All at Wade Ash would like to wish you and your loved ones a happy holiday season! We appreciate our association with you over the last year and hope to continue to work with you in the future.

We are very pleased to announce that Zachary D. Schlichting has joined the firm as an associate attorney. Mr. Schlichting will continue his practice in the areas of Estate and Trust Litigation, Contested Conservatorships and Guardianships, Estate and Trust Administration, and Estate Planning.

Kevin Millard was recently recognized by Chambers & Partners, an organization that, since 1990, has ranked both attorneys and law firms in their practice areas on the basis of their legal knowledge and experience, their ability, their effectiveness, and their client service.

Kevin Millard also spoke at a seminar on August 1, 2017 on the topic of A Few Things You Might Believe About Colorado Trust & Estate Law that Might Not be True. The seminar was sponsored by CLE in Colorado, Inc. the non-profit educational arm of the Colorado and Denver Bar Associations.

James Wade spoke on Fiduciary Neutrality for the Centennial Estate Planning Council at the Mount Vernon Country Club on September 14, 2017.

In addition, James Wade participated as a panelist at his 55th Harvard Law School Reunion Symposium in October, 2017 on the topic of What’s to Become of the Legal Profession? He had been requested to discuss the topic from the perspective of a boutique law firm.

James Wade and Kevin Millard are members of the Joint Editorial Board for Uniform Trust and Estate Acts. The Board is composed of representatives from the American College of Trust and Estate Counsel (ACTEC), the American Bar Association and the Uniform Law Commission. The Board oversees uniform laws in the Probate area including the Uniform Probate Code, the Uniform Trust Code, the Uniform Transfers to Minors Act and the Uniform Principal and Income Act. Kevin is a Representative from ACTEC. Jim has been on the Board since the early 1980’s and is a Liaison from the Board to State Court Judges including the National College of Probate Judges.

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In light of strong opposition from the Florida Bar Association, Florida Governor Rick Scott vetoed the Act because it did not provide adequate safeguards. In a letter to the Florida Secretary of State Ken Detzner, Governor Scott stated:

While the concept of remote notarization is meant to provide increased access to legal services like estate planning, the remote notarization provisions in the Bill do not adequately ensure authentication of the identity of the parties to the transaction and are not cohesive with the notary provisions set forth in Chapter 117, Florida Statutes.

Governor Scott went on to state while the idea of electronic wills is innovative and may transform estate planning for Floridians, he believes that this Bill fails to strike a proper balance between competing concerns.

Under the FEWA, an electronic will is considered self-proving if it conforms with the statute; there is an acknowledgment of the electronic will by the testator; and affidavits of witnesses are made in accordance with the statute and are part of the electronic record containing the electronic will or are attached to or are logically associated with the electronic will.

In 2017, the Florida Legislature approved House Bill 277 promulgating the new Florida Electronic Wills Act (FEWA). The FEWA authorizes the creation of electronic wills and provides that the execution of electronic wills may be witnessed and notarized through the use of remote technology. The Act also specifies that electronic wills for residents, as well as non-residents, may be probated in Florida.
will has not been altered in any way since the date of its execution.

The Qualified Custodian of an electronic will must:

• Not be an heir or devisee of the testator.
• Be domiciled in and a resident of the state of Florida or be incorporated or organized in Florida.
• Consistently employ a system for ensuring the safekeeping of the electronic records.
• Create and store the electronic record containing the electronic will under such system.
• Furnish to the court any information pertaining to the Qualified Custodian’s qualifications, policies and practices relating to the creation, sending, communication, receipt, maintenance, storage and production of electronic wills.

The legislation regarding the FEWA was not without controversy. The Real Property, Probate and Trust Law Section of the Florida Bar Association opposed the proposed legislation. Renowned legal scholars, Professors Sitkoff and Langbein, drafted a White Paper on the proposed enactment of the FEWA voicing the following concerns:

• Use of public key cryptograph and digital water-marking to insure the original digital document cannot be altered.
• Adequate licensing and regulation of Qualified Custodians by the Secretary of State.
• Minimum storage and security standards for Qualified Custodians of electronic wills.
• Safeguards to protect the testator from unfair terms of service which exonerate Qualified Custodians from liability for safekeeping of electronic wills.
• Protection of confidential information if the Qualified Custodian terminates services or seeks to transfer the electronic will to another Qualified Custodian.
• Procedures in place so that when the testator dies the electronic will can be deposited with the appropriate court.
• Protocols for personal representatives to access the electronic will at the testator’s death.
• Warnings to testators that their electronic wills might not be accepted by other states.

The Uniform Law Commission has authorized a drafting committee to work on proposed legislation for electronic wills. The first meeting of the drafting committee was scheduled for October of this year. The committee chairs have recognized that there are cases cropping up throughout the United States involving wills on tablets and other electronic devices. Electronic wills will someday become the modern day holographic wills (handwritten wills). It is inevitable that people are going to attempt to execute wills themselves and may use electronic devices, including applications downloaded on smart phones, to create estate planning documents.

