WADE ASH

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NEWSLETTER

November 2007

NEWS OF THE FIRM

We are delighted to report that the following people have returned to our firm (or will soon be returning) or, as the case may be, have decided to again share space with us:

Idaho's loss is Colorado's gain! We are very pleased to report that David Swank is returning to Denver and our firm. Dave will continue his legal practice in the areas of estate planning, estate administration and estate litigation. He will be Of Counsel to the firm and will return on December 1, 2007.

We are also pleased to report that paralegals Laura Nelson and Ticia Dobbins have returned to our firm. Laura works primarily in the area of estate planning, but is also working with the estate litigation department. Ticia works with the estate litigation department. They are both very talented and we are pleased to have them back!

Cindy Karr is a legal secretary that worked with the firm about fifteen years ago and, after pursuing other career opportunities, has decided to return to the legal field and our firm. We are excited to have her back!

Speaking of returning - Laurie Scott Paddock, Esq. is again sharing our office space. Laurie focuses her legal practice on employment and personal injury law. She has over 22 years of experience as an attorney and we are pleased to share space with her again.

LEONA HELMSLEY'S DOG

Leona Helmsley has been in the news again - this time on account of a bequest in her will of $10 Million for her dog, "Trouble".

Until Colorado's adoption of the update to the Uniform Probate Code in 1995, one could not specifically provide for the care of a pet in his or her will. There were two problems. First, bequests to animals were considered to be against public policy. Secondly, a bequest to a trust for a pet might fail since the life of the pet might, in theory, extend beyond the time period of the Rule Against Perpetuities. The solution before 1995 was to create an "honorary trust" - or a bequest to a trusted friend - for the purpose of caring for a beloved pet. The problem was that such an honorary trust was not legally enforceable by any person.

Colorado's Probate Code now authorizes the establishment of a trust, reasonable in amount, for the care of a specific pet during the pet's lifetime. New York (Leona's state of domicile) has a similar statute. A trustee will be appointed with enforceable duties, and the trust will designate the beneficiary (sometimes the trustee) to receive the remaining trust assets upon the death of the pet.

We draft these pet trusts from time to time and would be glad to help you update your will or trust to provide for the well-being of your dog or cat (or other pet) following your death.

WILLS v. REVOCABLE TRUSTS

LEVELING THE PLAYING FIELD

A revocable trust is a trust established by you during your lifetime. A trustee is appointed and the trust can provide support for you in the event of your incapacity. It would also contain provisions to dispose of your estate at death (similar to the provisions of a will). These trusts have been promoted around the country because of their ability to avoid probate and to provide privacy as to dispositive provisions. Probate avoidance is not a significant factor in Colorado, however, due to the fact that the Colorado Probate Code (based on the Uniform Probate Code) contains options which will effectively eliminate any probate court involvement at death.

Our office uses revocable trusts selectively for specific purposes - e.g., avoiding probate in foreign jurisdictions where real estate is involved; providing privacy as to dispositive provisions where celebrities or high visibility clients are involved; and to provide for professional trusteeship during incapacity where family members are not available.

There has been an effort nationally to "level the playing field" with respect to wills and probate estates on the one hand and revocable trust estates on the other. For example, federal tax elections formerly denied to the trustee, but available to the personal representative of a probate estate, are now available to both.

WILLS v. REVOCABLE TRUSTS CONT'D.

There are still some negatives to utilization of revocable trusts as the primary dispositive document. For example, Colorado courts have held that, during lifetime, the statutory residential real estate homestead exemption is lost if the residence is titled in a revocable trust. Also, with respect to wills and following death, it is easier to obtain the protection, by publication, of a short cut-off statute as to unknown claims (although this is of diminished importance in Colorado since we have a one year after-death general bar as to pre-death claims).

In the past, there were questions about whether revocable trust assets were liable after death for creditor claims and liable for the protective and beneficial exempt property and family allowances (which serve to protect the surviving spouse and family from creditor claims during the period of estate administration). By case law, revocable trust assets were subject to creditor claims, but the mechanics were unclear. One result was that, in insolvent or marginally solvent estates, there was less protection for families post-death under revocable trusts than wills.

In 2006, however, legislation was passed exposing certain non-probate assets (including revocable trust property) to probate creditor claims and to satisfaction of the family and exempt property allowances to the extent that probate assets are insufficient.

In some jurisdictions (other than Colorado) post-death executor and attorney fees are based upon statutory percentage schedules. In those jurisdictions revocable trust administration may be more cost efficient than probate administration. In Colorado, however, fees are based upon a reasonableness standard, primarily involving time expended under hourly rates and responsibilities undertaken. Thus, it is not clear that one approach is more economical than the other. If a revocable trust is established and all of the assets are transferred to the trust during lifetime, there is less expense involved post-death, but the transfer costs are incurred at an earlier time (during lifetime). Assets passing under wills and revocable trusts are subject to the same federal estate tax treatment, and the same estate planning opportunities for saving or deferring the imposition of federal estate taxes are available under both approaches.

