 months.

3. Insurable Interest Act. SB 11-182 was signed by the Governor on May 27, 2011 and is applicable to life insurance policies written on or after that date. This Act adds new §10-7-701, *et seq.*, C.R.S., and prohibits "Stranger Originated Life Insurance" or STOLI. This is a kind of insurance that has become more common within the past few years, and involves a group of investors basically purchasing life insurance on the life of a stranger. Generally, one must have an "insurable interest" (defined as a close family relationship or business relationship such as partners funding a buy-sell agreement with insurance) to purchase a policy on the life of someone else. The trustee of a life insurance trust created by the insured is included as one with an insurable interest, as are stepchildren and "designated beneficiaries," and charities so long as the insured consents. In addition, financial institutions loaning funds to an insured

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have an insurable interest to the extent of the debt.

4. Insurable Interest for Life Insurance Held by Trust. SB 11-175 was proposed by the Trust & Estate Section of the Colorado Bar Association separately from SB 11-182 described above, and was based on a Uniform Laws bill, adding new §15-16-501. This statute clarifies that the trustee of a life insurance trust has an insurable interest in the life of the Settlor of the trust, in response to an adverse court decision on that issue in Maryland a few years ago, and is consistent with new SB 11-182, described above. This Act takes effect on July 1, 2011.

5. Increases in the Amounts Allocated to Certain Family Members. SB 11-016 in its initial form increased the Family Allowance and Exempt Property to \$150,000 (currently \$50,000), but was amended to simply increase each amount to \$30,000 for a total of \$60,000. This Act takes effect January 1, 2012, so the increased allowances will apply to decedents dying in 2012, but the increase in the Small Estate Affidavit under the Omnibus Bill mentioned above takes effect August 10, 2011. These amounts will be indexed for inflation in increments of \$1,000 under amendments to the Probate Code passed in 2009. Generally, the Family Allowance of \$30,000 and the Exempt Property of \$30,000 are paid to the surviving spouse (and dependent children), if timely requested, before the payment of creditors (other than funeral and administration expenses).

6. Colorado Uniform Estate Tax Apportionment Act. SB 11-165 was signed by the Governor and takes effect generally on August 10, 2011, but new §15-12-1414 includes a delayed effective date until August 10, 2014. However, persons may incorporate the provisions of the Uniform Act in their Wills and Trust Agreements, to have it apply before 2014. Colorado's current estate tax apportionment statute is part of the Uniform Probate Code, and is in §15-12-916, C.R.S. That statute will continue to apply where the new

Uniform Act does not apply. The new Uniform Act includes much more detail on how estate taxes are apportioned among the persons interested in an estate, and with respect to property included in the taxable estate but passing outside a Will or Trust. Of course, these are still "default provisions" that can be overridden by the terms of a Will. "Savings" language is included in the Uniform Act so that taxes are not apportioned against a charitable gift or one that qualifies for the marital deduction, even if paid from the residue of an estate. More detail is included for proceedings initiated by a personal representative to recover a beneficiary's share of estate taxes. In addition, deferred taxes (such as through using Special Use Valuation that may result in recapture or paying tax in installments) are specifically considered by the Act.

FEDERAL ESTATE AND GIFT TAX ISSUES

Last December, a federal tax bill was passed that increased the estate, gift and generation-skipping transfer tax exemption to \$5 million for 2011 and 2012. If Congress takes no further action, then the exemption will return to \$1 million in 2013. While a decrease to \$1 million is probably unlikely, we no longer attempt to predict what Congress may or may not do with respect to taxes. There are a few points to keep in mind over the next year and a half:

1. Continue to make annual exclusion gifts. Such gifts do not reduce your exemption, and transfer future appreciation and income from the gifted property to your donees. You can give \$13,000 in each calendar year to each donee, plus paying medical expenses (including health insurance premiums) and tuition expenses directly to the provider or institution. Married couples can agree to "split the gifts" by filing a U.S. Gift Tax Return and give up to \$26,000 to each donee each calendar year.

