

MILLER, MONSON, PESHEL, POLACEK & HOSHAW

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

SEPTEMBER 2019 NEWSLETTER

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

IN THIS ISSUE

- **Time to Update Your Business Records** by *DeEtte E. Loeffler, J.D., LL.M., Taxation*
- **The Prevalence and Prevention of Elder Abuse** by *Marissa Wolfsheimer, Guest Contributor*
- **Federal Tax Update** by *Katie Lepore, CPA, J.D., LL.M., Taxation*
- **State Tax News** by *Katie Lepore, CPA, J.D., LL.M., Taxation*



TIME TO UPDATE YOUR BUSINESS RECORDS

By DeEtte L. Loeffler, J.D., LL.M., Taxation

If you own a small business, this is a great time to review your legal records for the entity and make sure they are complete and stored where you can find them. Here are a few of the things you want to look for and complete (if they have not yet been done).

Statement of Information. If you own a California entity, you are required to file a Statement of Information with the Secretary of State to verify your key business information including the current business address, officers or managers, and agent for service of process. Corporations are required to file this form annually, by the date on which they were formed. For example, if the corporation was formed on September 3, 2018, you must file your form SI-550 no later than September 3 of each year thereafter. Limited liability companies (LLCs) are required to file an LLC-12 every other year.

Statements of Information for corporations and LLCs can be filed electronically on the Secretary of State's website. Go to: <https://www.sos.ca.gov/business-programs/business-entities/forms/>.

Meeting Minutes. It is important to treat your business as separate from yourself. One important way of doing this is to hold annual or more frequent meetings to make decisions for the business and to keep Minutes of these meetings. The Bylaws (corporation) or Operating Agreement (LLC) for your business may provide specific requirements for how meetings are to be conducted. Be sure to comply with these requirements. Usually, decisions regarding who will serve as officers and managers should be reflected in these Minutes, as should decisions regarding distributions, admission of new members, or the sale/purchase of major assets. Minutes should be signed by the secretary and kept with your other key business documents (such as your Articles, Bylaws, Operating Agreement, and key employment agreements). If you are not certain what Minutes should look like, your attorney can assist you to prepare them or can provide a sample for your use. Annual meetings are generally held around the anniversary of the formation of your business unless another date is specified in the Bylaws

or Operating Agreement, or is agreed to by the owners. Be sure to complete annual Minutes as soon as possible after the annual meeting.

Income Taxes. Your business is required to file income tax returns annually, even if it is “just” a pass through entity which allocates all of its income and losses to the owners individually. Limited liability companies (LLCs), in particular, need to file a California return each year even if it is a basic informational return or for a disregarded entity. Simply paying the minimum \$800 franchise fee to the Franchise Tax Board (FTB) without filing a return will result in suspension of the LLC by the FTB. A suspended LLC cannot legally conduct business. We have recently seen a few clients whose businesses were inadvertently suspended for failure to file.

Individual federal and state income tax returns are generally due by April 15th of the year following the one in which the income was earned. However, partnership (including LLC) and S-corporation returns are due by March 15th. These rules changed in 2016 to require an earlier filing date for partnerships (originally due April 15) to allow partners to report K-1 information on their individual tax returns due April 15. Similarly, the due date for C-corporation returns was changed to April 15 (originally due March 15) since the corporate return generally does not affect individual tax returns.

In general, you should work with your tax preparer to ensure tax returns are filed and the appropriate tax forms are provided to the business owners in sufficient time for them to complete their own income tax returns in a timely manner. It is particularly important that you work with your accountant to timely pay the LLC \$800 franchise fee, which is due 3.5 months after formation, and is then prepaid every April for the ensuing tax year. Copies of business returns should be maintained with your other business records for at least 4 years following the date on which the returns were filed, though 7 years is recommended.

Property Taxes. If your business owns real property (or is responsible for paying the taxes on a long term or triple net lease), California real property taxes are assessed on January 1 for the following fiscal tax year (which runs from July 1 to June 30 of the following year). Tax payments are delinquent after December 10th (first installment) and April 10th (second installment). If you make improvements during the tax year, additional assessments may be imposed. Keep copies of all property tax payment records for at least 3 years, and for at least 7 years if improvements were made to the property. Additionally, if the entity owns California real properties which were transferred to it without a reassessment, and an owner dies or transfers entity ownership interests, you may have a requirement to alert the Board of Equalization of this change in ownership. The change may cause a property tax reassessment if control over the entity or more than 50% of the original co-owner interests have changed. If the proper forms are not timely filed, your entity also may be subject to penalties and interest on the missed property tax increase.

