WADE ASH

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NEWSLETTER

November 2008

NEWS OF THE FIRM

Happy holidays from all of us at Wade Ash Woods Hill & Farley, P.C.!

We are excited to announce that James R. Wade has been selected as the 2008 recipient of The Denver Foundation's Philanthropic Leadership Award and will be honored and recognized for his outstanding work in furthering philanthropy at a VIP Reception at the Denver Country Club on December 9, 2008.

James Wade, Herb Tucker, Marc Darling and Laurie Hunter were once again nominated and chosen by their peers to be honored in The Best Lawyers in America for 2009.

Marc Darling recently completed the Colorado Bar Association's Continuing Legal Education 40 hour program on Mediation Training, which was co-sponsored by the CBA Alternative Dispute Resolution Section. As a result of his completion of this comprehensive program, Marc received his certification as a Mediator and intends to devote part of his practice to mediating probate conflicts and related family disputes.

We are also pleased to announce that Andrea L. Rickles-Jordan has joined our firm as an associate. She will practice in the areas of Estate Planning, Trust and Estate Administration, Guardianships, Conservatorships, and Trust and Estate Litigation.

The firm has been diligently working on the redesign of its website and plans to launch it in the very near future. Once it is updated, you will find many more resources and information on the website related to the firm's areas of practice.

NOVEMBER 2008 TAX UPDATE

Estate Tax Exemption. The federal estate tax exemption will increase from $2 million in 2008 to $3.5 million for decedents dying in 2009. Similarly, the generation-skipping transfer tax (GST) exemption will increase along with the estate tax exemption. Unless Congress takes some action next year, the federal estate tax will be repealed for decedents dying during 2010, and the exemption will revert back to $1 million for decedents dying during 2011 and thereafter. We expect there will be a bill in Congress changing that course of events in 2009, but we will have to wait and see. The gift tax exemption stays at $1 million for lifetime gifts in excess of the annual exclusion throughout this process. The increase in the exemptions significantly impacts "formula" gifts in a Will or Trust. For example, assume a $4 Million distributable estate with $2 Million (the generation skipping tax exemption amount by formula) going to grandchildren (50%) and the residue of $2 Million going to children (50%). The increase in the GST Exemption could distort the estate plan by allocating $3.5 Million to the grandchildren (87.5%) and $500,000 to the children (12.5%).

Don't Pull the Plug! Let your family members know if you do not want them to "pull the plug" before January 1, 2009, if you are in a bad accident and could die before the increase in exemption kicks in. It could mean an extra $675,000 in tax!

Gift Tax Annual Exclusion. The federal gift tax annual exclusion will increase from $12,000 per donee per year to $13,000 effective January 1, 2009. If you have not yet made your 2008 annual exclusion gifts, be sure to make them before the end of the calendar year. Checks written to individuals prior to the end of the year, *but not deposited* until later are *not* completed gifts until the checks are deposited. There is an exception for checks written to charities: those are treated as completed gifts when written and delivered. Gifts paid directly to an educational institution for tuition, and medical expenses paid directly to the provider qualify for the gift tax annual exclusion *over and above* the $12,000 or $13,000 limit. You can make your 2009 annual exclusion gifts in January; you do not have to wait until the end of the year.

Silver Lining in Stock Market Decrease? The best time to make gifts (either outright or in trust) is *before* appreciation in value of the gifted property. This might be a very good time to make annual exclusion gifts of low value stocks to younger generations.

State Inheritance and Estate Taxes. Colorado no longer has an estate tax for decedents dying in 2005 and thereafter. There are states that still have inheritance or estate taxes, and some have lower exemptions than the federal exemption. If you own real property in states other than Colorado, state inheritance or estate taxes could apply. According to the ACTEC website, the states that have such taxes are Connecticut, D.C., Illinois ($2 million exemption), Indiana, Iowa, Kansas ($1 million exemption), Kentucky, Maine ($1 million exemption), Maryland ($1 million exemption), Massachusetts ($1 million exemption), Minnesota ($1 million exemption), Nebraska, New Jersey ($675,000 exemption), New York ($1 million exemption), North Carolina, Ohio, Oklahoma (but tax will be phased out in 2010), Oregon ($1 million exemption), Pennsylvania, Rhode Island (exemption only $675,000), Tennessee ($1 million exemption), Vermont and Washington.

New Federal Legislation. The financial "rescue plan" included some tax provisions, such as (a) alternative minimum tax relief, (b) the deadline for taxpayers age 70 or above to contribute their IRAs to qualified charities is extended to 12-31-2009, (c) farmers who contribute food to certain food banks prior to 12-31-2008 receive enhanced charitable deductions, (d) some of the more stringent penalties for tax return preparers were rolled back, and (e) a number of other tax breaks were extended through 2009 such as the election to deduct state and local sales taxes, and deductions for higher education expenses.

