

Recent Developments Affecting Estate Planning

Stanley M. Johanson

University Distinguished Teaching Professor and
James A. Elkins Centennial Chair in Law
The University of Texas School of Law
Austin, Texas

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I. 2015 Texas Legislative Changes

- A. **New rules governing disclaimers.** The Estate Code provisions governing disclaimers were replaced by a new Chapter 240 of the Texas Property Code, adapted from the Uniform Disclaimer of Property Interests Act.

1. **Statute “unbundled” from federal tax law; no longer a nine-month time limit on making a disclaimer.** For many years, a primary motivation for considering a disclaimer was to avoid transfer taxes. If, for example, already-wealthy daughter Donna received a substantial inheritance (aggravating her estate tax and income tax picture) and then made gifts to her children, there would be federal gift tax consequences. By making a disclaimer, the disclaimed interest would pass to Donna’s children (i) with no gift tax consequences, and (ii) with the benefit of utilizing her parent’s otherwise-unused GST exemption.
 - a. With a \$5.43 million estate and gift tax exemption, any tax motivation for making a disclaimer has virtually disappeared (except for estate plans based on a disclaimer-funded spousal bypass trust). Instead, the likely motivation for making a disclaimer would be to avoid creditors’ claims.
 - b. To be valid for federal tax purposes, a disclaimer must be made within nine months after the transfer is made. Under the statute as amended, the disclaimer can be made at any time before the heir or beneficiary has accepted the interest.
2. **Time limit on making a disclaimer.** Because there is no explicit time limit on making a disclaimer, does this mean that a beneficiary or heir could disclaim four or five years after the decedent’s death, and thereby avoid creditors’ claims? To say that this is hardly unlikely would be an understatement. Under Property Code §240.151(b), a disclaimer is barred if:
 - (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.

It is inconceivable that the heir or beneficiary would not have exercised dominion or control (if not full acceptance) of the interest over such an extended period. Even unoccupied land in far West Texas—who would be paying taxes on the property?

- a. **Future interests.** There is one situation, however, where a years-later disclaimer could be used to defeat creditors’ claims. Suppose that Dad’s will creates a trust: “Income to my son John for life, and on John’s death principal to my grandson Gary.” John dies fifteen years later; Gary (a failed real estate developer) is heavily in debt. During John’s lifetime, Gary held a future interest, meaning that he never had occasion to accept the interest, and he never exercised dominion and control over the interest.
3. **Simplified delivery and filing requirements.** Under the former law, a disclaimer instrument had to be delivered to the personal representative and filed with the probate court, with distinctive delivery rules applicable to nonprobate transfers. The new rules, applicable to probate and nonprobate transfers alike, greatly simplify the rule governing delivery, which can be in person, by mail, by fax, by email, or by any other method likely to result in receipt.

4. **Fiduciary's power to disclaim.** Fiduciaries may disclaim (1) powers granted to the fiduciary, (2) interests in property, or (3) powers over property otherwise passing to a trust for the benefit of a ward, estate or beneficiary. Court approval is required for disclaimers by a dependent administrator, guardian, or trustee of a court-created trust that benefits a minor or disabled person, or if the disclaimed interest would pass to the disclaiming fiduciary.
- B. Wills may be reformed for mistake.** It has long been held that, under trust law, a trust can be reformed to correct a mistake. The courts consistently held, however, that a will could not be reformed after the testator's death. "While courts have jurisdiction to construe wills, they have none to reform or correct them." Jackson v. Templin, 66 S.W.2d 666 (Tex. Comm. App. 1933). That rule has been changed by Estates Code §§ 255.451-255.456, authorizing judicial modification or reformation of wills to address administrative issues, achieve the testator's tax objectives, qualify a beneficiary for governmental benefits, or (if supported by clear and convincing evidence) correct a scrivener's error.
- C. Transfer on Death deed as a means of avoiding probate.** New Estates Code Chapter 114 enacts the Texas Real Property Transfer on Death Act, which allows the owner of real property to designate a beneficiary to receive title to the property on the owner's death without the necessity of probate. The TOD deed does not affect the transferor's ownership right, and the owner retains the power to transfer or encumber the property or revoke the deed. The TOD deed, which may not be created by the exercise of a power of attorney, must be recorded in the county in which the property is located. The statute sets out an optional TOD deed form, which no doubt will soon appear on the Internet.
- D. Directed Trusts—trust protectors and trust advisors.** A new Property Code § 114.0031, which was proposed by Texas Bankers Association and applies only to noncharitable trusts, provides that a person who is given authority to direct, consent to, or disapprove a trustee's investment, distribution or other decisions is considered a fiduciary in exercising that authority except to the extent the trust provides otherwise. A trustee who acts in accordance with those directions is not liable for doing so, except in cases of willful misconduct or gross negligence. The trustee has no duty to monitor the advisor's conduct, provide advice to or consult with the advisor, or communicate with or warn any beneficiary or third party just because the trustee might have exercised its discretion differently.

II. Legislation Relating to Estate and Gift Tax

- A. Repeal of the Estate Tax?** Proposed repeal of the federal estate and gift tax and the generation-skipping transfer tax is back in the news. On February 26, 2015, Representative Kevin Brady (R. Texas) introduced the Death Tax Repeal Act of 2015 (H.R. 1105). The bill is rather short and to the point:

SECTION 1. Short title.

This Act may be cited as the "Death Tax Repeal Act".

SEC. 2. Repeal of estate and gift taxes.

(a) **In general.**—Subtitle B of the Internal Revenue Code of 1986 (relating to estate, gift, and generation-skipping taxes) is hereby repealed.

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