



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

## NEWSLETTER

February 2006

### NEWS OF THE FIRM

We are pleased to announce that Laurie A. Hunter became a shareholder of the firm effective January 1, 2006. Laurie has been Of Counsel to the firm since October 2003, and she continues her practice in estate planning, probate and trust administration.

The National College of Probate Judges retained the firm and Jim Wade to prepare an *Amicus Curiae*, Friend of the Court, Brief to the United States Supreme Court on the *Marshall Estate* case (commonly referred to as the Anna Nichole Smith Case) to be argued in February 2006. The case involves questions of federal versus state jurisdiction in probate matters. Our brief argues that federal courts should be respectful of state court jurisdiction in probate areas. Traditionally the federal courts have not exercised jurisdiction in the probate and dissolution of marriage areas.

The firm is a member of the International Network of Boutique Law Firms, a collection of specialty law firms in different areas of the law. Marc Darling and Jim Wade participated in organizing the Colorado chapter. This organization gives us a better opportunity to network with other specialty firms in Colorado and across the United States.

We have added a contact telephone number for, and maintain access to an office in, Grand Junction to be more convenient for our Western Slope clients. The firm plans to have an attorney travel on a regular basis to Grand Junction, so if you would like to meet with us in Grand Junction, let us know.

Jim Wade, Herb Tucker, Marc Darling and Laurie Hunter were included in the *Best Lawyers in America* for 2006.

### Estate and Gift Tax Issues

Effective January 1, 2006, the federal estate tax exemption increased from \$1,500,000 to \$2,000,000, and the estate tax rate for taxable estates over the exemption decreased from 48% to 46%. The gift tax exemption remains at \$1,000,000 for lifetime gifts in excess of the annual exclusion. The gift tax annual exclusion increased effective January 1, 2006 from \$11,000 to \$12,000 per donee per year. In addition, the gift tax annual exclusion for gifts to a non-U.S. citizen spouse increased from \$117,000 to \$120,000. **You do not have to wait until December to make annual exclusion gifts. February is a great time of year to make gifts to reduce value in your estate.**

As we noted in our last Newsletter, because Colorado's estate tax was tied to the "state death tax credit" on the U.S. Estate Tax Return, and that credit was changed into a deduction effective January 1, 2005, Colorado no longer imposes a state estate tax. However, many other states have changed their laws to "decouple" their state estate tax from the federal state death tax credit, and they do impose a tax. A number of those states have also decreased the exemption for state purposes, so that even if a federal estate tax is not due, a state tax may be imposed. This impacts the estate plans for anyone domiciled in a state that has made this change, or anyone domiciled in Colorado but owning real property in such a state. If you have a question about the state in which you own real property, please contact us.

### Individuals Still are Not Planning for End of Life Issues

According to a survey by 7News on their website in January 2006, 33% of the persons responding said they do not have living wills, medical powers of attorney or any plan; 27% said they have living wills and they have discussed the issues with their family members; and 40% said they do not have documents in place, but they have discussed the issues with their families.

As we saw with the Terri Schiavo case last year, it is very important to have medical powers of attorney and other advance medical directives in writing and signed by anyone 18 years of age and older. Such documents set the framework in place to deal with accidents, illnesses or injuries. Parents should consider asking their college-bound children to sign powers of attorney, as well as HIPAA authorization forms that would enable the parent to obtain health information in the event of an accident. The Colorado statute that authorizes living wills requires that the document be specific regarding termination of artificial hydration and nutrition. We added a provision to our living will and medical power of attorney forms to address termination of life support, artificial hydration and nutrition, if one is in a persistent vegetative state. In addition, the firm has a Disposition of Last Remains form available for our clients. This form was authorized by the Colorado legislature in 2003.

## Financial Issues for Incapacitated Persons

In addition to the medical advance directives, financial powers of attorney are very important to name the persons who can handle financial affairs, and bring the estate plan up to date, in the event of a catastrophic injury or illness. A well-drafted power of attorney can avoid an expensive court-supervised conservatorship, and authorize the agent to make gifts, create trusts, and carry out other necessary estate planning.

Even if powers of attorney are not in place, the estate plan can still be brought up to date for an incapacitated person by filing an action with the Court. Recent changes to the Colorado conservatorship statutes authorize the Court to make a Will for an incapacitated person. An agent under a financial power of attorney may be given the authority to make gifts and create or amend trusts, but an agent cannot sign a Will.

