



WADE ASH

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

NEWSLETTER

August 2008

NEWS OF THE FIRM

The firm has once again continued its tradition of participating in the presentation of Colorado's Estate Planning Retreat. James Wade was the keynote speaker at the June, 2008 Retreat in Santa Fe, New Mexico and addressed the topics of the history of the Retreat (of which he was a founder); probate law reform; and his participation (as counsel for the National College of Probate Judges) in the U.S. Supreme Court case of *Estate of Marshall* (also called the Anna Nicole Smith case).

James Wade was reappointed through the Real Property, Trust and Estate Law Section of the American Bar Association as Liaison to the National College of Probate Judges. He also recently authored a new revision of his book, *The Colorado Probate System*.

Herb Tucker was elected as a Member of the Council for the Probate & Trust Section of the Colorado Bar Association for 2008-2009. He also recently presented a Continuing Legal Education seminar on *Common Law Marriage* for the Colorado Bar Association.

Herb Tucker and Spencer Crona recently presented Continuing Legal Education seminars for the Pikes Peak Estate Planning Council on *Common Law Marriage in Probate* and for the Colorado Bar Association on *Dead Man Talking - Testamentary Exception to the Attorney-Client and Doctor-Patient Privilege*.

Laurie Hunter presented a Colorado Bar Association Continuing Legal Education seminar on *Estate Planning for Married Couples and Larger Estates* and a seminar to the El Paso County Estate Planning Bar on *Rights of Surviving Spouses*. She also recently updated *Colorado Estate Planning, Will Drafting and Estate Administration* published by Lexis/Nexis.

Marc Darling continues to assist Pro Se parties as a volunteer of the Probate Court, and chairs two Subcommittees of the Probate Section of the Colorado Bar Association, and participated with Judges C. Jean Stewart and John P. Leopold at the Bar Association's recent Estate Planning Retreat.

James Wade, Herb Tucker, Marc Darling and Laurie Hunter were again named by their peers as *Best Lawyers in America* as well as *Colorado Super Lawyers*.

WALTER B. ASH (1932 - 2008)

Walter B. Ash, one of the founders of the firm in 1982, died April 29th. Walt was a Phi Beta Kappa graduate of the University of Kansas and was first in his class at the Kansas University Law School. Thereafter, he worked as an Assistant to the Solicitor General of the United States in the Department of Justice in Washington, D.C. and was a partner in the Denver firm of Davis, Graham & Stubbs until he helped form Wade Ash Woods Hill & Farley in 1982. During his years of practice with the firm, Walt was devoted to resolving the estate planning issues of our clients, was an exemplary partner in connection with the development and management of the firm, and was a mentor to lawyers and legal assistants at the firm. Walt retired in 1998 and spent a decade of good years traveling and horseback riding with his wife, Fern, especially in the wilderness areas of Colorado, Wyoming and New Mexico. We will all miss him.



LEONA HELMSLEY'S DOG

In our November, 2007 Newsletter, we briefly discussed pet trusts and reported that Leona Helmsley's dog "Trouble" was the recipient of a \$10 Million bequest. The Court recently reduced the trust fund for Trouble from \$12 Million to \$2 Million, with the remaining \$10 Million being distributed to Helmsley's charitable foundation. The 9 year old Maltese lives in Florida with the general manager of the Helmsley Sandcastle Hotel. In a 1989 trial for tax evasion, Leona Helmsley became known as the "queen of mean". She apparently was overheard by a former housekeeper as saying "We don't pay taxes. Only the little people pay taxes." Although she reportedly denied it, the words followed her until her death in 2007 at age 87. We are happy to assist you with the creation of a pet trust if you would like to provide for a special animal.

COLORADO LEGISLATIVE UPDATE

The 2008 Colorado legislative session adjourned May 6, 2008. Several bills were passed that affect estate planning.

SB 08-100 became effective May 14, 2008, and is Colorado's adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The purpose of the Act is to adopt a set of rules relating to cooperation and communication between courts of different states. Similar to the Child Custody Jurisdiction Act, the new Act defines a Home State and other states with "significant connection factors." It sets out procedures for jurisdiction of adult protective proceedings. It also sets out a procedure for transfer of protective proceedings when the person moves to another state, and the registration of Letters and Orders from the domiciliary state to authorize the fiduciary to act in Colorado. This latter procedure is similar to the ancillary proceedings authorized under prior law. See C.R.S. §§15-14.5-101 et seq.

HB 08-1248 became effective July 1, 2008 and affects joint tenancy real property. In C.R.S. §38-31-101, the "four unities" are confirmed as they apply to joint tenancies: the unities of time, title, interest and possession. Subsection (5)(a) of that statute authorizes a joint tenant to sever the joint tenancy by unilateral conveyance to himself or herself as tenant in common. Unequal joint tenancies are authorized in subsection

COLORADO LEGISLATIVE UPDATE (CONTD.)

