220.0818 **Trusts—Powers of Appointment.** California Civil Code section 600 and following sections provide for the creation of a power of appointment whereby a person may appoint or transfer to others an interest in property held by an inter vivos or testamentary trust.

If a power of appointment allows for the transfer of property from the trust to the holder of the power, his estate, his creditors, the creditors of his estate, or any of them, it is a general power of appointment. A grant of a general power of appointment is equivalent to a grant of absolute ownership. Thus, the exercise of a general power of appointment in favor of the decedent's spouse and children is legally equivalent to the transfer by the decedent of the property held by the trust to the decedent's spouse and children.

To the extent that a trust includes interests in real property, a transfer of real property through exercise of a general power of appointment may qualify for the interspousal exclusion if to a spouse, or for the parent-child exclusion if to a child, provided timely claims for exclusion are filed and all other requirements of Revenue and Taxation Code sections 63 or 63.1, as appropriate, are satisfied. C 12/26/90. (M99-1)

STATE OF CALIFORNIA

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December 26, 1990

Dear

This is in response to your letter of November 21, 1990 requesting advice as to the change in ownership consequences of the exercise by Will of a testamentary general power of appointment which appointed the decedent's interest in her father's trust to her husband and children in equal shares.

Based upon the information provided in your letter, we understand that the decedent's father established a trust in 1976 (amended and restated in 1983), which designated his children as the beneficiaries of the trust. One of the trust assets is San Francisco real property. The decedent was a daughter of the settlor and a beneficiary of the trust.

Under the terms of the trust, each beneficiary/child is given a testamentary power of appointment over his/her share of the trust in the event the child dies before termination of the trust. The specific language of the trust states:

> "In the event one (1) of the Settlor's children dies before the termination of the Trust, the benefit given to that child by this Trust instrument shall be given to those persons appointed to receive that benefit in the child's Will, or if none be appointed, to the child's heirs."

Among its various administrative provisions, the trust provides, in part, that the beneficiaries under the trust holding a majority share of the residual interest in the trust must approve all borrowing over $5,000, and that the real property of the trust cannot be sold without written approval of beneficiaries (or their successors) owning a majority share of the residual interest in the trust.

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Under her Will, the decedent bequeathed all of her right, title and interest in the trust property to her husband and children in equal shares. You state your opinion that the decedent's transfer to her husband qualifies for the interspousal exclusion from change in ownership under Revenue and Taxation Code section 63. You request that we confirm your understanding that the transfer of the decedent's interest in the trust property to her children qualifies for the parent/child exclusion from change in ownership under Revenue and Taxation Code section 63.1. After reviewing the information provided, we conclude that you have correctly interpreted the applicable law and that the exercise by the decedent of her testamentary general power of appointment constituted a transfer of the trust property from her to her children which would qualify for the parent/child exclusion from change in ownership under section 63.1, assuming that the various technical requirements of that section are satisfied.

Section 60 of the Revenue and Taxation Code (all section references are to the Revenue and Taxation Code unless otherwise indicated) defines the term "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.

Section 63 excludes from change in ownership any interspousal transfer, including transfers which take effect upon the death of a spouse.

Section 63.1 excludes from change in ownership certain parent/child transfers, including the transfer of the principal residence of an eligible transferor and the first $1 million of full cash value of all other real property of an eligible transferor. Section 63.1 provides in relevant part:

> (c) As used in this section:
>
> (1) "Purchase or transfer between parents and their children" means either a transfer from a parent or parents to a child or children of the parent or parents or a transfer from a child or children to a parent or parents of the child or children.
>
> ...
>
> (4) "Eligible transferor" means a parent or child of the eligible transferee.
>
> (5) "Eligible transferee" means a parent or child of an eligible transferor.

...

(7) "Transfer" includes, and is not limited to, any transfer of the present beneficial ownership of property from an eligible transferor to an eligible transferee through the medium of an inter vivos or testamentary trust.

As indicated in the foregoing provisions, the exclusions for interspousal transfers and for qualifying parent/child transfers are available with respect to real property owned by the spouse or the eligible transferor. The question, therefore, is whether the decedent under the power of appointment given to her by the terms of her father's trust can be considered to be the owner of any real property included in the interests she left to her husband and children under the terms of her Will.

Statutory provisions relating to powers of appointment are found at Civil Code section 1380.1 and following. Civil Code section 1381.2, subdivision (a) provides that a power of appointment is a general power only to the extent that it is exercisable in favor of the donee, his estate, his creditors, or creditors of his estate, whether or not it is exercisable in favor of others. According to the Law Revision Commission comment printed following section 1381.2 in West's Annotated California Codes, a power is general so long as it can be exercised in favor of any one of the following: the donee, his estate, his creditors, or the creditors of his estate. In order to be classified as general, the power of appointment need not give the donee a choice among all of this group. It is a general power if the power enables him to appoint to any one of this group.

The trust language quoted in your letter indicates that the decedent's interest in the trust could be given "to those persons appointed to receive that benefit in the child's Will." This power appears to be unlimited in any way and to be exercisable in favor of the decedent's estate, her creditors, or the creditors of her estate. We conclude, therefore, that this constituted a general, rather than a limited, power of appointment. The California courts have recognized that the grant of a general power of appointment is equivalent to a grant of absolute ownership. See, Estate of Thorndike (1979) 90 Cal. App. 468, 473; Estate of Kuttler (1959) 160 Cal. App. 3d 332, 338. See, also, Morgan v. CIR (1940) 309 U.S. 78, 81, which indicates that a person who can appoint to his own estate or creditors has "as full dominion over the property as if he owned it." Thus, when the decedent exercised her general power

of appointment over her interest in the property left by her father, her testamentary appointment was legally the equivalent of transferring her own property in trust to her husband and her children. We conclude, therefore, that to the extent that the trust benefit included an interest in real property, the transfer from the decedent to her husband would qualify under the interspousal exclusion from change in ownership while the transfer from the decedent to her children would qualify under the parent/child exclusion. Of course, a timely claim for the parent/child exclusion must be filed and the transfer must otherwise satisfy the requirements of section 63.1.

The views expressed in this letter are advisory only and are not binding upon the assessor of any county. You may wish to consult the San Francisco Assessor in order to confirm that the described property will be assessed in a manner consistent with the conclusions stated above.

Our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Very truly yours,

Richard H. Ochsner
Assistant Chief Counsel

RHO:ta
2884D
cc: Hon. Samuel Duca
Mr. John W. Hagerty
Mr. Verne Walton
Mr. Eric F. Eisenlauer