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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N Street, MIC: 64, Sacramento, California
(P. O. Box 942879, Sacramento, CA 94279-0001)

Telephone: (916) 445-4982
FAX: (916) 323-8765

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May 26, 1994

Attention:

This is in response to your letter of November 24, 1992, to Mr. a member of my staff, in which you asked our opinion about the application of Proposition 58 to a probate situation. I apologize for the delay in responding; other matters requiring our attention have resulted in an unfortunate backlog of correspondence.

The facts of the situation, as stated in the attachments to your letter, are summarized briefly. The decedent died on June 21, 1990. Her will left her properties jointly to her two sons. The probate court ordered the properties distributed jointly to sons A and B. However, the two sons did not wish to jointly own property with each other. Thus, son A conveyed his interest in parcel 1 to son B and son B conveyed his interest in parcel 2 to son A, resulting in son B owning parcel 1 and son A owning parcel 2. These deeds were recorded simultaneously after the distribution. Your office reappraised 50 percent of each property as of the date of transfer between the brothers. You asked if this was a correct procedure.

We concur with your actions. Revenue and Taxation Code Section 60 (all statutory references are to the Revenue and Taxation Code unless otherwise indicated) defines change in ownership as "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest."

Property Tax Rule 462(n)(3) states that the date of a change in ownership by will or intestate succession is the date of death of the decedent. The California Probate Code provides that title to a decedent's property passes on the decedent's death to the person(s) to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession (see Probate Code Section 7000).

In California Academy of Sciences v. County of Fresno (1987) (192 Cal. App. 3d 1436, 1440) the court held that the "residuary legatees became the owners of an undivided interest in the decedent's real property at the time of the decedent's death." Thus, it has been the Board's view that for property tax purposes the date of change in ownership in the case of inheritance of real property by will or intestate succession occurs on the date of the decedent's death.

In your situation, upon the death of the mother, there was a change in ownership of all real property owned by her. Under Section 63.1, though, qualifying transfers of real property between parents and children are excluded from the definition of change in ownership. Thus, the transfer of parcels 1 and 2 jointly to the two sons upon the death of the mother is excludable from change in ownership under Section 63.1.

However, subsequent transfers between siblings are not excluded and considered to be reappraisable changes in ownership. Thus, the transfer of son A's interest in parcel 1 to son B and the transfer of son B's interest in parcel 2 to son A would trigger a 50 percent reappraisal of each parcel.

If you have any further questions, please contact our Real Property Technical Services Unit at (916) 445-4982.

Sincerely,

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VW:sk

bc:

(Prep)

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1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

(916) 445-4588

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Executive Director

August 6, 1990

Dear

This is in response to your letter of April 21, 1990 requesting advice on the application of Proposition 58 to the transfer of your father's personal residence to your brother I have also received a copy of your note dated June 20, 1990, to which you attached a letter written by your father on March 12, 1982, which expresses the wishes of your father as to the disposition of his estate. As we recently discussed, I have also received a copy of the letter written by your brother, to our Assessment Standards Division, dated May 28, 1990. This letter states that recent inquiries made by your brother to various county assessor offices has shown that there are inconsistencies from county to county in the application of Proposition 58 to parent/child transfers pursuant to will or trust where the property is left to two or more children "share and share alike".

Based on the information provided in your letter and in letter, I understand that your father, , and his wife had three children, , and passed away in 1982 and on June 3, 1983, your father executed an intervivos trust which was prepared for him by Mr. , Attorney at Law. In addition to certain stocks and bonds, as trustor, transferred to the trust a residence at Lake in County and his principal residence in ~~County.~~ The trust was revocable until the trustor's death. It retained a life interest in the trustor and upon his death provided for distribution of the trust estate to his children, and "share and share alike".

Among the various powers expressly granted to the trustee in Exhibit A of the trust is the following:

> "(p) In any case in which the Trustee is required, pursuant to the provisions of this instrument, to divide any trust property into parts or shares for the

purpose of distribution or otherwise, the Trustee is authorized, in the Trustee's discretion, to make the division and distribution in kind, including undivided interests in any property, or partly in kind and partly in money, and for this purpose to make such sales of the trust property as the Trustee may deem necessary, on such terms and conditions as the Trustee shall see fit."

Your father passed away in September of 1989. Your brother, is interested in acquiring sole ownership of your father's residence in l. He will provide a promissory note secured by a deed of trust to the other two children as a means of financing the difference between the market value of the residence and his one-third share of the trust assets. Apparently the difference in value amounts to about 15 percent of the market value of the residence.

As the result of an inquiry from Mr. , you have been advised by Daniel M. Hallissy, Chief of the Standards Division of the Assessor's Office, that while the county would apply Proposition 58 to exclude the transfer of the residence to the three children from reassessment, it would treat the transfer of the property to the sole ownership of as a reassessable transfer of a two-thirds interest of the property. You have asked that we review the terms of your father's trust and the other information supplied and provide our opinion as to the correctness of the assessor's determination. As I recently discussed with you, my conclusion, after reviewing the information supplied and the applicable authorities, is that the transfer of the residence to your brother qualifies as an excluded parent/child transfer except to the extent that the value of the property exceeds the value of his one-third share of trust assets.