REDUCING EXPENSES FOR YOUR HEIRS

We often are asked about the costs of Colorado probate, and what steps can be taken to avoid probate. Colorado is a Uniform Probate Code state, and we have an "informal" procedure for appointment of a personal representative (executor). Under this procedure estates are generally opened by electronic filing with no attendance at a hearing. It is relatively inexpensive, compared to many other states. However, there are other factors that can greatly increase the cost of estate administration.

1. Will Does Not Meet Statutory Requirements. Probably the most common increase in estate administration costs is caused by a Will that does not meet the statutory requirements. Such a Will cannot be admitted under our "informal" procedure and, instead, must be filed in a "formal proceeding" that involves setting a court hearing, preparation of affidavits, and possibly witness testimony. In Colorado, a Will must be in writing, signed by the testator, with two witnesses also signing. Stationery store pre-printed Will forms and the use of software package forms, prepared without lawyer assistance, are often invalid or partially ineffective. While the estate planners do not favor the use of such forms, the estate litigators are kept busy responding to the issues presented. The following are some examples of Wills that caused more expense in the probate process:

(**a) Not Enough Witnesses.** We were successful in admitting a Will to probate that was only signed by the testator and one witness, but we did have to go through a formal probate procedure under Colorado's "harmless error" statute. Another common mistake is the testator signing the Will and having it notarized, but no witnesses.

(**b) Handwritten Will.** If the Will is in the handwriting of the testator, then it can be admitted as a holographic Will in a "formal" probate proceeding, with affidavits by persons familiar with the testator's handwriting. A pre-printed form Will or typed Will that is signed without witnesses does not meet the requirements of a holographic Will because the "material provisions" are not in the testator's handwriting. The harmless error statute may then be used to attempt to admit the Will in a formal proceeding.

(**c) Lost Will.** If the original Will is lost, a copy may be admitted to probate in formal proceedings. A Will that is lost is presumed to have been destroyed by the testator, so evidence either at a hearing or by affidavit must be filed rebutting that presumption.

(**d) Cross-Throughs on Will**. If something is crossed out on an original Will, this will usually cause the court clerk to reject an informal probate of the Will, and require formal proceedings before the judge.

2. Ambiguous Terms in Wills. The testator usually knows exactly what he or she means when writing a Will, but many years later, it might not be so obvious to the heirs and beneficiaries, or to the Court. Interpreting an ambiguity can be settled by beneficiary consent, or in a court proceeding, but both methods involve more time and expense. The following are some recent examples:

(**a) Charity Incorrectly Identified**. If the testator makes a gift to a charity, but uses only a general name, and not the actual legal name for a specific entity, it is sometimes not clear what legal entity is meant, and court proceedings are necessary to determine the correct beneficiary. Whenever a charitable gift is made in a Will, one should either contact the charity directly to obtain its legal designation, check the IRS list of charities, or check a website like Guidestar to verify the charity's name. In addition, it is best to give the personal representative authority to determine the correct charity in case there is a problem later on, such as a change in the charity's name, to avoid a court action.

(**b) Class Gift Combines Different Methods.** Gifts are often made in Wills to a person's "descendants, by representation." This is a short-hand method of saying equal shares to children, but if a child has died, that child's share will be divided for his or her children or, if none, it will be added to the shares for the other children. One could also make gifts to a class of beneficiaries "in equal shares" or "per capita." This generally means equal shares to the living members of a class (but there are some exceptions if the "anti-lapse" rules apply). Combining different types of distribution schemes create problems. For example, a gift was made to "my children and grandchildren in equal shares, by representation." Because one of the children had died, leaving children (grandchildren) of the testatrix, it was not clear what was meant. Did she mean that the children of the deceased child should receive a double share? Probably not, but an agreement among the beneficiaries had to be prepared, discussed and signed to solve the ambiguity.

(**c) "By Representation" Applied to More Than One Person's Descendants.** In another case, a gift was made to "John Doe's descendants and Jane Doe's descendants, by representation." John and Jane did not have any children together; each had children from prior marriages, but not the same number of children. Did this language mean equal shares for all children, or did it mean one-half to John's children, and one-half to Jane's children? This was solved by a Petition to the court for instructions.

