



# WADE ASH

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# NEWSLETTER

July 2009

## NEWS OF THE FIRM

Summer has finally arrived and it is our hope that you are enjoying it!

We are pleased to announce that James Wade, Herb Tucker, Marc Darling, Laurie Hunter and Spencer Crona have been recognized for inclusion in the 2009 Colorado Super Lawyers list. Only five percent of lawyers in Colorado are chosen each year, and we have five of them!

James Wade recently completed the 2008 supplement to Wade/Parks Colorado Law of Wills, Trusts and Fiduciary Administration which is published by CLE (Continuing Legal Education) in Colorado, Inc. (the non-profit educational arm of the Denver and Colorado Bar Associations).

Laurie Hunter recently completed the 2009 supplement to her Gifts to Minors monograph which is also published by CLE in Colorado, Inc. In addition she, Josie Faix and Andrea Jordan recently completed the 2009 update to Judge Stewart's Colorado Estate Planning, Will Drafting and Estate Administration Forms which is published by LexisNexis.

Herb Tucker and Greg Washington spoke at the 2009 Annual Estate Planning Retreat in Snowmass, Colorado, which was hosted by CLE in Colorado, Inc. Herb and Greg's presentation covered Presumptions and Inferences in Probate Litigation and Will Execution based on the recent Colorado Supreme Court decision in *Krueger v. Ary*.

Herb Tucker is also the Chair and Organizer of a Will Contest Seminar and Webcast to be hosted by CLE in Colorado, Inc. which will take place on September 18, 2009 in Denver, Colorado. He and James Wade, Marc Darling, Greg Washington and Spencer Crona will speak at the Seminar which is also co-sponsored by the CBA Trust and Estate Law, Elder Law, Solo/Small Firm and Litigation Sections of the Colorado Bar Association.

On September 11, 2009, Marc Darling will be part of a distinguished panel of speakers at the Biennial Advanced Estate Planning Symposium at the University of Denver. The panel will address multiple tax and probate topics.

Jill Griffiths, our Legal Administrator, recently received a First Place award at the Association of Legal Administrators' National Conference in New Orleans, Louisiana for Visibility-Non-ALA Advertising in her role on the Board of Directors as Chair of the Publicity Committee during the 2008-2009 Board Year.

We are also pleased to announce that June Anderson recently re-joined our firm! She will be working with our attorneys in her capacity as a Paralegal in the area of Estate Administration.

As you may be aware, we re-designed and launched our new website in December, 2008. For more information about our firm, our practice and the services we provide, please visit us at [www.wadeash.com](http://www.wadeash.com). Under the Publications tab, you will find our newsletters and a broad range of articles and memoranda on various probate-related topics such as The Uniform Transfers to Minors Act, Will Preparation for Individuals Lacking Testamentary Capacity, Qualified Personal Residence Trusts and much more.

## COLORADO LEGISLATIVE UPDATE

The Colorado legislature adopted a number of bills in the 2009 legislative session that affect estate plans. Following is a brief summary:

**Uniform Principal and Income Act:** SB 09-139 adopted clarifications to Colorado's version of this uniform statute in C.R.S. §15-1-1419 and 430 that had been approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The changes respond to IRS regulations imposing additional requirements on distributions from retirement accounts and similar payments so that they will qualify for the marital deduction for estate tax purposes, and also clarify how distributions from partnerships and other "pass-through entities" to trusts should be allocated between a mandatory income beneficiary and the trustee's liability for income taxes. The changes are effective January 1, 2009.

**Trust and Estate Section Omnibus Bill:** HB 09-1241 was the so-called "Omnibus Bill" that contained changes to the Colorado Probate Code assembled by the Trust and

Estate Section of the Colorado Bar Association. The bill was signed by the governor April 22, 2009. The major part of this bill re-enacted the 1955 version of the Uniform Principal and Income Act, that applies to estates and trusts that are *not* covered by the 2000 version of the Uniform Principal and Income Act. There are also a few other changes, including permitting parents to nominate guardians for their minor children by a separate, signed writing, but *without* requiring witnesses and a notary, and revisions were made to the statute concerning opening a safe deposit box to retrieve an original Will and burial instructions.

