

DISCLAIMERS UNDER THE NEW TEXAS UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT*

by Glenn M. Karisch**, Professor Thomas M. Featherston, Jr.***, and
Julia E. Jonas****

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** Attorney, The Karisch Law Firm, PLLC, Austin, TX. J.D. with Honors, The University of Texas School of Law, Austin, TX, 1980; B.J. with Honors, The University of Texas, Austin, TX, 1977.

*** Professor of Law, Baylor Law School. J.D., with Highest Honors, Baylor University School of Law, 1972; B.B.A., Baylor University, 1971.

**** Associate at Osborne, Helman, Knebel & Scott, LLP. J.D., with Honors, University of Texas Law School, 1980; B.A., Carleton College, 2007.

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I. INTRODUCTION

Like many states, Texas enacted a disclaimer statute in the 1970s as tax-motivated disclaimers became more prevalent.¹ Over the years, the disclaimer statute expanded and spawned trust-related offspring.² Because

1. See TEX. EST. CODE ANN. § 122 (West 2015).
 2. See *id.*

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, creating traps for the user.³ Disclaimers were possible under federal tax law that were not expressly allowed by Texas law.⁴

In 2015, the 84th Texas Legislature enacted the Texas Uniform Disclaimer of Property Interests Act, which became effective September 1, 2015.⁵ This paper briefly discusses the background of Texas's disclaimer statutes and some of the problems under the former statutes.⁶ It then examines the new Texas disclaimer law and offers a guide to using it.⁷ Finally, it addresses issues related to federal law which may affect Texas disclaimers.⁸ **Appendix 1** is a table with the statutory language and a section-by-section commentary.⁹ Forms implementing the new Texas disclaimer law are attached as **Appendix 2** and are available in Word format at texasprobate.com.¹⁰ 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 School of Law, 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.

II. BACKGROUND OF THE TEXAS DISCLAIMER STATUTES AND PROBLEMS UNDER PRIOR LAW

Enacted in 1971 and amended by nine legislatures, Texas Probate Code § 37A had been modified in a piecemeal manner for over three decades.¹¹ The result is currently codified in Texas Estates Code Chapter 122, subchapters A–D (Chapter 122).¹² As discussed below, Chapter 122 could be difficult to utilize for several reasons, including the fact that the

3. *See id.*

4. *See id.*

5. H.R. 2428, 84th Leg., R.S. (Tex. 2015).

6. *See* EST. § 122; TEX. PROB. CODE ANN. § 37A (West 1995).

7. *See* TEX. PROP. CODE ANN. § 240 (West 2015).

8. *See* H.R. 2428, 84th Leg., R.S. (Tex. 2015).

9. *See infra* App. 1, at 238.

10. *See infra* App. 2, at 276.

11. *See* PROB. § 37A.

12. *See* EST. § 122.

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.¹³

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.¹⁴ Additionally, the legislative history provides insight about the administrative challenges that arose under different configurations of the disclaimer statute.¹⁵

1. Enactment — 1971

The Texas Legislature enacted section 37A in 1971 as House Bill (HB) 728.¹⁶ The stated purpose of HB 728 was “to clarify the disclaimer law in Texas” because the existing disclaimer law was “vague and unclear.”¹⁷ As originally enacted, section 37A consisted of subsections (a) through (f).¹⁸ Fiduciary disclaimers were not addressed under the original statute.¹⁹

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.”²⁰ Accordingly, to be effective, a disclaimer had to adhere to the technical requirements of each of the six existing subsections, as applicable.²¹

2. Amendments

a. 1977 Amendment: Coordination with Federal Tax Law

The Texas Legislature significantly revised section 37A in 1977 in response to the Tax Reform Act of 1976.²² 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 to

13. *Id.*

14. *Id.*

15. *See id.*

16. H.B.728, 62nd Leg., R.S. (1971).

17. *Id.*

18. *See* EST. § 122; TEX. PROB. CODE ANN. § 37A.

19. *See* EST. § 122; PROB. § 37A.

