WADE ASH

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NEWSLETTER

December 2016

NEWS OF THE FIRM

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.

Herbert E. Tucker has become a Fellow of The American College of Trust and Estate Counsel ("ACTEC"). It is ACTEC's aim to improve and reform probate, trust and tax laws, procedures, and professional responsibility. Congratulations Herb!

We are very pleased to announce that Kevin D. Millard and Marc A. Chorney (formerly of Chorney & Millard LLP) have joined the firm as Of Counsel attorneys. Kevin and Marc will continue their practices in the areas of estate and trust planning, estate and trust administration and consultation (including expert testimony). Kevin and Marc will also be joined at Wade Ash by their staff of many years, Anne E. Wohlford and Laura A. Williams.

We are also pleased to announce that the firm has been named for the seventh year in a row by Best Lawyers in their Metropolitan Tier 1 Ranking as the 2017 Best Law Firm in Colorado in the areas of Litigation-Trusts & Estates and Trust & Estates Law.

IN THIS ISSUE

YEAR-END TAX PLANNING

Laurie Hunter

Annual Exclusion Gifts. The gift tax annual exclusion is $14,000 for 2016, and stays the same for 2017. You can make gifts of this amount to each of any number of people in a calendar year and not have to file a gift tax return, and the gifts will not use up part of your estate tax exemption. You can also make gifts of an unlimited amount by directly paying a donee's medical expenses to the provider, or tuition to the educational institution. If you make the gift by a check, *the donee must deposit the check and the amount must clear your account prior to the end of the year*.

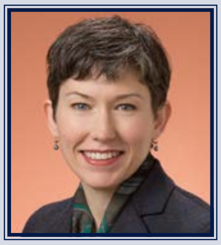
Charitable Gifts. Unlike gifts to individuals, charitable gifts made by check are considered made in 2016 so long as the check is mailed or delivered to the charity prior to the end of the year; it does not have to clear your account. You can also make a larger gift to a donor advised fund this year, and then look ahead to consider individual charities and the amounts you wish to give next year.

Larger Gifts and Estate Tax Exemption. The gift and estate tax exemption is $5,450,000 for 2016 and $5,490,000 for 2017. Even if you had used up your exemption in prior years, because the exemption is indexed for inflation, it has increased each year. You may have additional gift tax exemption available.

Year-End Trust Distributions. An irrevocable trust that is not a "grantor trust" is taxed at the highest rate at only $12,400 in taxable income (for 2016). If taxable income is carried out to the beneficiaries in distributions, then that income may be taxed to the individuals at lower rates. Distributions up to 65 days after the end of the calendar year may be made that will carry out 2016 distributable net income. Deductible expenses must be paid by the trust prior to the end of the calendar year.

IRA Minimum Required Distributions. If you have already reached age 70-1/2, you must take your Minimum Required Distribution (MRD) from your IRAs and qualified plans prior to the end of the year. In addition, anyone who has received an Inherited IRA due to the death of the prior owner must start taking MRDs in the year following death. MRDs from Inherited IRAs are not postponed until age 70-1/2. Also keep in mind that assets in your Inherited IRA may not have the same creditor protection as your own IRA.

COLORADO'S NEW TRUST DECANTING STATUTE



Heidi Gassman

Effective August 10, 2016, the Colorado legislature enacted C.R.S. § 15-16-901 *et seq.*, the Colorado Uniform Trust Decanting Act (the "Act"). "Decanting" generally refers to the distribution of trust property from one trust to another trust pursuant to a trustee's discretionary power to make distributions for beneficiaries. New York was the first state to enact a trust decanting statute in 1992; now, nearly half of the states, including Colorado, have specific statutes addressing and authorizing trust decanting in various forms.

Trust decanting is useful for tax planning, dealing with changes in applicable law, or making changes to the administration of a trust after it has become irrevocable. Before the availability of the Act, trustees in Colorado and other states without

COLORADO'S NEW TRUST DECANTING STATUTE (CONT'D.)

specific trust decanting statutes had to rely on specific language in a trust authorizing the trustee to distribute assets to or for the benefit of one or more beneficiaries, the common law principle of power of appointment, or the order of a court modifying the trust. None of these options were particularly simple or cost-effective, and often put the trustee in the position of acting without a solid legal basis, which potentially invited liability.

