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December 26, 2007

Ms. , Assessment Manager
San Luis Obispo County Assessor
1055 Monterey St., Ste. 360D
San Luis Obispo, CA 93408

Re: Joint Tenancy Change in Ownership

Dear Ms. :

This is in response to your correspondence to me, dated May 21, 2007, in which you modified your prior request for a legal opinion as to the change in ownership treatment of certain transfers involving joint tenancies by providing us with specific factual scenarios and supporting documents.

Set forth below is a summary of the applicable law, followed by each of the scenarios (redacted, renumbered and rephrased for clarity) and our analysis thereof. We note that virtually all of the scenarios presented involve some aspect of factual uncertainty, resolution of which is a matter that rests with the assessor with review by the local assessment appeals board if appealed by the taxpayer. Thus, our responses are not necessarily definitive for a specific situation.

Legal Background

As an initial matter, we note that responding to your questions involves consideration of several areas of law in addition to property tax law: the interpretation of deeds, ownership of various estates in real property, and the law pertaining to trusts.

Deed Interpretation Generally

Deeds that convey or transfer title to real property are interpreted using the same rules applicable to contracts. (Civ. Code, §§ 1040, 1066.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) The intention of the parties is to be "pursued, if possible." (Code Civ. Proc., § 1859.) Thus, there is a substantial component of factual determination in interpreting deeds for vesting and change in ownership purposes.

There are several rules of construction that assist the assessor in determining ownership and vesting. In interpreting a deed, "the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted; or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.) To properly construe a contract or deed, the circumstances under which it was made, the subject of the instrument, and of the parties to it, may be considered. (Code Civ. Proc., § 1860.) "The interpretation of the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible and given great weight on the issue of the parties' intent. [Citations.]" (Miller & Starr (3d ed. 2003) *California Real Estate*, § 1:60, p. 164.)

"Where otherwise proper, parol [oral] evidence is admissible to explain the terms of a deed." (2 Witkin, *Cal. Evid.* (4th ed.) Doc. Evid., § 83.) "In any case, parol evidence may be freely offered to explain an ambiguity, whether latent or patent." Thus, if a deed is ambiguous, external evidence of the parties' intentions at the time of executing the deed can be used to interpret the deed. However, extrinsic evidence may not be used to give an instrument a meaning to which it is not susceptible. (*City of Manhattan Beach v. Superior Ct.* (1996) 13 Cal.4th 232, 238.)

"If several parts of a grant are absolutely irreconcilable, the former part prevails." (Civ. Code, § 1070.) Finally, all the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of a deed. (*City of Manhattan Beach* (1996) 13 Cal.4th 232, 238.)

Additionally, there are several presumptions that apply specifically to deed interpretation. It is presumed that a grant of real property intends to convey fee simple title, "unless it appears from the grant that a lesser estate was intended." (Civ. Code, § 1105.) The owner of legal title is presumed to be the owner of the beneficial title, unless this presumption is rebutted by clear and convincing evidence. (Evid. Code, § 662; Cal. Code Regs., tit. 18, § 462.200, subd. (a).) "When more than one person's name appears on a deed, there is a rebuttable presumption that all persons listed on the deed have ownership interests in property, unless an exclusion from change in ownership applies." (Cal. Code Regs, tit. 18, § 462.200, subd. (b).) Property Tax Rule 462.200, subdivision (b) explains the factors that may be considered by the assessor in determining whether the presumption is rebutted.

Ownership of Real Property

Presumptions

Under California law, a tenancy in common is the presumptive form of creating title in property held among several persons.[i] Furthermore, tenancy in common interests are presumed to be equal unless otherwise stated.[ii] This presumption may be overcome by evidence to the contrary, such as a written agreement. (*Nazzisi v. Nazzisi* (1962) 203 Cal.App.2d 121, 124.) Under California law, a declaration in a deed or other title instrument that a married couple takes property as joint tenants raises a presumption that the couple intended to take title in joint tenancy. (*In re Summers* (Banker. 9th Cir. 2002) 278 B.R. 808)

Creation and Continuation of a Joint Tenancy

Subdivision (a) of section 683 of the Civil Code defines a joint tenancy (termed a "joint interest") applicable to real and personal property, but excluding bank accounts covered under subdivision (b), as follows:

> 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 expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

The distinguishing feature of joint tenancy is the right of survivorship. (*Estate of Probst* (1990) 50 Cal.3d 448, 455.) Under California law, there must be an explicit statement in the transfer document in order for a joint tenancy to be created. (Civ. Code, § 683, subd. (a).) The requirement that a joint tenancy be explicitly stated is additional to the four common law unities of time, title, interest, and possession and the essential characteristic of the right of survivorship. (*Tehnet v. Boswell* (1976) 18 Cal.3d 150, 155.) Although the common law requirement of unity of title was removed by the 1985 amendment of section 683 of the Civil Code, the unities of time, interest, and possession and the right of survivorship are still required. If a joint tenancy is not created, a tenancy in common generally results if circumstances do not indicate partnership or community property ownership. (Civ. Code, § 686.) *Thus, a declaration of joint tenancy in a deed is not dispositive of whether or not a joint tenancy has in fact been created.*

Joint tenancies may exist in undivided interests in real property. Two or more joint tenants "considered together would be tenants in common with the other coowner." (Miller & Starr, *California Real Estate* (3d ed. 2003), § 12:26, at p. 12-67, citing *Re v. Re* (1995) 39 Cal.App. 4th 91, *Gonzalez v. Gonzalez* (1968) 267 Cal.App.2d 428, 435, and *In re Galletto's Estate* (1946) 75 Cal.App.2d 580, 585.) Other undivided interests may be held either by a third party or one of the joint tenants as a separate and distinct interest, even if the result is that a single person owns a greater fractional share of the property than the other joint tenants. (*Estate of Galletto* (1946) 75 Cal.App.2d 580, 587.) Thus, where a husband and wife owned an undivided one-half interest in real property as joint tenants, they own equal and identical shares in that interest, but the wife was also permitted to own as her separate property the other one-half interest without affecting the existence of the joint tenancy in the husband-wife half-interest. (*Ibid.*)

It appears well-settled that either legal or equitable title may be held in joint tenancy. "Where a trust is created for several beneficiaries, the beneficiaries may be tenants in common or joint tenants of the beneficial interest to the same extent to which they might be tenants in common or joint tenants of a legal interest." (Rest. Trusts, 2d

ed., § 113, Comment c.) Under California law, equitable title to property may be held in joint tenancy even though legal title is held in the name of a trustee. In *Edmonds v. Commissioner of Internal Revenue*, involving the federal tax liability of a widow who had jointly held property with her husband, the Ninth Circuit Court of Appeals stated that equitable interests in property can be held in joint tenancy, and specifically that certain real property legally held in the name of a trust company for the benefit of husband and wife co-owners was equitably held in joint tenancy when the trust document so stated. Furthermore, on the husband's death the joint tenancy characterization was respected, as his portion of the property became vested in the wife, who became the entire owner of the property. (*Edmonds v. Commissioner of Internal Revenue* (1937) 90 F.2d 14, 15-16.) In *Lowenthal v. Kunz*, Pauline and Adele acquired real property as tenants in common. Pauline granted her interest to Adele, subject to an oral trust that Adele should hold the granted interest on behalf Pauline. Later, at Pauline's request, Adele conveyed the entire property to Pauline and Adele as joint tenants. The court held that the joint tenancy was valid and Adele became the owner of Pauline's one-half interest by right of survivorship, despite the fact that Adele only held equitable title to her own one-half interest, noting that a joint tenancy may be created by the sole owner of any estate that is capable of ownership. (*Lowenthal v. Kunz* (1951) 104 Cal.App.2d 181, 183-184.)

