Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act

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Partial List of Legal Articles and Papers

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- Co-Author, "Foreign Account Tax Compliance Act and Other Foreign Reporting," 31st Annual Advanced Tax Law, State Bar of Texas, Houston, Texas (2013)
- Co-Author, "Offshore Account Reporting Requirements," 59th Annual Texas CPA Tax Institute, Texas Society of Certified Public Accountants, Dallas, Texas (2012)

Contents

Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act[1]

Like many states, Texas enacted a disclaimer statute in the 1970s as tax-motivated disclaimers became more prevalent. Over the years, the disclaimer statute expanded and spawned a trust-related offspring. Because of this piecemeal development, the existing Texas disclaimer statutes (Chapter 122 of the Estates Code and Section 112.010 of the Trust Code) grew quirky and difficult to follow and created traps for the user. Disclaimers were possible under federal tax law that were not expressly allowed by Texas law.

In 2015, the 84th Texas Legislature enacted the Texas Uniform Disclosure of Property Interests Act,[2] which became effective September 1, 2015. This paper briefly discusses the background of Texas's disclaimer statutes and some of the problems under the former statutes. It then discusses the new Texas disclaimer law and offers a guide to using it. Finally, it discusses issues related to federal law which may affect Texas disclaimers. **Appendix 1** is a table with the statutory language and a section-by-section commentary. Forms implementing the new Texas disclaimer law are attached as **Appendix 2** and are available in Word format at texasprobate.com.

Tom Featherston wrote selected portions of this paper, all of which are cogent and insightful. Glenn Karisch and Julia Jonas wrote the other, messier parts.

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[2] HB 2428.

1. Background of the Texas disclaimer statutes and problems under prior law

Enacted in 1971 and amended by nine legislatures, Texas Probate Code Section 37A ("Section 37A") had been modified in a piecemeal manner for over three decades. The result is currently codified in Texas Estates Code Chapter 122, subchapters A - D ("Chapter 122"). As discussed below, Chapter 122 could be difficult to utilize for several reasons, including the fact that the effectiveness of a disclaimer depends on compliance with technicalities, and that some of the provisions are not consistent with federal law concerning qualified disclaimers for tax purposes.

A. History of Texas Disclaimer Statutes

Many of the idiosyncrasies of Chapter 122 can be explained through a review of the legislative history of Section 37A. Additionally, the legislative history provides insight about the administrative challenges that arose under different configurations of the disclaimer statute.

1. Enactment – 1971

Section 37A was enacted in 1971 as HB 728. The stated purpose of HB 728 was "to clarify the disclaimer law in Texas" because existing disclaimer law was "vague and unclear."[3] As originally enacted, Section 37A consisted of subsections (a) through (f). Fiduciary disclaimers were not addressed under the original statute.

The introductory language in the original statute included the following statement: "Failure to comply with the provisions hereof shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent."[4] Accordingly, to be effective, a disclaimer had to adhere to the technical requirements of each of the six existing subsections, as applicable.

2. Amendments

a. 1977 amendment: coordination with federal tax law

Section 37A was significantly revised in 1977 in response to the Tax Reform Act of 1976.[5] The previous version of Section 37A had permitted disclaimers only within six months after a transfer, but the 1977 amendment extended the deadline to nine months to conform with federal tax law.[6] Additionally, under the original language, a disclaimer could be revoked with judicial approval within nine months after the date

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[3] Bill Analysis, Committee on Judiciary, H.B. 728, 62nd Leg., R.S.
[4] Tex. Prob. Code § 37A (1971) (third sentence).
[5] Bill Analysis, Committee on Judiciary, S.B. 791, 75th Leg., R.S.
[6] Tex. Prob. Code § 37A(a) (1977).

of the transfer.[7] The 1977 amendment eliminated the judicial revocation procedure to be consistent with the requirement under the Internal Revenue Code that a qualified disclaimer be irrevocable.[8]

The 1977 amendment also clarified the timing for disclaimers of future interests for the first time. Specifically, the following language was added to Section 37A(a): "a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property of interest is finally ascertained and his interest is indefeasibly vested."[9] The relevant provision of the Texas Property Code concerning disclaimers of property from an inter vivos trust was almost identical.[10]

The definition of a qualified disclaimer for federal tax purposes uses the following language to define the permissible timing with respect to a disclaimer of a future interest: "not later than the date which is 9 months after . . . the day on which the transfer creating the interest in such person is made . . . ."[11] The Treasury Regulations provide that "[w]ith respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes . . . ."[12] Because of the discrepancy between Section 37A and federal law, a disclaimer of a future interest could be effective under Texas law while not constituting a qualified disclaimer for federal tax purposes.

For example, the disclaimer of a contingent remainder interest in a testamentary trust is subject to different deadlines for treatment as a qualified disclaimer under federal law or as an effective disclaimer under Texas law. In this situation, a qualified disclaimer of a contingent remainder interest that vests upon the death of the lifetime beneficiary must be made within nine months of the decedent's date of death (i.e. the "date on which the transfer creating the interest in [the disclaimant] is made").[13] In contrast, a disclaimer pursuant to Section 37A would be effective so long as it was made within nine months after the death of the lifetime beneficiary (i.e. the "event determining that the taker of the property is finally ascertained and his interest is indefeasibly vested").[14]

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[7] Tex. Prob. Code § 37A(d) (1971)
[8] *See* I.R.C. § 2518(b).
[9] Tex. Prob. Code § 37A(a) (1977).
[10] Former Tex. Prop. Code § 112.010(c-2)(2) (memorandum of disclaimer must be delivered to the trustee "not later than the date that is nine months after the . . . date of the event that causes the taker of the interest to be finally ascertained and the interest to be indefeasibly vested.").
[11] I.R.C. § 2518(b)(2). *See also Jewett v. Comm'r*, 455 U.S. 305, 315-16 (1982).
[12] Treas. Reg. § 25.2518(c)(3)(i).
[13] *See* Treas. Reg. § 25.2518(c)(5) Ex. 1, 3; *Jewett,* 455 U.S. at 305 (under former version of I.R.C. § 2518 requiring disclaimer "within a reasonable time after knowledge of the existence of the transfer", the Court held that "disclaimers of a contingent interest in a testamentary trust, though effective under local law, were not made until 33 years, and thus not 'within a reasonable time,' after the interest was created, the disclaimers were subject to a gift tax . . . .").
[14] Note that the deadline would be the same in the case of a disclaimer of an interest in an irrevocable inter vivos trust pursuant to Tex. Prop. Code § 112.010.

Finally, the 1977 amendment included provisions permitting a personal representative to disclaim property on behalf of an estate or a ward with court approval, and permitting an independent executor to disclaim property on behalf of an estate without court approval.[15]

b. 1993 amendment: relation-back doctrine and other changes

The 1993 Legislature enacted several substantive changes to Section 37A. Prior to 1993, Section 37A provided that a valid disclaimer "shall be effective as of the death of decedent" but did not explicitly address the issue of whether a disclaimer might constitute a fraudulent transfer as to the disclaimant's creditors.[16] In response to the court's holding in *Dyer v. Eckols,* the legislature added language to the initial part of Section 37A codifying the "relation-back" doctrine.

Specifically, the revised statute provided that "[a] disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant."[17] Further, the revised language stated that a disclaimer under Section 37A is not a "transfer" for the purposes of the Business & Commerce Code.

Codification of the relation-back doctrine had significant implications in the state creditor-protection context and in the federal bankruptcy context. For example, federal courts have held that under Texas law, pre-petition disclaimers are effective in the bankruptcy context,[18] but post-petition disclaimers are not effective to remove property from the bankruptcy estate.[19]

The 1993 amendment included language that is applicable when the decedent's will directs the disposition of disclaimed property.[20] The 1993 amendment also clarified that a partial disclaimer by a decedent's surviving spouse did not constitute a disclaimer of any other transfer for the benefit of the surviving spouse.[21]

c. Other amendments

Amendments in 1979, 1987, 1991, 1995, and 2011 revised provisions of Section 37A regarding the types of property that can be disclaimed, the disclaimer procedures applicable to charitable organizations or governmental agencies, and certain terminology. The 2007 amendment authorized court-approved disclaimers by an agent appointed under a durable power of attorney authorizing disclaimers.[22]

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[15] Tex. Prob. Code § 37A (1977) (first sentence).
[16] *See Dyer v. Eckols*, 808 S.W.2d 531, 533-34 (Tex. App.—Houston [14 Dist.] 1991, writ dism'd by agr.).
[17] Tex. Prob. Code § 37A (1993) (second sentence).
[18] *Matter of Simpson*, 36 F.3d 450, 453 (5th Cir. 1994).
[19] *In re Schmidt*, 362 B.R. 318, 326-27 (Bkrtcy W.D. Tex. 2007).
[20] Tex. Prob. Code § 37A (1993) (third sentence).
[21] Tex. Prob. Code § 37A(f) (1993).
[22] Tex. Prob. Code § 37A(a) (2007).

Finally, the 2013 amendment added Estates Code Section 122.107, which provided that a disclaimer by a delinquent child support obligor is ineffective.[23] The 2013 amendment also imposed an affirmative requirement that any memorandum of disclaimer include a statement regarding whether the disclaimant is a child support obligor.[24]

3. Estates Code Chapter 122

Starting on January 1, 2014, Section 37A was replaced by Chapter 122. As part of the codification process, Section 37A, which consisted of seventeen subsections, was reorganized into four subchapters under Chapter 122 of the Estates Code, with 21 total sections.

Despite the many technical additions and the sheer volume of the statute as amended, Chapter 122 retained one provision of the original statute nearly verbatim: "a disclaimer that does not comply with this chapter is ineffective . . . [except] as an assignment of the disclaimed property . . . ." As with the original six-subsection statute, Chapter 122 required technical compliance with all formal requirements to qualify as an effective disclaimer.

B. Equitable rescission of disclaimers

Section 122.004 of the Estates Code stated that a disclaimer that is filed and served as provided in Chapter 122 is irrevocable.[25] This provision is consistent with the requirement of irrevocability for a qualified disclaimer for federal tax purposes.[26] Section 122.004 applied regardless of whether the disclaimant understood how the disclaimed property would be distributed.

For example, in *Northwestern National Casualty Co. v. Doucette*,[27] the Fort Worth Court of Appeals held that an heir's disclaimer of her interest in her father's estate was effective and irrevocable despite the fact that she was mistaken about who the disclaimed property would pass to. The disclaimer recited the disclaimant's belief that the disclaimed property would pass to her mother, the decedent's surviving spouse. However, the disclaimant was unaware that the decedent had legally adopted another child, meaning that the adopted child would receive the disclaimed property. The *Doucette* court upheld the trial court's finding that the disclaimer was valid and irrevocable "in spite of the probable unintended results of the property distribution."[28]

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[23] Former Tex. Est. Code § 122.107.
[24] Former Tex. Est. Code § 122.051(b).
[25] Former Tex. Est. Code § 122.004.
[26] *See* I.R.C. § 2518(b).
[27] *Nw. Nat. Cas. Co. v. Doucette*, 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).
[28] *Id.*at 399.

Similarly, in *Baker Botts v. Cailloux*,[29] the San Antonio Court of Appeals rejected a trial court's award of a constructive trust to compensate a disclaimant for an allegedly mistaken disclaimer. The disclaimant in *Cailloux* disclaimed her interest in her husband's residuary estate, causing significant assets to pass to designated charities. Several years later, after the disclaimant had been diagnosed with Alzheimer's disease, her agent under a durable power of attorney filed a lawsuit against the executor of the husband's estate and the attorneys who had represented the executor and the disclaimant for breach of fiduciary duty among other claims. The jury found that the executor and the law firm had breached their fiduciary duties to the disclaimant by failing to fully and fairly disclose all important information to her. In awarding damages of $65 million against the defendants to be held in a constructive trust for the disclaimant's benefit, the trial court stated that it was exercising its "equitable powers" to "place [the disclaimant] in the position she would have held but for the breach of fiduciary duty … and had she not signed the disclaimer."[30]

The *Cailloux* court determined that the trial court's decision was erroneous because there was no evidence that any breach of fiduciary duty had caused the disclaimant to disclaim her interest in property. Of greater relevance, the court stated that the trial court's imposition of a constructive trust would not have been appropriate even if causation had been proved at trial. This equitable remedy was not appropriate because the defendants did not hold legal title to the disclaimed property. Because the alleged wrongdoers were not the persons who received the property as a result of the disclaimer, the court stated that it was not within the court's equitable powers to order the defendants to return the disclaimant to her pre-disclaimer position.

In contrast to *Doucette and Cailloux*, in at least one case a Texas court has found that a disclaimer may be deemed ineffective if the disclaimant executed the disclaimer in reliance on a factual mistake. In *McCuen v. Huey*, [31] the potential disclaimant executed an affidavit filed with the Alabama court in which his brother's estate was being administered. The affidavit recited "disclaimant's" belief that the specific gift from the decedent to the disclaimant under the will had been adeemed and that he consented to the distribution of all property of the decedent to the residuary beneficiary. Contrary to this belief, the decedent had owned the gifted property (Texas real property) at death.

The heirs of the residuary beneficiary argued that the affidavit should be treated as a disclaimer for the purposes of determining title to the Texas real property. However, the court concluded that the affidavit was not an effective disclaimer because "to be effective, a disclaimer of an inheritance is enforceable against the maker only when it has been made with adequate knowledge of that which is being disclaimed."[32]

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[29] *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied).
[30] *Id.*at 733.
[31] *McCuen v. Huey*, 255 S.W.3d 716, 722 (Tex. App.—Waco 2008, no pet.).
[32] *Id.* at 731.

Note that although the *McCuen* decision was issued in 2008, the purported disclaimer was executed in the 1960s, prior to the enactment of Section 37A. Further, although the *McCuen* court referenced Section 37A in its discussion of the potential disclaimer, it reached its conclusion without considering whether the affidavit satisfied the technical requirements for a statutory disclaimer. Finally, the result in *McCuen* has not been cited in any case decided under Section 37A or Chapter 122. Accordingly, there remained questions as to whether an effective disclaimer under Chapter 122 could be revoked or deemed ineffective based on a mistake of fact.

C. Problems with Chapter 122

1. Must meet all requirements to be effective

Section 122.102 of the Estates Code provided that "a disclaimer which does not comply with this chapter is ineffective" except as an assignment of property. There are 21 sections of Chapter 122 dealing with disclaimers, and many impose requirements. In order for her disclaimer to be effective (a prerequisite to being a qualified disclaimer for federal tax law purposes), the disclaimant had to comply with all of these requirements:

- The disclaimer had to be in writing and notarized.[33]
- It had to include a statement regarding whether the disclaimant was a "child support obligor" whether the disclaimant had minor children, or not.[34]
- It had to be filed in the decedent's probate proceeding,[35] except in some cases it had to be filed with the county clerk's office in the county of the decedent's residence,[36] filed with the county clerk of the county in which real property owned by a non-resident decedent is located,[37] within nine months of the decedent's death,[38] except in the case of a future interest[39] and except if the disclaimant was a charity.[40]
- In addition to the filing requirement, a disclaimer had to be delivered in person to or mailed by registered or certified mail to ***and received by*** the personal representative of the decedent's estate within nine months of the

[33] Former Tex. Est. Code § 122.051(a).
[34] Former Tex. Est. Code § 122.051(b).
[35] Former Tex. Est. Code § 122.052.
[36] Former Tex. Est. Code § 122.053.
[37] Former Tex. Est. Code § 122.054.
[38] Former Tex. Est. Code § 122.055(a).
[39] Former Tex. Est. Code § 122.055 (b).
[40] Former Tex. Est. Code § 122.055(c).

decedent's death,[41] except in the case of a future interest,[42] and except if the disclaimant was a charity.[43]

- The disclaimant could not have "previously accepted the property by taking possession or exercising dominion and control of the property as a beneficiary."[44]

There were similar, but slightly different, requirements for a beneficiary to disclaim an interest in a trust (delivered to the trustee,[45]or, if there was no trustee, to the transferor of the interest or his legal representative[46]).

These requirements were unnecessarily burdensome. For example:

- It should not have been necessary to both ***file*** with the court ***and deliver*** to the executor in order to make the disclaimer effective.
- It should have been possible to send the notice to the executor by courier or delivery service, but the statute required delivery in person or registered or certified mail.
- It should have been sufficient if the notice was ***mailed*** to the executor by the deadline – the disclaimant should not have been required to assure that it was received by the executor by the deadline.
- And, of course, it is ridiculous that a disclaimer may have been ineffective simply because it omitted a statement that the disclaimant was not a "child support obligor."[47]

2. The Texas deadlines didn't match up with the tax deadlines

The deadlines in the Texas statutes clearly were based on the nine-month deadline for qualified disclaimers for tax purposes. However, as discussed above, the Texas deadlines did not match the tax deadlines perfectly.[48]

3. Disclaimer by a trustee

What happened under Chapter 122 or Trust Code Section 112.010 if a trustee disclaimed property which otherwise would have passed into a trust? Would the

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[41] Former Tex. Est. Code § 122.056(a)(1).
[42] Former Tex. Est. Code § 122.056(a)(2).
[43] Former Tex. Est. Code § 122.056(b).
[44] Former Tex. Est. Code § 122.104).
[45] Former Tex. Prop. Code § 112.010(c-2)(2).
[46] Former Tex. Prop. Code § 112.010(c-2)(2).
[47] This requirement was added in 2013. The requirement may be useful in a few child support cases, but failing to include the statement in the 99% of the cases where child support is not an issue should not have made the disclaimer ineffective.
[48] *See "1977 amendment: coordination with federal tax law"* in Article 1 above.

property have passed into the trust? In TAM 8549004, which appears to apply Texas law, the Internal Revenue Service concluded that applicable state law did not permit a trustee to disclaim property to avoid having the property pass into the trust.[49] This was based on three factors:

a. The trustee, as a fiduciary, had no authority to unilaterally renounce a portion of the trust property on behalf of beneficial interests.

b. The beneficiaries, holding equitable title to trust property, were entitled to have the properties distributed to the trust.

c. The state's disclaimer statute did not broaden a trustee's function so as to empower the trustee to unilaterally disclaim property. Rather, it could be used only by persons with beneficial interests.

Texas appellate courts have not ruled on this issue, so it is not clear if a Texas court would agree with this analysis.[50]

Under prior law, if the trustee's disclaimer was accompanied by the beneficiaries' disclaimer of the property, the disclaimers should have been effective to keep the property out of the trust.[51] Further, if the trustee asked a court to approve the disclaimer, the per-se breach of fiduciary duty issue could have been avoided. Section 115.001(a) of the Trust Code permits a court to relieve a trustee from any duty imposed by the trust instrument or by law. Section 112.054(a) of the Trust Code permits a court to direct or permit the trustee to do acts that are not authorized or are forbidden by the terms of the trust.

