WADE ASH NEWSLETTER

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February 2014

NEWS OF THE FIRM

We are excited to announce that, beginning with this issue of our Newsletter, we are introducing an electronic version of the newsletter. If you would like to begin receiving our newsletters electronically, please go to the home page of our website (www.wadeash.com) and sign up. You will also have the option of opting out of the paper version.

We are pleased to announce that 2014 marks the third year in a row that our firm has been named in the U.S. News-Best Lawyers, Best Law Firms Metropolitan Tier 1 Ranking as the Best Law Firm in Colorado in the area of Trusts & Estates Law and the area of Litigation - Trusts & Estates Law.

We are also pleased to announce that the following attorneys in our office have been selected by their peers as Best Lawyers in America in 2014: James Wade, Herb Tucker, Marc Darling, Laurie Hunter, Josie Faix, Greg Washington, Merry Balson and Keith Lapuyade.

James Wade spoke on Selected Trust Issues in Dissolution of Marriage Proceedings at the Colorado Bar Association seminar entitled Trusts in Divorce Property Divisions on February 5, 2014 in Denver, Colorado. He will also be speaking at the National College of Probate Judges Spring Conference in Vail, Colorado on the topic of Federal Issues in Estate Administration. He also recently updated and released the Sixth Edition of Wade/Parks Colorado Law of Wills, Trusts, and Fiduciary Administration which is published by Continuing Legal Education in Colorado and the Colorado and Denver Bar Associations.

Herb Tucker and Keith Lapuyade have been asked to serve as faculty at the Probate Litigation Evidence Practicum on April 4, 2014 which will be sponsored by the Colorado Bar Association in Denver, Colorado.

Alison Zinn was featured in the December, 2013 issue of 5280 Magazine in an article about prominent Colorado women. She also participated in a panel discussion on Bias and Discrimination Within the Legal Profession at the Colorado Bar Association Continuing Legal Education seminar on Workplace Discrimination on January 10, 2014 in Denver, Colorado.

Keith Lapuyade co-authored an article in the December, 2013 issue of Seminars in Cutaneous Medicine and Surgery published by IMNG Medical Media. He also presented "The Role of Personal Counsel" at the November 20, 2013 CDLA seminar at the J.W. Marriott in Cherry Creek North.

Jill Griffiths, Legal Administrator, participated in a panel discussion on February 3, 2014 with students at the University of Denver Sturm College of Law who are pursuing a degree in the Master of Science in Legal Administration program. The panel was part of the curriculum for the Applied Leadership and Management Theory course taught by Ron Seigneur, CPA and Adjunct Professor.

PERILS OF AVOIDING PROBATE

James Wade

In states (unlike Colorado) where estate settlement costs are high and the system of estate administration is slow, there are various methods properly used to have assets pass outside of the probate system. In Colorado, however, these methods may be counterproductive.

In some states, revocable trusts are often used as a will substitute to avoid probate. In Colorado, however, our system of informal probate, unsupervised administration and informal closing effectively removes the court from estate administration and makes probate estate administration as efficient as the use of a revocable trust at death.

There are disadvantages to revocable trusts including the following:

1. Loss of statutory homestead exemption for residential real estate placed in a revocable trust (our Court of Appeals ruled that the exemption was intended to benefit people and not trusts);

2. Loss of short four-month period for creditors to file claims in a probate estate after death;

3. Risk of having to file trust income tax returns prior to death;

4. Post-death complications in not being able to utilize income tax and distribution planning (trusts generally can only utilize a calendar year for income tax purposes; post-death a trust can file a special election under the Internal Revenue Code to be taxed as if it were a probate estate so as to get the benefits of selecting a non-calendar year); and

5. The early costs of setting up the trust and funding it (the ultimate net cost should be about the same).

POD (payable on death) bank accounts and TOD (transfer on death) security accounts are authorized by statute and are sometimes promoted by financial institutions as a short-cut way to avoid probate. Again, probate cost avoidance is not applicable in Colorado, and there is a real risk that use of these accounts may end up distorting the primary estate plan provided in the will. Assume you have your estate under your will pass in equal shares to your three children. Having no POD or TOD designations will accomplish this. If, however, these kinds of accounts are used to designate a particular child as recipient of a particular account or accounts, there

PERILS OF AVOIDING PROBATE (CONT'D.)

must be constant surveillance as to the value and titling of each account to keep your overall estate in balance.