Finally, we note that under section 56 of the Probate Code, a "person" means "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity." Subdivision (a) of section 683 of the Civil Code provides in part that a joint tenancy may be created "when granted or devised to executors or trustees as joint tenants." Under common law, a group of trustees is presumed to hold legal title as joint tenants. (2 *The Law of Trusts* (4th ed. 2001), Trusts, §§ 100 and 103.) This common law rule, although apparently abrogated or otherwise limited in many states, has been applied to interpret the default rule regarding cotrustee action currently codified at section 15620 of the Probate Code, which provides that "[u]nless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action." This statute has been interpreted to mean that "cotrustees take a joint interest in the property of the trust estate that partakes of the nature of a joint tenancy and possesses none of the attributes of a tenancy in common." (*Conrad v. Hawk* (1932) 122 Cal.App. 649, 652-654.)[iii]

Severance of a Joint Tenancy

The "limitations and requirements" with respect to severance of a joint tenancy are set forth in section 683.2 of the Civil Code, as follows:

> 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.

b) Nothing in this section authorizes severance of a joint tenancy contrary to a written agreement of the joint tenants, but a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrance for value in good faith and without knowledge of the written agreement.

c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied:

(1) Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located.

(2) The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

d) Nothing in subdivision (c) limits the manner or effect of:

(1) A written instrument executed by all the joint tenants that severs the joint tenancy.

(2) A severance made by or pursuant to a written agreement of all the joint tenants.

(3) A deed from a joint tenant to another joint tenant.

e) Subdivisions (a) and (b) apply to all joint tenancies in real property, whether the joint tenancy was created before, on, or after January 1, 1985, except that in the case of the death of a joint tenant before January 1, 1985, the validity of a severance under subdivisions (a) and (b) is determined by the law in effect at the time of death. Subdivisions (c) and (d) do not apply to or affect a severance 0made before January 1, 1986, of a joint tenancy.

Fundamentally, however, "[t]he presence of an intention to terminate a joint tenancy depends on the circumstances, and is ordinarily a question of fact." (Miller & Starr (3d ed. 2003) *California Real Estate*, § 19, p. 223.) Thus, Board staff has previously opined that a deed transferring a joint tenant's interest to himself, as provided under subdivision (a)(2) of section 683.2 of the Civil Code, presumably terminates his joint tenancy interest in the absence of clear and convincing evidence that he did not intend to terminate the joint tenancy with respect to his interest. (See Lambert Letter dated May 24, 1999.)

Joint Tenancies and Trusts

At the heart of many of the scenarios presented in your questions is the underlying issue of whether the transfer of a joint tenancy interest into trust always severs the pre-existing joint tenancy. Under subdivision (a)(1) of section 683.2 of the Civil Code, a joint tenancy may be severed by execution and delivery of a deed that conveys legal title to the joint tenant's interest to a *third person*. This provision is relied on by a leading estate planning treatise for its position that transfer of a joint tenancy interest into a trust *always* severs the joint tenancy as to the transferred interest because the trustee is a "third person." (Lang et al., *California Wills & Trusts* (2006) § 140.06[9][a], fns. 51 and 57.) However, we note that this interpretation does not distinguish those situations where the settlor himself or herself personally serves as trustee. In any event, we understand that many estate planning practitioners assume that a joint tenancy is severed whenever a joint tenancy interest is transferred into trust, regardless of the identity of the trustee, the provisions of the trust, or of any evidence of an intent to sever the joint tenancy.[iv]

However, solely for property tax purposes, Board staff has advised county assessors of its opinion that a transfer to a third person only severs a joint tenancy when "it transfers the severing joint tenant's interest to a trust for the benefit of a third person [who is not one of the existing joint tenants] (*contrary to joint tenants' survivorship rights*)." (Emphasis added.) (Letter to Assessors (LTA) 2004/042, July 6, 2004, pp. 1-2.)

Property Tax Law

A "change in ownership" is defined 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. (Rev. & Tax. Code, § 60.) The termination of any joint tenancy interest is a change in ownership, except as provided by statute or if an exclusion applies. (Rev. & Tax. Code, § 61, subd. (f).) For joint tenancies not involving original transferors, the termination of any joint tenancy interest results in reappraisal of only the interest terminated. (Rev. & Tax. Code, § 65, subd. (a).) For joint tenancies involving original transferors, there is no reappraisal on termination of any interest until no original transferors remain on title. (Rev. & Tax. Code, § 65, subds. (c) and (d).)

For purposes of change in ownership, transfers through the medium of a revocable or irrevocable trust are treated as occurring between individuals, and not between an individual and the trust as an entity. It is necessary to "look through the trust" (i.e., disregard the identity of the trustee) to determine the parties between whom a transfer is taking place. For a transfer to an irrevocable trust, the transfer is considered for property tax purposes to be to the present beneficiary of the trust. This principle is demonstrated in Property Tax Rule 462.160, which provides that the transfer of real property to an irrevocable trust is a change in ownership of such property at the time of the transfer unless all the present beneficiaries qualify for an exclusion from change in ownership. (Rule 462.160, subds. (a) and (b).) For a transfer to a revocable or "living" trust, the beneficial ownership for property tax purposes remains in the trustor or trustors. Thus, for a transfer from a trustor to a revocable trust, there is no transfer of a beneficial interest and therefore no change in ownership: the trustor is treated as having retained the beneficial ownership of the transferred property even if a non-excludable beneficiary receives benefits while the trust remains unrevoked. (Rev. & Tax. Code, § 62, subd. (d)(2).)

The "look-through" treatment of trusts was given as specific advice to assessors in Letter to Assessors 80/25 (February 19, 1980, pp. 4-5), in which the Board advised county assessors to look through trusts to determine the beneficial ownership for change in ownership purposes. Thus, for property tax purposes, a trust is not considered an entity or a unit separate and apart from its beneficial owners. (LTA 80/25, pp. 4-5.) Rather, the presumption in section 662 of the Evidence Code, that legal title reflects beneficial ownership, should be applied, so that a deed granting "A and B as trustees of the A and B Revocable Trust" should be interpreted as a grant of legal title and beneficial ownership to A and B.

Analysis of Deeds Presented

As an initial matter, we note that all of the situations presented in your letter involve deeds that are ambiguous. Thus, we recommend that, to the greatest extent feasible, the assessor's staff should contact the grantors and grantees of these deeds, as appropriate, to ascertain the actual subjective intent of the parties at the time of execution of the deeds. To the extent that this is not feasible, we recommend that the assessor's staff expressly notify grantors and grantees, as appropriate, of any assumptions made in determining the vesting and ownership for change in ownership purposes.