20. PROB. § 37A.

21. *Id.*

22. S.B. 791, 75th Leg., R.S. (1977).

federal tax law.²³ Additionally, under the original language, a disclaimer could be revoked with judicial approval within nine months after the date of the transfer.²⁴ The 1977 amendment eliminated the judicial revocation procedure to be consistent with the requirement under the Internal Revenue Code that a qualified disclaimer be irrevocable.²⁵

The 1977 amendment also clarified the timing for disclaimers of future interests for the first time.²⁶ Specifically, the following language was added to section 37A(a): “a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property of interest is finally ascertained and his interest is indefeasibly vested.”²⁷ The relevant provision of the Texas Property Code concerning disclaimers of property from an *inter vivos* trust was almost identical.²⁸

The definition of a qualified disclaimer for federal tax purposes uses the following language to define the permissible timing with respect to a disclaimer of a future interest: “not later than the date which is 9 months after . . . the day on which the transfer creating the interest in such person is made.”²⁹ The Treasury Regulations provide that “[w]ith respect to *inter vivos* transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes.”³⁰ Because of the discrepancy between section 37A and federal law, a disclaimer of a future interest could be effective under Texas law while not constituting a qualified disclaimer for federal tax purposes.³¹

For example, the disclaimer of a contingent remainder interest in a testamentary trust is subject to different deadlines for treatment as a qualified disclaimer under federal law or as an effective disclaimer under Texas law.³² In this situation, a qualified disclaimer of a contingent remainder interest that vests upon the death of the lifetime beneficiary must be made within nine months of the decedent’s date of death (i.e., the “date on which the transfer creating the interest in [the disclaimant] is made”).³³ In contrast, a disclaimer

23. PROB. § 37A(a).

24. *Id.* § 37A(d).

25. See I.R.C. § 2518(b) (West 1983).

26. PROB. § 37A(a)(1977).

27. *Id.*

28. TEX. PROP. CODE ANN. § 112.010(c-2)(2), *repealed by* H.R. 2428, 84th Leg., R.S. (Tex. 2015) (memorandum of disclaimer must be delivered to the trustee “not later than the date that is nine months after the . . . date of the event that causes the taker of the interest to be finally ascertained and the interest to be indefeasibly vested.”).

29. I.R.C. § 2518(b)(2). See *Jewett v. Comm’r*, 455 U.S. 305, 315–16 (1982).

30. Treas. Reg. § 25.2518-2(c)(3)(i) (1997).

31. See PROB. § 37A.

32. See *id.*

33. See Treas. Reg. § 25.2518-2(c)(5) Ex. 1, 3; *Jewett*, 455 U.S. at 305 (under former version of I.R.C. § 2518 requiring disclaimer “within a reasonable time after knowledge of the existence of the transfer”, the Court held that “disclaimers of a contingent interest in a testamentary trust, although

pursuant to section 37A would be effective so long as it was made within nine months after the death of the lifetime beneficiary (i.e. the “event determining that the taker of the property . . . is finally ascertained and his interest is indefeasibly vested”).³⁴

Finally, the 1977 Amendment included provisions permitting a personal representative to disclaim property on behalf of an estate or a ward with court approval, and permitting an independent executor to disclaim property on behalf of an estate without court approval.³⁵

b. 1993 Amendment: Relation-back Doctrine and Other Changes

The 1993 Legislature enacted several substantive changes to section 37A.³⁶ Prior to 1993, section 37A provided that a valid disclaimer “shall be effective as of the death of decedent,” but did not explicitly address the issue of whether a disclaimer might constitute a fraudulent transfer as to the disclaimant’s creditors.³⁷ In response to the court’s holding in *Dyer v. Eckols*, the legislature added language to the initial part of section 37A codifying the “relation-back” doctrine.³⁸

Specifically, the revised statute provided that “[a] disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant.”³⁹ Further, the revised language stated that a disclaimer under section 37A is not a “transfer” for the purposes of the Business & Commerce Code.⁴⁰

Codification of the relation-back doctrine had significant implications in the state creditor-protection context and in the federal bankruptcy context.⁴¹ For example, federal courts have held that under Texas law, pre-petition disclaimers are effective in the bankruptcy context, but post-petition disclaimers are not effective to remove property from the bankruptcy estate.⁴²

The 1993 Amendment included language that is applicable when the decedent’s will directs the disposition of disclaimed property.⁴³ The 1993

effective under local law, were not made until 33 years, and thus not ‘within a reasonable time,’ after the interest was created, the disclaimers were subject to a gift tax . . .”).