Still, this was a very long way around the problem. It seems likely that a different result would be reached under the reasoning in TAM 8549004 if state law expressly permitted a trustee to disclaim and if the law clearly provided that the result of the disclaimer would be that the disclaimed property does not pass into the trust.[52]

4. Disclaimer of survivorship property

Federal law permits a disclaimer of survivorship property.[53] Chapter 122 defined a "beneficiary" who is permitted to disclaim as including persons receiving property as a result of the death of another person by community property with right of survivorship, joint tenancy with right of survivorship or by survivorship agreement,[54]

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[49] IRS TAM 8549004 (Aug. 30, 1985).
[50] *See* E. Diane Thompson, Michael J. Cenatiempo, Practical Look at Disclaimers: Does Phaseout of Exemptions and Rate Cuts in New Law Make Disclaimers the Technique of Choice for Most? Risks and Rewards (Including Conflicts and Avoiding Claims by Under-Represented Disclaimants) at 57-61, 26th Annual Advanced Estate Planning & Probate Course (June 2002).
[51] *See* PLRs 8729008, 8804004 and 9745008.
[52] Section 8 of the Uniform Disclaimer of Property Interests Act so provides.
[53] Treas. Reg. § 25.2518-2(c)(4).
[54] Former Tex. Est. Code § 122.001.

but Chapter 122 did not give any more specifics about disclaiming survivorship property.

2. The new Texas Uniform Disclaimer of Property Interests Act

The Texas Uniform Disclaimer of Property Interests Act (the "Texas Disclaimer Act"), which replaces the disclaimer provisions of Chapter 122 of the Estates Code and Section 112.010 of the Trust Code, is effective September 1, 2015.[55] It is found in new Chapter 240 of the Property Code.[56]

The National Council of Commissioners on Uniform State Laws (NCCUSL) first adopted the Uniform Disclaimer of Property Interests Act in 1999. It was last updated in 2010. Eighteen states have enacted versions of the 1999 act.

The Texas Disclaimer Act is divided into four subchapters: Subchapter A – "General Provisions;" Subchapter B – "Type and Effect of Disclaimer;" Subchapter C – "Delivery or Filing;" and Subchapter D – "Disclaimer Barred or Limited." Different types of disclaimers are addressed separately. For instance, disclaimers by individuals of property passing because of a decedent's death are governed by Section 240.0511, while disclaimers of property passing for reasons other than a decedent's death are governed by Section 240.0512, and disclaimers of rights in survivorship property are governed by Section 240.052. Likewise, the delivery or filing requirements applicable to disclaimers depend on the nature of property or interest being disclaimed.

A. Summary of key features of the Texas Disclaimer Act

This paper goes into greater detail about the Texas Disclaimer Act later, but here is a summary of some of its key features:

1. There is just one statute

The Texas Disclaimer Act addresses disclaimers of all types of property in Chapter 240 of the Property Code. There no longer are separate Estates Code and Trust Code statutes.

2. There is no state law time limit for disclaimers

Prior to 1977, federal tax law did not have a hard-and-fast nine-month deadline for qualified disclaimers. Like most states, Texas reacted to the 1977 tax legislation by adopting a nine-month deadline in its statute. However, there is no reason why disclaimers under state law need to be tied to that deadline. As noted above,

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[55] The change in the disclaimer statutes raises issues about which statute to follow if the decedent died prior to September 1, 2015. *See "Effective date issues"* in this article below.

[56] REPTL tried to have the Texas Disclaimer Act placed in Chapter 122 of the Estates Code, since that is where practitioners logically would look for it, but Legislative Council required it to be placed in the Property Code. One of the authors (Tom) likes it this way. There are cross-references to the new statutes in Chapter 122 of the Estates Code and Section 112.010 of the Trust Code.

problems arise because the Texas nine-month deadline does not match perfectly with the tax law deadline. Those problems are eliminated if the Texas statute has no deadline. This is even more relevant in light of the recent increase in the applicable exclusion amount for federal estate tax purposes. Fewer and fewer disclaimers will be tax-based, so there is less and less of a reason to tie Texas's statute to the tax law deadline.

For a more detailed analysis regarding federal preemption issues and other implications of the decoupled deadline, see Article 3 below.

3. There are less restrictive technical requirements

Many of the duplicative and logistically challenging technical requirements applicable under Chapter 122 have been eliminated in the Texas Disclaimer Act. For example, when disclaiming property passing by will or intestacy in an estate subject to administration, the Texas Disclaimer Act permits delivery of the disclaimer to the executor to suffice. It is not necessary also to file a disclaimer in the probate proceeding.

4. Different types of property are specifically addressed

The Texas Disclaimer Act includes provisions that are specifically designed to address unique characteristics of different types of property and ownership structures. For example, there are specific provisions regarding survivorship property and beneficiary designation property which are missing in Chapter 122.

5. Fiduciary disclaimers are expanded with clear rules for different types of fiduciaries

The Texas Disclaimer Act more clearly addresses the disclaimer of interests and powers by fiduciaries. The rules for disclaimers by different types of fiduciaries are stated. Trustees are expressly permitted to disclaim property, causing the property not to pass into the trust. For guardians, dependent administrators and trustees of court-created trusts, prior court approval is required. The trustee of a non-court-created trust may seek court approval or may make the disclaimer without court approval by giving the beneficiaries 30 days' notice. Court approval is required if the effect of the fiduciary disclaimer is to cause the property to pass to the fiduciary individually. The duties of fiduciaries in making disclaimers are clarified.

B. A guide to using the Texas Disclaimer Act

Attached to this paper is a section-by-section analysis of the Texas Disclaimer Act. Here is a discussion of some of the important issues to understand in order to use the new statute.

1. Effective date issues

The Texas Disclaimer Act became effective September 1, 2015, and applies to disclaimers of any interest in or power over property, whenever created.[57] Sections 17 and 18 of HB 2428 provide that the Texas Disclaimer Act applies if the filing and notice provisions under the former law have not elapsed. If the time for filing or delivering notice of a written memorandum of disclaimer under former law has elapsed, the former law applies and is continued in effect for that purpose.

This means that, while the effective date of the act was September 1, 2015, the operative date is December 1, 2014. If the event giving rise to the disclaimer (for example, the death of a decedent) occurred on or after December 1, 2014,[58] the nine-month deadline under the prior law had not lapsed prior to the effective date of the new act, so the new disclaimer rules apply and there is no time limit for disclaiming. If the decedent died November 30, 2014, the nine-month deadline lapsed prior to the effective date, so the old disclaimer rules apply.

2. Illustrating the basics: A non-fiduciary disclaimer in a decedent's estate

What are the keys to disclaiming in the simplest of cases – a disclaimer by an individual of property received from a decedent's estate?

a. There is no deadline, so long as the disclaimer is made before accepting the property.

One of the major changes of the Texas Disclaimer Act is abandonment of the nine-month deadline for disclaimers. A disclaimer still may have to be made within nine months of the decedent's death to be a qualified disclaimer for tax purposes, but a disclaimer can be effective for state law purposes even if it is made more than nine months after the decedent's death.

What sets the state law deadline for a disclaimer under the new statute? *Acceptance.* A disclaimer is barred if "the disclaimant accepts the interest sought to be disclaimed by: (A) taking possession of the interest; or (B) exercising dominion and control over the interest."[59] The "taking possession" and "exercising dominion and control" language was intentionally added to the Texas version of the uniform act so that the acceptance standard under prior law will not change.[60]

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[57] Tex. Prop. Code § 240.003.

[58] Determining the applicable law if the death occurred exactly on December 1, 2014, is tricky. Tex. Est. Code §122.055 provides that the disclaimer must be filed "not later than nine months after the date of the decedent's death." Nine months would fall exactly on September 1, 2015, which is the effective date of the new act. This probably means that the new law applies, but it would be safer to comply with the former law and complete the disclaimer prior to September 1, 2015.

[59] Tex. Prop. Code § 240.151(b)(1). A disclaimer also is barred by a written waiver, if the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest, of the interest sought to be disclaimed is sold under a judicial sale. *See* Tex. Prop. Code § 240.101.

[60] *See* Former Tex. Est. Code §122.104 and former Tex. Prop Code § 112.010 (c-1).

This should make it possible for a debtor who has not filed a petition in bankruptcy to disclaim property more than nine months after a decedent's death and thereby avoid having the property go to the debtor's creditors, so long as the debtor has not accepted the property.[61]

What if the individual wishing to disclaim also is the executor of the estate? No problem. Acceptance of property in a fiduciary capacity is not an acceptance of the property in an individual capacity and does not bar a disclaimer in an individual capacity.[62] Practitioners believe that the same result would have been reached under the former law, but the former law did not expressly state it.

b. What must the disclaimer instrument contain?

To be effective, a disclaimer must be in writing, declare the disclaimer, describe the interest or power disclaimed and be signed by the person making the disclaimer.[63] It does ***not*** need to be notarized, unless of course it must be recorded in the real property records. If the person is disclaiming a partial interest, he or she may express that interest as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.[64]

c. What about delivering or filing it?

If there is a personal representative of the estate, the disclaimer must be delivered to the personal representative,[65] *and* ***it does not have to be filed or recorded anywhere***. It may be delivered by personal delivery, first-class mail, facsimile, e-mail, or "any other method likely to result in the disclaimer's receipt."[66] If that's too loosey-goosey for the disclaimant, there is a safe harbor: if the disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer's receipt, delivery is considered to have occurred ***on the date of mailing regardless of receipt***.[67]

Practice Tip: Take advantage of the safe harbor rule when delivering disclaimers. If the disclaimer is sent by certified mail to an address the disclaimant believes is valid, delivery is deemed to have occurred on the date of mailing even if the recipient never receives the disclaimer.

If there is no personal representative of the estate, the disclaimer must be filed in the official public records of any county in which the decedent was

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[61] *See "1993 amendment: relation-back doctrine and other changes"* in Article 1 above and *"Disclaimant's bankruptcy"* in Article 3 below.
[62] Tex. Prop. Code § 240.151(c).
[63] Tex. Prop. Code § 240.009(a). It also must be delivered or filed as provided elsewhere in the Act (*see "What about delivering it or filing it?"* in this article below).
[64] Tex. Prop. Code § 240.009(b).
[65] Tex. Prop. Code § 240.102(1).
[66] Tex. Prop. Code § 240.101(a).
[67] Tex. Prop. Code § 240.101(b).

domiciled on the date of death or owned real property.[68] Thus, if it is unclear if the decedent was domiciled in Collin County, where her home is located, or in Dallas County, where the nursing home in which she resided at death is located, the disclaimant safely may file the disclaimer in any county in which the decedent owned real property and it will be effective with respect to other real and personal property even if the other property is not located in the county of filing or if the decedent was not domiciled in the county of filing.

d. To whom does the disclaimed property go?

If the will or other instrument creating the interest says where it goes in the event of a disclaimer, the interest goes where the instrument says it goes.[69] Under prior law, the testator or settlor had the ability to control where disclaimers went by including provisions in the instrument. This ability may take on greater importance under the Texas Disclaimer Act because of the abandonment of the nine-month deadline for disclaimers. Currently, many well-drafted wills and trusts address what happens when a surviving spouse disclaims property – causing it to pass into a credit-shelter trust.[70] In the future drafters may come up with more creative ways to plan for disclaimers.[71]

If the instrument does not say where the disclaimed property goes, then it passes as if the disclaimant had died immediately before the decedent's death.[72] There are provisions in the Texas Disclaimer Act that address passage of the property in more unusual cases, such as when the disclaimant is a charity or other non-natural person[73] or when there are unusual facts making it difficult to determine the takers of the property.[74]

e. When is the disclaimer effective?

The disclaimer takes effect as of the time of the decedent's death and relates back for all purposes to the time of the decedent's death.[75] This "relates back" language was intentionally added to the Texas version of the uniform act to make it clear that Texas still follows the relation-back doctrine. A disclaimed interest is not subject to the claims of any creditor of the disclaimant.[76]

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[68] Tex. Prop. Code § 240.102(2).
[69] Tex. Prop. Code § 240.051(d).
[70] This technique is possible because Treas. Reg. § 25.2518-2(e)(2) permits a surviving spouse – and only a surviving spouse – to disclaim property and still to retain an interest in and power over that property without adverse tax consequences.
[71] *See "Anticipating possible disclaimers when drafting estate planning* documents" in Article 4 below.
[72] Tex. Prop. Code § 240.051(e)(2).
[73] Tex. Prop. Code § 240.051(e)(1).
[74] Tex. Prop. Code § 240.0511.
[75] Tex. Prop. Code § 240.051(b).
[76] Tex. Prop. Code § 240.051(b)(2). This may not be the case if the disclaimer is made after the disclaimant is the subject of a bankruptcy proceeding. *See "1993 amendment: relation-back doctrine and other changes"* in Article 1 above and *"Disclaimant's bankruptcy"* in Article 3 below.

3. *Disclaimers of other types of property and in other situations*

One of the benefits of the Texas Disclaimer Act is that it provides specific guidance for disclaiming property received from different sources.

a. *Survivorship property*

To disclaim property passing by right of survivorship, the disclaimant must give notice of the disclaimer to the person to whom the disclaimed interest passes,[77] and the disclaimed interest passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.[78]

b. *Beneficiary designation property*

To disclaim property passing by beneficiary designation:

- If the disclaimer occurs before the interest passing by beneficiary designation becomes irrevocable, the disclaimant must give notice of the disclaimer to the person making the beneficiary designation.[79] Thus, if a son is disclaiming benefits from his mother's IRA while she is still living, he must deliver the disclaimer to his mother, not to the IRA custodian (assuming that the IRA beneficiary designation becomes irrevocable on the mother's death).

- If the disclaimer occurs after the interest passing by beneficiary designation becomes irrevocable, the disclaimant must give notice of the disclaimer to the person obligated to distribute the interest . [80] Thus, if a son is disclaiming benefits from his mother's IRA and the disclaimer occurs after his mother's death, he must deliver the disclaimer to the IRA custodian, since it is the person obligated to distribute the interest.

c. *Trust property*

For a beneficiary to disclaim an interest in a *testamentary* trust, the beneficiary must deliver the disclaimer to the trustee then serving, or, if there is no trustee then serving, to the personal representative of the settlor's estate. If there is no trustee or personal representative then serving, the disclaimer must be filed in the official public record of any county in which the decedent owned property on the date of the decedent's death *or* in the official public records of any county in which the decedent owned real property.[81]

For a beneficiary to disclaim an interest in an *inter vivos* trust, the beneficiary must deliver the disclaimer to the trustee then serving. If no trustee is then serving, the

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[77] Tex. Prop. Code § 240.106.
[78] Tex. Prop. Code § 240.240.052(c).
[79] Tex. Prop. Code § 240.105(b).
[80] Tex. Prop. Code § 240.105(c).
[81] Tex. Prop. Code §240.103.

disclaimer must be filed with a court having jurisdiction to enforce the trust, in the official public records of the county in which the situs of administration of the trust is maintained *or* in the official public records of the county in which the settlor is domiciled or was domiciled on the date of the settlor's death. In addition, if the settlor is alive and the trust is irrevocable, the disclaimer must be delivered to the settlor of the trust or the transferor of the interest.[82]

d. Powers of appointment

The Texas Disclaimer Act has specific provisions regarding disclaimers of powers of appointment or other powers not held in a fiduciary capacity and disclaimers by the appointee of, or object or taker in default of exercise of, a power of appointment.[83]

e. Disclaimer of a power by agent.

In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.[84]

4. A potential trap for those used to using the former law: Delivery to multiple parties

A potential trap under the Texas Disclaimer Act applies if a disclaimant is disclaiming multiple types of property.

Under the former law, a timely delivery of the disclaimer to the personal representative of the estate and a timely filing in the probate proceeding would be

Example 2: Danny wishes to disclaim all property he may otherwise receive because of Teddy's death, regardless of the form in which it passes. Danny is beneficiary of a BigCo life insurance policy, a BadCo life insurance policy and a BigBank IRA. Teddy, Danny and Sue are joint owners of a SmallBank right of survivorship account. Danny is a beneficiary under Teddy's will.

- Under the former Texas law, Danny would perfect his disclaimer (assuming all other requirements were met) by delivering it to the personal representative of Teddy's estate and filing it in Teddy's probate proceeding.
- Under the new law, Danny must deliver disclaimers to:
  - BigCo, which is the entity obligated to distribute the BigCo life insurance proceeds.
  - BadCo, which is the entity obligated to distributed the BadCo life insurance proceeds.
  - BigBank, which is the entity obligated to distribute the BigBank IRA proceeds.
  - Sue, who is the party to whom the disclaimed survivorship interest in the SmallBank account passes. (It does not need to be delivered to SmallBank, and delivering it to SmallBank is not sufficient to make it effective.)
  - The personal representative of Teddy's estate, with respect to all probate property.

[82] Tex. Prop. Code §240.104.
[83] Tex. Prop. Code §§240.054 and 240.055.
[84] Tex. Prop. Code §240.110.

likely to be sufficient to constitute a disclaimer of probate and nonprobate assets.[85] Under the new law, because different persons are entitled to receive delivery of the disclaimers of different types of property, either multiple disclaimers may have to be prepared and delivered to the appropriate recipients or a single disclaimer may have to be delivered to multiple recipients.

If disclaimers must be delivered to multiple persons, should the disclaimant prepare a separate disclaimer for each recipient or one comprehensive disclaimer to be delivered to multiple recipients? Either method should work, so long as the requirements of Property Code Section 240.009 are met: the disclaimer must be in writing, declare the disclaimer, *describe the interest or power disclaimed,* be signed by the person making the disclaimer and be delivered or filed as required by Chapter 240. This means, for example, that a disclaimer of life insurance proceeds should describe the policy and its proceeds as the "interest or power disclaimed;" it probably is not sufficient to say that the person is disclaiming all property passing by reason of the death of the decedent since that does not describe the insurance proceeds specifically.

5. Fiduciary disclaimers

The Texas Disclaimer Act has extensive provisions governing disclaimers by fiduciaries such as guardians, personal representatives, agents, and trustees. Fiduciary disclaimers are different from individual disclaimers because of the dual roles the fiduciary plays.

The person serving as fiduciary has individual interests and powers. For example, a trustee has the power to make distributions to trust beneficiaries based on the standard in the trust instrument. The person serving as trustee may wish to disclaim a power over property which he or she does not wish to hold or which might cause tax or creditor problems if he or she held it. The person may wish to disclaim an undesired power even before beginning to serve as fiduciary.

As a fiduciary, the person serves as a representative of another (as in the case of a guardian, executor, administrator or agent) or as the holder of legal title for the benefit of beneficiaries (as in the case of a trustee). In representing a ward, estate or agent or in acting on behalf of a trust, the fiduciary may wish to disclaim interests or property which otherwise would pass to the ward, estate, agent or trust.

While in many respects the same issues affecting individual disclaimers also affect fiduciary disclaimers, the Texas Disclaimer Act specifically addresses those issues which are unique to fiduciary disclaimers.

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[85] *See* Former Tex. Est. Code § 122.056(a). If some of the property being disclaimed was trust property, it also may have been necessary to deliver the disclaimer to the trustee of the trust. *See* Former Tex. Prop. Code § 112.010(c-2).

a. Disclaimer of powers by a person designated to serve as or serving as a fiduciary

What if a trust instrument gives the named trustee powers which would constitute a general power of appointment? The designated individual may be willing to serve as trustee, but not if the trust property would be subject to his creditors or included in his estate for tax purposes. The answer, of course, is that the individual may disclaim the offending powers. How does this work, and what issues may arise?