Original Problem

Julia took title to the property by a deed recorded on December 23, 2003. A subsequent deed was recorded on November 17, 2005, where Julia deeded to Julia and Roberta as joint tenants. Recorded immediately after that deed was a deed where Julia and Roberta deeded to themselves as trustees of their joint trust. They sell the property on July 6, 2006. Similarly, in Example 5, Martin and Susan acquire real property as joint tenants on January 2, 2003. On May 23, 2005, they transfer their joint tenancy interests to a joint trust, and continue to own the property.

Original Problem: Your Questions

When joint tenants deed to a single trust, does this qualify for the exclusion (assuming that within the trust Julia and Roberta name each other as beneficiary on death)? A joint tenancy requires two or more persons on title. In this case, there is only one trust – can a single trust be a joint tenant by itself (contrary to the definition of a joint tenancy being between two or more persons? Would the trust documents have to identify (i.e. specifically state in the trust that the trustors were joint tenants? The Property Tax Rule indicates that the exclusion applies if each transferor deeds to his or her own trust, not that all joint tenants deed to a single trust. This also brings up the question, if a single trust qualifies as a "joint tenancy," were Julia to deed directly from herself to the trust, then would Julia become an original transferor and Roberta an other than original transferor? Regarding Martin and Susan, assuming that the Martin-Susan trust names each other as an on-death beneficiary of the respective joint tenancy interests, does the transfer into a single trust (so only one entity is on title) meet the definition of a joint tenancy? Could Martin and Susan become original transferors in this situation?

If a transfer to a single trust does qualify (or might qualify if certain specifications are met) for exclusion, then these transfers would clearly be a step transaction if this does

qualify. There is no place in the code that excludes this type of transfer from being a step transaction (as are for certain parent-child transfers). In Letter to Assessors (LTA) 2004/042, it states in part that Example 9 to Rule 462.040 was added to clarify that if transfers are taken for estate planning purposes, then transfers taken to avoid a change in ownership are not considered a step transaction. First, what criteria and documentation would be required to identify that transfers are for estate planning purposes? Second, under what authority is the conclusion reached that such transfers can be excluded from the step transaction doctrine?

Original Problem: Response

As an initial matter, we note that transfers of interests to revocable trusts are always excluded from change in ownership under subdivision (d) of section[v] 62 of the Revenue and Taxation Code. We assume that by reference to an "exclusion" you mean the obtaining of original transferor status by a joint tenant under section 65. For purposes of this response, we assume that a transfer into a revocable trust does not automatically sever a joint tenancy (see discussion below).

We also presume that, for revocable trusts, legal title in the name of the trustors reflects beneficial title. In this example, since we look through the revocable trust to determine the identity of the joint owners of the beneficial interests, the assessor should consider that Julia and Roberta were joint tenants before and after the transfer into the revocable trust because they named each other as the beneficiaries of their interests in the trust. Assuming the appropriate trust provisions exist, the pre-existing joint tenancy continues to be respected for property tax purposes. Under subdivision (b)(1) of Rule 462.040, both Julia and Roberta as beneficial owners become original transferors.

We have previously advised that a joint tenancy must exist prior to a transfer into a revocable trust in order for original transferor status to be obtained. (See Question 15, LTA 2004/042.) This limitation allows the assessor to clearly identify when a joint tenancy exists in a revocable trust and when original transferor status is obtained. In order to obtain original transferor status by means of a transfer into a revocable trust, it is not necessary that the joint tenancy interests be transferred to separate trusts for each joint tenant. (*Ibid.*) In other words, for property tax purposes there is no difference between individual trusts and joint trusts if the beneficial owner is the joint tenant. Under such circumstances, original transferor status may be obtained. However, if the trustees named on the deed are not the same as the pre-existing joint tenants, then the assessor has the discretion to presume a change in ownership and the taxpayer has the corresponding right to provide clear and convincing evidence that there was no change in ownership.

As discussed in Question 23 of LTA 2004/042, the step transaction doctrine may be applied when multiple steps are taken to complete a transaction for the sole purpose of avoiding a change in ownership. The timing of events is a factor in applying the step transaction doctrine's binding commitment, end result, and interdependence tests. The LTA states that "[t]he changes to Rule 462.040 were made so that transfers for estate planning purposes would not trigger changes in ownership." The 2003 rule amendments and the LTA also provide specific direction to assessors to apply the step transaction doctrine, if applicable.

In the scenario at issue, it could be argued that the co-owners Martin and Susan took extra steps because they could have taken title directly through their trust. However, if they had done so, neither would be considered for property tax purposes a joint tenant or an original transferor. By taking title as joint tenants and then transferring the property to their revocable trust for each other's benefit, they obtain original transferor status. (For co-owners Julia and Roberta, there is no issue regarding a step transaction because they sold the property in a transfer that presumably triggered a change in ownership or an applicable exclusion.) As explained in Example T of LTA 2004/042, if one of the co-owners had died, the original transferor status should be respected because under longstanding Board interpretation, death is not a "step" in the step transaction doctrine. However, Example T and the discussion of various step transaction scenarios in LTA 2004/042 assume steps that create original transferor status close in time to the event that triggers a reassessment. Thus, if a co-owner in this scenario avoids reassessment on a buy-out or other inter vivos transfer as a result of obtaining original transferor status, then the assessor may wish to consider whether or not the evidence indicates that the step transaction doctrine applies.

Example 1

On December 28, 2005, Brian, a single man and Allen and Kathryn, husband and wife as joint tenants, all as joint tenants, grant to Brian, a single man and Allen and Kathryn, co-trustees of the Allen-Kathryn Living Trust, all as joint tenants.

Example 1: Your Questions

How much interest does Brian have after the transfer – 33-1/3% or 50%?
How much interest does the trust have – 66-2/3% or 50%?
If the trust is a standard husband-wife revocable trust, and if Brian is the beneficiary upon the death of both trustors, would all three be original transferors?

Would the percentage of interest each receives make a difference? (I.e., Allen and Kathryn start with 66-2/3% - if the trust ends up with 50%, then would it qualify for original transferor status?)

