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No. 2004/042

TO COUNTY ASSESSORS:

QUESTIONS AND ANSWERS REGARDING CHANGES
TO PROPERTY TAX RULE 462.040

In 2003, the Board approved amendments to Property Tax Rules 462.040, *Change in Ownership—Joint Tenancies*, and 462.240, *The Following Transfers Do Not Constitute a Change in Ownership* (Title 18, sections 462.040 and 462.240, California Code of Regulations). The Office of Administrative Law approved the amendments on October 14, 2003 and filed the amended rules with the Secretary of State on that date.

Letter To Assessors (LTA) 2003/077 explained the changes to Rules 462.040 and 462.240. This letter is posted on the Board's Web site at www.boe.ca.gov/proptaxes/2003.htm. The amended versions of Rules 462.040 and 462.240 are posted at www.boe.ca.gov/proptaxes/ptrules.htm. As a follow up to LTA 2003/077, this LTA presents a series of questions and answers on the implementation of the changes to Rule 462.040. A separate letter was issued presenting the changes to Rule 462.240 (see LTA No. 2004/023, dated April 26, 2004).

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

Sincerely,

/s/ David J. Gau

David J. Gau
Deputy Director
Property and Special Taxes Department

DJG:grs
Enclosure

CHANGE IN OWNERSHIP – JOINT TENANCY

GENERAL QUESTIONS

1. What is joint tenancy?

Joint tenancy is characterized by (1) the four "unities" of interest, title, time, and possession, and (2) the *right of survivorship*. Civil Code section 683 defines a joint tenancy as an estate in property owned by two or more people in equal shares (*unity of interest* – there is only one title and each person must have one and the same interest) that is expressly declared by one and the same grant, agreement, or devise (*unity of title*) commencing at one and the same time (*unity of time*), and the property must be held for the benefit and undivided possession of each other (*unity of possession*). By the *right of survivorship*, each surviving joint tenant succeeds by operation of law to the interest of a deceased joint tenant, until there is but one survivor, whereupon it vests in that survivor absolutely. A joint tenancy must be expressly stated. If not, it is presumed that a tenancy in common exists.

2. How are joint tenancies created?

To create a joint tenancy, the four unities mentioned in the response to the previous question are required, namely: unity of time, title, interest, and possession. That is, the parties must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and the property must be held by one and the same undivided possession. If any one of these unities are lacking, the estate is not a joint tenancy.

A joint tenancy may be created by:

- a joint tenancy deed from the owner or owners to two or more other parties,
- the owners deeding to an intermediary and taking back a joint tenancy deed, or
- the owners directly transferring the property to themselves as joint tenants.

A joint tenancy may be created in an estate in fee, for life, for years, or in remainder. Both real and personal property, or an undivided interest therein, may be held in joint tenancy.

It is necessary that there be some operative words declaring the intention to create a joint tenancy, and the intention should be clearly expressed in the granting clause in the deed without any conflicting terms. The phrase, "as joint tenants", implies the right of survivorship and is sufficient. If disproportionate shares are named, a tenancy in common is created.

3. How is a joint tenancy severed?

The Legislature codified the law of severance of a joint tenancy in Civil Code section 683.2 in 1985. Subdivision (a) describes the case law and common law methods that permit a joint tenant to sever his/her joint tenancy interest. The severing deed or declaration must be in writing, must be properly executed by the severing joint tenant, and must express an intent to sever by any of the following means: (1) it transfers the severing joint tenant's interest to a third person (except spouse), (2) it transfers the severing joint tenant's interest to a trust for the benefit of a third

person (contrary to joint tenants' survivorship rights) or to a legal entity (such as a partnership), (3) it constitutes an agreement to sever, or (4) it transfers the severing joint tenant's interest to a remaining joint tenant.

The effect of a valid severance is that the survivorship rights are extinguished as between the severing joint tenant and the other joint tenants, resulting in a tenancy in common to that extent; the transfer does not affect the continuation of the joint tenancy between the interests of any two or more remaining joint tenants. Subdivision (b) protects the rights of the other joint tenants against an unlawful severance – i.e., an unrecorded agreement that is contrary to their recorded deed – except against the rights of a purchaser for value and in good faith and without knowledge of their unrecorded deed or agreement. Subdivision (c) provides that a severance by one joint tenant transferring to himself as a tenant in common or to a third party (including his trust for a third party) is not valid or effective to terminate the right of survivorship of the other joint tenants as to his interest, unless one of the following requirements is met:

(1) before the death of the severing joint tenant, the severing deed, declaration, or other written instrument (including trust or partnership agreement) is recorded in the county where the property is located; or

(2) the severing deed, declaration, or other written instrument (including trust or partnership agreement) is executed and acknowledged before the death of that joint tenant and is recorded in the county where the property is located not later than 7 days after the death of that severing joint tenant.

Subdivision (d) also provides that one joint tenant may sever by transferring his interest to one or more of the other joint tenants by a properly executed deed delivered to the other joint tenant(s). The purpose of the statute is to prevent a "secret" severance by one joint tenant by making his attempt invalid and ineffective for terminating the survivorship rights of the other joint tenants in his interest, unless it is recorded or all joint tenants agree in writing. Only upon the accomplishment of a valid severance does one's position as a joint tenant and an "original transferor" (if he was one) cease.

