Problems with the Texas disclaimer statutes and what to do about them

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What we’ll cover

• Use and misuse of disclaimers (only briefly)
• Evolution of Texas disclaimer law
• Problems with the current statute
• Possible solution: the Texas Uniform Disclaimer of Property Interests Act
• Paper and slides: texasprobate.com

Disclaimers can be a useful tool

• Fixing a plan after death
• Tax savings
• Protecting assets from creditors

Photo credit: Beercha
Disclaimers: unpleasant surprises?

- Lots of tricky rules
- Can’t direct property to someone
- Creditor protection may not work
  - Medicaid
  - Post-petition in bankruptcy

Evolution of Texas disclaimer law

Pre-1971: common law
1971 statute

• To clarify existing law, which was vague and unclear
• 6-month deadline
• Failure to comply with all provisions makes a disclaimer ineffective except as an assignment
• Judicial revocation allowed

1977 amendment

• Codifies federal tax disclaimer requirements – sort of
  – 9-month deadline
    • Discrepancy: when 9 months begins to run on future interests
    – Judicial revocation is not permitted
• Permits disclaimers by personal reps and guardians
  – No mention of trustees

1993 amendment

• Codifies the relation back doctrine
  – Dyer v. Eckols
  – Not subject to creditors’ claims
  • Bankruptcy cases
• Permits the testator to direct the disclaimed property
• Permits a partial disclaimer by the surviving spouse

Photo credit: Allen Watkins

1993 amendment

• Codifies the relation back doctrine
  – Dyer v. Eckols
  – Not subject to creditors’ claims
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Photo credit: Thomas R. Machnitzki
Since 1993

- Type of property
- Disclaimer by charitable org
- POA disclaimer
- Reorganized, codified statute
- "Child support obligor"

Equitable rescission of disclaimer

- *Northwest National v. Doucette*  
  - Disclaimer is effective in spite of its probable unintended results
- *Baker Botts v. Cailloux*  
  - Equitable trust remedy not available where executor and attorneys may have breached duties
- *McCuen v. Huey*  
  - Disclaimer ineffective if maker had inadequate knowledge of what was being disclaimed  
  - 2008 case, but applying pre-1971 law

Problems with current statutes

- Must meet *all* requirements to be effective  
  - In writing and notarized  
  - Include "child support obligor" statement  
  - Filed in the probate proceeding within 9 months  
    - Or, in some cases, with the county clerk of the county of domicile or where real property is located  
    - Delivered in person or mailed by registered or certified mail to *and received by* the personal representative within 9 months  
    - Cannot previously have accepted property by taking possession or exercising dominion and control
Practice tips

• Start early
• Line up the personal representative
• Have the personal representative acknowledge receipt of the disclaimer on its face
• Don’t rely on the mailbox rule to meet the filing deadline
• Always mail it and track down the green card
• Follow an established form (“child support obligor”)
• Don’t forget the notary

Problems

• The Texas deadlines don’t match up perfectly with the tax deadlines
• Can you use a disclaimer to keep property out of a trust?
  – Does a trustee have the power to disclaim?
  – The Texas Trust Code disclaimer statute is set up for beneficiary disclaimers
  – Consider:
    • Combined beneficiary and trustee disclaimer
    • Judicial approval under TTC §§ 112.054(a) and 115.001(a)

Possible solution

The Texas Uniform Disclaimer of Property Interests Act
**Uniform Act**

- One coherent statute in the Estates Code
  - No separate statute in the Trust Code
- No state-law time limit for disclaimers
- Less restrictive technical requirements
- Different types of property are specifically addressed
- Expanded fiduciary disclaimers

**Issues with the Uniform Act**

- Fiduciary disclaimers – How broad? How clear?
  - Trustee disclaimers
  - Can a disclaimer be revoked if it was a breach of a fiduciary’s duty?
  - When is court approval required?
  - Borrowed from Florida: a parent may disclaim for a minor child if child would receive property only because of other disclaimer

Please give feedback on the proposed statute:
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**Issues with the Uniform Act**

- Effect on the relation back doctrine
  - We do not want to change the current result
- Jointly held property
- One statute (Estates Code) or two (Estates Code and Trust Code)?
- Dozens of other details

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