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November 16, 2009

Re: *Application of the Grandparent-Grandchild Exclusion*
Assignment No.: 09-144

Dear Mr. _____ :

This is in response to your July 17, 2009, letter to Dean Kinnee, Chief, County-Assessed Properties Division requesting a written opinion as to whether the grandparent-grandchild exclusion would apply to an intestate transfer from a grandfather to his grandchildren when, at the time of the grandfather's death, the grandfather's son/father of the grandchildren was deceased but the grandfather's daughter-in-law/mother of the grandchildren is alive and not remarried. In our opinion, the exclusion is not available because all of the persons who qualify as children of the grandfather and parents of the grandchildren are not deceased. Since the daughter-in-law/mother qualifies as a child of the grandfather because she did not remarry after her husband's death, and she is not a step-parent to the grandchildren, the transfer to the grandchildren is not eligible for the grandparent-grandchild exclusion.

FACTS

Grandfather had three children, two sons and one daughter; however, one son had predeceased him. The predeceased son was survived by his wife, who is grandfather's daughter-in-law (daughter-in-law/mother) and two children (grandchildren). The daughter-in-law/mother had not remarried at the time of grandfather's death in December 2007. Grandfather named his son, daughter, and the daughter-in-law/mother in his will as the beneficiaries of the family home (property). The will was declared invalid and not admitted to probate. The property passed under the laws of intestate succession to the grandfather's surviving son and daughter and the grandchildren. The grandchildren intend that their mother receive a one-third share of the property as intended by the grandfather, and intend to quit-claim their interests in the property to her if they have not done so already. After probate closed, the children and grandchildren filed an application for exclusion with the assessor's office. The assessor granted a parent-child exclusion as to the transfers to the son and daughter, but did not grant the grandparent-grandchild exclusion with respect to the one-third of the property that passed to the grandchildren because the daughter-in-law/mother of the grandchildren is living and not remarried.

LAW

Article XIII A, section 2 of the California Constitution requires the reassessment of real property upon a change in ownership. Revenue and Taxation Code¹ 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. On March 26, 1996, the voters of California passed Proposition 193, which amended section 2, subdivision (h) of Article XIII A of the California Constitution to extend the parent-child exclusion to grandparent-grandchild transfers in certain limited circumstances.

Section 63.1 implements the parent-child and grandparent-grandchild exclusions from change in ownership. As relevant here,² the transfer of a principal residence from a grandparent to a grandchild is eligible for exclusion from reassessment as long as the grandchild has not received a principal residence, or interest therein, through another purchase or transfer that was excluded as a principal residence transfer under section 63.1, subdivision (a)(1) (transfer between parents and children), and the requirements of section 63.1, subdivision (a)(3)(A) are met.

Section 63.1, subdivision (a)(3)(A) provides that a transfer of real property from grandparent to grandchild can only be excluded from reassessment if all of the parents of the grandchild, who qualify as the children of the grandparent, are deceased as of the date of purchase or transfer. However, a son-in-law or daughter-in-law of the grandparent that is a step-parent to the grandchild need not be deceased.³ The term "middle generation" has been used to refer to all of the parents of grandchildren who qualify as the children of the grandparent. (Letter to Assessors (LTA) No. 97/23, June 5, 1997.) Thus, the grandparent-grandchild exclusion applies only when there is no living person belonging to the middle generation who is legally defined as the child of the grandparent and a parent of the grandchild, unless that member of the middle generation is a step-parent to the grandchild.

"Children" is defined in section 63.1, subdivision (c)(3) and includes, but is not limited to, any child born of the parent or any child adopted by the parent, other than an individual adopted after reaching the age of 18 years. (Rev. & Tax. Code, § 63, subd. (c)(3)(A) and (D).) "Children" also includes any son-in-law or daughter-in-law of the parent, until the marriage on which the relationship is based is terminated, or, if the marriage is terminated by death, until the remarriage of the son-in-law or daughter-in-law. (Rev. & Tax. Code, § 63.1, subd. (c)(3)(C).) Thus, a daughter-in-law is a child of her husband's parents until either she divorces her husband or until her husband dies and she remarries. A "grandchild" 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).)

ANALYSIS

The grandparent-grandchild exclusion applies if all persons who qualify as the children of the grandfather and as parents to the grandchildren are deceased as of the date of the transfer or,

¹ All section references are to the Revenue and Taxation Code unless otherwise indicated.

² We assume that all requirements except for those discussed in this letter have been met.

³ Under section 63.1, subdivision (a)(3)(A), beginning with the lien date for the 2006-2007 fiscal year, a son-in-law or daughter-in-law of the grandparent that is a step-parent to the grandchild need not be deceased on the date of the transfer.

if still living, are not barriers to eligibility for the exclusion. In identifying the parents who qualify as the "children of the grandparent," we look first to the father, who was a child of the grandfather and a parent to the grandchildren. Since the father was deceased at the time of the transfer, he is not a barrier to eligibility for the exclusion.

The daughter-in-law/mother is the only other person to consider. The daughter-in-law/mother is a parent to the grandchildren, and is considered a child of the grandfather under section 63.1, subd. (c)(3)(C) because her marriage to son/father was terminated by death and she was not remarried at the time of grandfather's death. Therefore, because she was living at the time of the transfer and is not a step-parent of the grandchildren, the daughter-in-law/mother is a barrier to the grandchildren's eligibility for the exclusion.

CONCLUSION

If it appears that the grandparent-grandchild exclusion is being interpreted too narrowly under these facts, we note that this result is consistent with the intent of Proposition 193 because at the time of the transfer the grandchildren were eligible to receive the full benefit of the parent-child exclusion from their mother. The grandparent-grandchild exclusion is an extension of the parent-child exclusion, not an exclusion in its own right. In the "Argument in Favor of Proposition 193," Assemblyman Knowles states that this proposition was authored to allow taxpayers to decide "whether to permit property to be transferred from grandparents to their own grandchildren *only in cases where both parents are deceased*, so that California families who are caught in this unfortunate situation are not punished due to mere oversight in the law." (Letter to Assessors No. 2008/018, February 27, 2008, p.18, emphasis in original.) We acknowledge the discrepancy between the laws governing intestate succession and property taxation that give rise to this result, but are not aware of any authority that would support the granting of the grandparent-grandchild exclusion on this basis.

The views expressed in this letter are advisory in nature only; they represent the analysis of the legal staff of the Board based on present law and the facts set for herein, and are not binding on any person or public entity.

Sincerely,

/s/ Susan Galbraith

Susan Galbraith
Tax Counsel

SG:yg

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cc: Mr. David Gau MIC:63
Mr. Dean Kinnee MIC:64
Mr. Todd Gilman MIC:70