

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



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81-28

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 17, 1981

R. L. Halperin, State Tax Assessor
State House, Station #24
Augusta, Maine 04333

Dear Mr. Halperin:

This will respond to your request for an opinion on the following questions:

1. Are the gifts of real estate exempt from the real estate transfer tax, 36 M.R.S.A. §4641 et seq.?
2. Are deeds of distribution made pursuant to Title 18-A of the new probate code exempt from the real estate transfer tax?

The Real Estate Transfer Tax Law

The real estate transfer tax is imposed upon the privilege of transferring title to real property. 36 M.R.S.A. §4641-A. The tax is computed at the rate of 55¢ for each \$500 of "consideration" for the real property. Consideration is defined as:

. . . the total price or amount paid, or required to be paid, for real property valued in money, whether received in money or otherwise and shall include the amount of any mortgages, liens or encumbrances thereon. 36 M.R.S.A. §4641(1)

In addition to the imposition of a tax on the transfer of real property, the law requires that any deed^{1/} that is recorded be accompanied by a statement prepared by the parties to the transaction,

1/ Deed is defined as:

. . . a written instrument whereby the grantor conveys to the grantee title in whole or in part to real property. 36 M.R.S.A. §4641(2).

§4641-D.^{2/} It is upon the offering of the deed for recordation, accompanied by the "declaration of value", that the tax must be paid. The amount of tax is computed on the consideration as set forth in the declaration of value. 36 M.R.S.A. §4641-B. The register of deeds is to record the deed only upon the filing of the declaration and the payment of tax.

Gifts of Real Estate

The common definition of gift is a voluntary transfer of property made gratuitously, without consideration. Thus, a gift of real estate occurs when the grantor transfers title in real estate to the grantee without any benefit being conferred upon the grantor by the grantee. Since the real estate transfer tax is imposed upon the privilege of transferring title to real property and the gift of real estate involves the transfer of title, a gift of real estate is not "exempt" from the real estate transfer tax. Thus, in order to record a deed whereby real property is transferred by gift, the deed must be accompanied by a declaration of value. The tax, however, is imposed at a rate based upon the "consideration". When property is received as a gift, no amount in money or otherwise, is paid for it. Therefore, "consideration" is zero, and the tax imposed based upon "consideration" is zero.

Deeds of Distribution

The newly enacted Probate Code (Title 18-A of Maine Revised Statutes Annotated) provides in relevant part:

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.^{3/} 18-A M.R.S.A. §3-907

It seems apparent that a deed of distribution was intended to serve the same purpose as an ordinary deed serves. The deed of distribution is executed by the personal representative acting for the decedent-grantor, for the purpose of showing that the real property has been assigned, transferred or released to the distributee.

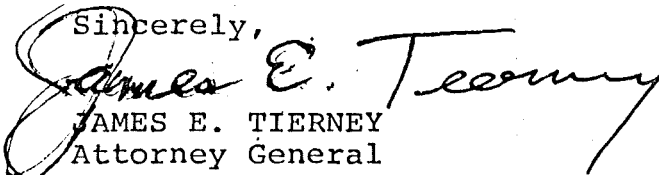
^{2/} Certain deeds, not pertinent to the questions discussed herein, are excepted from the requirement of filing a "declaration of value".

^{3/} Under section 3-711 of the Probate Code, "a personal representative has the same power over the title to property of the estate that an absolute owner would have . . ."

While it could be argued that a deed of distribution is merely evidence of the conveyance of title instead of the device whereby title is actually conveyed, that would be an overly technical reading of the statutory provisions, and one which could be made in the case of any deed. Therefore, we conclude that a deed of distribution is a deed within the Real Estate Transfer Tax Law.

As a "deed", the requirement of filing a declaration of value upon offering the deed for recording would apply, since none of the exceptions of section 4641-D are applicable. However, in most instances, the decedent does not receive any consideration from the distributee for the transfer of the real property. The transfer would then be a gift, and no tax would be due. Whenever the decedent does receive consideration for the transfer of the property by will, the value of the consideration should be supplied on the declaration form and the appropriate tax paid.

I trust that this adequately answers your questions. Please feel free to call on me if I can be of any further service.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET:jg

cc: Senator Thomas M. Teague
Representative Bonnie Post