WADE ASH NEWSLETTER

WADE ♦ ASH ♦ WOODS ♦ HILL & FARLEY, P.C.

June 2007

NEWS OF THE FIRM

James Wade was honored on April 4, 2007 by the National College of Probate Judges at their conference in Williamsburg, Virginia. Mr. Wade serves as Liaison to the National College of Probate Judges from the American Bar Association Real Property, Probate and Trust Law Section. He represented the National College of Probate Judges with the filing of an *amicus* brief in the United States Supreme Court case involving the *Estate of J. Howard Marshall* (the so-called Anna Nicole Smith case). The case dealt with the current application of the "probate exception" in matters of federal court jurisdiction.

After a great deal of thought and consideration, David Swank and his family have decided to move to Idaho this summer. We will miss Dave a great deal and wish him the best of luck. We are excited to have a top-rate colleague to work with in Idaho. He has joined the firm of McAnaney & Associates, where he will continue his trust and estate legal practice. Colorado's loss is Idaho's gain!

J. Michael Farley was honored at the Senior Spring Banquet of the Denver Bar Association on May 9, 2007 at the Warwick Hotel. Mike was one of about 24 attorneys present who became lawyers in 1957 and have been members of the Denver Bar Association for 50 years.

James Wade, Herb Tucker, Marc Darling and Laurie Hunter were nominated and chosen by their peers to be honored in *The Best Lawyers in America* for 2007, as featured in the July issue of *The American Lawyer*.

James Wade, Herb Tucker, Marc Darling, Laurie Hunter and David Swank also were selected as *Colorado Super Lawyers* after peer nomination and a review process by Law & Politics, as published in the April, 2007 editions of 5280 Magazine and Colorado Super Lawyers Magazine.

PUBLICATIONS

In addition to 2007 updates of Jim Wade's *Colorado Probate System* and *Wade/Parks Colorado Law of Wills, Trusts, and Fiduciary Administration*, Continuing Legal Education in Colorado, Inc. published Laurie Hunter's *Gifts to Minors* in April 2007, including a chapter on UTMA gifts by Merry Balson. Merry also co-authored the chapter entitled Selecting, Forming and Maintaining the Entity in *A Guide for Colorado Nonprofit Organizations* published by Continuing Legal Education in Colorado, Inc.

Laurie Hunter, Merry Balson, Josie Faix and Clara Brown also recently prepared the 2007 update to Judge C. Jean Stewart's two-volume set entitled *Colorado Estate Planning, Will Drafting, and Estate Administration Forms* to be published by Lexis in July, 2007.

Herb Tucker and Michelle Mieras (formerly with the firm) wrote an article entitled 'State of Mind' Hearsay Exception in Probate Litigation that appeared in the April 9, 2007 issue of *Law Week Colorado*. A similar article entitled "Dead Men Don't Lie, Applicability of the State of Mind Hearsay Exception in Probate Litigation" also appeared in the March, 2007 Trust and Estate Section Newsletter, *Council Notes*. In addition, Herb Tucker and Spencer Crona presented materials on Colorado's version of common law marriage at the June, 2007 Estate Planning Retreat. And finally, Herb Tucker, Spencer Crona and Clara Brown wrote an article that will appear in the July, 2007 issue of *The Colorado Lawyer* entitled Codifying the Testamentary Exception: Exercising the Privilege to Listen.

2007 LEGISLATIVE UPDATE

State

The Colorado legislature adopted several statutes that may affect your estate plan:

1. **Trust and Estate Section's "Omnibus Bill."** The CBA Trust and Estate Section proposed an "Omnibus Bill" that was passed by the legislature and signed by the Governor. This bill makes various changes to the Colorado Probate Code and related statutes, including (a) modification of the Uniform Transfers to Minors Act to authorize a custodian to transfer a UTMA account to a "2503(c) Trust" for a minor beneficiary; (b) revision of C.R.S. §15-10-111 to provide more details about the authority of bank personnel to open a safe deposit box to look for an original Will; (c) adding authority for the Public Administrator to act for a missing individual not yet declared dead; and (d) giving the court authority to appoint a special administrator on its own motion.

