

## Memorandum

**To:** Mr. Thomas Hudson, Tax Counsel  
Board Member's Office, Second District

**Date:** May 19, 2005

**From:** Shirley Johnson, Tax Counsel  
Legal Department, Property Taxes Division

**Subject:** Joint Tenancy and Trusts

This is in response to your email dated May 4, 2005, to Acting Assistant Chief Counsel Selvi Stanislaus, requesting our opinion on an issue raised at a discussion at the recent assessors' conference in Paso Robles. The issue concerns the transfer of a joint tenancy interest to the joint tenants' revocable living trust and whether such a transfer severs the joint tenancy. You have posed two specific questions which are restated below followed by summary responses and detailed analyses.

**1. Can a trust ever be a joint tenant?**

**Summary Response:** Yes, California Civil Code § 683, subdivision (a) specifies that a joint tenancy may be created by grant or devise to trustees as joint tenants.

**2. If so, whose life is the "measuring life" to determine when the trust's interest in the property passes to the surviving joint tenant(s)? (i.e., is the measuring life that of the trustee, the beneficiary, the last surviving contingent beneficiary, the trustor, or someone else?)**

**Summary Response:** For property tax purposes, the measuring life is the joint tenant who transferred the property to his or her revocable trust. Upon creation of a revocable trust and transfer of real property to that trust, trustor holds the present beneficial interest in the trust property.

### LAW AND ANALYSIS

Civil Code section 683, subdivision (a) defines a joint interest and provides in relevant part that

- (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, . . . when granted or devised to executors or trustees as joint tenants.

Thus, a deed conveyance from A to A as trustee of her trust and to B as trustee of his trust, as joint tenants can create a valid joint tenancy as a single transfer granted to trustees as joint tenants.

**Transfer of Joint Tenancy Interest into a Revocable Trust Would Not Sever the Joint Tenancy.**

In your email message, you raise the question whether a joint tenant's interest can be transferred into a trust without severing the joint tenancy. We conclude that the transfer of joint tenancy interest to a revocable trust in which the other joint tenant is the present beneficiary is consistent with the right of survivorship and, therefore, does not sever the joint tenancy, because the joint tenants retain the present beneficial interest in the property and the trustee receives only bare legal title. For property tax purposes, the trustee never holds the present beneficial interest in the trust property, even though he or she has legal title and the power to sell. Furthermore, it is our view that joint tenants, who place their property interests in trust and name each other as the sole present beneficiary of their respective trusts, do not destroy any of the four unities necessary for a valid joint tenancy.

**Analysis**

Four unities are essential to the creation and continuation of a joint tenancy: unity of interest, time, title, and possession. (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155.) As a general rule, if one of the unities is destroyed the joint tenancy is severed and the joint tenants become tenants in common. (*Tenhet v. Boswell*, supra, at p. 155.) Under Civil Code section 683.2, the conveyance of **legal title** to the joint tenant's interest to a third party severs the joint tenancy with respect to that joint tenant's interest.

California Civil Code § 683.2(a), states:

- (a) Subject to the limitations and requirements of this section, in addition to any other means by which a joint tenancy may be severed, a joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means:
  - 1) Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant.
  - 2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

Some commentators take the view that, in applying subdivision (a)(1) of Civil Code Section 683.2, a conveyance of **legal title** of a joint tenant's interest to a trustee of a revocable trust severs the

joint tenancy.<sup>1</sup> For property tax purposes, however, the conveyance of legal title does not constitute a transfer of an interest that confers ownership on the transferee resulting in a change in ownership. Thus, the transfer of legal title does not destroy any of the four unities because the joint tenant retains the present beneficial interest in the property. Furthermore, if the other joint tenant is the beneficiary of the revocable trust, the transfer has no effect on the right of survivorship.

Revenue and Taxation Code section 60<sup>2</sup>, which interprets and implements article XIII A of the California Constitution, defines a 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”. Under section 60, a “change in ownership” does not occur for purposes of property tax reassessment upon the transfer of bare legal title to property without a corresponding transfer of the beneficial use thereof. (*Parkmerced Co. v. City and County of San Francisco* (1983) 149 Cal.App.3d 1091.) In *E. Gottschalk & Co. v. County of Merced* (1987) Cal.App.3d 1378, the court of appeals stated “[i]n common parlance the term ‘ownership’ generally connotes the right of possession and use to the exclusion of others, as distinguished from technical aspects of title.”

Thus, to have a change in ownership under section 60, the particular transaction must satisfy the three requirements contained in the definition:

1. It transfers a present interest in real property;
2. It transfers the beneficial use of the property; and
3. The property rights transferred are substantially equivalent in value to the fee interest.