**Uniform Power of Attorney Act:** The 2009 Colorado legislature passed and the governor signed the Uniform Power of Attorney Act as HB 09-1198. Although the effective date is generally January 1, 2010 (and will apply to all powers of attorney existing as of that date), the provisions of the new Act *may* be used before then, and became effective on the governor's signature. The Uniform Act makes a number of changes to Colorado's current power of attorney statutes, including adding restrictions to powers such as gifting, and a new statutory form is included in the Act. A power of attorney signed after the effective date of the Act will be presumed to be "durable" instead of requiring certain language in order to be durable and survive the principal's incapacity. The new Act revises current Colorado law with respect to the affidavit that can be signed by an agent, and protection of third parties from liability for following the directions of an agent. The new Act also provides that an agent will be entitled to receive reasonable compensation for services performed unless the power of attorney states otherwise. Existing Colorado statutes will continue to apply to medical powers of attorney, and to financial powers of attorney executed by corporations and others who are not individuals. Wade Ash is in the process of revising our financial power of attorney forms to comply with the new Act.

**Uniform Probate Code Amendments:** The 2009 Colorado legislature adopted amendments to the Uniform Probate Code proposed by NCCUSL in 2008, as HB 09-1287. However, these changes will not be effective until July 1, 2010, to give the subcommittee of the Trust and Estate Section of the Colorado Bar Association more time to review their provisions. The changes include (a) permitting a notarized Will without witnesses to be valid (although *best practice* in our firm will still include witnesses and a

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notary, and the so-called “self-proving affidavit”); (b) a mistake in a Will may be modified even without an inherent ambiguity (similar to the standard for correcting a mistake in a Trust); (c) modifying the intestate statutes; and (d) taking into account assisted reproduction techniques, and posthumously conceived children when defining who is a “parent” and a “child” for purposes of intestate succession and receiving class gifts under a Will or Trust.

### **Designated Beneficiary Agreement:**

The 2009 Colorado legislature adopted HB 09-1260, authorizing unmarried adults to sign a document designating each other as beneficiary for certain purposes, having their signatures notarized, and recording the document with the county clerk and recorder's office. The document does not override other documents, such as a Will, Trust, or designated beneficiary under a contract for an IRA, life insurance policy, annuity, etc. The Designated Beneficiary Agreement can be revoked by recording a revocation in the clerk and recorder's office. The form for the Agreement is contained in the Act, and is available on-line at [www.designatedbeneficiaries.org](http://www.designatedbeneficiaries.org). We are concerned that individuals will sign and record this kind of Agreement, and believe that is all that is necessary to accomplish what a Will or separate beneficiary designations on life insurance policies, IRAs, annuities, and the like can do. ***This Agreement does not actually designate the person as beneficiary of such contractual benefits.*** Instead, a Change of Beneficiary form must be signed and submitted to the company holding such policies or accounts to have the proceeds pass as intended. ***We strongly urge our clients to make a Will, and sign healthcare and financial powers of attorney to designate individuals as their fiduciaries instead of relying upon this Agreement.*** However, the Agreement can be useful to designate an individual to be able to bring a wrongful death suit, which otherwise is limited to a narrow class of individuals (spouse, children and parents), and to receive workers compensation benefits.

**Probate Forms:** The Judicial Task Force has completed its initial revision of all of the Colorado Probate Code forms as JDF forms. The forms are available on the Colorado Supreme Court's website, with instructions, at [www.courts.state.co.us/forms/subcategory.cfm/category/probate](http://www.courts.state.co.us/forms/subcategory.cfm/category/probate). Use of the forms became mandatory on July 1, 2009.

**Update on Beneficiary Deed Legislation.** You may recall that in 2004 the Colorado legislature adopted a statute authorizing beneficiary deeds to transfer title

to real estate on the grantor's death. Recently, advertisements have appeared in newspapers and magazines selling a “beneficiary deed kit.” While these deeds can be a useful method to transfer title in certain situations, they must be coordinated with your overall estate plan. This is also true for “pay on death” bank accounts or “transfer on death” investment accounts. Before sending money to a vendor for a “kit” please call if you wish to discuss our recommendations for titling property to coordinate with your estate plan.

## FEDERAL TAX UPDATE

**U.S. Estate Tax:** As we noted in our last newsletter, the U.S. Estate Tax Exemption increased to \$3.5 million for estates of decedents dying in 2009. Under the law still on the books, the exemption will be unlimited in 2010, but return to \$1 million in 2011. See our discussion below about anticipated changes this year.

**U.S. Gift Tax:** The annual exclusion amount increased to \$13,000 for gifts made in 2009. You do not need to wait until the end of the year to make annual exclusion gifts; you can make them now! Also keep in mind that healthcare expenses and tuition ***paid directly to the institution or provider*** qualify for the gift tax annual exclusion over and above the \$13,000 amount.