Amend Partnership or Operating Agreements. If the nature of your business, or its size, has changed in the last 12 months, review your business documents to ensure they meet your current situation and business goals. Changes in the law may also affect your business, so it is wise to consult with your business attorney to confirm your business documents are in compliance with current law. If any ownership interests have changed hands, it is wise to amend your Partnership or Operating Agreement (or to issue stock for a corporation) to reflect the new ownership interests. If your agreement includes a price for purposes of a buy-out, you should determine if this price is still reasonable based on the current value of the business. Making these updates annually will ensure your CPA can properly allocate taxable income and will simplify matters in the event of a dispute between owners or a creditor claim.

As a reminder, partnerships, and entities taxed as partnerships (like some LLCs), are now required to designate a Partnership Representative for tax matters on their tax returns. If your Operating or Partnership Agreement still includes a “Tax Matters Partner,” we recommend you amend it to reflect current law.

Please see our [March 2018 Newsletter](#) article entitled *New Rules Affecting Partnership and LLC Audits* for a full explanation of the changes to partnership taxation audit laws. Past editions of our Newsletter are available at <https://www.mmpph.com>.

Finally, you should review current ownership and any buy-sell agreements to ensure you do not inadvertently make the buy-sell ineffective. In the recent case of *Han v. Hallberg*, 35 Cal. App. 5th 621 (2019), the partnership had a buy-sell agreement. The partners later allowed the transfer of a general partnership interest to a revocable trust but failed to amend the Partnership Agreement to require that partner’s interest to be sold upon his death to the remaining partners pursuant to the buy-sell agreement. As a result, the deceased partner’s son, as trustee, retained ownership contrary to the intent of the partners.

If you have questions about your business entities, please contact our office.



THE PREVALENCE AND PREVENTION OF ELDER ABUSE

*By Marissa Wolfsheimer**

SCENARIO

Imagine this scenario: your elderly neighbors have one adult daughter who lives in another city. Over time, the husband falls ill and the wife becomes increasingly forgetful. Previously, the couple had done estate planning to deliberately limit their daughter’s control of their finances and plans for the remainder of their

lives. However, once they grew feeble, the daughter hired another attorney to redraft her parents’ estate plans, which included naming herself as the trustee and giving her control of their finances, directly against her parents’ original wishes. She then manipulates her father into signing the new estate plan just prior to his death and, with this new estate plan in order, her mother is ultimately forced to move away from the familiar comfort of her community to live closer to her selfish daughter. This is just one disheartening example of elder abuse.

STATEMENT OF THE PROBLEM

Elder abuse has evolved into a multi-billion dollar industry, victimizing an estimated 5 million people per year.¹ In 2011, the financial losses from elder abuse were an estimated \$2.9 billion.² This industry is growing; Adult Protective Services has had significant increases in reported cases over the past decade. It is further estimated that only 4% of elder abuse is reported worldwide.³ The aforementioned anecdote described abuse by a family member, which unfortunately is not rare. About 90% of abusers are either family members or other individuals the elder trusts.⁴ While there are other forms of elder abuse, financial exploitation is particularly prevalent.

As defined by California Penal Code Section 368, elder abuse occurs when any person knows or reasonably should know that a person is an elder or dependent adult, and

(i) willfully causes or permits the elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or

¹ National Council on Aging <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/>

² *Id.*

³ https://www.who.int/violence_injury_prevention/violence/elder_abuse/en/

⁴ *Id.*

(ii) having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or

(iii) willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, or

(iv) who violates any provisions of law proscribing theft, embezzlement, forgery, or fraud, or

(v) who steals the property or personal identifying information of an elder or dependent adult, or

(vi) who falsely imprisons an elder or dependent adult.⁵

STRANGER DANGER

Although most elder abuse is perpetrated by people elders know and trust, there are many ways that strangers can exploit elders too. Elders are often targets of scams that try to solicit money or personal information. Scammers may call saying the elder has won a prize or that a family member is in danger. A good rule of thumb is to never give out personal information such as one's Social Security number, credit card number, or bank account information on a phone call that was initiated by someone else, especially a stranger.