Section 60 requires as a fundamental element of change in ownership that a ***present beneficial interest*** in real property has transferred. In a transaction where there is only a transfer of legal title to the property, no change in ownership has occurred. The statutory provisions regarding trusts reflect the

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<sup>1</sup> 3-140 California Wills & Trusts § 140.06 [9][a], *Transferring Joint Tenancy Property to Trust*, states that when property held in joint tenancy is transferred directly to a revocable inter vivos trust, the conveyance terminates the joint tenancy. (Civ. Code § 683.2(a)(1).)

In addition, 2-90 California Wills & Trusts § 90.04 [2][b](6), *Trust Property*, states, in relevant part:

“[2] Character of Property

[b] Property Not Transferable by Owner

By its nature, some property cannot be the subject of a **trust**. If, for public policy reasons or because of the character of the property itself, the owner cannot effectively transfer it, the owner cannot create a **trust** of the property. Examples of property interest that cannot be the subject of a **trust** include the following:

6. The interest of a joint tenant in **joint tenancy** property. However, a joint tenant in real property may **sever the joint tenancy** as to the joint tenant’s interest without the joinder or consent of the other joint tenants by executing and delivering a deed that conveys legal title to the joint tenant’s interest to a third person, or by executing a written instrument that evidences the intent to **sever the joint tenancy**. When a joint tenant’s interest has been severed, it may be transferred to a trustee and become trust property. The severance and the transfer to the trustee may be simultaneous. . .” (Civ. Code § 683.2(a).)

<sup>2</sup> All statutory references are to the Revenue and Taxation Code.

conclusion reached by the Legislature in implementing Proposition 13, that a change in ownership occurs only upon a transfer of *beneficial ownership* of the property in a trust, and not on the transfer of legal title (Assembly Revenue and Taxation Committee, *Property Tax Assessment*, Volume I, October 29, 1979).<sup>3</sup> Thus, the change in ownership results mandated under section 61(g) and (h), section 62 (d) and Rule 462.160 are based on the concept that the trustee is never the beneficial owner of the trust property, even though he has legal title and the power to sell. (See Annotation No. 220.0761, Milam Letter 7/14/80, attached.)

In interpreting section 60, Rule 462.240, subsection (a),<sup>4</sup> states that the transfer of bare legal title to property is not a change in ownership. The underlying rationale of Rule 462.240, subsection (a), is that the transfer is not coupled with the right to immediate use, occupancy, possession or profits, the transfer is considered to be the transfer of mere legal title to the property, and therefore, does not result in a change in ownership.

This rationale was discussed and applied in the case of *Parkmerced Co. v. City and County of San Francisco* (1983) 149 Cal.App. 3d 1091, where the plaintiff was a partnership formed for the purpose of acquiring and operating specified real property, but title to the property was held by one of the partners whose sole purpose was to hold title for the partnership but without any right to use, occupancy, or profits. The court stated that no change in ownership occurs “upon the transfer of bare legal title without a corresponding transfer of the beneficial use thereof,” and since the partner held no more than “bare legal title” to the property, the subsequent transfer to the partnership was not a change in ownership.

Similarly, in *Allen v. Sutter County Board of Equalization* (1983) 139 Cal.App.2d 887, 890, the court held that no change in ownership resulted from an outright transfer of property by a trustee to the grandchildren of the trustor as they reached the designated age to receive distribution under an irrevocable trust. Since the grandchildren held the present beneficial ownership of the trust property from the creation of the trust, the trustee could only transfer bare legal title. This is similar to the transfers to and from an inter vivos, irrevocable “qualified personal residence trust” (QPRT), described in Annotation No. 625.0208, Eisenlauer Letter 1/10/96, attached, except that the trustor retains present beneficial ownership of his/her residence for a set term of years before transferring it to the children,

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<sup>3</sup> On page 19 of Volume I, this requirement is explained as follows:

“Beneficial use is necessary to protect custodianships, guardianships, trusteeships, security interests, and other fiduciary relationships from unintended change in ownership treatment. For example, a father buys land for his minor son, taking title as custodian for the son. There is a change in ownership when the father buys the property; however, when the son reaches majority and gets the property outright there is no change in ownership. This is because the father never had the beneficial use of the property. The son was the real owners from the outset and when he reached majority there was no transfer of the beneficial use.”

