



STATE BOARD OF EQUALIZATION
PROPERTY AND SPECIAL TAXES DEPARTMENT
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0064
916 274-3350 • FAX 916 285-0134
www.boe.ca.gov

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CYNTHIA BRIDGES
Executive Director

No. 2013/021

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TO COUNTY ASSESSORS:

CHANGE IN OWNERSHIP EXCLUSION - COTENANTS

Effective September 29, 2012, Assembly Bill 1700¹ adds section 62.3 to the Revenue and Taxation Code² to provide that *change in ownership* does not include a transfer of real property from one cotenant to the other that takes effect upon the death of one transferor cotenant. Section 62.3(e) specifically states that its provisions apply to transfers that occur on or after January 1, 2013.

This exclusion applies if all of the following conditions are met:

- Two cotenants must together own 100 percent of the property as tenants in common or joint tenants.
- The two cotenants must be owners of record for the one-year period immediately preceding the death of one of the cotenants.
- The property must have been the principal residence of both cotenants for the one-year period immediately preceding the death of one of the cotenants.
- The transfer must occur due to the death of one of the cotenants, and the surviving cotenant must obtain a 100 percent ownership interest in the property.
- The surviving cotenant must sign an affidavit under penalty of perjury affirming that he or she continuously resided at the residence for the one-year period immediately preceding the transferor cotenant's death.

If one of the above conditions is not met, the exclusion does not apply. Following is a discussion of these points, and answers to questions that we received from assessors' staff regarding the implementation of the cotenancy exclusion.

FORM OF OWNERSHIP

The property must be held in a tenancy in common or joint tenancy form of ownership by the cotenants, with no other individual holding title to the property. Specifically, two individuals must own 100 percent of the real property as either joint tenants or tenants in common.

¹ Stats. 2012, ch. 781.

² All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

Question 1: If there are other cotenants, does this disqualify the cotenant from filing an affidavit for the exclusion?

Yes. Pursuant to section 62.3(a)(1), the exclusion only applies to property owned 100 percent by two individuals.

RECORDED OWNERSHIP

Both cotenants must be owners of record of the property for the one-year period immediately preceding the transferor cotenant's death. The exclusion will not apply if the surviving cotenant was not on title to the property for at least a year prior to the decedent's date of death.

Question 2: Does the cotenancy apply only to property acquired by two individuals?

Section 62.3 is silent on how the property is acquired by the cotenants. Section 62.3(a)(3) requires that the two cotenants be owners of record for the one-year period immediately preceding the transferor cotenant's death.

Question 3: Is it required that the cotenants take title at the same time in order to consider the title as a cotenancy?

Pursuant to section 62.3(d)(1), a *co tenancy interest* is a term that describes an interest in real property held only as tenants in common or joint tenants. The two cotenants do not have to take title together at the same time to create a cotenancy interest. They merely have to be on title together as tenants in common or joint tenants for the one-year period prior to the time that the cotenancy exclusion is claimed.

Question 4: If the decedent was an original transferor and the surviving cotenant was not an original transferor, does the exclusion apply as long as the surviving cotenant was added by a recorded document at least one year prior to the death of the original transferor?

Yes. The exclusion applies as long as the cotenants both have been on title for at least a year prior to the date of death. Additionally, section 62.3(a) provides that qualifying transfers are not changes in ownership "Notwithstanding any other provision in this chapter... ." Therefore, notwithstanding the fact that such a transfer would normally be a change in ownership pursuant to section 65(c), it would be excluded by section 62.3, assuming all of the conditions of that section are met.

Question 5: Does it matter what gender the cotenants are?

No. Section 62.3 does not mention gender.

PRINCIPAL PLACE OF RESIDENCE

The property must be the principal residence of both cotenants immediately preceding the transferor cotenant's death. Both cotenants must have continuously resided at that residence for the one-year period immediately preceding the date of death of one of the cotenants. Section 62.3(d)(2) provides that a *principal residence* means a dwelling eligible for either the Homeowners' Exemption or the Disabled Veterans' Exemption.

In order to qualify for either exemption, the dwelling must be established as the owner's principal place of residence as of 12:01 a.m. on the lien date (January 1). If new to the property and not yet domiciled at the property through a lien date, the exemption may be claimed by a qualified individual on the supplemental assessment resulting from a change of ownership or completion of new construction on or after January 1.

