

Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act

Glenn M. Karisch

The Karisch Law Firm, PLLC
301 Congress Avenue, Suite 1910
Austin, Texas 78701
(512) 328-6346
www.texasprobate.com

Professor Thomas M. Featherston, Jr.

Mills Cox Chair of Law
Baylor Law School

Julia E. Jonas

Osborne, Helman, Knebel & Scott, LLP
301 Congress Avenue, Suite 1910
Austin, Texas 78701
(512) 542-2000
www.ohkslaw.com

Glenn M. Karisch
The Karisch Law Firm, PLLC
301 Congress Avenue, Suite 1910
Austin, Texas 78701
Phone: (512) 328-6346 Fax: (512) 597-4062
karisch@texasprobate.com

Education

The University of Texas School of Law, Austin, Texas
Juris Doctor with Honors, 1980
Order of the Coif
The University of Texas at Austin, Austin, Texas
Bachelor of Journalism with Highest Honors, 1977

Professional Experience

The Karisch Law Firm, PLLC, 2008 -
Barnes & Karisch, P. C., Austin, Texas, 1998 - 2007
Ikard & Golden, P. C., Austin, Texas, 1992 - 1998
Hoffman & Stephens, P. C., Austin, Texas, 1991-1992
The Texas Methodist Foundation, Austin, Texas, Vice President and General Counsel, 1989-1991
Coats, Yale, Holm & Lee, P. C., Houston, Texas, 1980-1989

Professional Activities

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
Fellow, American College of Trust and Estate Counsel
Real Estate, Probate and Trust Law Section, State Bar of Texas
Chair, 2007-2008
Council Member, 1999-2003
Chair, Probate Legislation Committee, 2003 - 2008
Chair, Trust Code Committee, 2000-2004
Chair, Subcommittee Studying Articles 8 and 9 of the Uniform Trust Code, 2000 - 2002
Chair, Subcommittee Studying Uniform Principal and Income Act, 2000 - 2002
Chair, Guardianship Law Committee, 1999-2000
Chair, Estate Planning and Probate Section, Austin Bar Association, 1996-97

Partial List of Legal Articles and Papers

- Author and Editor, Texas Probate Web Site [texasprobate.com] and the Texas Probate Mailing List [probate@list.texasprobate.net] (1995-Present).
- "UPIA Handbook," The Texas Probate Web Site [texasprobate.com] (2003 - 4).
- "Multi-Party Accounts and Other Non-Probate Assets in Texas," University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference (2000), updated on texasprobate.com.
- "Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999), updated on The Texas Probate Web Site [texasprobate.com]
- "Protecting the Surviving Spouse," State Bar of Texas Advanced Estate Planning and Probate Law Course (2006), updated on The Texas Probate Web Site [texasprobate.com].
- "Court-Created Trusts in Texas," State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated on The Texas Probate Web Site [texasprobate.com].
- "Dealing with Dysfunctional Clients," State Bar of Texas Advanced Estate Planning and Probate Course (2010).
- "Bypass Trust Basics," University of Texas CLE Estate Planning, Guardianship and Elder Law (2010).
- Legislative Updates, 1997 – 2015, The Texas Probate Web Site [texasprobate.com].

Thomas M. Featherston, Jr.
Mills Cox Professor of Law
Baylor Law School
1114 S. University Parks Dr.
Waco, Texas 76798-7288
254-710-4391
Tom_Featherston@baylor.edu

Education

- B.B.A. (joint B.B.A./J.D. program) Baylor University, Waco, Texas, 1971
- J.D. (with highest honors), Baylor University, Waco, Texas 1972