Although hiding behind a phone or computer makes it easy for a stranger to pursue financial exploitation, attempts are also executed in person. Examples of this could include a repairman overcharging for the amount of work he did or an insurance agent trying to sell a plan that is not appropriate for the elder, such as a deferred annuity. Some level of cognitive or physical impairment may put the elder at a greater risk for all kinds of exploitation.

⁵ California Penal Code §368(b)-(f).

CAREGIVERS

The majority of caregivers are family members.⁶ Caregivers should be chosen carefully. Some may seek a handsome gift after the elder they cared for passes away. While gifts to non-family member caregivers are generally not valid, gifts to family members are generally enforceable.⁷ Things can become especially "tricky" when a child acts as caregiver to a parent. Abuse might be difficult to spot, because there is a presumption that the child caring for an elder parent is doing so out of love. However, in some cases, a child might be more interested in accessing or preserving his or her anticipated inheritance than the best quality of life for the parent. Performing the caregiving personally, rather than hiring an outside caregiver, allows the child to limit care and preserve assets for himself or herself later. Additionally, if one child insists on doing all the caregiving for a parent, the parent might feel pressure (inflicted by the child), or simple gratitude, to redistribute assets upon death to that child, taking them away from the other children. This misallocation of assets could be considered undue influence, which could further result in family members suing one another in probate court. Although the family caregiver may start out with good intentions, he or she might slowly spiral into little abuses until matters "get out of hand." Lawyers can be in a good position to help protect elders from abusive family members. They can insist that they be allowed to meet privately with an elder who is seeking to make a significant change to his or her estate plan.

HELPFUL DOCUMENTS TO HAVE

An important matter to address in one's estate plan is a Power of Attorney. A Power of Attorney grants permission for an additional party to be the signatory of legal, financial, or medical matters. If an elder's mental capacity

⁶ National Alliance for Caregiving and AARP 2015, Caregiving in the US; <https://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf>

⁷ See Probate Code §§21380-21392 regarding Presumption of Fraud or Undue Influence.

is diminishing, he or she might wish to name an agent in a Power of Attorney to handle finances and minimize possible outside manipulators. There are different kinds of Power of Attorney documents that are important to delegate appropriately. Co-Powers of Attorney prevent unilateral action, which has both costs and benefits. For example, if one child is named as agent under the medical Power of Attorney and another child is named as agent under the financial Power of Attorney, then the first child might not be able to make medical decisions without consulting the second child for funding. This could be beneficial in order to prevent a single child's abuse of his or her power, but could also inhibit swift and proper care and treatment. Using Co-Powers of Attorney may or may not be right for everybody, but is certainly important to consider. Regardless, a Power of Attorney should be given only to a truly trustworthy individual because he or she will be making decisions on behalf of another, and the Power of Attorney could be abused. Additionally, elders with a trust may want to appoint a co-trustee to assist them with paying bills. This also can help to prevent the elder from being taken advantage of by family or strangers.

STEPS TO TAKE

Numerous problems can occur within the realm of elder abuse for both the elder and their loved ones, but through meticulous planning, much of it can be avoided. First, make sure your estate plan is complete with all the appropriate documents and designations. Second, although it may feel uncomfortable, discuss the intentions of your estate planning with your family members and other beneficiaries earlier rather than later to prevent later discrepancies of your true desires. Regarding caregiving, contractual planning is a good solution. If the caregiver is a family member, do not shy away from discussing a wage. Outside caregivers do not work for free, and establishing a wage for a family member caregiver could reduce the pressure to increase the caregiver's inheritance. If using a non-family member caregiver, elders are

strongly encouraged to use a licensed and bonded company which will vet and supervise their employees.

Organizations like NAPSA (National Adult Protective Services Association) work to provide services for victims of elder abuse. Many cases stay unreported for reasons of feeling embarrassment, but one should not feel ashamed; to report elder abuse, contact Adult Protective Services at 800-510-2020 (within San Diego County) or 800-339-4661.

CONCLUSION

Elder abuse is an extremely prevalent and costly problem. Its perpetrators can fall on a spectrum from malicious strangers to well-intentioned family members. Having a trustworthy network that is attentive to potential elder abuse is a vital source of prevention. Proactive planning and discussion of caregiving and asset allocation also can be helpful in averting financial elder abuse.