34. PROB. § 37A. Note that the deadline would be the same in the case of a disclaimer of an interest in an irrevocable *inter vivos* trust pursuant to TEX. PROP. CODE ANN. § 112.010. *See id.*

35. PROB. § 37A.

36. *See id.*

37. *See Dyer v. Eckols*, 808 S.W.2d 531, 533–34 (Tex. App.—Houston [14 Dist.] 1991, writ dismissed by agr.).

38. PROB. § 37A.

39. *See id.*

40. *See id.*

41. *Simpson v. Penner (Matter of Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994); *In re Schmidt*, 362 B.R. 318, 326–27 (Bankr. W.D. Tex. 2007).

42. *Schmidt*, 362 B.R. at 326–27.

43. PROB. § 37A.

Amendment also clarified that a partial disclaimer by a decedent's surviving spouse did not constitute a disclaimer of any other transfer for the benefit of the surviving spouse.⁴⁴

c. Other Amendments

Amendments in 1979, 1987, 1991, 1995, and 2011 revised provisions of section 37A regarding the types of property that can be disclaimed, the disclaimer procedures applicable to charitable organizations or governmental agencies, and certain terminology.⁴⁵ The 2007 amendment authorized court-approved disclaimers by an agent appointed under a durable power of attorney authorizing disclaimers.⁴⁶

Finally, the 2013 amendment added Estates Code § 122.107, which provided that a disclaimer by a delinquent child support obligor is ineffective.⁴⁷ The 2013 amendment also imposed an affirmative requirement that any memorandum of disclaimer include a statement regarding whether the disclaimant is a child support obligor.⁴⁸

3. Estates Code Chapter 122

Starting on January 1, 2014, section 37A was replaced by Chapter 122.⁴⁹ As part of the codification process, the legislature reorganized section 37A, which consisted of seventeen subsections, into four subchapters under Chapter 122 of the Estates Code, with 21 total sections.⁵⁰

Despite the many technical additions and the sheer volume of the statute as amended, Chapter 122 retained one provision of the original statute nearly verbatim: "a disclaimer that does not comply with this chapter is ineffective . . . [except] as an assignment of the disclaimed property . . ." ⁵¹ As with the original six-subsection statute, Chapter 122 required technical compliance with all formal requirements to qualify as an effective disclaimer.⁵²

B. Equitable Rescission of Disclaimers

Section 122.004 of the Estates Code stated that a disclaimer that is filed and served as provided in Chapter 122 is irrevocable.⁵³ This provision is

44. *Id.* § 37A(f).

45. *See id.* § 37A.

46. *Id.* § 37A(a).

47. TEX. EST. CODE ANN. § 122.107, *repealed* by H.R. 2428, 84th Leg., R.S. (Tex. 2015).

48. *Id.* § 122.051(b) (*repealed* 2015).

49. *Id.* § 122 (West 2015).

50. *Id.*

51. *Id.* § 122.102 (*repealed* 2015).

52. *See id.*

53. *Id.* § 122.004 (*repealed* 2015).

consistent with the requirement of irrevocability for a qualified disclaimer for federal tax purposes.⁵⁴ Section 122.004 applied regardless of whether the disclaimant understood how the disclaimed property would be distributed.⁵⁵

For example, in *Northwestern National Casualty Co. v. Doucette*, the Fort Worth Court of Appeals held that an heir's disclaimer of her interest in her father's estate was effective and irrevocable despite the fact that she was mistaken about who the disclaimed property would pass to.⁵⁶ The disclaimer recited the disclaimant's belief that the disclaimed property would pass to her mother, the decedent's surviving spouse.⁵⁷ However, the disclaimant did not know that the decedent had legally adopted another child, meaning that the adopted child would receive the disclaimed property.⁵⁸ The *Doucette* court upheld the trial court's finding that the disclaimer was valid and irrevocable "in spite of the probable unintended results of the property distribution."⁵⁹

