Use of Disclaimers in Pre- and Post-Death Planning

Glenn M. Karisch
The Karisch Law Firm, PLLC
Austin, Texas
texasprobate.com

Introduction

- The materials
  texasprobate.com/disclaimer.pdf
  texasprobate.com/disclaimerslideshow.pdf
- The focus
  - A few basics
  - Common problems
  - Using disclaimers in pre-death planning
  - Using disclaimers in post-death planning

Disclaimers are simple, right?

- IRC §2518
- Treas. Regs. §25.2518
- Texas Probate Code Section 37A
- Texas Trust Code Section 112.010

Why Disclaim?

- If it's done right, a disclaimer means that there's no receipt of property or right by the disclaimant and no subsequent transfer
  - Shift property ownership – for example, create a "bypass" gift when one otherwise would not occur
  - Avoid (some) creditors
  - Avoid receipt of "bad" assets
  - Fix messed up estate plans

Disclaimers Must Be “Qualified”

- An irrevocable and unqualified refusal in writing
- Delivered to transferor or legal representative (in Texas: and filed)
- Within 9 months of death or transfer
- No acceptance of the interest or benefits
- Property passes without direction of disclaimant

Within 9 Months

- Of decedent’s death
- Of the date of transfer
  - Inter vivos transfer – date of gift
  - Life estate and remainder interest, vested or contingent – date interest created
  - Disclaimer of disclaimed interest by successors – date interest was created in preceding disclaimant
- Underage disclaimant may wait until age 21

No acceptance of interest or benefits

- Using the property or interest
  - Merely taking delivery of an instrument of title, without more, is not acceptance
- Accepting income from property
- Directing others to act with respect to property
  - Acting in a fiduciary capacity is not acceptance
  - Disclaimer cannot be based on agreement

Disclaimant Cannot Direct Property

- D’oh!
- Disclaimed property just “goes,” it doesn’t always go where it was intended to go
- Disclaimant cannot disclaim “in favor of” another person
- Disclaimed property passes
  - As directed by the will or other instrument
  - In accordance with state law
- Disclaimer cannot be revoked

Creditor/Medicaid Issues

- Disclaimers usually work to avoid creditors
  - Majority of Texas appellate decisions –
    - A disclaimer is not a fraudulent transfer
  - Most pre-petition disclaimers upheld in bankruptcy, but
  - ***Post-petition disclaimer may be set aside***
- Disclaimers do not avoid federal tax liens
- Disclaimers are treated as transfers for Medicaid-qualifying purposes

What Could Possibly Go Wrong?

- Acceptance of interest or benefits
  - Life insurance
  - Joint tenancy with right of survivorship
  - Overzealous advisors
- Not following Texas and federal delivery and filing requirements
- Not properly identifying actual recipients

Using Disclaimers in Pre-Death Planning

- Spousal disclaimer to bypass trust
  - Special rule for spouses: Spouse may disclaim and still receive interest or benefits in property
  - If deceased spouse’s will or trust directs disclaimed property into bypass trust, spouse can be –
    - Trustee
    - Beneficiary (principal limited to ascertainable standard)
  - Spouse cannot have power of appointment

Using Disclaimers in Pre-Death Planning

- Spousal disclaimer to bypass trust
  - Allows “second look”
  - Beneficiary designation planning
    - Outright gift to spouse, disclaimer to bypass trust
      - Life Insurance
      - IRAs, 401(k)s
  - Power of appointment is lost to portion of trust holding disclaimed property

Using Disclaimers in Post-Death Planning

- Utilizing the applicable exclusion amount of the first spouse to die
  - Example: Spouse may disclaim property, permitting it to pass to children
- Utilizing the GST exemption
  - Example: Child may disclaim property, permitting it to pass to skip persons

Using Disclaimers in Post-Death Planning

- Formula disclaimers work
  - Disclaimant as fiduciary may pick and choose assets to fund disclaimer
  - But power to appoint must be limited by an ascertainable standard
- Percentage disclaimers work

Using Disclaimers in Post-Death Planning

- Qualifying trusts for the marital deduction
- Solving joint tenancy with right of survivorship problems
- Solving fractional ownership problems
  - But be careful – know where disclaimed property is going
- Avoiding receipt of “bad” assets
  - Especially useful for charity or foundation

Use of Disclaimers in Pre- and Post-Death Planning

Glenn M. Karisch
The Karisch Law Firm, PLLC
Austin, Texas
texasprobate.com