Section 240.007 addresses disclaimers of this type in detail. It permits the person designated to serve as, or serving as, fiduciary the power to disclaim any power over property, including a power of appointment and the power to disclaim.

If the person is designated to serve as a trustee, the disclaimer of this power could affect beneficiaries' rights. For example, if the trustee wishes to disclaim the power to make distributions for the beneficiaries' "comfort," the disclaimer may solve a tax problem for the trustee-designate, but it also may eliminate a beneficiary's right to receive distributions for comfort. The Texas Disclaimer Act addresses this situation by:

- Requiring the person to disclaim this type of power only on or after accepting the trust.
- Making it clear that the disclaimer must be compatible with the trustee's fiduciary obligations.[86]

If the trustee is serving when the disclaimer is made, the trustee owes the beneficiaries fiduciary duties and the disclaimer must be compatible with those duties. If the disclaimer improperly and adversely affects a beneficiary's rights, the beneficiary has recourse against the trustee. Of course, because in many cases a disclaimer of distributive powers will not harm the beneficiaries and will provide tax benefits, giving the trustee the ability to disclaim is worthwhile.

This requirement – that a trustee must first begin to serve as trustee before disclaiming a power affecting beneficiaries' distributive rights – does not apply to other types of fiduciaries or to trustees if the power being disclaimed does not affect beneficiaries' rights. In these other situations, the person designated to serve as a fiduciary may disclaim the power before beginning to serve as a fiduciary.[87] This means that the person does not owe fiduciary duties to the beneficiary when the disclaimer is being made.

b. Fiduciary duties versus court approval

As discussed below, some fiduciary disclaimers require court approval, while others do not. Whether or not it is required, "unless a court of competent jurisdiction

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[86] Tex. Prop. Code § 240.007(b).
[87] Tex. Prop. Code § 240.007(a).

approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary's fiduciary obligations."[88] Thus, if a fiduciary goes ahead with a disclaimer without court approval, he or she faces potential liability for breach of fiduciary duty.

An independent executor has a duty to collect the assets of the decedent's estate. A trustee has a duty to preserve the trust's corpus. How can an independent executor or trustee ever disclaim without breaching his or her fiduciary duties? The Texas Disclaimer Act addresses this by saying a disclaimer by a fiduciary acting in a fiduciary capacity "is not a per se breach of the fiduciary's fiduciary obligations."[89] This avoids the absurdity of having the Texas Disclaimer Act permit fiduciary disclaimers without court approval but making them impossible by imposing fiduciary duties.

If fiduciary disclaimers are subject to fiduciary duties "unless a court of competent jurisdiction approves the disclaimer," does that mean that fiduciaries who obtain court approval cannot be challenged later for the decision to disclaim? This is a logical reading of the statute and probably is how it will be construed. Still, the statute stops short of saying that a fiduciary obtaining court approval has no fiduciary duties with respect to the decision to disclaim.

c. Equitable remedies voiding the disclaimer are not available

If a beneficiary successfully shows that a fiduciary breached his or her fiduciary obligations in making a disclaimer, can a court declare the disclaimer to be void or otherwise make the disclaimer ineffective? No. The Texas Disclaimer Act expressly decides the equitable rescission issue for fiduciary disclaimers: "Possible remedies for a breach of fiduciary obligations do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the disclaimer ineffective."[90] The beneficiary is limited to other remedies – damages or removal, for example. The reason for this provision is to provide finality and certainty about the effect of a disclaimer.

Does this completely eliminate the possibility of an equitable rescission of a disclaimer? In *McCuen v. Huey*,[91] discussed above, the court held a disclaimer to be ineffective based on a mistake of fact. Even though the Texas Disclaimer Act precludes rescission of a ***fiduciary*** disclaimer as a remedy for breach of fiduciary duty, the act does not explicitly address rescission of disclaimers in any other context (such as a disclaimer by an individual, or a disclaimer by a fiduciary that did not constitute a breach of fiduciary duty).

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[88] Tex. Prop. Code § 240.008(f).
[89] Tex. Prop. Code § 240.008(f).
[90] Tex. Prop. Code § 240.008(g).
[91] *McCuen v. Huey*, 255 S.W.3d 716, 722 (Tex. App.—Waco 2008, no pet.).

Accordingly, there may be a slight opening for equitable rescission of a disclaimer if a situation similar to the facts of *McCuen* arose after enactment of the Texas Disclaimer Act: a disclaimer based on a mistake of fact by someone other than a fiduciary. However, the most well-reasoned interpretation of Texas law is that equitable rescission of disclaimers based on a mistake of law or fact, either before or after enactment of the Texas Disclaimer Act, is not available. As discussed above, there are several reasons to doubt that the *McCuen* court's reasoning applies to statutory disclaimers at all. Further, after Vermont adopted the Uniform Disclaimer of Property Interests Act, the Vermont Supreme Court considered a similar question: could a mother's disclaimer of her interest in her son's estate be revoked based on her claim that she did not understand the disclaimer that she executed?[92] After considering the language of the uniform act and reviewing other case law, the court concluded that "disclaimers are not revocable based on disclaimant's mistake of law".[93] However, the court reserved the right to rescind the disclaimer if the fact finder found undue influence, coercion, or incompetence in the execution of the disclaimer.[94] Since the Texas Disclaimer Act instructs courts to consider uniformity among states enacting the uniform act in applying and construing it,[95] the Vermont court's interpretation of the uniform act is likely to be followed in Texas: disclaimers should almost always be irrevocable, but there may be a remedy available to victims of especially egregious cases of manipulation and abuse.[96]

d. Disclaimers requiring court approval

Prior court approval of a disclaimer by a fiduciary is required in these situations:

- A disclaimer by a personal representative who is not an independent executor or independent administrator (in other words, a guardian, temporary guardian, dependent administrator, or temporary administrator).
- A disclaimer by the trustee of a court-created trust established under Chapter 1301 of the Estates Code or Section 142.005 of the Texas Property Code.
- A disclaimer that would result in an interest in or power over property passing to the person making the disclaimer.[97]

The requirement of court approval if the disclaimer would result in an interest or power over property passing to the person making the disclaimer was added (1) to assure that the fiduciary making the disclaimer does not possess a general power of appointment for federal tax purposes and (2) to provide a layer of protection for

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[92] *Carvalho v. Estate of Carvalho,* 978 A.2d 455 (Vt. 2009).
[93] *Id.* at 461.
[94] *Id.* at 463.
[95] Tex. Prop. Code § 240.005.
[96] Because of Tex. Prop. Code § 240.008(g), rescission would not be available if a fiduciary (rather than an individual) made the disclaimer, even if the facts were egregious, if the claim is based on a breach of the fiduciary's fiduciary obligations.
[97] Tex. Prop. Code § 240.008(c).

beneficiaries. This requirement applies only to a disclaimer by a ***fiduciary***. It does not require court approval of a disclaimer if, as a result of a disclaimer by an individual (non-fiduciary), an interest in or power over property passes to that individual. This permits the common technique of permitting a surviving spouse to disclaim an interest which then passes into a credit shelter trust of which the spouse is a beneficiary and trustee.[98]

This requirement will impede some trustee disclaimers. If the trustee is the outright recipient of disclaimed property or a current or remainder beneficiary of a trust receiving disclaimed property, the disclaimer requires court approval, since the disclaimer results in an interest in or power over property passing to the person making the disclaimer. In most cases, this means that using the surviving spouse or a descendant of the decedent as trustee forces that trustee to seek court approval of a disclaimer. The estate planner can draft around this problem by using a non-family-member trustee or including a provision appointing a special trustee whose sole authority is to make disclaimers.[99]

e. Disclaimers not requiring court approval

Except for the three cases stated above where court approval is specifically required, a disclaimer by a fiduciary acting in a fiduciary capacity does not require court approval to be effective unless the instrument that created the fiduciary relationship requires court approval.[100] This includes disclaimers by independent executors, independent administrators or agents under powers of attorney.

f. A special case: disclaimer by natural guardian

Borrowing a provision from the Florida version of the uniform act,[101] the Texas Disclaimer Act permits the natural guardian (parent) of a minor to disclaim on behalf of the minor an interest in or power over property that the minor is to receive *solely as a result of another disclaimer,* but only if there is no court-appointed guardian and only if the disclaimed interest does not pass to or for the benefit of the natural guardian as a result of the disclaimer.[102]

This provides the potential to solve a common problem with disclaimers. Under prior law, a disclaimer strategy might not work because a parent making a disclaimer has minor children who would receive the property instead of the intended recipient. If the child would receive the property only if her mother disclaimed, then there is no

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[98] A special tax rule permits a spouse to disclaim while retaining an interest in the disclaimed property. 26 U.S.C. §2518(b)(4)(A). The spouse may serve as trustee of a trust receiving the disclaimed property only if her ability to make distributions is limited by an ascertainable standard. Treas. Reg. §25.2518-2(e)(2). A Texas disclaimer does not have to comply with these tax rules, but adverse tax consequence may accompany noncompliance.

[99] *See "Drafting to permit a special trustee to make disclaimers"* in Article 4 below.

[100] Tex. Prop. Code § 240.008(b).

[101] Section 739.201(2), Florida Statutes (2014).

[102] Tex. Prop. Code § 240.008(e).

policy reason why the mother should not be permitted to disclaim on the child's behalf without court approval, allowing the property to pass as if the mother and all her descendants predeceased.

The natural guardian making this type of disclaimer is a fiduciary and owes fiduciary duties to the child. Since there is no court approval, the disclaimer must be compatible with the natural guardian's fiduciary obligations.[103]

g. Trustee disclaimers

A driving force for adoption of the Texas Disclaimer Act was to allow disclaimers by trustees that cause the disclaimed property not to pass into the trust. It may have been possible to do this under former law, but the result was not clear and it required extra steps.[104]

If a trustee disclaimer results in property not passing into a trust with no action by a trust beneficiary, the trust beneficiary is vulnerable and the trustee is faced with possible claims of breach of fiduciary duty. Because of a trustee's duty to collect and administer the trust corpus, it might be a per se breach of trust for a trustee to disclaim.

REPTL considered different ways to balance ease of use, protection of the trustee, and protection of beneficiaries. The Uniform Disclaimer of Property Interests Act itself allows trustee disclaimers without notice to beneficiaries and without court approval. Comments to the uniform act mention that a trustee who disclaims is subject to fiduciary duties, but it does not contain a statutory provision to this effect. States adopting versions of the uniform act have approached trustee disclaimers in variety of ways:

- Follow the uniform act – permit trustee disclaimers with no notice and no court approval.
- Require court approval for all trustee disclaimers.
- Prohibit trustee disclaimers.

i. Court approval or notice

The Texas Disclaimer Act expressly allows trustee disclaimers. If the trust is a court-created trust, court approval of the disclaimer is required.[105] If, as a result of the trustee's disclaimer, the trustee individually will receive an interest in or power over property, court approval of the disclaimer is required.[106] In all other cases, the trustee has a choice:

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[103] Tex. Prop. Code § 240.008(f).
[104] *See "Disclaimer by a trustee"* in Article 1 above.
[105] Tex. Prop. Code § 240.008(c).
[106] Tex. Prop. Code § 240.008(c).

- The trustee may get court approval; or
- The trustee may give the beneficiaries 30 days' notice prior to disclaiming.[107]

If the trustee chooses to give notice, the act contains detailed provisions about which beneficiaries are entitled to notice, what must be included in the notice and the rights of beneficiaries receiving notice.[108]

Practice Tip: A trustee concerned about liability for making a disclaimer can reduce or eliminate fiduciary liability by getting prior court approval. A trustee who is not worried about liability can expedite the disclaimer procedure and save money by using the notice procedure with waivers as appropriate.

A trustee's disclaimer without court approval must be compatible with the trustee's fiduciary obligations.[109]

If the trustee chooses to forego court approval and instead gives notice, may he or she require adult beneficiaries to consent and release claims as a condition to making the disclaimer?[110] The potential problem is Treas. Reg. §25.2518-2(d)(1). In order to be a tax-qualified disclaimer, the disclaimant cannot accept "the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer." This prevents individuals from receiving consideration for making a disclaimer. Is the trustee receiving consideration if he or she conditions making the disclaimer on getting a release? And if the disclaimer is not conditioned on getting the release, is there consideration for the release? The cases on pre-arranged complex disclaimer arrangements are pretty generous for the taxpayer, so a trustee might consider this path after further research and soul-searching.[111]

ii. Where does the disclaimed property go?

If a trustee disclaims property that would have become trust property, the Texas Disclaimer Act provides that the property passes as if all current, presumptive remainder, and contingent beneficiaries of the trust died before the trust became irrevocable or never existed (in the case of non-individual beneficiaries).[112] In other words, the trust is treated as never having existed for the purposes of the disclaimed property. The property passes to the next beneficiary provided under the governing instrument.

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[107] Tex. Prop. Code § 240.008(d).
[108] Tex. Prop. Code § 240.0081.
[109] Tex. Prop. Code § 240.008(f). See the discussion in Section II.B.4.b. above.
[110] Section 114.032 of the Trust Code provides that a written agreement, including a release, between a trustee and a beneficiary is final and binding on the beneficiary and any person represented by the beneficiary if the instrument is signed by a beneficiary with legal capacity who has full knowledge of the circumstances surrounding the agreement.
[111] *See Estate of Lassiter v. Commissioner,* TC Memo 2000-324, and *Monroe v. Commissioner,* 124 F3d 699 (5th Cir. 1997).
[112] Tex. Prop. Code § 240.053(c).

All of the trust beneficiaries are treated as having died only for purposes determining the disposition of an interest in property disclaimed by a trustee that otherwise would have passed into the trust. They are not treated as having died for other purposes of the instrument.[113] Therefore, if the next beneficiary provided under the governing instrument also was a beneficiary of the trust subject to the disclaimer, that beneficiary is not treated as having died for purposes of the contingent gift.

For instance, consider a will with a pecuniary gift to a credit shelter trust and the residuary gift to the surviving spouse. If the trustee of the credit shelter trust disclaimed an interest in property, the property would pass to the surviving spouse as part of the residuary estate, regardless of the survival of the testamentary trust's remainder beneficiaries. The surviving spouse is treated as having died for purposes of the credit shelter trust disclaimer but is not treated as having died with respect to the residuary gift.

This provides a useful planning technique for decedents with nontaxable estates who die with old tax-planned wills, but only if the credit shelter gift is the pre-residuary gift. In these cases, it usually is more beneficial for the property to be taxable in the surviving spouse's estate (because of the adjustment to basis at the second death) than for the credit shelter trust to be established (which is not needed for estate tax savings and which precludes basis step-

Practice Tip: A trustee's disclaimer may be a way to avoid creation of a credit shelter trust. This may be useful if basis adjustment, not estate tax savings, is the primary objective.

- The technique works in pecuniary bypass/residuary marital plans since the disclaimer of the pre-residuary gift causes the property to pass as part of the residuary.
- The technique is not likely to work in pecuniary marital/ residuary bypass plans unless:
  - The surviving spouse does not need the assets that would otherwise pass into the credit shelter trust (since the disclaimer of the residuary gift is likely to cause the property to pass to descendants, not to the surviving spouse); or
  - The desired result can be obtained through a series of disclaimers by contingent remainder beneficiaries – see footnote 114; or
  - The instrument specifically provides that a disclaimer by the trustee of the credit shelter trust causes the property to pass to the surviving spouse (or into a marital deduction trust).

Drafting Tip: When drafting new wills and trusts, specify where disclaimed property goes in the event of a trustee disclaimer.

[113] Tex. Prop. Code § 240.053(d).

up).[114]

If the gift to the credit shelter trust is the pre-residuary gift and the gift to the surviving spouse or to a qualified terminable interest property ("QTIP") trust is the residuary gift, a disclaimer by the trustee of the credit shelter trust will cause the property to pass to the surviving spouse or to the QTIP trust, each of which qualifies for basis adjustment at the death of the surviving spouse.

This technique is unlikely to work if the pre-residuary gift is to the surviving spouse or QTIP trust and the residuary gift is to the credit shelter trust. The Texas Disclaimer Act does not permit "upstream" disclaimers, only "downstream." In this case, if the trustee of the credit shelter trust disclaims, the property is likely to pass to the decedent's descendants, not to the surviving spouse.[115] An upstream disclaimer is possible if the will or trust specifically provides for it.[116]

6. Other Texas Disclaimer Act issues

a. Effect of spendthrift provision and provisions in instrument granting or limiting disclaimer power

What if the governing instrument contains a spendthrift provision that states that "the interest of a beneficiary in gifted property may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee"?[117] Is the beneficiary's disclaimer a prohibited "transfer" for purposes of the spendthrift provision? The Texas Disclaimer Act comprehensively answers "no."[118] A spendthrift provision never prevents a disclaimer from being effective.

If a governing instrument includes a specific restriction on the right to disclaim, the answer depends on who is attempting to disclaim. A person other than a fiduciary can always disclaim, even if the governing instrument purports to forbid disclaimers.[119] Accordingly, the right of an individual to disclaim cannot be limited.

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[114] For a discussion of this subject, *see* Mickey Davis, *Basis Adjustment Planning,* 38th Annual Advanced Estate Planning & Probate Course (2014).

[115] If the residuary gift is to the credit shelter trust and the entire residuary gift is community property, it may be possible to cause the property to pass to the surviving spouse through a series of disclaimers. If the trustee of the credit shelter trust disclaims and all contingent takers under the terms of the instrument (usually this will be all of decedent's living descendants) disclaim, an intestacy may be created. Under Tex. Est. Code §201.003(b)(1), all of the community estate passes by intestacy to the surviving spouse if there is no surviving descendant of the decedent. This approach may not be as far-fetched as it sounds since a parent may disclaim for his or her minor children without court approval in this situation.[115] Tex. Prop. Code § 240.008(e).

[116] *See "Anticipating possible disclaimers when drafting estate planning documents"* in Article 4 below.

[117] *See* Tex. Prop. Code § 112.035.

[118] Tex. Prop. Code §§ 240.006(b) (applying to a person other than a fiduciary), 240.007(c) (applying to a person designated to serve or serving as a fiduciary, as to disclaimer of a power), 240.008(a)(1) (applying to a fiduciary acting in a fiduciary capacity, as to disclaimer of an interest in or power over property).

[119] Tex. Prop. Code § 240.006(b).

A fiduciary disclaimer is barred if the instrument ***creating the fiduciary relationship*** explicitly prohibits disclaimers.[120] A fiduciary acting in a fiduciary capacity may nonetheless disclaim if an instrument ***other than the instrument creating the fiduciary relationship*** prohibits disclaimers.[121] Note that the instrument creating the fiduciary relationship will generally be the instrument creating the disclaimed interest or power only in the case of a trust. In the case of a guardianship, the instrument creating the fiduciary relationship is a court order. Even if the instrument providing for a gift of property to the ward prohibited disclaimers, the guardian would not be bound by that provision, as the gift instrument would be "an instrument other than the instrument that created the fiduciary relationship" and accordingly could not bar a disclaimer.[122] Similarly, property passing to an estate or a principal pursuant to another individual's gift could be disclaimed by the executor or agent, respectively, even if the instrument providing for the gift prohibited disclaimers (although the disclaimer would be barred by a provision in the will or power of attorney stating that the fiduciary could not disclaim on behalf of the estate or principal).