Example 1: Response

As we discussed in a telephone call on July 10, 2007, part of your question involves longstanding issues about the meaning of the language of this deed with regard to the vesting of the interests when percentage interests are not specified. You informed me that, when presented with a grant from a third party using language similar to "Brian, a single man and Allen and Kathryn, husband and wife as joint tenants, all as joint tenants," counties across the state (including San Luis Obispo County) attribute a one-third interest to each named individual. However, if the grant is to "Brian, a single man and Allen and Kathryn, co-trustees of the Allen-Kathryn Living Trust, all as joint tenants," then 50 percent will be attributed to Brian and 50 percent to the trust; however, the existence of the trust would be disregarded for change in ownership purposes.[vi]

best approach would be to request additional information from the taxpayers, including review of the trust provisions, to determine whether a change in the percentage ownership interests was intended. However, if such evidence in not forthcoming, in our view the better interpretation is that each named individual retains a 33 1/3 percent interest in the property.[vii] However, even assuming that as a result of the second deed Brian holds 33 1/3 percent and the remaining 66 2/3 percent of the property is held in a revocable trust for the benefit of trustors Kathryn and Allen, if the terms of the trust are as you describe, then the initial joint tenancy would be severed and no new joint tenancy among the three individuals would be created because the terms of the trust are inconsistent with the rights of survivorship that must characterize a joint tenancy. That is, the original joint tenancy would provide that Brian receive half of the interest owned by the first to die of Kathryn or Allen. However, under the trust terms you describe, the interest of the first of Allen or Kathryn to die would first go to the survivor of the two of them. Only upon the death of both would Brian obtain any interest. Thus, we would conclude that the pre-existing joint tenancy was severed, and that Brian becomes a tenant in common with the trustors of the trust, who would hold legal title to two-thirds of the property.[viii] You did not provide the prior deed by which Brian, Kathryn and Allen became joint tenants, so we do know whether any of them became original transferors as a result of the transfer you describe. Therefore, we cannot definitively advise you as to the change in ownership consequences of Brian becoming a tenant in common.

Example 2

On February 6, 2004, Alex and Catherine, husband and wife, as joint tenants, granted real property to Alex and Catherine, husband and wife and Robert, a widower, all as joint tenants. On February 27, 2006, Robert quitclaimed his interest to himself as trustee of his revocable living trust.

Example 2: Your Questions

We don't have Robert's trust, but assuming that it named Alex and Catherine as Robert's on-death beneficiaries, would the 2006 deed mean that Robert was trying to sever the trust from the joint tenancy, or would this be interpreted as maintaining the joint tenancy interest if the trust goes to benefit the other joint tenants on the death of Robert?

Example 2: Response

If Robert's trust named Alex and Catherine as on-death beneficiaries, and otherwise preserved the required unities and characteristics of the pre-existing joint tenancy, then in our opinion the assessor should conclude that the joint tenancy was not severed by Robert's transfer into trust and that Robert obtains original transferor status by means of the transfer into his living trust.

Example 3

On March 13, 2003, a third party granted real property to "Brian and Linda, Husband and Wife as community property with right of survivorship, as to an undivided one-half interest and Stanley and Janet, Husband and Wife as community property with right of survivorship, as to an undivided one-half interest all as joint tenants." On October 21, 2005, Stanley and Janet, husband and wife, granted to Stanley and Janet,

trustees of the Stanley and Janet Revocable Trust, all of their undivided one-half interest in the property.

Example 3: Your Questions

Is there a joint tenancy prior to the transfer to the trust, or would the specification of "community property with right of survivorship" (CROS) cancel the joint tenancy vesting? If there is a joint tenancy, and if the trust names both Brian and Linda as beneficiaries on the death of the trustors, does a standard husband/wife revocable trust qualify for original transferor status? It meets the basic definition under the rule, but it does not act like a joint tenancy would, i.e., if Stanley died, under a standard trust, Janet would have the beneficial interest in all of the trust assets during her lifetime. This would mean that Janet would be holding an unequal interest (50 percent) from the other two joint tenants, who would only hold 25 percent each, and who would not have received any interest upon Stanley's death.

Example 3: Response

The law pertaining to the characterization of property interests held by married couples (and effective January 1, 2005, registered domestic partners) contains many presumptions. While California presumes that property acquired while married[ix] is held as community property (Fam. Code, § 760), a husband and wife may hold real property as joint tenants, tenants in common, community property, or community property with right of survivorship. (Fam. Code, § 570.) Specifically, effective July 1, 2001, married couples may hold property as "community property with right of survivorship," which combines the characterization of community property with the survivorship characteristic of joint tenancy. Under subdivision (a) of section 682.1 of the Civil Code (operative and applicable to instruments created on or after July 1, 2001):

> Community property of a husband and wife, when expressly declared in the transfer document to be community property with right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy. Prior to the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed. Part I (commencing with Section 5000) of Division 5 of the Probate Code and Chapter 2 (commencing with Section 13540), Chapter 3 (commencing with Section 13550) and Chapter 3.5 (commencing with Section 13560) of Part 2 of Division 8 of the Probate Code apply to this property.

For property tax purposes, however, there is no "original transferor" concept applicable to property held as community property with right of survivorship. A declaration in a deed or other title instrument that the parties take the subject property as joint tenants raises a presumption that the married couple intended to take title in joint tenancy." (*See* 11 B. Witkin, Summary of California Law, *Community Property* § 190(b) (9th ed. 1990).) However, "[a] community estate and a joint tenancy cannot exist in the same property at the same time, and the fact that property is held by spouses under a joint

tenancy deed raises a rebuttable presumption of an intent to hold the property as joint tenants." (*Trimble v. Coffman* (1953) 114 Cal.App.2d 618, 622.)

Furthermore, where undivided interests are held in co-tenancy, the undivided interests may be held in joint tenancy. "The equality of interest requirement simply means that the interests of the joint tenants in the subject or interest involved in the joint tenancy must be equal." Thus, a husband and wife were able to own one-half of a subject property as joint tenants, at the same time as the wife owned the other half of the property as a tenant in common. (*Estate of Galletto* (9146) 75 Cal.App.2d 580, 587.)

Based on the above, we conclude that we would likely conclude that the grant of "community property with right of survivorship" with respect to each couple's interests is "absolutely irreconcilable" with the grant to "all as joint tenants." Applying the rule of section 1070 of the Civil Code to the grant deed language, therefore, the initial characterization of each couple's interest as "community property with right of survivorship" would prevail over the final phrase "all as joint tenants," unless the taxpayers provided sufficient evidence to establish otherwise. Each couple's undivided interest would therefore be held as community property with right of survivorship, and the half interests themselves would be held as a tenancy in common.[x] For property tax purposes, there would be no joint tenancy, and therefore Stanley and Janet would not become original transferors as a result of transferring their interests into their revocable trust.

Example 4

On December 12, 2002, Patrick and Linda, presumably unrelated persons and pre-existing joint tenants,[xi] transfer to themselves as trustees of their respective living trusts "as joint tenants." On July 12, 2005, Patrick and Linda as trustees transfer to themselves "as joint tenants." On July 13, 2005, Patrick and Linda transfer to themselves as trustees of their respective living trusts "as joint tenants."

Example 4: Your Questions

Because Patrick and Linda's initial transfer into trust occurred prior to November 13, 2003, Patrick and Linda did not obtain original transferor status as a result of that transfer. In 2005, they deed out of the trusts to themselves as individuals in joint tenancy, and then the following day back into their trusts "as joint tenants." It appears this would be for one of two reasons. Either they vest out to themselves in order to obtain a loan, or because they want to create OT status for themselves. If they deeded out only to obtain a loan, would a transfer from their trusts in joint tenancy to themselves as individuals in joint tenancy create OTs, barring any other event? Or, would this only be considered as a change within the joint tenancy (since they were not tenants in common before), and therefore would not create OTs? If the transfer from the trusts to themselves as joint tenants would create OTs, then if we determined the transfer immediately back into the trusts was a step transaction, but they said it was for estate planning purposes, what would be the correct interpretation of the transfers?

