

Chapter 7.

Disclaimers, Settlements, and Elections To Take Against the Will

GENERAL CONSIDERATIONS

Sometimes a decedent's best laid plans do not materialize. Assets may appreciate or depreciate in value, an unexpected gift may be received, or a loss may occur. Adjustments may not have kept pace with fast-moving events. Sometimes the decedent was merely careless or neglectful, and at death it's too late to change his (her) plan for disposing of property. Nevertheless, the heirs or legatees can often make certain changes in the plan of disposition through disclaimers, settlements, and the election to take against the will.

DISCLAIMERS

No one is forced to take what is due to him (her) under another person's will or by virtue of the laws of inheritance in the absence of a will. The bequest or legacy can be disclaimed. A disclaimer is defined as the irrevocable and unqualified refusal by a beneficiary to accept property during probate under authority of Section 2518 of the Internal Revenue Code (IRC). Disclaimers can be effectively utilized to realize certain post mortem estate planning benefits that were not established prior to the decedent's death. If a qualified disclaimer is made by someone who does not wish to accept an interest in property, the interest disclaimed will be treated for Federal tax purposes as if it had never been transferred to that person. Additionally, the disclaimant will not be treated as having made a gift, for either estate or gift tax purposes, to the person to whom the interest passes by reason of the disclaimer.

Disclaimer Requirements

Section 2518 of the IRC provides a single set of definitive rules for disclaimers for purposes of the estate, gift, and generation-skipping transfer taxes. To be effective, a disclaimer must be qualified.

Four basic requirements must be met:

- (1) The refusal must be in writing.
- (2) The written refusal must be received by the transferor, his (her) legal representative, the

estate representative, or the holder of legal title to the property not later than 9 months after the day on which the transfer is made, or 9 months after the beneficiary becomes 21 years old.

- (3) The disclaiming party must not have accepted the property, any interest in it, or any of its benefits before making the disclaimer.
- (4) The property disclaimed must pass to someone other than the person making the disclaimer without any direction on the part of the disclaimant. However, a valid disclaimer may be made by a surviving spouse even though the interest passes to a trust in which he (she) has an income interest.

Disclaimer Provisions in the Will.--In the absence of a contrary provision in the will, disclaimed assets go to those persons who would have received them if the disclaiming party had predeceased the estate owner. However, if there is a possibility that a disclaimer might be a useful post mortem tool, it would be advisable to make provision for disclaimers in the will. These could include the requirement that a written statement be delivered to the executor within the requisite time limits, stipulations for disposition of disclaimed bequests, and details as to what is required to assure the effectiveness of a disclaimer for Federal and State tax purposes (various States have further requirements of their own in addition to the Federal requirements listed above). The provision in the will that disposes of a disclaimed bequest is extremely important to the one who is going to disclaim. As noted above, the disclaimant cannot disclaim in favor of anyone of his (her) choice; all that can be done is a refusal to accept the bequest and allow it to pass under the alternate provision in the will.

Disclaimers by the Surviving Spouse

If the surviving spouse's marital deduction bequest provides more than he (she) may need or consume, the additional amount will be includable in his (her) estate. This could result in the beneficiaries of the surviving spouse receiving somewhat less than they might otherwise receive. In such a situation, the

surviving spouse might wish to disclaim all or part of the bequest. If the disclaimer will result in the disclaimed property passing to those whom it is desired to benefit (that is, the children), the property in question would never be included in the surviving spouse's taxable estate. It would pass to the intended beneficiaries without gift tax liability and without any added transfer expenses. A point to consider is that a disclaimer of a marital deduction bequest may serve to increase the estate tax liability of the decedent's estate unless it is made in favor of a charity or the unified credit is available to offset liability. But even if additional estate tax results for the decedent's estate, the disclaimer could possibly reduce the estate tax and administration costs of the disclaimant's estate. These factors would all have to be considered.

Disclaimer in Favor of a Surviving Spouse

If a surviving spouse is to receive a marital deduction bequest considered to be less than adequate for his (her) needs and there are bequests to others, the other beneficiaries may wish to disclaim their bequests in whole or in part. The effect of this strategy would be to increase the marital deduction and thus reduce estate taxes. Internal Revenue Code Section 2056(a) permits an estate tax marital deduction for property disclaimed by a third person that passes in favor of the surviving spouse. If the disclaimed assets are not necessary for the surviving spouse's needs, gifts in the amount of the disclaimed bequests could later be made to the original beneficiaries in installments that would minimize or eliminate gift taxes.

CHARITABLE DISCLAIMERS

Internal Revenue Code Section 2055(a) allows a deduction for a charitable transfer resulting from a disclaimer. For example, if a decedent's will provides that a charity would receive a disclaimed bequest, a disclaimer may reduce estate taxes and, at the same time, take the bequest out of the disclaimant's estate. In this situation, however, there are income tax considerations to be taken into account. If the bequest is accepted and then given to charity, the legatee-donor will get an income tax deduction. The value of that deduction must be weighed against any higher estate taxes resulting from acceptance of the bequest.

WILL SETTLEMENTS

A will contest or settlement can result in a shift of property interests from one beneficiary to another or from a beneficiary named in the will to a person not named. If the contest or settlement is bona fide and at arm's length, the courts have held that no gift results.

ELECTION AGAINST THE WILL

If a will does not give a surviving spouse a prescribed share of the testator's estate, many States permit the surviving spouse "to take against the will." If the surviving spouse makes this election, he (she) will get a larger share of the estate. At the same time, the election may increase the marital deduction, thereby reducing the estate tax.