STATE OF CALIFORNIA

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March 8, 2000

Honorable Raymond Olivarria
Amador County Assessor
500 Argonaut Lane
Jackson, CA 95642

Dear Mr. Olivarria:

This is in response to your letters of October 4, 1999 to Kristine Cazadd and December 29, 1999 to me requesting our opinion as to the proper application of the parent/child exclusion from property tax change in ownership and reappraisal with respect to a series of transfers of property located in , California. You advise us that this property, a 22.61 acre parcel, on June 8, 1992, was deeded from Father and Mother, as Trustees of the Family Living Trust, to A and B, husband and wife. B is the daughter of Father and Mother, and A and B applied for and were allowed the parent/child exclusion from reassessment pursuant to Revenue and Taxation Code section 63.1 with respect to this transfer.

On May 1, 1998, A and B deeded an undivided 1/3 interest in this 22.61 acre parcel to C, another daughter of Father and Mother. Previous thereto, on April 10, 1998, this property had been subdivided into four parcels by the recordation of a parcel map.[1] Thereafter, in simultaneous transfers recorded June 19, 1998, A and B deeded to C, Parcel 1 of that parcel map, effectively transferring to her the 2/3rds interest in that parcel to which they had previously held record title, and C deeded to A and B Parcels 2, 3, and 4 of that parcel map, effectively transferring back to them the 1/3 interest to which she held record title as to those parcels by virtue of the May 1, 1998 deed. Thus, upon the conclusion of these transfers, C held record title to Parcel 1 outright, and A and B held record title to Parcels 2, 3, and 4.

Parcel 1 is improved with a house. Parcels 2, 3, and 4 are vacant lots. You have developed further information that C has lived in and maintained the house since 1989. It was the intent of Father and Mother, A and B, and C that the property was always intended to be transferred from the Father and Mother to their children, with C to receive the house. However, due to circumstances at the time, C was not able to qualify to "put the mortgage in her name" in 1992. Therefore, it was agreed that the house was to be put in A and B's names, but with the understanding and agreement that C was responsible "to make all mortgage payments, pay the taxes, insurance and upkeep on the property until she was financially secure enough to secure the house and the division was complete." C "did keep up everything and worked hard to establish

[1] In your letter, you indicate that this parcel map was recorded in December 1996. However, the legal descriptions in the subsequent deeds refer to Parcel Map Number 2449, recorded April 10, 1998.

herself so she could qualify to get the house financed." In 1998, the property division was completed and C qualified to get the house refinanced. Father and Mother, A and B, and C all agree that the intent all along was for C to receive the house from Father and Mother, and that in 1998, C "received [legal title to] the house as promised by her parents."

You ask whether, given these circumstances, the assessor can allow the parent/child exclusion for the transfer from Father and Mother to C, where title was not given directly to C, but among the family the house/Parcel 1 was treated as belonging to her? You further ask whether, in order for the exclusion to be allowed, the deeds must be rescinded and re-filed, or may the assessor accept other records to justify the exclusion? For the reasons given below, it is our opinion that, if you find that A and B in 1992 took title to Parcels 2, 3, and 4 themselves and title to the house/Parcel 1 in trust or subject to a holding agreement for C, you could conclude that the transfer of the house/Parcel 1 was from Father and Mother to C, and you could allow the parent/child exclusion for that transfer. Moreover, you could conclude that a trust or holding agreement was imposed and agreed to if sufficient information exists for you to so conclude, even without the rescinding and re-filing of deeds.

As you know, Revenue and Taxation Code section 63.1 provides, in part: "(a) Notwithstanding any other provision of this chapter, a change in ownership shall not include the following purchases or transfers for which a claim is filed pursuant to this section: . . . [¶] (2) The purchase or transfer of the first one million dollars ($1,000,000) of full cash value of all other real property of an eligible transferor in the case of a purchase or transfer between parents and their children."

Thus, the primary question is whether in 1992 Father and Mother transferred any interest in the property to C, to which the parent/child exclusion might apply, or whether that transfer was from Father and Mother solely to A and B. That, in turn, will rest on your conclusion as to whether A and B received the entire beneficial ownership of the property themselves, or whether they received beneficial ownership to parcels 2, 3, and 4, and held legal title only to the house/Parcel 1, in which C held the beneficial ownership.