Example 4: Response

In Question 19, Example Q of LTA 2004/042, the Board advised that a transfer of real property into a revocable living trust for the benefit of the other joint tenant after November 12, 2003 will allow the trustor to obtain original transferor status even if the trustor revoked a similar, prior trust.

In Question 25 of LTA 2004/042, the Board advised that transfers by joint tenants out of and back into revocable living trusts for the benefit of each other for refinancing purposes "should not revoke or otherwise affect their original transferor status," and advises assessors to request supporting documentation if necessary.

In Question 23 of LTA 2004/042, the Board advised that:

> [t]he changes to Rule 462.040 were made so that transfers for estate planning purposes would not trigger changes in ownership. If multiple steps were taken to complete a transaction for the sole purpose of avoiding a change in ownership, it would be appropriate for an assessor to apply the step transaction doctrine.

The three step transaction tests (end result, interdependence, and binding commitment) are briefly explained in the LTA. It is also noted that only one of the tests needs to be met to apply the doctrine, and timing of the events is a factor for consideration. Additionally, the interdependence test may be applied when "each of [the] steps, even though having some legitimate business purpose, would have been essentially fruitless had not the ultimate goal been achieved." (*McMillanBCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 562.)

Examples S and U present scenarios where original transferor status was obtained by transfer into trust, and a change in ownership that would have been triggered by an inter vivos transfer was avoided. Example T, on the other hand, explains that extra steps taken extremely close in time and ending in avoiding a change in ownership that would have been triggered by a death are not collapsed. In the scenario you present, the asssessor's staff may request that Patrick and Linda produce evidence that the transfers out of trust and back into trust were not solely for the purpose of avoiding a change in ownership, regardless of whether that change in ownership might occur as a result of an inter vivos transfer or on death. If the purpose were for refinancing, for example, then Patrick and Linda would become original transferors as a result of the transfer in question.

<u>Example 5 (discussed under Original Problem)</u>

<u>Example 6</u>

Doris K., as surviving trustee of the K. Living Trust (unknown whether the trust is currently revocable or irrevocable) grants to Doris as trustee of the K Living Trust and Donald, an unrelated person, as joint tenants.

Example 6: Your Questions

Since no joint tenancy existed between the individuals as is shown in all of the Rule examples, assuming that the K. Living Trust names Donald as the beneficiary upon

the death of Doris, does a joint tenancy exist between the trust and the individual? Would the trust be an OT?

Example 6: Response

As discussed in the response to the Original Problem, the Board advised in Question 15 of LTA 2004/042 that a joint tenancy must exist prior to a transfer into trust in order for original transferor status to be obtained by the prior joint tenant. In this case, whether there currently is a joint tenancy between the trust and Donald, or between the trustor and Donald, no one would become an original transferor because there was no joint tenancy for property tax purposes prior to the transfer.

Example 7

On March 21, 2003, third parties transfer to Justin and Maria, husband and wife, and Devin, a single man, all as joint tenants. On May 9, 2005, Maria, a married woman, quitclaims all of her interest to Justin, a married man as his sole and separate property. The same day, Justin, a married man, grants to Justin as trustee of Justin's Separate Property Trust "his undivided 50 percent interest" in the real property.

Example 7: Your Questions

We interpret the March 21, 2003 grant deed as making all named individuals joint tenants, with one-third interests. On the quitclaim of Maria's interest to Justin, we consider that Justin and Devin remain joint tenants as to a two-thirds interest, and Justin is a tenant in common as to the one-third interest quitclaimed to him. Assuming that Justin's trust names Devin as the beneficiary on Justin's death, what would be the ownership and vesting? Would there be any interest subject to reassessment? Would there be any original transferor status?

Example 7: Our Response

This is also primarily a deed interpretation question. In contrast to Example 8b, these individuals may have intended that the husband and wife hold only 50 percent of the property between them, not two-thirds.[xii] However, the first deed stated that three persons hold as joint tenants (as always, subject to rebuttal by clear and convincing evidence of the intent of the parties at the time of the grant), and therefore we would conclude that each person holds a one-third interest. (It appears that none are original transferors.)

Under a quitclaim deed, Maria can only transfer to Justin what she already has a right to: her one-third interest. This transfer terminated her joint tenancy interest, resulting in reappraisal of that interest only (unless excluded as an interspousal transfer under section 63 of the Revenue and Taxation Code) because there are no original transferors on title. Under *Estate of Galletto, supra*, after Maria's interest terminates, Justin and Devin remain joint tenants as to two-thirds of the property, with Justin as a tenant in common as to the one-third interest obtained from Maria. This scenario is one where, in our view, the assessor's staff should attempt to contact Justin to determine his intent with respect to the transfer into his revocable trust. However, in the absence of any other evidence, we are of the view that the assessor would be entitled to assume that

Justin transferred 50 percent of the property to his trust, severing the Devin-Justin joint tenancy, but with no reappraisal because Justin and Devin are "other than original transferors." (Cal. Code Regs., tit. 18, §462.040. subd. (b)(4).)

Example 8a

On October 12, 2006, Theresa quitclaims all of her interest in certain real property to James, her spouse, as his sole and separate property. The same day, James grants the property to himself as to a 50 percent interest and to Jim Dan and Cheryl, trustees of the Jim Dan-Cheryl living trust, as to the other 50 percent interest, "all as joint tenants."

Example 8a: Your Questions

Since Jim Dan and Cheryl were not on title as individuals before, and the interest is deeded directly to their trust, would this make a difference as to whether the trust could be a joint tenant? If the Jim Dan-Cheryl trust names James as the beneficiary on the death of both trustors, would this qualify as a joint tenancy? In this instance, the trust is for the benefit of both Jim Dan and Cheryl, and the interest specified is 50 percent. Does this affect whether a joint tenancy exists?

Example 8a: Response

Under the presumption that legal title reflects beneficial ownership, James's grant of a 50 percent interest to himself, 25 percent to Jim Dan, and 25 percent to Cheryl is "wholly irreconcilable" with a declaration of joint tenancy. Since the declaration of joint tenancy occurs later in the grant than the grant of the 50 percent interest to James, the declaration of joint tenancy would be disregarded under section 1070 of the Civil Code. James, Jim Dan and Cheryl would be tenants in common in the interests stated above. The terms of the trust support this conclusion.

Example 8b

On July 1, 2004, James and Marilyn, husband and wife, grant to James and Marilyn, husband and wife, and Cindy, a single woman, "all as joint tenants." On May 2, 2005, James and Marilyn, husband and wife, quitclaim "as to an undivided 2/3 interest" to James and Marilyn as trustees of the James-Marilyn living trust.

Example 8b: Your Questions

We consider that the 2004 deed creates a joint tenancy among the three named individuals, with a 1/3 share each. In 2005, James and Marilyn grant "their undivided 2/3 interest" to their trust. Does this affect whether a joint tenancy exists?