Similarly, in *Baker Botts v. Cailloux*, the San Antonio Court of Appeals rejected a trial court's award of a constructive trust to compensate a disclaimant for an allegedly mistaken disclaimer.⁶⁰ The disclaimant in *Cailloux* disclaimed her interest in her husband's residuary estate, causing significant assets to pass to designated charities.⁶¹ Several years later, after the disclaimant had been diagnosed with Alzheimer's disease, her agent under a durable power of attorney filed a lawsuit against the executor of the husband's estate, the attorneys who had represented the executor, and the disclaimant for breach of fiduciary duty among other claims.⁶² The jury found that the executor and the law firm had breached their fiduciary duties to the disclaimant by failing to fully and fairly disclose all important information to her.⁶³ In awarding damages of \$65 million against the defendants to be held in a constructive trust for the disclaimant's benefit, the trial court stated that it was exercising its "equitable powers" to "place [the disclaimant] in the position she would have held but for the breach of fiduciary duty . . . and had she not signed the disclaimer."⁶⁴

The *Cailloux* court determined that the trial court's decision was erroneous because there was no evidence that any breach of fiduciary duty had caused the disclaimant to disclaim her interest in property.⁶⁵ Of greater

54. See I.R.C. § 2518(b) (West 1983).

55. EST. § 122.004 (*repealed* 2015).

56. *Nw. Nat'l Cas. Co. v. Doucette*, 817 S.W.2d 396, 400 (Tex. App.—Fort Worth 1991, writ denied).

57. *Id.* at 397.

58. *Id.*

59. *Id.* at 400.

60. *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 736 (Tex. App.—San Antonio 2007, pet. denied).

61. *Id.* at 725.

62. *Id.*

63. *Id.* at 725–26.

64. *Id.* at 733.

65. *Id.* at 738.

relevance, the court stated that the trial court's imposition of a constructive trust would not have been appropriate even if causation had been proven at trial.⁶⁶ This equitable remedy was not appropriate because the defendants did not hold legal title to the disclaimed property.⁶⁷ Because the alleged wrongdoers were not the persons who received the property as a result of the disclaimer, the court stated that it was not within the court's equitable powers to order the defendants to return the disclaimant to her pre-disclaimer position.⁶⁸

In contrast to *Doucette* and *Cailloux*, in at least one case a Texas court has found that a disclaimer may be deemed ineffective if the disclaimant executed the disclaimer in reliance on a factual mistake.⁶⁹ In *McCuen v. Huey*, the potential disclaimant executed an affidavit filed with the Alabama court in which his brother's estate was being administered.⁷⁰ The affidavit recited the disclaimant's belief that the specific gift from the decedent to the disclaimant under the will had adeemed and that he consented to the distribution of all the decedent's property to the residuary beneficiary.⁷¹ Contrary to this belief, the decedent owned the gifted property (Texas real property) at death.⁷²

The heirs of the residuary beneficiary argued that the affidavit should be treated as a disclaimer for the purposes of determining title to the Texas real property.⁷³ However, the court concluded that the affidavit was not an effective disclaimer because "to be effective, a disclaimer of an inheritance is enforceable against the maker only when it has been made with adequate knowledge of that which is being disclaimed."⁷⁴

Note that although the *McCuen* decision was issued in 2008, the purported disclaimer was executed in the 1960s, prior to the enactment of section 37A.⁷⁵ Further, although the *McCuen* court referenced section 37A in its discussion of the potential disclaimer, it reached its conclusion without considering whether the affidavit satisfied the technical requirements for a statutory disclaimer.⁷⁶ Finally, the result in *McCuen* has not been cited in any case decided under section 37A or Chapter 122.⁷⁷ Accordingly, questions remained as to whether an effective disclaimer under Chapter 122 could be revoked or deemed ineffective based on a mistake of fact.⁷⁸

66. *Id.* at 736–37.

67. *Id.*

68. *Id.* at 737–38.

69. *See* *McCuen v. Huey*, 255 S.W.3d 716, 731(Tex. App.—Waco 2008, no pet.).

70. *Id.* at 722.

71. *Id.* at 728–29.

72. *See id.* at 732.

73. *Id.* at 730–31.

74. *Id.* at 731.

75. *Id.* at 722.

76. *Id.* at 730.

