



Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: July 2, 2019

TO: Honorable Members of the IRA/AGA/Registration Committee

FROM: Matt Brown, Senior Staff Attorney *MB*
Brendan Darrow, Staff Attorney *BD*

SUBJECT: Proposed Amendment to Regulation 503 – Revocable Trusts

Recommendation:

That the IRA/AGA/Habitability Committee approve and recommend that the Board adopt Revisions to Regulation 503, clarifying that the term “natural person” includes a trustee of a revocable trust that owns the subject property under the limited circumstances in which the property is held in trust solely for estate planning purposes.

Background and Need for Rent Stabilization Board Action:

Owner-occupants of duplexes that were owner-occupied on December 31, 1979 are exempt from the Rent Stabilization and Eviction for Good Cause Ordinance, as are owner-occupants who share kitchen or bath facilities with their tenants. Regulation 503 sets forth criteria for assessing “occupancy” by a landlord for purposes of enforcing these occupancy-based exemptions.

During the foreclosure crisis, attorneys for banks successfully argued that their clients had “stepped into the shoes” of foreclosed-upon owners and therefore were entitled to exemptions that apply only to owner-occupants. In 2013, the Board adopted amendments to Regulation 503 to preclude banks, corporations, or other business entities from claiming to “occupy” the property for purposes of evading rent control.

1. Revocable living trusts are not natural persons, but they are controlled by natural persons and are not business entities.

Recently, several landlords who hold their properties in revocable living trusts have inquired about their status under Regulation 503. These concerns were also raised at the meeting of the 4x4 Joint Task Force Committee on Housing on May 21, 2019. The 4x4 Committee unanimously referred the issue to the Rent Board IRA/AGA/Registration Committee for consideration.

Legal staff has evaluated the concerns raised by the public and by the members of the 4x4 Committee and has drafted proposed language that would narrowly permit landlords who hold property in revocable living trusts to claim the exemption to which they would otherwise be entitled, should they exercise their option to revoke the trust.

2. Background on the nature of revocable living trusts.

Revocable living trusts are an instrument created solely for the purpose of avoiding the probate process upon the death of the trustee. A person who creates a revocable living trust *grants* assets to the trust (making that person the “grantor” or “settlor” of the trust). In order for the trust to be revocable, the same person who grants the assets into the trust must also be named as the trustee. The result of this arrangement is that the assets held by the trust do not technically belong to any natural person, thus they do not have to be transferred to heirs by a probate court. There are no tax benefits to creating a revocable living trust; state and federal tax codes treat the grantor/trustee as the owner of the property contained within the trust.

3. Recognizing revocable living trusts can be accomplished without creating new exemptions or avenues for subterfuge.

Members of the 4x4 Committee expressed concerns that allowing a non-person entity to claim exemption would have unintended consequences. Staff has taken care to draft language (attached to this Memorandum) that would apply narrowly and predictably. It would *not* permit a landlord to claim exemption for a property that is owned by another person, or a property that is owned by any sort of business entity. It would *not* permit a landlord to claim owner occupancy of a property that is held in any other type of trust for tax or business purposes. Lastly, the draft language would not permit a landlord to claim exemption for children or spouses who did not own the property before it was held in trust.

No additional exemptions would be created by the proposed language. On the contrary, any exemptions that are not currently recognized by the Board because the property is held in a revocable trust are illusory; the landlord can revoke the trust and gain exemption at any time. The draft language merely corrects an unintended consequence of the Board’s actions to prevent abuse of exemptions by foreclosing banks.

4. Sole beneficiaries of revocable living trusts may be treated as owners upon the death of the trustee(s).

Whereas the trustee of a revocable living trust retains control over property that they grant to the trust, the beneficiaries of the trust do not. However, upon the death of the trustee(s), the beneficiaries take control of the property, and are treated as “owners” for tax purposes. Where multiple beneficiaries are named in the trust, the nature of their control and ownership over the property may be convoluted or even contested. On the other hand, a sole beneficiary has a plain and uncontrovertible right to own the property contained in a revocable trust upon the death of the trustee(s). For that reason, the City of Santa Monica Rent Control Board lost a case in Superior Court on the grounds that the sole beneficiary of a revocable living trust becomes the owner of the trust’s assets upon the death of the trustee (*Solomon v. SMRCB*) In light of that Santa Monica case, staff recommends adoption of a provision that would recognize the sole beneficiary of a revocable trust as the owner for purposes of the Rent Ordinance upon the death of the trustee.

Conclusion

Regulation 503 should be amended to clarify that the term "natural person" includes a trustee of a revocable trust that owns the subject property under the limited circumstances in which the property is held in trust solely for estate planning purposes.

Proposed Regulation 503 is attached hereto. Additions are underlined.

Name and Telephone Number of Contact Person:

Matt Brown, Staff Attorney (510) 981-4930
Rent Stabilization Board

503. Definition of Principal Residence

(A) **Background and Purpose.** Like many of the exemptions listed in Berkeley Municipal Code Section 13.76.050, the exemptions identified in Berkeley Municipal Code Sections 13.76.050F. and 13.76.050G. (Sections 5(f) and 5(g) of the Ordinance) are transitory. A landlord may not claim an exemption pursuant to Sections 5(f) or 5(g) of the Ordinance unless the landlord occupies a unit on the property as his/her principal residence at the time the landlord asserts or claims the exemption.

(B) "Person" limited to "natural person." Only a natural person may claim principal residence in a unit when claiming an exemption under Sections 5(f) or 5(g) of the Ordinance. For purposes of this Regulation, "person" shall mean only a "natural person." A successor in interest is not entitled to the exemptions in either Sections 5(f) or 5(g) of the Ordinance merely because a previous landlord claimed entitlement to one of these exemptions. A bank, corporation, or other business entity may never claim a unit as exempt under Sections 5(f) or 5(g) of the Ordinance as such entities are not natural persons. A natural person who is both the grantor and trustee of a revocable living trust may claim principal residence. The spouse of the trustee of a revocable living trust may claim principal residence only if he or she was a grantor of at least 50% interest in the property at the time it was granted to the trust. A natural person who is the sole beneficiary of a revocable living trust for which all grantor(s)/trustee(s) are deceased may claim principal residence. All applicable criteria set forth in Subsections C and D shall apply equally to natural persons claiming principal residence pursuant to a revocable living trust as if those persons were owners of record.

(C) Principal residence, as used in Sections 5(f) and 5(g) of the Ordinance, is that dwelling place where the person actually resides a majority of the time. For the purpose of this Ordinance, a person may have only one principal residence.

(D) In the determination as to the principal residence status of the dwelling place, the following factors shall be considered:

- (1) whether the person carries on basic living activities at the dwelling place;
- (2) whether the person maintains another dwelling and, if so, the amount of time that the person spends at each dwelling place;
- (3) whether the person has filed for and obtained a homeowner's exemption for the dwelling place;
- (4) whether the person is a registered voter at the dwelling place;
- (5) other relevant factors.

[Effective Date: 11/26/80; renumbered 04/09/99; added new sections A and B, and enumerated sub-section identifiers of new Section D (previously A through D) 06/17/13; _____, 2019.]