Decanting under the Act is far simpler and easier: it does not require court approval, it lays out clear guidelines as to which trust provisions and beneficiary interests may be changed, and it provides an easy-to-follow procedure for effecting the decanting. There are certain limitations: decanting is not available for irrevocable charitable trusts, or for trusts not subject to Colorado law. In decanting a trust, the trustee also must act "in accordance with the purposes of the first [original] trust", which means that a trustee cannot go against the intent of the person who formed the original trust, or act inconsistently with the purposes of a trust to be decanted into a new trust.

The Act refers to two levels of trustee discretion over distributions of original trust assets. The first level is "expanded distributive discretion", that is, the discretionary power to distribute trust assets to beneficiaries which are not limited to an ascertainable standard (usually health, education, maintenance, and support) or a reasonably definite standard. If the trustee has this level of unlimited discretionary distribution, the trustee can change beneficial interests in the new trust. This is a very broad power; however, the trustee cannot add beneficiaries to the new trust, or eliminate a current beneficiary's vested interest.

The second level of trustee discretion is "limited distributive discretion", which means that the trustee does not have unlimited powers, but must distribute trust assets for limited ascertainable standards of health, education, maintenance, or support, or subject to other clear standards or limitations. A trustee with limited distributive discretion may decant an original trust into a new trust, but the new trust "must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust." Practically speaking, this means that the trustee may decant to change administrative provisions, but cannot make material changes to the dispositive provisions of the original trust.

The Act, of course, prohibits trustees from making changes to a trust to benefit themselves, such as increasing the trustee's compensation above what is already authorized without beneficiary permission or expanding limitations on the trustee's liability.

The procedure for decanting is relatively simple. The trustee first would determine whether to simply modify the original trust or to prepare an entirely new trust to receive decanted assets, and would have a new trust agreement prepared. The trustee must provide formal notice to the settlor, current beneficiaries, and other trustees or fiduciaries, with a description of the details of the decanting. After a 63 day notice period (which may be waived by the persons receiving notice), the trustee would exercise the decanting power in a signed record identifying the original trust, the new trust, the assets being distributed to the new trust, and the assets, if any, remaining in the original trust.

The Act also allows decanting in certain special circumstances. A trustee may decant into a special needs trust, which is very useful if a beneficiary of a standard irrevocable trust becomes disabled and would qualify for government benefits. This type of decanting must "further the purposes of the first trust", which means that the trustee cannot use the Act to create a special needs trust with substantially different purposes than the original trust. The trustee may also decant an animal trust which has a designated "protector" (a person with authority to enforce the trust on behalf of the beneficiary animal), with the permission of the protector. Finally, a trust that has some charitable interests, but is not entirely charitable, may be decanted, with certain limitations.

The Act provides certainty, structure, and a number of useful options for trustees of Colorado irrevocable trusts, and is a welcome addition for tax and estate practitioners.

MINORITY INTEREST DISCOUNTS IN FAMILY CONTROLLED ENTITIES

Jonathan F. Haskell

On August 2, 2016, the Treasury Department proposed a series of regulations to Section 2704 of the Internal Revenue Code. If these proposed regulations are made final, this could greatly limit the ability of family controlled partnerships, limited liability companies, and corporations to transfer interests in a manner that takes advantage of minority discounts.

The fair market value of a property for transfer tax purposes is the hypothetical price at which the property would change hands between a willing buyer and a willing seller. Minority discounts exist to reflect the reality that a minority interest lacks control over the entity. In addition, family entities very often restrict the ability of family members to transfer their membership interest to members outside of their immediate family. As a result, discounts up to 40% have been recognized by the IRS and courts when valuing transfers of these interests.

The eradication of minority discounts would most likely only be a negative result to those individuals with taxable estates which, for a person dying in 2016 is $5,450,000, and $10,900,000 for a married couple. If an individual does not have a taxable estate and receives a minority interest as a result of a parent's death, they would prefer to receive the asset at a high value because this would give them a high income tax basis in the asset. If, however, an individual has a taxable estate, they would want to receive the minority interest discount in order to reduce the size of the estate tax.

The provisions of the proposed regulations will not apply until they become final, which at the earliest would be sometime in 2017, and more realistically 2018 or

MINORITY INTEREST DISCOUNTS IN FAMILY CONTROLLED ENTITIES (CONT'D.)

beyond. Very likely, the proposed regulations will be modified before they are made final, and will not completely extinguish the ability of individuals to use minority interest discounts. More realistically, the Treasury Department will limit valuation discounts in some way.

