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Using Disclaimers in Post-Mortem Estate Planning

By: Guy S. Emerich
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Most of the time when one thinks about estate planning, a person thinks about pre-death planning. However, from time to time post-mortem planning comes into play. In this Newsletter we will look at an important post-mortem planning tool. That tool is the disclaimer.

A disclaimer is a refusal to accept an interest in or a power over property. In its most common usage a disclaimer involves an estate or trust beneficiary refusing to accept all or a portion of the inheritance or trust benefits to which they would have been entitled. In short, a beneficiary is saying "I do not want the inheritance the decedent left me." Why would anyone ever renounce their right to inherit?

One of the most common reasons is because of a legal fiction that takes place when one files a disclaimer. When a disclaimer is signed, the beneficiary, in a legal fiction, is treated as having predeceased the testator. The result of that legal fiction is that the next level of beneficiaries will inherit.

Let's look at an example. Assume that Mr. Doe has died and under his will he has left his entire fortune to his son and daughter. Both of the children are already financially secure and do not want the inheritance that their father has left them. Mr. Doe's will says that if his son or daughter predeceases him then their children become the beneficiaries. By signing a disclaimer the two children will make their children the beneficiaries of Mr. Doe's estate.

The children of the son and daughter now inherit from their grandfather. If the disclaimer is done timely and properly, the movement of the assets from Mr. Doe's estate to the grandchildren is not viewed as a gift from the children's parents. The reason is simply that the grandchildren are now viewed as beneficiaries of Mr. Doe's estate, so no assets ever came from their parents. Thus, there was no transfer.

When a person files a disclaimer he can disclaim all or any portion of the inheritance. It is not an "all or nothing" proposition. For example, if the estate was \$500,000, the beneficiary could disclaim \$100,000 so that amount would pass to his children. The beneficiary would retain the remaining \$400,000. Of course, the disclaimed amount goes to whom the document, trust, or will, says is the next level of beneficiary. The beneficiary needs to read the trust or will carefully to be sure he or she knows who the next level of beneficiary will be. It is quite possible that the beneficiary's children might not be the people who inherit in the event of a disclaimer.

The use of a disclaimer is governed by Florida law, chapter 739, known as the Florida Uniform Disclaimer of Property Interests Act, and by Section 2518 of the Internal Revenue Code (IRC).



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The technical provisions of the Florida act need to be complied with in terms of how it should be executed and whether it needs to be recorded in the public records. Section 2518 of the IRC must be complied with so that there is no question that the amount disclaimed is not a gift.

Basically Section 2518 requires that a qualified disclaimer be executed within nine months from the date on which the transfer creating the interest in the beneficiary is made. For most disclaimer cases that means within nine months from date of death. In addition the person who is disclaiming cannot have accepted the interest being disclaimed or any of its benefits. Finally, as a result of the disclaimer the interest passes without any direction on the part of the person making the disclaimer and passes either to the spouse of the decedent or to a person other than the person making the disclaimer.

The Florida law states a number of circumstances when a disclaimer is barred or limited. One of the most significant is if the person disclaiming is insolvent when the disclaimer becomes irrevocable, the idea being that a person should not be allowed to defeat his creditors' claim, to his inheritance by disclaiming and refusing to accept the inheritance.

In summary, disclaimers are an excellent post-mortem technique for moving assets to other beneficiaries without it being treated as a gift from the initial beneficiary. Because the use of disclaimers is time-sensitive and must be done before the acceptance of any benefit, disclaimers should be discussed early in the estate or trust administration process.

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