4. What are the changes to Property Tax Rule 462.040?

Rule 462.040, subsection (b)(1) was amended to clarify that an original transferor, within the meaning of Revenue and Taxation Code[1] section 65, subdivision (b)[2] may be created by (1) tenants in common transferring to themselves as joint tenants without adding other persons to title and (2) each joint tenant who is not an original transferor transferring to his or her revocable trust for the benefit of the other joint tenant(s). Example 9 was added to the rule to clarify that the step transaction doctrine is applicable when circumstances exist to indicate that transfers of joint tenancy interests have no estate planning purpose and have been made solely in order to avoid change in ownership. The amendment to subsection (b)(3) clarifies that the termination of a joint tenancy terminates the original transferor status of the joint tenants. Subsection (d) allows

[1] All references are to the Revenue and Taxation Code unless otherwise indicated.

[2] Section 65(b) provides that, "[t]here shall be no change in ownership upon the creation or transfer of a joint tenancy interest if the transferor or transferors, after such creation or transfer, are among the joint tenants. Upon the creation of a joint tenancy described in this subdivision, the transferor or transferors shall be the 'original transferor or transferors' for purposes of determining the property to be reappraised on subsequent transfers."

an assessor to determine that evidence presented by the coowners rebuts the legal presumption that the deed accurately reflects the coowners' method of holding title and that those persons jointly owning property are joint tenants and original transferors provided that the assessor has reasonable cause to believe, based on the evidence provided, that they intended to create a joint tenancy and became original transferors. For further details, see Letter To Assessors 2003/077.

5. What is the effective date for the changes to Property Tax Rule 462.040?

The Office of Administrative Law approved the amendments on October 14, 2003, and filed the amended rules with the Secretary of State on that date. By law, the amendments became effective 30 days after filing, on November 13, 2003.

6. Is the assessor required to follow any particular procedure when processing transfers involving joint tenancy interests to determine whether or not they qualify for exclusion?

As with any other change in ownership exclusion, the assessor should follow his or her normal procedures to determine whether a transfer might qualify for the exclusion. If it can be determined that a transfer qualifies for the exclusion based on the transfer document, the Preliminary Change of Ownership Report, or any other supporting documentation, then the exclusion should be allowed.

7. What kinds of documents should assessors request to determine if an exclusion applies?

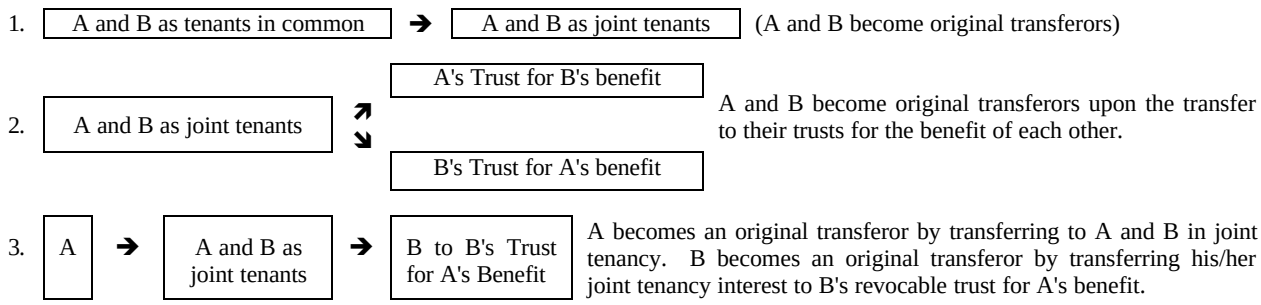
As with any other change in ownership exclusion, assessors should request and examine deeds, trust agreements, property agreements, affidavits, income tax returns, or other relevant documentation that might exist.

8. What should an assessor do if a taxpayer does not want to provide a copy of the trust instrument?

An exclusion from change in ownership should not be granted without supporting documentation. The taxpayers must provide sufficient documentation to enable the assessor to determine the beneficiary or beneficiaries and their interests in the trust property.

9. How can a person become an original transferor?

The original transferor (OT) concept was added to section 65 in 1980 for the exclusive purpose of delaying change in ownership and reappraisal until the severance or termination of a joint tenancy. To become an original transferor, an individual must be both a transferor and a transferee. A transferor may create the original transferor status in the following three ways:



In each of these situations, a change occurred—either a change in the method of holding title or the addition of another person. A deed from X and Y as joint tenants to X and Y as joint tenants simply reaffirms the initial transfer and does not create original transferor status.

Once a joint tenant becomes an original transferor, that status remains until that joint tenant's interest is terminated or transferred or the entire joint tenancy terminates.[3] Here are some ways in which the original transferor status may cease:

- Termination of the entire joint tenancy
- A transfer of that joint tenant's interest to another person or entity
- A change in the method of holding title (e.g., community property or tenancy in common)
  - An exception to the change in the method of holding title is a transfer to a revocable trust for the benefit of the other joint tenant(s).