An aside: Adding a family member's name to an asset as joint tenant (again to avoid probate at death) may be unwise. Such action with respect to real estate and securities creates an irrevocable, completed gift for transfer tax purposes and may require the filing of a gift tax return. It may also subject the assets to the creditors of the child whose name is added. This may not be the case with bank accounts, but those accounts provide their own problems. Assume again that your will names your three children as equal beneficiaries of your estate. Assume you add the name of one of your children to your bank account, at least in part to have a second signature to write checks to pay bills. Assume there is $20,000 in your account at the time of your death. Does the child whose name was added as joint tenant get the full $20,000 by survivorship or should the amount pass as part of your estate in equal thirds? The easy solution to this problem is to add the child to your account by using the bank's power of attorney or agency account registration form (rather than using the joint tenancy registration form). In this way the child can still write checks to pay bills without distorting the estate plan.

As additional aside: A revocable trust funded only with real estate outside of Colorado may be appropriate to avoid ancillary probate and administration. At death the trustee is directed to distribute the real estate pursuant to the will of the person who created the trust.

PORTABILITY OF UNUSED ESTATE TAX EXEMPTION

Laurie Hunter

As we have reported in the past, the 2010 Tax Act created a new concept: the "portability" of a deceased spouse's unused estate tax exemption to the surviving spouse's exemption. This means that the exemption of the first spouse to die can be added on to the exemption of the surviving spouse (perhaps doubling it). The current estate tax exemption is $5,340,000 for decedents dying in 2014. The deceased spouse's unused exemption amount (DSUEA) can only be added onto the surviving spouse's exemption by timely filing a U.S. Estate Tax Return (Form 706) that is due 9 months after the decedent's death, or if an application for exemption is timely filed, 15 months after date of death. Ordinarily, a Form 706 is only required to be filed if the gross estate exceeds the applicable exemption ($5 million as indexed for inflation after 2011). But as we have noted in prior newsletters and blogs, even if the first spouse's estate does *not* exceed the exemption, a surviving spouse should consider filing a Form 706 to increase the surviving spouse's exemption through portability. Many people have not filed such a return, and those in same-sex marriages would not have known that they *could have* filed such a return until the decision by the U.S. Supreme Court in *U.S. v. Windsor* last June.

The IRS issued Revenue Procedure 2014-18 on January 29, 2014 that grants an automatic extension of time to file a Form 706 to elect portability if the following requirements are all met:

- Death occurred between 12-31-2010 and 1-1-14;
- The decedent was a U.S. citizen or resident and was survived by a spouse;
- The decedent's gross estate did not exceed the applicable exemption (which would have required the filing of a Form 706);
- The estate did not file a Form 706 within the 9-month period after date of death, or 15 months if an extension was filed;
- A complete Form 706 is actually filed on or before 12-31-2014; and
- The following notice is on the top of the Form 706: "Filed pursuant to Rev. Proc. 2014-18 to elect portability under § 2010(c)(5)A)."

This extension is automatic if all of the requirements are met, and a Request for Relief under IRC § 9100 need not be filed (that ordinarily has a $10,000 filing fee). The IRS mentioned in the Revenue Procedure that although the due date for electing portability is statutory for estates that are required to file a Form 706, the due date for electing portability on a Form 706 for estates *not* required to file a return is governed by regulation, and therefore the IRS can extend the due date by the Revenue Procedure and without action by Congress. The IRS also noted that a claim for refund based upon portability under this Revenue Procedure must be filed within the time limits of IRC § 6511(a): the later of three years after filing the tax return where the tax was paid (the surviving spouse's Form 706) or two years after payment of the tax.

SO YOU WANT TO BECOME A FIDUCIARY?

Herb Tucker

Before agreeing to serve in any fiduciary capacity, you should know what you are getting into. Under the Colorado Probate Code, a fiduciary is defined as a personal representative, special administrator, guardian, conservator, special conservator, trustee, agent under a power of attorney, and custodian of assets created under the Colorado Uniform Transfers to Minors Act. Fiduciaries are held to a high standard of care and performance. Generally, they owe duties of loyalty and impartiality to beneficiaries. The Probate Code provides that a fiduciary shall observe the standards in dealing with trust and estate assets that would be observed by a prudent man dealing with property of another. If a fiduciary has special skills or training, he is expected to use those special skills and expertise in carrying out his fiduciary duties.

Fiduciaries are required to hold estate assets for the benefit of beneficiaries and creditors. Fiduciaries are required to:

- Segregate estate funds.
- Preserve and protect estate assets.
- Prepare tax returns.
- Give notice to decedent's creditors.
- Prepare inventories of estate assets.
- Account to beneficiaries.