FEDERAL TAX UPDATE

By Katie Lepore, CPA, J.D., LL.M., Taxation

Senate Proposal to Change Estate Tax Exemptions. Senator Chris Van Hollen (D-MD) introduced S. 1950, the *Strengthen Social Security by Taxing Dynastic Wealth Act*, to return estate, gift, and generation-skipping transfer tax rates and exemptions to their 2009 levels, which would result in a 45% tax rate and a \$3.5 million estate, gift, and GST exemption. If passed, it would be effective for estates of decedents dying after December 31, 2019. The bill has been referred to the Senate Committee on Finance.

IRS Addresses Virtual Currency Owners. The IRS has begun sending letters to taxpayers with virtual currency transactions

that may have potentially failed to report income or did not report the transactions correctly. Taxpayers who received a letter are encouraged to review prior returns and file amended returns if necessary. IRS Commissioner Rettig stated the Agency will be “expanding” its efforts in regulating virtual currency.

Debate Over Capital Gains Inflation. The debate over adjusting capital gains to keep pace with inflation is in the news again. Senator Ted Cruz (R-TX) and 20 Republican colleagues sent a letter to Treasury Secretary Mnuchin urging him to issue regulations that adjust the capital gains in a taxpayer’s portfolio each year with the rate of inflation. The Republicans argue that taxpayers may pay capital gains on appreciation that is solely due to investments increasing in value because of inflation rather than true appreciation in value. Fifteen Senate Democrats also sent a letter to the Secretary, urging the opposite, claiming capital gains are already taxed at a lower rate, are mostly paid by the wealthy, and furthermore, changing the law through regulations is unlawful. The Treasury Department has not commented.

New 706 and 709 Mailing Address. As a reminder to our colleagues, effective July 1, 2019, Forms 706 and 709 are now to be mailed to the IRS in Kansas City.

New Tax Forms and Updates. The IRS issued a new draft Form 1040 (personal income tax return) identified as Form 1040-SR, specifically for use by senior citizens. Taxpayers who are 65 or older are eligible to use the form, which features clarification as to the standard deduction and additional standard deduction available for the blind and aged. It also features larger print and is intended to replace the Form 1040-EZ, to a degree. Taxpayers may not itemize deductions when using Form 1040-SR.

Additionally, the IRS has issued a draft long Form 1040 (personal income tax return) for

2019 and instructions for Schedules A and B. The Schedule A instructions now include the 10% AGI limitation for medical deductions instead of 7.5% and restrictions on charitable deductions for those who received a state or local tax credit for a charitable contribution to a state established charity. The 6 schedules that accompanied the 2018 Form 1040 have been reduced to 3 schedules; some items that were reportable on schedules are now reportable on page 1.

A draft Form 1041 (fiduciary income tax return) for 2019 was also issued by the IRS which now adds a line item for the Section 199A pass through deduction and a line on Schedule G to report the tax on ESBTs. Schedule D was also updated and accompanying instructions were released.

Further, the IRS issued a draft form 706 (estate tax return) for 2019 which includes a Schedule R-1, GST tax payment voucher, as a separate form.

A second draft of the 2020 Form W-4 (withholding form) was released and the IRS reports there will be no more substantive changes to the final version, expected to be released this fall. Alongside the new Form W-4, the IRS launched a new online Tax Withholding Estimator to assist taxpayers with calculating their withholding, replacing the Withholding Calculator which was designed mostly for working people. The Estimator can be found at: <https://www.irs.gov/individuals/tax-withholding-estimator>



STATE TAX NEWS

By Katie Lepore, CPA, J.D., LL.M., Taxation

California Presidential Candidates Must Disclose Tax Returns. A new law approved

on July 30 by Governor Gavin Newsom, SB 27, the *Presidential Tax Transparency & Accountability Act*, requires all candidates for President of the United States or Governor of the State of California to release to the California Secretary of State their last five years of income tax returns in order to be listed on the California ballot. Returns must be provided at least 98 days prior to the primary. Candidates may redact sensitive information such as Social Security numbers, the names of dependents, medical information, addresses, and telephone numbers. The California primary elections will take place in March 2020; candidates must submit their tax returns by November 2019 to be eligible for the primary ballot. The bill is expected to be challenged in court.