77. *The author conducted a thorough search on Westlaw and found no reported cases.*

78. *The author conducted a thorough search on Westlaw and found no reported cases.*

C. Problems with Chapter 122

1. Must Meet All Requirements to Be Effective

Section 122.102 of the Estates Code provided that “a disclaimer that does not comply with this chapter is ineffective” except as an assignment of property.⁷⁹ Chapter 122 consisted of twenty-one sections dealing with disclaimers, and many imposed requirements for effective disclaimers.⁸⁰ In order for a disclaimer to be effective (a prerequisite to being a qualified disclaimer for federal tax law purposes), the disclaimant had to comply with the following requirements:

- The disclaimer had to be in writing and notarized.⁸¹
- It had to include a statement regarding whether the disclaimant was a “child support obligor,” whether the disclaimant had minor children, or not.⁸²
- The disclaimant had filed the disclaimer in the decedent’s probate proceeding.⁸³ Except in some cases, it had to be filed with the county clerk’s office in the county of the decedent’s residence or filed with the county clerk of the county in which real property owned by a non-resident decedent is located.⁸⁴ The disclaimant needed to file the disclaimer within nine months of the decedent’s death, except in the case of a future interest and except if the disclaimant was a charity.⁸⁵
- In addition to the filing requirement, a disclaimer had to be delivered in person to or mailed by registered or certified mail to and received by the personal representative of the decedent’s estate within nine months of the decedent’s death, except in the case of a future interest, or if the disclaimant was a charity.⁸⁶
- The disclaimant could not have “previously accepted the property by taking possession or exercising dominion and control of the property as a beneficiary.”⁸⁷

There were similar, but slightly different, requirements for a beneficiary to disclaim an interest in a trust (disclaimant must deliver the disclaimer to the trustee, or, if there was no trustee, to the transferor of the interest or his legal representative).⁸⁸

79. TEX. EST. CODE ANN. § 122.102, *repealed* by H.R. 2428, 84th Leg., R.S. (Tex. 2015).

80. *See id.*

81. *Id.* § 122.051(a) (*repealed* 2015).

82. *Id.* § 122.051(b) (*repealed* 2015).

83. *Id.*

84. *Id.*

85. *Id.* §§ 122.052–.005(c).

86. *Id.* §§ 122.056(a)(1)–(b).

87. *Id.* § 122.104.

88. TEX. PROP. CODE ANN. § 112.010(c-2)(2), *repealed* by H.R. 2428, 84th Leg., R.S. (Tex. 2015).

These requirements caused unnecessary burdens.⁸⁹ For example:

- It should not have been necessary to both *file* with the court *and deliver* to the executor in order to make the disclaimer effective.⁹⁰
- It should have been possible to send the notice to the executor by courier or delivery service, but the statute required delivery in person or registered or certified mail.⁹¹
- It should have been sufficient if the notice was *mailed* to the executor by the deadline — the disclaimant should not have been required to assure that the executor received it by the deadline.⁹²
- And, of course, it is ridiculous that a disclaimer may have been ineffective simply because it omitted a statement that the disclaimant was not a “child support obligor.”⁹³

2. *The Texas Deadlines Did Not Match Up With the Tax Deadlines*

The legislature clearly based the deadlines in the Texas statutes on the nine-month deadline for qualified disclaimers for tax purposes.⁹⁴ However, as discussed above, the Texas deadlines did not match the tax deadlines perfectly.⁹⁵

3. *Disclaimer By a Trustee*

What happened under Chapter 122 or Trust Code § 112.010 if a trustee disclaimed property which otherwise would have passed into a trust?⁹⁶ Would the property have passed into the trust?⁹⁷ In Technical Advice Memorandum (TAM) 85-49-004, which appears to apply Texas law, the Internal Revenue Service (I.R.S.) concluded that applicable state law did not permit a trustee to disclaim property to avoid having the property pass into the trust.⁹⁸ The I.R.S. based this decision on three factors:

- (1) “The trustee, as a fiduciary, had no authority to unilaterally renounce a portion of the trust property on behalf of beneficial interests.”⁹⁹

89. See EST. § 122.056 (repealed 2015).

90. See *id.*

91. See *id.*

92. See *id.*

93. PROP. § 122.104 (repealed 2015). This requirement was added in 2013. *Id.* The requirement may be useful in a few child support cases, but failing to include the statement in the 99% of the cases where child support is not an issue should not have made the disclaimer ineffective. See *id.*

94. See *supra* Part II.A.

95. See *supra* Part II.A.2.a.

96. I.R.S. Tech. Adv. Mem. 85-49-004 (Aug. 30, 1985).

97. See *id.*

98. *Id.*

99. *Id.*

(2)The beneficiaries, holding equitable title to trust property, were entitled to have the properties distributed to the trust.¹⁰⁰