SO YOU WANT TO BECOME A FIDUCIARY? (CONT'D.)

- Keep meticulous records of all financial transactions and make those records available to inquiring beneficiaries and creditors.
- Timely pay bills of the estate.
- Make distributions to heirs and beneficiaries of the estate.
- Prepare final accountings.

In 2011, the General Assembly enacted Part 5 of the Probate Code entitled "Fiduciary Oversight, Removal, Sanctions and Contempt." This section of the Code gives courts jurisdiction over fiduciaries and affords judges as well as beneficiaries a number of remedies against the fiduciary. Under this section of the Code, where there is nonfeasance or malfeasance, courts have the ability to remove and sanction fiduciaries. Fiduciaries who fail to carry out their duties and responsibilities to the estate may be held in contempt, brought into court and face possible personal liability or surcharge.

The compensation to lay fiduciaries, who are typically family members, generally ranges from $40 to $80 per hour depending upon the complexity of work performed. Beneficiaries are permitted to review all fiduciary fees, including the fiduciary's contemporaneous time records. If fees are determined, under the specific criteria of the Probate Code, to be unreasonable, the fiduciary may be required to refund fees to the estate.

The Probate Code permits personal representatives to hire agents, including attorneys. Historically, Colorado case law and Probate Code permits a fiduciary to pay his fees, as well as his attorney's fees, from the estate. However, this is not always the case when fees are challenged. The greatest risk to a fiduciary is that if he is dragged into court by disgruntled beneficiaries to defend the reasonableness of fiduciary fees or his attorney's fees, the fiduciary may face personal liability and have to reimburse the estate.

Generally, courts are reluctant to award fees incurred to defend fiduciary fees or attorney fees. Under the Probate Code, Courts are given broad discretion to deny fiduciary fees and attorney fees related to fee dispute litigation. Fee dispute litigation is expensive in that some courts want experts to opine as to the reasonableness of the fiduciary's fees and attorney's fees. Expert witnesses in fee disputes are typically attorneys experienced in probate and trust matters and are expensive, charging many thousands of dollars for their opinions and testimony. Fee dispute litigation can require pretrial discovery, including the fiduciary's deposition, his attorney's deposition and the expert witness' deposition. The escalation of pretrial discovery can compound the fiduciary's exposure if fees are found to be unreasonable.

Before putting on the fiduciary hat, you should have your estate planning attorney carefully explain to you the inherent risks in serving in any fiduciary capacity. Most probate and trust litigation disputes involve second marriages and children from the first marriage or siblings (or their spouses) who have an axe to grind. You should also be leery stepping into the fiduciary role where the decedent had significant debt, including significant tax liability. Fiduciaries are required to prepare and file the decedent's personal income tax return for year of date of death and fiduciary income tax returns as well as federal estate tax returns for estates over $5.34 Million.

Do not automatically assume that as a nominee fiduciary all of your fees and your attorney's fees are going to be paid out of the estate. You may want to decline to act as fiduciary. You should discuss alternatives with your estate planning attorney before nominating a family member to serve as a fiduciary. These alternatives include hiring a neutral third party or even a professional experienced in serving in various fiduciary capacities. In the long run, the expense of paying a professional may save the estate significant litigation expenses and relieve you of the stress that comes with possible personal liability while serving in a fiduciary capacity.

DOWNTON ABBEY FANS

Laurie Hunter

Those of us who watched the first episode of *Downton Abbey* this year on PBS were excited to see our area of the law highlighted, and to receive additional education in English entailed estates. A letter signed by Matthew Crawley was interpreted to be a valid Will so that his share of the estate passed to his wife, Mary, instead of to his infant son. Matthew's letter was signed and witnessed, and although it indicated his intent to later prepare a more formal Will, he wanted to set out in writing his wish that Mary would be his sole heir. Generally, an intent to prepare a Will in the future is not itself held to be a valid Will, but the letter in this instance indicated an intent to be a testamentary document. Those who watch the show will remember that Lord Grantham (Robert) had three surviving daughters after his son died on the *Titanic*. Therefore, his title and lands would pass on his death to the next male heir, who turned out to be cousin Matthew, and his wife and daughters would have to leave their home. Matthew married Mary, one of the daughters, so the family could stay. Robert encountered some financial difficulties, so Matthew used cash that he inherited from another source to purchase a one-half interest in the estate. We believe that he could have purchased an interest that would only last during Robert's remaining lifetime, but the show does not clarify that issue. The purchased interest was owned by Matthew *individually* and was not part of Lord Grantham's title, so Matthew was able to leave it by Will to his wife, Mary. Robert's title and entailed lands will now pass on his death to Matthew's son, since Matthew predeceased Robert. Even though England abolished fee tail in land in 1925, titles generally still are passed down the male line only. This has become a current issue in the United Kingdom, especially after Parliament changed the law so that if Prince William had a daughter first, she would have been next in line. It turned out he had a son, so the monarchy will progress along the male line.