2. **Second Parent Adoption.** C.R.S. §19-5-203(d.5) permits adoption by a person where there is only one legal parent. This will make it easier for the partner in a same-sex relationship to adopt the legal child of the other, if there is no other parent. This simplified adoption procedure was already in place for step-parents in a marital relationship where the other legal parent had either died or relinquished parental rights. The new bill extends the procedure to persons not in marital relationships.

3. **Revised Uniform Anatomical Gift Act.** This updated version of the Uniform Anatomical Gift Act replaces Colorado's 1963 version of the Act.

2007 COLORADO LEGISLATIVE SESSION CONT'D.

The bill generally makes it easier to document the desire to make a gift, and it gives certain individuals, such as agents under health care powers of attorney, the right to sign a document making a gift before the persons dies. It also expands the list of persons with priority if there is no signed document.

Federal

Small Business and Work Opportunity Tax Act, adopted by Congress and signed by the President on May 25, 2007, includes an expansion of the application of the "Kiddie Tax" for children from age 18 to age 19, and to age 24 for full-time students, effective for 2008 and tax years thereafter. Under the Kiddie Tax, the child's unearned income is taxed at the parents' top tax rate.

LOOK BEFORE YOU LEAP

The United States Supreme Court first recognized common law marriage in 1877. Colorado has recognized common law marriage since 1870. Today, only ten states recognize common law marriage. The states that recognize common law marriage are Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas and Utah. Essentially, in a common law marriage, two people create a valid marital relationship without the benefit of a legal marriage ceremony performed according to statutory requirements. In order to prove the existence of a common law marriage in Colorado, a petitioner must prove the following:

1. Mutual consent or agreement of the parties to be husband and wife.

2. Mutual assumption of the marital relationship.

Courts generally examine a variety of circumstantial evidence in making a determination of the existence or nonexistence of an agreement to assume a common law marital relationship. Specific evidence that may be considered includes the following:

- maintenance of joint bank accounts and credit cards;
- purchase and joint ownership of property;
- use of the man's surname by the woman (note: absence of this, however, is not indicative of lack of common-law marriage);
- use of the man's surname by children born to the parties (note: absence of this, however, is not indicative of lack of common-law marriage);
- filing of joint tax returns;
- consistent public acknowledgment and reputation of the marriage;
- cohabitation (i.e., sharing a common residence);
- common travel;
- length of relationship;
- legal impediments to marriage (e.g., one party married to a third party);
- sharing domestic responsibilities;
- representations on important documents, such as bank loan forms, insurance forms or tax returns (and related tax documents); and
- witness testimonials.

Most states who do not recognize common law marriage extend full faith and credit to the laws of sister states who do recognize common law marriage. This means that if you are common law married in one state and move to another state which does not permit common law marriages, that state must recognize the common law marriage.

There is no such thing as a common law divorce. While a couple may enter into a marriage by common law, there is only one form of divorce and that is pursuant to formal dissolution proceedings pursuant to the Colorado Uniform Dissolution of Marriage Act. Pursuant to the Colorado Uniform Dissolution of Marriage Act, there must be a finding that the marriage is irretrievably broken and an adjudication by a state court that enters a formal decree of dissolution.

While many believe that cohabitation for a number of years is sufficient to create common law marriage, there must be a mutual assumption of the marital relationship and holding out to the world that you are husband and wife.

The frequency of non-marital cohabitation has substantially increased since the 1940s. The Bureau of Census records indicate that from 1970 to 1993 the number of unmarried-couple households in the United States increased by 571% (from 523,000 to

LOOK BEFORE YOU LEAP CONT'D.

