ROBINSON & COLE LLP
INDIVIDUAL CLIENTS GROUP
Planning Pointers
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Qualified Disclaimers

Wills and trust agreements are thought to be set in stone after the death of the testator or settlor. However, it is possible to alter the initial direction of a will or trust agreement with what is known as a "qualified disclaimer."

What is a qualified disclaimer?

A qualified disclaimer is a refusal to accept a gift, bequest, devise or legacy, which meets certain statutory requirements.

What is the purpose of a qualified disclaimer?

There are many purposes behind disclaiming property. The primary purpose is effectively to "rewrite" dispositive provisions of a will or trust to obtain more favorable transfer tax consequences.

What makes a disclaimer "qualified"?

A "qualified" disclaimer must be an irrevocable, unqualified refusal to accept the property. It must be (i) in writing, identifying the property or interest disclaimed, (ii) signed by the person disclaiming the property or his/her legal representative, (iii) delivered to the transferor or his/her legal representative, and (iv) made no later than nine months after the date of transfer creating the interest disclaimed or nine months after a minor disclaimant reaches age 21.

For example, if a decedent by his will leaves $10,000 to a friend, the friend must disclaim the $10,000 within nine months of the decedent's date of death. A father leaves 100 shares of stock to his child and the residue of his estate to his spouse. The child is 20 years of age at the time of the father's death. If the child disclaims the stock within nine months of attaining age 21, the disclaimer is qualified so long as the child has not accepted it after attaining age 21.

What happens to the disclaimed property?

Assuming the disclaimer is qualified, the disclaimed property passes to the contingent beneficiaries of the gift, bequest or legacy, i.e., to the people the original transferor named to receive the property in the event the primary beneficiary was deceased at the time of transfer or chose not to accept the property.

Can the person disclaiming the property direct how the disclaimed interest is distributed?

No, a disclaimed interest must pass according to the transferor's directions. For example, in her will a decedent leaves $500,000 to her nephew if he survives her, but if he does not survive her, this amount passes to her nephew's children who survive the decedent. If the nephew disclaims the property, it passes to his children who survive the decedent. The nephew cannot direct that the property pass to his brother.

Is it possible to disclaim property after it has been accepted?

No, once an individual has accepted the property, he/she cannot disclaim it. For example, if an individual uses the property or receives income from the property, he/she has accepted the property and cannot thereafter disclaim it. Also, if an individual treats the property as his/hers, such as by directing others with regard to the property, he/she in essence has accepted the property and cannot disclaim it.

Are there any gift or other tax consequences to the person disclaiming the property?

No, the property passes to the contingent beneficiaries without any tax consequence to the person disclaiming the property, provided the disclaimer is "qualified."

Are qualified disclaimers of less than the entire interest in property possible?

It is possible to disclaim a portion of property if it is severable from the entire interest. However, not all property is severable into portions. For example, if a decedent leaves all of her tangible personal property to her brother, the brother can disclaim everything except the decedent's piano. If the decedent in her will establishes a trust directing that all of the income is to be paid to her husband, and upon his

death, the remainder is to be paid to her children in equal shares, the husband may disclaim his income interest in the trust, and the property then would pass to the decedent's children. However, if the wife by her will leaves the residue of her estate to her husband to be distributed to him outright, the husband cannot disclaim a remainder interest in the property and retain a life estate in the property for himself.

Is a qualified disclaimer effective even when the disclaimed interest passes to a trust that names the person disclaiming the property as a beneficiary?

In general, no. For example, under his will a decedent leaves his real estate outright to his daughter. He also leaves the residue of his estate to a trust for his daughter's benefit, and at her death the trust property (or if she does not survive the decedent, the residue) passes to the daughter's children. The will provides that if the daughter does not survive the decedent, the real estate passes with the residue of the estate. The daughter's disclaimer of the real estate would be faulty unless she also disclaimed her interest in such real estate as part of the residue.

The exception to this general rule is that a spouse may disclaim property even though the property then passes to a trust that benefits the spouse. In order for the disclaimer to be qualified, however, the spouse must not have the ability to direct the disposition of the disclaimed property, such as by having a power of appointment over the property if it is held in the trust.

Can a fiduciary, such as an executor, trustee, or attorney-in-fact under a power of attorney, disclaim an interest in property?

Yes, a fiduciary can disclaim an interest in property if the will, trust or power of attorney gives the fiduciary that authority or if the appropriate probate court authorizes the disclaimer.

Why would an executor or trustee disclaim property passing to an estate or trust?

The primary reason an executor or trustee might disclaim property passing to an estate or trust is to save death taxes. For example, where a husband and wife die within a short time of each other, the executor of one estate might disclaim property passing from the other spouse to equalize the estates so that each estate will be taxed at the lowest possible rate.

Can a person use a disclaimer to qualify himself/herself for federal Title XIX assistance (i.e. Medicaid)?

No, in order to qualify for Title XIX benefits or to maintain such benefits, the person must disclose all his/her property to the state, including any property the person may wish to disclaim.

SUMMARY

Qualified disclaimers are useful means by which provisions of a will or trust can be altered, and are most commonly used if the alteration results in transfer tax savings. Because of the underlying technical requirements, you should consult your estate planning attorney or tax advisor to discuss the possible benefits of a qualified disclaimer. Bear in mind, however, that the person who may wish to disclaim property should not accept the property (or any benefit from it) and must act within the nine-month time period.

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