

# MILLER, MONSON, PESHEL, POLACEK & HOSHAW

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

## NEWSLETTER

501 WEST BROADWAY, SUITE 700  
SAN DIEGO, CALIFORNIA 92101-3563  
TELEPHONE: (619) 239-7777  
FAX NUMBER (619) 238-8808

August 2007

### In this Issue:

#### [The Greatest Gift You Can Give \(Advance Health Care Directives\)](#)

ROBERTA D. REPASY, JD, LL.M.

#### [California Property Tax Consequences When Transferring Real Property \(Part II\)](#)

RAY W. RIDLON, ESQ.

---

### The Greatest Gift You Can Give

ROBERTA D. REPASY, JD, LL.M.



---

*“One of the greatest gifts an adult child can give to parents is to speak for them when they can’t speak for themselves.”<sup>1</sup>*

Unfortunately, the time may come when, because of an illness (such as Alzheimer’s) or accident, you are not able to make your own health care decisions. An Advance Health Care Directive (sometimes referred to as a health care “proxy”) allows you to plan for these circumstances so that your desires as to your care are honored.

#### **Advance Directive Compared to a Living Will**

An Advance Health Care Directive is not the same as a “living will.” A living will (or Declaration under the Natural Death Act) is merely a statement that you do not wish to receive life-sustaining treatment if you are suffering from a terminal illness or are in a permanent coma. An Advance Health Care Directive, on the other hand, allows you to give

legal authority to an agent who can speak on your behalf with regard to most health care matters if you are not able to express your desires (e.g., you have had a stroke and are not able to communicate verbally or otherwise, are unconscious, are not able to comprehend the matters at hand [e.g., if you have Alzheimer’s] are terminally ill, etc.).

An agent appointed under an Advance Health Care Directive can be given authority to accept or refuse medical treatment (including treatment that may hasten or postpone death if your condition is terminal and death is imminent), consent to a “do not resuscitate” order, employ and discharge health care personnel, authorize an autopsy, dispose of your remains by cremation or burial, make gifts of your organs or anatomical parts, and to arrange for other matters as you set forth within your Directive. The breadth of your agent’s authority is defined by the Directive itself; hence, you can make it as broad or as restrictive as you like. Under California law, however, your agent cannot authorize any of the following: electroconvulsive therapy, psychosurgery, sterilization, abortion, or placement in a mental health treatment facility.

If you have executed an Advance Health Care Directive, doctors and health care providers are required to look to your agent for decisions regarding your health care. This can be especially important if relations with or amongst family members are strained, or when one prefers to name a friend or partner with whom there is no legal

---

<sup>1</sup>Kathy Brandt, Vice President, National Hospice and Palliative Care Organization.

relationship (e.g., couples who are not married or registered as domestic partners).

Your agent can also be given authority to authorize an autopsy and to dispose of your remains by cremation or burial. Absent such a designation, California law grants these rights only to certain family members (a spouse, adult child, parent, etc., in that order); this may not always conform to one's desires.

### **Persons Who Can Be Appointed as An Agent**

With some limited exceptions, you can name almost any adult as your agent. You cannot name any of the following persons as your agent *unless that person is related to you*: (1) your health care provider, (2) a person who operates a community care facility or a residential care facility in which you receive care, (3) any person employed by a community care or residential care facility in which you receive care, or (4) an employee of any health care facility in which you are being treated.

It is usually best to appoint someone whom (1) you trust and (2) is familiar with your wishes with regard to your health care. You should also appoint an "alternate" agent to serve if your primary agent is not able to act (for example, if you and your primary agent are in a common accident). While you can appoint multiple persons to serve jointly, a disagreement between them means that no one will be able to speak on your behalf.

You should discuss your wishes with all proposed agents before naming them in the Directive to be sure that they are willing to act and will act according to your wishes.

### **How Long is An Advance Directive Valid?**

Unless otherwise specified in the Advance Health Care Directive itself, an Advance Directive signed in or after 1992 does not expire. Advance Health Care Directives signed prior to 1992 have expired (whether or not the document refers to an expiration date).

If, however, you change your mind as to any of your health care matters, or wish to

designate a different agent, you should execute a new Directive.