3,510,000). As a result, courts throughout the country now face, with increasing regularity, controversies arising out of the breakup of these relationships. Litigants have asked courts to establish the appropriate balance between public policy favoring marriage and older cases explicitly disproving any intimate contact outside marriage, to more modern cases that recognize non-married couples' rights.

One of the most famous celebrity palimony suits was *Marvin v. Marvin* whereby Lee Marvin's companion and housekeeper brought suit to collect alimony for termination of her career. In that case, the California Supreme Court determined that it was good public policy to allow for recovery under a theory of contract or quasi-contract so long as the relationship was not based on sexual services.

The Colorado courts have similarly recognized equitable claims for unjust enrichment where parties living together have both contributed to the purchase of mutual property. The Colorado Court of Appeals recently held that "social norms and behaviors have changed to such an extent that we join the majority of courts in other states in holding that non-married cohabitating couples may legally contract with each other so long as sexual relations are merely incidental to the agreement. Furthermore, couples may ask the court for assistance in law and equity to enforce such agreements."

One sure way to avoid a common law marriage is to enter into a cohabitation agreement before moving in together. The cohabitation agreement can set the ground rules for financial and other arrangements in the relationship and it may prevent a lot of headaches if the relationship does not last. The agreement itself can expressly state that the man and woman do not intend by living together to create a common law marriage. Most good estate planning attorneys have a cohabitation agreement and should be consulted before couples consider living together.

To avoid common pitfalls of common law marriage and palimony suits, you may want to consider the following:

1. Hold title to any major purchases in the name of the person or persons who is/are actually paying for it. If you buy a car with your own down payment and make all the monthly payments yourself, the car should be in your name only. Joint purchases, however, should be in the names of both parties.

2. Keep finances separate if you want to avoid heated disputes in the event the relationship terminates.

3. Keep accurate records of your financial contributions to any property held by your partner.

4. Write "gift" or "loan" on checks written to your partner if you want to negate any possible suggestion that you have been supporting him/her, which is an issue that can arise in a post-breakup "palimony" lawsuit.

5. Remember that a never-married parent has the same child support obligations as a once-married parent.

6. Do not commingle your money by opening joint accounts, incurring joint debts, or making joint purchases if you want to avoid legal complications and the possibility of a "palimony" suit for support of your partner after a split.

7. Do not allow your partner to hold title to major purchases in his/her name alone if you are both paying for that property, even if he/she orally agrees that the house or car belongs to both of you. The deed or title is more convincing evidence than one partner's allegation of a spoken promise.

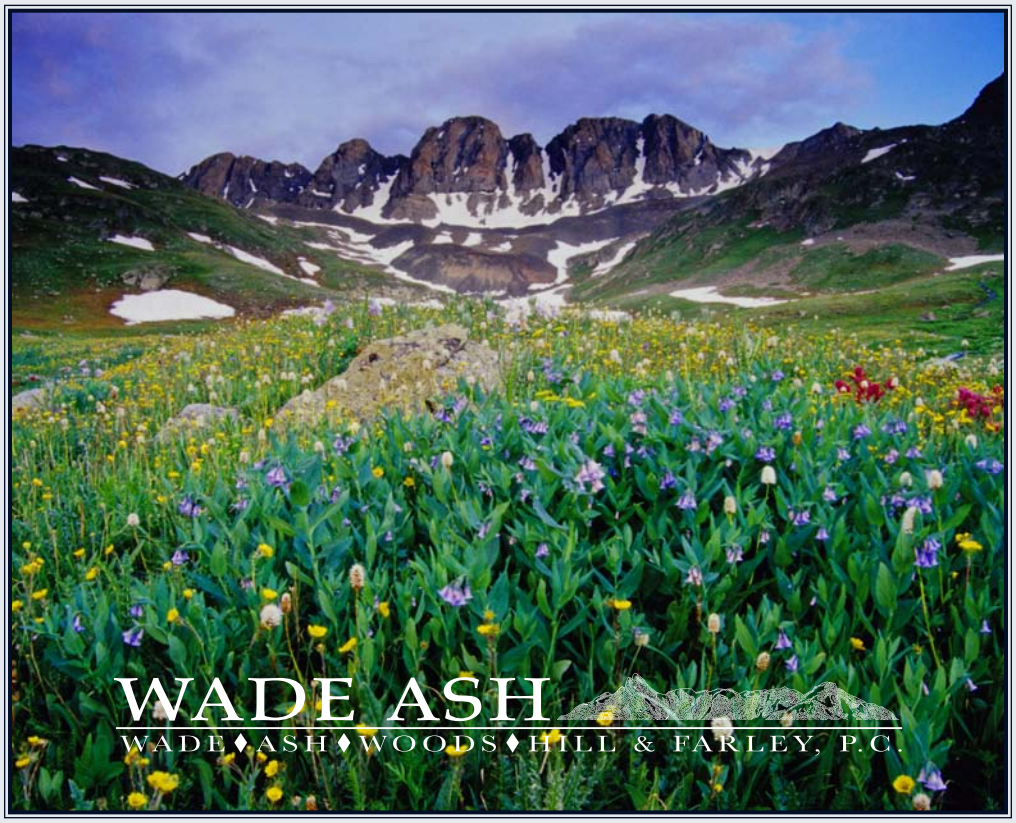
8. Do not co-sign or guarantee debts that are incurred by your partner unless you intend to be equally responsible for paying them back, even if you should split up.