One of the foremost factors in granting the homeowners' exemption or the disabled veterans' exemption is determining what constitutes a dwelling as a principal place of residence. For property tax purposes, the relative definition of a principal place of residence is the same as, or closely parallels to, the legal doctrine of domicile. Under this doctrine, a person's domicile depends on two factors: *physical presence* and *intention*. The combination of both factors should be used to make the final determination of a claimant's primary residence.

Physical Presence Factor

Physical presence is the place where:

- A person is physically present and makes his or her home.
- A person customarily returns after work and between trips or absences due to work, pleasure, or otherwise, even if the absence is extended. A member of the armed services who is on active military service outside of California does not lose their residency under the Servicemembers Civil Relief Act.³
- Clothes and personal belongings are kept.
- Housekeeping (preparing meals, sleeping, bathing, entertaining) is set up.
- The person files income tax returns as a resident.
- A driver's license is issued.
- The person has listed for voter registration.

For the physical presence factor, the individual facts as they relate to each other as a whole should be reviewed in each claim, as not all elements listed are necessary to satisfy this requirement.

Intention Factor

Intention factor is the intent of the claimant to remain at the residence and not the intent to stay there only for a temporary purpose and return to a legal domicile elsewhere. Of the two factors, intention is essential and required.

If the Homeowners' Exemption or the Disabled Veterans' Exemption was not granted in the name of both cotenants, then proof that the real property was their principal residence must be provided. Proof of residency may include vehicle registration, voter registration, bank accounts, or income tax records.

³ 50 Appendix U.S.C.A. 501-594.

Question 6: *Does "continuously resided at the residence for one year" mean 12 months? Can one year be interpreted to mean a period other than 365 days?*

A year is defined⁴ as a period of 365 days (leap year is 366 days) divided into 12 months. Section 62.3(a)(5) requires the transferor and the transferee to have continuously resided at the residence for the one-year period preceding the transfer. We take this to mean the prior one-year period immediately preceding the death of the transferor. For example, if a transferor died on March 10, 2013, the one-year period would be the period from March 11, 2012 through March 10, 2013.

Question 7: *Is there any other way to verify continuous residency?*

Once residency is established, it is presumed that residency will be continuous until another property becomes the principal residence (similar to the Homeowners' and Disabled Veterans' Exemptions). Whether the transferor and the transferee actually continuously resided at a residence for the one-year period preceding a transfer is a question of fact for the assessor to determine on a case-by-case basis if evidence indicates otherwise. As such, no particular number of days will establish continuous residence, but rather the intentions and actions of the parties should control. Further, temporary absences should be treated as they are for the purposes of the Homeowners' Exemption.

Question 8: *How does the assessor verify that the property was the principal place of residence for both parties in cases where there is a Homeowners' Exemption but only under one social security number?*

Section 62.3(d)(2) defines a *principal residence* as one that is eligible for the Homeowners' Exemption or the Disabled Veterans' Exemption. Therefore, in a situation where the social security number of a cotenant is not on file, the person claiming the exclusion must provide evidence that he or she was eligible to receive the Homeowners' Exemption or the Disabled Veterans' Exemption on the transferred property and not receiving an exemption on another property. In-state presence, vehicle registration, voter registration, bank accounts, and state income tax filings are among the factors to be considered.⁵

DATE OF TRANSFER

A transfer must occur due to the death of one cotenant in order for the cotenancy exclusion to apply. Property Tax Rule 462.200(c)⁶ provides that the *date of death* is the date of change in ownership. Thus, pursuant to section 62(e), these provisions only apply to dates of death that occur on or after January 1, 2013.

Question 9: *Does the date of death, not just the transfer of property, also have had to occur on or after January 1, 2013 for the cotenancy exclusion to apply? Currently, there are many transfers pending resolution of probate – some pending for many years.*

⁴ Webster's Dictionary, Third College Edition.

⁵ Annotation 505.0078 (11/20/84) [http://www.boe.ca.gov/proptaxes/pdf/505_0078.pdf].

⁶ Title 18, Public Revenues, California Code of Regulations.

Pursuant to Rule 462.260(c), the date of change in ownership is the date of death of the decedent. Therefore, the exclusion only applies to those transfers that occurred as a result of the death of a cotenant where he or she dies on or after January 1, 2013.⁷

ACQUISITION METHODS

Upon the death of the transferor cotenant, the surviving cotenant must obtain a 100 percent ownership interest in the property via the transferor cotenant's will or trust, intestate succession, or by operation of law.

The cotenancy exclusion does not apply if any other provision in the Revenue and Taxation Code provides a change in ownership exclusion. Applicable exclusions may include the interspousal, registered domestic partner, parent-child, or the joint tenancy exclusion where the surviving joint tenant has original transferor status.

