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Dependent Disclaimers – Who Wields the Power?

*Christina Ciaramella D'Elia, Esq.**

Lengthy opportunities for the confluence of theory and practice tend to escape practitioners on a daily basis. While otherwise immersed in attending to clients and billing hours, this has been a wonderful opportunity to merge the two and meddle in the middle. That being said, while this very specific question of dependent disclaimers is not one confronted on a daily basis, it teases out some central threads of discussion that make up the virtual foundation of estate planning. The use of disclaimers, who a disclaimer will benefit, and how, is of primary importance, but the notion of whether a minor could or should benefit from a disclaimer, as a condition precedent to whether it could or should steer a post-mortem transaction, is a fresh angle on a new question. Additionally, who decides whether, and how, a minor child can disclaim property? The idea that adults and minor children may be treated differently while their interests in property may be the same is also intriguing.

A disclaimer is a refusal or renunciation by an estate beneficiary of a transfer of property,[1] often used to create flexibility in estate planning and to enable a surviving spouse or beneficiaries to take a "second look" at the existing estate plan of a decedent, in the event expected, or unexpected, reasons arise to modify it. With the laws governing federal and state[2] exemption amounts fluctuating over the past 16 years, estate

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1 *See* I.R.C. § 2518(b); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c) (McKinney 2017) (governing qualified disclaimers and renunciations of property under Federal and New York State Law). As I am a New York practitioner, any examples or references to statutes will be in accordance with the laws of New York for purposes of illustration.

2 The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. 107-16, 115 Stat. 38 (2001), The American Taxpayer Relief Act of 2012 ("ATRA"), Pub. L. 112-240, 126 Stat. 2313 (2013), and New York State legislation passed on March 31, 2014, N.Y. TAX LAW § 952 (McKinney 2017), have governed the fluctuations to the state and federal estate tax exemption amounts for the past 16 years.

planning attorneys have commonly drafted wills during that time which contain disclaimer trust provisions to provide maximum post-mortem flexibility to shelter wealth, if possible or necessary. Before the exemption amounts began to steadily increase, and before the law introduced the concept of portability,[3] wills were commonly outfitted with credit shelter trusts to ensure the capture of the (at the time, much lower) exemption amount for each individual. One of the pitfalls of a credit shelter trust, especially in the current estate tax realm, is that without a disclaimer option to revisit an estate plan post-death, a credit shelter trust can be inadvertently overfunded by ordinarily drafted language.[4] When an estate's value does not exceed the exemption amount, often times a surviving spouse is left with a credit shelter trust which holds all of the available wealth. Invading the credit shelter trust to provide basic support wholly undermines its purpose (and can create buyer's remorse for a flawed estate plan). Even the use of an outright disclaimer as a possible remedy under these circumstances could drive wealth directly into the hands of the surviving spouse's issue (if any), producing another potentially undesirable result. A common estate planning rule of thumb is to advise clients when the law changes, and encourage them to advise their attorney if their lives change.

In practice, estate planners commonly encounter surviving spouses who, at the death of a spouse, want to disclaim property into a trust for his or her children (pursuant to such a direction in a will) to accelerate their inheritances. Often, a surviving spouse is financially stable and the children could benefit from gaining access to their inheritances sooner rather than later. In this case, a spouse's disclaimer directly benefits the children, and is not part of a larger post-mortem strategy to benefit the overall estate or all of its beneficiaries. In situations where a disclaimer

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[3] The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, § 303, 124 Stat. 3296, 3302-03 (2010) created the "deceased spousal unused exemption amount" ("DSUEA") which amended I.R.C. section 2010 to calculate a surviving spouse's applicable exemption amount as the lesser of the basic exclusion amount or the basic exclusion amount of the last deceased spouse of the decedent less the amount of the exclusion used by the last deceased spouse, thereby permitting a surviving spouse to "port over" any remaining unused exemption amount of a deceased spouse.

[4] Sample language includes, "a sum equal to the largest amount permitted to pass free of federal and state estate tax by reason of the unified credit; provided, however, that such amount shall be determined after taking into account my adjusted taxable gifts and shall be reduced by (1) the value for federal estate tax purposes of all other items which pass or have passed under other provisions of this Will or otherwise, that are included in my gross estate and which do not qualify for the marital or charitable deductions for federal estate tax purposes and (2) all charges to principal of my estate (other than estate management expenses attributable to property passing under this Will to my husband) that are not allowed as deductions in computing my federal estate tax."

would benefit not a later generation, but would enable a surviving spouse to take advantage of the marital deduction,[5] or would benefit the estate as a whole, to reduce or eliminate an estate tax burden[6] or to preserve shares of a closely-held business,[7] a disclaimer by a child and a subsequent disclaimer by a grandchild seems like a very clever idea.

