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In *Dependent Disclaimers*,[1] Katheleen R. Guzman shines a spotlight on the difficulty of attempting to achieve a laudable estate tax savings objective, one that would maximize property passing to a decedent's family unit, by disclaiming on behalf of a minor heir such child's potential property interest arising by virtue of the child's parent's own disclaimer, both in favor of the decedent's surviving spouse, in whose hands the property would not be subject to estate tax. Examining *In re Friedman*,[2] she observes that the necessity of filing a petition seeking court approval for such a disclaimer leaves judges to assess the merits of the proposed action within a legal framework that is currently inadequate to permit making a holistic, non-financial best interests determination for the minor.[3] The tax-inefficient estate disposition left to families in this position presents them with the dilemma of resigning themselves to the tax liability or asking their youngest and most vulnerable members effectively to forsake individual inheritances by disclaiming in favor of the collective family good, and presents the courts with the unenviable task of reviewing "through a stilted 'best interests' policy lens"[4] whether to sanction such disclaimers by parents on behalf of children. The taxpayer-friendly goal of maximizing family wealth is certainly a sympathetic one – why write a check to Uncle Sam when the money could instead pass to the grieving widow or widower, sheltered by the estate tax marital deduction, thereby remaining within the family eventually to pass back down to the disclaimants (especially when surely this is what the decedent intended and would have directed had he or she better understood the tax implications)? But the proposal laid out by Professor Guzman, although it illuminates some legal assumptions inherent in the current evaluative framework that are rightly questioned, itself rests on some wobbly legs that should be addressed and

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1 Katheleen R. Guzman, *Dependent Disclaimers*, 42 ACTEC L.J. (forthcoming Apr. 2017) (manuscript at 2) (on file with ACTEC Law Journal).

2 7 N.Y.S.3d 845 (Sur. Ct. 2015).

3 Guzman, *supra* note 1, at 12.

4 *Id.* at 2.

considered, lest the proposed solution inadvertently jettison or undermine sound safeguards for the sake of too few.

One of the key elements of Professor Guzman's proposal is to change the standard of judicial review of petitions to make a dependent disclaimer, from a consideration of the traditional best interests of the minor disclaimant, which she believes currently drives judges "toward a reductionist bottom line"[5] of considering only the financial consequences of the disclaimer – leading to disallowance on account of the potential property passing through the hands of the child to the ultimate taker – to a presumption, if such petitions to disclaim are reviewed at all, that the disclaimer meets the best interests test, with the burden to show otherwise shifted to a party with standing to object.[6] Furthermore, the best interests test should be expanded to allow for consideration of factors other than financial.[7] The other key element of the proposal is adopting the classification of "non-property"[8] for the minor's inchoate expectancy in the property to be disclaimed by the parent, reducing its significance in harmony with the minimal judicial examination standard proposed for a petition by the parent to make the dependent disclaimer.

Although Professor Guzman puts forth strong arguments in support of her proposed best interests presumption, there are questions likely to nag a court that could hinder adoption: Is it safe to presume the parent and child's interests are precisely aligned? For the most vulnerable of minor disclaimants – the only child with no relative other than the parent and grandparent (petitioning to act in collusion to disclaim the child's interest in their presumed collective favor) – who else would have standing to object? Isn't independent court review precisely the protection required in this situation? The risk to the child of permanent loss of property may be too high a price absent it.

It is difficult to argue that the "false binary"[9] created by a too "cramped"[10] view of best interests cannot be improved upon. However, an expansive concept of the best interests of the minor disclaimant, such that an evaluation "would not focus strictly on the financial consequences for the child, but would also consider such important factors as family harmony and stability,"[11] introduces its own difficulties in implementation. The courts are accustomed to evaluating a fiduciary's performance based on financial outcome – the fiduciary accounting

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5 *Id.* at 12.
6 *Id.* at 14.
7 *Id.* at 42-43.
8 *Id.* at 32.
9 *Id.* at 12.
10 *Id.* at 17.
11 *Id.* at 39 (citing Espinosa v. Sparber, 612 So. 2d 1378, 1379 n.1 (Fla. 1993)).

proceeding is premised on precisely that. Such a quantification of best interest is simple to evaluate. Where other non-numeric factors are required or desired to be considered, the prudent fiduciary who seeks to demonstrate due care and diligence may turn to child psychologists or therapists to bolster the court record in support of a decision or action, and a court may require same, mitigating the anticipated saved costs of the proposal.[12] Additionally, although the modified best interests standard proposed is for the specific facts of a dependent disclaimer, and therefore sets the bar for, most likely, the parent of the child disclaimant, it could be viewed as simply a different standard applicable favorably to a family or parental guardian versus a third party fiduciary – one that may not be tenable if the fiduciaries perform and are required to account for similar actions.

Professor Guzman explains quite cogently that the minor dependent disclaimant's interest is "but the doubly contingent possibility of non-expectant and conditional share"[13] – a bundle of rights so nebulous that it warrants classification as "non-property" at best,[14] and, after extensive comparison of the dependent disclaimer to other doctrines by which parents may affect their descendants' property interests relative to the level of review to which the parent is subject upon exercise, concludes that parental review upon making a dependent disclaimer should be "very light indeed."[15] And so in reviewing cases that reached a similar result as *Friedman,* she hones in on "what seems to be a bias against tax-driven disclaimers as much as some concern over how doing so would affect the rights of a minor."[16] Statements in the cited cases lend support to that observation, but it could not be that an aversion to tax savings, or avoidance, is the primary determinant in these rulings. After all, all disclaimers contain a tax-saving element; but for section 2518 of the Code, the affirmative act of refusing to accept a bequest and allowing it to pass to the next taker under a will or pursuant to intestacy would itself generate a gift tax liability for the disclaimant.[17] So permitting any disclaimer at all aids and abets tax savings. With respect to the rarer and circumstance-specific dependent disclaimer, however, the judges whose opinions are cited by Professor Guzman could also simply be less comfortable than she with the notion that the minor disclaimant's interest is "non-property" to be so easily cast aside and facilitated by the court's imprimatur of a favorable decision. The legal

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12 *See id.* at 11-12.

