

The Estate Planning Advisor

Disclaimers

By Richard J. Shapiro, J.D.

One hallmark of an effective estate plan is “controlled flexibility” – that is, a plan that accomplishes the client’s objectives, but within a flexible framework that allows for adjustments necessitated by a changing landscape. A “disclaimer” (also called a “renunciation” under New York law) is a planning tool that provides *after death* planning flexibility. Disclaimers are most effective when the strategy is considered – and planned for – during the client’s lifetime.

A disclaimer in an irrevocable and unqualified refusal to accept an interest in property. The effect of a disclaimer is as if no transfer of property was made to the person making the disclaimer. Under both Federal and New York law, the general rules for a valid disclaimer include (1) the person making a disclaimer must do so no more than nine months after the date of transfer (usually the date of death of the person from whom the property is being disclaimed), (2) the person making the disclaimer cannot have accepted any part of the property interest, or any benefits therefrom, and (3) the disclaimed property must pass without any direction on the part of the person making the disclaimer.

Why would anyone willingly forego an interest in property? There are any number of both tax and non-tax reasons. For example, assume \$3 million of assets is left by a husband in his will directly to his wife. If the wife keeps all the assets and dies in 2008 with the same \$3 million of assets, her estate will pay combined Federal and New York estate taxes of about \$550,000.

If, however, the husband’s will provided that any property disclaimed by his wife were to pass into a “credit shelter trust” created under the husband’s will for the benefit of the wife and the children, the wife might choose to disclaim \$1 million, which would then pass into the credit shelter trust. Upon the wife’s death in 2008, only \$2 million of total assets would be subject to estate taxes, which equates to a total estate tax of \$99,000 – or over \$450,000 less than would be incurred without the disclaimer.

Critical to the success of the disclaimer in the above example is that the husband’s will already included the specific language that provided for the disposition of the assets to the credit shelter trust in the event the wife were to disclaim. Absent such provisions, upon the wife’s disclaimer the disclaimed assets would pass directly to the children. In most cases, the surviving spouse does not want the assets to pass directly to children during her lifetime, but is much more willing to disclaim if she can benefit from the assets left in the trust.

Here’s another example. A man’s will left one-half of his assets to his second wife, and one-half of the assets to his four children from his first marriage. The man was

in the process of revising his estate plan when he died suddenly. However, the dispositions in the man's will were rendered largely moot, as the majority of his \$2 million in assets were in bank accounts left "in trust for" his wife. In this case the wife graciously helped carry-out her husband's wishes by disclaiming a number of those bank accounts. As a result of the disclaimer, those assets passed as if the wife predeceased the husband, and under the will those assets passed to his children.

Could the wife have simply taken the accounts and gifted the assets to the husband's children? While she could have taken that route, any gifts in excess of \$12,000 per year per beneficiary would have affected the wife's own estate and gift tax exemptions. Utilizing a disclaimer avoided use of any of those valuable tax exemptions.

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