(3)The state’s disclaimer statute did not broaden a trustee’s function so as to empower the trustee to unilaterally disclaim property.¹⁰¹ Rather, only persons with beneficial interests could use a disclaimer.¹⁰²

Texas appellate courts have not ruled on this issue, so it is unclear if a Texas court would agree with this analysis.¹⁰³

Under prior law, if the trustee’s disclaimer was accompanied by the beneficiaries’ disclaimer of the property, the disclaimers should have been effective to keep the property out of the trust.¹⁰⁴ Further, if the trustee asked a court to approve the disclaimer, two ways exist that avoid the per-se breach of fiduciary duty.¹⁰⁵ First, Trust Code § 115.001(a) permits a court to relieve a trustee from any duty imposed by the trust instrument or by law.¹⁰⁶ Second, Trust Code § 112.054(a) permits a court to direct or permit the trustee to do acts that the terms of the trust do not authorize or forbid.¹⁰⁷

Still, this was a very long way around the problem. It seems likely that a court would reach a different result under the reasoning in TAM 85-49-004 if state law expressly permitted a trustee to disclaim and if the law clearly provided that the result of the disclaimer would be that the disclaimed property does not pass into the trust.¹⁰⁸

4. Disclaimer of Survivorship Property

Federal law permits a disclaimer of survivorship property.¹⁰⁹ The former Chapter 122 of the Estates Code defined a “beneficiary” as a person who is permitted to disclaim, including persons receiving property as a result of the death of another person by community property with right of survivorship, joint tenancy with right of survivorship, or by survivorship agreement, but Chapter 122 did not give any more specifics about disclaiming survivorship property.¹¹⁰

100. *Id.*

101. *Id.*

102. *Id.*

103. See E. Diane Thompson & Michael J. Cenatiempo, *Practical Look at Disclaimers: Does Phaseout of Exemptions and Rate Cuts in New Law Make Disclaimers the Technique of Choice for Most? Risks and Rewards (Including Conflicts and Avoiding Claims by Under-Represented Disclaimants)* at 57–61, State Bar of Texas, 26th Annual Advanced Estate Planning & Probate Course (June 2002).

104. See I.R.S. Priv. Ltr. Rule. 87-29-008 (Apr. 8, 1986), I.R.S. Priv. Ltr. Rul. 97-45-008 (Nov. 7, 1997).

105. See I.R.S. Priv. Ltr. Rule. 87-29-008 (Apr. 8, 1986), I.R.S. Priv. Ltr. Rul. 97-45-008 (Nov. 7, 1997).

106. TEX. PROP. CODE ANN. § 115.001(a) (West 2011).

107. *Id.* § 112.054(a) (West 2006).

108. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 8 (amended 2010).

109. Treas. Reg. § 25.2518-2(c)(4) (1997).

110. TEX. EST. CODE ANN. § 122.001 (West 2014).

II. THE NEW TEXAS UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

The Texas Uniform Disclaimer of Property Interests Act (the Texas Disclaimer Act), which replaces the disclaimer provisions of Chapter 122 of the Estates Code and section 112.010 of the Trust Code, became effective September 1, 2015.¹¹¹ It is found in the new Chapter 240 of the Property Code.¹¹²

The National Council of Commissioners on Uniform State Laws (NCCUSL) first adopted the Uniform Disclaimer of Property Interests Act (UDPIA) in 1999.¹¹³ It was last updated in 2010, and eighteen states have enacted versions of the 1999 Act.¹¹⁴

The Texas Disclaimer Act is divided into four subchapters: (A) “General Provisions;” (B) “Type and Effect of Disclaimer;” (C) “Delivery or Filing;” and (D) “Disclaimer Barred or Limited.”¹¹⁵ The Act addresses different types of disclaimers separately.¹¹⁶ For instance, section 240.0511 governs disclaimers by individuals of property passing because of a decedent’s death, while section 240.0512 governs disclaimers of property passing for reasons other than a decedent’s death, and section 240.052 governs disclaimers of rights in survivorship property.¹¹⁷ Likewise, the delivery or filing requirements applicable to disclaimers depend on the nature of the property or interest being disclaimed.¹¹⁸

A. Summary of Key Features of the Texas Disclaimer Act

This paper goes into greater detail about the Texas Disclaimer Act later, but the following provides a summary of some key features: (1) the Act consists of just one statute, (2) the Act does not have a state law time limit for disclaimers, (3) the Act provides for less restrictive technical requirements, (4) the Act specifically addresses different types of property, and (5) the Act expanded fiduciary disclaimers including clear rules for different types of fiduciaries.¹¹⁹

111. See PROP. § 240.001. The change in the disclaimer statutes raises issues about which statute to follow if the decedent died prior to September 1, 2015. See *infra* Part III.B.1.