9. Do not become so financially dependent on your partner that you limit your ability to support yourself in the future. Whereas divorced spouses may have the legal obligation to support each other, especially if one gave up a career to take care of the home and children, the same is not true of former cohabitants. Either keep your skills and contacts in the job market, or consider a written agreement setting forth your partner's legal obligation to help support you if the relationship ends.

10. Do not hold yourselves out to the public as husband and wife, allow yourselves to be known as or referred to as "Mr. and Mrs. So-and-So," or use the same last name, even casually, if you want to avoid legal complications of a "palimony" suit or the potential for common law marriage status should the relationship end.

NEWS OF THE FIRM

Visitor parking for our clients and others is located at the Southwest corner of the building in the parking lot. We have four spaces specifically designated as Wade Ash spaces. Please feel free to use those spaces when you visit our building. There are also a couple of other visitor spots to the immediate East of our four designated spaces. We are working with the new building manager to make sure our spaces are better designated. Once the construction of the new building at Alameda and Monroe is completed, we believe our parking will improve. If you experience difficulties, please let us know so that we can continue to improve this situation.



Please visit our website at www.wadeash.com regularly for more information on our firm, lawyers and publications. This newsletter is for general information purposes. It is not legal advice. If you have questions about your specific situation, please call (303) 322-8943 and reference this newsletter.

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SAFE DEPOSIT BOX PRACTICE

The Colorado Legislature in its recent session modified provisions of the Colorado Probate Code dealing with access to safe deposit boxes. In particular, it clarified the provisions regarding entry into a box following the death of the "lessee" of the box and the protocol for processing an original will located in the box.

Post-death entry for this purpose may be time consuming and expensive. Thoughtful planning may avoid the problems.

The owner of the contents of a safe deposit box is a "lessee" of the bank, and the lease terms are established on the bank form. One or more persons (often husband and wife) may be joint lessees. Either may enter the box during the joint lives of the lessees and, upon the first death, the survivor continues to have access. Problems regarding access tend to arise when the joint lessees are both incapacitated or, following the death or incapacity of one of the lessees, the other becomes incapacitated.

There are two ways to deal with this problem. One is to name a third party, often a child or other trusted family member, as an additional lessee. This will allow the third party access at any time notwithstanding the death or incapacity of one or both of the primary lessees. The other approach is to designate a third party as an agent or "deputy" of the primary lessees. This avoids issues about third party ownership of the contents and allows access at any time during the lifetimes of the primary lessees.