With respect to the issue of the nature of the ownership interests transferred in a particular real property transaction, Property Tax Rule 462.200 (18 Cal. Code of Regs. §462.200) authorizes assessors to rely on the deed presumption which provides:

> **"(b) DEED PRESUMPTION.** 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.

In overcoming this presumption, consideration may be given to, but not limited to, the following factors:

(1) The existence of a written document executed prior to or at the time of the conveyance in which all parties agree that one or more of the parties do not have equitable ownership interests.

(2) The monetary contribution of each party. The best evidence of the existence of any factor shall be an adjudication of the existence of the factor reflected in a final judicial finding, order, or judgment. Proof may also be made by declarations under penalty of perjury (or affidavits) accompanied by such written evidence as may reasonably be available, such as written agreements, canceled checks, insurance policies, and tax returns."

In addition, Evidence Code section 662 provides:

> "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

Clear and convincing proof has been defined as:

> "clear, explicit and unequivocal", "so clear as to leave no doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." (1 Witkin, *Calif. Evid.* (3d ed. 1986) §160, p. 137)

In *Toney v. Nolder* (1985) 173 Cal.App.3d 791, the plaintiff claimed an interest in real property based on his contention that he and the defendant had an oral partnership agreement. The court held that there is no exception to the standard set forth in Evidence Code section 662 and the plaintiff was required to meet the clear and convincing evidence standard. Under these legal principles, the names appearing on a deed are presumed to own not only legal title to the real property but also beneficial ownership. This presumption can be overcome only by proof that is clear and convincing, that is, evidence that is explicit, unequivocal and leaves no doubt.

However, the following is also applicable to and may be helpful in this situation:

> "It is well established that although a conveyance of lands is absolute in terms, and on its face purports to convey an estate in fee, it may nevertheless be shown that the lands are held by the grantee in trust; and that the terms of such trust may be shown by oral testimony. In order, however, that the lands so

> conveyed may be impressed with a trust, the trust must be created and its terms agreed upon by the parties to the instrument at the time of its execution, or the instrument must be executed in pursuance of a previous agreement. Furthermore, the evidence that will authorize a court to find that a conveyance of lands which is absolute in terms was, in reality, made upon a trust must be clear, satisfactory and convincing. The parties to an instrument which is clear and unambiguous in its terms must be presumed to have intended the legal effect of those terms, unless it is clearly and satisfactorily shown that it was their mutual intention that those terms should have a different effect. The burden of proof to thus vary the terms of the instrument is on the party claiming contrary thereto, and he must establish his allegations by a preponderance of the evidence. The issue is purely one of fact (*Sherman v. Sandell*, 106 Cal. 373, 374-375 [39 P. 797])." *Jose v. Pacific Tile & Porcelain Co.* (1967) 251 Cal.App.2d 141, 144.

It is the role of the assessor to ultimately evaluate the facts to determine the sufficiency and import of the evidence. Utilizing the standards set forth above, particularly paragraphs (1) and (2) of Rule 462.200(b), if you conclude that the presumption is rebutted (based on other documents, C's tax returns, C's monetary contributions, C's insurance, etc.), then C obtained beneficial ownership of the house/Parcel 1 in 1992, and A and B merely held legal title. It is possible that the 1992 deed from Father and Mother to A and B was accompanied by an "oral trust" in favor of C with respect to that portion of the property then occupied by C, or by a "holding agreement" whereby A and B agreed to hold title to the house/Parcel 1 on behalf of C. In either case, the 1992 transfer would be considered, to that extent, a transfer from Father and Mother to C for purposes of the parent/child exclusion. Section 63.1, subdivision (c)(9), provides that the transfer of that portion of the property subject to trust could constitute a transfer subject to the parent/child exclusion.[2] C could file a parent/child claim within 6 months of the date of supplemental assessment. (§63.1(e)(1)(C)). Moreover, if you reach such a conclusion, that fact would then be established and there would be no apparent need for corrective deeding to reflect the transfer from Father and Mother to C.