10. Are the amendments to Rule 462.040 limited to family members or persons in an intimate personal relationship?

No. Coowners may hold title in joint tenancy regardless of the relationship of the parties or the nature of that relationship. However, the parties ordinarily have some type of close relationship because transfers that create joint tenancies usually are made for estate planning purposes. If one joint tenant dies, the surviving joint tenant(s) immediately become the sole owner(s) by the right of survivorship.

LEGAL ENTITIES

11. How does Rule 462.040 apply to legal entities?

Because legal entities cannot be joint tenants, the amendments have no effect. As stated above, a joint tenancy is a method of holding title by two or more persons in which each of the joint tenants has a right of survivorship to the interest of the other joint tenant(s) upon death. The right of survivorship precludes a legal entity from holding title as a joint tenant because it is not a natural person whose interests would pass on death. Please note that although a single-member limited liability company is disregarded as a legal entity for *federal* income tax reporting purposes, it is still treated as a separate legal entity for California property tax purposes.

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[3] This is similar to the treatment of transfers of original coowners' interests in legal entities. See Annotation 220.0452 (C 8/26/98).

If a deed is recorded transferring real property to an individual and a legal entity as joint tenants, no valid joint tenancy exists because a legal entity is not a person who can hold title as a joint tenant. In that event, a tenancy in common would result, and Rule 462.040 would not apply.

12. Would a transfer from a legal entity to the owners of the legal entity as joint tenants make the joint tenants original transferors?

No. Such a transfer may qualify for an exclusion from change in ownership under section 62(a)(2), but the individual owners would not become original transferors. The owners of a legal entity do not as individuals hold title to property owned by the legal entity. The property is transferred from one owner, the legal entity, to third parties, the legal entity owners. Thus, in a transfer from a legal entity to an individual, the individual is only a transferee; the legal entity is the transferor, not the individual. To become an original transferor, an individual must be both a transferor and a transferee.

Example A:

Property is owned by Partnership P, which is composed of A, B, C, and D, each as to a 25% interest. Partnership P deeds to A, B, C, and D as joint tenants.
Property is excluded from reassessment under section 62(a)(2); A, B, C, and D are joint tenants but do *not* become original transferors.

JOINT TENANCY PRESUMPTION

13. How would this rule apply to deeds where *unequal* percentages are specified, but the vesting is stated as joint tenancy?

Rule 462.040 applies to the creation, transfer or termination of joint tenancy interests. Because a joint tenancy is ownership that is equal and undivided, the Board's legal staff has taken the position that a deed that recites title as joint tenants with unequal interests does not create a valid joint tenancy. In that event, the coowners are presumed to be tenants in common, and the rule will not apply. If the coowners contend that the joint tenancy is valid, they must provide additional documentation sufficient to rebut the presumption that the interests, as stated on the deed, are unequal.

If an essential unity—such as unity of interest—is destroyed, the joint tenancy is severed and a tenancy in common results. In *Yeoman v. Sawyer*, 99 Cal.App.2d 43 (1950), the court held that joint tenants cannot hold unequal interests and, in that event, a valid joint tenancy is not created. In *Clark v. Carter*, 265 Cal.App.2d 291 (1968), the court of appeal held that a recital of a joint tenancy creates a rebuttable presumption that title to property is held in joint tenancy, unless evidence or an agreement proves that the property was intended to be other than joint tenancy. Thus, a deed that specifies unequal interests is evidence that the parties intended to hold title in a manner other than joint tenancy.

Example B: Deeding Unequal Interests

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-29-97	A for 25%, B for 25%, and C for 50%, all as joint tenants		100% change in ownership. Interests are unequal – no valid joint tenancy exists.
(b)	C	12-6-03	C's Trust	A and B are beneficiaries	Because no prior joint tenancy exists, C does *not* become an original transferor (no change in ownership).

When tenants in common with unequal interests transfer by deed to joint tenancy, the ownership interest that transfers from a coowner to the other coowner(s) to make the percentages equal does not result in a change in ownership as to the transferring interest(s). Section 65(b) provides that change in ownership does not include the creation or transfer of a joint tenancy interest if the transferor(s), after the creation or transfer, is among the joint tenants. Unlike section 62(a), nothing in section 65(b) requires that proportionality be maintained before and after the transfer.

Example C: Deeding from Unequal Interests into Joint Tenancy

	Grantor	Recording Date	Grantee	Result
(a)	X	1-29-97	A for 99% and B for 1% as tenants in common	100% change in ownership.
(b)	A and B	12-6-03	A and B as joint tenants	No change in ownership. A and B become OT's.

SPOUSAL APPLICATION

14. Will a husband and wife become original transferors if they transfer property held as joint tenants to themselves as community property with right of survivorship pursuant to Civil Code section 682.1?

No. Property held by a husband and wife as community property with right of survivorship is distinguished from joint tenancy. Under Civil Code section 682.1,[4] only a husband and wife may hold title as community property with right of survivorship, and any exclusion resulting therefrom would be determined under section 63 and Property Tax Rule 462.220. However, if a husband and wife transfer property held in joint tenancy into a trust for each other's benefit, the joint tenancy is not severed, and they become original transferors.

[4] Civil Code section 682.1 became operative on July 1, 2001.