Small Estate Affidavit Amounts Updated. The California legislature and Governor Newsom enacted AB 473, *Disposition of Estate Without Administration*, on July 30, 2019. The new law increases the amount for a probate court Small Estate Affidavit from \$150,000 to \$166,250. Likewise, the Affidavit re Real Property of Small Value is changed from \$50,000 to \$55,425. These values are scheduled to increase every three years.

San Diego Institutes New Zoning Rules. On July 29, 2019, the San Diego City Council approved new zoning rules to promote developers building more mixed-use projects consisting of housing blended with commercial uses. According to David Garrick of the *San Diego Union Tribune*, “the goal is spurring more developments in suburban-style parts of the city with large surface parking lots, such as Mission Valley, Kearny Mesa, Mira Mesa and University City.” The City Council hopes the new rules will help reduce the city’s lack of available housing.

City Council Approves Homes Near Mass Transit. On August 1, 2019, the San Diego City Council approved two plans that would increase housing units by over 9,000 near planned trolley stations. One of these locations

is the Balboa Stations Specific Plan, located on the eastern side of Pacific Beach covering the area of mostly car dealerships located off Interstate 5 at Garnet Avenue. The second location is the Morena Corridor Specific Plan, which runs along the Interstate 5 at Morena Boulevard, which is currently occupied mostly by restaurants and bigger stores with large parking lots near the University of San Diego.

Arizona Sues California Over “Doing Business” Tax. The State of Arizona has asked the U.S. Supreme Court to hear a case challenging the State of California’s \$800 annual “doing business” tax. Entities in California, most notably LLCs, that are “doing business” in the state of California must pay an annual \$800 fee to the Franchise Tax Board (FTB). The FTB has a very broad interpretation of what constitutes doing business in California such that California residents whose business is solely in other states may be subject to the tax; conversely, out of state residents who transact minimal business in California may be subject to the tax as well. Arizona claims the tax violates the Due Process and the Commerce Clauses of the U.S. Constitution. A decision whether to hear the case is expected by the U.S. Supreme Court later this year.

San Francisco Voter-Approved Taxes Upheld. The San Francisco Superior Court upheld a commercial rent tax and a homelessness tax on July 5, 2019 which were approved by voters on the prior June and November ballots, respectively. The Howard Jarvis Taxpayers Association sued, claiming the taxes should be considered “special taxes,” which require a two-thirds supermajority vote for approval according to the California Constitution and San Francisco Charter. The Court held that it was the voters, not the legislature, that approved these taxes, and therefore a simple majority was enough approval. The Howard Jarvis Taxpayers Association plans to appeal the decision. This decision is significant as it may allow taxes to be increased on a city-by-city basis rather than through the legislature in Sacramento.

State Bar Considering Allowing Non-Lawyers to Provide Legal Service. The State Bar of California is asking for public comments on a current proposal that would allow non-lawyers to provide legal advice and services and to hold a financial ownership interest in law firms. The State Bar claims that there are not enough legal services available for low income taxpayers and that the current proposal would allow more access to legal advice at possibly cheaper rates, with appropriate regulation. Entities that provide legal services could be made up of a combination of lawyers and non-lawyers. In the tax and estate planning field, this could open the door for accounting firms to provide all services in-house. Public comments in support or opposition can be made at the following link until September 23:

<https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2019-Public-Comment/Options-for-Regulatory-Reforms-to-Promote-Access-to-Justice>

**Marissa Wolfsheimer interned with our office the summer of 2019. She just finished the second year of her undergraduate studies at UCLA and plans to major in political science.*

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 information 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 and does not create an attorney-client relationship between the reader and Miller, Monson, Peshel, Polacek and 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.



**MILLER, MONSON, PESHEL,
POLACEK & HOSHAW**

A Partnership of Professional Law Corporations
Providing quality legal services since 1959

[THOMAS M. MONSON](#)
[MARY J. PESHEL](#)
[TIMOTHY C. POLACEK](#)
[WILLIAM D. HOSHAW†](#)
[SUSAN L. HORNER](#)
[DeETTE L. LOEFFLER](#)
[BRADFORD N. DEWAN](#)
[JUDY S. BAE](#)
[KATHLEEN A. LEPORE](#)
[PHILIP R. FREDRICKSEN†](#)

†OF COUNSEL

RALPH GANO MILLER
1926 – 2016

<https://www.mmpph.com>



DeEtte L. Loeffler, Esq.
Newsletter Editor

©Miller Monson Peshel Polacek & Hoshaw, 2019