An advantage of the economic crisis and decrease in value of many kinds of assets is lower gift tax values for transfers to younger generation beneficiaries or trusts for their benefit. Also, the decrease in federal interest rates for intra-family installment sales makes these types of transactions very attractive at this time, even though the August rates are slightly more than the June rates. For example, the August 2009 mid-term annual rate is 3.37% (for loans under 10 years and more than 3 years) up from 2.25% in June, and the long-term annual rate is 5.12%. The “applicable federal rate” for valuing annuities and remainder interests is 3.4% for July and August 2009, up from 2.8% in June.

**2009 Legislation:** We still expect Congress to pass a law this year changing the repeal of estate tax in 2010, followed by a \$1 million exemption in 2011. Senator Baucus, the chairman of the Senate Finance Committee, introduced a bill that would keep the exemption at the \$3.5 million level, and would also make the exemption “portable” between spouses. This could mean prospectively that creating a “Family Trust” or “Credit Shelter Trust” at the first spouse's death would not be necessary to use both spouses' exemptions. If

Congress becomes too busy to pass a broader tax bill this year, then we might see an “extender” bill passed late in the year, simply extending the 2009 exemption and rate to 2010.

As part of the Administration's proposal for a healthcare bill that could pass this fall, a few provisions are included as “revenue raisers.” One would provide that Grantor Retained Annuity Trusts cannot have a term less than 10 years. ***If you are considering creating a GRAT with a shorter term, we recommend you get that trust in place and funded as soon as possible.***

Another provision in the healthcare proposal authorizes Treasury to issue regulations that would limit valuation discounts for family limited partnerships and limited liability companies, even where there is an active business involved. ***Again, if gifts of family business entities are contemplated to take advantage of minority interest and lack of marketability discounts, those gifts should be made as soon as possible.*** In addition, if your estate plan anticipates benefitting from valuation discounts for family business entities for estate tax purposes, those discounts may no longer be available when death occurs. You might want to consider alternatives to lock in the current value, such as a qualified installment sale of a family business interest, especially because interest rates for promissory notes are currently so low. ***Such a sale should be completed as soon as possible, before new regulations are effective restricting the use of valuation discounts.*** When tax legislation authorizes Treasury to issue regulations, such as the valuation discount proposal in the healthcare legislation, so long as Treasury issues the regulations within 18 months, the effective date of the regulations will still relate back to the effective date of the bill. At this time, “date of enactment” is mentioned in the proposal, but it is possible that Congress would decide to make it retroactive to “date of introduction.” That is why it is important to complete any planned transactions using business valuation discounts as soon as possible.

A number of tax changes applicable to individuals were included as part of the Economic Stimulus bill, including making the college education credits and deductions more generous, and increasing the first-time homebuyer credit. One change that is somewhat adverse to taxpayers is extending the so-called “kiddie tax” (taxing children's unearned income at the parents' rates) to children up to age 24 if they are full-time students.

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Finally, a cash incentive for individuals and businesses to trade in older gas-guzzling vehicles for new more efficient ones was included as part of the Supplemental Appropriations Act of 2009. A voucher for \$3,500 or \$4,500 may be issued, depending on the type of vehicle traded in and the type purchased. The new vehicle must be purchased between July 1 and November 1, 2009.

**State Estate Tax Update:** In our last newsletter, we listed the states that still have a separate inheritance or estate tax. In addition to those states, Delaware just re-enacted their estate tax, with a \$3.5 million exemption, effective for estates of decedents dying on or after July 1, 2009.

## COMPENSATING RELATIVES FOR CAREGIVING SERVICES

The Department of Labor estimates that by 2010 over 40 million baby boomers will be age 65 or older and by 2030, this population segment will increase to 71.5 million. In addition, the age 85 or older segment of the U.S. population is the fastest growing elderly age group, growing 274% between 1960 and 1994. It is estimated that those 85 or older will compose 5% of the U.S. population by 2050. As the baby boomers continue to age, their healthcare costs will continue to increase. In addition, the growth of the elderly population will increase the strain on all systems that touch their lives from retirement policies and pensions to healthcare, Medicare and other systems. As a result, many baby boomers will find themselves burdened with their own healthcare issues and/or the healthcare issues of their aging parents.

In many Asian cultures children are viewed as owing their parents comfort and aid throughout the parents' lives. Further, the children have a moral obligation to respect and care for their parents. The foundation of this tradition demands the respect and care of the elderly with affection, responsibility and gratitude. Cultural mores require that the adult child provide care in all aspects for the aging parent, including inviting the elderly parent to live in his or her home. It is further expected that the child will provide care to the parent until death. In these cultures, a daughter or son who refuses to care for an elderly parent brings dishonor to his or her family.