TRUSTS

15. In Rule 462.040(b)(1), what does a transfer of the joint tenancy interest "through his or her trust" mean?

There are three parts that must be satisfied in order to confer original transferor status by transferring an interest to the other joint tenant "through his or her trust." It does not matter if joint tenants transfer to one trust or to multiple trusts as long as all the other joint tenants are the present beneficiaries and thus retain the right of survivorship.

- The real property interests must be held in joint tenancy at the time the joint tenants transfer the interests into the revocable trust.
- The deed transferring a joint tenant's interest into the trust must be recorded on or after November 13, 2003 (the effective date of the rule change).
- The trust must name all the other joint tenant(s) as present beneficiaries, i.e., the person to receive the trustor's real property interest upon his or her death.

For purposes of Rule 462.040, a present beneficiary is a person who receives the property held in a *revocable* trust when the trustor dies. Section 62(d) excludes the transfer of property into a revocable trust from change in ownership because the trustor holds the present beneficial interest in his property until the day he or she dies; the trustor can revoke the trust at any time until death. Thus, until the death of the trustor of a revocable trust, the present beneficiary only has a contingent interest, or *future* beneficial interest, in the trust property which vests when the trustor dies, and becomes a *present* beneficial interest.

For an *irrevocable* trust, the beneficiary, not the trustor, is the owner of the property.[5] If the other joint tenant is a present beneficiary of an irrevocable trust, title passed upon the creation of the trust, and the trustor no longer has any interest in the property.

Example D: Transfer to Revocable Trust Naming A as Beneficiary

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-5-02	A and B as joint tenants		100% change in ownership.
(b)	B	3-26-04	B's Revocable Trust for A's benefit	B retains present interest and A becomes the present beneficiary	B becomes an OT; A is an "other than original transferor" (OTOT). No change in ownership.

Example E: Transfer to Irrevocable Trust Naming A as Beneficiary Severs the Joint Tenancy

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-5-02	A and B as joint tenants		100% change in ownership.

[continued]

[5] *Allen v. Sutter County Board of Equalization*, 139 Cal.App.3rd 887, and Section 62(d).

	Grantor	Recording Date	Grantee	Special Notes	Result
(b)	B	3-26-04	B's Irrevocable Trust for A's benefit	A is present beneficiary	50% change in ownership; joint tenancy is severed because B has transferred his present beneficial interest to A.
(c)	A	10-29-04	B	A dies	100% change in ownership (B is not an OT).

Example F: Transfer to Revocable Trust Naming Only One of the Joint Tenants

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	A	1-18-03	A, B and C as joint tenants		A becomes an OT. B and C become OTOT's. No change in ownership.
(b)	B	12-13-03	B's Revocable Trust for C's benefit	C is only beneficiary	33.333% change in ownership – Joint tenancy is severed as to B's interest because all the other joint tenants are not present beneficiaries. A and C are joint tenants as to their 66.667% interest, and B is a tenant in common as to his 33.333%.

Example G: Recorded Transfer to Trust for Third Party Severs Joint Tenancy; No Change in Ownership if Exclusions were Not Used

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-5-02	A and B as joint tenants		100% change in ownership.
(b)	A	3-26-04	A's Revocable Trust for B's benefit	B is present beneficiary	A becomes an OT; B becomes an OTOT.
(c)	B	10-29-04	B's Revocable Trust for X's benefit	X is present beneficiary	Joint tenancy is severed; no change in ownership because no prior exclusions were used.

Since B's interest had been reassessed at the time of purchase, this transfer would not create a change in ownership, even though a joint tenancy was severed, and the interest did not revert to an OT. Assessors will now need to review the record title to confirm when OT's were reassessed and when they were excluded upon acquisition.

Example H: Recorded Transfer to Trust for Third Party Severs Joint Tenancy; Change in Ownership if Prior Exclusions were Used

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	A	1-5-02	A, B and C as joint tenants		No change in ownership. A becomes an OT. B and C become OTOT's.

[continued]

	Grantor	Recording Date	Grantee	Special Notes	Result
(b)	B	3-26-04	B's Revocable Trust for A and C's benefit	A and C are present beneficiaries	B becomes OT; C remains an OTOT.
(c)	C	10-29-04	C's Revocable Trust for X's benefit (recorded)*	X is present beneficiary	33.333% change in ownership. Joint tenancy is severed as to C's interest. A and B are joint tenants as to their 66.667% interest, and C is a tenant in common as to his 33.333% which C acquired under a prior exclusion.
(d)	B dies	12-2-04	A and C		16.667% change in ownership to C.

* The result would be no change in ownership if the deed to C's Trust or C's trust with X as present beneficiary was not recorded, because without recordation A and B's survivorship rights in C's interest would not be severed. The term "recorded" for purposes of this rule means recordation of the trust or deed to the trust.