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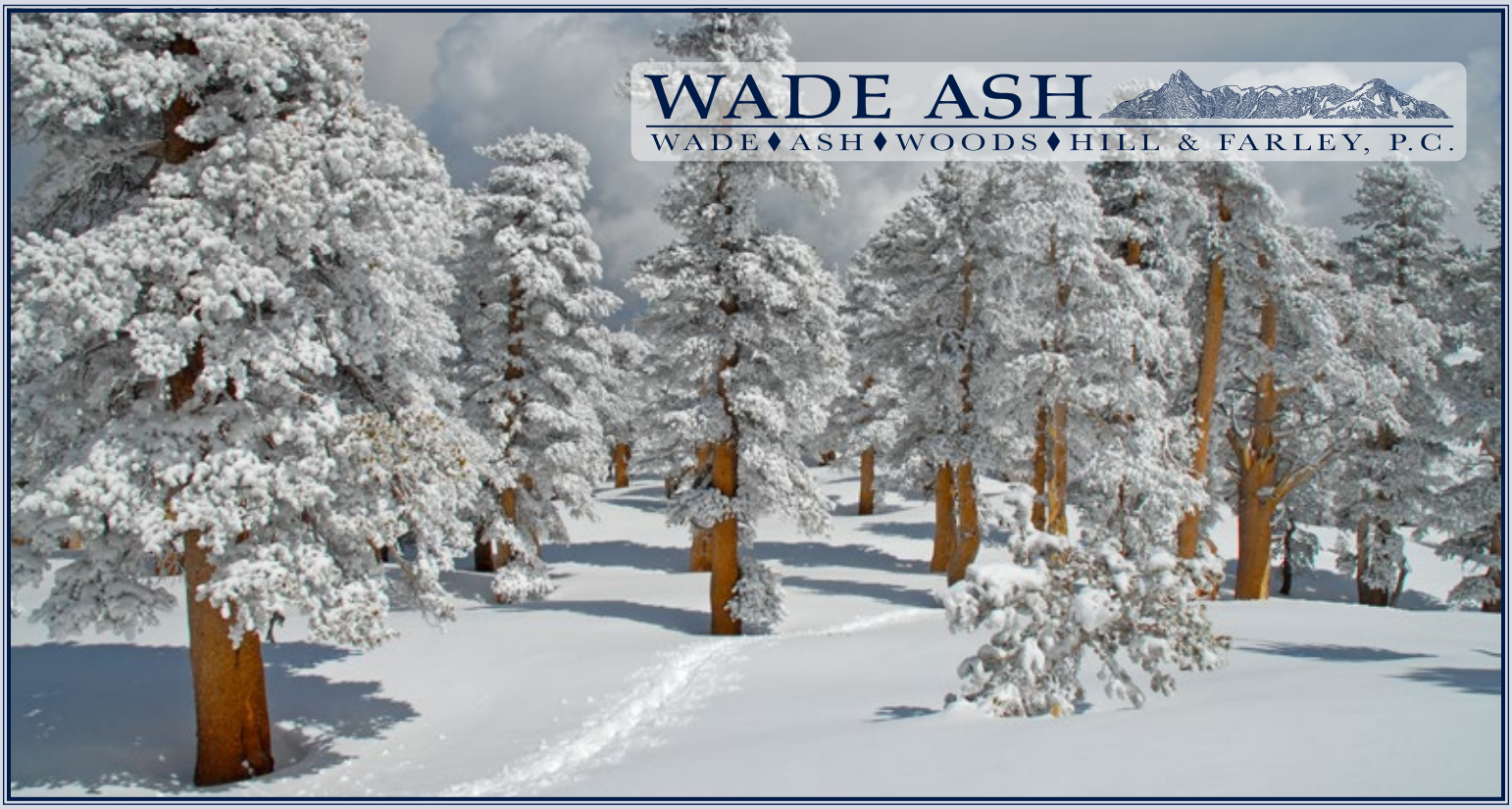

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