In contrast, a trustee is bound by the terms of the instrument creating the fiduciary relationship, which in most cases is also the instrument creating an interest or power. For example, a person who is designated as the trustee of a testamentary trust, governed by a will that prohibits fiduciary disclaimers, either must accept the appointment as trustee with all powers granted under the will or must decline to serve as trustee.[123] There can be no disclaimer of unwanted powers if the will prohibits disclaimers. Similarly, after accepting the appointment as trustee, the trustee cannot disclaim any interest in property passing to the trust because of the will's prohibition on fiduciary disclaimers.[124]

b. Tax savings catch-all

Practice Tip: Consider using the tax savings catch-all if the desired disclaimer is not described by the Texas Disclaimer Act or when trying to fix after the fact a disclaimer which failed to meet the Act's requirements.

Although it is not necessary to comply with Section 2518 of the Internal Revenue Code in order for a disclaimer to be effective under the Texas Disclaimer Act, the act includes a safe harbor for disclaimers that are qualified for federal tax purposes. Specifically, Section 240.057 provides that if a disclaimed interest is treated under the Internal Revenue Code as never having been transferred to the disclaimant, the disclaimer is effective as a disclaimer under the Texas Disclaimer Act.[125] Under this provision, a disclaimant that is focused on making a qualified

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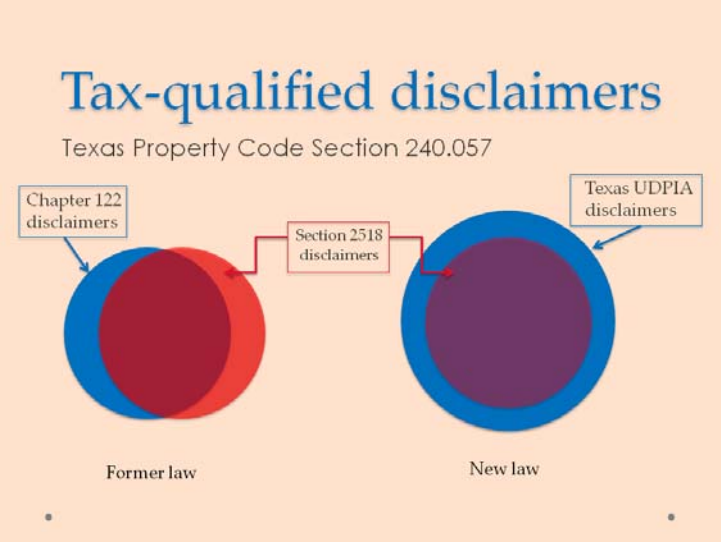
[120] Tex. Prop. Code §§ 240.007(a) (person designated to serve or serving as a fiduciary), 240.008(a) (fiduciary acting in fiduciary capacity).
[121] Tex. Prop. Code § 240.008(a)(2).
[122] *See* Tex. Prop. Code § 240.008(a)(2).
[123] *See* Tex. Prop. Code § 240.007(a).
[124] *See* Tex. Prop. Code § 240.008(a).
[125] Tex. Prop. Code § 240.057.

disclaimer for federal tax purposes can follow the guidance under Section 2518 and the developed case law in order to comply with federal law and be assured that the disclaimer will be effective for state law purposes as well. Note that the Texas Disclaimer Act does not ***require*** compliance with Section 2518; rather, Section 240.057 is a permissive provision that provides an alternative method of executing an effective disclaimer.



With Section 240.057, the possibility no longer exists that a disclaimer which otherwise would qualify for tax purposes fails to qualify because it is not supported by Texas law. Under prior Texas law, there were some disclaimers that were possible under state law which did not qualify for tax purposes, and there were some disclaimers which were possible under tax law, but only if state law permitted, and Texas law did not permit them. Now all tax-qualified disclaimers are permitted under Texas law, and there are additional disclaimers permitted under Texas law which are not qualified for tax purposes.[126]

c. Do fiduciaries have liability for distributing property before a disclaimer?

Consider the efficient personal representative or trustee who completes the administration of the estate or trust and distributes the property to the named beneficiaries. What liability does that fiduciary have if a beneficiary later wishes to disclaim? Must the fiduciary wait a certain period of time before distributing property? If so, how long?

Practice Tip: Consider warning an heir or beneficiary that the fiduciary is about to distribute real property in order to give him or her the chance to disclaim before the deed is executed and recorded.

The responsibility for disclaiming an interest in an estate or trust falls on the heir or beneficiary, not on the personal representative. Even if the fiduciary distributes the property, the heir or beneficiary does not have to accept it. Still, since a personal representative or trustee may have the duty to disclose material information known

[126] The principal reason that some disclaimers permitted under the Texas Disclaimer Act fail will not qualify for tax purposes is that there is no time limit under Texas law, while the nine-month time limit still applies for tax law purposes.

to them that might affect a beneficiary's rights,[127] it may be prudent to warn the beneficiary that the distribution is going to occur. This is particularly true with distributions of real estate. While it is relatively easy for an heir or beneficiary to refuse to accept a check (by not cashing it) or tangible personal property (by refusing delivery), recording a deed creates a presumption that the deed has been delivered and that the grantee has accepted a deed.[128] By sending the heir or beneficiary a letter stating that the personal representative or trustee is about to distribute the real property, the personal representative gives the beneficiary a chance to avoid the creation of this presumption by delivering the disclaimer prior to execution and recording of the deed.

d. Are non-statutory disclaimers permitted?

Prior to the enactment of Texas's first disclaimer statute in 1971, common law disclaimers were permitted.[129] The 1971 statute provided that "[f]ailure to comply with the provisions hereof shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent."[130] Until the enactment of the Texas Disclaimer Act, this basic language had remained a part of Texas's disclaimer statutes and most recently appeared in Section 122.102 of the Estates Code. If by statute a disclaimer was "ineffective except as an assignment," common law disclaimers were barred.

HB 2428 repeals Section 122.102. It amends Section 122.201 of the Estates Code to provide that "a person who is entitled to receive property … and does not disclaim the property under Chapter 240, Property Code, may assign the property … to any person." This is not the same thing as saying that a disclaimer not in compliance with the statute is an assignment.

The Texas Disclaimer Act does not have a provision similar to the repealed Section 122.102. Instead, Section 240.003 states that Chapter 240 of the Property Code "applies to disclaimers of any interest in or power over property, whenever created, and Section 240.004 states that, unless displaced by a provision of Chapter 240, the principles of law and equity supplement the chapter and that the chapter "does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a ***statute*** [not ***law***] other than this chapter." (Emphasis and bracketed language added.)

Professor Adam Hirsch of the University of San Diego School of Law has commented on this part of the uniform act. He believes that, unless a state changes the uniform

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[127] *Montgomery v. Kennedy*, 669 S. W. 2d 309, 313 (Tex. 1984).
[128] *Panhandle Baptist Foundation, Inc. v. Clodfelter,* 54 S. W. 3d 66, 71-72 (Tex. App. Amarillo 2001). The presumption of delivery and acceptance may be rebutted by contrary evidence. 54 S. W. 3d at 72.
[129] *See First City Nat'l Bank of Houston v. Toombs,* 431 S.W.2d 404, 406 (Tex.Civ.App.-San Antonio 1968, writ ref'd n.r.e.)
[130] Tex. Prob. Code § 37A (1971) (third sentence).

act, the provision that the act does not limit any right of a person to disclaim under a *"law"* other than the act permits common law disclaimers. He thinks this is problematic,[131] and he urged REPTL to address it.

The Texas Disclaimer Act addresses the issue by changing the word "law" to "statute" in Section 240.004(b) of the Property Code. The act does not limit disclaimer rights arising under another statute. Does this mean that it limits disclaimer rights under common law? The Act does not say that common law disclaimers are barred. A court is likely to interpret the new act to mean that non-statutory disclaimers are barred. Still, there is a tiny crack through which someone may attempt to squeeze to assert a common law right to disclaim. Because of the breadth of the Texas Disclaimer Act and because it eliminates the nine-month deadline for disclaimers, it is hard to imagine a case in which someone would intentionally try to make a common law disclaimer. If the issue arises at all (which is unlikely), it probably will arise in an attempt to cure a problem with a disclaimer that failed to meet the requirements of the Texas Disclaimer Act, such as a failure to deliver the disclaimer to the proper person before filing a petition in bankruptcy.

3. Federal issues

Practice Tip: Even though there is no state law time limit on disclaimers, don't forget that the nine-month deadline remains relevant for tax-motivated disclaimers. Best practice is to disclaim before the tax deadline passes even if the disclaimant is unlikely to have a taxable estate.

If a disclaimer includes making sure the disclaimant is not treated as having ever received the disclaimed property for federal tax law purposes, the requirements of IRC § 2518 will still need to be met. For example, the disclaimer must be made within Section 2518's nine-month rule requirements. As noted above, a tax-motivated disclaimer made pursuant to Section 2518 would still be a valid disclaimer for Texas law purposes.[132] If the disclaimer does not meet the requirements of Section 2518, the disclaimant will be deemed to have made a transfer for gift tax purposes (recall donative intent not required), perhaps requiring the filing of a gift tax return and even triggering gift tax liability.

A. Federal tax liens

In *Drye v. United States*,[133] the Supreme Court held that a disclaimer by the decedent's statutory heir could not defeat a federal tax lien on the heir's property as a matter of federal law. In that case, the decedent's insolvent heir owed unpaid income taxes at the time of the decedent's death. The heir disclaimed after the decedent's death, resulting in the property passing under state law to the disclaimant's child.

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[131] *See* Adam J. Hirsch, The Code Breakers: How States are Modifying the Uniform Disclaimer of Property Interests Act, 46 Real Property, Trust and Estate Law Journal 325, 331 (2011).
[132] Tex. Prop. Code § 240.057.
[133] 528 U. S. 49 (1999).

In reaching its decision, the Supreme Court focused on the statutory tax lien statute, IRC § 6321 – the lien attaches to the taxpayer's "property and rights to property." Thus, the lien attached to the disclaimant's interest in the decedent's estate at the time of the decedent's death (notwithstanding state-law relation back theory).

B. Disclaimant's bankruptcy

While lacking a definitive Supreme Court decision or statute on point, most federal courts have focused on whether the disclaimer was "pre-" or "post-" petition. If the disclaimer took place prior to filing for bankruptcy, state law applies, and the disclaimer is effective. If the disclaimant is already in bankruptcy, federal law applies, and the disclaimer is ineffective. Relevant Texas cases follow these rules.[134]

C. ERISA beneficiaries

ERISA states that its provisions supercede all state laws as they may relate to any employee benefit plan.[135] The Fifth Circuit has held that a disclaimer consistent with state law guidelines was not effective as a disclaimer of pension benefits, because it did not comply with the plan's prescribed method of disclaimer.[136]

While not exactly on point, in *Kennedy v. Plan Administrator*, the Supreme Court has held that a waiver by the participant's spouse during a divorce proceeding was not effective since it did not meet the execution requirements of the plan's "disclaimer" provisions.[137]

D. Medicaid eligibility

In addressing Medicaid eligibility, federal law defines as a resource any property the individual is entitled to but does not receive because of action taken by the individual.[138] That language has been interpreted to cause a disclaimer to be treated as if the property had been received by the disclaimant and then transferred by the disclaimant for long-term care Medicaid eligibility.[139]

While states have the authority to develop their own eligibility requirements under 42 U.S.C. 1396(a)(1), the states are required to follow certain federal mandates.[140] Thus, under Texas and federal law, disclaimers are generally treated as transfers.[141]

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[134] *See Matter of Simpson*, 36 F.3d. 450 (5th Cir. 1999) and *In re Schmidt*, 362 B.R. 318 (Bankr. W.D. Tex 2007).
[135] 29 U.S.C. § 1144(a) 2012.
[136] *See Nickel v. Estate of Estes*, 12 F.3d 294 (5th Cir. 1997).
[137] *See Kennedy v. Plan Administrator,* 555 U.S. 285 (2009).
[138] 42 U.S.C. § 1396p(h)(1).
[139] *See* H. Clyde Farrell and Bliss Burdette Pak, *Estate Planning for Beneficiaries Who May Need Long Term Care*," 2014 Stanley M. Johanson Estate Planning Workshop (UT-CLE, 2014).
[140] See 42 U.S.C. 1396p(c).
[141] *See* Medicaid for Elderly and People with Disabilities Handbook § E03372.

However, in their excellent article, Farrell and Pak discuss the possibility that a disclaimer may not be treated as a transfer if Medicaid is available as a result of SSI eligibility. They refer to 42 U.S.C. § 1382b(c)(1)(A)(i) and a paper by Reba Collins, *Questions Regarding Trusts and Other SSI Issues*," presented at the University of Texas School of Law Special Needs Trusts Conference 2011.

4. Drafting opportunities

The Texas Disclaimer Act offers estate planning attorneys drafting opportunities in four areas: (a) Drafting estate planning documents in anticipation of possible disclaimers; (b) drafting disclaimers themselves; (c) drafting notices and waivers for use by trustees wishing to disclaim; and (d) drafting pleadings and related documents seeking court approval of fiduciary disclaimers.

A. Anticipating possible disclaimers when drafting estate planning documents

The Texas Disclaimer Act provides that the instrument creating the interest to be disclaimed may state where the disclaimed interest goes.[142] This gives planners the opportunity to create certainty and in some cases achieve creative results.

1. Disclaimer into the credit shelter trust.

When an estate plan utilizes a credit shelter trust, planners often have provided that, if the surviving spouse disclaims property which otherwise would pass outright to a surviving spouse, the property instead passes into the credit shelter trust.[143]

This technique worked under the former Texas law and it works under the Texas Disclaimer Act. It may be used to supplement a formula-funded trust by providing a way to get assets not subject to the formula provision into the credit shelter trust. It also may be used as the only way to get assets into the credit shelter trust (a "disclaimer trust"), permitting the surviving spouse to decide whether or not to include estate tax planning or asset protection after his or her spouse's death. It also may be used in life insurance and retirement plan beneficiary designations to give the surviving spouse the option of moving all or a portion of the benefits to the credit shelter trust if circumstances warrant.

Care must be taken to assure that the surviving spouse is given no special power of appointment over the disclaimed property.[144] The credit shelter trust should include a savings provision negating the power of appointment over disclaimed property. The credit shelter trust also should include a provision permitting the trustee to segregate the disclaimed property in a separate trust or share so that the property going into

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[142] Tex. Prop. Code §240.051(d); Tex. Prop. Code §240.053(b).
[143] Internal Revenue Code §2518(b)(4)(A). Treas. Reg. §25.2518-2(e)(2).
[144] Treas. Reg. §25.2518-2(e)(2).

the trust by means other than a disclaimer still may be subject to a special power of appointment.

2. Disclaimer out of the credit shelter trust

As mentioned above,[145] it may be beneficial to permit the trustee of the credit shelter trust to disclaim property that otherwise would pass into the credit shelter trust to instead pass in a way which qualifies for the marital deduction (whether outright to the surviving spouse or to a QTIP trust). This permits the trustee to make an educated guess at the time of the first spouse's death whether estate tax savings or basis adjustment on the death of the surviving spouse is more likely to be beneficial.

If the pre-residuary gift is to the credit shelter trust and the residuary gift qualifies for the marital deduction, then it probably is unnecessary to include a provision specifying where property goes if the trustee of the credit shelter trust disclaims. Even so, it is beneficial to include a specific provision in every credit-shelter formula will or trust for two reasons: (a) It is a good idea to have a boilerplate provision on this point so that the drafter will not forget to include it when the marital deduction gift is the pre-residuary gift; and (b) it may help the trustee avoid liability for breach of fiduciary duty for making the disclaimer since it is an indication that the testator or settlor anticipated this situation and considered a trustee disclaimer to be an appropriate action in some cases.[146]

If the gift to the credit shelter trust is the residuary gift, then a provision directing the disclaimed property "upstream" to the spouse outright or to a QTIP trust must be included. The default rule of the Texas Disclaimer Act does not provide for upstream disclaimers.

3. Going crazy with specific provisions: Directing disclaimers into and out of various trusts

Planners should consider including trust-specific provisions for each trust in the instrument directing the disclaimed property to the desired destination. This may seem extreme, but it is a tool that the Texas Disclaimer Act gives estate planners and it is one to consider using. Here are examples:

- A disclaimer by the trustee of credit shelter trust causes property to pass into the QTIP trust, and a disclaimer by the trustee of the QTIP trust causes property to pass into the credit shelter trust.

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[145] *See "Where does the disclaimed property go?"* and the related practice tip in Article 2 above.
[146] In addition to specifically directing the disclaimed property to the marital deduction gift, it may be a good idea to include a statement of the testator's or settlor's intention that the trustee may consider making a disclaimer and is exonerated from liability so long as he or she acts in good faith and is not grossly negligent. *See "Exculpating the trustee for making disclaimers"* in this article below.

- A combination disclaimer by the trustee of the credit shelter trust and the trustee of the QTIP trust causes the property to pass to the surviving spouse, outright and free of trust.
- A disclaimer by the trustee of a GST exempt trust causes the property to pass into a non-GST exempt trust.
- A disclaimer by a trustee causes the property to pass into a special needs trust.
- A disclaimer by the trustee causes the property to pass into a qualified subchapter S trust or an electing small business trust.
- A disclaimer by the trustee causes retirement plan benefits to pass into a conduit trust.

4. Drafting to permit a special trustee to make disclaimers

If a family member is the trustee of a trust, that trustee may be forced to seek court approval of a disclaimer (rather than using the notice provisions) because an interest in or power over property is likely to pass to that person as a result of the disclaimer.[147] For example, if the surviving spouse is the trustee of the credit shelter trust, and the trustee wishes to disclaim so that the property passes to the spouse outright or into a QTIP trust, the surviving spouse cannot use the notice provisions to avoid going to court. The same result occurs if a descendant of the testator is the trustee and the disclaimer causes property to pass into a QTIP trust of which the descendant is a remainder beneficiary.[148]

The settlor or testator may avoid this result by using a non-family member as trustee. However, that may be undesirable for other reasons.

The estate planner can solve this problem by including a provision appointing a special trustee whose sole authority is to make a disclaimer on behalf of the trust. If the special trustee is a disinterested person, this would permit a disclaimer without court approval (by following the notice provisions) while permitting a family member to serve as trustee. This also may be a good idea if a corporate trustee is used, since the corporate trustee may be too conservative to make a disclaimer without court approval.

When using this approach, consider the following:

- As special trustee, the disinterested person is subject to fiduciary duties. If the trustee disclaims without court approval, the disclaimer must be compatible

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[147] Tex. Prop. Code §240.008(c)(4).

[148] On the other hand, the descendant/trustee of a credit shelter trust could disclaim using the notice provisions to avoid the need for court approval if the disclaimer results in the property passing outright to the surviving spouse.

with his or her fiduciary obligations.[149] He or she may be exculpated, but only to the extent permitted by the Trust Code.[150]

- The disinterested party given the power to disclaim must be a "trustee." He or she cannot be called a "trust protector" or "advisor." Section 240.008(d) of the Property Code permits a trustee to disclaim; it does not permit someone other than a trustee to disclaim on behalf of a trust.