The drafting committee also recognizes that companies will want to create a market for electronic wills and will encourage legislatures to adopt statutes that create a way to validate those wills. A company called Bequest, Inc. (which is a Miami-based company that runs a national website called willing.com) is behind the Florida Act. In 2016, Bequest, Inc. retained a national lobbying firm, Ballard Partners, and provided testimony in favor of the bill in the Florida Senate subcommittee this year. Bequest, Inc. plans to launch a product enabling it to act as a Qualified Custodian of records as proposed under the Florida statute. Recent legislation suggests that if such bills are being pushed by Bequest, Inc., other companies like legal services giant, Legal Zoom, will create similar products to offer electronic wills. Legal Zoom currently has a product in the United Kingdom called Legacy that lets people create or even update a digital will with their smartphone.

The drafting committee will have to address a number of complex issues surrounding signature requirements to protect the document from tampering. Authentication technology has been reduced to something you know (password), are (biometrics) and have (driver’s license or passport). Emerging technologies that measure biometrics and apply them to identity verification are becoming a reality. Biometrics is the measurement of biological characteristics. The nature of measurements including fingerprints, facial, voice and optical characteristics, DNA, as well as brainwaves, are all characteristics that are unique to each individual. These measurements may prove to your computer or smart phone your identity, permitting access to your digital documents. Some biometric measurements are easy to see including facial, iris and fingerprint scans from high resolution images with an algorithm that compares physical details.

This year the Transportation Security Administrator (TSA) announced that Denver and Atlanta will allow passengers
who are pre-screened to use fingerprint identification. Boston will be the test site for facial recognition scans of pre-approved passengers. There are also invisible biometrics, such as voice print biometrics, which rely on the unique sound of the human voice and measure a trait that combines the uniqueness of your lungs, larynx and other vocal organs.

The future of biometrics is limitless. Someday brainwave biometrics could be used to prevent impulsive text messages, e-mails or tweets where the sender is prohibited from sending a transmission when he is in a distressed mental state or under the influence of drugs or alcohol. In the future, it may be possible that brainwave biometrics could prevent a testator, who has significant dementia or Alzheimer’s, from amending or revoking his or her electronic will.

Another unique problem with electronic wills is storage. As in the FEWA, one option is to require a Qualified Custodian to store the will. If the concept of the Qualified Custodian is in place, specific qualifications and protocols will need to be in play. Another option will be storage through the courts. Many courts allow e-filing of pleadings. It is entirely possible to set up a system for storage that would not be burdensome for the courts. The courts could charge a fee that would cover the costs to avoid any type of fiscal note impacting the state’s budget.

How will electronic wills be revoked? Traditional statutes require revocation by a subsequent document or a physical act. If there are multiple electronic copies and the testator destroys one, is that a valid revocation? How would a testator destroy an electronic will? Should revocation of an electronic will be limited to only subsequent documents?

Electronic wills also raise complex issues regarding choice of state law questions. Should it matter that the testator becomes a domiciliary of the state after the execution of the will? Should a will executed electronically, be granted full faith and credit by one state to another state? This is another incentive to develop a uniform law which would harmonize state law throughout the United States.

To my surprise and despite my disclosures, the defendant asked me no questions and made no challenges, leaving me impaneled on his jury despite my background in criminal prosecution.

As with any proceeding involving a pro se litigant, the process limped along in many places, although I was endlessly impressed with the patience and professionalism of both the presiding judge and the assistant district attorney. After two very long days of taking testimony, during which we were allowed to take notes and ask written questions approved by the judge (to make sure that they met the requirements of applicable rules of evidence), and also during which the defendant himself took the stand, we were read the approved jury instructions and ushered into the jury room to begin our deliberations.

The third lesson I learned was the best of all: my worst fears of stereotypically apathetic or argumentative (or both) jurors were never realized. My eleven fellow jurors were among some of the most thoughtful, respectful, and considerate people I have ever had the pleasure of working with. We reviewed the physical evidence, discussed witness testimony and credibility in detail, and broke down the elements of each crime as they were presented in the jury instructions. We worked very hard to apply the evidence presented at trial in the most objective way possible. We accommodated each other’s opinions, viewpoints, and life experiences as applied to the evidence. In short, the process worked exactly like it was supposed to.

I know very few people who truly want to sit in judgment over another human being and, because of this, serving as a juror will never be an easy undertaking. Juries, however, are an indispensable part of our justice system. Trial by jury separates us from dictatorships and totalitarian regimes. Service on a jury is well worth the time and effort involved.
Please visit our website at www.wadeash.com regularly for more information on our firm, lawyers and publications. This newsletter is for general informational purposes. It is not legal advice. If you have questions about your specific situation, please call (303) 322-8943 and reference this newsletter.