Example I: Transfer to Recorded Trusts Without Naming All Joint Tenants as Beneficiaries and Subsequent Gift by OT's

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-18-02	A and B as joint tenants		100% change in ownership
(b)	B	12-13-03	B's Revocable Trust for A's benefit	A is beneficiary	B becomes an OT
(c)	A	12-13-03	A's Revocable Trust for B's benefit	B is beneficiary	A becomes an OT
(d)	A's Trust and B's Trust	3-24-04	A, B, C and D as joint tenants		A and B are OT's C and D are OTOT's
(e)	C	4-18-04	C's Revocable Trust for D's benefit	D is beneficiary	25% change in ownership. C's interest in joint tenancy is severed.
(f)	D	4-18-04	D's Revocable Trust for C's benefit	C is beneficiary	25% change in ownership. D's interest in joint tenancy is severed.
(g)	A and B gift	1-02-05	C's Trust and D's Trust		50% change in ownership because no OT's remain.

Reason: C's and D's trusts and/or deeds transferring to the trusts are *recorded* and do not name all the other joint tenants as beneficiaries, and therefore the joint tenancy is severed as to the

interests transferred. [Note: In Example 9 of Rule 462.040, when it says that C and D transfer to each other through their trusts means that the trusts name *all* the other joint tenants, including A and B, as beneficiaries. Rule 462.040(b)(1) states in part: "Any joint tenant may also become an original transferor by transferring his or her joint tenancy interest *to the other joint tenant(s)* through his or her trust if the trust instrument names *the other joint tenant(s)* as the present beneficiary or beneficiaries." (Emphasis added)]

Example J: Transfer of Life Estate or Lifetime Right to Income is Substantially Equal to the Value of a Fee Interest and is Consistent with the Right of Survivorship in Joint Tenancy.

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	1-13-04	A and B as joint tenants		100% change in ownership.
(b)	B	5-6-04	B's Revocable Trust for A's benefit	B's Trust leaves life estate to A upon B's death; leaves C (B's child) remainder	No change in ownership. B becomes an OT because right of survivorship is preserved; life estate is a fee interest.
(c)	B	12-29-04	A (life estate holder)	B dies	50% change in ownership in B's interest because A is not an OT. No change in ownership as to A's interest since no prior exclusions were used. The joint tenancy terminates since A is now the sole owner.
(d)	A	8-9-05	C	A dies	100% change in ownership; however, 50% coming from B's trust is eligible for the parent-child exclusion since the interest is coming from B, the parent of C.

Example K: Transfer to Revocable Trust with Sprinkle/Spray Power

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	A	3-8-88	A, B and C as joint tenants		A becomes an OT. B and C become OTOT's. No change in ownership.

[continued]

	Grantor	Recording Date	Grantee	Special Notes	Result
(b)	B records	12-20-03	B's Revocable Trust for A and C's benefit	A and C are beneficiaries. Trust has sprinkle provision allowing transfers to A and C until both become age 55 (C is 26)	33.333% change in ownership since B received interest under prior exclusion; the sprinkle provision allows for unequal distribution of property, so the joint tenancy is severed as to B's 33.333% interest.
(c)	B gifts	4-4-04	C	B gift deeds his 33.333% to C	33.333% change in ownership on transfer of B's tenancy-in-common interest.

16. Must the trustor(s)/settlor(s) also be named as the trustee(s)?

No. A trustee is the person or entity appointed or required by law to administer a trust. The trustee holds legal title to the trust property, but does not have a present beneficial ownership interest unless the trustee is also a named beneficiary of the trust. While it is common for the trustor/settlor to also be the trustee, it does not matter for purposes of this rule amendment. However, if the trustor is also the trustee and there is a subsequent change of the trustee, this should be investigated as the change in trustee may be due to the death of the trustor.

Example L: Substitution of Trustee is not a Change in Ownership

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	4-15-03	A and B as joint tenants		100% change in ownership.
(b)	A records	12-14-03	Bank of America as trustee of A's Revocable Trust for B's benefit[6]	B is beneficiary	No change in ownership. A becomes an OT.
(c)	B	4-2-04	C and D as trustees of B's Trust	A is beneficiary	No change in ownership. B becomes an OT.
(d)	Bank of America as trustee of A's Trust	5-6-04	Union Bank substituted as trustee of A's Trust		Substitution of trustee is not a change in ownership; trustee has legal title but no present interest in real property.

[6] For purposes of the remaining examples, all trusts are considered to be revocable trusts.

17. How does the interspousal exclusion apply under the new rule amendments with relation to trusts and original transferors?

Section 63 and Property Tax Rule 462.220 provide an exclusion from change in ownership for all transfers of real property interests and legal entity ownership interests between spouses. These provisions do not affect the amendments to Rule 462.040. However, section 65(b) provides that spouses of original transferors are also considered original transferors. Thus, spouses must be considered in any transfers between joint tenants and trusts.

Example M: Transfer to Revocable Trust for Benefit of the Other Joint Tenant and Spouse who is not a Joint Tenant Severs the Joint Tenancy

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	3-25-00	A and B as joint tenants	A and B are brothers	100% change in ownership.
(b)	A records	11-21-03	A's Revocable Trust for B and C's benefit	B and C (B's wife) are beneficiaries	No change in ownership; A does not become an OT because the joint tenancy is severed.

A does not become an original transferor because the trust named someone other than the other joint tenant as beneficiary, and the person named was not the spouse of the transferor or an original transferor. Therefore, the joint tenancy is severed, and A is not an original transferor. There is no change in ownership since there was no prior exclusion.

