

October 4, 2002

Lynne G. Howell, Supervisor of Recording
and Licensing
Circuit Court for Harford County
20 West Courtland Street
Bel Air, Maryland 21014-3783

Re: Tax-Property Article, §12-108(d) and (g)

Dear Ms. Howell:

By letter dated September 4, 2002, you requested advice concerning the recording tax consequences when a deed is recorded whereby a current or former spouse is removed from title, or a new spouse is added to title, to residential property and the deed is accompanied by a refinance deed of trust given by the grantee(s) on the deed. For the following reasons, I have concluded that no State transfer tax or recordation tax is payable on a deed whereby a spouse or former spouse is removed from title or whereby a spouse is added to title. When a refinance deed of trust accompanies a deed whereby a new spouse is added to title, the deed of trust is subject to recordation tax on the amount of debt secured that exceeds one-half of the principal balance due on the prior mortgage or deed of trust that is being refinanced. When the refinance deed of trust accompanies a deed whereby a spouse or former spouse is removed from title, the deed of trust is subject to recordation tax only to the extent the secured debt exceeds the principal balance due on the prior mortgage or deed of trust that is being refinanced.

While your letter refers to the deed as being “for zero consideration,” the conveyance of the half-interest is not without consideration when the grantee is satisfying some or all of the grantor’s liability for a pre-existing debt. Thus, when former spouses jointly owe a prior debt, and one of the spouses agrees, in conjunction with acquiring the other spouse’s half interest in the property, to incur a new debt for which he/she is solely liable and to pay off their joint indebtedness, the consideration payable for the half interest in the property is one half of the debt balance that is being paid. Similarly, when a sole owner of a residence, and sole obligor on the secured indebtedness, conveys a half interest to a new spouse, and both spouses incur a new indebtedness that is being used to pay off the prior debt of the one, the new spouse is not getting the half interest for free; the consideration payable for the half interest in the property is half the balance of the prior debt that the new spouse is helping pay with the proceeds of the new loan for which

the new spouse is jointly liable.

While there is consideration payable for the conveyance from two spouses or former spouses to one of them, or from one spouse to himself/herself and a new spouse, when the deed is accompanied by a refinance deed of trust reflecting the payoff of a prior indebtedness owed by the grantor(s), the deed is exempt from State transfer and recordation taxes pursuant to Tax-Property Article (hereinafter “TP”), §§12-108(d) and 13-207(a)(3).¹ The exemption in §12-108(d) states that “[a]n instrument of writing that transfers property between spouses or former spouses is not subject to recordation tax; that exemption is made applicable to State transfer tax by §13-207(a)(3).² Thus, a deed between spouses or former spouses whereby a spouse is removed from titled or added to title is not subject to State recordation or transfer tax regardless of the amount or nature of the consideration payable.

The next issue relates to whether the deed of trust given by the grantee(s) in conjunction with an interspousal transfer qualifies for application of the refinance exemption under TP §12-108(g) as to the entire principal balance being refinanced or only a portion of the balance. The exemption provides:

(1) In this subsection, “original mortgagor” includes an individual who assumed a debt secured by real property that the individual purchased as a principal residence and who paid the recordation tax on the consideration paid for the property.

¹ When the consideration payable truly is zero, no exemption from tax is needed. Under TP §12-103(a) and 13-203(a), the State recordation and transfer taxes on an instrument of transfer are computed on the “consideration payable.” Tax rate times zero equals zero. When there is consideration payable – the grantor, in exchange for transferring some or all of the grantor’s interest in the real property to the grantee, receives cash or property (real or personal) and/or the benefit of having a debt paid off, forgiven, or assumed – the instrument of transfer is subject to tax unless an exemption applies.

² The statutory exemption from county transfer tax in code counties with home rule under Article XI-F of the Maryland Constitution is the same as for State transfer tax under TP §13-207. *See* TP §13-402.1. However, the statutory exemption from county transfer tax, if any, in counties with a home rule charter form of government under Article XI-A of the Maryland Constitution is limited to the situation when the instrument of transfer is “in accordance with a property settlement or divorce decree.” *See* TP §13-403. Such counties could, by local law, provide an additional exemption from county transfer tax for interspousal transfers made outside the context of divorce. Any circuit court clerk serving as the collector of county transfer tax should consult with the county attorney about the scope and application of any exemptions from such tax.