(6)(a), but under subsection (6)(d), for Medicaid qualification purposes, the unequal joint tenancy will be ignored, and will be presumed to be equal.

HB 08-1153 became effective July 1, 2008 and sets out the tools that a probate judge may use to ensure that fiduciaries are acting properly. Most of these powers were already available to the Courts under existing statutes, but the enforcement provisions applicable to fiduciaries are gathered into new C.R.S. §§15-10-501 *et seq.* While the fiduciaries subject to these provisions are defined broadly (including personal representatives, guardians, conservators, trustees, agents under powers of attorney and custodians under Uniform Transfers to Minors Accounts), simply filing a Trust Registration Statement is not enough to give the Court personal jurisdiction over a trustee for these enforcement purposes. A new proceeding involving the trust would first have to be filed.

HB 08-1173 will become effective September 1, 2008, and is Colorado's adoption of the Uniform Prudent Management of Institutional Funds Act, and is an update of the prior uniform act. This Act applies to charitable organizations and institutions and sets out rules with respect to management of endowment and operating funds. It also sets out a procedure for restrictions on the use of a particular fund to be released if it is no longer practical or is wasteful.

SB 33 adds C.R.S. §§ 11-109-1001, *et seq.* to the Colorado statutes and became effective May 28, 2008. The Act authorizes creation of Private Family Trust Companies. Such a company cannot transact business with the general public, and may apply for an exemption from state regulation of trust companies. It can act as trustee for family trusts.

FEDERAL LAW UPDATE

Congress has still failed to pass any legislation clarifying the estate tax exemptions going forward. The exemption is \$2 Million this year and \$3.5 Million for decedents dying in 2009. In 2010, the estate tax would be repealed, but in 2011 the exemption would return to \$1 Million under the law applicable before 2001.

Although not a legislative change, the U.S. Supreme Court decided a case of significance to trustees and personal representatives of estates in Knight vs. Comm'r, 128 S.Ct. 782. In that case, the Court ruled that certain administration expenses are miscellaneous deductions that are subject to the 2% of adjusted gross income "floor." Up until this decision, many administration expenses, including trustee fees, attorney fees, accountant fees, investment advisory fees and other expenses (probate filing fees, recording fees, sales expenses) have been deducted on a U.S. Fiduciary Income Tax Return (Form 1041) at 100% to reduce net income to the trust or estate. Decisions at lower levels had split on whether certain fees should be subject to the same 2% floor that individuals must use. The Court ruled that investment advisory fees are subject to the floor, reasoning that only expenses incurred by a trust or estate "which would not have been incurred if the trust or estate did not exist" are not subject to the floor. Simply, because individuals incur investment advisory fees that are subject to the 2% floor, the trust's investment advisory fees will also be subject to the 2% floor.

The Mortgage Forgiveness Debt Relief Act of 2007 became law on December 18, 2007, and included a provision giving a surviving spouse the authority to use the deceased spouse's \$250,000 capital gain exclusion on sale of a principal residence for up to two years after the date of death. That means the surviving spouse will still have up to a \$500,000 gain exclusion for sale of a principal residence within that time period, assuming the requirements for the exclusion were otherwise met.

The Tax Technical Corrections Act of 2007 became law December 29, 2007, and retroactively repealed the gift and estate tax limits on charitable deductions for gifts of fractional interests in tangible personal property (such as artwork), but left in place the limits for income tax purposes imposed in the Pension Protection Act of 2006. The income tax limits will probably continue to discourage fractional interest gifts.

The Food, Conservation, and Energy Act of 2008 (the Farm Act) contained some tax provisions, including a two-year extension of the favorable conservation easement provisions applicable to farmers and ranchers. Those provisions were set to expire for conservation easements created after 2007, but are now extended through the end of 2009. The favorable treatment includes a charitable contribution deduction of up to 100% of adjusted gross income instead of the 50% limitation for contributions of conservation easements by persons who do not qualify as farmers and ranchers (which is still an increase over the 30% limitation for capital gain property), and carryover of excess contribution for 15 years instead of 5 years.

The Heroes Act was signed by President Bush on June 17, 2008, and provides a number of tax breaks for military families, including a requirement that ERISA plans must provide that a participant who dies while on active military duty will be treated as having returned to work, and then died while employed for purposes of determining benefits payable to survivors. In addition, any military death payments may be rolled over to a Roth IRA or Coverdell education savings account within one year after receipt of the payment. In order to pay for these benefits, tax rules were tightened on expatriates who are U.S. citizens. A special transfer tax will be imposed on covered gifts or bequests received by a U.S. citizen or resident from persons (or their estates) whose expatriation date is after the date of the Heroes Act. The tax applies at the highest estate or gift tax rate (now 45%) on an annual basis, and only to gifts in excess of the \$12,000 annual exclusion. The tax is reduced by transfer taxes paid to another country, but the estate tax exemption (now \$2 Million) does not apply. If the gift or bequest is made to a U.S. trust, the trust pays the tax.