18. If original transferors can be created when a trust names the other joint tenants as the beneficiaries, would the original transferor status be reversed if a trust is subsequently amended? How should assessors track trust amendments?

After two joint tenants transfer property to two trusts, each for the benefit of the other joint tenant, and subsequently one trust is amended so that the beneficiary is changed to someone other than the other joint tenant, there is no valid severance of the joint tenancy unless the trust amendments are properly executed and recorded in the county where the property is located (as discussed in question 2). Unrecorded trust amendments have no effect on the survivorship rights of the joint tenants. If recorded, their transfers to third parties would sever the joint tenancy and may subsequently trigger a change in ownership depending on the history of the ownership interests.

Tracking trust amendments is similar to tracking any other recorded transfers of real property. When an amended trust or a deed referencing a trust amendment appears on record title and a decision on a change in ownership is necessary, as in the example below, the assessor should request copies of the beneficiary provisions of the trust(s) and all amendments, and review the facts. Unrecorded trust amendments have no effect on the survivorship rights of the joint tenants and do not cause the severance of the joint tenancy interest.

Example N: Trust Amendment Severing an OT's Joint Tenancy Interest Removes OT Status and Exclusion Upon Death

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	5-18-98	A and B as joint tenants		100% change in ownership.
(b)	A	11-15-03	A's Revocable Trust for B's benefit	B is beneficiary	A becomes an OT. B becomes an OTOT.
(c)	B	12-7-03	B's Revocable Trust for A's benefit	A is beneficiary	B becomes an OT.
(d)	A records revised trust	3-10-04	C named as beneficiary of amended/ revised trust	Trust amendment omits B and names C	Change in right of survivorship breaks joint tenancy, removes OT status. A and B become tenants in common. No change in ownership since no prior exclusions used.
(e)	B	12-4-04	B dies and A receives 50% interest		Since A is no longer an OT, 50% change in ownership of B's interest.

In Step (e), if B had sold his 50% interest to A (instead of B dying), a 50% change in ownership would also result, since trust amendment severed the joint tenancy and destroyed A's former OT status. A would be purchasing B's interest as a tenant in common.

19. Does the revocation of a trust trigger a change in ownership?

Generally, no. The revocation of a trust will not trigger a change in ownership unless one or more of the joint tenants was an original transferor (OT) and one or more of the joint tenants was an other than original transferor (OTOT) when the joint tenancy was created. The revocation of one trust and the creation of and transfer to a new trust does have change in ownership consequences.

Example O: Revocation of Trust Created by Joint Tenant who was an OT

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	A	5-10-96	A and B as joint tenants		A becomes an OT. B becomes an OTOT.
(b)	A	12-4-03	A's Revocable Trust for B's benefit	B is beneficiary	No change in OT status.

[continued]

	Grantor	Recording Date	Grantee	Special Notes	Result
(c)	A's Trust	2-11-04	A	A revokes trust	No change in ownership because joint tenancy is not severed; A retains the OT status it gained in step (a), which is not severed by the transfer to trust in step (b).
(d)	B	3-2-04	A	Sale	No change in ownership because A retained OT status from step A.

Example P: Revocation of Trust Does Not Change OT Status

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	5-10-96	A and B as joint tenants		100% change in ownership.
(b)	A	12-4-03	A's Revocable Trust for B's benefit	B is beneficiary	A becomes an OT. B becomes an OTOT.
(c)	A's trust	2-11-04	A	A revokes trust	No change in ownership because joint tenancy is not severed; A's OT status continues.
(d)	B	4-11-05	A	Sale	No change in ownership because A is an OT.

Example Q: Revocation of Trust and Creation of and Transfer to New Revocable Trust

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	5-10-96	A and B as joint tenants		100% change in ownership.
(b)	A	5-10-98	A's Revocable Trust for B's benefit	B is beneficiary	A does not become an OT because transfer occurred before 11-13-03.
(c)	B	5-10-98	B's Revocable Trust for A's benefit	A is beneficiary	B does not become an OT because transfer occurred before 11-13-03.
(d)	A's Trust and B's Trust	12-1-03	A and B as joint tenants	A revokes trust; B revokes trust	No change in ownership because joint tenancy is not severed.
(e)	A and B	12-31-03	A and B's Revocable Trust for A and B's benefit	A and B are each other's beneficiary	A and B become OT's.

REBUTTING THE DEED PRESUMPTION - RULE 462.040(d)

20. How might a will or estate plan be used to determine "reasonable cause" under this subsection?

While Rule 462.040 (b)(1) does not allow original transferor status to be created through the use of a will or estate plan, a will or estate plan may be used as evidence of "reasonable cause" to determine if a joint tenant was a transferor among the joint tenants. In other words, a will or estate plan is a written instrument that may reflect the parties' intent to take title as joint tenants.

Rule 462.200(b) provides a rebuttable presumption that when more than one person's name appears on a deed, all persons listed on the deed have ownership interests in property, unless an exclusion from change in ownership applies. In overcoming this presumption, consideration may be given to, but not limited to, the following factors:

- The existence of a written document executed prior to or at the time of the conveyance in which all parties agree that one or more of the parties do not have equitable ownership interests.
- The monetary contribution of each party. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns.

