STATE OF CALIFORNIA

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February 3, 2009

Re: Grandparent-grandchild Exclusion from Change in Ownership under Revenue and Taxation Code § 63.1
Assignment No. 08-241

Dear Ms. :

This letter is in response to your letter to Randy Ferris, Assistant Chief Counsel, dated October 27, 2008.

You have asked our opinion on whether the grandparent-grandchild exclusion may apply to a transfer from a grandmother to her grandchildren when the daughter-in-law to the grandparent (and mother to the grandchildren) was separated but not divorced from her now-deceased husband and has been estranged from her sons. As explained below, unless she has remarried, in our opinion the exclusion is unavailable because the daughter-in-law to the grandmother is still living and was only separated and not divorced from her now-deceased husband.

FACTS

E F , who died on January 29, 2008, was the trustor of The F Family Trust, your client (the Trust).

Ms. F was predeceased by two adult sons, the named trust beneficiaries: R F (date of death March 31, 2003), and P F (date of death January 4, 2006). R was not survived by any issue, but P was survived by two children who became the vested beneficiaries of the Trust as of the date of E 's death:[1] C , currently 22 years old, and D , currently 20 years old. The sole Trust asset is E F 's principal residence in . C and D live in the house.

[1] The Trust provides that outright distributions shall not take place until each beneficiary turns 25, but this provision does not affect the date of change in ownership or the potential availability of the grandparent-grandchild exclusion.

P F was separated from his wife and the mother of C and D , G F , a.k.a. G H , in 1989. Since then, G has been estranged from her sons and was estranged from P until his death in 2006. G and P never divorced, and we are not aware that G has remarried.

LAW AND ANALYSIS

As you know, Revenue and Taxation Code[2] section 60 defines a "change in ownership" 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. Section 63.1 implements the parent-child and grandparent-grandchild exclusions from change in ownership.

As an initial matter, we note that an eligible grandparent-grandchild transfer includes, but is not limited to, any transfer of the present beneficial ownership of property from an eligible transferor to an eligible transferee through the medium of an inter vivos or testamentary trust. (Rev. & Tax. Code, § 63.1, subd. (c)(9).) 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. Thus, if the requirements of section 63.1 are otherwise satisfied, transfers to and from a trust are eligible for the grandparent-grandchild exclusion.

The terms "parent" and "grandparent" are not specifically defined by statute. Rather, the eligible relationships are defined with respect to the statutory definitions of "children" and "grandchildren." "Grandchild" or "grandchildren" is defined as any child or children of the child or children of the grandparent or grandparents. (Rev. & Tax. Code, § 63.1, subd. (c)(4).) "Children" includes any son-in-law or daughter-in-law of the parents; however, this relationship only exists until the divorce of the parent's child to the son- or daughter-in law, or, if that relationship is terminated by death, until the remarriage of the surviving son- or daughter in-law. (Rev. & Tax. Code, § 63.1, subd. (c)(3)(C).)

While section 63.1 excludes certain transfers between grandparents and their grandchildren from change in ownership, that exclusion only applies when all children of the grandparents who qualify as parents of the grandchildren are deceased, with one exception. Section 63.1, subdivision (c)(2) provides that:

> 'Purchase or transfer of real property between grandparents and their grandchild or grandchildren' means a purchase or transfer on or after March 27, 1996, from a grandparent or grandparents to a grandchild or grandchildren if all of the parents of that grandchild or those grandchildren who qualify as the children of the grandparents are deceased as of the date of the transfer. … [I]n determining whether "all of the parents of that grandchild or those grandchildren, who qualify as the children of the grandparents, are deceased as of the date of purchase or transfer," a son-in-law or daughter-in-law of the grandparent that is a stepparent to the grandchild need not be deceased on the date of the transfer.

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

Under the facts provided, E is a grandparent to C and D and they are her grandchildren. The transfer of E 's principal residence to C and D through the medium of the Trust potentially qualifies for the grandparent-grandchild exclusion as a transfer from E to C and D . However, because G is not C or D 's stepparent, the requirement of section 63.1, subdivision (c)(2), that all parents who qualify as children of the grandparents must be deceased in order to qualify for the grandparent-grandchild exclusion, must be met.

Since G was not divorced from P at the time of his death, under section 63.1, subdivision (c)(3)(C), she remains E 's daughter-in-law and therefore is considered E 's child if she has not remarried. Since there is no evidence that G is deceased, in our opinion the exclusion is unavailable for the transfer from the Trust to C and D .

That G was legally separated from P since 1989 and allegedly estranged from P and her sons for many years does not affect our analysis. The plain language of section 63.1, subdivision (c)(3)(C), is that a son- or daughter-in-law qualifies as a child of a mother-in-law or father-in-law until remarriage if the marriage on which the in-law relationship is based is "terminated" by death or divorce. In our view, the use of the word "terminated" expresses the Legislature's intent that the in-law relationship exists until the marriage no longer legally exists. Legally separated spouses are still married. We therefore do not equate a legal separation, even that of many years, to a divorce for purposes of the parent-child or grandparent-grandchild exclusions, and we do not believe that a county assessor has the authority to do so.

If G were deceased as of the date of E 's death, then the grandparent-grandchild exclusion would be available. Whether a person is deceased for purposes of section 63.1 is a matter of factual determination for the county assessor. We note that under Evidence Code section 667, a "person not heard from for five years is presumed to be dead." However, we are not aware of any authority under which a county assessor could declare a person "estranged" from his or her relatives as "deceased" for these purposes. If you were able to establish to the satisfaction of the assessor that the circumstances of G 's estrangement resulted in her being presumed dead under California law as of the date of E 's death, the exclusion may be available.

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/ Matthew F. Burke

Matthew F. Burke
Tax Counsel

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