Example 8b: Response

This example demonstrates that sometimes, especially when there is a husband and wife involved, two of three persons intend to take title to two-thirds of the property, not one-half. In this case, the second deed is consistent with the vesting of each of the named individuals as joint tenants, because the unity of interest (one-third each) is indicated, but as in Example 7, the intent of the parties is not clear until the subsequent deed is recorded. As discussed above, the grant of James and Marilyn's interests to their living trust does not affect the existence of the joint tenancy for property tax purposes if the trust provides survivorship rights for Cindy as well as the spouses. However, if this is a "typical" husband-wife trust that passes the property to the surviving spouse, then the transfer into trust would sever the joint tenancy as to James and Marilyn's interests, as in the examples set forth above.

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/ Carole Ruwart

Carole Ruwart
Tax Counsel III

CR:eb
J:/Prop/Prec/Jt. Tenancy/05-676

Enclosure

cc: Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
Mr. Todd Gilman MIC:70

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[i] "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." (Civ. Code, § 686.)

[ii] "When two or more persons take as tenants in common under an instrument silent as to their respective shares, a presumption arises their shares are equal. [*Citations.*]" (*Caito v. United California Bank* (1978) 20 Cal.3d 694, 705.)

[iii] See also Restatement of Trusts, 2d ed., § 34 Conveyance to Two Trustees. "If the owner of property makes a conveyance of the property to two persons jointly as trustees, one of whom at the time is dead or otherwise incapable of taking title to the property, but the conveyance is otherwise effective, the other person takes and holds the property in trust. [¶] COMMENTS & ILLUSTRATIONS: Comment: a. Conveyance inter vivos. If there are two or more trustees they hold as joint tenants. If a conveyance inter vivos is made to two persons as joint tenants and one of them is dead at the time, the title vests in the other. If the conveyance is in trust, the other holds upon the intended trust. . . . § 103 Death of One of Several Trustees. [¶] Upon the death of one of several trustees, the title to the trust property is in the survivors as trustees. [¶] COMMENTS & ILLUSTRATIONS: Comment: [¶] a. Trustees as joint tenants. If there are two or more trustees, they hold as joint tenants. When one dies, the other or others hold the title to the trust property by survivorship. [¶] Although in most of the States by statute joint tenancy is abolished or the presumption of a joint tenancy is abolished or survivorship as between joint tenants is

abolished, these statutes do not apply to trustees. [¶] The rule stated in this Section is applicable where a corporation and an individual are co-trustees. If the individual trustee dies, the corporation becomes sole trustee. [¶]

[iv] The California Supreme Court has previously held that because a joint tenancy must be expressly declared in the creating instrument, the Court would "decline to find a severance in circumstances which do not clearly and unambiguously establish that either of the joint tenants desired to terminate the estate." (*Tehnet v. Boswell* (1976) 18 Cal.3d 150, 157-158 (hereafter *Tehnet*.).) In *Tehnet*, a joint tenancy was not severed merely because a joint tenant leased his interest in the joint tenancy property to a third person for a term of thirty years, and the leasing joint tenant died before the term was completed. The Court held that the leasehold interest expired on the death of the joint tenant. (*Id.*, at p. 152.) Although this case predates the enactment of section 683.2 of the Civil Code, we have found no authority holding that section 683.2 was intended to overrule any aspect of the *Tehnet* court's holding. However, we note that *Tehnet* could be distinguished because the lease was not a deed granting legal title to a third party – rather, the transfer involved a written agreement conveying beneficial use of the property for the term of the lease.

A more recent case confirms that courts do not consider a joint tenancy automatically severed on transfer into trust, at least when the settlors and trustees are the same persons. In *Estate of Powell* (2000) 83 Cal.App.4th 1434, the court held that a husband-wife joint tenancy was severed on transfer to a revocable joint trust after finding that the terms of the trust evidenced a "clear intent" to eliminate the right of survivorship. The court was apparently referring the following provisions of the trust, summarized as: "upon the death of either trustor, the other would become the sole beneficiary. All income from trust assets was to be distributed to or for the benefit of the trustors or their survivor and, upon the death of both trustors, the trust estate was to be distributed to [wife's son by her previous marriage.]" (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1437-1438.) In effect, each beneficiary received only a life estate, not full ownership, as a result of the trust provisions. The court further stated that "[b]y its express terms, the . . . trust eliminated the right of survivorship central to a joint tenancy. Thus, while it is true the community property nature of the property continued to exist after declaration of the trust, property held in joint tenancy lost this character upon being included in the trust estate." (*Powell* at p. 1442.) The court further noted that the contesting spouse failed to challenge the lower court's finding "as lacking in evidentiary support," indicating that whether a transfer into trust is deemed to sever a joint tenancy is a matter of fact. This case was decided after the 1984 enactment of section 683.2 of the Civil Code, and makes no mention of subdivision (a)(1)'s provision that a deed conveyed to a third person severs a joint tenancy.

Furthermore, the law of trusts is consistent with this view. The creation of a trust involving real property places the legal title in the trustee and the equitable or beneficial title in the beneficiaries. However, the transfer of property into trust is not always accompanied by a transfer of legal title or beneficial ownership. As explained by a leading treatise on trust law:

> It sometimes happens that the owner of property executes a conveyance of the property to himself as trustee. In such a case he is of course both settlor and trustee. Technically, however, there is no transfer of the legal title to the property, since the settlor-trustee holds the legal title both before and after the creation of the trust. He is not in reality transferring property from himself individually to himself as trustee, but is merely evidencing his intention to hold in trust the property that he previously held free of trust. At any rate, the trust is effectively created, whether in form the owner of the property declares himself trustee or purports to convey the property to himself as trustee.

(2 Scott, *The Law of Trusts* (4th ed. 2001), Trusts, § 100, citing *Lamb v. First Huntington Natl. Bank* (1940) 122 W. Va. 88, 7 S.E.2d 441.)

Other leading California cases dealing with transfers of joint tenancy interests into trust include *Reiss v. Reiss* (1941) 45 Cal.App.2d 740 and *McDonald v. Morley* (1940) 15 Cal.2d 409. In those cases the courts held that the transfers into trust severed the joint tenancies. However, in each case, the court found evidence that the grantor intended to sever the joint tenancy. This intent was shown either expressly by language in the transfer or impliedly by interference with the right of survivorship. "We are of the opinion that the clearly expressed desire of Rosa Reiss to terminate the joint tenancy arrangement was effectively accomplished by the transfer of the legal title to her son *for her expressed specific purpose of having* the control and *the right of disposition of her half of the property*." (*Reiss* at p. 747.) "[B]y their contract the

parties specifically provided that if either one of them died, the interest of that one should not go to the survivor but to the daughter. This is entirely inconsistent with an estate in joint tenancy, which was thereby terminated." *McDonald* at p. 412. The intent requirement found in these cases corresponds with the language in 683.2, subdivision (a)(2), which allows for the severance of a joint tenancy by "execution of a written instrument *that evidences the intent to sever the joint tenancy*."