Professional Activities

- Faculty member, Baylor Law School (1982-present)
- Selected, An Outstanding University Professor - Baylor University (2000)
- Selected, Distinguished Texas Probate and Trust Attorney, Real Estate, Probate & Trust Law Section, State Bar of Texas (2009)
- Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization (since 1979)
- Academic Fellow, American College of Trust and Estate Counsel (since 1991)
- Trusts & Estates Articles Editor, *Probate & Property*, an ABA publication (since 2000)
- Member, Faculty of the ABA's Skills Training for Estate Planners, New York, New York "since 2009"
- Co-author of *West's Texas Practice Guide-Probate* (since 2000)
- Author of *Questions and Answers: Wills, Trusts & Estates*, a LexisNexis publication (3rd ed., 2014)
- Co-author of *Questions and Answers: Wills, Trusts & Estates*, a LexisNexis publication (2nd ed., 2008)
- Author of *Questions and Answers: Wills, Trusts & Estates*, a LexisNexis publication (2003)
- Co-author of *Bridging the Gap-Drafting for Tax and Administration Issues*, an ABA publication (2000)
- Former Chair and Council Member, Real Estate, Probate and Trust Law Section, State Bar of Texas
- Former Council Member, Real Estate, Probate and Trust Law Section, American Bar Association
- Lifetime Fellow, American Bar Foundation
- Visiting Professor, Universitat Erlangen - Nurnberg, Erlangen, Germany (Summer 1998)
- Private practice in the estate planning and probate area in Houston, Texas (1973-1982)
- Frequent author and lecturer in areas of estate planning, probate and marital property

Julia E. Jonas
Osborne, Helman, Knebel & Scott, LLP
301 Congress Avenue, Suite 1910
Austin, Texas 78701
Phone: (512) 542-2000 Fax: (512) 542-2011
jejonas@ohkslaw.com

Julia Jonas is an associate of Osborne, Helman, Knebel & Scott, LLP, and practices primarily in the area of estate planning, including representation regarding complex testamentary dispositions, dynasty trusts, family limited partnerships, limited liability companies, and related wealth planning strategies. She advises clients with respect to their philanthropic objectives, including the creation of split-interest charitable trusts and private foundations. Julia also represents fiduciaries and beneficiaries in connection with probate procedures, trust and estate administration, guardianship accountings and administration, and trust terminations and modifications. In connection with this work, Julia assists the firm's litigators in controversies involving trust, estate, and guardianship matters. Julia also assists in the representation of the firm's international clients, advising on international tax and compliance obligations, asset protection, and fiduciary litigation.

Professional Memberships and Honors

- Member, State Bar of Texas
- Member, American Bar Association
- Member, Austin Bar Association
- Member, Austin Young Lawyers Association
- Member, The College of the State Bar of Texas
- Member, Estate Planning Council of Central Texas
- Member, International Bar Association
- Scholarship Recipient, 2014 Individual Tax and Private Client Committee Scholarship Award, International Bar Association Annual Conference (Tokyo, Japan)

Education

- University of Texas Law School (J.D., with honors, 2011)
- Carleton College (B.A., English, 2007)

Publications and Presentations

- Co-Author, "Problems with the Texas Disclaimer Statutes and How to Deal with Them," 38th Annual Estate Planning & Probate Course, State Bar of Texas, San Antonio, Texas (2014)
- 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