Finally, whenever gifts in an estate plan are to be made to someone who is incapacitated and who is, or may be, receiving government benefits, care must be taken in structuring the gift so that it does not cause the disqualification of the beneficiary for those government benefits. Usually outright gifts are not recommended if there is an asset test that applies to the beneficiary (such as the \$2,000 asset test for Medicaid recipients). Special Needs Trusts or Purely Discretionary Trusts can be used to make funds available for the beneficiary's needs that are not met by the government benefits, without causing disqualification.

## IRS Circular 230

By now, many of our clients have probably seen the following notice that we started adding to our written communications on June 30, 2005:

IRS Circular 230 Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice included in this written or electronic communication was not intended or written to be used, and it cannot be used by the taxpayer, for the purpose of avoiding any penalties that may be imposed on the taxpayer by any governmental taxing authority or agency.

This notice is required by the IRS rules to avoid our having to fully research and disclose every possible tax issue that might affect a transaction when we communicate with our clients about an issue, or prepare documents that have tax consequences. Such a full opinion would be prohibitively expensive. If you have questions at any time about these notices, or would like to discuss our preparation of a full opinion, please feel free to call.

## New Requirements for Charitable Remainder Trusts

Last year, the IRS issued Rev. Proc. 2005-24 imposing new requirements on charitable remainder trusts ("CRT") created on or after June 28, 2005. The IRS was concerned that a surviving spouse's "elective share rights" might defeat a portion or all of the charitable gift. Colorado law grants spouses such rights to take a forced share if they are disinherited, as do most states. Therefore, a CRT created after that date will not be qualified and receive the tax advantages of a charitable gift unless a valid waiver of the rights of a surviving spouse to take a forced elective share is signed.

We have added such a waiver to our CRT forms, intending that it be signed by the spouse of the grantor at the same time as the CRT agreement. This does not address the problem of CRTs signed when the grantor of the trust is single, but later marries, nor does it address the issue of whether the spouse must be represented by separate counsel when considering whether to sign such a waiver. As to CRTs created before June 28, 2005, they will be disqualified **retroactively** only if the surviving spouse actually exercises his or her elective share rights.

On February 3, 2006, the IRS issued Notice 2006-15, indefinitely postponing the new requirements in Rev. Proc. 2005-24. We will keep you posted on future developments.

## Changes to Medicaid

Medicaid is the federal/state program that pays for medical care, including long-term nursing home care, for persons who meet the asset and income tests. This is distinct from *Medicare* that pays for health costs for persons who have either retired or are on Social Security disability. Medicare pays for a certain number of skilled nursing days, not long-term care.

Effective January 1, 2006, the monthly income test for Medicaid is \$1,809 (up from \$1,737 in 2005), and the asset test remains at \$2,000 (it is not indexed to increase annually). The non-institutionalized spouse who is living at home may retain up to \$99,540 in assets. The average monthly nursing home cost for purposes of computing the penalty period after a gift is \$5,092 (increased from \$4,965 in 2005). Before February 2006, the penalty period (number of months) before an individual could qualify for Medicaid under the \$2,000 asset test after making a gift was computed by dividing the amount of the gift by the average monthly nursing home cost, but this period could not exceed 36 months. Therefore, even a large gift made at least three years prior to applying for Medicaid would not have disqualified the individual for Medicaid, under prior law.

**In February 2006, the U.S. Congress passed, and the President signed, the Deficit Reduction Act of 2005. The Act changes the calculation of the penalty period after gift transfers.** Under the new bill, the maximum “look-back” period is increased to 60 months, but more importantly, the start of the penalty period has also been changed. Under prior law, the penalty period started to run from the date of the gift. Under the new bill, the penalty period will start to run when the individual would otherwise be eligible (when the individual only has \$2,000 remaining in assets). This change will make it much more difficult for persons to qualify for Medicaid after making gifts.

## Fraud Alert

*The foregoing Fraud Alert was compiled by the Denver District Attorney's Office and is re-printed here with permission of Lisa Curtis, the Director of Consumer Services.*

### **ID Theft: Tips to Help Prevent the #1 Crime**

Theft of databases such as Lexis/Nexis has increased people's fear of computer hackers. However in Denver, you are far more likely to have your identity stolen via **purse snatchings, mail theft, and dumpster diving**. To significantly reduce your risk of being a victim to identity theft:

- Wear a close-fitting pouch, instead of carrying a purse or wear your wallet in your front pocket.
- Don't carry your checkbook, extra credit cards, or Social Security card in public, and don't use your Social Security number on your driver's license.
- Don't give any part of your Social Security, credit card or bank account numbers over the phone or Internet, unless you have made the contact to a company or financial institution with which you are familiar.
- Request a free copy of your credit report once a year from each of the three major credit reporting agencies at **www.annualcreditreport.com** or 1-877-322-8228 (you will have to give them your Social Security Number.)
- Cancel all unused credit card accounts appearing in your credit report.
- Call **1-888-567-8688** to “opt out” of credit agency marketing lists and reduce credit card solicitations or opt out online at **www.optoutprescreen.com**.
- Shred pre-approved credit card offers and all financial documents with a cross-cut or confetti shredder.
- Mail bills to be paid at the Post Office, not in your mail box with the red flag raised or in street corner postal receptacles.
- Have new boxes of checks sent to your bank or credit union, not your home.