(**d) Terms Not Defined.** In a handwritten Will, the testatrix gave "my money to be divided equally between my living sisters and brothers." This gift raised several issues, including (1) What did "money" mean: bank accounts, money market accounts and coin collections, or might it also include other "liquid" assets such as life insurance, annuities and investments; (2) were the testatrix's two half-sisters included, and (3) in Colorado, the "anti-lapse" statutes would apply to give a deceased brother or sister's share to his or her children even though that was not stated in the Will.

(**e) Grandchild Not Defined.** "I give $5,000 to each of my grandchildren." This gift seemed clear, except that one of the testatrix's children had given birth to a child while a teenager, and the baby was adopted by an unrelated

couple. Did the testatrix intend that child to be a "grandchild" for purposes of the gift, or not? It is better to be clear, and list the people meant to be included in a class. There can be a similar problem when an adoption was not completed before death, or when a baby is conceived after death of the father through alternative reproduction techniques.

(**f) Estate Tax Apportionment.** Gifts to spouses and charities are usually not subject to estate taxes, but they can be if the testator wants the tax burden to be shared, or if the testator did not want that result, but inadvertently or mistakenly directed the taxes to be paid from those gifts. This can happen if the "residue" is divided among the spouse, charities and other beneficiaries, and the estate taxes and expenses are payable from the residue.

(**g) Failure to Provide Birthdates.** Where distributions are delayed until a beneficiary attains a certain age, administration is more efficient if the birthdates are recited in the Will.

3. Lost Heirs, Beneficiaries or Fiduciaries. Another costly problem involves trying to find a person named in a Will for whom the family no longer has contact information. The personal representative must take reasonable steps to try to find the person, which may include publishing notice. Ultimately, if the beneficiary cannot be found, there is a procedure to turn the gift over to the Colorado state treasurer. Another problem involves a complicated set of "heirs" even where there is a clear Will. When the Application is filed with the Court, in order for a Will to be admitted to probate all of the decedent's intestate heirs must be listed, and notice must be given to them of the opening of the estate. Sometimes there are many heirs in a complex situation, and some of those people may have been out of touch for many years with the rest of the family. If a Will is very old, the person named as personal representative may be deceased or unknown to the rest of the family.

4. Specific Gifts of Property. Often a Will includes certain specific gifts, but there should always be a "residuary" clause, which is a gift of "all the rest of my property." This is because one's assets are constantly changing. Sometimes a specific gift is made, but at death that asset is no longer owned or the beneficiary has died. Those contingencies should be addressed in the Will. Equally important is the problem if all of the decedent's property is given in specific gifts to certain beneficiaries. If there is no "residue," then there is no fund to pay expenses, such as probate filing fees, debts, funeral expenses and taxes. Each of the specific gifts must then abate proportionately to pay the expenses, which can be a time-consuming computation.

