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January 23, 1991

TO COUNTY ASSESSORS:

No. 91/08
CORRECTION

CHANGE IN OWNERSHIP CONSEQUENCES OF REAL PROPERTY
IN AN ESTATE OR TRUST
DISTRIBUTED ON A "SHARE AND SHARE ALIKE" BASIS

This letter sets forth the change in ownership consequences of transfers of property from parents to children when property is distributed according to a will or trust and the language of the document directs that the assets of the estate or trust be distributed to the children on a "share and share alike" basis.

Currently, when an estate or trust is to be distributed on a share and share alike basis many assessors presume, for property tax purposes, that the beneficiaries of a trust or the heirs of a will have an equal interest in each and every property owned by the decedent. Consequently, in these counties a change in ownership occurs if any heir or beneficiary obtains an interest in any real property greater than his/her proportional interest in the estate or trust. For example, if property is left to four children and one child is granted a 100 percent interest in the parent's residence, the assessor would have determined that 75 percent of the property interests transferred. Using this policy, the percentage of interests transferred is the amount that the interest in the real property exceeds the proportional interest in the estate.

Our recommendations for the change in ownership consequences of property distributed on a share and share alike basis depend on the provisions of the trust instrument or the will.

TRUSTS

The key to whether a change in ownership occurs when property is distributed according to a trust on a share and share alike basis is whether the trust instrument limits the trustee's powers to distribute property.

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 Probate Code 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.)

The statement "a distribution in kind may be made pro rata or non-pro rata," means that the trustee has a choice in how he/she distributes non-cash assets, such as real property. The trustee can either give the beneficiaries common ownership in all the assets of the trust estate (pro rata) or can allocate specific assets to individual beneficiaries (non-pro rata).

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 statutory power, the instrument controls unless a court, pursuant to Probate Code Section 1620.1, 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.

Unless the trust instrument specifically states otherwise, the trustee has the power to distribute the trust assets in kind on either a pro rata or non-pro rata basis. Consequently, property in a trust, where the trustee has the power to distribute trust assets on a share and share alike basis can be treated as a direct transfer from parent to child to the extent that the value of the property does not exceed the value of the stipulated share of trust assets. This is because both statutory and case law recognize that, unless the trust instrument specifically states how the beneficiaries are to share the trust's assets, the trustee has the power to distribute property as he/she wishes. Accordingly, the assessor should recognize these transfers of property as a parent to child transfer, which may qualify for the parent/child exclusion under Section 63.1.

Example:

A parent leaves a trust estate with a net worth of \$500,000 to his four children on a share and share alike basis. Each child is to receive \$125,000 net worth of assets. The trust document does not limit the trustee's power to distribute the trust assets. Accordingly, as provided by Probate Code Section 16246, the trustee has the power to distribute sole ownership of any asset or a fractional interest in any asset to any of the children.

In distributing the trust, the trustee decides to deed the principal residence, worth \$112,500 and no outstanding loans, to one child. In our view, this would be considered a 100 percent transfer from parent to child which may be excluded from change in ownership under Section 63.1 if a proper claim form is filed. This is because the net worth of the property is under the child's \$125,000 share in the estate. If the property had a net worth which was more than \$125,000, a partial change in ownership

would have occurred. The following example outlines the procedures for such a situation.

If the trustee deeds another child an investment property, with a market value of \$225,000 and an outstanding mortgage balance of \$50,000 (encumbrances in the property should be considered), then a 28.57 percent reappraisable change in ownership would occur. This is calculated as follows: equity in the property minus child's share of the trust estate divided by the equity in the property ($\$175,000 - \$125,000 / \$175,000$). In this case, the equity in the property that the child receives exceeds his/her proportional share of the trust estate by 28.57 percent. In effect, this 28.57 percent interest in the property is a transfer of property between siblings. It does not qualify as a transfer from parent to child since it exceeds the direction that the children share and share alike. Therefore, a 28.57 percent change in ownership of the property has occurred while the remaining 71.43 percent may be excluded from change in ownership according to the provisions of Section 63.1 of the Revenue and Taxation Code.

In practice, assuming a 1975 factored base year value of \$75,000, the new base year value of the property would be calculated as follows:

1975	Factored base year value	$\$ 75,000 \times 71.43\% = \$ 53,572$
1990	Market value	$\$225,000 \times 28.57\% = \underline{64,282}$
	Value to be enrolled for current roll	\$117,854

WILLS

Whether a change in ownership occurs when a child receives a 100 percent interest in real property from a parent's estate when the estate is distributed according to a will on a share and share alike basis depends on whether the will gives the executor a clear grant of broad discretion to distribute property in kind on a pro rata or non-pro rata basis.

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 in 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 property in kind on a pro rata or non-pro rata basis or something equivalent. Probate Code Section 6140(a) states that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will. In light of this general principle, a clear grant of discretion to distribute the property in kind on a pro rata or non-pro

January 23, 1991

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.