(2) A mortgage or deed of trust is not subject to recordation tax to the extent that it secures the refinancing of an amount not greater than the unpaid principal amount secured by an existing mortgage or deed of trust at the time of refinancing by the original mortgagor of real property that is used as a principal residence by the original mortgagor.

(3) To qualify for an exemption under paragraph (2) of this subsection an original mortgagor shall include a statement in the recitals or in the acknowledgment of the mortgage or deed of trust, or submit with the mortgage or deed of trust, an affidavit under oath, signed by the original mortgagor, stating:

- (i) that the individual is the original mortgagor;
- (ii) that the mortgaged property is the principal residence of the original mortgagor; and

- (iii) the amount of unpaid principal of the original mortgage or deed of trust that is being refinanced.

There is no question that when a new spouse is added to title and is a co-grantor of the new deed of trust that secures a joint indebtedness used to pay off the prior secured debt of the grantor spouse, the new spouse does not qualify as an "original mortgagor." Not only was the new spouse not a party to the original mortgage, *i.e.* an "original mortgagor" in the true sense of the words, but also the new spouse is not someone who assumed and paid tax on the indebtedness secured by the prior mortgage at the time of purchasing an interest in the property, *i.e.* an "original mortgagor" as defined in TP §12-108(g)(1). Because only one of the two grantors of the new deed of trust qualifies as an "original mortgagor," only half the principal balance due on the prior mortgage should be credited against the amount secured by the new deed of trust when calculating the recordation tax thereon. Moreover, the new deed of trust does not qualify for the purchase-money-deed-of-trust exemption under TP §12-108(i) as to new spouse's share of the secured indebtedness that is being used to pay the prior debt because the deed whereby the new spouse is added to title is not subject to recordation tax on account of the TP §12-108(d) exemption. One of the requirements for a mortgage or deed of trust to qualify as a purchase money mortgage or deed of trust is that the accompanying instrument of transfer be subject to recordation tax. *See* TP §12-108(i)(1)(ii).

The last issue is whether 50% or 100% of the principal balance of the refinanced debt should be credited against the new deed of trust given by one of two spouses, or former spouses, when the deed of trust is given in conjunction with a deed whereby the other spouse, or former spouse, relinquishes his/her half interest in the property. The credit afforded should be 100% of the principal balance due on the prior mortgaged indebtedness being refinanced. The sole grantor of the new deed of trust is an original mortgagor. This is not a case where there is any grantor on the new deed of trust who does not qualify as an "original mortgagor." Therefore, the new deed of trust is not subject to recordation tax "to the extent that it secures the refinancing of an amount not greater than the unpaid principal amount secured by an existing mortgage or deed of trust at the time of refinancing by the original mortgagor of real property that

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is used as a principal residence by the original mortgagor.” See TP §12-108(g)(2).

In summary, a deed conveying property between spouses or former spouses, whereby one is removed from title or added to title, is not subject to any State transfer or recordation taxes, although it may be subject to county transfer taxes if not made pursuant to a divorce decree or property settlement agreement. A refinance deed of trust given in conjunction with a deed whereby a new spouse is added to title qualifies for the refinance exemption only as to half the principal balance due on the mortgaged indebtedness that is being refinanced. A refinance deed of trust given in conjunction with a deed whereby a spouse or former spouse is removed from title qualifies for the refinance exemption for the entire principal balance due on the mortgaged indebtedness that is being refinanced.

To the extent your practice of imposing recordation tax on such refinance deeds of trust has been more liberal than this advice requires – *i.e.* if you have been affording an exemption for the entire principal balance due on the prior mortgaged indebtedness even when a new spouse has been added to title and is a co-grantor of the new deed of trust – I recommend that you afford a grace period and notice of the change in practice before implementing this advice. I suggest that a one-page notice of the above summary be distributed to persons who routinely submit documents for recording and that such notice contain a date after which any former practice that may be inconsistent with this advice will be discontinued.

If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Julia M. Andrew
Assistant Attorney General

JMA/s

cc: All Circuit Court Clerks
David Durfee, Esq.
James F. X. Cosgrove, Esq.
J. Paul Rieger, Jr. Esq.