Subdivision (c)(9) of Section 63.1 provides that, for purposes of that section, "transfer" includes "any transfer of the present beneficial ownership of property from an eligible transferor [e.g., a parent] to an eligible transferee [e.g., a child] through the medium of an intervivos or testamentary trust." In these regards, Property Tax Rule 462.160 provides that the following transfers do not constitute changes in ownership:

> "(b) [¶] (4) The transfer is one to which the parent-child . . . exclusion applies, and for which a timely claim has been made . . .
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> * * *
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> "(d) [¶] (5) Termination results in a transfer to which the parent-child . . . exclusion applies, and for which a timely claim has been filed as required by law."

[2] In this event, the parent/child exclusion applied for and allowed to A and B would have to be revised, reduced, etc.

In regard to "oral trusts," a trust in real property is within the statute of frauds, and generally must be in writing. Probate Code § 15206. An oral trust in real property, however, is not void, but only *unenforceable* when its invalidity is urged by the party to be charged. Hence, only the trustee and his successors may take advantage of the statute. *Cardoza v. White* (1933) 219 Cal. 474, 476. Further, an oral trust is enforceable if the beneficiary, with the consent of the trustee, enters into possession or makes improvements, or changes position in reliance upon the trust. *Haskell v. First Nat. Bank* (1939) 33 Cal.App.2d 399, 402; *Mulli v. Mulli* (1951) 105 Cal.App.2d 68, 73; J*ose v. Pacific Tile & Porcelain Co.* (1967) 251 Cal.App.2d 141, 144.

In Matter of Torrez, (1988) 63 B.R. 751, 827 F.2d 1299, the court reaffirmed the exception to the requirement of a writing for resulting trusts:

> "Under California law, resulting [oral] trust is implied by operation of law whenever a party pays the purchase price for a parcel of land and places title to the land in the name of another."

However, it is well settled that the elements proving both the existence and the validity of a resulting or constructive trust must be established by the party asserting its existence. In Parkmerced Co. v. City and County of San Francisco, (1983) 149 C.A.3d 1091, the court stated on page 1095,

> "... Today it is not at all uncommon for individuals, or corporations such as title companies, to hold "bare legal title" to property for the owner of its beneficial interest. Such a transaction is of the nature of a resulting trust "which arises from a transfer of property under circumstances showing that the transferee has no duty other than to deliver the property to the person entitled thereto, upon demand. And such a transfer, when made, will be of the property's "bare legal title" to the person already entitled to its "beneficial use."
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> "We are brought to a consideration of the uncontroverted material evidence of the case. [¶] ... The partnership was formed for the purpose of acquiring and operating Parkmerced. The partnership agreement provided in part that title to Parkmerced would be held by one of the partners, Parkmerced Corporation, as nominee for the partnership. The transaction's documents were executed by Parkmerced Corporation "on behalf of the partnership," and title to the property was taken in Parkmerced Corporation's name as nominee of, and as authorized by, the partnership."

Whether or not the similar types of facts of a resulting or constructive trust exist in the instant case is a question of fact to be determined by the assessor upon the examination of all the available evidence. A and B must establish that they were the "trustees" of the house/Parcel 1 under a constructive or oral trust created by Father and Mother upon recordation of the 1992 deed. A and B must also establish that they transferred bare legal title only as "trustees" to C by the 1998 deed.

In regard to finding the existence of a holding agreement between the parties, Rule 462.200 (c) contemplates a holding agreement as an arrangement created by a transfer of title from a principal, (e.g. Father and Mother, here) to the holder of title (A and B, here) on behalf of a third party (e.g. C, here).[3] This would require the existence of a written agreement between the Father and Mother and A and B, indicating that at all times A and B were subject to the terms of the holding agreement, were permitted to hold record title only, and that all beneficial use and control remained in C. Since no such agreement or other writing formal or informal has been submitted or referred to in your letters, we will assume for purposes of this analysis that the taxpayers will seek to prove that the holding agreement was oral in nature. An "oral" holding agreement is invalid and necessitates establishing a "resulting trust" discussed above, in which A and B received title to Parcel 1 as the nominee of C.