WORKING WITH YOUR PROBATE LITIGATOR

This article provides some practical tips regarding communicating with your attorney in a cost efficient manner in connection with estate or trust litigation matters (such as will contests, breach of trust and fiduciary duty cases, and contested creditor claims).

PRE-MEETING PREPARATION

- Get your documents organized. If possible, prepare notebooks and index all of your important documents.
- Prepare detailed written notes outlining your legal problems and questions.
- Provide your lawyer with all of the details and let him or her decide what is important to your case.
- Provide chronologies of facts going back to the origin of the dispute. For example, in will contest litigation, it is important to document the decedent's mental and physical decline both prior to and after the preparation and execution of a will.
- The more organized you are, the less time it will take your lawyer to review and become familiar with your case.

CANDOR WITH YOUR ATTORNEY

Lawyers have a saying that the client's best case is the day he or she walks in the door. After discovery of all the facts, generally both sides' cases become a bit weaker. It is very important that you provide a complete and honest description of all of your problems, including information that may be favorable as well as unfavorable, even if it is embarrassing. Leaving out minor facts or details could later have a significant impact on your case. Only if you fully disclose all of the facts about your situation can an attorney properly analyze and weigh your case and advise you appropriately. Remember that there are strict rules that require an attorney to keep your information confidential.

DISCUSSIONS RELATED TO LITIGATION FEES AND COSTS

Your attorney will be ready to discuss fees at the first meeting and you should be ready to do the same. Do not assume that your first meeting will be free. You should discuss, when scheduling your meeting, whether the initial consultation is free or whether you will be charged for it. You can and should negotiate fees and discuss payment plans with your attorney. Ethical rules require that the agreement be in writing and you should keep a copy for your file. Make sure the fee agreement spells out specifically what the attorney is to do for you. You should ask your attorney for estimates as to what

it might cost to take your case through trial and possible appeal. It is always difficult for lawyers to estimate fees because judges and individual courts have different rules and policies which will play a role in how efficiently and cost effectively your case is going to be tried. You should also discuss alternatives to trial, including mediation. You should discuss with your attorney whether matters will be delegated to associates or paralegals who bill at a lower rate. Remember you will be charged for each telephone call, e-mail, voice-mail and in-person contact. You may also be charged for costs including copies, postage, faxes, transcription costs, long distance telephone calls, mileage, etc.

The attorney's fees depend on many variables such as amount of time, the difficulty of the work, the skill required, the customary fee in your area for similar work, the experience, the reputation and ability of the attorney, and whether the fee is a set amount, hourly or contingent on the outcome of the case.

Generally, in probate litigation the attorney will bill you by the hour and collect an initial retainer. Such fees may vary widely depending on the complexity of the legal work, the skill of the attorney and whether there are time deadlines. If you engage a lawyer shortly before trial, and he or she is forced to devote all his time and energy to your case, you may be charged more by the lawyer. You should receive periodic billing statements which provide a description of the legal work performed on your behalf. If work is performed by others (including associates, paralegals and/or legal secretaries), request their hourly rates as well.

UNDERSTANDING THE PROCESS

In order for your attorney to serve you better, you must understand all aspects of your case and the legal process in general. You should remember that there is no such thing as a stupid question when it comes to the law. Understanding the process will help you understand how the lawyer is working and what type of information is needed on your case. You should remember that you are also paying for the attorney's time. It may be cost effective to send your attorney an e-mail with multiple questions rather than numerous telephone calls with one question. You should avoid calling your attorney every time you think of your case.

UNDERSTAND WHAT YOU SIGN

Before you sign a pleading or a document, ask your attorney to explain it fully to your satisfaction. What can be clear and routine to an attorney can be confusing to people without legal training. Remember that you picked this attorney because of his or her abilities and, therefore, you should understand

that he or she may not proceed with certain recommendations you have, if he or she feels it may not be helpful to your case.

LEGAL ADVICE

Give careful and thoughtful consideration to what your attorney advises—the attorney's judgments are based on his or her legal training and years of experience. You should ask your attorney for his or her opinion as to the likely outcome of your case. Remember your lawyer is able to evaluate your case without emotion. You should remember that no attorney wins every case and that there are always risks at trial. The best legal advice may not be what you want to hear. It is the lawyer's responsibility to make you aware of potential outcomes of your case, based upon all of the facts as they develop. Strong cases can become weak and vice versa after the discovery phase.