At the end of the day, what this all means is that if you have been planning for years to sell or gift minority interests in a family controlled entity to other family members, this proposed legislation may affect you. In addition, if you have a taxable estate then you may wish to think about gifting minority interests sooner rather than later in order to take advantage of the discounts that may be reduced in the future.

COLORADO'S NEW LAW: THE END-OF-LIFE OPTIONS ACT


Jody Pilmer

This election season was full of interesting contests and a few surprises. If you were following the issues in Colorado, you saw an array of familiar ballot initiatives dealing with legalized marijuana, funding for the Scientific and Cultural Facilities District, and of course, heated contests between diametrically opposed candidates. But you also saw the passage of a ballot initiative that will only directly affect a limited portion of the population, but is intended to provide that small group with an alternative to suffering through a painful terminal illness. Proposition 106, which will become law in Colorado in January, 2017, creates a statutory scheme that provides adults who have been diagnosed with a terminal illness and six months or less to live the right to request and self-administer lethal medication in order to end their lives. It sounds simple, but it is quite a bit more complicated than that. Opponents saw countless practical and ethical problems with the law. Proponents attempted to address the complexities associated with such a personal and irreversible decision by providing sufficient checks and balances. The result is the Colorado End-of-Life Options Act. The statutory scheme, which will be located in the Colorado Revised Statutes at § 25-48-101 *et seq.*, operates in a manner intended to prevent abuse and misapplication of the process. The various safe-guards built into the statute include a Colorado residency requirement, a written request witnessed by at least one disinterested party, the agreement of two physicians regarding diagnosis, prognosis, and capacity, a potential professional mental health evaluation, and meticulously informed consent. In addition, no physician or health care facility is required to carry out a request for medication under the statute and the medication must be self-administered. Finally, the statute creates a new class 2 felony offense in Colorado for anyone who forges or coerces a request for end-of-life medication or prevents a terminally ill person from rescinding his or her request. Additional protective measures draw focus upon the policy implications of permitting a person to end his or her life intentionally. For example, the statute prohibits provisions in wills or contracts that would affect whether or not an individual may make or rescind a request for aid in dying medication. No contractual obligations can be conditioned upon or affected by a person's request for or rescission of a request for medication under the statute. There are also various provisions that prevent an individual who makes use of the statute from being denied health care benefits and health insurance. Likewise, life and accident insurance policies are not affected by a person's decision to request and administer lethal medication under the statute. Colorado is only the sixth state to address this issue. Four other states have similar statutes and one other state's supreme court has addressed the issue and permitted physicians to prescribe medication to hasten a terminally ill person's death. Colorado's statutory scheme will surely be tested over the years. While it is difficult to predict how and by whom the operation of the statute may be challenged, there is at least one area that could see potential litigation. While it is not clear who would have standing to challenge a person's request for medication under the statute, it is reasonable to anticipate potential challenges in relation to mental capacity and the informed nature of a decision to request life-ending medication. Any physician who is considering honoring a request by a terminally ill patient must ensure that the individual is making an "informed decision," which is specifically defined in the statute. In order to make an informed decision, an individual must have the mental capacity to do so. Legally speaking, "mental capacity" can have different meanings depending on the circumstances. In order to make a valid will, for example, a person must demonstrate testamentary capacity. Testamentary capacity requires that a person understand the extent of his or her property and how the will would distribute the property, understand the natural objects of his or her bounty, and understand the nature of the act of making a will and its purpose. The person must also not be suffering from a condition that results in a persistent belief, with no existence in fact and that is adhered to against all evidence, that affects the preparation or dispositions of his or her will. In the context of criminal law, a person may be incompetent to assist in his or her own defense, but may have been mentally capable of understanding right or wrong and developing criminal intent. A person in need of a conservator may be incapable of managing property and business affairs because of an inability to receive or evaluate information or to make or communicate decisions, but may have no trouble meeting his or her daily needs and may still be deemed mentally capable of making all other decisions, including making a valid will. The Colorado End-of-Life Options Act seeks to avoid confusion by defining "mental capacity" to mean that "in the opinion" of the participating physicians or a psychiatrist or psychologist, the requesting individual has the "ability to make and communicate an informed decision to healthcare providers." It is a definition that is hard to apply and the statute does not address a procedure for potential challenges to capacity or who would have standing to challenge the opinion of the participating medical professionals.