If you conclude that the 1992 deed must be accepted at its face value, i.e., the presumption is <u>not</u> rebutted, then only A and B have any beneficial interest in the property prior to the 1998 transfers. Those 1998 transfers to C would therefore have resulted in a change in ownership. The parent/child exclusion from change in ownership does not apply to transfers between siblings, and none of the other exclusions appear applicable. Therefore, under those circumstances, it would appear that the transfer of Parcel 1 to C would be a change in ownership.[4]

If, on the other hand, you conclude that the presumption is rebutted and the 1992 deed transferred only legal title as to the house/Parcel 1, then C had equitable or beneficial ownership of the house/Parcel 1, either as the beneficiary of the oral trust, or under a holding agreement, and would be the owner, for property tax purposes. The 1998 transfer from A and B to her is effectively the termination of the trust created by Father and Mother to her, to which the parent/child exclusion would have applied, assuming other requirements are met.

Under this determination, the transfer to C of the house/Parcel 1 by the 1998 deeds, would be considered a transfer of mere legal title; and therefore, not a change in

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[3] Rule 462.200(c) may be applicable to the situation as follows: **"(c) HOLDING AGREEMENTS.** A holding agreement is an agreement between an owner of the property, hereafter called a principal, and another entity, usually a title company, that the principal will convey property to the other entity merely for the purposes of holding title. The entity receiving title can have no discretionary duties but must act only on explicit instructions of the principal. The transfer of property to the holder of title pursuant to a holding agreement is not a change in ownership. There shall be no change in ownership when the entity holding title pursuant to a holding agreement conveys the property back to the principal.
(1) There shall be a change in ownership for property subject to a holding agreement when there is a change of principals.
(2) There shall be a change in ownership of property subject to a holding agreement if the property is conveyed by the holder of title to a person or entity other than the principal."

[4] See footnote 5.

ownership, per Property Tax Rule 462.240.[5] See also Property Tax Rule 462.160. (Ordinarily, "The termination of a trust, or portion thereof, constitutes a change in ownership at the time of the termination of the trust." Rule 462.160(c). However, "The following transfers do not constitute changes in ownership: [¶] (1) . . . Termination results in the distribution of trust property according to the terms of the trust to a person or entity who received a present interest (either use of or income from the property) when the trust was created . . ." Rule 462.160(d).)
It is the functional equivalent of a partition of the property, excludable under section 62(a)(1) ("Change in ownership shall not include: [¶] (a)(1) Any transfer between coowners that results in a change in the method of holding title to the real property transferred without changing the proportional interests of the coowners in that real property, such as a partition of a tenancy in common.")

Again, the parties would bear the burden of proof with respect to the existence of any oral or resulting trust or any holding agreement. The standard of proof is clear and convincing evidence as previously discussed. In summary, if there is evidence that under the 1992 deed, A and B were holding a portion of the property for Father and Mother pursuant to an oral trust or a holding agreement for the benefit of C, then the transfer from A and B of that interest to C by the 1998 deeds would not be considered a change in ownership, but the transfer of bare legal title. Beneficial ownership would have transferred to C by the 1992 deed to A and B, resulting in a change in ownership, that is subject to a possible parent/child exclusion.

The views expressed in this letter are advisory only; 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/ Daniel G. Nauman

Daniel G. Nauman
Tax Counsel

DGN:tr
prop/precdnt/parchild/00/02dgn

cc: Ms. Lyla C. Garcia
Mr. Dick Johnson, MIC:63
Mr. David Gau, MIC:64

[5] Arguably, the May 1998 transfer of a 1/3 interest in the entire property to C, and the June 1998 transfers of the 2/3 interests in Parcels 2, 3, and 4 from C to A and B would each be a change in ownership between siblings and subject the interests transferred to reassessment. However, it appears from the facts presented that the May deed was a mistaken attempt to accomplish the purposes of the apparent trust, and when it was recognized that the transfer of the 1/3 interest was not consistent with having held the house/Parcel 1 in trust for C, the mistake was promptly corrected by the June deeds. It thus appears that the June deeds are, in effect, a reformation of the May deed.

Mr. Charles Knudsen, MIC:64
Ms. Jennifer Willis, MIC:70