

Bond

Disclaimer Planning

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BOND SCHOENECK
& KING ATTORNEYS

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I. OVERVIEW

- ❑ Disclaimers are governed by state and federal law.
- ❑ Federal tax law applies to the tax treatment of disclaimed property.
- ❑ State law defines the type of property which is subject to disclaimers and provides the rules for exercising valid disclaimers under state law.

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II. INITIAL ANALYSIS

- ❑ What type of property is being disclaimed?
 - Real Estate
 - Homestead
 - IRA
 - Bank Account
 - Tangible Personal Property
 - Business Assets
 - Trust Interest
 - Cash Gift

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II. INITIAL ANALYSIS (cont'd):

- Were benefits received/accepted by the beneficiary?
- Who will receive the disclaimed property? Look to:
 - Testamentary Instrument
 - Irrevocable Inter Vivos Trust
 - Beneficiary Designation Form
 - Real Property Deed
- Dual Disclaimer?
- Applicable Law:
 - Federal Law
 - State Law
 - Both or Multiple Jurisdictions

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III. FLORIDA LAW

- Chapter 739, Florida Statutes, et seq., governs.
 - May disclaim, in whole or in part, conditionally or unconditionally, any interest in, or power over, property, including a power of appointment.
 - Disclaimer must describe the interest or power disclaimed.
 - Disclaimer must be in writing and declare the writing as a disclaimer.
 - Disclaimer must be signed, witnessed, acknowledged, and delivered or filed.
 - Disclaimer may be made at any time unless barred under the statute.

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III. FLORIDA LAW (cont'd):

- ❑ A natural guardian, without court approval, may disclaim on behalf of a minor child, if:
 - Interest or power which the minor child is to receive solely as a result of another disclaimer,
 - The disclaimed interest or power does not pass to or for benefit of natural guardian.
- ❑ Disclaimer becomes irrevocable when:
 - Any conditions within the disclaimer are satisfied, and
 - The Disclaimer is delivered or filed, or
 - As provided in Sections 739.201-739.207, which ever occurs later.

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III. FLORIDA LAW (cont'd):

- ❑ Disclaimer is barred under Florida law if:
 - Disclaimant has waived right in writing;
 - Disclaimant accepted interest to be disclaimed;
 - Disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers interest or contracts to said effect;
 - Interest to be disclaimed is sold pursuant to a judicial sale; or
 - Disclaimant is insolvent when the disclaimer becomes irrevocable.

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IV. FEDERAL LAW

- ❑ Qualified Disclaimer Under Federal Law. See, IRC § 2518, et seq. and regs.
- ❑ Qualified Disclaimer under Federal Law:
 - Disclaimant treated as having predeceased the event of transfer. Disclaimant is not the “transferor” for federal gift and estate tax purposes.
- ❑ Unqualified Disclaimer under Federal Law:
 - Disclaimant is deemed the transferor for estate and gift tax purposes which requires that gift tax rules be applied in determining whether or not a taxable gift has been made.
- ❑ Disclaimer must be irrevocable, unqualified (unconditional, in writing).

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IV. FEDERAL LAW (cont'd):

- Qualified Disclaimer under Federal Law, generally:
 - Disclaimer must be in writing.
 - Disclaimer must be delivered within 9 months from:
 - transfer creating interest, or
 - day on which the Disclaimant attains age 21.
 - Disclaimant must not have accepted the interest disclaimed or any of its benefits.
 - Disclaimed interest must pass to either the spouse of the decedent, or a person other than the person making the disclaimer.

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V. DISCLAIMER PLANNING

- Disclaimer planning with formula for surviving spouse:
 - Tax planning
 - Flexibility
 - Creditor Protection to spouse.
 - Risks:
 - Refusal by surviving spouse to disclaim,
 - Incapacity of surviving spouse.

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V. DISCLAIMER PLANNING (cont'd.)

- IRAs – Generally:
 - Delay acceptance of asset until disclaimer decision is made.
 - Check with plan or IRA custodian as to any specific institutional requirements for disclaimers.
 - IRA disclaimer may be qualified under IRC § 2518, even if not valid under state law.

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V. DISCLAIMER PLANNING (cont'd):

☐ IRA – Qualified Disclaimer:

- Beneficiary cannot accept the IRA – this includes transfer of account, taking distributions, or making investment decisions within account:
 - Exception: A beneficiary may accept decedent's final RMD and still make a valid disclaimer of the IRA or a portion of the IRA (except as to the RMD received).
- If no contingent beneficiary named under Beneficiary Designation form, look to custodial agreement or plan documents to default provisions:
 - Spouse
 - Estate

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HYPOTHETICAL:

- ❑ Goal: Maximize GST Exemption
 - ❑ Facts:
 - Gen 1 GRAT
 - GRAT Remainder → Gen 2 Non-Exempt Trust
 - Gen 2 Disclaims – via formula – GRAT Remainder interest in Gen 2 Non-Exempt Trust
 - Gen 2 GST Exemption applicable to transfer
 - ❑ Disclaimer complies with Florida Law, but fails to be a Qualified Disclaimer as to Sec. 2518
- Gen 2 now becomes the transferor of GRAT remainder (formula) amount to Gen 3 GST Exempt Trusts

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ALTERNATIVES TO DISCLAIMERS

- ❑ Non-Judicial Settlement Agreement:
 - See Fla. Statute § 736.04112.

- ❑ Trust Protector Amendment:
 - Is this available under the terms of the document?