It will be interesting to watch as this statute becomes a part of Colorado's health care culture. In Oregon, where a similar statute has been in place for twenty years, there have been 1,545 requests for lethal prescriptions through eighteen years of data.

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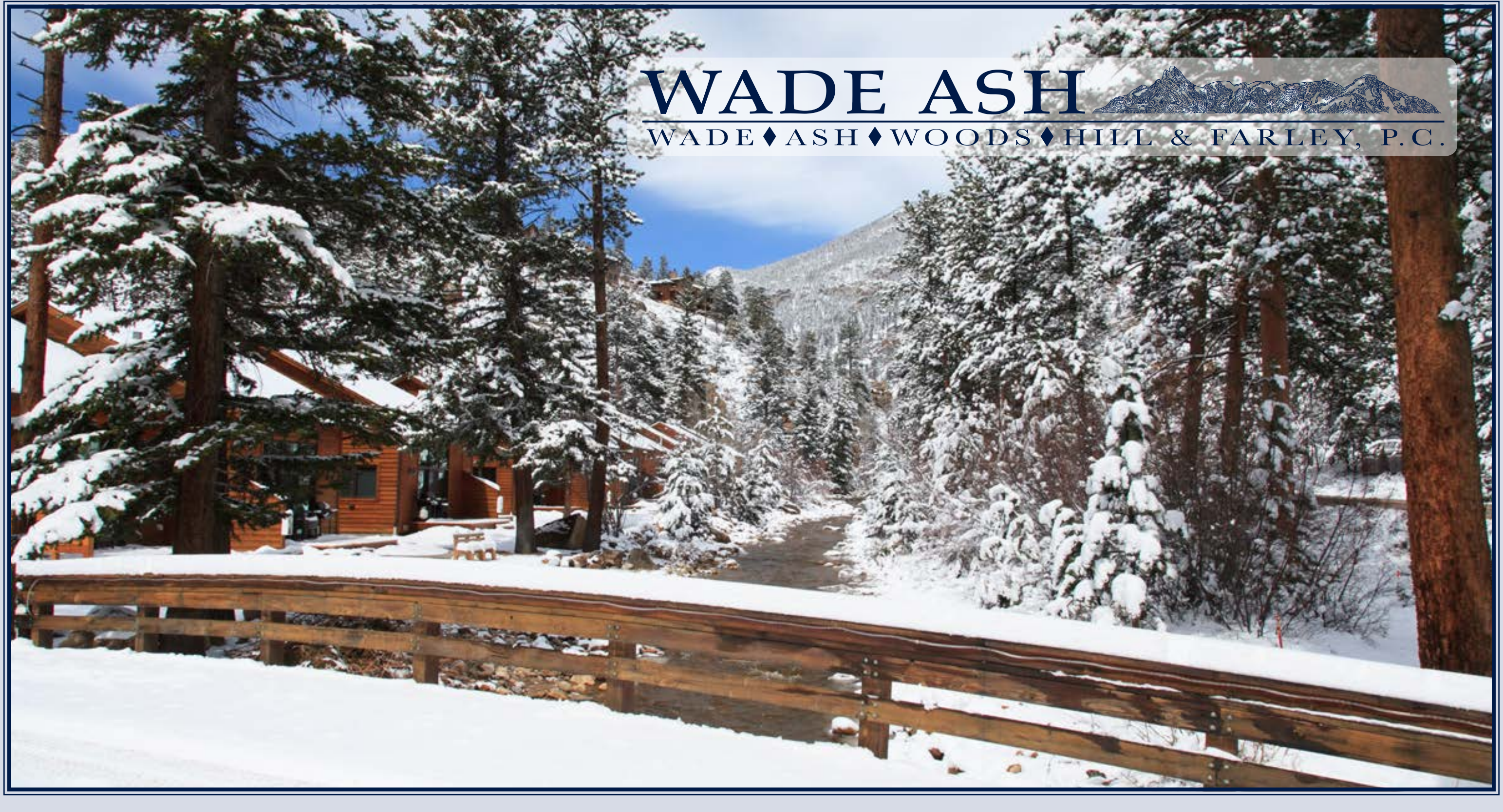

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