13 *Id.* at 24.

14 *Id.* at 32.

15 *Id.*

16 *Id.* at 17 n.72. *See also id.* at 31 n.151.

17 *See id.* at 5.

rationale as to why minor child B's bundle of sticks "is not even an inchoate expectancy" and "does not even warrant a name"[18] may be sound, but it is not difficult to imagine a judge trying to reconcile the idea that in the hands of minor child B it is a nothing, yet disclaiming that same bundle of sticks results in a very real and substantial estate tax saving to parent and grandparent and ostensibly the extended family unit. Surely, then, it must be worth something to minor child B, and even if not articulable, surely something worth protecting under a conservative approach. Perhaps the court factors in to the value of the bundle of sticks an element that Professor Guzman does not discuss – the role of the unforeseeable proverbial bus. Suppose that, while waiting for the court to issue its decision on whether she could disclaim on behalf of her child, to decide whether she herself will disclaim her vested interest, the parent of minor child B in *Friedman* crosses the street and is struck and killed by the proverbial bus – suddenly, minor child B's bundle of sticks has vested and become a very choate interest. The potential of complete transformation of the bundle of sticks by the wildcard variable of the proverbial bus (or illness, accident, or other cause of death) is perhaps why "the law seems more solicitous of the minor's (as well as other's) rights when the event takes place post-death, which is also when the interests normally vest."[19] It is not difficult, then, to imagine the cautious jurist denying the parent's request to divert the bundle of sticks away from minor child B, even if doing so results in a significant estate tax liability to the family unit, the effects of which will trickle down, hopefully only indirectly, to minor child B.

For estate planners and those sensitive to economic effects, the *Friedman* decision that allowed the incurrence of a deadweight property loss to the family in favor of the United States Treasury was the wrong result. While Professor Guzman's proposal lays a solid beginning foundation for a different legal outcome, the move away from the traditional approach of evaluating dependent disclaimer petitions toward a presumptive best interests default, including consideration of non-financial factors, underpinned by a classification of the minor child's interest to be disclaimed as non-property, could be challenging for courts to immediately accept. It is possible, though, that buttressing aspects of Professor Guzman's novel approach to the legal framework with hard-nosed numbers gleaned from a traditional tax analysis might illustrate to a court the economic impact in a manner that enhances the chances of a positive judicial reception to a dependent disclaimer petition.

Consider the value of minor child B's bundle of sticks sought to be disclaimed. The facts of *Friedman* are clear that in parent's hands, the

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[18] *Id.* at 24.
[19] *Id.* at 32.

bundle is subject to estate tax (the very tax the family unit seeks to avoid and save via the disclaimer). If parent disclaims, the bundle of sticks in B's hands is subject to the same estate tax (hence the need for the dependent disclaimer). However, what is not discussed in the case nor by Professor Guzman is that in B's hands, the bundle will be further reduced by generation-skipping transfer ("GST") tax – an additional level of tax imposed over and above the estate tax to disincentivize wealth transfer across multiple generations to avoid or minimize estate tax – having now passed from grandmother to grandchild. Under section 2603(b) of the Code, the GST tax "shall be charged to the property constituting such transfer"[20] – in other words, not spread among uncle's or grandmother's bundles of sticks, but charged only against B's bundle. To add insult to injury, estate tax is imposed on the portion of the bundle of sticks used to pay the GST tax, and under New York law, that estate tax is apportioned against B's bundle.[21] Meanwhile grandmother's bundle gets the benefit of the marital deduction, meaning that since her share generates no estate tax, it also bears none. The effect of this is that if parent were to disclaim her share or were she to be hit by the proverbial bus, B's interest would be significantly reduced by its tax burden. And, as parent's disclaimer is contingent upon her being able to disclaim on behalf of B, the value of B's bundle reduced by taxes must be further reduced by the probability that parent will ever disclaim or will be hit by the proverbial bus or suffer some other calamity that could cause the bundle to actually vest in B – an appraiser aided by actuarial tables and other information could assist in computing these likelihoods. The final bundle may be much, much smaller than the original one.

The point is that even if the judge were not fully convinced to accept Professor Guzman's classification that B's bundle is non-property, presumably with near-zero value, or to wholly abandon a financial evaluation of B's best interests or to concede to a presumptive best interests default with respect to the dependent disclaimer petition, the legal arguments advanced by Professor Guzman, including the consideration of non-financial best interests factors such as family harmony and stability and overall increased wealth from the sought-after family unit estate tax savings, which can also be quantified, can be weighed against a quantification of B's tax- and vesting probability-shrunken rights absent a permitted dependent disclaimer. The combination of Professor Guzman's novel approaches with a more traditional judicial best financial interests evaluation may be a winning one that achieves the ultimate estate tax savings objective.

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20 I.R.C. § 2603(b).

21 N.Y. EST. POWERS & TRUST LAW § 2-1.8 (McKinney 2014).