As explained in the answer to Question 2, operative words must be clearly expressed declaring the intent to create a joint tenancy. If the deed does not express this intent, some other documentation must be provided that declares the intent to create a joint tenancy. The assessor must make a determination based on all the facts available to him or her. One document may not be sufficient.

Example R:

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	11-14-93	A and B as tenants in common		100% change in ownership.
(b)	A	1-15-04	A's Revocable Trust for B's benefit	B is beneficiary	A does not become an OT because A was not a joint tenant.
(c)	B	1-15-04	B's Revocable Trust for A's benefit	A is beneficiary	B does not become an OT because B was not a joint tenant.

[continued]

	Grantor	Recording Date	Grantee	Special Notes	Result
(d)	B	7-28-04	A	B dies	A records an Affidavit – Death of Joint Tenant that references the 11-14-93 deed. 50% change in ownership upon the death of B—neither A nor B became OT's since no deed was recorded that changed their tenancy in common interest to joint tenancy prior to transferring their interests to their trusts.

Because title was originally vested in A and B as tenants in common, the assessor may want to request additional documentation to determine whether there is "reasonable cause" to conclude that A and B intended to take title as joint tenants. If, upon the examination of all the documentation, the assessor concludes that A and B actually intended to take title as joint tenants, then the assessor might treat A and B as original transferors as a result of their recorded transfers to their trusts on January 15, 2004. In that case, there would be no reassessment when B died.

21. What other types of documentation might an assessor request to determine if "reasonable cause" exists, and what weight should be given to each?

Other types of evidence might include sales contracts, Deposit Receipt and Purchase Agreements, escrow instructions, recorded Deeds of Trust, wills, notarized agreements, and affidavits.

The most weight would be given to those documents that were executed and notarized prior to or contemporaneous with the recording of the deed. Next in weight would be those documents that were executed prior to the recording, but that were not notarized. The least weight, if any, would be given to affidavits signed much later in time.

An assessor might also want to look for indications of intent that might be in the property record or the Preliminary Change of Ownership Reports or Change in Ownership Statements.

22. What effect would there be if property that is owned by joint tenants has an additional deed recorded to the same joint tenants restating the joint tenancy vesting?

Re-recording an identical deed would have no effect for property tax purposes. It would not trigger a change in ownership. Neither would it create original transferor status.

An assessor may presume that legal title is based on the recorded deed under Evidence Code section 662 and Rule 462.200. Therefore, unless additional information is supplied, an assessor would assume that A and B were already holding title in joint tenancy, and that the additional

recording was a duplicate recording, and no change would be made. In other words, just filing a duplicate deed would **NOT** make A and B original transferors in this case.

However, the decision might change if documents described in Rule 462.200(b) to rebut the deed presumption were supplied showing that there had been an unrecorded agreement severing the joint tenancy between the time of the original recording, and the time of the second recording. The assessor might find evidence of "reasonable cause" to conclude that the joint tenancy had been severed, and that A and B had actually been tenants in common before the second recording. If that were the case, A and B would become original transferors.

STEP TRANSACTION APPLICATION

23. Successive additions of "original transferors" could transfer property perpetually to different persons without reassessment. How are legitimate steps distinguished from those utilized to avoid a change in ownership, and for which the step transaction doctrine is applicable?

The changes to Rule 462.040 were made so that transfers for estate planning purposes would not trigger changes in ownership. If multiple steps were taken to complete a transaction for the sole purpose of avoiding a change in ownership, it would be appropriate for an assessor to apply the step transaction doctrine.

The step transaction doctrine is a basic principle of tax law that the substance of a multiple step transaction, rather than its form, determines the tax consequences of the transaction. The doctrine was first developed by the federal courts to thwart the avoidance of federal income tax through the use of multiple steps that, in form, avoid or limit tax consequences of a transaction that would have resulted if fewer steps had been taken. To apply the doctrine, the courts look through the form of the transaction to the substance by ignoring or "collapsing" some of the steps for tax purposes. Thus, a court will determine whether the individual steps were necessary components of a multiple step transaction.[7]

An assessor should look to the three tests set forth in *Shuwa Investments Corp. v. County of Los Angeles*, 1 Cal.App.4th 1635 (1991), and *McMillin-BCED/Miramar Ranch North v. County of San Diego*, 31 Cal.App.4th 545, mod. 32 Cal.App.4th 264a (1995).[8] The three tests are:
End result test: Separate steps may be condensed into a single transaction when it appears they were all part of an ultimate result intended from the outset. This test also appears to require all the parties to have been pursuing a related intent throughout the steps taken.

Interdependence test: An analysis of the relationship between the steps results in a reasonable interpretation that the steps are so interdependent that taking one step would be fruitless without the completion of the series of steps.

[7] Letter To Assessors No. 92/69, dated October 14, 1992.
[8] The *McMillin* court case was sent to county assessors via Letter To Assessors No. 95/33, dated May 31, 1995.

Binding commitment test: A requirement that if one step is taken, there is a binding commitment to take the remaining steps. This test, like the end result test, appears to require all the parties to have been pursuing a related intent throughout the steps taken.