There are a couple of limitations to the designation of a third party as agent or deputy rather than as co-lessor. All agency arrangements terminate at the death of the principal. Therefore, unless there is a surviving co-lessee, the deputy will not have the authority to enter the box post-death to retrieve the will or other valuable papers. The other problem relates to the reluctance of banks to honor agency instruments (such as a durable power of attorney for property management prepared for you by our office in connection with your estate plan) other than on their own form. Colorado's power of attorney statute allows the assessment of costs against a bank or other third party who fails to honor a power of attorney, but it may take a phone consultation with the bank's legal counsel to facilitate use of your power of attorney (other than on the bank's deputy card).

What should you keep in your safe deposit box? Valuable assets such as stock and bond certificates and certificates of title to vehicles are all good candidates. Valuable tangible personal property such as jewelry and objects of art may be kept in a box and excluded from the premium cost of homeowner's casualty insurance.

Non-titled property (such as cash, currency, stamp collections, coin collections, and bearer bonds) may cause problems. The contents of a box are subject to the claims of the owner's creditors. If a third party is added as co-lessee of the box (rather than as deputy or agent) there is a risk of his or her creditors attempting to seize the contents of the box. This would include claims in a dissolution of marriage.

Also, there is a requirement on the federal estate tax Form 706 that all safe deposit box contents be listed with the burden, in effect, on the decedent's personal representative to explain why any contents of the box are not included in the return.

Where does all this leave us as a practical matter?

Although handling the safe deposit box will vary with the circumstances of each client, the following are general guidelines:

1. A client (or husband and wife clients) should always have a trusted third party on the box as a co-lessee or as a deputy or agent. In order to facilitate post-death access, having a co-lessee may be better than an agent.

2. If an agent is to be used it is better practice to use the bank's form rather than to depend upon your durable general power of attorney.

3. If the box contains property other than that owned by the lessee, such property should be identified and the ownership stated (especially with regard to such items as cash and bearer bonds).

4. It is generally not good practice to place your medical power of attorney and durable general power of attorney for property management in your box. There are too many cases where these kinds of documents were not easily accessible to the agent at the time needed. Normally these powers of attorney are signed with duplicate originals. Your agent should have a duplicate original (or be aware of where you keep the documents at home).

5. Placing wills in safe deposit boxes is common, but must be thought out. If you place your will in your box it is important to let your lawyer and personal representative know where the box is located (including the exact address of the bank since the name of the bank may change and since the bank may have a number of branches) and also the location of the key. Recall that the effectiveness of agency (powers of attorney) arrangements terminate at death. If there is not a co-lessee living and available following your death, your box will have to be entered (and possibly drilled) by bank personnel under a statutory protocol to retrieve your will and deliver it to the Probate Court.

6. Problems may be avoided if a co-lessee or a deputy, knowing of the pending death of the lessee of the box, enters the box and removes all of the contents. In such a case it is better protection for all concerned if a written inventory of the contents of the box is prepared, and better still if verified by an independent third party.

7. There was a practice years ago of having two boxes, one in the name of the wife containing the property of the husband and the other in the name of the husband containing the wife's property. This was done largely to facilitate entry into a box following the first death at a time when Colorado had an inheritance tax and the Colorado Department of Revenue had a lien on the contents of the decedent's box. Colorado has not had an inheritance tax since 1980; there is no tax lien on the box and its contents; and this practice no longer serves its original purpose.

8. Several years ago our legislature passed a bill allowing individuals to direct the disposition of their last remains (e.g., by cremation or burial) and to provide the details and also to provide instructions on the kind of service to be held. The recent Probate Code amendment also allows post-death access to retrieve instructions regarding last remains, burial policies, and the like. Consistent with the discussion above, these kinds of documents should probably be kept in a safe place at home (a place known to family members and the named personal representative) unless it is clear that there will be a surviving co-lessee or lessees who will continue to have access to the box.

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