Based on the reasoning of these cases, while a transfer of a joint tenancy interest to the trustee of a trust may lead to the presumption under section 662 of the Evidence Code that the joint tenancy has been severed with respect to the transferred interest, the taxpayer must be allowed to demonstrate by clear and convincing evidence that he or she had no intent to sever the joint tenancy by such transfer. In our view, this lack of intent to sever can be shown by express language, or by lack of interference with any of the fundamental characteristics of a joint tenancy (the required unities and the right of survivorship). The trust provisions must be reviewed to reach an accurate determination.

We further note that a severance by deed or other written agreement does not terminate the survivorship rights of the other joint tenants unless the writing is recorded. (Civ. Code, § 683.2, subd.(c).) Agreements that can effect a severance include: (1) a written instrument executed by all the joint tenants that severs the joint tenancy; (2) a severance made by or pursuant to a written agreement of all joint tenants; and (3) a deed from a joint tenant to another joint tenant. Thus, it can be argued that execution by all joint tenants of a trust or trusts evidencing an intent to sever the joint tenancy is effective to sever the joint tenancy. As pertinent here, a joint tenancy may be severed without the joinder or consent of the other joint tenants by execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as a transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed. (Civ. Code, § 683.2, subd. (a)(2).) However, under subdivision (b) of section 683.2 of the Civil Code, severance by this means does not terminate the right of survivorship of the remaining joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied: (1) before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located; or (2) the deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

[v] All section references are to the Revenue and Taxation Code unless otherwise indicated.

[vi] Our research confirms that a 50/50 vesting (i.e., treating the trust as a unit) could be intended.

[vii] In our experience, transfers of real property by trustors to revocable living trusts are normally intended to change only the method of holding title, not the percentage ownership.

[viii] We note that this conclusion may not reflect the intent of the parties for estate planning purposes. The parties may have intended that Brian's ownership interest be passed by operation of law to Allen and Kathryn in the event that Brian predeceased Allen and/or Kathryn.

[ix] Further references to "married persons" include "registered domestic partners" unless otherwise indicated.

[x] Upon the death of each spouse, the interest would succeed to the respective spouse, but on the death of both spouses of a couple, the half interest would go to the heirs of the surviving spouse, and not automatically to the other couple or surviving spouse thereof. This result may or may not reflect the intent of the individuals involved.

[xi] The 2002 deed states "Interspousal" but all vestings identify themselves as unmarried. You assume that they are not married.

[xii] Any attempt to impose a uniform vesting on this type of grant will be erroneous as to some deeds; the assessor's staff should obtain additional information, if possible, to determine the actual intent of the parties when ambiguous deeds are presented.

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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TELEPHONE (916) 324-6583
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May 24, 1999

Re: Termination of Joint Tenancy

Dear Ms.

This is in response to your letter of February 22, 1999, in which you request our opinion on the consequences of a series of events with respect to the following parcels in

a. 735 , APN -08.
b. 718 , APN -37.
c. 6401 APN -21.
d. 758 APN 252-01.
e. 730 , APN -022-01.

Factual Background

As to each respective property, it appears that the following sequence of events took place: (1) One. January, 1989: grant deed recorded from "W . C s and L. C , husband and wife, as joint tenants," to "W C. and L . C , husband and wife, and S H , a Married Woman, all as joint tenants." (2) Two. Mrs. L C passes away. (3) Three. June 1989: grant deed recorded from "W C s, a widower" to "W C , a widower." (4) Four. December 31, 1990: Mr. Wi C passes away. (5) Five. March 1991: Affidavit--Death of Joint Tenant recorded for the death of Mr. W . C .

In your letter, you also state the following:

> Joint tenancy was made between my mom, dad, and me in 1988.... In June 1989, my dad recorded a deed... for each of the six properties above to show his widowhood. The tax and revenue office reassessed these properties as tenants in common, by revenue and taxation codes.

We do not find any evidence that my dad intended to change from joint tenants to tenants in common in either the deed or the Preliminary Change of Ownership Report... Number G on the Preliminary Change of Ownership Report says, "Does this transfer return property to the person who created the joint tenancy (original transferor)?" And on each form it is answered, "NO." This would indicate that he did not intend to change tenancy.

* * *

Would you please have your legal team look at this carefully and inform us as to the validity of the reassessment and how you deem title was held at date of death....

Brief Summary of Change in Ownership Law
As to Joint Tenancies

The Legislature has enacted a comprehensive plan with respect to the transfer of real property to joint tenancies, in which, after the creation of a joint tenancy, the county assessor waits to see whether or not a change in ownership will subsequently occur. For example, after the transfer of real property to a joint tenancy including a transferee who was not also a transferor, it is possible that the transferee may be the first to die or may transfer his or her interest back to the transferor. In those cases, there will be no change in ownership. On the other hand, the transferor may die, or may transfer his or her interest to the transferee, in which case the transferee would then own the entire property; resulting in a 100 percent change in ownership and a reappraisal of the entire property. (Section 65, subd. (c).)

This legislative plan, however, is operative only as long as there is uncertainty about the identity of the ultimate owner of the property by reason of survivorship. When the uncertainty is resolved, as when the property is converted from joint tenancy to tenancy in common -- where each party's rights are set and not divestable on death -- the existing rights will be reflected for property tax purposes. If the resulting tenants in common originally acquired the property jointly, then an exclusion from change in ownership is available. Since the interests of the remaining tenants in common remained the same after the transfer, there would not be a change in ownership by reason of the change in the method of holding title. (Section 65, subd. (d).) On the other hand, if one of the resulting tenants in common came onto title to the property by being made a joint tenant after the date of the creation of the joint tenancy, then his or her interest originally escaped reappraisal as described above. Thus, the subsequent transfer of the interest to him or her as a tenant in common -- now that it has become certain -- will be a change in ownership subject to reappraisal

Summary of Conclusion

Under the facts as we understand them, and in the absence of additional evidence, it is our opinion that the June 1989 grant deed that Mr. C recorded in favor or himself had the effect of both (i) terminating the joint tenancy and (ii) causing a change in ownership as to the undivided 50 percent tenancy in common interest thereby vested in Ms. H . The transaction may be

excluded from change in ownership, however, if all of the requirements for the parent-child exclusion were satisfied. The subsequent death of Mr. C in December 1990 would create a change in ownership of the remaining 50 percent undivided tenancy in common interest owned by him at his death, unless an exclusion from property taxation was available -- such as the parent-child exclusion.

Law and Analysis

Set forth below is an analysis of the sequence of events outlined above:

One. January, 1989: grant deed recorded from "W C and L C , husband and wife, as joint tenants," to "W C and L C s, husband and wife, and S H , a Married Woman, all as joint tenants."

Under Board Property Tax Rule 462.040(a), "The creation, transfer, or termination of a joint tenancy interest is a change in ownership of the interest transferred." Among the exceptions to change in ownership set forth in subdivision (b) of Rule 462.040, however, is the following:

> (1) The transfer creates or transfers any joint tenancy interest and after such creation or transfer, the transferors are among the joint tenants.
>
> Such transferors who are also transferees in this situation are considered to be "original transferors" for purposes of determining the property to be reappraised upon subsequent transfers. If a spouse of an original transferor acquires an interest in the joint tenancy property either during the period that the original transferor holds an interest or by means of a transfer from the original transferor, such spouse shall also be considered to be an original transferor. All other initial and subsequent joint tenants are considered to be "other than original transferors."
>
> Example 5: A and B, as joint tenants, transfer to A, B, C, and D as joint tenants. No change in ownership because A and B, the transferors, are included among the transferees and are, therefore, "original transferors." (C and D are "other than original transferors.")