In the *McMillin* case, timing was also determined to be a factor to consider for the step transaction doctrine. For the binding commitment test, the court stated that it appeared to require a sequence of events stretching over a long period of time, perhaps several years. However, for the end result test and the interdependence test, "timing is a valid fact and circumstance to be considered in analyzing the entire set of circumstances."[9] The steps in the *McMillin* case all occurred within a two-week period.

In addition, the *McMillin* case determined that the step transaction doctrine might occur even though the steps may have a legitimate business purpose, and only one of the three tests needs to be met. In looking at the facts of a given situation, an assessor may use "reasonable cause" to determine if the facts and/or intent meet any of the three tests.

24. If an assessor believes that a series of transfers should be considered steps under the step transaction doctrine, on what date should the reassessment occur? Would some of the steps ever result in a partial reassessment?

The reassessment should occur when the final step has been taken. No reassessment should occur on any of the interim steps. However, if one of the steps results in a reassessment, then the series of transactions should not be stepped together. This is an exception to the rule that substance over form controls. Substance over form does not apply when a taxpayer selects a form that results in a change in ownership consistent with the apparent legislative intent of the statutes.[10] Likewise, when a date of death occurs, the step transaction doctrine should not be applied because death is not a voluntary "step" in a step transaction.

Example S: Transfers Made Close in Time and Sale of Original Owners' Interests Indicate that Steps were Part of a Single Transaction

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	3-5-87	A and B as joint tenants		100% change in ownership.
(b)	A	11-17-03	A's trust	B is beneficiary	A becomes an OT.
(c)	B	11-17-03	B's trust	A is beneficiary	B becomes an OT.

[continued]

[9] *McMillin, supra*, 31 Cal.App.4th 559.

[10] In footnote 13 of the *Shuwa* decision, the court rejected the taxpayer's argument that each of the individual steps of the transactions should be allowed to stand on its own and declined to accept taxpayer arguments that the change in ownership consequences should be determined by the substance rather than the form of the transaction. The court noted that giving the precise statutory language its full effect as applied to the form of the transaction resulted in a finding of change in ownership and subjected the property to reappraisal. Thus, when the form chosen by the taxpayer results in reappraisal, the language of the statute will be given full effect.

	Grantor	Recording Date	Grantee	Special Notes	Result
(d)	A and B	1-8-04	A, B, C, and D as joint tenants	A and B are no relation to C and D	No change in ownership (A and B are original transferors).
(e)	C	2-11-04	C's Revocable Trust for A, B, and D's benefit	A, B, D are beneficiaries	C becomes an OT.
(f)	D	2-11-04	D's Revocable Trust for A, B, and C's benefit	A, B, C are beneficiaries	D becomes an OT.
(g)	A and B sell	3-26-04	C and D		100% change in ownership, the time proximity and nature of the steps show that the transfer to C and D was not for estate planning purposes.

Example T: Transfers Made Close in Time and Final Transfer Upon Death is Not Evidence of Single Transaction

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	3-5-87	A and B	No vesting specified; presumed to be tenants in common	100% change in ownership.
(b)	A and B	11-19-03	A and B as joint tenants	Execution date of deed is 11-19-03, one day prior to B's death	No change in ownership (section 62(b)(1)) – Use 11-19-03 as effective date for transfer – A and B become OT's, since effective date is after 11-13-03.
(c)	B	11-20-03		B dies – Assessor is not notified	
(d)	B	12-8-04	A	Affidavit – Death of Joint Tenant is recorded	No change in ownership (A is an OT). No step transaction applied – Death cannot be a "step" in a step transaction.

Example U: Transfers Close in Time with Buy-Out by One Joint Tenant may Indicate a Non-Estate Planning Purpose

	Grantor	Recording Date	Grantee	Special Notes	Result
(a)	X	3-5-87	A and B as joint tenants	A and B are unrelated	100% change in ownership.
(b)	A	11-17-03	A's Trust	B is beneficiary	A becomes an OT.
(c)	B	11-17-03	B's Trust	A is beneficiary	B becomes an OT.

[continued]

	Grantor	Recording Date	Grantee	Special Notes	Result
(d)	B sells (A and B revoke trusts on 12-10-03)	12-7-03	A	B buys another home and files for homeowners' exemption	50% change in ownership; Steps (b) and (c) were not taken for estate planning purposes and trusts were revoked.

The latter three steps – i.e., mutual transfers into each other's trusts on the same day, followed by a "buy-out" of one joint tenant's interest by the other joint tenant and mutual revocation (or amendment changing beneficiaries) of their trusts one month later – indicate intent to establish OT status merely for the purpose of avoiding change in ownership upon a pre-planned sale from B to A.

25. Should the step transaction be applied to a series of steps that are taken solely for refinancing purposes?

No. If A and B are joint tenants and become original transferors by transferring their real property interests into their trusts for the benefit of the other, the transfer of the property interests from the trusts for refinancing purposes should not revoke or otherwise affect their original transferor status. Consistent with Rule 462.200(a), steps that are taken *solely* for financing purposes and involve a change merely in legal title, should not revoke the original transferor status. After the lender's requirements have been met, A and B would be required to transfer the property back into the trust for the benefit of each other to preserve the original transferor status. Assessors should request supporting documentation in the event of any doubts or concerns.