We receive many inquiries about the use of revocable trusts as will substitutes (particularly from clients who have heard horror stories about probate administration in other jurisdictions). We are always available to discuss the pros and cons.

END OF YEAR TAX TIDBITS

The holidays are just around the corner which means the year is coming to an end. There are a few tax-related items you should keep in mind as the year draws to a close.

- The estate tax exemption will remain at $2 million for 2008, and then increase to $3.5 million in 2009. If Congress has not passed new legislation, the estate tax will be repealed in 2010 (an "unlimited" exemption) and when that law sunsets in 2011, the estate tax exemption will return to $1 million. As a reminder, the gift tax exemption stays at $1 million through all these years.

- If you have not done so, now is the time to make your 2007 annual exclusion gifts. As a reminder, you may give up to $12,000 per donee in 2007. The exclusion amount will remain at $12,000 for 2008. You do not need to wait until the end of the year to make your gifts. For example, an easy way to double your gift is to make your 2007 gift in December and your 2008 gift in January.

- The Pension Protection Act of 2006 created an opportunity for tax-free charitable giving directly from an IRA. This opportunity, however, expires at the end of this year so if you are interested in participating, you need to do so by the end of the year. If you are at least 70-1/2 years of age, you can make a transfer directly from your IRA (except SEPs and SIMPLEs) to a charity, while excluding the distribution from your income. Some entities are not eligible recipients, including donor-advised funds, supporting organizations, certain private foundations, charitable remainder trusts, pooled income funds, and charitable gift annuities. You cannot receive the distribution yourself and then transfer it to the charity. It must be a direct transfer.

- The Pension Protection Act of 2006 also increased the percentage limitations and carryover period applicable to qualified conservation contributions (conservation easements). For qualified conservation contributions to an organization, the taxpayer may deduct up to 50 percent of the taxpayer's adjusted gross income. Any excess will be treated as a charitable contribution for each of the 15 succeeding years. Farmers and ranchers may deduct up to 100 percent of their adjusted gross income so long as the property remains available for agriculture or livestock production. This increased deduction is scheduled to sunset at the end of this year. A bill in the Senate would permanently extend this provision, so stay tuned.

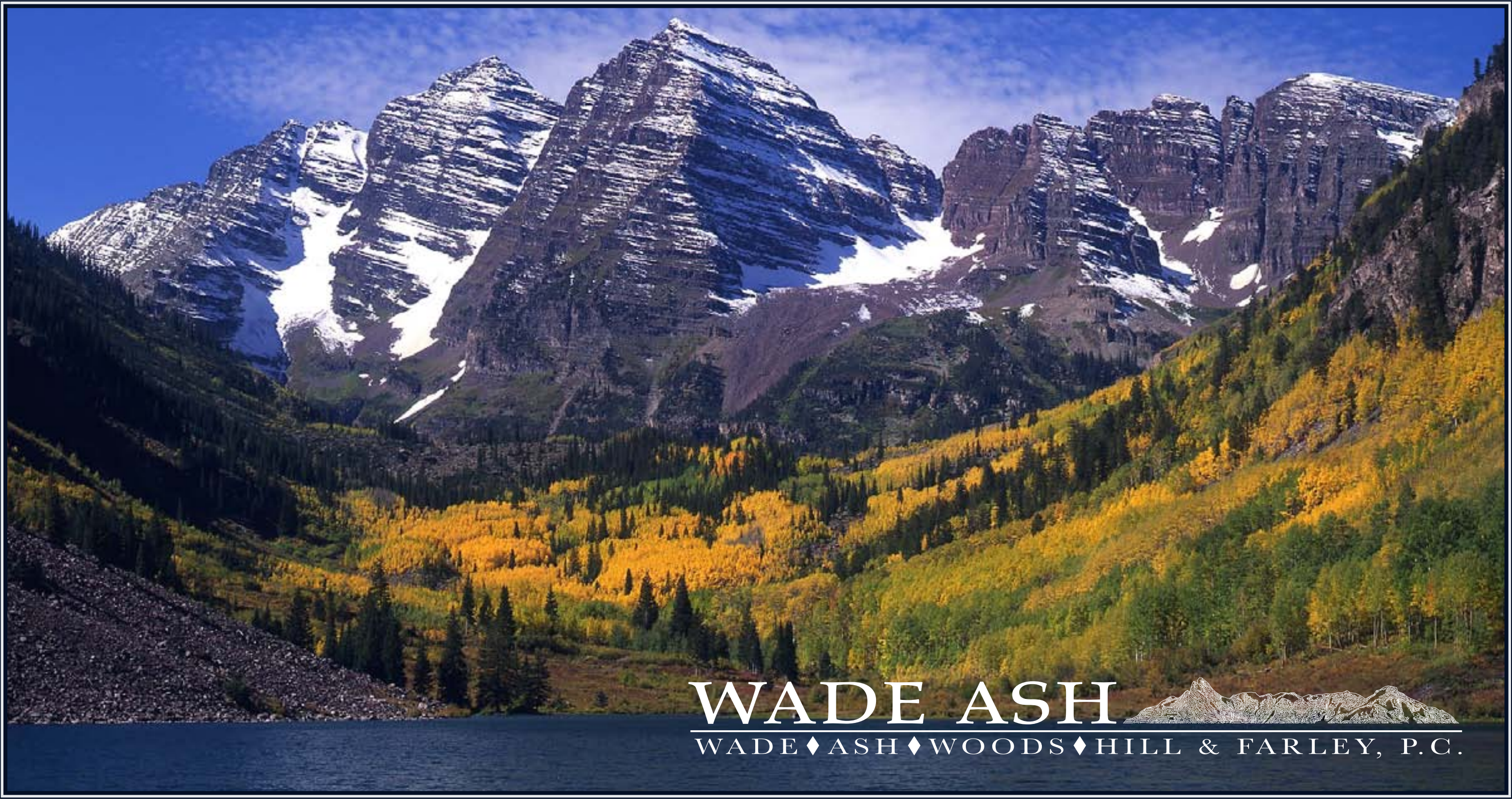
CHECKLIST FOR MAINTAINING A FAMILY PARTNERSHIP OR LLC

