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450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
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www.boe.ca.gov

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August 18, 2004

The Honorable Cris Andrews
Shasta County Assessor-Recorder
1500 Court Street, Suite 115
Redding, CA 96001-1694

Attention:
Assessor-Recorder Program Manager

Re: *Change in Ownership—Personal Lifetime Right of Occupancy Agreement*

Dear Mr. Andrews:

This is in response to your letter dated December 8, 2003, requesting our opinion as to whether or not a recorded “Personal Lifetime Right of Occupancy Agreement” (“Agreement”) constitutes a change in ownership of the subject residential real property. You also ask for guidance for future determinations of whether or not a lifetime right of occupancy agreement constitutes a change in ownership. It appears from the copy of the Agreement provided with your letter that the individual retaining the lifetime right of occupancy also retained the right to receive any net rental income generated by the residence. For the reasons set forth below, we conclude that the personal lifetime right of occupancy created by the Agreement at issue is not a change in ownership.

Factual Background

The recitals to the Agreement state: 1) The transferor owns the residential real property at issue as a joint tenant with the transferee;¹ 2) the residence is the transferor’s principal residence; 3) the transferor is executing a gift deed concurrent with the Agreement conveying all of the transferor’s interest in the real property to the transferee; and 4) pursuant to a written agreement, the transferor retains a personal lifetime right of occupancy in the residence.

The substance of the Agreement between the transferor and the transferee is that the transferor, although granting all of her 50 percent undivided interest in the residence to the transferee, retains a personal lifetime right of occupancy in the residence until her death. Pursuant to the Agreement, the transferee may not sell or transfer the residence during the transferor’s lifetime; the transferor is responsible for mortgage payments, taxes, utilities, maintenance, and other costs associated with the residence during her lifetime; the transferee may occupy the residence or rent the residence to a third party only if the transferor is absent from the residence due to the need to move to a hospital or nursing home and specified

¹ This fact adds a potentially interesting variation to the overall tax picture of the transfer at issue, since the transferor apparently owns only an undivided one-half interest in the real property as a joint tenant, rather than 100 percent of the real property. Our analysis, however, will deal with the transferor’s undivided one-half interest only.

conditions are met. Among the specified conditions is the requirement that the transferor receive the net proceeds from the rental of the residence.

Applicable Law and Analysis

Revenue and Taxation Code section 60² defines a “change in ownership” as (1) a transfer of a present interest in real property, (2) including the beneficial use thereof, (3) the value of which is substantially equal to the value of the fee interest. (*Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 162.) Conversely, a transfer that does not meet the three elements of section 60 does not result in a change in ownership. (*Id.*, at p. 165.) Our analysis thus must examine whether the transfer subject to the lifetime right of occupancy created by the Agreement and retained by the transferor satisfied the three elements of section 60. Our analysis should provide you with guidance to make future determinations regarding these types of agreements.

The lifetime right of occupancy purports to create a life estate in real property. Although apparently transferring her undivided one-half interest in the real property to the transferee by gift deed, the transferor retains the right to occupy the residence former lifetime. The transferor thus retains, rather than transfers, a present interest in the real property. The transferee receives a future interest, the remainder, which becomes possessory upon the death of the transferor. For this reason, the transfer does not meet the first element of section 60.

In addition to a present interest in the real property, the transferor retains the beneficial use of her interest in the property. The term “beneficial use” includes the right to occupy the real property or the right to receive the income produced by the real property. (See Cazadd Letter, dated Feb. 8, 1999, enclosed; *Leckie v. County of Orange* (1998) 65 Cal.App.4th 334, 338-339; *Pacific Southwest Realty Co. v. County of Los Angeles*, *supra*, 1 Cal.4th at pp. 163-164.) The Agreement grants the transferor the right to occupy the residence and states that the transferee may not sell the residence during the transferor’s lifetime as this would defeat the transferor’s occupancy right. Further, the transferor retains the right to receive net rental income generated by the residence. These factors indicate the transferor retained, rather than transferred, the beneficial use of the property. Therefore, the second element of section 60 is not met.

Finally, to qualify as a change in ownership, the value of the interest transferred must be substantially equal to the value of the fee interest in the property. As discussed above, the transferor retained the right to occupy the residence for her lifetime, she is responsible for payment of the mortgage and other expenses of the property, and the transferor retained the right to net rental income generated by the residence. These three rights retained by the transferor constitute primary factors in determining the value of the present beneficial interest in the property. Given that the transferor retained these rights, the value of the life interest retained by the transferor is, in our view, equivalent to a life estate in the property.

A life estate is defined as an estate with a duration limited to the life of a person holding it, or to the life of some other person. (*Estate of Smythe* (1955) 132 Cal.App.2d 343, 345-346.) While no particular language is required to create a life estate, any language that reserves in land

² Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

a lifetime interest, right, or privilege for the benefit of the grantor or others and withholds that right or privilege from the operation of the grant creates a "life estate." (*Estate of Smythe, supra*, 132 Cal.App.2d at pp. 345-346; *Victory Oil Co. v. Hancock Oil Co.* (1954) 125 Cal.App.2d 222, 232.) A life tenant receives a present interest in the subject real property, the beneficial use of the subject real property, and the primary interest under the value equivalency test. (*Leckie v. County of Orange, supra*, 65 Cal.App.4th at pp. 338-339.)

As you know the creation of a life estate is a change in ownership, unless the instrument creating the life estate reserves the life estate in the transferor. (Cal. Code Regs., tit. 18, § 462.060, sub.(a). Thus, the transfer subject to the lifetime right of occupancy retained by the transferor, in this case, does not result in a change in ownership.

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/ Reed Schreiter

Reed Schreiter
Senior Tax Counsel

Enclosure [Annotation 220.0786 (C 2/8/99)]

RS:eb

Precedent/Coowners/04/05-rs

cc: Ms. Kristine Cazadd, MIC:82
Mr. David Gau, MIC:63
Mr. Dean Kinnee, MIC:64
Ms. Mickie Stuckey, MIC:62
Mr. Todd Gilman, MIC:70