Question 10: In cases of tenancy in common, does the assessor exclude the change in ownership from reassessment upon the death with the assumption that the transferee will ultimately receive title (for example, through probate) simply based on the affidavit? Or should the assessor reassess and hold the affidavit pending confirmation that the transferee actually receives the decedent's interest?

On the date of death, the beneficial interest in the property transfers to the heirs, beneficiaries, or others entitled to the property.⁸ It is not necessary to wait for legal title to be transferred to process a change in ownership. Similarly, it is not necessary to wait for legal title to be transferred to claim an exclusion from change in ownership. Assuming the taxpayer can show, by providing a copy of the will, trust, or other document, that he or she owns the beneficial interest in the property, then the assessor should grant the exclusion. If someone other than the cotenant ultimately inherits the property, then the assessor should reassess the decedent's interest as of the date of death (unless another exclusion applies).

Question 11: Does marital status matter?

Yes. Section 62.3(c) provides that the "exclusion provided by this section shall not apply to any transfer of real property interests for which a separate exclusion in this chapter applies." If the cotenants are spouses or registered as domestic partners with the California Secretary of State, then the exclusion under sections 63 or 62(p) would apply instead of section 62.3.

Question 12: What happens to the cotenancy exclusion if the cotenant, through a court order or trust, becomes a life tenant for a 50 percent interest inherited and the remainder of future interest is designated?

The cotenancy exclusion of section 62.3 only applies to transfers by and between two cotenants. A transfer of a remainder interest upon the termination of a life estate is considered to be from

⁷ The Appellate Court ruling in *Larson v. Duca*, (1989) 213 Cal.App.3d 324, opined that the date of change in ownership is the date of a judicial decree of distribution does not apply to exclusions under section 62.3 as that decision specifically limits itself to specific circumstances for purposes of applying the parent-child exclusion under section 63.1.

⁸ Probate Code section 7000; Property Tax Rule 462.260(c) and (d).

the creator of the life estate and not the life tenant.⁹ Therefore, in a situation where a cotenant obtains a life estate in the residence from a third party, when the remainder ultimately vests in the other cotenant it will be a transfer from the third party and the exclusion of section 62.3 will not apply.

Alternatively, if a property is owned 100 percent by two cotenants, and one cotenant at his or her death transfers a life estate in the property through his or her will or trust to the surviving cotenant giving the surviving cotenant 100 percent of the present interest in the property, then the exclusion would apply.

Question 13: How can a cotenant inherit via trust if title can only be held in joint tenancy or tenancy in common?

According to section 62.3(b), the transfer may occur pursuant the transferor cotenant's trust. Subdivision (d)(1) defines a *cotenancy interest* as "an interest in real property held only as tenants in common or joint tenant." This does not prohibit legal title from being held by a trust while equitable title is held by the cotenants as beneficiaries of the trust. To conclude otherwise would render subdivision (b)(1) contradictory to subdivision (d)(1) and would be in direct conflict with Board staff's longstanding opinion regarding property held in trust.¹⁰ Further, "Where a trust is created for several beneficiaries, the beneficiaries may be tenants in common or joint tenants of the beneficial interest to the same extent to which they might be tenants in common or joint tenants of a legal interest."¹¹

AFFIDAVIT

The surviving cotenant must sign an affidavit under penalty of perjury affirming that he or she continuously resided at the property for the one-year period immediately preceding the cotenant's death. On December 19, 2012, the Board of Equalization approved BOE-58-H, *Affidavit of Cotenant Residency*. This form has been transmitted to county forms coordinators.

Question 14: Is there any filing period for the affidavit?

There is no filing period specified in section 62.3.

Question 15: Will there be a late-filing fee for the cotenancy exclusion, similar to the fee for the parent-child exclusion in section 63.1?

Since section 62.3 does not contain any filing deadline, there can be no penalty for failure to meet a filing deadline that does not exist. Moreover, section 62.3 does not authorize a filing fee of any type.

The *Affidavit of Cotenant Residency* is not a change in ownership statement. If an assessor mails the affidavit in lieu of the *Change in Ownership Statement*, the filing period and penalty under section 482 do not apply.

Question 16: When the death of a transferor cotenant is not discovered timely, is the exclusion retroactive to the date of death, or from the filing date of the affidavit

⁹ Annotation 220.0372 (4/13/92) [http://www.boe.ca.gov/proptaxes/pdf/220_0372.pdf] .