- May a family member who could benefit from the disclaimer be given the power to appoint the special trustee? The authors can think of no reason this would not work, although it would be more conservative to have a different method of selecting the special trustee. Disclaimers which are part of a pre-arranged plan may be attacked by the Internal Revenue Service.[151]

5. Exculpating the trustee for making disclaimers

To overcome the reluctance of a trustee to disclaim, the settlor may wish to exculpate the trustee from liability for making a disclaimer. This should be done only in appropriate cases and should not be a boilerplate provision. Also, a trustee cannot be exculpated for breaches of fiduciary duty which are committed in bad faith, intentionally or with reckless indifference, nor may the trustee be exculpated for any profit derived by the trustee from a breach of trust.[152]

6. Prohibiting trustee disclaimers

Perhaps all of this trustee disclaimer business is too much for the settlor (or the planner) to handle. The instrument creating the trust may expressly prohibit trustee disclaimers.[153]

The prohibition of a disclaimer must be included in the instrument creating the fiduciary relationship. It cannot be included in the instrument making the gift unless that same instrument creates the fiduciary relationship.[154] For example, if the will makes a gift to the trustee of a testamentary trust established under that will, the testator may prohibit the trustee from disclaiming. However, if the will makes a pour-over gift to a living trust, the testator cannot prohibit a disclaimer by the trustee by including a provision in the will since the will did not create the fiduciary relationship. To prohibit a trustee disclaimer of a pour-over gift to a living trust, the

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[149] Tex. Prop. Code §240.008(f). This subsection also provides that a trustee disclaimer is not a per se breach of fiduciary obligations.
[150] Tex. Trust Code §114.007(a). See also *"Exculpating the trustee for making disclaimers"* below.
[151] *See* Steve Akers, "Post Mortem Planning – It's Not Too Late to Plan: A Review of Income, Gift and Estate Tax Planning Issues and Strategies," (July 2015) (see the discussion of *Estate of Monroe v. Commissioner,* 124 F. 3d 699 (5th Cir. 1997) on page 113).
[152] Tex. Trust Code §114.007(a).
[153] Tex. Prop. Code §240.008(a).
[154] Tex. Prop. Code §240.008(a). *See "Effect of spendthrift provision and provisions in instrument granting or limiting disclaimer power"* in Article 2 above.

trust instrument, not the will, must include the provision prohibiting a disclaimer since the trust instrument creates the fiduciary relationship.

7. Using a disclaimer to make a defined-value gift or to defer the decision to pay gift tax or estate tax

Since the Texas Disclaimer Act permits the transferor to state in the instrument creating the interest to be disclaimed where the interest goes if it is disclaimed,[155] a donor could include a provision in the gift instrument that provides for the property to return to the donor if the donee disclaims. This makes it possible for the donor to give property which may be finally determined for gift tax purposes to be worth more than the available remaining exemption amount and then rely on the donee to make a formula disclaimer of the excess.[156] This is an alternative to including the defined-value clause in the gift instrument itself. In a happy marriage situation, a more conservative approach to achieve close to the same result would be for the gift instrument to provide that, in the event of a disclaimer by the donee, the disclaimed property would pass into a inter vivos QTIP trust for the spouse of the donor. In this way, the argument that the donor somehow retained an interest by directing the disclaimed property to himself or herself is avoided.

This technique can be taken a step further. Assume that the donor fears that the Internal Revenue Service will announce new Section 2704 regulations within the next nine months and that those regulations (1) will apply to transfers after the date the regulations are announced and (2) will eliminate or reduce discounting on the estate tax return for lack of marketability and lack of control. The donor may give a much larger gift to the donee – large enough that the donor is certain to incur gift tax if no disclaimer is made – and provide in the gift instrument that disclaimed property passes back to the donor or into a QTIP trust for the donor's spouse. For the nine months following the gift, the donee should have the option to choose between exposing the portion of the gifted property in excess of the exemption amount to gift taxation or to estate taxation:

- If the regulations are issued during the nine-month period and they do indeed severely limit discounts available on the donor's estate tax return, the donee can do nothing and cause a gift tax to be incurred and paid on the discounted value of the gift.
- If the regulations are not issued during the nine-month period, or if during the nine-month period it begins to seem likely that the estate tax will be repealed, the donee can disclaim, causing part or all of the property to be includible in the donor's (or the donor's spouse's) estate for estate tax purposes.

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[155] Tex. Prop. Code §240.051(d).

[156] Steve Akers, "Transfer Planning, Including Use of GRATs, Installment Sales to Grantor Trusts, and Defined Value Clauses to Limit Gift Exposure," 32nd Annual Advanced Estate Planning and Probate Course (2008). Many practitioners have grown comfortable putting the defined-value clause in the gift instrument itself since *Wandry v. Commissioner,* T. C. Memo 2012-88 (2012).

Could the Internal Revenue Service attack this as a pre-arranged plan in a manner similar to its attack in *Estate of Monroe v. Commissioner?* [157] It is hard to see such an attack prevailing so long as the facts do not show collusion. Persons often make decisions to disclaim or not to disclaim for tax reasons, so the mere fact that the donee's decision is intended to save taxes should not make it a pre-arranged plan. Also, while the donee may expect to receive the property in question at the donor's death, this result is not assured. The donor could change his or her mind or could have creditor problems. There is economic substance to the donee's decision to disclaim or refrain from disclaiming.

Note that, while the Texas Disclaimer Act does not place a time limit on disclaimers, the disclaimers discussed in this section must be completed within nine months of the transfer because of the nine-month limit for gift tax purposes.

B. Drafting disclaimers under the Texas Disclaimer Act

Drafting disclaimers under the Texas Disclaimer Act is pretty straightforward. The act sets the requirements for each type of property. Attached as Appendix 2 are annotated examples of disclaimers. These forms are available in pdf and Word formats at texasprobate.com.

C. Using the notice provisions for trustee disclaimers

The trustee of a non-court-created trust may disclaim property without court approval so long as (a) the trustee in his or her individual capacity does not receive the property or an interest in the property as a result of the disclaimer and (b) the beneficiaries are notified in the manner prescribed in Section 240.0081 of the Property Code.[158]

The notice provisions are based on those used in the decanting statutes.[159] An example of a notice form is included in Appendix 2. A beneficiary may waive the right to receive a notice. An example of a waiver form is included in Appendix 2.

1. Who is entitled to notice?

To disclaim without court approval, the trustee must give notice to all of the current beneficiaries and presumptive remainder beneficiaries of the trust.[160] For purposes of determining who is a current beneficiary or a presumptive remainder beneficiary entitled to notice, a beneficiary is determined as of the date the notice is sent.[161]

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[157] 124 F. 3d 699 (5th Cir. 1997). The IRS attack based on a pre-arranged plan was successful in the Tax Court, but the Fifth Circuit overturned the Tax Court.
[158] Tex. Prop. Code §240.008.
[159] *See* Tex. Trust Code §§111.071 and 111.074.
[160] Tex. Prop. Code §240.0081(a).
[161] Tex. Prop. Code §240.0081(b).

a. Current beneficiary

A "current beneficiary," with respect to a particular date, means a person who is receiving or is eligible to receive a distribution of income or principal from a trust on that date.[162] If the trust permits the trustee to spray distributions among a primary beneficiary and his or her descendants, all are current beneficiaries entitled to notice.

b. Presumptive remainder beneficiary

A "presumptive remainder beneficiary," with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if the trust terminated on that date or the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.[163]

While this definition says who a presumptive remainder beneficiary is *in the absence of notice* of the exercise of a power of appointment, it does not say who the presumptive remainder beneficiary is *if the trustee is notified* that a power of appointment has been exercised. For example, assume that the only current beneficiary has a broad special testamentary power of appointment over the trust property and that the remainder beneficiaries in default of exercise of the power are the current beneficiary's two adult children:

- If the trustee is not notified of the exercise of the power of appointment, the two adult children are presumptive remainder beneficiaries and are entitled to notice.
- If the beneficiary sends the trustee a copy of his or her will exercising the power in favor of his accountant, who are the presumptive remainder beneficiaries entitled to notice?
    - Is the accountant the only presumptive remainder beneficiary?
    - Are the current beneficiary's children the only presumptive remainder beneficiaries?

Unless the trustee is notified of an *irrevocable* exercise of a power of appointment, the safest course is to treat the appointee of a *revocable* exercise of a power of appointment *and* the persons who would be presumptive remainder beneficiaries had the power not been exercised all as presumptive remainder beneficiaries entitled to notice.

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[162] Tex. Prop. Code §240.002(1). The Texas Disclaimer Act uses the same definition that the decanting statutes use, which is found in Tex. Trust Code §112.071(3).
[163] Tex. Prop. Code §240.002(1). The Texas Disclaimer Act uses the same definition that the decanting statutes use, which is found in Tex. Trust Code §112.071(7).

c. Notice to minor or incapacitated beneficiaries

If a minor or incapacitated beneficiary has a court-appointed guardian or conservator, the notice must be given to the guardian or conservator. If a minor beneficiary has no court-appointed guardian or conservator, the notice must be given to a parent of the minor.[164]

d. Notice to the attorney general

Notice to the attorney general is required if a charity is entitled to notice, a charity entitled to notice in no longer in existence, the trustee has the authority to distribute trust assets to one or more charities that are not named in the instrument, or the trustee has the authority to make distributions for a charitable purpose but no charity is named as a beneficiary for that purpose.[165] Notice to the attorney general is *not* required merely because a charity is a permissible appointee of a power of appointment held in a non-fiduciary capacity or merely because a charity is a remote contingent beneficiary.[166]

e. Waiver and other exceptions to the notice requirement

Section 240.0081(e) provides that the trustee is not required to provide the notice to a beneficiary who:

(1) is known to the trustee and cannot be located by the trustee after reasonable diligence;

(2) is not known to the trustee;

(3) waives the notice requirement; or

(4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them.

A form of waiver of notice is in Appendix 2.

Because of the way Section 240.0081(e)(4) is worded, in order to take advantage of its virtual representation exception, a notice *must* be given to the ancestor virtually representing his or her descendants; a waiver by the ancestor is insufficient. The exception only works for an ancestor "to whom the trustee has given notice;" if that ancestor waives the notice, the trustee has not given him or her notice, so Subsection (e)(4) is not invoked. Even though a notice to a minor child with no guardian or conservator must be given to the child's parent under Subsection (d), that parent is not authorized to waive the notice, since Subsection (e) forgives giving notice to a

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[164] Tex. Prop. Code §240.0081(d).
[165] Tex. Prop. Code §240.0081(c).
[166] Tex. Prop. Code §§240.002(1) and 240.0081(a) and (c).

"beneficiary" who waives notice, not to a parent who receives the notice on the minor's behalf.[167]

Similarly, the attorney general probably is not able to waive notice since the attorney general is not a beneficiary for purposes of Section 240.0081(e).

The trustee has a duty to disclose material facts known to the trustee that might affect beneficiaries' rights.[168] While the scope of this duty is subject to debate, a disclaimer is likely to be considered a material fact that the trustee must disclose. Therefore, the trustee should disclose the underlying facts and the reason for making the disclaimer. This disclosure could be included in the waiver form itself, but it may be better to keep the waiver simple and make the disclosure in one or more separate documents. The waiver should include an acknowledgement of receipt of the disclosure by the beneficiary.

The drafter should use extreme caution about including a release in the waiver. The trustee often wants a beneficiary's release to be supported by consideration in order to assure its effectiveness.[169] Often the consideration for a beneficiary release is to induce the trustee not to incur the expense of a judicial proceeding to approve the trustee's action. If the trustee includes a release – especially a release supported by consideration – it may be deemed to have received consideration for making the disclaimer, which could make the disclaimer ineffective for tax purposes.[170] In order for the release to be effective, the beneficiary must be acting on full information[171] and must have full knowledge of the circumstances surrounding the agreement."[172]

f. Examples

The following examples help illustrate who is entitled to notice. In these examples, Parent is the parent of two adult children, Son and Daughter. Parent has no deceased children. Son has two children, Grandchild 1, who is an adult, and Grandchild 2, who is a minor. Daughter has no children or other descendants.

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[167] Unlike a parent of a minor with no guardian or conservator, a court-appointed guardian of the estate of a minor or incapacitated beneficiary probably can sign a waiver under Tex. Prop. Code §240.0081(e) since the guardian is the beneficiary's legal representative. Of course, the guardian probably needs to get court approval before disclaiming.

[168] *Montgomery v. Kennedy,* 669 S. W. 2d 309, 313 (Tex. 1984).

[169] Section 114.005 of the Trust Code does not say that a release by a beneficiary must be supported by consideration. It says the beneficiary must be acting on "full information." Section 114.032 of the Trust Code does not say that a written agreement between a beneficiary and a trustee must be supported by consideration in order to be binding on the beneficiary. It says that the beneficiary must have "full knowledge of the circumstances surrounding the agreement."

[170] "[T]he acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed," and a qualified disclaimer cannot be made if the disclaimant has accepted any of the benefits of the disclaimed property. Treas. Reg. §25.2518-2(d)(1).

[171] Tex. Trust Code §114.005.

[172] Tex. Trust Code §114.032(a)(3).

1. *The trust terms provide for health, education, maintenance and support ("HEMS") distributions to Parent for life. When Parent dies, the trust terminates and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants is living, on termination the trust property passes to Charity.* Notice must be given to Parent, who is the only current beneficiary, and to Son and Daughter, who are the only presumptive remainder beneficiaries. Parent, Son and Daughter may waive the notice requirement.

2. *The trust terms provide for HEMS distributions to Parent for life. When Parent dies, the trust continues, with separate shares for Son and Daughter, who are entitled to receive HEMS distributions for life. The trust terminates on the deaths of Son and Daughter and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants is living, on termination the trust property passes to Charity.* If no beneficiary waives notice, notice must be given to Parent, who is the only current beneficiary, and to Son and Daughter, who are the only presumptive remainder beneficiaries. Parent, Son and Daughter may waive the notice requirement.

3. *The trust terms provide for HEMS distributions to Parent and Parent's descendants for life. When Parent dies, the trust terminates and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants is living, on termination the trust property passes to Charity.* Notice must be given to Parent, Son, Daughter, Grandchild 1 and Grandchild 2, since all are current beneficiaries. Parent, Son, Daughter and Grandchild 1 may waive notice. Since Grandchild 2 is a minor, the notice must be given to his or her parent, so the notice may be given to Son. Son can waive notice on his own behalf, but he cannot waive notice on behalf of Grandchild 2, so formal notice to Son as parent of Grandchild 2 must be given.

4. *The trust terms provide for HEMS distributions to Parent for life. When Parent dies, the trust terminates and passes to Charity.* Notice must be given to Parent, who is the only current beneficiary, to Charity, who is the only presumptive remainder beneficiary, and to the attorney general pursuant to Section 240.0081(c). Parent and Charity may waive notice. The attorney general may not waive notice, so formal notice must be given to the attorney general even if Charity waives notice.

5. *The trust terms provide for HEMS distributions to Parent for life. Parent has a broad special testamentary power of appointment. When Parent dies, the trust terminates. If Parent has not exercised Parent's power of appointment, the trust property passes outright to Parent's descendants, per stirpes. If none of Parent's descendants is living, on termination the trust property passes to Charity. The trustee has not been notified whether or not Parent has exercised Parent's power of appointment.* Notice must be given to Parent, who is the only current beneficiary, and to Son and Daughter, who are the only presumptive remainder beneficiaries. Parent, Son and Daughter may waive the notice requirement.

6. *The trust terms provide for HEMS distributions to Parent for life. Parent has a broad special testamentary power of appointment. When Parent dies, the trust terminates. If Parent has not exercised Parent's power of appointment, the trust property passes outright to Parent's descendants, per stirpes. If none of Parent's descendants is living, on termination the trust property passes to Charity. The trustee has been notified that Parent has made a (revocable) will exercising Parent's power of appointment in favor of Charity.* Notice must be given to Parent, who is the only current beneficiary. It is not clear under Tex. Trust Code §112.071(7) who the presumptive remainder beneficiaries are, so the safest course is to give notice to Son, Daughter, Charity and the attorney general. The attorney general cannot waive notice, so formal notice must be given to the attorney general even if Charity waives notice.

2. What must the notice contain?

Section 204.0081(f) provides that the notice must state that include a statement that: (A) the trustee intends to disclaim an interest in property; (B) if the trustee makes the disclaimer, the property will not become trust property and will not be available to distribute to the beneficiary from the trust; (C) the beneficiary has the right to object to the disclaimer; and (D) the beneficiary may petition a court to approve, modify, or deny the disclaimer. While the notice must say that the trustee "intends to disclaim," the statute does not obligate the trustee to disclaim just because the notice is sent. Rather, it anticipates that the trustee may not disclaim despite giving the notice.[173]

The notice also must describe the interest in property the trustee intends to disclaim, specify the earliest date the trustee intends to make the disclaimer, and include the name and mailing address of the trustee.[174] The notice must be given not later than the 30th day before the date the disclaimer is made.[175] It must be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt.[176]

The trustee has a duty to disclose material facts known to the trustee that might affect beneficiaries' rights.[177] While the scope of this duty is subject to debate, a disclaimer is likely to be considered a material fact that the trustee must disclose. Therefore, the trustee should disclose the underlying facts and the reason for making the disclaimer. This disclosure could be included in the notice itself, but it may be better to keep the notice form simple and make the disclosure in one or more separate documents included with the notice.

A form of notice is included in Appendix 2.

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[173] *Se, e. g.*, Section 240.0081(h), which begins "If the trustee makes the disclaimer for which notice is provided…."
[174] Tex. Prop. Code §240.0081(f)(2), (3) and (4).
[175] Tex. Prop. Code §240.0081(f)(5).
[176] Tex. Prop. Code §240.0081(f)(6).
[177] *Montgomery v. Kennedy,* 669 S. W. 2d 309, 313 (Tex. 1984).

3. When may the trustee disclaim?

The notice must specify the earliest date the trustee intends to make the disclaimer, and it must be given not later than the 30th day before the date the disclaimer is made.[178]

The statute does not state whether a notice is deemed to have been given on the date of sending or on the date of receipt. Since multiple methods of delivery are authorized, including personal delivery, fax and email,[179] the trustee can eliminate this uncertainty by using personal delivery with proof of delivery. If personal delivery is impractical or undesirable, the trustee may send the notice by multiple methods, including a method like fax or email that assures immediate delivery and including a method that requires acknowledgement of receipt, such as first-class certified mail, return receipt requested.

Since the notice must state the earliest possible date of the disclaimer and must be given not later than the 30th day before the date the disclaimer is made, the "earliest date the trustee intends to make the disclaimer" stated in the notice should be the 30th day after the notice is sent, even if the trustee conservatively is treating the date notice is given to be the date of receipt rather than the date of sending. Of course, the trustee should not disclaim before the 30th day after notice is actually given.

Is the trustee required to wait 30 days if all beneficiaries waive notice? Probably not. The only mention of the 30-day requirement is in the notice itself. If no notice is required because all beneficiaries waive notice, then the 30-day waiting period should not apply.[180]

If the nine-month deadline for tax purposes is relevant, the trustee wishing to disclaim must give the notices sufficiently early so that the 30-day period expires before the deadline. It is dangerous to believe that waivers will permit delaying the notice beyond the eight-month mark. As mentioned above in the section entitled "Waiver and other exceptions to the notice requirement," if a current or presumptive remainder beneficiary is a minor, an incapacitated person or a charity, it is likely to be impossible to avoid the need to give at least one notice. This means that, even if all of the adults are in agreement that a disclaimer should be made, the trustee may be barred from making a disclaimer without court approval if he discovers the need for a notice at the last minute.

