



(916) 323-7712

November 5, 1981

Dear Mr. :

This is in response to your letter of October 14, 1981, regarding the probate homestead of Laura Miller, deceased. According to your letter and materials attached thereto, C died on February 20, 1968, leaving his separate real property to his three adult children by a prior marriage. The deceased's wife, L petitioned the court for an order setting apart a probate homestead in such real property and such order was issued December 23, 1968. In this regard, the court ordered that the property be set apart to L for the duration of her lifetime, or until her remarriage, or so long as she continues to use said real property as her residence. In the decree of final distribution of the estate of C, the court awarded such real property to the three adult children subject to the probate homestead of L. On May 4, 1980, L died and on February 2, 1981, the three children transferred their undivided 1/3 interests in the property to M. Specifically, you ask whether the property changed ownership on February 20, 1968, date of C's death; on December 23, 1968, date the probate homestead was ordered; or May 4, 1980, date of L's death. (It is undisputed that a change in ownership occurred on February 2, 1981, when the property was transferred to M.)

Did a change in ownership of the property occur on February 20, 1968, the date of C's death?

California Probate Code, Section 300 provides:

When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code [Succession]; but all

of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code [Administration of Estates of Decedents], and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code.

Similarly, Property Tax Rule 462(n) provides as follows:

For purposes of reappraising real property as of the date of change in ownership of real property, the following dates shall be used:

. . .

(3) Inheritance (by will or intestate succession). The date of death of the decedent.

. . .

However, it should be noted that the right of testamentary disposition is subordinate to the authority of the court to appropriate property for the support of the family of the testator and for a homestead for the surviving spouse and minor children. (Estate of Kennedy, 157 Cal. 517.) Thus, the property of a decedent goes to his heirs or devisees subject to the administration of his estate, one of the objects of which is the setting apart of a homestead to the family (Estate of Davis, 86 Cal. App. 2d 263), and to the extent that this power is exercised by the court in any estate, the devisees and legatees take no present beneficial interest at all. (Estate of Kennedy, 157 Cal. 517.) If the homestead is selected from the separate property of the decedent, the homestead vests, on death, in the heirs or devisees of decedent, subject to the power of the court to set it apart for a limited period to the family. (Probate Code, Section 663, in effect in 1968.) If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and subject to such homestead right, the property remains subject to administration. (Probate Code, Section 661, in effect in 1968.)

Based on the foregoing statutes and case law, it appears that title to the property did vest in the three adult children of C on the date of his death. However, since the

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children were not entitled to the beneficial use and a present interest in the property, because their right to possession was subject to a probate homestead for the life of L , we are of the opinion that no change in ownership of the property to the children occurred on February 20, 1968. (See Revenue and Taxation Code, Section 60.)

With respect to whether a change of ownership of the probate homestead occurred on February 20, 1968, please see below.

Did a change in ownership of the property occur on December 23, 1968, the date the probate homestead was ordered?

A homestead right or a right to have a homestead, is not a right which vests under the law of succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. Setting apart a probate homestead is a part of the proceeding in the probate court, as much so as the family allowance. Thus, since a probate homestead is not technically derived from the will of the testator or the laws of intestate succession, it is created by the order of the court setting it apart. (Estate of Wooten, 64 Cal. App. 2d 96; Estate of Kennedy, 157 Cal. 517.) However, since the order to set aside a probate estate in the decedent's separate property for the life of the surviving spouse serves to postpone the present, beneficial interest in the property of the heirs or devisees, we are of the opinion that for change in ownership purposes the order setting aside the probate homestead relates back to the date of death of the decedent when the title vested in the children. In other words, absent the interspousal exclusion provided in Section 63 of the Revenue and Taxation Code, change in ownership would have occurred with respect to the probate homestead to the surviving spouse on the date of death of C rather than on the date of the order. Of course, Section 63 specifically excludes such a transfer from the definition of change in ownership.

Did a change in ownership of the property occur on May 4, 1980, the date of L's death?

As previously discussed above, following the death of C , the court ordered that a probate homestead be set apart for L for the duration of her lifetime or until her remarriage or as long as she continues to use said real property as her residence. While the maximum duration of her interest in the property is for her lifetime, it is uncertain whether her interest could be legally classified as a "life estate". At least two cases suggest that it could. (Estate of Tittel, 139 Cal. 149; Estate of Adams, 228 Cal. App. 2d 264.) In any event,

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the probate homestead set apart for the life of L could certainly be classified as a precedent property interest similar to a life estate. At the time of C's death, the three adult children had a vested future interest in C's separate property which may be either classified as a remainder interest (Estate of Tittel, 139 Cal. 149) or a reversionary interest (24 Cal. Jur. 3d, Decedent's Estates, §477). In this regard, we believe that Section 61(f) of the Revenue and Taxation Code is applicable, which provides in relevant part:

[C]hange in ownership, as defined in Section 60, includes, but is not limited to: Any vesting of the right to possession or enjoyment of a remainder or reversionary interest which occurs upon the termination of a life estate or other similar decedent property interest ....

In conclusion, we believe that:

1. On the date of C's death, his three adult children received title to his separate property subject to L's probate homestead. This did not constitute a change in ownership of the property since they received only a future interest at that time.
2. On the date of C's death, L received a probate homestead by order of the court which was a present property interest similar to a life estate. This did not constitute a change in ownership because of the interspousal exclusion.
3. On may 4, 1980, the date of L's death, C's three adult children received the present beneficial use of C's separate property. This constituted a change in ownership under Section 61(f) of the Revenue and Taxation Code.

I hope this is responsive to your inquiry. If we may be of further assistance to you in this matter, please do not hesitate to contact this office.

Very truly yours,

Margaret S. Shedd  
Tax Counsel

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