<sup>4</sup> Rule 462.240 provides in relevant part:

The following transfers do not constitute a change in ownership:

- (a) The transfer of bare legal title, e.g.,
  - (1) Any transfer to an existing assessee for the purpose of perfecting title to the property.
  - (2) Any transfer resulting in the creation, assignment, or reconveyance of a security interest not coupled with the right to immediate use, occupancy, possession or profits.

who then obtain beneficial ownership. In all of these transfers however, the trustee has the ability to transfer only legal title, and beneficial ownership was held either by the trustor (until the term ended and the QPRT terminated) or by the children who obtained beneficial ownership.

In conclusion, the transfer of joint tenancy property to the trustee of a revocable trust does not sever the joint tenant's interest, because only bare legal title to the joint tenant's property interest would be transferred to the trustee, and the joint tenant would retain the present beneficial interest in the property.

### **Survivorship Rights**

Among other means, a joint tenancy may be severed by the execution of a written instrument that evidences an intent to sever the joint tenancy. However, the execution of instruments creating revocable trusts by joint tenants that name each other as beneficiaries and are funded by the property held in joint tenancy maintain the joint right of survivorship. Thus, we conclude that such trust instruments are not evidence of an intent by the joint tenants to sever the joint tenancy because the right of survivorship remains intact.

### **Analysis**

The intent of the joint tenants is an important consideration in determining whether their acts in dealing with the property terminate the joint tenancy. (*County of Fresno v. Kahn* (1962) 207 Cal. App. 2d 213.) Civil Code Section 683.2, subdivision (a)(2) in summary states, that in addition to any other means, a joint tenancy may be severed by execution of a written instrument that establishes intent to sever the joint tenancy. The court of appeal has also held that a joint tenant can sever the estate by implication if he or she enters into an agreement the terms of which are inconsistent with the continued existence of the joint tenancy. (See *Wardlow v. Pozzi* (1959) 170 Cal.App.2d 208.) Since the right of survivorship is one of the incidents of a joint tenancy, any act or event that modifies the right of survivorship would evidence an intent to sever the joint tenancy relationship.

The following list of cases look to the intent of the parties to determine whether there was intent to sever the right of survivorship:

In *Re v. Re* (1995) 39 Cal.App.4<sup>th</sup> 91, 96-97, a mother, daughter, and son received property as joint tenants. Subsequently, by deeds, the mother and daughter created a separate joint tenancy as between themselves as to their two-thirds interest in the property. In a partition action brought by the son, the trial court held that the son was entitled to only one-third of the proceeds. The court had determined that the deeds by the mother and daughter showed an intent to sever the joint tenancy with respect to son; to establish a joint tenancy between the mother and daughter to their interests in the property; and to establish a tenancy in common with son.

In *Hammond v. McArthur* (1947) 30 Cal. 2d 512, the decedent, an aunt, conveyed her land to herself and the niece as joint tenants. Later, the niece conveyed to the decedent a life estate, together with the rights to all of the rents and profits of the property. The decedent died, and the administrator sought to quiet title in the land. The trial court found that the niece held the land in fee simple, because

upon the decedent's death the joint tenancy terminated and title vested in the niece. The administrator contended that the conveyance of the life estate to the decedent terminated the joint tenancy and created a tenancy in common. He also contended that the conveyance of the life estate destroyed the unities necessary to a joint tenancy. The court affirmed the judgment of the trial court. The court held that the conveyance of the life estate did not terminate the joint tenancy for the purposes of survivorship. The court noted that when one of two joint tenants in fee simple made a conveyance of his interest for life, upon the termination of the life interest, the joint tenancy, as it originally existed, revived.

In *McDonald v. Morley* (1940) 15 Cal. 2d 409, a husband and wife made a property settlement agreement at which time they held title to the subject property "as joint tenants". However, the agreement specifically provided that if either one of them died, the interest of that party would go to the daughter, not the survivor. The court found that this agreement was entirely inconsistent with an estate in joint tenancy, which was thereby terminated, and that it was the parties' intention to do so. Thereafter, the husband and wife were tenants in common with separate discernable interests.

Under Rule 462.040, joint tenants will become "original transferors" if they transfer their property interest into their respective trusts or wills for the benefit of the other joint tenant or joint tenants. Under the analysis applied in the foregoing cases, the creation of such a trust is consistent with the estate in joint tenancy because the right of survivorship in each of the joint tenants is maintained. Thus, the transfer is not evidence of an intent to sever the joint tenancy.

SJJ:jlh

Attachments

Prec/Joint Tenancy/05/243.SJJ.doc

Prec/Trusts/05/243.SJJ.doc

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	Ms. Selvi Stanislaus	MIC:82
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	Ms. Mickie Stuckey	MIC:62
	Mr. Todd Gilman	MIC:70
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