Therefore, if it is determined that the will clearly grants the executor broad discretion in distributing property in kind on a pro rata or non-pro rata basis, the change in ownership consequences are identical to those in the example illustrated for trusts above. If it is not certain or it has not been proved that the executor has this power, then the assessor is correct in allocating an equal fractional interest in each and every property owned by the parent to each child for property tax purposes. It follows that a partial change in ownership will occur if any child acquires an interest in any real property owned by the parent greater than the proportional interest in the estate. It is important to note that the taxpayer carries the burden of proving, to the assessor's satisfaction, that the will in fact grants the requisite discretionary power in distributing the property.

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

Sincerely,



Verne Walton, Chief
Assessment Standards Division

VW:sk



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Executive Director

February 19, 2009

Honorable Gary W. Freeman
San Joaquin County Assessor
24 South Hunter Street, Room 303
Stockton, CA 95202-3273

Attn: _____, Chief of Standards/Recorder-County Clerk

**Re: Parent-Child Exclusion under Will – "Share and Share Alike"
Assignment No.: 08-194**

Dear Ms. _____:

This is in response to your letter to Chief Counsel Kristine Cazadd dated September 12, 2008, requesting an opinion as to whether a non pro rata distribution of the decedent-mother's real property to one of her three surviving children, where the terms of the decedent's will allocated equal shares in her property to her surviving children, results in a change in ownership. In our opinion, a two-third interest in the property is subject to reassessment because one child-beneficiary (C _____) provided consideration (cash) to the estate in order to equalize the shares of the beneficiaries for the purpose of distribution of the property under the will, constituting payment for the interests of the others beneficiaries (i.e., a purchase of the other siblings' interests in the property). (Property Tax Annotation (Annotation) 625.0235.005.)

Facts and Contentions

The real property at issue is located at _____ (property). The previous owner of the property, _____ N _____, died testate on August 22, 2006. The third paragraph of Ms. N _____'s will, which you provided for our review, states that "I give all my jewelry, clothing, household furniture and furnishings, personal automobiles, books and other tangible articles of a personal nature together with any insurance on such property to my surviving children, *in equal shares*, as they may select on the basis of valuation." (Emphasis added.) The fourth paragraph of her will states that "I give the residue of my estate to my issue, who survive me, by right of representation." Although this paragraph four does not specifically state that the surviving children were entitled to receive a distribution of the real property held in the estate *in equal shares*, we consider this to be a reasonable and valid

interpretation of the language in the will.¹ Ms. N was survived by her three children, A, B and C.

A, as executor of the will, filed a change of ownership statement dated January 25, 2007, which identified transfer of the property equally to each of the three children (i.e., one-third interest in the property transferred to A, B and C). She also filed a parent-child exclusion claim for transfer of the entire property dated January 25, 2007, identifying Ms. N as the transferor and all three children as transferees of the property. Your letter indicates that you allowed the parent-child exclusion as of the date of Ms. N's death, which we understand to mean that you concluded that the entire transfer of the property was subject to the parent-child exclusion.

Before probate closed, C encumbered another piece of property that he owned, and contributed \$140,000 to the estate, which was the appraised value of his mother's real property to be distributed under the will. The executor then distributed the estate equally amongst the three siblings, giving the real property to C, solely, and distributing the remaining assets (including the money contributed by C to the estate) to the other siblings. A grant deed for the property was executed in the name of C and M, as Trustees of The N Family 2000 Revocable Trust, on June 8, 2007. C filed a preliminary change in ownership form for the property dated June 29, 2007, in which he stated that he purchased the property from his mother's estate for \$133,000.

In light of the new information provided to you, you concluded that C acquired a one-third interest in the real property from his mother and a two-third interest in the real property from his siblings as the date of distribution based on your finding that, pursuant to the guidance provided in LTA 91/08, the executor was not explicitly given discretion under the will to distribute assets on a non pro rata basis. Consequently, you determined that a change in ownership occurred of the two-third interest in the property that C purchased from his siblings, which was then subject to reassessment. C and his attorney assert that the parent-child exclusion is applicable to the entire property, and any reliance upon LTA 91/08 is inappropriate because Probate Code section 6143, which is discussed in this letter as support for the guidance provided, has been repealed. There is no formal appeal involved and this matter is not before the local Assessment Appeals Board.

Legal Analysis

Article XIII A, section 2 of the California Constitution requires the reassessment of real property upon a "change in ownership." Revenue and Taxation Code² section 63.1 provides an exclusion from change in ownership for certain purchases or transfers of real property between

¹ Probate Code section 21102 provides guidance on interpreting the testator's intent. (See cases in Deering's Ann. Prob. Code, § 21102 (2009 supp.), under headings Decision under Current Prob. C § 21102, In General, & Decisions under Former Prob. C § 6140, Giving Reasonable Meaning to Will; Common Sense Consideration of Language.) Probate Code section 21102 replaced former Probate Code section 6140, and pursuant to Probate Code section 2, "a provision of the Probate Code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment." (14 Witkin Sum. Cal. Law Wills § 47.)

