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April 14, 1987

Honorable David A. Cardella
Merced County Assessor
2222 "M" Street
Merced, CA 95340

Dear Mr. Cardella:

Re: Transfer of Property to Ex-Spouse

This is in response to your request for our advice on whether a transfer of real property from B to J her ex-husband, constitutes a reappraisable transfer, or whether it is excluded from change in ownership as an interspousal transfer. The facts as outlined in your letter are as follows:

On February 25, 1977, J and B , then husband and wife, purchased the property consisting of approximately 77 acres and referred to as the Airport Place. A new house was built on the property in 1977 and appraised as new construction for 1978. On November 17, 1977, the parties agreed to separate and entered into a Marital Settlement Agreement. An Interlocutory Judgment of dissolution of marriage was entered on January 25, 1979.

Paragraph 6, item 4 of the Marital Settlement Agreement lists Airport Place as community property. Paragraph 7 A(1)of the Agreement grants to B a as her separate property a "life estate in the resident place or at any time that she removes herself from the place whichever occurs first." Paragraph 7 B(4) grants Airport Place to J as his separate property "subject to life estate/or earlier removal in residence home to the wife."

On April 3, 1986, a grant deed was recorded in which B granted Airport Place to J as his sole and separate property. The deed states that: "THIS DEED IS GIVEN TO TERMINATE THE LIFE ESTATE AS SET FORTH IN DEED RECORDED DECEMBER 29. 1977." You ask whether this transfer is a reappraisable termination of a life estate or if it is excluded as an interspousal transfer under section 63 of the Revenue and Taxation Code.

Ch/our Transfer

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Revenue and Taxation Code section 63 provides that

> "a change in ownership shall not include any interspousal transfer, including, but not limited to:
>
> (c) Transfers to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation."

Therefore, the issue raised is whether the transfer of Airport Place from [illegible] to [illegible] is a transfer to a former spouse "in connection with a property settlement agreement." It is our opinion that it is.

The Marital Settlement Agreement specifically grants to [illegible] as her separate property an estate for life or an estate until "she removes herself from the place whichever occurs first." The Marital Settlement Agreement further grants to [illegible] the Airport Place property subject to his wife's estate. Therefore, under the Marital Settlement Agreement, [illegible] is granted a remainder interest in the property as his separate property. Because the terms of the subsequent transfer were set out in the 1977 Marital Settlement Agreement, it is our opinion that the transfer is "in connection with a property settlement agreement."

In your letter, you ask us for our opinion on two additional questions concerning interspousal transfers in general. The first concerns the application of Rule 462(1)(3). Rule 462(1)(3) provides that "a change in ownership shall not include any interspousal transfer, including, but not limited to:

> "(3) Transfers to a spouse or former spouse in connection with a property settlement agreement, including post-dissolution amendment thereto, or decree of dissolution of a marriage or legal separation."

You ask if a post-dissolution amendment has to be affirmed by the court or if it can be an agreement between ex-spouses.

A decree dividing community property is not subject to modification after it has become final. (In Re Marriage of Shanahan (1979) 95 Cal.App.3d 295, 297.) After the trial court has divided the property and the judgment has become final, the court loses jurisdiction to modify or alter the division made.

Thus, with respect to property, the property settlement approved by the court, entered in the judgment, and final by a lapse of time for review, is not subject to modification. (6 Witkin Summary of California Law 5058 (8th ed. 1974).) An exception to this rule arises in cases where the court expressly reserves jurisdiction to modify a property award. (Mueller v. Walker (1985) 167 Cal.App.3d 600, 605-606.) Based on the foregoing well-established case law, it is our opinion that unless the court has expressly reserved jurisdiction to modify a property award, or unless the parties themselves in their property settlement expressly reserve the right to modify the property settlement agreement, and if it appears to have been the intention of the parties to the property settlement agreement to definitely and permanently adjust their property rights, a subsequent transfer is not in connection with a property settlement agreement. Of course, the parties may subsequently make any agreement they wish, but since they are no longer married and their rights have already been fully settled, such a transfer is not in connection with the dissolution of their marriage.

Lastly, you ask the following question which was posed by your staff concerning interspousal transfers:

> "The judge says that at the end of X years the property is to be sold, neither one gets the house. At the end of that time, they decide between themselves that one will sell to the other. Non-reappraisable? Reappraise 100%, 50%?"

The situation you describe generally involves a family home award pursuant to Civil Code section 4800.7. Civil Code section 4800.7 provides in pertinent part as follows:

> "(a) As used in this section, 'family home award' means an order that awards temporary use of the family home to the party having custody of minor children and children for whom support is authorized under Section 206 in order to minimize the adverse impact of dissolution or legal separation on the welfare of the children.
>
> (b) Except as otherwise agreed to by the parties in writing:
>
> (1) A family home award may be modified or terminated at any time at the discretion of the court."

Whenever a court grants a temporary home award of community property, the noncustodial spouse's property rights under Civil Code section 4800(a) are delayed temporarily. Section 4800(a) grants the parties in a dissolution proceeding the right to an equal division of community property at the time of dissolution. The trial court's order often provides for the termination of a family home award on the following contingencies: (1) when the children reach the age of majority; or (2) when the custodial spouse remarries or otherwise brings added income to the home. Obviously, an extensive period of time could pass before these contingencies occur which would delay the noncustodial spouse's right to equal division of community property rights. (In Re Marriage of Howard (1986) 184 Cal.App.3d 1, 8.)

Under section 4800.7(b), the court expressly retains the jurisdiction to modify or terminate the family home award. Therefore, until the family home award is terminated by the court, its division as community property is not settled and final. It is our opinion, therefore, that a transfer between the spouses occurring before the property rights pertaining to the house are settled, should be excluded as an interspousal transfer.

To summarize the foregoing, it is our opinion that when (1) either the parties through an agreement, or, (2) the court through retained jurisdiction, has left a property matter open or modifiable, then a transfer between ex-spouses will be considered within the interspousal exclusion. However, where it appears to have been the intention of the parties to definitely and permanently settle their property rights and a decree of dissolution has become final, any subsequent transfers are transfers of separate property between unmarried parties and are not interspousal transfers.

I hope the foregoing analysis is helpful to you. If you have any questions or if you wish to discuss this further, please contact me.

Very truly yours,

Michele F. Hicks

Michele F. Hicks
Tax Counsel

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