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[178] Tex. Prop. Code §240.0081(f).
[179] Tex. Prop. Code §240.0081(f)(6).
[180] Section 240.008(d)(2) requires the trustee desiring to disclaim without court approval to provide written notice of the disclaimer in accordance with Section 240.0081. If under Section 240.0081 no notice is required because all beneficiaries waive the notice requirement, then the trustee has not provided written notice, but the trustee has complied with the notice requirements of Section 240.0081. The most conservative approach would be to send at least one notice so that Section 240.008(d)(2) is clearly triggered.

4. What should a beneficiary do if he or she does not want the trustee to disclaim?

The notice provides that a beneficiary has the right to object to the disclaimer and that the beneficiary may petition a court to approve, modify, or deny a disclaimer.[181] Section 240.0081(h) provides that a beneficiary receiving a notice does not lose the beneficiary's right, if any, to sue the trustee for breach of the trustee's fiduciary obligations in connection with making the disclaimer.[182]

While the notice must say that a beneficiary may object to the disclaimer, the statute does not provide a mechanism for or the consequences of an objection. While in many cases a trustee receiving a beneficiary's objection in any form may choose either not to disclaim or to seek court approval of the disclaimer, there is nothing to prevent the trustee from ignoring the objection and disclaiming without court approval.

The only way for a beneficiary to block a disclaimer is to petition a court to modify or deny the disclaimer. While the notice mentions this right, the statute does not describe the procedure or basis for this action. To prevent the trustee from disclaiming, the beneficiary should seek injunctive relief or similar equitable relief rather than simply filing a petition. If the disclaimer is tax-motivated, the trustee must disclaim within nine months of the event triggering the disclaimer (usually the decedent's death). Even when faced with a lawsuit, once the trustee has given the notice and the 30-day period elapses, the trustee has the power to disclaim unless ordered not to do so by the court.

Once the disclaimer is made, the beneficiary may pursue a breach of fiduciary duty claim against the trustee. However, the beneficiary cannot undo the disclaimer based on breach of fiduciary duty,[183] so his or her remedies would be limited to damages, removal of the trustee, etc. The disclaimed property would be gone. If the trustee is judgment-proof, as a practical matter the beneficiary may have no remedy.

D. Seeking court approval of fiduciary disclaimers

1. Necessary parties

A fiduciary's suit to approve a disclaimer would be subject to the same necessary party rules as any action involving that type of fiduciary. The Texas Disclaimer Act does not add or remove necessary parties.

The guardian of an estate wishing to disclaim has to notify those persons who have made appearances in the guardianship proceeding. The court may wish to appoint an attorney ad litem or guardian ad litem for the ward. However, an ad litem is not

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[181] Tex. Prop. Code §240.0081(f)(1).
[182] Section 240.008(f) provides that, unless a court approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary's fiduciary obligations.
[183] Tex. Prop. Code §240.008(g).

expressly required. Since the guardian of the estate is the ward's legal representative, logically an ad litem should not be necessary, assuming that the guardian will not personally benefit from the disclaimer.

The agent under a durable power of attorney must make the principal a party. If the principal is incapacitated, the court may appoint an attorney ad litem or guardian ad litem for the principal. The principal's heirs and presumptive will beneficiaries should not be necessary parties and may not be permissible parties.

The personal representative of a decedent's estate should make all persons interested in the estate parties.[184]

The trustee of a trust created under Section 142.005 of the Property Code or under Chapter 1301 of the Estates Code probably needs to make the beneficiary of the trust a party, and if that beneficiary is incapacitated, the court may appoint a guardian ad litem or attorney ad litem. The person for whom one of these trusts is created is the sole beneficiary of the trust,[185] so remainder beneficiaries or family members with expectancies should not be necessary parties to the action.[186]

While current beneficiaries and presumptive remainder beneficiaries of a non-court-created trust are entitled to notice if the trustee chooses not to seek court approval of the disclaimer,[187] the Texas Disclaimer Act does not say that current beneficiaries and presumptive remainder beneficiaries are necessary parties to an action to approve a disclaimer. The only necessary parties are (a) a beneficiary designated by name in the trust instrument (unless that beneficiary's interest has been distributed, extinguished, terminated or paid), (b) a person who is actually receiving distributions from the trust at the time the action is filed, and (c) the trustee.[188] However, a person who is not made a party may not be bound by the judgment, so the trustee may wish to make all beneficiaries not virtually represented by another beneficiary parties to the action.[189]

2. Forum

A suit to approve a disclaimer brought by a guardian or personal representative should be brought in the court in which the guardianship or administration is pending.[190]

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[184] "Person interested" means an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered. Tex. Est. Code §22.018(1).
[185] Tex. Prop. Code §142.005(b)(1); Tex. Est. Code §1301.101(a)(1).
[186] *See* Tex. Trust Code §115.011(b).
[187] Tex. Prop. Code §240.0081(a).
[188] Tex. Trust Code 115.011(b). A beneficiary of a trust on whose act or obligation the action is predicated also is a necessary party, but a trustee's action to approve a disclaimer is not predicated on an act or obligation of a beneficiary.
[189] *See* Tex. Trust Code §115.013.
[190] Tex. Est. Code §§1021.001 and 1151.102(c)(6).

A suit to approve a disclaimer brought by the trustee of a court-created trust should be brought in the court which created the trust.[191]

A suit to approve a disclaimer brought by an agent under a power of attorney may be brought in the district court or in a statutory probate court.[192]

A suit to approve a disclaimer brought by a trustee of a non-court-created trust may be brought in a district court or a statutory probate court.[193] If the trust is a testamentary trust created by a decedent whose will was probated in a county court at law, or if the trust is an inter vivos trust created by a decedent whose will was probated in a county court at law, the suit may be brought in that county court at court.[194]

3. Judgment

If the fiduciary and the beneficiaries agree to the judgment approving a disclaimer, is the disclaimer ineffective for tax purposes? The Internal Revenue Service has attacked disclaimers based on a pre-arranged plan,[195] and the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed.[196] Merely agreeing to the terms of the judgment does not involve consideration, and the Texas Disclaimer Act provides for and in some cases requires court approval, so having the parties sign an agreed judgment should not keep the disclaimer from being qualified for tax purposes. Still, to distance the disclaimer from a *Monroe*-type attack, it is preferable for the judgment to be entered without the agreement of the fiduciary.[197]

5. Conclusion

Disclaimers can be effective tools in planning and administration. The Texas Uniform Disclaimer of Property Interests Act should make disclaimers easier and more effective.

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[191] Tex. Est. Code §1301.151; Tex. Prop. Code §142.005(d).
[192] Tex. Est. Code §32.006.
[193] Tex. Trust Code §115.001; Tex. Est. Code §§32.006 and 32.007.
[194] Tex. Est. Code §§31.002(b) and 32.001(a).
[195] *See Estate of Monroe v. Commissioner*, 124 F. 3d 699 (5th Cir. 1997). In *Monroe*, the IRS attack based on a pre-arranged plan was successful in the Tax Court, but the Fifth Circuit overturned the Tax Court.
[196] Treas. Reg. §25.2518-2(d)(1).
[197] A judgment which is not agreed to by all parties does not become final and nonappealable for 30 days after the judgment is signed. Texas Rule of Civil Procedure 329b (d) and (f). Ideally the trustee can time the proceeding so that the judgment becomes final and nonappealable before the disclaimer is made. Assuming no party appeals, this means that ideally the judgment should be signed more than 30 days before the disclaimer.

Appendix 1 – The Texas Uniform Disclaimer of Property Interests Act (Property Code Chapter 240) – Text and Commentary

Title	*Text of Statute*	*Commentary*
240.001. Short Title.	This chapter may be cited as the Texas Uniform Disclaimer of Property Interests Act.	The disclaimer act is found in the Property Code, but it is not a part of the Trust Code. Just like Tex. Prop. Code §111.001 permits a reference to the "Texas Trust Code," this section permits practitioners to refer to this chapter by title.
240.002. Definitions.	In this chapter: (1) "Current beneficiary" and "presumptive remainder beneficiary" have the meanings assigned by Section 112.071. (2) "Disclaim" means to refuse to accept an interest in or power over property, including an interest or power the person is entitled to: (A) by inheritance; (B) under a will; (C) by an agreement between spouses for community property with a right of survivorship; (D) by a joint tenancy with a right of survivorship; (E) by a survivorship agreement, account, or interest in which the interest of the decedent passes to a surviving beneficiary; (F) by an insurance, annuity, endowment, employment, deferred compensation, or other contract or arrangement; (G) under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual; or (H) by an instrument creating a trust. (3) "Disclaimant" means: (A) the person to whom a disclaimed interest or power would have passed had the disclaimer not been made; (B) the estate to which a disclaimed interest or power would have passed had the disclaimer not been made by the personal representative of the estate; or (C) the trust into which a disclaimed interest or power would have passed had the disclaimer not been made by the trustee of the trust. (4) "Disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made. (5) "Disclaimed power" means the power that	(1) The definitions of "current beneficiary" and "presumptive remainder beneficiary" are needed to determine to whom a trustee must give notice of intention to disclaim under Section 240.0081. (3) A trust can be a "disclaimant" even though it is not a "person" under Section 240.002(10). The purpose of the definition of "disclaimant" is to identify the person, estate or trust to whom disclaimed property would have passed, not the fiduciary holding legal title. (13) "Survivorship property" (governed by Sections 240.052 and 240.106) includes multiple party accounts with rights of survivorship and community property with right of survivorship. It does not include pay on death or transfer on death accounts, which are "beneficiary designation" property subject to Section 240.105.

Title	*Text of Statute*	*Commentary*
	would have been possessed by the disclaimant had the disclaimer not been made. (6) "Disclaimer" means the refusal to accept an interest in or power over property. (7) "Estate" has the meaning assigned by Section 22.012, Estates Code. (8) "Fiduciary" means a personal representative, a trustee, an attorney in fact or agent acting under a power of attorney, or any other person authorized to act as a fiduciary with respect to the property of another person. (9) "Guardian" has the meaning assigned by Section 1002.012, Estates Code. (10) Notwithstanding Section 311.005, Government Code, "person" means an individual, corporation, including a public corporation, business trust, partnership, limited liability company, association, joint venture, governmental entity, including a political subdivision, agency, or instrumentality, or any other legal entity. (11) "Personal representative" has the meanings assigned by Sections 22.031 and 1002.028, Estates Code. (12) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a state. (13) "Survivorship property" means property held in the name of two or more persons under an arrangement in which, on the death of one of the persons, the property passes to and is vested in the other person or persons. The term includes: (A) property held by an agreement described in Section 111.001, Estates Code; (B) property held by a community property survivorship agreement defined in Section 112.001, Estates Code; and (C) property in a joint account held by an agreement described in Section 113.151, Estates Code. (14) "Trust" has the meaning assigned by Section 111.003. (15) "Ward" has the meaning assigned by Section 22.033, Estates Code.	

Title	*Text of Statute*	*Commentary*
240.003 Applicability of Chapter.	This chapter applies to disclaimers of any interest in or power over property, whenever created.	The new statute applies to all disclaimers of interest in or power over property, even if the interest or power (or the right to disclaim it) arose prior to the new law's effective date of September 1, 2015. HB 2428's effective date provisions make the old law continue to apply to any disclaimer where the time period for notice or filing had lapsed prior to the new law becoming effective. Because of the nine-month time limit under the prior law, December 1, 2014, is an important date. If the decedent died before that date, the old law applies. If the decedent died on or after December 1, 2014, but before September 1, 2015, the person disclaiming has a choice: (a) disclaim before September 1, 2015, using the old law or (b) disclaim on or after September 1, 2015, using the new law, which would mean that the nine-month deadline under the old law would not apply. If the decedent died on or after September 1, 2015, the new law applies.
240.004. Chapter Supplemented by Other Law.	(a) Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter. (b) This chapter does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a statute other than this chapter.	Because this section does not limit disclaimer rights under another "*statute*," not another "*law,"* this section probably bars common law disclaimers. The prior disclaimer statute effectively barred common law disclaimers, but the new act is not as clear on this point.
240.005. Uniformity of Application and Construction.	In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law, with respect to the subject matter of this chapter, among states that enact a law based on the uniform act on which this chapter is based.	Versions of the uniform act have been enacted in 18 states. Texas courts are directed to consider judicial decisions in other states interpreting the uniform act.
240.006. Power to Disclaim by Person Other Than Fiduciary.	(a) A person other than a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. (b) A person other than a fiduciary may disclaim an interest or power under this section even if the creator of the interest or power imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.	This states the general rule that a person may disclaim an interest in or power over property in whole or in part. A person's power to disclaim is not limited by spendthrift provisions or restrictions on transfers or disclaimer rights contained in the instrument. An individual named as a beneficiary cannot be forced to accept property even if the testator or settlor purports to prohibit disclaimers in the will or trust instrument.

Title	*Text of Statute*	*Commentary*
240.007. Power to Disclaim Power Held in Fiduciary Capacity by Person Designated to Serve As or Serving As Fiduciary.	(a) Subject to Subsection (b) and except to the extent the person's right to disclaim is expressly restricted or limited by a law of this state or by the instrument creating the fiduciary relationship, a person designated to serve or serving as a fiduciary may disclaim, in whole or in part, any power over property, including a power of appointment and the power to disclaim, held in a fiduciary capacity. (b) If a power being disclaimed under Subsection (a) by a person designated to serve or serving as a trustee affects the distributive rights of any beneficiary of the trust: (1) the person may disclaim only on or after accepting the trust; (2) the disclaimer must be compatible with the trustee's fiduciary obligations; and (3) if the disclaimer is made on accepting the trust, the trustee is considered to have never possessed the power disclaimed. (c) A person designated to serve or serving as a fiduciary may disclaim a power under this section even if the creator of the power imposed a spendthrift provision or similar restriction on transfer.	This section provides that a person named as a fiduciary (such as the executor of an estate) may disclaim a power given to the person in a fiduciary capacity before or after the person begins to serve as a fiduciary. The person may wish to do so before beginning to serve so that he or she will not be acting as a fiduciary (and, therefore, subject to fiduciary duties) when making the disclaimer. If a trustee wishes to disclaim a power which could adversely affect trust beneficiaries' distributive rights, he or she may do so only after becoming trustee, and the disclaimer must be compatible with his or her fiduciary obligations as trustee. This gives the beneficiaries recourse to sue the trustee if, by disclaiming the distributive power, the interests of the beneficiaries are harmed.
240.008. Power to Disclaim by Fiduciary Acting in Fiduciary Capacity.	(a) Subject to this section and except to the extent the fiduciary's right to disclaim is expressly restricted or limited by a law of this state or by the instrument creating the fiduciary relationship, a fiduciary acting in a fiduciary capacity may disclaim, in whole or in part, any interest in or power over property, including a power of appointment and the power to disclaim, that would have passed to the ward, estate, trust, or principal with respect to which the fiduciary was acting had the disclaimer not been made even if: (1) the creator of the interest or power imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim; or (2) an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim. (b) Except as provided by Subsection (c), (d), or (f), a disclaimer by a fiduciary acting in a fiduciary capacity does not require court approval to be effective unless the instrument that created the fiduciary relationship requires court approval. (c) The following disclaimers by a fiduciary acting in a fiduciary capacity are not effective	This section provides the rules for disclaimers by fiduciaries acting in a fiduciary capacity. It specifies different requirements for court-supervised personal representatives than for independent executors and for trustees of court-created trusts than for trustees of other trusts. Any disclaimer by a fiduciary which would cause the property to pass to the fiduciary personally must be approved by a court. This could apply, for example, if a trustee disclaims property on behalf of a trust which causes the property to pass to the trustee individually. A trustee of a trust which is not court supervised must either give the notice required by Section 240.0081 or obtain court approval before disclaiming. Seeking court approval provides greater protection for the trustee, since a fiduciary disclaimer without court approval must be compatible with a trustee's fiduciary obligations. The remedies for a breach of fiduciary duty do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the

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	unless approved by a court of competent jurisdiction: (1) a disclaimer by a personal representative who is not an independent administrator or independent executor; (2) a disclaimer by the trustee of a management trust created under Chapter 1301, Estates Code; (3) a disclaimer by the trustee of a trust created under Section 142.005; or (4) a disclaimer that would result in an interest in or power over property passing to the person making the disclaimer. (d) A trustee acting in a fiduciary capacity may not disclaim an interest in property that would cause the interest in property not to become trust property unless: (1) a court of competent jurisdiction approves the disclaimer; or (2) the trustee provides written notice of the disclaimer in accordance with Section 240.0081. (e) In the absence of a court-appointed guardian, without court approval, a natural guardian as described by Section 1104.051, Estates Code, may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, that the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer. (f) Unless a court of competent jurisdiction approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary's fiduciary obligations. A disclaimer by a fiduciary acting in a fiduciary capacity is not a per se breach of the fiduciary's fiduciary obligations. (g) Possible remedies for a breach of fiduciary obligations do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the disclaimer ineffective.	disclaimer ineffective. This helps assure finality in disclaimers. A beneficiary may have an action for damages or removal against the fiduciary who disclaims, but the beneficiary cannot undo the disclaimer based on breach of fiduciary duty.

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240.0081. Notice Required by Trustee Disclaiming Certain Interests in Property; Effect of Notice.	a) A trustee acting in a fiduciary capacity may disclaim an interest in property that would cause the interest in property not to become trust property without court approval if the trustee provides written notice of the disclaimer to all of the current beneficiaries and presumptive remainder beneficiaries of the trust. (b) For the purpose of determining who is a current beneficiary or presumptive remainder beneficiary entitled to the notice under Subsection (a), a beneficiary is determined as of the date the notice is sent. (c) In addition to the notice required under Subsection (a), the trustee shall give written notice of the trustee's disclaimer to the attorney general if: (1) a charity is entitled to notice; (2) a charity entitled to notice is no longer in existence; (3) the trustee has the authority to distribute trust assets to one or more charities that are not named in the trust instrument; or (4) the trustee has the authority to make distributions for a charitable purpose described in the trust instrument, but no charity is named as a beneficiary for that purpose. (d) If the beneficiary has a court-appointed guardian or conservator, the notice required to be given by this section must be given to that guardian or conservator. If the beneficiary is a minor for whom no guardian or conservator has been appointed, the notice required to be given by this section must be given to a parent of the minor. (e) The trustee is not required to provide the notice to a beneficiary who: (1) is known to the trustee and cannot be located by the trustee after reasonable diligence; (2) is not known to the trustee; (3) waives the requirement of the notice under this section; or (4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them. (f) The notice required under Subsection (a) must: (1) include a statement that: (A) the trustee intends to disclaim an interest in property;	These notice provisions are modeled on the notice required before a trustee may decant (see Section 112.074 of the Texas Trust Code). A beneficiary may waive notice. No notice is required to be given to descendants of a beneficiary who virtually represents his or her descendants – similar interests with no apparent conflict of interest. The notice must include specific information, including a statement that the beneficiary has a right to object to the disclaimer or to petition a court to approve, modify or deny the disclaimer. Acting or not acting on receipt of a notice of disclaimer does not constitute acceptance of the property. Even if the beneficiary does not object or petition a court prior to the disclaimer, he or she does not lose his or her right to sue the trustee for breach of fiduciary obligations. However, once the disclaimer is made after notice, the disclaimer cannot be voided or declared ineffective based on breach of fiduciary duty. See Section 240.008(g).