Lawyers routinely evaluate the proper party to act on behalf of a minor, and when said party can act. When (in New York Surrogate's Court, for instance) the interests of parents and minor children are adverse, a parent cannot fairly represent his or her child in the eyes of the law, and rightly so; the looming notion of a conflict of interest taints the objectivity of the transaction.[8] However, when the interests of parents and minor children are aligned, or "the same,"[9] the potential conflict of interest is seemingly erased. The law of virtual representation authorizes a parent to represent his or her minor child's interest. *But for* the conditional nature of a dependent disclaimer, both parent and child are otherwise disclaiming the *exact same interest*. Once the parent disclaims property, the *same* property passes to the child, to disclaim or not. The interests are not simultaneous and yet not adverse, but merely linear; does that (or should that?) alter the ability of the parent to represent the minor child's interest, especially if, as in *Friedman*, *Horowitz*, and *Goree*, neither party will *actually* receive any property? It seems impossible for a parent to benefit any more than a minor child from a dependent disclaimer, as property moves beyond the reach of either of them, to put both the parent and the minor child in a better position than if the dependent disclaimer had not been made.

However, in order to achieve the desired result, Ms. Guzman discussed the courts' reliance upon the "best interests of the child" test to determine whether a minor can disclaim. As in *Friedman*, *Horowitz*, and *Goree*, the courts' divergent analyses left no answer to *when* such a dependent disclaimer would *ever* be in the best interest of a child. If the minor child's disclaimer is permitted, it ensures that neither the disclaiming adult nor the disclaiming minor will receive any property. When such a post-mortem strategy is meant to benefit all beneficiaries equally by, for example, saving estate tax that may have depleted the estate more substantially than by distribution, or by preserving a family business, an argument in favor of the best interests of an individual child

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5 *In re* Friedman, 7 N.Y.S.3d 845, 845 (Sur. Ct. 2015).

6 *In re* Estate of Horowitz, 531 A.2d 1364, 1366-67 (N.J. Super. Ct. Law Div. 1987).

7 Estate of Goree v. Comm'r, T.C. Memo. 1994-331, 68 T.C.M. (CCH) 123, 123-24 (1994).

8 N.Y. SURR. CT. PROC. ACT § 315 (McKinney 2017).

9 *See id.* § 315(5) ("Representation of persons under a disability. If the instrument expressly so provides, where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the person under a disability.").

simply cannot be made. Thus, a tax-avoidant, wholly beneficial strategy could never be found favorable when minors are involved. Ms. Guzman most appropriately mused that if a standard must be applied, perhaps the fairest way would be to presume the disclaimer meets the best interests of the child, until it doesn't. Otherwise, this appears to be an inconsistent and ineffective standard of review.

Why *must* the dependent disclaimer benefit the minor when it may not similarly benefit the adult also disclaiming? As a minor is legally incapable of making decisions, the law dictates that any decision made on a minor's behalf should be done in its best interests. In traditional applications of this test, in cases of adoption, custody or guardianship, the applicable principles are non-pecuniary and relate to the welfare and relationships of the child and the parents, but they clearly have absolutely no bearing upon the carrying out of an overarching tax-motivated plan for the benefit of a larger set of beneficiaries. Unless the dependent disclaimer strategy threatened to damage a child's familial relationships, this traditional application has no place in the context of this analysis. The courts in *Horowitz* and *Goree* create a fundamental conflict when they consider the dependent disclaimer in the first place (which, regardless of the testator's intent, exists precisely to enable post-death changes), and then overlay a purpose requirement to the application. An adult is permitted to decide freely, with no compelling reason, without considering familial relationships, and with uninhibited motivation to avoid taxes, whether to exercise a right to disclaim to preserve assets or the well-being of the multi-generational family. The courts have deemed such reasons valid for adults, but they do not in any way intersect with the standard by which the same decision may be made on behalf of a minor. As the dependent disclaimer is not predicated upon the benefit or detriment to any one person, if the courts continue to impose a purpose in order for a minor to disclaim, they must then endeavor to create a more uniform standard to apply on behalf of minors to make the strategy beneficial to all parties.

Clients with estates of all sizes try to avoid spending substantial time and money on overly complicated estate plans. We are often greeted by most new clients with the assurance that "this should be very simple." As estate planners who prefer repeat business, we accommodate by drafting creatively and expansively, and we aim to create a comprehensive plan that can hopefully grow with a client, and can also keep him or her feeling secure. And although flexible drafting is, in the opinion of many, a safer practice than drafting for every contingency, there is a pervasive notion that over-relying upon such flexibility can lead to time-consuming and expensive measures to "fix" what may not have been (and perhaps could have been) addressed during the life of the testator.

The facts in *Goree* are particularly relevant to this point.[10] The family of the decedent, who sought to protect a large, multi-generational closely held business, initiated proceedings that progressed all the way to the Tax Court to permit disclaimers of their intestate shares so the surviving spouse could benefit fully from the marital deduction.[11] The time, energy, and resources drained by the proceedings could all have been preserved with the drafting of a simple will! An individual with a $4 million principal asset, the worth of which is immeasurably more valuable as a result of the history and livelihood it has provided for so many members of its family, seems deserving of more than mere dependence upon the default laws of the state. No one can prepare for everything, but there is an old saying in boxing that goes, "never leave it in the hands of the judges" . . . humorously *a propos.*

10 *See Goree,* 68 T.C.M. (CCH) at 123-24.
11 *Id.*