

(916) 445-3076

July 14, 1980

Mr. Mark Freed  
Deputy County Counsel  
County Administration Center  
2555 Mendocino Ave.  
Santa Rosa, CA 95401

Dear Mr. Freed:

You requested an opinion from Glenn Rigby on a couple of trust questions. Glenn asked that I respond to your question.

We have seen some examples of the type of trusts you mention. We were of the opinion that in some cases the trust established may be invalid because it was not possible to ascertain a description of the trust property or the beneficiaries of the trust, both of which are necessary requirements for a valid trust. We have advised assessors that under these circumstances to treat the property as a transfer free of trust to the trustee as provided in Section 869a of the Civil Code. We also have advised assessors that when there is doubt about the validity of the trust for these reasons and the trustee is unable or unwilling to supply the required information, the trust should be ignored and treated as an outright transfer to the trustees. If this is the situation with the trusts you describe, then the purported transfer to trustees would be reappraised as to 50 percent of the property. In Case No. 1 in your June 13 letter, the transfer from the husband to the wife would be excluded, but the portion transferred to the third party would be reappraised. In Case No. 2 there would be a second change in ownership for that portion of property that transferred from the third party co-trustee to the husband.

Assuming both trusts are valid express trusts, then there probably would be no change in ownership in either case. Under our view of Section 62(d) of the Revenue and Taxation Code, the transferor or spouse need not be the only present beneficiary to enjoy the exemption. If the transferor or spouse is one of several present beneficiaries, it is sufficient in our opinion to enjoy the exclusion of Section 62(d). However, this brings up a second potential problem.

*Just to be sure*

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There are usually only two types of present beneficiaries, a use beneficiary or an income beneficiary. Either may qualify for the Section 62(d) exclusion. With shares or units as the indicator of who the beneficiary is, it is not clear in which category the beneficiaries fall. In our opinion, if the trustor (or spouse) makes a present use of or receives the income from the trust property, the property would not be reappraised upon its transfer into trust under Section 62(d).

If the trustor (or spouse) does not qualify under this standard, he cannot be a present beneficiary of the trust property even if the certificates indicate otherwise. Under this condition, the entire property would be subject to reappraisal upon the transfer into trust.

The two questions you asked raise a question about the effect of the trust rules on ownership of property for change in ownership purposes. In our view, there is only one change in ownership for property transferred in trust, either upon transfer into trust or upon distribution to the beneficiaries. The only way one can rationalize the result mandated by Section 62(d) is to view either the trustor (when there is no change in ownership) or the equitable beneficiaries (when there is a change in ownership) as the owners of the property. The trustee is never viewed as the owner of the trust property for our purposes even if he has legal title and power to sell. Thus, in the two cases you raise, if there is no change in ownership upon transfer into trust, then the transferor is still considered the owner of the property, and the transfer to the third party as trustee is not a transfer of the ownership of the property. Similarly, if there is a change in ownership upon transfer into trust, the equitable beneficiaries become the owners of the property, and the transfer to a third party as co-trustee or back to the husband as co-trustor from the third party is not a transfer of the ownership of the property.

To answer the second question you raised, whether the interspousal exclusion is cumulative or concurrent, I can only say that if the transfer into trust is not a change in ownership, it simply brings up the possibility of two exclusions instead of one. Once there is a transfer into trust that is a change in ownership, then the interspousal exclusion would come into play and exclude the property from reappraisal. This could be the situation where a husband transfers property to a trust where the husband is not a present beneficiary and the wife is only a future beneficiary. For the most part, we

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have treated transfers into trust as requiring reappraisal or exclusion of all property transferred. We have not attempted to split the ownership between different interests involved in a trust situation. However, we have not rejected completely the idea that in some situations this split of ownership may be appropriate. We don't think the cases you bring up, though, supply the appropriate instance of splitting ownership rights in a trust situation.

Very truly yours,

Robert D. Milam  
Tax Counsel

RDM:fr

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June 13, 1980

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RECEIVED  
JUN 17 1980  
G. A. LEGAL

Re: Trusts

Dear Glenn:

Your opinion about whether there is a change of ownership (and to what extent) in either of the following trusts is respectfully solicited. The trusts are similar, but sufficiently different to be explained individually.

1. In this trust, the husband and wife owned real property as joint tenants. The wife conveyed the property to the husband as his sole property. The husband then created a trust to hold the property and named as co-trustees the wife and a third person. The trustees were given broad powers, including the ability to sell the property for the benefit of the trust. The trust was irrevocable and lasted for 25 years.

The beneficial interest of the trust was divided into 200 shares and the interests declared to be transferrable. In answer to an inquiry posed by the Assessor, the husband advised that he and his wife held some of the beneficial interest, but he would not identify the amount of shares held.

2. In this trust, the husband and wife owned real property. The husband created a trust which named as co-trustees the wife and a third person. The trust was irrevocable and had a life of 25 years. Again, there were broad powers vested in the trustees, including the power of sale. The beneficial interest consisted of 100 transferrable shares and the husband and wife owned some of the shares, but the amount owned is uncertain.

Glenn L. Rigby  
Assistant Chief Counsel

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Immediately after the creation of the trust, the third person co-trustee resigned and the husband was appointed co-trustee. The quit claim deed transferring the property to the trust showed that the husband and the wife conveyed the property to the husband and wife as co-trustees.

As you know, in absence of an interspousal transfer, both of these trusts would be considered to have changed ownership as they would not qualify for exemption under Revenue and Taxation Code section 62(d), because the trusts are irrevocable and the transferor is not "the present beneficiary." However, section 63 overrides section 62 and provides that a change of ownership shall not include "any interspousal transfer."

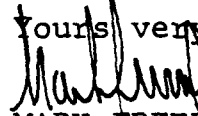
The problems that are apparent are these:

1. All of the commentary in Revenue and Taxation Code and the State Board Rules view the beneficial interest of the trust as the significant interest for purposes of determining whether a change of ownership occurs. (See R. & T. §62(d)(1); §63(a) Rule 462(h)(1)(A) and 462(k)(1)) Yet, the trustee holds legal title (and more than bare legal title) to the property so this interest has to be considered. Section 63 appears to override consideration of whether the beneficial interest or the legal interest is to be evaluated as, in specifying that any interspousal transfer is exempt, both legal and equitable interests would be included.

2. If, as in the first trust, the transfer from husband to wife as a co-trustee exempts that portion (50%) of the transfer from reappraisal, then how is the beneficial interest treated? In other words, are the exemptions cumulative or concurrent? For example, assume that in the first trust, 50% of the transfer is exempt because the spouse is a co-trustee. Assume further that the husband and wife hold 50 of the 200 shares of beneficial interest. Is the exemption cumulative such that 75% (50 + 25%) of the transfer is exempt, or is it concurrent, such that only 50% of the transfer is exempt?

Your consideration of these matters is appreciated.

Yours very truly,

  
MARK FREED  
Deputy County Counsel

MF:jw  
cc: Ernest L. Comalli  
Steve Olsen