### **Who Should Have A Copy of Your Directive?**

You should provide your agent with a copy of your Directive. You should also provide your health care provider with a copy for their records. Many people place their Directives (along with information regarding their medical insurance and drugs they are taking) in a marked envelope on the front or side of their refrigerator so that emergency medical technicians or paramedics can find it easily in case of an emergency.

In addition, California law now requires that the Secretary of State maintain an Advance Health Care Directive Registry where you can either (1) file a copy of your Directive or (2) provide information as to the location of your Directive. Information maintained by the Registry is made available to the registrant's health care provider, public guardian, or legal representative upon request. Registering your Directive can be useful for many reasons. As an example, if you are rendered unconscious by an accident in Nevada and are taken to an emergency room, the hospital staff there can obtain a copy of your Directive. This will allow them to render treatment that is consistent with your stated desires.

*More information regarding the Advance Health Care Directive Registry, including how you can register your Directive, can be found at the Secretary of State's website, [www.ss.ca.gov](http://www.ss.ca.gov).*

---

### **CALIFORNIA PROPERTY TAX CONSEQUENCES IN THE ESTATE PLANNING CONTEXT (Part II)**

RAY W. RIDLON, ESQ.



---

In Part I of this article, we addressed the exclusions available for the following transfers that are not considered changes in ownership and thus do not trigger reassessment:

- Interspousal transfers, including transfers between registered domestic partners
- Parent-child transfers
- Grandparent-grandchild transfers

In this Part II, we discuss exclusions available for the following transfers that are not considered changes in ownership by the County Assessor and

do not trigger reassessment:

- Age 55 exclusion
- Joint tenancy transfers
- Trust transfers

### **Replacement of Former Home Exclusion for Those 55 or Older**

Homeowners age 55 or older who sell their current principal residence and purchase or build a replacement property may transfer the property tax basis of their current residence to the new residence. They may do so only once (however, disabled individuals may do so twice), and only if the replacement residence 1) was purchased or built within two years of the sale of the original residence, 2) has an equal or lesser market value than the original residence, and 3) is eligible for the Homeowner's Exemption. In addition, the claim must be filed within three years after the purchase or construction of the replacement residence. Generally, the replacement property must be located within the same county as the original property. However, some counties, including San Diego, Orange and Los Angeles Counties, allow for inter-county transfers.

### **Joint Tenancy Transfers**

According to California Property Tax Rule 462.040, the creation, transfer, or termination of a joint tenancy interest is a change in ownership. As discussed in Part I of this article, "change in ownership" triggers reassessment of the interest transferred. However, there are also exceptions to the rule regarding joint tenancy. The exceptions, which require careful consideration to ensure that reassessment is not inadvertently triggered, are discussed further below.

The general rule for change in ownership in joint tenancy arrangements is demonstrated in Rule 462.040 by the following examples:

1. A and B purchase property as joint tenants; a creation of a joint tenancy interest. There is a change in ownership of the entire property. 100% of the property is reassessed.
2. A and B, as joint tenants, transfer the property to C and D, as joint tenants; a complete transfer of a joint tenancy interest. Again, there

is a change in ownership and reassessment of the entire property.

3. C and D, as joint tenants, subsequently transfer the property to C, as sole owner; a termination of a joint tenancy interest. There is a change in ownership of only 50% of the property. Therefore, only 50% of the value of the property would be reassessed for property tax purposes.

Rule 462.040 excludes from reassessment transfers of real property from joint tenants to themselves and others all as joint tenants, tenants in common to themselves as joint tenants, joint tenants to each other's respective trusts, the beneficiaries of which are the respective joint tenants, and transfers by or to the remaining original transferors resulting from such transfers of joint tenants.

In other words, as long as an original transferor(s) is included among the transferees of the new joint tenancy arrangement, or there is a termination of the joint tenancy by transfer back to the original transferor(s), there will generally be no change in ownership and, therefore, no reassessment. This is an oversimplification of the exclusion rule for joint tenancy reassessments. Always check with your accountant or real estate/tax attorney when trying to determine whether a joint tenancy arrangement or termination may trigger reassessment.