2. Consider using part or all of your increased \$5 million gift tax exemption. In the 2001 Tax Act that increased the estate tax exemption from \$675,000 to \$3.5 million, the gift tax exemption stayed at \$1 million. Lowering the gift

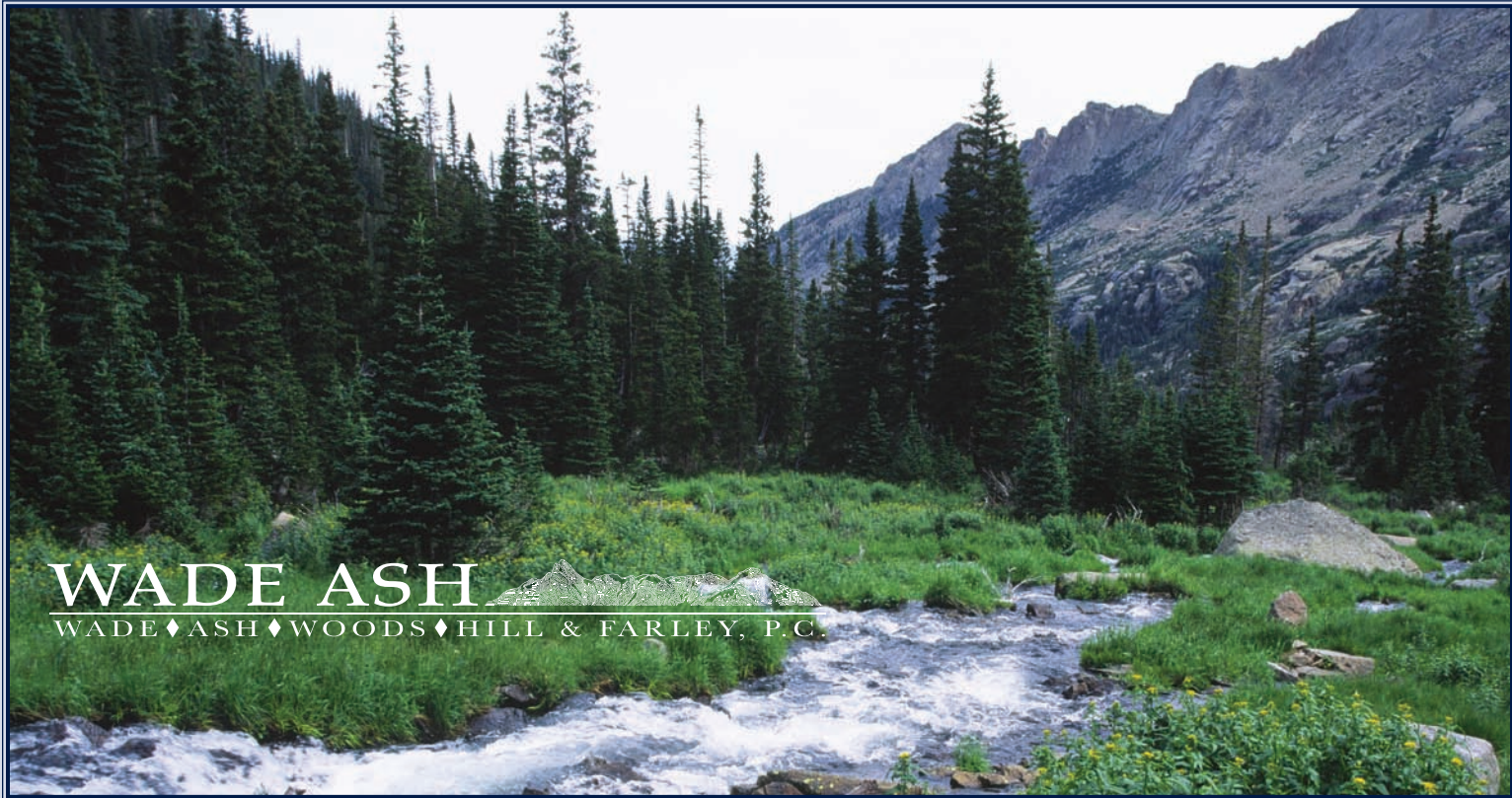
tax exemption might be a compromise position for Congress in future tax changes.

3. If your spouse dies in 2011 or 2012, under the 2010 Tax Act, you may add to your own estate tax exemption the *unused* exemption of the first spouse. This is referred to as "portability." But in order to add the unused exemption to your own, ***you must timely file a federal estate tax return.*** The return is due 9 months after date of death, and one 6-month extension may be requested. Even if total assets do not exceed \$5 million, and all of the assets are titled in joint tenancy and pass automatically to the surviving spouse, and/or the spouse is named as beneficiary of life insurance and retirement accounts, under the Tax Act, the election to use the deceased spouse's unused exemption must be made on the federal estate tax return. ***This will be an easy requirement to miss, which may result in increased estate taxes in the future.***

4. If portability applies and the election is made on a timely filed federal estate tax return, the increased exemption applies for ***both the gift and estate tax exemptions.*** The surviving spouse of a 2011 decedent could potentially give away up to \$10 million before 2013 without paying any gift tax.



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