State of California

Memorandum

To : Mr. Verne Walton

Date May 9, 1988

From : Eric F. Eisenlauer Eric F Eisenlauer

Subject: Date of Change in Ownership

This is in response to your memorandum of April 5, 1988 to Mr. Richard H. Ochsner in which you request our opinion with respect to the following facts presented by the Shasta County Assessor's office.

Betty K. transferred residential real property to her daughter Patti and son-in-law by deed dated, signed by Betty, and notarized May 2, 1984. The deed was recorded at the request of Betty on December 29, 1987. Patti states that she has lived in the residence five or six years. Neither Betty nor the grantees have filed a homeowners' exemption on the property. Betty has stated that the deed was prepared in 1984 in case of her death and that she subsequently decided to deed the property to her daughter at the date of recording.

The issue presented by the foregoing facts is whether Betty's conveyance of the subject real property is excluded from change in ownership under Proposition 58 and Revenue and Taxation Code section 63.1 as a transfer between a parent and children. That, in turn, depends upon whether the property was conveyed before or after November 6, 1986.

Property Tax Rule 462(n)(1) provides that with respect to sales of real property transfers which are evidenced by the recordation of a deed are rebuttably presumed to occur on the date of recordation. This presumption may be rebutted by evidence proving a different date to be the date all parties' instructions were met in escrow or the date the agreement of the parties became specifically enforceable.

If there was an agreement of sale between Betty and her daughter and son-in-law in this case, the foregoing rule would be applicable. Since the facts provided do not indicate that there was such an agreement, we will assume there was none and that Rule 462(n)(1) does not apply.

Civil Code section 1054 provides that a deed takes effect only when delivered. The term "delivery" refers solely to the intention of the grantor and not to the mere physical act of manually transferring the deed to the grantee. (Osborn v. Osborn (1954) 42 Cal.2d 358.) If the grantor has the required intent, there may be a legal "delivery" even though the deed itself has not been given to the grantee. (Huth v. Katz (1947) 30 Cal.2d 605.) A legal "delivery" requires an intention by the grantor that the deed be presently operative and effective to transfer title to the grantee and that the grantee become the legal owner. (Huth v. Katz, supra.)

Whether the grantor has the requisite intent and whether there has been a legal delivery of the deed are questions of fact to be determined from all of the circumstances surrounding the transaction. (Longley v. Brooks (1939) 13 Cal.2d 754.) This would include the grantor's own words or acts at or near the time the deed was executed (Knudson v. Adams (1934) 137 Cal.App. 261) and the grantor's acts and declarations before and after the execution of the deed (Osborn v. Osborn, supra). Such declarations are admissible on the issue of delivery and it is immaterial that such declarations are in the interest of the grantor (Coffey v. Cooper, 185 Cal.App.2d 464, 468).

Also, there are certain presumptions which operate with respect to delivery of a deed. These are rebuttable and can be overcome by contrary evidence (Evid. Code § 600). For example, it is presumed that a deed has been delivered when it has been duly executed or acknowledged (Henneberry v. Henneberry (1958) 164 Cal.App.2d 125). On the other hand, it is presumed that if the grantor retains possession of the deed there has been no delivery and the party who alleges that the title has been transferred has the burden of proving that the grantor intended to convey title to the grantee at the time he executed the deed (Miller v. Jansen (1943) 21 Cal.2d 473).

Under the foregoing principles, there was an effective conveyance by Betty in 1984 only if Betty intended the deed to be operative and effective to convey title to her daughter and son-in-law at that time. Betty said that the deed was prepared in case of her death. This suggests that Betty did not intend to transfer anything at the time of execution but only when she died. Any attempt to convey property by a deed that is to become effective only upon the grantor's death is completely ineffective for lack of delivery (Miller v. Jansen, supra). Betty also said she subsequently decided to deed the property to her daughter (and son-in-law) at the date of recording. Betty's statements tend to rebut the presumptions of delivery arising from due execution and acknowledgment of the deed. Moreover, there appears on the deed the statement that it was

recorded at Betty's request which infers that Betty had possession of the deed and raises a presumption of nondelivery prior to the time of recording.

Although the question is not entirely free of doubt, we are of the opinion, based on the facts presented, that no delivery occurred until the deed was recorded.

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cc: Mr. Gordon P. Adelman
Mr. Robert H. Gustafson

Copy to: Jacqueline