Proposition 58 added subdivision (h) to section 2 of Article XIIIA of the Constitution. Briefly, subdivision (h) excludes from change in ownership the purchase or transfer of the principal residence of the transferor in the case of the purchase or transfer between parents and their children. It also excludes the purchase or transfer of the first $1 million of the full cash value of all other real property between parents and their children.

Subdivision (h) is implemented by Revenue and Taxation Code section 63.1. Section 63.1, in part, defines "transfer" as including any transfer of the present beneficial ownership of property from an eligible transferor to an eligible transferee through the medium of an intervivos trust. It seems clear, therefore, that if the transfer of the residence

to your brother -qualifies as a transfer from your father pursuant to the terms of his intervivos trust then the transfer qualifies for inclusion under these provisions of the Revenue and Taxation Code and the California Constitution.

The provisions for distribution of your father's trust estate provide that it shall go to the three children "share and share alike." This direction indicates that the three children are to share equally in the trust estate. The question, of course, is whether the three children each receive a one-third interest in each individual trust asset. Subdivision (p) of Exhibit A of the trust grants to the trustee express authority to make distributions in kind and so forth. While I, frankly, had some difficulty in deciding whether this was a clear, broad grant of discretion to the trustee to distribute all trust property in kind, that dilemma is resolved by the provisions of the Probate Code dealing with trust administration found at Sections 16000 and following.

Probate Code Section 16200 provides, in part, that a trustee has not only the powers conferred by the trust instrument but also, except as limited in the trust instrument, the powers conferred by statute. Following Section 16200 are a number of provisions conferring express statutory powers on trustees. Among those provisions is Section 16246 which provides:

> "The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made pro rata or non-pro rata" (added by Chapter 820 of the Statutes of 1986).

California trust law recognizes that the administration of a trust is governed by the trust instrument. Union Bank and Trust Co. v. McColgan (1948) 84 Cal.App. 2d 208. Thus, where the trust instrument conflicts with a statutory power, the instrument controls unless a court, pursuant to Probate Code section 16201, relieves the trustee of the restriction in the instrument. Absent a restriction in the trust instrument, the trustee enjoys both the powers conferred by the trust instrument and those conferred by the provisions of the Probate Code, including section 16246.

The powers granted to the trustee under Exhibit A of your father's trust expressly provides that they are "In addition to all other powers and discretions granted or vested in a Trustee by law." It does not appear, therefore, that any limitation on the powers conferred by statute was intended under your

father's trust. Thus, the trustee has the power to distribute the trust assets in kind on either a pro rata or non-pro rata basis. Accordingly, the distribution to your brother of the property would be properly characterized as a transfer under the terms of the trust from your father to your brother for the purposes of Proposition 58 and section 63.1, to the extent that the value of the property did not exceed the value of your brother's one-third interest in the total trust estate. The excess, which you state is about 15% of the value of the property, could not qualify as a transfer from your father to your brother since it would exceed the direction that the three children share and share alike. To that extent, the transfer must be considered to be a transfer from the other beneficiaries pursuant to a sale of their interest to your brother

It must be recognized that we are dealing here with the provisions of a trust rather than a will. Under the provisions of the Probate Code, we would not necessarily reach the same result had the distribution been made pursuant to a will. Under the Probate Code provisions applicable to wills, the general rule is that a devise of property to more than one person vests the property in them as owners in common. Probate Code Section 6143 provides that unless a contrary intention is indicated by the will, "a devise of property to more than one person vests the property in them as owners in common." See also Estate of Pence (1931) 117 Cal.App. 323, at 331, holding that a devise to more than one person to "share and share alike" indicates a gift in common. See also Noble v. Beach (1942) 21 Cal.2d 91, 94; and, Estate of Russell (1968) 69 Cal.2d 200, 214-215. Of course, many wills contain provisions which grant discretion to distribute the property in kind on a pro rata or non-pro rata basis or something equivalent. In light of the general principle that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will (Probate Code Section 6140 (a)) a clear grant of broad discretion to distribute the property in kind on a pro rata or non-pro rata basis must be given due recognition. In the absence of such a clear grant of broad discretion in the will, however, or an appropriate judicial determination of the meaning of the provisions of the will, assessors are entitled to rely on the general rule set forth in Section 6143 of the Probate Code.

As demonstrated by the above discussion, this is a difficult area of the property tax law and we are in agreement with your brother's suggestion that our Assessment Standards Division should provide guidance to assessors to assist them with these complex problems. By copy of this letter, I am requesting that the division prepare an appropriate advisory letter to county

assessors setting forth guidelines consistent with the views expressed above.

As I believe we have discussed, the opinions expressed in this letter are advisory in nature and are not binding upon any assessor. I have, however, taken the liberty of furnishing a copy of this letter to both the [illegible] and [illegible] Assessors' Offices, for their information.

Very truly yours,

Richard H. Ochsner
Assistant Chief Counsel

RHO:sp
2520D

cc: [illegible]

Mr. Daniel M. Hallissy
Contra Costa County Assessor's Office
834 Court Street
Martinez , CA 94553

Mr. Tony Exsen
Plumas County Assessor's Office
P. O. Box 1016
Quincy, CA 95971

Mr. John Hagerty
Mr. Verne Walton
Mr. Eric Eisenlauer