¹⁰ Annotation 220.0761 (07/14/80) [http://www.boe.ca.gov/proptaxes/pdf/220_0761.pdf] .

¹¹ *Restatement of the Law (2d) of Trusts*, American Law Institute, Section 113, com. c.

forward? If retroactive, how far back can assessors go to correct prior rolls, and how many years can be refunded?

Pursuant to section 62.3(a), a transfer that meets the conditions of section 62.3 is excluded from change in ownership. A transfer by operation of death causes a change in ownership upon the date of death of the decedent. Therefore, if property is reassessed upon the death of a cotenant and the assessor later learns that the transfer met the requirement of section 62.3, then the assessor must correct that assessment, since no change in ownership occurred. An assessor should correct the base year value pursuant to section 51.5(a) whenever the error is discovered and process roll corrections pursuant to section 4831. Refunds may be generated by the county auditor pursuant to section 5097.

Question 17: What is considered a "complete" affidavit? If some of the data elements are missing and cannot be determined, how should the assessor proceed—approve or deny the exclusion?

Section 62.3(a)(6) provides that in order for the exclusion to apply the "transferee has signed, under penalty of perjury, an affidavit affirming that he or she continuously resided with the transferor at the residence for the one-year period immediately preceding the transfer."

As such, to meet with the requirements of subdivision (a)(6), an affidavit must:

- (1) Be signed by the transferee under penalty of perjury;
- (2) Identify the transferee and transferor;
- (3) Identify the residence; and
- (4) Contain affirmations such that the assessor can conclude that the transferor and transferee continuously resided with the transferor at the residence for the one-year period immediately preceding the transfer.

If an affidavit does not contain all of the above information, then it is incomplete and the exclusion does not apply until a complete affidavit is provided to the assessor. As noted above, once a complete affidavit is provided, then, assuming all other requirements are met, the exclusion is retroactive to the date of the death.

Question 18: Would the filing of a Preliminary Change of Ownership Report or a Change in Ownership Statement be sufficient to grant the cotenancy exclusion?

No. Signing and filing a *Preliminary Change of Ownership Report* or a *Change in Ownership Statement*¹² is not sufficient to meet the requirement to sign an affidavit affirming continuous residency since neither form contains the required residency language.

¹² BOE-502-A and BOE-502-AH, respectively.

A copy of section 62.3 is enclosed. If you have any questions regarding this change in ownership exclusion, please contact the County-Assessed Properties Division at 1-916-274-3350.

Sincerely,

/s/ David J. Gau

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:grs
Enclosure

Section 62.3 as added to the Revenue and Taxation Code:

62.3. (a) Notwithstanding any other provision in this chapter, a change in ownership shall not include a transfer of a cotenancy interest in real property from one cotenant to the other that takes effect upon the death of the transferor cotenant if all of the following conditions apply:

(1) The transfer is solely by and between two individuals who together own 100 percent of the real property in joint tenancy or as tenants in common.

(2) As a result of the death of the transferor cotenant, the deceased cotenant's tenancy in common or joint tenancy interest in the real property is transferred to the surviving cotenant, which results in the surviving cotenant holding a 100-percent ownership interest in the real property immediately after the transfer, thereby terminating the cotenancy.

(3) For the one-year period immediately preceding the transfer, the real property was coowned by the transferor and the transferee, and both cotenants have been the owners of record of that real property.

(4) The real property constituted the principal residence of both cotenants immediately preceding the transferor cotenant's death.

(5) The transferor and the transferee continuously resided at that residence for the one-year period immediately preceding the transfer.

(6) The transferee has signed, under penalty of perjury, an affidavit affirming that he or she continuously resided with the transferor at the residence for the one-year period immediately preceding the transfer.

(b) A transfer of cotenancy interest in real property from one cotenant to the other shall take effect upon the death of the transferor cotenant under any of the following circumstances:

(1) Pursuant to the transferor cotenant's will or trust, upon the death of the transferor cotenant.

(2) Through intestate succession from the transferor cotenant.

(3) By operation of law, upon the death of the transferor cotenant.

(c) The exclusion provided by this section shall not apply to any transfer of real property interests for which a separate exclusion in this chapter applies.

(d) For purposes of this section, both of the following apply:

(1) "Cotenancy interest" means an interest in real property held only as tenants in common or joint tenants.

(2) "Principal residence" means a dwelling eligible for either the homeowners' exemption or the disabled veterans' exemption.

(e) This section shall only apply to transfers that occur on or after January 1, 2013.