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	(B) if the trustee makes the disclaimer, the property will not become trust property and will not be available to distribute to the beneficiary from the trust; (C) the beneficiary has the right to object to the disclaimer; and (D) the beneficiary may petition a court to approve, modify, or deny the disclaimer; (2) describe the interest in property the trustee intends to disclaim; (3) specify the earliest date the trustee intends to make the disclaimer; (4) include the name and mailing address of the trustee; (5) be given not later than the 30th day before the date the disclaimer is made; and (6) be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt. (g) A beneficiary is not considered to have accepted the disclaimed interest solely because the beneficiary acts or does not act on receipt of a notice provided under this section. (h) If the trustee makes the disclaimer for which notice is provided under this section, the beneficiary does not lose the beneficiary's right, if any, to sue the trustee for breach of the trustee's fiduciary obligations in connection with making the disclaimer. Section 240.008(g) applies to remedies sought in connection with the alleged breach.	
240.009. Power to Disclaim; General Requirements; When Irrevocable.	(a) To be effective, a disclaimer must: (1) be in writing; (2) declare the disclaimer; (3) describe the interest or power disclaimed; (4) be signed by the person making the disclaimer; and (5) be delivered or filed in the manner provided by Subchapter C. (b) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property. (c) A disclaimer is irrevocable on the later of the date the disclaimer: (1) is delivered or filed under Subchapter C; or (2) takes effect as provided in Sections 240.051-240.056. (d) A disclaimer made under this chapter is not a transfer, assignment, or release.	A disclaimer must be in writing and signed by the disclaimant. It does ***not*** need to be notarized, although it may have to be notarized if it is to be filed in the real property records. Partial disclaimers are permitted and may be expressed in many ways – fractional, monetary amount, term of years, etc. As under prior Texas law, a disclaimer is not a transfer of property since the disclaimant is treated as never having received the property. However, since the nine-month deadline for disclaiming is removed from Texas law but remains for federal gift tax purposes, the disclaimant may be treated as having made a taxable transfer if the disclaimer is made after the tax deadline.

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240.0501. Definition.	In this subchapter, "future interest" means an interest that: (1) takes effect in possession or enjoyment, if at all, later than the time at which the instrument creating the interest becomes irrevocable; and (2) passes to the holder of the interest at the time of the event that causes the taker of the interest to be finally ascertained and the interest to be indefeasibly vested.	
240.051. Disclaimer of Interest in Property.	(a) This section and Sections 240.0511 and 240.0512 apply to a disclaimer of an interest in property other than a disclaimer subject to Section 240.052 or 240.053. (b) If an interest in property passes because of the death of a decedent: (1) a disclaimer of the interest: (A) takes effect as of the time of the decedent's death; and (B) relates back for all purposes to the time of the decedent's death; and (2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant. (c) If an interest in property passes because of an event not related to the death of a decedent: (1) a disclaimer of the interest: (A) takes effect: (i) as of the time the instrument creating the interest became irrevocable; or (ii) in the case of an irrevocable transfer made without an instrument, at the time of the irrevocable transfer; and (B) relates back for all purposes to the time the instrument became irrevocable or the time of the irrevocable transfer, as applicable; and (2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant. (d) A disclaimed interest passes according to any provision in the instrument creating the interest that provides for: (1) the disposition of the interest if the interest were to be disclaimed; or (2) the disposition of disclaimed interests in general. (e) If the instrument creating the disclaimed interest does not contain a provision described by Subsection (d) and: (1) if the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist; or (2) if the disclaimant is an individual: (A) except as provided by Section	The Texas Disclaimer Act retains the relation-back doctrine. A disclaimer relates back for all purposes to the time of the decedent's death (or the time of irrevocable transfer), and the disclaimed interest is not subject to the claims of any creditor of the disclaimant. Federal law may make the disclaimer ineffective in some cases. For example, a disclaimer made after a bankruptcy petition is filed probably is ineffective, and disclaimers may be treated as transfers for Medicaid qualification purposes. This section distinguishes between disclaimers of interests passing because of a death and interests passing because of an event not related to a death. Examples of an interest passing because of an event not related to the death of a decedent are: (1) an irrevocable gift of property during the donor's lifetime; (a) an interest created when a trust becomes irrevocable prior to the death of a settlor; and (3) an interest created when an income interest in a trust terminates after a set number of years or on a specific date rather than on the death of the income beneficiary. The relation-back doctrine applies both in death-related and non-death related situations. If the instrument creating the disclaimed interest (usually a will or trust, but also possibly a deed, beneficiary designation or other writing) states where an interest goes if it is disclaimed, the terms of the instrument control. If not, this section and the following two sections give the rules for determining who is entitled to receive the disclaimed interest.

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	240.0511, if the interest is passing because of the death of a decedent, the disclaimed interest passes as if the disclaimant had died immediately before the time as of which the disclaimer takes effect under Subsection (b); or (B) except as provided by Section 240.0512, if the interest is passing because of an event not related to the death of a decedent, the disclaimed interest passes as if the disclaimant had died immediately before the time as of which the disclaimer takes effect under Subsection (c). (f) A disclaimed interest that passes by intestacy passes as if the disclaimant died immediately before the decedent.	
240.0511. Disposition of Interest Passing Because of Decedent's Death and Disclaimed by Individual.	(a) Subject to Subsection (b): (1) if by law or under the instrument creating the disclaimed interest the descendants of a disclaimant of an interest passing because of the death of a decedent would share in the disclaimed interest by any method of representation under Section 240.051(e)(2)(A), the disclaimed interest passes only to the descendants of the disclaimant who survive the decedent; or (2) if the disclaimed interest would have passed to the disclaimant's estate under Section 240.051(e)(2)(A), the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the decedent. (b) If no descendant of the disclaimant survives the decedent, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died immediately before the decedent, except that if the transferor's surviving spouse is living but remarried before the decedent's death, the transferor is considered to have died unmarried immediately before the decedent's death. (c) On the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died immediately before the decedent, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.	If the disclaimant's descendants are next in line, only those descendants who survive the decedent take. If the disclaimant's estate is next in line, the disclaimed interest passes instead to the surviving descendants of the disclaimant. If no descendant of the disclaimant survives the decedent, the interest passes to the transferor's heirs at law, with no benefit to a remarried surviving spouse.

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240.0512. Disposition of Interest Passing Because of Event Other Than Decedent's Death and Disclaimed by Individual.	(a) Subject to Subsection (b): (1) if by law or under the instrument creating the disclaimed interest the descendants of a disclaimant of an interest passing because of an event not related to the death of a decedent would share in the disclaimed interest by any method of representation under Section 240.051(e)(2)(B), the disclaimed interest passes only to the descendants of the disclaimant living at the time of the event that causes the interest to pass; or (2) if the disclaimed interest would have passed to the disclaimant's estate under Section 240.051(e)(2)(B), the disclaimed interest instead passes by representation to the descendants of the disclaimant living at the time of the event that causes the interest to pass. (b) If no descendant of the disclaimant is living at the time of the event described by Subsection (a)(1), the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died immediately before the event described by Subsection (a)(1), except that if the transferor's surviving spouse is living but remarried before the event, the transferor is considered to have died unmarried immediately before the event. (c) On the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died immediately before the time the disclaimer takes effect under Section 240.051(c)(1)(A), but a future interest held by the disclaimant is not accelerated in possession or enjoyment.	The rules for an interest passing because of an event other than a decedent's death (addressed in Section 240.0512) are essentially the same as those for interests passing because of a decedent's death (addressed in Section 240.0511), but they are stated in a separate section for clarity.
240.052. Disclaimer of Rights in Survivorship Property.	(a) On the death of a holder of survivorship property, a surviving holder may disclaim, in whole or in part, an interest in the property of the deceased holder that would have otherwise passed to the surviving holder by reason of the deceased holder's death. (b) If an interest in survivorship property is disclaimed by a surviving holder of the property: (1) the disclaimer: (A) takes effect as of the time of the deceased holder's death; and	A disclaimer by a person receiving property by right of survivorship applies to that portion of the survivorship property which would otherwise have passed to the disclaimant. For community property, this is the decedent's one-half of survivorship property. For multi-party accounts with right of survivorship, this is the portion of the account the decedent owned immediately prior to death using the proportional contribution rule found in Section 113.102 of the Estates Code. For survivorship property under Section 111.001

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	(B) relates back for all purposes to the time of the deceased holder's death; and (2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant. (c) An interest in survivorship property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.	of the Estates Code, it is whatever portion of the survivorship property the decedent is treated as owning immediately prior to death.
240.053. Disclaimer Of Interest By Trustee.	(a) If a trustee disclaims an interest in property that otherwise would have become trust property: (1) the interest does not become trust property; (2) the disclaimer: (A) takes effect as of the time the trust became irrevocable; and (B) relates back for all purposes to the time the trust became irrevocable; and (3) the disclaimed interest is not subject to the claims of any creditor of the trustee, the trust, or any trust beneficiary. (b) If the instrument creating the disclaimed interest contains a provision that provides for the disposition of the interest if the interest were to be disclaimed, the disclaimed interest passes according to that provision. (c) If the instrument creating the disclaimed interest does not contain a provision described by Subsection (b), the disclaimed interest passes as if: (1) all of the current beneficiaries, presumptive remainder beneficiaries, and contingent beneficiaries of the trust affected by the disclaimer who are individuals died before the trust became irrevocable; and (2) all beneficiaries of the trust affected by the disclaimer who are not individuals ceased to exist without successor organizations and without substitution of beneficiaries under the cy pres doctrine before the trust became irrevocable. (d) Subsection (c) applies only for purposes of determining the disposition of an interest in property disclaimed by a trustee that otherwise would have become trust property and applies only with respect to the trust affected by the disclaimer. Subsection (c) does not apply with respect to other trusts governed by the instrument and does not apply for other purposes under the instrument or under the laws of intestacy.	Disclaimed property that would have become trust property passes pursuant to the terms of the instrument. This gives the estate planning attorney drafting the will or trust the ability to direct what happens if the trustee disclaims. If no provision is made for passage of a disclaimed interest, the trust is treated as never having existed for purposes of the disclaimed interest, and the interest passes to the next beneficiary in line after the trust under the terms of the instrument. Because a beneficiary of the trust affected by the disclaimer is likely to be an outright recipient of the disclaimed property or a beneficiary of the trust which receives disclaimed property, Section 240.053(d) provides that the beneficiary is treated as having predeceased only for purposes of the trust affected by the disclaimer and not for other purposes of the instrument. For example, in a credit shelter/QTIP trust plan with an up-front gift to the credit shelter trust and a residuary gift to a QTIP trust, property disclaimed by the trustee of the credit shelter trust passes directly into the QTIP trust under Section 240.053(c), regardless of the status and identity of the income and remainder beneficiaries of the credit shelter trust and the QTIP trust. If the surviving spouse is a beneficiary of both the credit shelter trust and the QTIP trust, under Section 240.053(c), he or she is treated as having predeceased with respect to the credit shelter trust but, under Section 240.053(d), is not treated as having predeceased with respect to the QTIP trust. Therefore, the surviving spouse is allowed to be a beneficiary of the QTIP trust notwithstanding the disclaimer by the trustee of the credit shelter trust.

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240.054. Disclaimer of Power of Appointment or Other Power Not Held in Fiduciary Capacity.	(a) If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, this section applies. (b) If the holder: (1) has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable; or (2) has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power. (c) The instrument creating the power is construed as if the power had expired when the disclaimer became effective.	
240.055. Disclaimer by Appointee of, or Object or Taker in Default of Exercise of, Power of Appointment.	(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable. (b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.	
240.056. Disclaimer of Power Held in Fiduciary Capacity.	(a) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable. (b) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power. (c) A disclaimer subject to this section is effective as to another person designated to serve or serving as a fiduciary if: (1) the disclaimer provides that it is effective as to another person designated to serve or serving as a fiduciary; and (2) the person disclaiming has the authority to bind the estate, trust, or other person for whom the person is acting.	

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240.057. Tax Qualified Disclaimer.	(a) In this section, "Internal Revenue Code" has the meaning assigned by Section 111.004. (b) Notwithstanding any other provision of this chapter, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated under the Internal Revenue Code as never having been transferred to the disclaimant, the disclaimer or transfer is effective as a disclaimer under this chapter.	This is a tax savings catch-all provision. Even if a disclaimer would not otherwise be effective under the Texas Disclaimer Act, if a disclaimer is a qualified disclaimer for federal tax law purposes, it is effective under the Texas act. For this reason, the are no tax-qualified disclaimers which fall outside of the Texas Disclaimer Act, but there are disclaimers permitted under the Texas Disclaimer Act which are not tax-qualified.
240.058. Partial Disclaimer by Spouse.	A disclaimer by a decedent's surviving spouse of an interest in property transferred as the result of the death of the decedent is not a disclaimer by the surviving spouse of any other transfer from the decedent to or for the benefit of the surviving spouse, regardless of whether the interest that would have passed under the disclaimed transfer passes because of the disclaimer to or for the benefit of the surviving spouse by the other transfer.	This section was carried over from former law so that there is no question that it continues to apply.
240.101. Delivery or Filing Generally.	(a) Subject to applicable requirements of this subchapter, a disclaimant may deliver a disclaimer by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the disclaimer's receipt. (b) If a disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer's receipt, delivery is considered to have occurred on the date of mailing regardless of receipt.	Section 240.101 fixes some of the problems with delivery of a disclaimer. Delivery methods are expansive, and Section 240.101(b) imports a good-faith mailbox rule. If the disclaimer is mailed to the appropriate person by certified mail, return receipt requested, at an address the disclaimant in good faith believes is "likely to result in the disclaimer's receipt," the delivery is considered to have occurred on the date of mailing (not the date of receipt), and it is considered to be delivered even if the intended recipient ***never*** receives it.
240.102. Disclaimer of Interest Created Under Intestate Succession or Will.	In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust: (1) a disclaimer must be delivered to the personal representative of the decedent's estate; or (2) if no personal representative is then serving, a disclaimer must be filed in the official public records of any county in which the decedent: (A) was domiciled on the date of the decedent's death; or (B) owned real property.	If there is a personal representative of a decedent's estate, then the disclaimer must be delivered to the personal representative and does not have to be filed anywhere. If there is no personal representative of an estate (even if there is a probate proceeding, such as the probate of a will as a muniment of title or a determination of heirship), the disclaimer is filed in the official public records (real property records) of any county in which the decedent was domiciled at death or owned real property. Filing in the probate proceeding accomplishes nothing. If there is no personal representative, the filing requirement is either/or: it is not necessary to file in the

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		county of domicile ***and*** in a county where real estate is owned; rather, the disclaimant may file in either. If the disclaimer covers real property in more than one county or property other than real property (such as tangible or intangible personal property), filing in ***any*** county where real estate is located (or in the county of domicile) makes the disclaimer effective for all property described in the disclaimer.
240.103. Disclaimer of Interest in Testamentary Trust.	In the case of an interest in a testamentary trust: (1) a disclaimer must be delivered to the trustee then serving; (2) if no trustee is then serving, a disclaimer must be delivered to the personal representative of the decedent's estate; or (3) if no trustee or personal representative is then serving, a disclaimer must be filed in the official public records of any county in which the decedent: (A) was domiciled on the date of the decedent's death; or (B) owned real property.	If the person wishes to disclaim an interest in a testamentary trust, the disclaimer must be delivered to the trustee if a trustee is serving at that time. If there is no trustee serving (for example, if the trust has not yet been funded or the trustee has resigned), the disclaimer must be delivered to the personal representative of the estate. If there is no personal representative or trustee, the disclaimer is filed in the official public records (real property records) of any county in which the decedent was domiciled or owned real property. Filing in the probate proceeding accomplishes nothing. The filing requirement is either/or: it is not necessary to file in the county of domicile ***and*** in a county where real estate is owned; rather, the disclaimant may file in either. If the disclaimer covers real property in more than one county or property other than real property (such as tangible or intangible personal property), filing in ***any*** county where real estate is located (or in the county of domicile) makes the disclaimer effective for all property described in the disclaimer.
240.104. Disclaimer of Interest in Inter Vivos Trust.	In the case of an interest in an inter vivos trust: (1) a disclaimer must be delivered to the trustee then serving, or, if no trustee is then serving, a disclaimer must be filed: (A) with a court having jurisdiction to enforce the trust; or (B) in the official public records of the county in which: (i) the situs of administration of the trust is maintained; or (ii) the settlor is domiciled or was domiciled on the date of the settlor's death; and (2) if a disclaimer is made before the time the instrument creating the trust becomes irrevocable, a disclaimer must be delivered to the settlor of a revocable trust or the transferor of the interest.	For all inter vivos trusts (revocable and irrevocable), the disclaimer must be delivered to the trustee, or if there is no trustee, the disclaimer must be filed with a court having jurisdiction to enforce the trust (which isn't likely to happen unless a lawsuit involving the trust already is pending), or in either (1) the county of situs of administration or (2) the county where the settlor is domiciled if living or was domiciled at death if not living. If the trust is revocable, the disclaimer also must be delivered to the settlor. This is an extra requirement for revocable trusts, not an alternative requirement.