112. See PROP. § 240.001. REPTL tried to have the Texas Disclaimer Act placed in Chapter 122 of the Estates Code, since that is where practitioners logically would look for it, but Legislative Council required it to be placed in the Property Code. One of the authors (Tom) likes it this way. There are cross-references to the new statutes in Chapter 122 of the Estates Code and Section 112.010 of the Trust Code.

113. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 1 (amended 2010).

114. *Id.*

115. PROP. §§ 240.001–.151.

116. *Id.* §§ 240.0501–.058.

117. *Id.* §§ 240.0511–.052.

118. *Id.* §§ 240.0501–.058.

119. *Id.* §§ 240.001–.151.

1. There Is Just One Statute

The Texas Disclaimer Act addresses disclaimers of all property types in Chapter 240 of the Property Code.¹²⁰ There are no longer separate Estates Code and Trust Code statutes.¹²¹

2. There Is No State Law Time Limit for Disclaimers

Prior to 1977, federal tax law did not have a hard-and-fast nine-month deadline for qualified disclaimers.¹²² Like most states, Texas reacted to the 1977 tax legislation by adopting a nine-month deadline in its statute.¹²³ However, there is no reason why disclaimers under state law need to adhere to that deadline.¹²⁴ As noted above, problems arise because the Texas nine-month deadline does not match perfectly with the tax law deadline.¹²⁵ These problems are eliminated if the Texas statute has no deadline.¹²⁶ This is even more relevant in light of the recent increase in the applicable exclusion amount for federal estate tax purposes.¹²⁷ Fewer and fewer disclaimers will be tax-based, so there is less and less of a reason to tie Texas's statute to the tax law deadline.¹²⁸

For a more detailed analysis regarding federal preemption issues and other implications of the decoupled deadline, see Part III below.¹²⁹

3. There Are Less Restrictive Technical Requirements

The Texas Disclaimer Act eliminates many of the duplicative and logistically challenging technical requirements applicable under Chapter 122.¹³⁰ For example, when disclaiming property passing by will or intestacy in an estate subject to administration, the Texas Disclaimer Act permits delivery of the disclaimer to the executor as sufficient.¹³¹ The statute no longer requires the disclaimant to file a disclaimer in the probate proceeding.¹³²

120. *See id.*

121. *See id.*

122. *See supra* Part II.A.

123. *See supra* Part II.A.

124. *See supra* Part II.A.

125. *See supra* Part II.A.

126. *See supra* Part II.A.

127. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 8 (amended 2010).

128. *Id.*

129. *See infra* Part III.

130. *See generally* TEX. PROP. CODE ANN. § 240.005 (explaining the need for uniformity in the law).

131. *Id.* § 240.102.

132. *See id.*

4. *Different Types of Property Are Specifically Addressed*

The Texas Disclaimer Act includes provisions that are specifically designed to address unique characteristics of different types of property and ownership structures.¹³³ For example, the Act includes specific provisions regarding survivorship property and beneficiary designation property, which were missing in Chapter 122.¹³⁴

5. *Fiduciary Disclaimers Are Expanded With Clear Rules for Different Types of Fiduciaries*

The Texas Disclaimer Act more clearly addresses the disclaimer of interests and powers by fiduciaries.¹³⁵ The Act states the rules for disclaimers by different types of fiduciaries.¹³⁶ Trustees are expressly permitted to disclaim property, causing the property not to pass into the trust.¹³⁷ However, for guardians, dependent administrators, and trustees of court-created trusts, prior court approval is required.¹³⁸ The trustee of a non-court-created trust may seek court approval or may make the disclaimer without court approval by giving the beneficiaries 30 days notice.¹³⁹ The fiduciary must obtain court approval, if the effect of the fiduciary disclaimer causes the property to pass to the fiduciary individually.¹⁴⁰ Further, the Act clarifies duties of fiduciaries in making disclaimers.¹⁴¹