A family limited partnership or limited liability company (together, "Company") can be an important and useful vehicle for conducting a family business or managing family assets. Often, parents create a Company and then give ownership interests to their children or other descendants, or to trusts for them. To obtain the benefits of the Company, it is essential that the Company be created, maintained, and operated properly. A Company is a business, and it must be managed as a business. Over the past several years, the IRS has stepped up its enforcement efforts by challenging the business purposes of family Companies, and arguing that the parents retain control of interests transferred. Retaining control can result in the property owned by the Company being included in the parents' estates for estate tax purposes. Here is a checklist of basic steps to follow in forming and operating a family Company.

- ❏ **Forming the Company**
  - ❏ Check the availability of the name, sign the Partnership Agreement or Operating Agreement creating the Company, and file the appropriate documents (on-line) with the Colorado Secretary of State.
  - ❏ Obtain a taxpayer identification number for the Company. The Company will be a separate taxable entity for federal tax purposes and must have its own separate taxpayer identification number. If there is more than one owner, usually the Company will be taxed as a partnership.
  - ❏ Open a bank account in the name of the Company, using the Company's taxpayer identification number.
  - ❏ Promptly after the Company is formed, make sure that each owner makes his or her initial capital contribution. Do NOT transfer personal use assets to the Company, and be sure that the parents retain sufficient assets in their own names to satisfy their living expenses.
  - ❏ Cash contributions should be deposited in the Company's bank account.
  - ❏ Other contributions should be conveyed into the name of the Company. If real estate is contributed, the contributing owner should sign and record a deed to convey the property to the Company.

- ❏ **Operating the Company**
  - ❏ When an important business decision is to be made, have a meeting of the persons entitled to vote on that matter (for example, the general partners or managers), and record the decision in minutes of the meeting.
  - ❏ All documents relating to the Company's business affairs should be signed in the name of the Company by the appropriate party or parties – the general partners in the case of a partnership or the managers in the case of a limited liability company.
  - ❏ Keep appropriate books and records of the Company's assets, business activities, and income and expenses.
  - ❏ Have the Company's accountant prepare partnership income tax returns (IRS Form 1065) for the Company, and make sure that the returns are filed on time. Make sure that each owner receives an appropriate IRS Form K-1, showing his or her share of the Company's income, deductions and credits, so that those items will be reported properly by the owners on their personal income tax returns.
  - ❏ Distributions from the Company must be made in accordance with the terms of the agreement, and should be made on a pro rata basis in accordance with their percentage interests. Disproportionate distributions to the parent(s) can be used by the IRS to show that the parents retained the use of Company property.
  - ❏ An owner who renders valuable services to the Company, such as management of real estate, may receive reasonable compensation for his or her services. However, self-employment taxes must be paid on any compensation received.
  - ❏ Do not allow any owner to use any property that belongs to the Company for his or her personal benefit.
  - ❏ File the required periodic reports for the partnership or Company with the Colorado Secretary of State.

- ❏ **Gifts of Interest in the Partnership or Company**
  - ❏ Obtain appropriate appraisals when making gifts of ownership interests. To adequately document the fair market value of the interests you plan to give away, you may need two appraisals. First, if the Company owns assets that are not easily valued, such as real estate, you will need to obtain a valuation of those assets. Second, you will need to obtain an appraisal of the Company interests that will be given away. This appraisal should be prepared by a qualified business appraiser, who will review the partnership or operating agreement, and the rights of the partners or members, as well as the assets owned by the partnership or Company and its business activities, to determine the value of the interests you plan to give away. A new or updated appraisal should be obtained each time a gift is made.
  - ❏ File gift tax returns (IRS Form 709) when appropriate.



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