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240.105. Disclaimer of Interest Created by Beneficiary Designation.	(a) In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of: (1) an annuity or insurance policy; (2) an account with a designation for payment on death; (3) a security registered in beneficiary form; (4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or (5) any other nonprobate transfer at death. (b) In the case of an interest created by a beneficiary designation that is disclaimed before the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation. (c) In the case of an interest created by a beneficiary designation that is disclaimed after the designation becomes irrevocable: (1) a disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and (2) a disclaimer of an interest in real property must be recorded in the official public records of the county where the real property that is the subject of the disclaimer is located.	Section 240.105(c) requires recording a disclaimer in the real property records in the unusual case of a disclaimer of real property passing pursuant to an irrevocable beneficiary designation. If beneficiary designation property is disclaimed before the designation becomes irrevocable (usually this means before the death of the person making the designation), the disclaimer must be delivered to the person making the designation (for example, the owner of the insurance policy or participant in a retirement plan), not to the third party (for example, the insurance company or plan administrator) holding the property subject to the beneficiary designation. If the property is disclaimed after the designation becomes irrevocable (usually this means after the death of the person making the designation), the disclaimer must be delivered to the person obligated to distribute ***personal*** property (insurance company, plan administrator, etc.) or filed in the county where real property is located, if the beneficiary designation property is ***real*** property. If the person making the disclaimer wishes to disclaim benefits passing because of the death of the insured/participant from multiple policies and retirement plans, disclaimers must be delivered to multiple recipients – each insurance company and plan administrator.
240.106. Disclaimer by Surviving Holder of Survivorship Property.	In the case of a disclaimer by a surviving holder of survivorship property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.	Section 240.106 is the only section that requires delivery of a disclaimer to the person to whom the disclaimed interest passes. If the decedent and the disclaimant were the only parties to a survivorship account, then the disclaimer will cause the disclaimed interest to pass to the personal representative of the decedent's estate, so delivery to the personal representative is required. If there were three or more parties to the survivorship account, then the disclaimed interest would pass to the other surviving account owners, so delivery to these account owners is required. Delivering a copy of the disclaimer to the third party holding the survivorship property (bank, brokerage firm, etc.) may be wise for practical reasons, *but it is not sufficient to make the disclaimer effective.*

Title	*Text of Statute*	*Commentary*
240.107. Disclaimer by Object or Taker in Default of Exercise of Power of Appointment.	In the case of a disclaimer by an object or taker in default of an exercise of a power of appointment at any time after the power was created: (1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or (2) if no fiduciary is then serving, the disclaimer must be filed: (A) with a court having authority to appoint the fiduciary; or (B) in the official public records of the county in which the creator of the power is domiciled or was domiciled on the date of the creator's death.	
240.108. Disclaimer by Certain Appointees.	In the case of a disclaimer by an appointee of a nonfiduciary power of appointment: (1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate, or the fiduciary under the instrument that created the power; or (2) if no fiduciary is then serving, the disclaimer must be filed: (A) with a court having authority to appoint the fiduciary; or (B) in the official public records of the county in which the creator of the power is domiciled or was domiciled on the date of the creator's death.	
240.109. Disclaimer by Certain Fiduciaries.	In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided by Section 240.102, 240.103, or 240.104 as if the power disclaimed were an interest in property.	
240.110. Disclaimer of Power by Agent.	In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.	
240.111. Recording of Disclaimer.	If an instrument transferring an interest in or power over property subject to a disclaimer is required or authorized by law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or registered as that instrument. Except as otherwise provided by Section 240.105(c)(2), failure to file, record, or register the disclaimer does not affect the disclaimer's validity between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.	This applies to disclaimers which are required or authorized by law to be filed, recorded or registered. Section 12.001 of the Property Code provides that any instrument concerning real or personal property may be recorded if it has been acknowledged. If the disclaimer is acknowledged, it is “authorized” to be filed by Section 12.001. Does this give the disclaimant an alternative way to make a disclaimer effective -- filing it instead of delivering it to the persons entitled to receive it under other

Title	*Text of Statute*	*Commentary*
		sections of Subchapter C? Section 240.009(a)(5) provides that, to be effective, a disclaimer must be "delivered or filed in the manner provided by Subchapter C." It is clear that (1) disclaimers do not have to be filed or recorded in order to be effective except in specific circumstances; (2) in those specific circumstances (such as when the interest passes by intestacy and there is no personal representative of the estate – see Section 240.102) disclaimers must be filed or recorded in order to be effective; and (3) any disclaimer is permitted to be filed or recorded if it is acknowledged. It is *not* clear that filing or recording a disclaimer that other sections of Subchapter C say must be delivered to a person is a safe alternative to that delivery. This approach may work, but it may not, so it should not be relied upon.
240.151. When Disclaimer Barred or Limited.	(a) A disclaimer is barred by a written waiver of the right to disclaim. (b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective: (1) the disclaimant accepts the interest sought to be disclaimed by: (A) taking possession of the interest; or (B) exercising dominion and control over the interest; (2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or (3) the interest sought to be disclaimed is sold under a judicial sale. (c) The acceptance of an interest in property by a person in the person's fiduciary capacity is not an acceptance of the interest in the person's individual capacity and does not bar the person from disclaiming the interest in the person's individual capacity. (d) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by the previous exercise of the power. (e) A disclaimer, in whole or in part, of the future exercise of a power not held in a fiduciary capacity is not barred by the previous exercise of the power unless the	Section 240.151(b)(1) imports the definition of "acceptance" of a disclaimed interest from Chapter 122. This provides continuity in the law. In Texas, acceptance continues to mean taking possession of property or exercising dominion and control of property. Acceptance of property as a fiduciary is not acceptance of the property individually. For example, if the surviving spouse is the executor of the deceased spouse's estate, the surviving spouse as executor may take control and possession of estate property without precluding a later disclaimer by the surviving spouse individually, so long as he or she has not accepted the property individually. As with prior law, an attempted disclaimer which is barred by the Texas Disclaimer Act is treated as an assignment to the person or persons who would have received the property if the disclaimer had been effective. In some states, an ineffective disclaimer causes the property to revert back to the disclaimant. That's not the rule in Texas. A disclaimer by a "child support obligor" as defined in the statute is barred only as to disclaimed property that could be applied to satisfy the specified child support obligations. If the disclaimant is not a "child support

Title	*Text of Statute*	*Commentary*
	power is exercisable in favor of the disclaimant. (f) A disclaimer of: (1) a power over property that is barred by this section is ineffective; and (2) an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under Subchapter B had the disclaimer not been barred. (g) A disclaimer by a child support obligor is barred as to disclaimed property that could be applied to satisfy the disclaimant's child support obligations if those obligations have been: (1) administratively determined by the Title IV-D agency as defined by Section 101.033, Family Code, in a Title IV-D case as defined by Section 101.034, Family Code; or (2) confirmed and reduced to judgment as provided by Section 157.263, Family Code. (h) If Subsection (g) applies, the child support obligee to whom child support arrearages are owed may enforce the child support obligation against the disclaimant as to disclaimed property by a lien or by any other remedy provided by law.	obligor," he or she is not affected and does not have to include language about this in the disclaimer.

Disclaimer Forms Index

Appendix 2 -- Disclaimer Forms

Disclaimer Form 1.1.1
Decedent's estate with personal representative – mailed—full disclaimer

Disclaimer

_____, 20___ *[date of mailing]*

Certified Mail, Return Receipt Requested[1]
No. _____

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[2] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

[Add if appropriate. I do not disclaim my interest in _____ *[describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.]*.[3]

_____
[signature of disclaimant][4]

[1] If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. Tex. Prop. Code Sec. 240.101(b). Care should be taken to retain proof of mailing.
[2] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.
[3] If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer delivered to the personal representative is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.
[4] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

Appendix 2 -- Disclaimer Forms

Disclaimer Form 1.1.2
Decedent's estate with personal representative – mailed—specific asset

Disclaimer

_____, 20___ *[date of mailing]*

Certified Mail, Return Receipt Requested[1]
No. _____

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[2] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy:

_____ *[describe specific asset or interest being disclaimed]*

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

_____
[signature of disclaimant][3]

[1] If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. Tex. Prop. Code Sec. 240.101(b). Care should be taken to retain proof of mailing.
[2] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.
[3] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

Appendix 2 -- Disclaimer Forms

Disclaimer Form 1.1.3
Decedent's estate with personal representative – mailed—pecuniary formula

Disclaimer

_____, 20___ *[date of mailing]*

Certified Mail, Return Receipt Requested[1]
No. _____

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[2] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim a pecuniary amount[3] of property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy, determined as follows:

_____ *[include the formula provision defining the pecuniary amount being disclaimed]*

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

_____
[signature of disclaimant][4]

---

[1] If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. Tex. Prop. Code Sec. 240.101(b). Care should be taken to retain proof of mailing.

[2] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.

[3] A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property. Tex. Prop. Code Sec. 240.009(b).

[4] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

Appendix 2 -- Disclaimer Forms

Disclaimer Form 1.2.1
Decedent's estate with personal representative – hand-delivered—full disclaimer

Disclaimer

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[1] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

[Add if appropriate. I do not disclaim my interest in _____ *[describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.]*.[2]

_____
[signature of disclaimant][3]

Receipt acknowledged on _____, 20__[4]

_____
[signature of personal representative]
_____ *[name of personal representative]*,
Personal Representative of the
Estate of _____ *[name of decedent]*

---

[1] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.

[2] If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer delivered to the personal representative is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.

[3] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

[4] A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer's receipt. Tex. Prop. Code Sec. 240.101(a). If the certified mail safe harbor is not used (*see* Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Appendix 2 -- Disclaimer Forms

Disclaimer Form 1.2.2
Decedent's estate with personal representative – hand-delivered— specific asset

Disclaimer

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[1] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy:

_____ *[describe specific asset or interest being disclaimed]*

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

_____
[signature of disclaimant][2]

Receipt acknowledged on _____, 20__[3]

_____
[signature of personal representative]
_____ *[name of personal representative]*,
Personal Representative of the
Estate of _____ *[name of decedent]*

---

[1] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.
[2] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.
[3] A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer's receipt. Tex. Prop. Code Sec. 240.101(a). If the certified mail safe harbor is not used (*see* Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Disclaimer Form 1.2.3
Decedent's estate with personal representative – hand-delivered— pecuniary formula

Disclaimer

To: _____ *[name of personal representative]*
_____ *[address]*
_____

This disclaimer is delivered to you in your capacity as personal representative of the estate[1] of _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent."

I, _____ *[name of disclaimant]*, disclaim a pecuniary amount[2] of property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy, determined as follows:

_____ *[include the formula provision defining the pecuniary amount being disclaimed]*

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

_____
[signature of disclaimant][3]

Receipt acknowledged on _____, 20__[4]

_____
[signature of personal representative]
_____ *[name of personal representative]*,
Personal Representative of the
Estate of _____ *[name of decedent]*

---

[1] If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. Tex. Prop. Code Sec. 240.102.

[2] A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property. Tex. Prop. Code Sec. 240.009(b).

[3] The disclaimant's signature does not need to be notarized, *see* Tex. Prop. Code Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

[4] A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer's receipt. Tex. Prop. Code Sec. 240.101(a). If the certified mail safe harbor is not used (*see* Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Appendix 2 -- Disclaimer Forms

Disclaimer Form 2.1
Decedent's estate with no personal representative – full disclaimer

Disclaimer

Choose one of these three options:[1]

[Option 1 -- Will probated as muniment of title:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*, and the Decedent's will was admitted to probate as a muniment of title in Cause No. _____ in the _____ *[name of court]* of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 2 – Estate proceeding but no current personal representative:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*. The Decedent's estate was the subject of a proceeding in Cause No. _____ in the _____ *[name of court]* of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 3 – No estate proceeding:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*. No personal representative is now serving with respect to the Decedent's estate.

Choose one of these two options:[2]

[Option 1 -- Domiciled in county:] The Decedent was domiciled in _____ County, Texas, on the date of the Decedent's death.

[Option 2 – Owned real property in county:] The Decedent owned real property in _____ County, Texas.

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

---

[1] If no personal representative is then serving, the disclaimer must be filed in the official public records of any county in which the decedent was domiciled on the date of death or owned real property. Tex. Prop. Code Sec. 240.102(2). The three most likely ways in which a personal representative would not be serving are (1) the will was probated as a muniment of title, (2) there was an estate proceeding but no personal representative is now serving, or (3) there was no estate proceeding. Although the statute does not require the disclaimer to include information about the estate proceeding, if there was an estate proceeding it is prudent to include information about it.

[2] If there is no personal representative, the disclaimer may be filed in *any* county in which the decedent was domiciled on the date of death *or* owned real property. Tex. Prop. Code Sec. 240.102(2). It is not necessary to file in both places. Also, filing a disclaimer in a county where the decedent owned real property makes the disclaimer effective with respect to personal property wherever located and with respect to real property not located in that county.

[Add if appropriate. I do not disclaim my interest in _____ *[describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.]*.[3]

Dated _____, 2015.

_____
[signature of disclaimant]

Acknowledgment[4]

The State of Texas
County of _____

This instrument was acknowledged before me on _____, 20___, by _____ *[name of disclaimant]*.

_____ *[Seal]*
Notary Public, State of Texas

After recording, return to:

*[*name *and address]*

[3] If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer filed in the official public records is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.

[4] An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law. Tex. Prop. Code Section 12.001(a).

Appendix 2 -- Disclaimer Forms

Disclaimer Form 2.2
Decedent's estate with no personal representative – specific asset

Disclaimer

Choose one of these three options:[1]

[Option 1 -- Will probated as muniment of title:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*, and the Decedent's will was admitted to probate as a muniment of title in Cause No. _____ in the _____ *[name of court]* of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 2 – Estate proceeding but no current personal representative:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*. The Decedent's estate was the subject of a proceeding in Cause No. _____ in the _____ *[name of court]* of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 3 – No estate proceeding:] _____ *[name of decedent]*, referred to in this disclaimer as the "Decedent," died on or about _____, ____ *[date of death]*. No personal representative is now serving with respect to the Decedent's estate.

Choose one of these two options:[2]

[Option 1 -- Domiciled in county:] The Decedent was domiciled in _____ County, Texas, on the date of the Decedent's death.

[Option 2 – Owned real property in county:] The Decedent owned real property in _____ County, Texas.

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy:

---

[1] If no personal representative is then serving, the disclaimer must be filed in the official public records of any county in which the decedent was domiciled on the date of death or owned real property. Tex. Prop. Code Sec. 240.102(2). The three most likely ways in which a personal representative would not be serving are (1) the will was probated as a muniment of title, (2) there was an estate proceeding but no personal representative is now serving, or (3) there was no estate proceeding. Although the statute does not require the disclaimer to include information about the estate proceeding, if there was an estate proceeding it is prudent to include information about it.

[2] If there is no personal representative, the disclaimer may be filed in *any* county in which the decedent was domiciled on the date of death *or* owned real property. Tex. Prop. Code Sec. 240.102(2). It is not necessary to file in both places. Also, filing a disclaimer in a county where the decedent owned real property makes the disclaimer effective with respect to personal property wherever located and with respect to real property not located in that county.

_____ *[describe specific asset or interest being disclaimed]*[3]

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

Dated _____, 2015.

_____
[signature of disclaimant]

Acknowledgment[4]

The State of Texas
County of _____

This instrument was acknowledged before me on _____, 20___, by _____ *[name of disclaimant]*.

_____ *[Seal]*
Notary Public, State of Texas

After recording, return to:

*[*name *and address]*

[3] Even if the asset being disclaimed is not located in a county where the decedent was domiciled or owned real property, the only way to meet the delivery and filing requirements for an asset passing by will or intestacy when there is no personal representative then serving is to file in one of those counties.
[4] An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law. Tex. Prop. Code Section 12.001(a).

Appendix 2 -- Disclaimer Forms

Disclaimer Form 3.1
Trustee's notice of intent to disclaim

[Trustee's letterhead]

_____, 20___ *[date of notice]*[1]

Certified Mail, Return Receipt Requested[2]
No. _____

To: _____ *[name of beneficiary]*[3]
_____ *[address]*
_____

Re: Trustee's notice of intent to disclaim

Dear _____ *[name of beneficiary]:*

I am the trustee of the _____ *[name of trust]*, referred to in this notice as the "Trust." You are a current beneficiary or presumptive remainder beneficiary of the Trust. This notice is being given to you in accordance with Section 240.0081 of the Texas Property Code.

1. In my capacity as trustee of the Trust, I intend to disclaim all right, title and interest in and to the following described property (referred to in this notice as the "Property"):[4]

---

[1] The notice must be given not later than the 30th day before the date the disclaimer is made. Tex. Prop. Code Sec. 240.0081(f)(5). The statute does not specify if the 30 days is measured from the date of the notice or the date of receipt.

[2] The notice may be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt. Tex. Prop. Code Sec. 240.0081(f)(6). Unlike the delivery requirements for disclaimers (*see* Tex. Prop. Code Sec. 240.101(b)), there is no safe harbor for certified mail. Therefore, the safest practice would be to collect the acknowledgments of receipt of certified mail and use the latest of these as the beginning of the 30-day period.

[3] The trustee must give notice to current beneficiaries and presumptive remainder beneficiaries. These terms are defined in Tex. Prop. Code Sec. 240.002. In addition, notice must be given to the attorney general if a charity is a beneficiary or potential beneficiary. Tex. Prop. Code Sec. 240.0081(c). If the beneficiary is has a court-appointed guardian or conservator, the notice must be given to the guardian or conservator. If a minor beneficiary has no court appointed guardian or conservator, the notice must be given to a parent of the minor. Tex. Prop. Code Sec. 240.0081(d). The notice does not have to be given to a beneficiary who waives notice (*see* Form 3.2), who is not known to the trustee, who is known to the trustee but cannot be located after reasonable diligence, or who is a descendant of a beneficiary to whom the trustee has given notice if they have similar interests and no apparent conflict of interest. Tex. Prop. Code Sec. 240.0081(e).

[4] Tex. Prop. Code Section 240.0081(f)(1)(A) and 240.0081(f)(2).

[describe property or interest to be disclaimed]

2. If I make the disclaimer, the Property will not become trust property and will not be available to distribute to you from the Trust.[5]

3. You have the right to object to the disclaimer.[6]

4. You may petition a court to approve, modify, or deny the disclaimer.[7]

5. The earliest date I intend to make the disclaimer is _____, 20___ *[date of intended disclaimer]*.[8]

6. My name and mailing address is:[9]

_____ *[name of trustee]*
_____ *[mailing address of trustee]*

Optional: I intend to make this disclaimer because _____ *[state reasons for disclaimer]*.

Optional: If you have questions, need additional information or wish to discuss this matter, please contact me.

_____ *[signature of trustee]*
_____ *[name of trustee]*, Trustee of the
_____ *[name of trust]*

[5] Tex. Prop. Code Section 240.0081(f)(1)(B).
[6] Tex. Prop. Code Section 240.0081(f)(1)(C).
[7] Tex. Prop. Code Section 240.0081(f)(1)(D).
[8] Tex. Prop. Code Section 240.0081(f)(3). The earliest date stated in the notice should not be earlier than 30 days after the date of the notice. As a practical matter, the earliest date for the disclaimer will be the date stated here or 30 days after the last notice is given, whichever is later.
[9] Tex. Prop. Code Section 240.0081(f)(4).

Appendix 2 -- Disclaimer Forms

Disclaimer Form 3.2
Waiver of trustee's notice of intent to disclaim

Waiver of Notice

I, _____ *[name of beneficiary]*, hereby waive the requirement of notice under Section 240.0081 of the Texas Property Code of the intention of _____ *[name of trustee]*, trustee of the _____ *[name of trust]*, to disclaim the following described property which otherwise may pass into the trust:

[describe property or interest to be disclaimed]

[Optional: Include acknowledgments of receipt of material information, understanding the effect of the disclaimer, etc.].[1]

[Use extreme caution about including a release.].[2]

_____ *[signature of beneficiary]*
[name of beneficiary]

Acknowledgment[3]

The State of Texas
County of _____

This instrument was acknowledged before me on _____, 20___, by _____ *[name of beneficiary]*.

_____ *[Seal]*
Notary Public, State of Texas

---

[1] Section 240.0081 of the Property Code does not require the beneficiary waiving notice to acknowledge receipt of material information or understanding the effect of the disclaimer, but the trustee may wish to have these acknowledgments for the trustee's protection.

[2] Caution: While some trustees may wish to include a release, the release may be deemed to be consideration received by the trustee for making the disclaimer, which could make the disclaimer ineffective for tax purposes. In order for the release to be effective, the beneficiary must be acting on full information in order for the release to be effective. Tex. Prop. Code Sec. 114.005.

[3] Section 240.0081 of the Property Code does not require the waiver to be notarized, but the trustee may wish to require an acknowledgment for his or her protection.