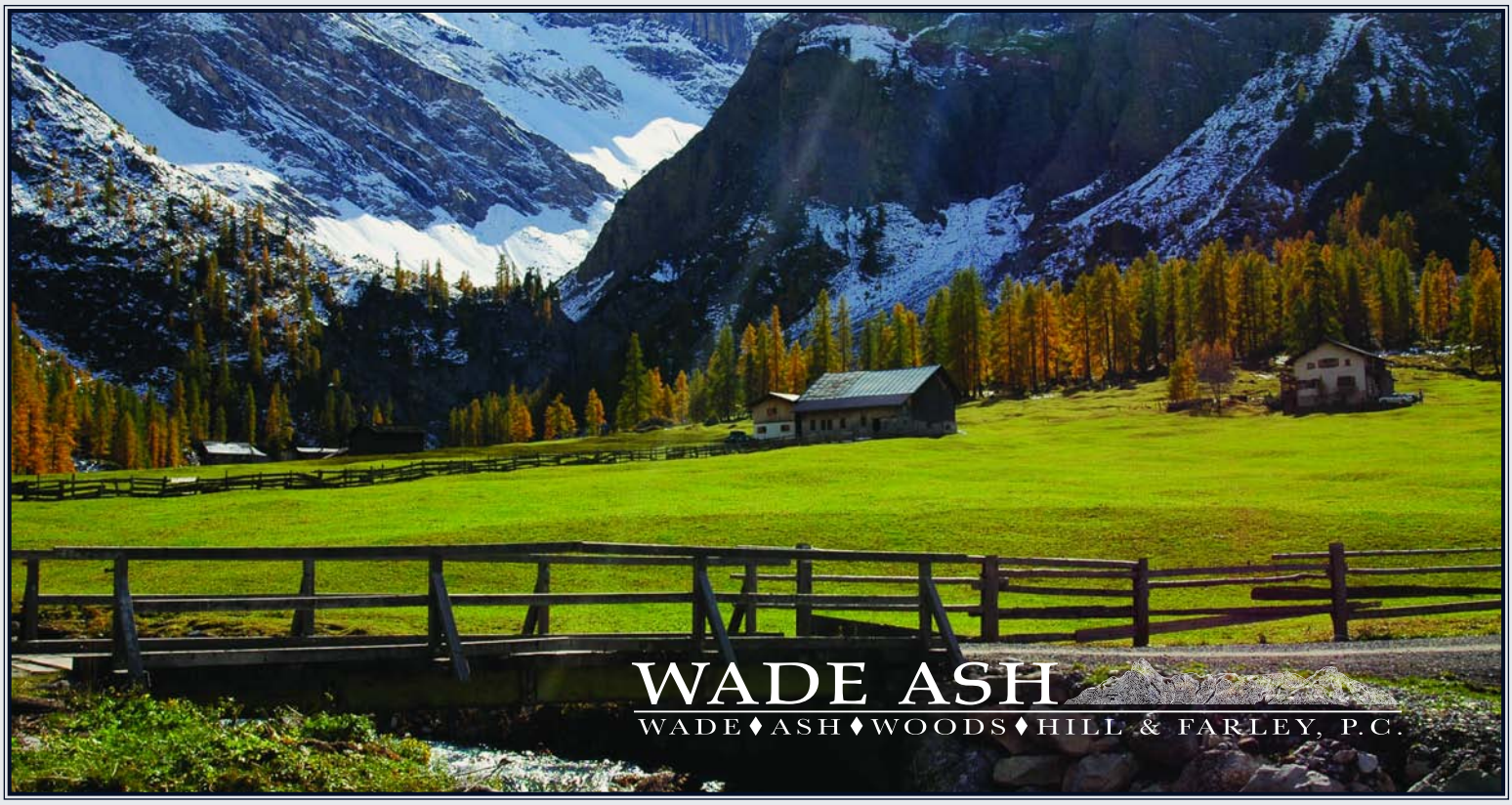
5. Informal Methods to Avoid Probate. Some persons have heard from neighbors or friends that they should avoid probate, and then they take steps to change titles on their assets or beneficiary designations to avoid having any property pass through their estates. As mentioned above, Colorado has a relatively inexpensive probate procedure, so that should not be a concern in this state. Some of the methods used to avoid Colorado probate can be much more costly than probate itself. For example, if a parent adds a child to the title on his residence as a joint tenant, a completed gift has occurred that may require the payment of gift tax. Also, if the child has a creditor problem in the future or goes through a divorce, that child is an owner of the parent's residence. If a child is added as a joint tenant to a bank account or investment account, no completed gift occurs immediately, but the child will have the authority to withdraw all of the funds. There is fairly frequent litigation on the issue of whether a child was added as a joint tenant to a bank account for "convenience" or if that child was intended to be the beneficiary at death. If you want to name someone to be able to sign checks on your account for convenience, it is better to name him as agent under a power of attorney, and not as a joint owner. Also, if one child is made a "Pay on Death" beneficiary of one account, and another child is beneficiary on another account, usually the balances in the accounts are not equal at the time of death, which can cause friction.

6. Real Property in Other States. While Colorado's probate procedure is relatively inexpensive, and Colorado no longer has a state estate tax or inheritance tax, many other states do have such taxes, and have much more complex and costly probate proceedings. If a decedent owns real property in another state, expenses can be greatly increased to clear title.

7. Family Problems. If one anticipates tension among children or other beneficiaries, steps should be taken during the planning process to minimize attacks on the testator's plan. If the problems are simply ignored, expensive litigation can result. Another issue concerns selection of fiduciaries, such as the personal representative and trustee. Placing one family member in a position of control over the finances of another often does not encourage the continuation of a personal relationship. "No contest" penalty clauses may also be used to attempt to disinherit a named beneficiary who challenges the Will or administration of an estate. Under Colorado law, these clauses are not effective if good cause exists for bringing the attack.

8. Problem Assets. If the testator has assets that are difficult to value, dispose of or find, that should be addressed in the planning process. If the testator has reason to expect someone else may claim an ownership interest, the estate planning attorney should be alerted. Unusual collections can also cause problems for the family in realizing value. If the testator knows who should be contacted, he should give that information to his family or estate planning attorney. Hidden assets (such as jewelry hidden in cereal boxes in the pantry) are also a big problem. Let someone know!

9. Funeral Arrangements. To avoid hurt feelings that can lead to disputes in the estate, fill out a form for Instructions about Disposition of Last Remains to let your family know what you would like to have happen. Our firm has been involved in court disputes over burial vs. cremation, where the remains should be buried, competing services, and directions for headstones. We may address those issues in more detail in a future newsletter!



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