

Issues for Consideration Re: Prop 19 - Transfer of Primary Residence to Parent's Child or Stepparent's Stepchild

Residences may be owned by only one parent (or partner) outright, or in trust, or joint. Blended families have more complex issues to address.

Where property was inherited 50/50 as separate property to each spouse, title is held in their respective trusts and one homestead is filed. At death, existing estate provisions allow the property of the decedent spouse to be given through a QTIP trust, or "outright", or in the form of a "right to occupy" or as a "life estate" to the surviving spouse. It is not clear how these choices would (or even could be) handled under the proposed one-year occupancy by the Child provision of Prop 19, as discussed further below.

QTIP Trust – The property (real estate, securities, etc.) is placed in a special trust for the surviving spouse with the requirement that all income be paid to the surviving spouse, but any principal or income remaining in the trust then be inherited by the beneficiaries (i.e., the parent's children). The primary reason to use a QTIP is to defer any estate taxes until the death of the second spouse. While estate tax exemptions are very high currently, that is not expected to last, and a more realistic view needs to be considered. It's easy to see, however, that a surviving spouse could live another ten or twenty years, and could also remarry, etc., so a child would be waiting a very long time for any inheritance. The one-year time frame for move in doesn't work. The surviving spouse would already have a homestead.

Outright – The decedent gifts his/her share of the property outright to his/her spouse, no strings attached. The surviving spouse may elect later to gift to the Child or not.

Right to Occupy. The surviving spouse or partner may be given the right to occupy the property during the remainder of his/her lifetime. Right to occupy is not a legal form of title, the surviving spouse has no ownership interest in the property nor is on title. The Trustee of the decedent's trust holds title, so does not file a homestead, even though the spouse lives there. This right is personal and therefore cannot be sold or transferred, however, the surviving spouse or partner may still have responsibility for expenses and property taxes. When the right to occupy does end, then the next beneficiary (Child) would inherit. This could be many years later. The one-year time frame for move

in doesn't work. Instead, a form might be prepared and filed with the County addressing this provision as a "placeholder" for the day the Child can inherit and actually move in.

Life Estate. The surviving spouse or partner may be given a life estate in the real property, which is a form of legal title which the surviving spouse or partner CAN sell (e.g., if he/she has to move, they have the "right" to sell their interest in the real property; i.e., the value of the remaining life to a third party.) Another possibility might be for the parents to establish a life estate for both of them while they are alive, with their children as remaindermen, receiving the property after the last Life Tenant dies. The property could not be sold unless both Life Tenants and the Children all agree, and the Child has no liability for the property while the two Life Tenants live. The one-year provision for the Child to move in does not work. The parents who are both Life Tenants could live another 20 or 30 years or more (depending on when they establish their joint Life Tenancy). Again, perhaps a form can be filed with the County as a "placeholder" identifying the Child(ren) beneficiaries so the first \$1 million protection from property tax increase might be retained for the future event.

Handling of 50% Separate Interest

- 1) The first spouse to die can only give his/her 50% separate interest using one of the above four choices. With the right-to-occupy, no additional homestead is filed (it already exists for the surviving spouse since only one homestead application is filed by the couple.) Same is true for 'outright' gift to spouse who can then bequeath to the Child via his trust. It's not clear if the decedent's 50% share will be reassessed to FMV of the entire residence? If so, this would place a hardship on the surviving spouse! There should be no reassessment as to property taxes until the second spouse dies. If half the residence becomes subject to reassessment for property tax purposes, what would that computation consist of?
- 2) With the surviving spouse receiving a life estate, then he/she does have full title (his/her own 50% ownership plus the remaining 50% life estate ownership) so far as being able to disposition the property, through his/her trust and including selling to a third party (e.g., the decedent parent's Child). In this instance, because the Child buys the property, is the first \$1 million still protected? Or is this only applicable if the surviving spouse gifts or bequeaths the property to the Child?
- 3) And, in the event the spouses place the house in a life estate for both of them while alive, with the remaindermen being the Child, in which case the Child has no rights or obligations

until the second Life Tenant (second spouse) passes away, at which point the Child receives the residence. Would the Child still receive the \$1 million protection against rise in property tax at this point many years later? Again, some kind of form used as a “placeholder” to protect the first \$1 million from reassessment as of the date of establishing the life tenancy might be used and a requirement for obtaining a FMV as of that date to file with the “placeholder” form.

- 4) In the above cases, the one-year move in provision does not work. It is possible that the surviving parent could live many years after the death of the first parent.
- 5) In the case where the Child receives the residence and can move in within the one-year time frame, but then the Child dies the following year, does his/her child also receive the \$1 million protection against rise in property tax (presuming his/her child's other parent is also deceased?)
- 6) In another example, the surviving spouse (parent or stepparent) might also marry again. In this event, different or additional children from the new spouse might become eligible beneficiaries. Again, it would not be feasible to require the decedent's child to move in within one year (or their siblings in succession.) (Seems the record keeping would be burdensome and prone to errors and omissions.)
- 7) With respect to siblings in succession, would that require a new FMV reassessment each time that occurs?
- 8) It's also quite true that estates can and do take years to settle. During this time, the real property remains in the name of the Trustee for the decedent's trust, with the Child waiting to receive his/her bequest. When that finally occurs, I believe the actual transfer date is considered to be the date of the death of the decedent and not the final date of estate settlement. This, in itself, makes it impossible for the Child to file a homestead or take possession of the residence. In fact, the Trustee is responsible for determining the handling of the residence in that interim and in particular, if there is an estate contest. When the Child does finally receive clear title to the property and can file the homestead, any reassessment should be calculated as of the initial date of death and bequest, be it one or 10 years later.

Thank you.

BJ