By contrast, the elderly in the United States typically reside in retirement communities and multi level care facilities where their

medical care and material needs are provided. If the elderly are unable to afford the costs of such a facility through private insurance, the costs may be covered by the Medicaid system. However, given the economic downturn, the current uncertainty of the Medicaid system and the fact that a healthcare reform may be years away, family members may very well have to provide care for an aging parent.

Some probate courts in Colorado, faced with a barrage of requests by relative caregivers for compensation for care services provided to family members, deny compensation absent a written agreement for such services. The basis for this refusal stems from a presumption by some judges that relative caregivers should offer assistance to their elderly family member not for money, but gratuitously out of love and affection. However, the reality for many relative caregivers is that providing care to a loved one can come at an enormous sacrifice, placing tremendous strain both financially and emotionally on the caregiver and his or her family. In order to ensure that the relative caregiver is compensated, a written care agreement should be put in place prior to the rendering of such services. These agreements create enforceable contracts between the relative caregiver and the elderly family member which should be recognized by both the courts and Medicaid.

### ***Impact on Medicaid Eligibility***

Absent a written caregiver agreement, Federal Medicaid regulations treat any payments made by a care recipient to a relative caregiver as a "gift." Pursuant to Medicaid regulations a gift could trigger a five year penalty period. Under the Deficit Reduction Act (DRA) of 2005, signed into law on February 8, 2006, the look back period for transferring away assets for less than fair market value, including making gifts, was extended from three years to five years. Any gifts made within a five year period prior to the Medicaid application can be counted against the applicant and potentially disqualify the individual from receiving Medicaid coverage. In contrast, payments made pursuant to a caregiver agreement will not be considered by Medicaid to be a "gift." Since these agreements can affect Medicaid eligibility, it is important to make sure that one consults with a knowledgeable probate attorney to assist in drafting the caregiver agreement.

### ***Creating a Complete Agreement***

First, an effective caregiver agreement must be in writing and should be witnessed by one or more parties unrelated to the caregiver or care recipient. Second, the agreement should be executed before the relative caregiver begins to provide services or receives compensation. Third, the agreement should include the amount of compensation and payment schedules. Fourth, the agreement should spell out the nature of the services to be provided, as well as the days and times that the services are to be provided to the care recipient. Finally, the agreement should not include

provisions for advance payments for anticipated future services because Medicaid may treat unearned compensation as a gift. When determining the amount of compensation the relative caregiver is to receive for his or her services, one should consider consulting with a geriatric care professional to determine reasonable compensation based on fees charged by other professionals and non-professionals for similar services.

### ***Powers of Attorney***

Generally, medical powers of attorney are limited to advance directives by the principal to his or her agent regarding healthcare decisions. Typically, medical powers of attorney only take effect upon the principal's disability, incapacity or incompetency. Under current Colorado law, agents under medical powers of attorney are not entitled to compensation; however, agents under financial powers of attorney are entitled to compensation if it is expressly stated in the document. Under the new Uniform Power of Attorney Act, effective in Colorado January 1, 2010, an agent under a financial power of attorney is entitled to "reasonable compensation," unless otherwise provided in the power of attorney. If a financial power of attorney includes compensation for care services, the document should provide a detailed description of the type of services the agent will provide and the compensation the agent will receive.

### ***Reducing Potential Conflict***

Caregiver agreements can also help reduce post mortem intra family conflict. Often, well intended family members provide care services to an elderly parent for years only to end up in drawn out and costly court proceedings with siblings or other family members at the time of the parent's death. These disputes frequently involve claims against the estate for compensation, actions to set aside inter vivos transfers of property to the relative caregiver or challenges to the deceased parent's will which may favor the relative caregiver. A caregiver agreement can eliminate the intra family conflict by creating an enforceable contract that should be recognized by both the courts and Medicaid. Disclosure of the caregiver agreement to other family members during the care recipient's lifetime may further reduce possible conflicts at the time of the care recipient's death.

### ***Other Benefits***

For an aging parent, care given by a trusted family member can provide tremendous peace of mind. Additionally, the aging parent and other family members may find comfort in knowing that the parent will receive proper care and attention. In many cases, paying a relative to provide care services may also be less expensive than hiring outside professionals. Further, by providing the relative caregiver with compensation for his or her services and ensuring reimbursement for out of pocket expenses such as food, fuel and medical supplies, the caregiver is relieved of any financial burden.



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