| | |
|---|----|
| 1. Background of the Texas disclaimer statutes and problems under prior law | 2 |
| A. History of Texas Disclaimer Statutes..... | 2 |
| 1. Enactment – 1971 | 2 |
| 2. Amendments | 2 |
| a. 1977 amendment: coordination with federal tax law | 2 |
| b. 1993 amendment: relation-back doctrine and other changes..... | 4 |
| c. Other amendments..... | 4 |
| 3. Estates Code Chapter 122 | 5 |
| B. Equitable rescission of disclaimers..... | 5 |
| C. Problems with Chapter 122..... | 7 |
| 1. Must meet all requirements to be effective..... | 7 |
| 2. The Texas deadlines didn't match up with the tax deadlines | 8 |
| 3. Disclaimer by a trustee | 8 |
| 4. Disclaimer of survivorship property..... | 9 |
| 2. The new Texas Uniform Disclaimer of Property Interests Act | 10 |
| A. Summary of key features of the Texas Disclaimer Act..... | 10 |
| 1. There is just one statute | 10 |
| 2. There is no state law time limit for disclaimers | 10 |
| 3. There are less restrictive technical requirements..... | 11 |
| 4. Different types of property are specifically addressed..... | 11 |
| 5. Fiduciary disclaimers are expanded with clear rules for different types of fiduciaries | 11 |
| B. A guide to using the Texas Disclaimer Act | 11 |
| 1. Effective date issues | 12 |
| 2. Illustrating the basics: A non-fiduciary disclaimer in a decedent's estate | 13 |
| a. There is no deadline, so long as the disclaimer is made before accepting the property. | 13 |
| b. What must the disclaimer instrument contain? | 14 |
| c. What about delivering or filing it? | 14 |
| d. To whom does the disclaimed property go? | 15 |
| e. When is the disclaimer effective? | 15 |
| 3. Disclaimers of other types of property and in other situations | 15 |
| a. Survivorship property..... | 15 |
| b. Beneficiary designation property..... | 16 |
| c. Trust property | 16 |
| d. Powers of appointment | 17 |
| e. Disclaimer of a power by agent..... | 17 |
| 4. A potential trap for those used to using the former law: Delivery to multiple parties | 17 |
| 5. Fiduciary disclaimers..... | 18 |
| a. Disclaimer of powers by a person designated to serve as or serving as a fiduciary | 18 |
| b. Fiduciary duties versus court approval | 19 |
| c. Equitable remedies voiding the disclaimer are not available..... | 20 |
| d. Disclaimers requiring court approval | 21 |
| e. Disclaimers not requiring court approval..... | 22 |
| f. A special case: disclaimer by natural guardian..... | 22 |

| | |
|---|----|
| g. Trustee disclaimers | 22 |
| 6. Other Texas Disclaimer Act issues | 26 |
| a. Effect of spendthrift provision and provisions in instrument granting or limiting disclaimer power | 26 |
| b. Tax savings catch-all | 27 |
| c. Do fiduciaries have liability for distributing property before a disclaimer? | 27 |
| d. Are non-statutory disclaimers permitted? | 28 |
| 3. Federal issues | 29 |
| A. Federal tax liens | 29 |
| B. Disclaimant's bankruptcy | 30 |
| C. ERISA beneficiaries | 30 |
| D. Medicaid eligibility | 30 |
| 4. Conclusion | 31 |
| Appendix 1 – The Texas Uniform Disclaimer of Property Interests Act (Property Code Chapter 240) – Text and Commentary | 32 |
| Appendix 2 - Disclaimer Forms | 50 |

Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act¹

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 becomes 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.

The authors acknowledge the help provided by Gerry Beyer of the Texas Tech Law School, Stanley Johanson and Mark Ascher of the University of Texas School of Law, William LaPiana of the New York Law School and Adam Hirsch of the University of San Diego School of Law. The Trust Code Committee of the Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL") is responsible for the new statute, and the authors acknowledge its efforts and those of its co-chairs, Marjorie Stephens of Dallas and Jeff Myers of Fort Worth, as well as Bill Pargaman (REPTL Chair-Elect) and Craig Hopper (REPTL Legislative Wrangler) of Austin.

¹ Licensed for commercial use to the State Bar of Texas and the University of Texas School of Law;

otherwise subject to Creative Commons license CC BY-NC-ND 3.0.

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

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).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act

Also available as part of the eCourse

[Elder Law: Exempt Property, Allowances in Lieu Thereof, and Family Allowances; Credit Shelter Trusts; plus Disclaimer Issues](#)

First appeared as part of the conference materials for the
17th Annual Estate Planning, Guardianship and Elder Law Conference session
"Disclaimers: Old Friend, New Issues"