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

parents and their children on or after November 6, 1986; namely, the transferor's principal residence and up to \$1,000,000 of other real property. (Rev. & Tax. Code, § 63.1, subd. (a)(1) & (2).)

Here, the property was transferred to C and thus, a change in ownership of the entire property occurred unless an exclusion applies. Subdivision (c)(9) of section 63.1 defines "transfer" to include 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." Therefore, if the transfer of the property is from Ms. N to her son, C, then the transfer *may* qualify for exclusion from change in ownership under section 63.1.³

C contributed \$140,000 to the estate in order to receive a 100 percent interest in the property, rather than a one-third interest. We have advised that when a beneficiary makes a money contribution to a trust in order to equalize the shares of the beneficiaries for the purpose of a trust distribution, that this constitutes payment for the interest of the other beneficiary and in effect constitutes a purchase of that interest from that beneficiary. (Annotation 625.0235.005.) Applying this guidance to the facts here, we consider C's contribution of money to the estate in exchange for a two-third interest in the property to be a purchase of the other siblings' interest in the property, with the other siblings being the transferors of the property. As such, transfer of two-thirds interest in the property does not qualify for the parent-child exclusion and is subject to reassessment.

Your letter indicates that the assessor and the property owner disagree on the application of LTA 91/08 to the facts here. As our analysis above indicates, a change in ownership occurred because C provided consideration to the estate in exchange for his siblings' interest in the property as discussed in Annotation 625.0235.005; and our conclusion is not based on LTA 91/08. However, we would like to address the property owner's assertion that LTA 91/08 is outdated due to the repeal of Probate Code section 6143.

LTA 91/08 states, in part, that when a will distributes real property interests from parent to children on a "share and share alike" basis, the children are assumed to hold the property as tenants in common pursuant to Probate Code section 6143. LTA 91/08 further provides that, pursuant to the general principle set forth in Probate Code section 6140, subdivision (a), if the will clearly grants the executor broad discretion in distributing property in kind on a pro rata or non-pro rata basis, then there will be a change in ownership to the extent that any child acquires an interest in any real property owned by the parent that is greater than the child-beneficiary's equal proportionate share in the property. Also, if it is not certain that the executor has this discretion, then for property tax purposes, there is a distribution of an equal fractional interest in each and every property owned by the parent to each child.

Probate Code section 6143 was repealed in 1994 in the same legislation in which a similarly worded statute, Probate Code section 21106,⁴ was enacted.⁵ Probate Code section

³ As you noted, for purposes of determining whether the transfer qualified for the parent-child exclusion, there is also the issue of whether the executor had the authority to distribute the estate property in a non pro rata basis, as discussed in LTA 91/08.

⁴ Former Probate Code section 6143 stated that "[u]nless 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." Whereas, former Probate Code

21106 is historically derived from Probate Code section 6143,⁶ and was later repealed in 2002 because it was considered less complete than, and the equivalent to, Civil Code section 686.⁷ Civil Code section 686 states that:

§ 686. What interests are in common

Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 683, or unless acquired as community property. (Emphasis added.)

Civil Code section 686 is consistent with the statement in LTA 91/08 that any devise of property to more than one person vests the property in those persons as tenants in common *unless* a contrary intention is indicated in the will. It also bears mentioning that *Estate of Pence* (1931) 117 Cal. App. 323, which is cited in LTA 91/08 as holding that a devise to more than one person to share and share alike indicates a gift in common, also analyzes Civil Code section 686 in support of its conclusion. Based on the foregoing, and considering that we are not aware of any authority or indication that a substantive change of Probate Code section 6143 was intended by its repeal, we believe that the guidance set forth in LTA 91/08 concerning the change in ownership consequences of real property in an estate distributed on a "share and share alike" basis is correct, irrespective of the fact that Probate Code section 6143 has been repealed.⁸

Moreover, as stated above, LTA 91/08 also refers to former Probate Code section 6140, subdivision (a), which was replaced by Probate Code section 21102, subdivision (a), which states that: "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."⁹

Consequently, we believe that the guidance set forth in LTA 91/08 with respect to wills remains valid irrespective of the fact that Probate Code sections 6140 and 6143 have been repealed.

section 21106 stated that "[a] transfer of property to more than one person vests the property in them as owners in common."

⁵ Stats 1994 chap. 806 § 21 (AB 3686).

⁶ See Historical Derivation, Deering's Ann. Prob. Code § 21106 (2008 supp.).

⁷ Legislative history regarding the repeal of Probate Code section 21106 is located at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1784_cfa_20020620_162326_sen_floor.html (Jan. 15, 2009).

⁸ See Prob. Code, § 2, subd. (a).

⁹ The 1994 enactment of Section 21102 extended former Section 6140 (wills) to trusts and other instruments. (See fn.1, *supra*, & Amendments, Deering's Ann. Prob. Code § 21102 (2009 supp.).)

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Kiren K. Chohan

Kiren Kaur Chohan
Tax Counsel III

KKC:cme

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cc: Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
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