Some of the rules regarding joint tenancy exclusions may soon change as the California Assessors' Association (CAA) recently recommended significant amendments to Property Tax Rule 462.040. The proposed amendments may be reviewed at [www.boe.ca.gov/proptaxes/pdf/Ita07010.pdf](http://www.boe.ca.gov/proptaxes/pdf/Ita07010.pdf). Comments regarding the proposed amendments were to be submitted to the State Board of Equalization by April 27, 2007, at which time the merits of the CAA petition were to be evaluated. However, on May 8, 2007, the CAA requested that the process be delayed until September 1, 2007.

### **Trust Transfers**

The general rule holds that a change of ownership occurs when property is transferred to a trust. There are six basic exceptions to this rule:

1. Transfer to a Revocable Trust: A transfer to a trust over which the Trustor retains the power of revocation. If the revocable trust becomes irrevocable at some point, reassessment may occur unless the trustor-transferor remains or becomes the sole present beneficiary or unless another exclusion applies (e.g., inter-spousal transfer, parent-child, etc.).

2. Inter-spousal Trusts: A transfers to a trust for the benefit of one's spouse.

3. Parent-Child or Grandparent-Grandchild Trusts: A transfer to a trust for which the parent-child or grandparent-grandchild exclusion applies, and for which a timely claim has been made as required by law.

4. Proportional Interests: A transfer to a trust by multiple parties and the proportional interests of the beneficiaries in the property remains the same before and after the transfer.

5. Certain Irrevocable Trusts: This exclusion exists for irrevocable trusts in which the trustor-transferor is the sole present beneficiary of the trust. The exclusion is also available if the sole present beneficiaries are individuals other than the trustor-transferor, as long as such beneficiaries are covered by one of the other exclusions discussed earlier. If the trustee of an irrevocable trust has the power to "sprinkle" trust income or principal among various beneficiaries, reassessment may occur if any of the allowable beneficiaries is not covered by an exclusion.

An exclusion from reassessment does exist for an irrevocable trust which has beneficiaries not covered by an exclusion as long as the trustor-transferor retains a reversion which will occur in less than 12 years.

*In next month's newsletter, the final part of this article will address transfers involving legal entities.*

*The contents of this article are for information purposes only and are not meant to be and should not be construed to be legal advice. The legislature and the State Board of Equalization are constantly changing the laws pertaining to California real property transfers. Before acting on any information contained in this article, you should independently verify the applicability of the information to your situation or contact your own legal or tax professional.*

*If you would like to receive further information regarding the topics in this newsletter, or if you would like to let us know any issues or topics you would like to see addressed in future newsletters, please contact us at (619) 239-7777 or [newsletter@mmpph.com](mailto:newsletter@mmpph.com).*

**Disclaimer:** This newsletter is provided to share knowledge and expertise with our colleagues with the goal that all may benefit. The content of this newsletter is for general informational purposes only. The information contained within this newsletter is not intended to serve as legal advice or as a guarantee, warranty, or prediction regarding the outcome of any particular legal or tax matter. Nothing contained within this newsletter should be used as a substitute for legal advice. This newsletter does not create an attorney-client relationship between the reader and Miller, Monson, Peshel, Polacek & Hoshaw. Legal advice depends on the specific facts and circumstances of each individual's situation. You should not rely on this newsletter without first consulting with a qualified, licensed attorney.

**IRS Circular 230 Notice:** Any federal tax advice contained in this communication, including any attachments and enclosures, is not intended or written to be used, and may not be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

## MILLER, MONSON, PESHEL, POLACEK & HOSHAW

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

THOMAS M. MONSON  
MARY J. PESHEL  
TIMOTHY C. POLACEK  
WILLIAM D. HOSHAW<sup>†</sup>  
ROBERTA D. REPASY  
SUSAN L. HORNER  
RAY W. RIDLON  
BRADFORD N. DEWAN  
PHILIP R. FREDRICKSEN<sup>†</sup>  
JUDY S. BAE  
<sup>†</sup>OF COUNSEL

THE KOLL CENTER  
501 WEST BROADWAY, SUITE 700  
SAN DIEGO, CALIFORNIA  
(619) 239-7777  
FAX (619) 238-8808  
<http://www.mmpph.com>