Under the given facts, I assume that Mr. and Mrs. C were themselves "original transferors" within the meaning of Rule 462.040. Here, after the transfer, both of these transferors were included among the remaining joint tenants. Thus, the transfer is excluded from change in ownership per subdivision (b)(1) of Rule 462.040.

Two. Mrs. L C passes away.

Subdivision (b)(2) of Rule 462.040 provides another exception to change in ownership upon the transfer of a joint tenancy interest. That provision excludes transfers that terminate "an original transferor's interest in a joint tenancy... and the interest vests in whole or in part in the remaining original transferor(s)." The example provided is as follows:

> Example 10: A and B transfer to A, B, C, and D as joint tenants. A dies or grants his interest to the remaining joint tenants, B, C, And D. No change in ownership because B, an original transferor, remains as a joint tenant.

Accordingly, in this case, the death of Mrs. L . C did not result in a change of ownership because, after her death, Mr. W . C. , an original transferor, remained among the joint tenants.

Three. June 1989: grant deed recorded from "W C a widower" to "W . C a widower."

As indicated above, unless there is an applicable exception, the termination of a joint tenancy interest creates a change in ownership. As provided in section 65(a) of the Code of Revenue and Taxation:

> Upon a change in ownership of a joint tenancy interest only the interest or portion which is thereby transferred from one owner to another owner shall be reappraised.

In this case, Mr. C recorded a grant deed to the properties, naming himself as the beneficiary, as a "widower." Pursuant to Miller & Starr, 5 California Real Estate 2d, §12:24:

> A joint tenant can execute and record a deed which names the joint tenant as both grantor and grantee, and upon recordation of the deed the joint tenancy is severed and there is no further right of survivorship by the other owner.

Assuming, as provided by section 662 of the Evidence Code, that beneficial ownership is consistent with legal title, the recordation of the deeds from Mr. C to himself served to terminate the joint tenancies in the properties. Such grant deeds also served to convert the title to the properties to tenancies in common on an equal – or 50/50 – basis. Thus, after the recordation of the deeds, Ms. S H held an undivided 50 percent interest in each of the properties, as a tenant in common.

As none of the exceptions to change in ownership set forth in Rule 462.040(b) are applicable to these facts, then – unless another exclusion is available – the recordation of the deeds terminating the joint tenancies caused a change in ownership of the 50 percent interest in the properties transferred to Ms. H (Rev. & Tax. Code §65(a); See also SBE Property Tax Annotations 220.0298 and 220.0297.) Set forth below is an example stated in Property Tax Annotation 220.0298:

> A mother's transfer of property to herself and to her son as joint tenants does not constitute a change in ownership because the transferor creates a joint tenancy in which she is one of the joint tenants... If the joint tenants later take title to the property as tenants in common, there is a change in

ownership of the 50 percent undivided interest in the property acquired by the son.

A possible property tax exclusion that might be applied in these circumstances, however, is the parent-child exclusion set forth in section 63.1 of the Code of Revenue and Taxation. Of course, the exclusion will be applicable only if all of the requirements of section 63.1 were satisfied, including the following: (i) Ms. H is the child of Mr. C within the statutory meaning; (ii) the $1,000,000 limitation was not exceeded; and (iii) a claim was timely filed.

In your letter, you state that you do not find any evidence that Mr. C "intended to change from joint tenants to tenants in common in either the deed or the Preliminary Change of Ownership Report." In support of this contention, you cite such report where Mr. C answered, "No" to the question, "Does this transfer return property to the person who created the joint tenancy (original transferor)?"[1] As indicated above, however, Evidence Code section 662 provides a presumption that beneficial ownership is consistent with legal title. And in this case, an examination of the recorded documents indicates a termination of the joint tenancies upon Mr. C ' recordation of the grant deeds to himself. To overcome this legal presumption, you would now have to submit clear and convincing evidence to the assessor to the contrary; say, for example, that the grant deeds in question were recorded by mistake and that, in so doing, Mr. C did not intend to terminate the joint tenancy.

In my opinion, the report does not, in and of itself, provide such clear and convincing evidence of an intention other than to terminate the joint tenancy. For one thing, you have not provided an alternative explanation of what Mr. C was trying to accomplish with such deeds. Nevertheless, this ultimately is a factual determination that must be made by the assessor based upon the submitted evidence.

Four. December 31, 1990: Mr. W C passes away.

Assuming that, at date of death, the property was owned 50 percent by Mr. C and 50 percent by Ms. H as tenants in common, then – in the absence of an applicable exclusion such as the parent-child exclusion – the death of Mr. C would result in a change in ownership of the undivided 50 percent interest in the properties held by him at his date of death. (Property Tax Rule 462.020(a).)

If, on the other hand, the grant deed from Mr. C to himself was ignored, then – in the absence of an applicable exclusion – there would be a 100 percent change in ownership of the properties. Subdivision (b)(2) of Property Tax Rule 462.040 provides that, "upon the termination of the interest of the last surviving original transferor, there shall be a reappraisal of the property as if it had undergone a 100 percent change in ownership." Again, of course, the parent-child exclusion would be available if all the requirements of section 63.1 were satisfied.

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[1] This is not an incorrect answer. The transfer did not just return the property to Mr. Curtis, it divided the property between Mr. Curtis and Ms. Hense.

Five. March 1991: Affidavit--Death of Joint Tenant recorded for the death of Mr. W. C

Assuming that the earlier deed from Mr. C to himself terminated the joint tenancy, this document would have no property tax effect. Assuming the joint tenancy still existed, it would be possibly relevant to the passage of title -- although you list no similar document for the death of Mrs. C -- but it has no particular relevancy for property tax purposes other than to confirm the termination of the interest of the last remaining original transferor.

Conclusion

As indicated above, it is my opinion that the grant deeds that Mr. C recorded in favor of himself created a presumption that the joint tenancy was at that time terminated. At that date, there was a change in ownership as to an undivided 50 percent tenancy in common interest in the real properties, unless, of course, a property tax exclusion was available -- such as the parent-child exclusion under section 63.1. The requirements of section 63.1, however, must be satisfied before the exclusion is available.

In order to overcome the presumption that the joint tenancy was terminated when the deed from Mr. C to himself was recorded, you must present clear and convincing contrary evidence to the county assessor. The ultimate question is one of fact.

I hope the above answers your questions. If not please call me at (916) 324-6593.

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.

Yours very truly,

Robert W. Lambert
Senior Tax Counsel

RWL:jd
h:/property/precednt/coowners/1999/11rwl

cc: Honorable
County Assessor

Mr. Dick Johnson, MIC:63
Mr. David Gau, MIC:64
Ms. Jennifer Willis, MIC:70