**For assistance call the DA's Fraud Line:  
720-913-9196 or 720-913-9179**

*CASE is a Partnership of the District Attorney and the  
community to Prevent Elder Financial Exploitation*

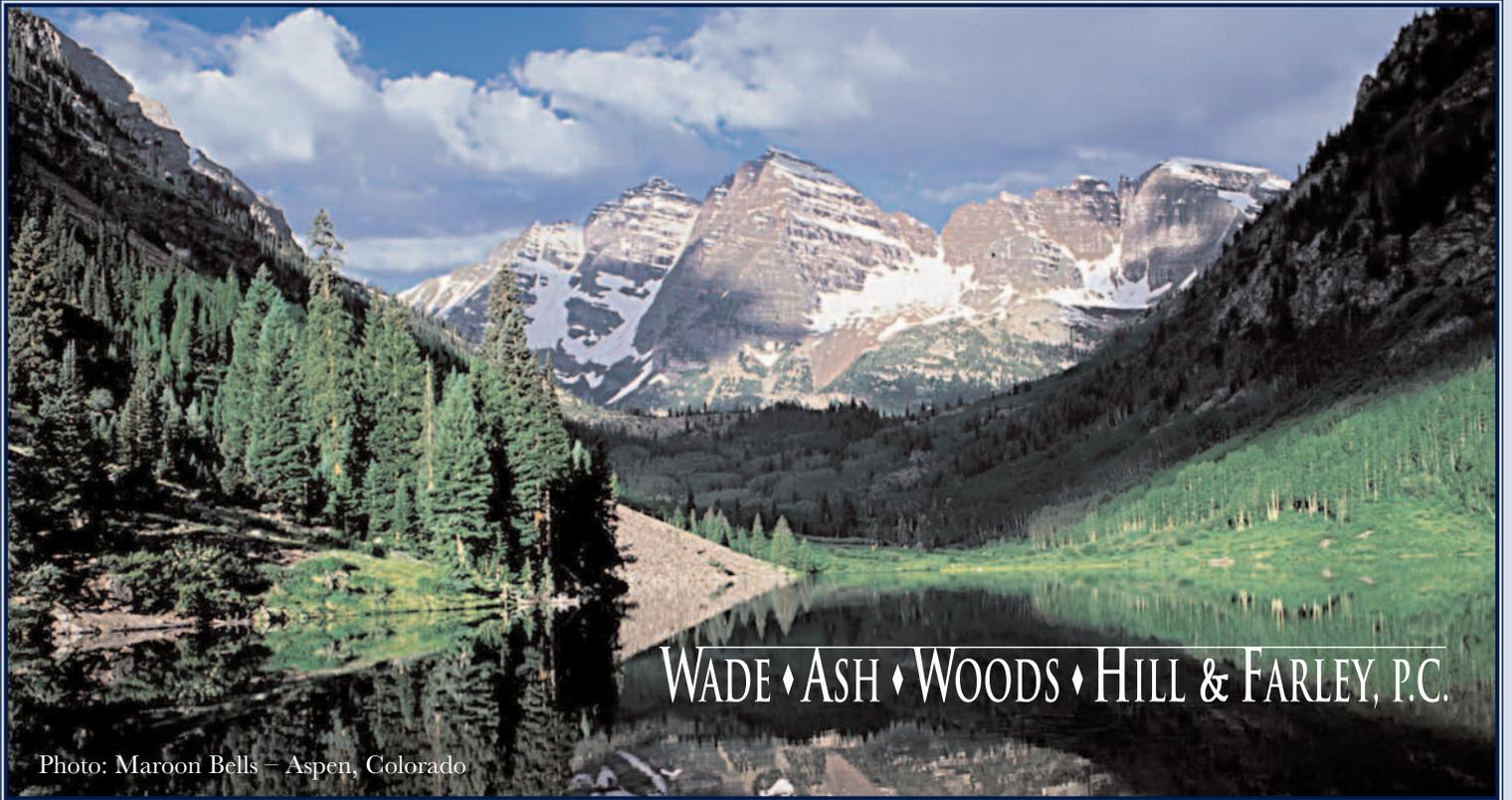


Photo: Maroon Bells – Aspen, Colorado

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