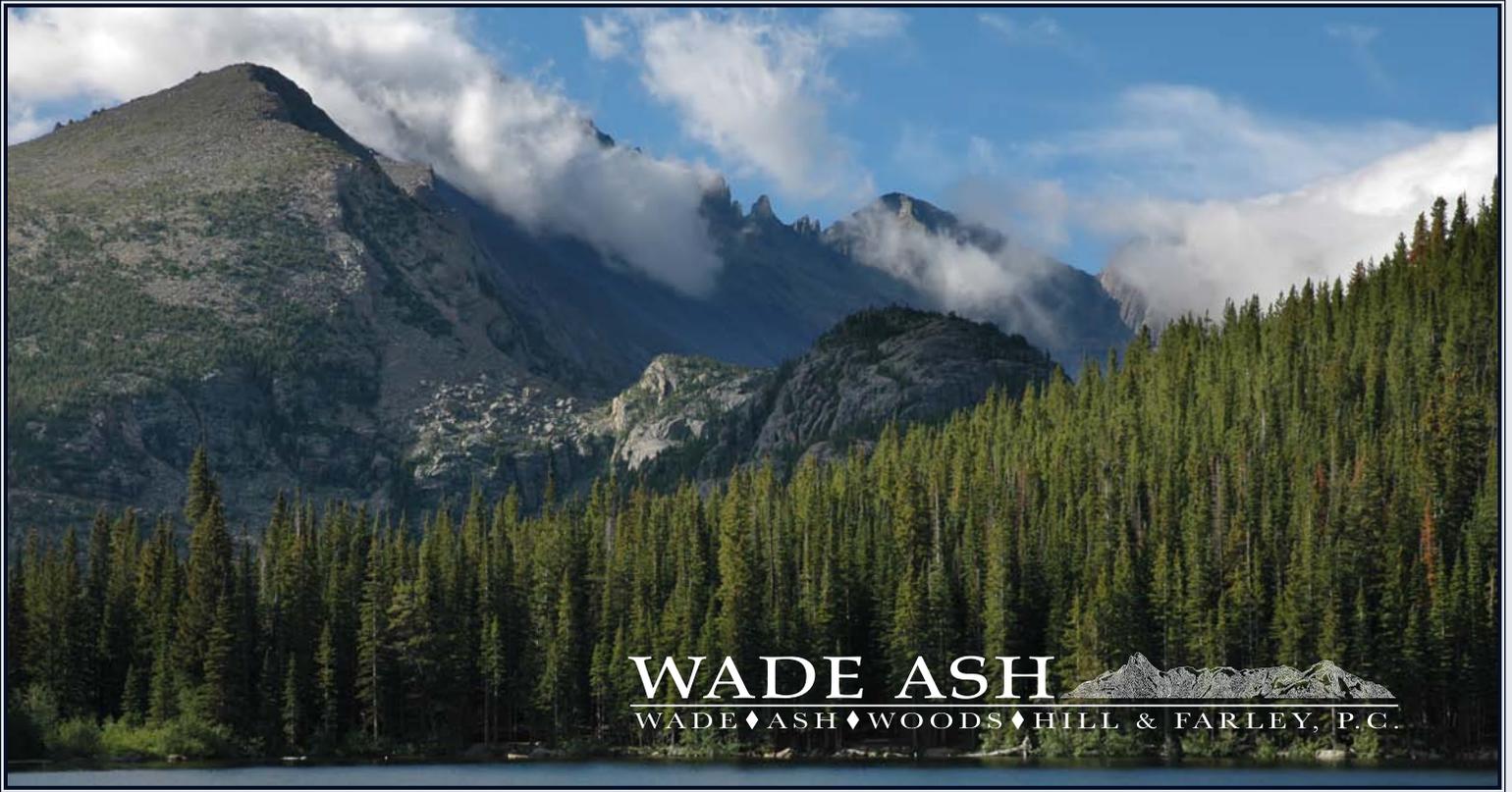
WHAT WILL MY ATTORNEY EXPECT OF ME?

The attorney will expect you:

- To be on time for court dates and appointments.
- To keep in touch with him or her and let him or her know when you are out of town for an extended period of time, or change your address or employment.
- To be completely honest and not withhold any important information which could be potentially damaging to your situation.
- To be realistic regarding the attorney's time. Remember that he or she has other clients. If your attorney does not get back to you as quickly as you would like, ask him or her if there is a better mode of communication such as e-mail which would help facilitate quicker responses.

DEVELOPING A GOOD ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship should be one of mutual respect and trust. Clients should feel comfortable discussing all aspects of their case with their attorney, including fees. As the case evolves and you learn more about the court and opposing counsel, your lawyer will be able to predict with greater certainty what the reasonable fees and expenses might be. Accordingly, throughout the course of litigation, the client is encouraged to ask questions so that he or she is better able to make an informed decision regarding the risks and benefits of going to trial.



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