B. *A Guide to Using the Texas Disclaimer Act*

Appendix 1 of this paper includes a section-by-section analysis of the Texas Disclaimer Act.¹⁴² This article provides a discussion of some of the important issues to understand in order to use the new statute effectively.¹⁴³

1. *Effective Date Issues*

The Texas Disclaimer Act became effective September 1, 2015, and applies to disclaimers of any interest in or power over property, whenever

133. *See id.* §§ 240.052, 240.105.

134. *Id.* § 240.008.

135. *Id.*

136. *Id.*

137. *Id.* § 240.0081.

138. *Id.* § 240.008.

139. *Id.* § 240.0081.

140. *Id.* § 240.008.

141. *Id.*

142. *See infra* App. 1, at 238.

143. *See infra* Part II.B.1.

created.¹⁴⁴ Sections 17 and 18 of House Bill 2428 provide that the Texas Disclaimer Act applies if the filing and notice provisions under the former law have not elapsed.¹⁴⁵ As the Act explains, “[i]f the time for filing or delivering notice of a written memorandum of disclaimer under former law has elapsed, the former law applies and is continued in effect for that purpose.”¹⁴⁶

This means that while the effective date of the act was September 1, 2015, the operative date is December 1, 2014.¹⁴⁷ If the event giving rise to the disclaimer (for example, the death of a decedent) occurred on or after December 1, 2014, the nine-month deadline under the prior law had not lapsed prior to the effective date of the new act, so the new disclaimer rules apply and there is no time limit for disclaiming.¹⁴⁸ If the decedent died November 30, 2014, the nine-month deadline lapsed prior to the effective date, so the old disclaimer rules apply.¹⁴⁹

2. *Illustrating the Basics: A Non-fiduciary Disclaimer in a Decedent’s Estate*

What are the keys to disclaiming in the simplest of cases—a disclaimer by an individual of property received from a decedent’s estate?¹⁵⁰

a. *There Is No Deadline, So Long as the Disclaimer Is Made Before Accepting the Property*

One of the major changes of the Texas Disclaimer Act is abandonment of the nine-month deadline for disclaimers.¹⁵¹ A disclaimer may still have to be made within nine months of the decedent’s death to be a qualified disclaimer for tax purposes; however, in Texas a disclaimer can be effective for state law purposes even if it is made more than nine months after the decedent’s death.¹⁵²

144. PROP. § 240.003.

145. H.B. 2428, 84th Leg., R.S. (Tex. 2015).

146. *Id.*

147. *See id.*

148. TEX. EST. CODE ANN. § 122.005 (West 2014). Determining the applicable law if the death occurred exactly on December 1, 2014, is tricky. *Id.* TEX. EST. CODE § 122.055 provides that the disclaimer must be filed “not later than nine months after the date of the decedent’s death.” *Id.* Nine months would fall exactly on September 1, 2015, which is the effective date of the new act. TEX. PROP. CODE ANN. § 240.001 (West 2015). This probably means that the new law applies, but it would be safer to comply with the former law and complete the disclaimer prior to September 1, 2015. *Id.*

149. EST. § 112.005, *repealed by* H.B. 2428, 84th Leg., R.S. (Tex. 2015).

150. *See infra* Part III.2.a.

151. *See generally* TEX. PROP. CODE ANN. § 240.009 (West 2015) (explaining the requirements of an effective disclaimer, of which time is not mentioned).

152. *See id.* § 240.057.

What sets the state law deadline for a disclaimer under the new statute?¹⁵³ Acceptance.¹⁵⁴ A disclaimer is barred if “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.”¹⁵⁵ The Texas version of the uniform act intentionally added the “taking possession” and “exercising dominion and control” language so that the acceptance standard under prior law would not change.¹⁵⁶

This should make it possible for a debtor who has not filed a petition in bankruptcy to disclaim property more than nine months after a decedent’s death and thereby avoid having the property go to the debtor’s creditors, so long as the debtor has not accepted the property.¹⁵⁷

What if the individual wishing to disclaim is also the executor of the estate?¹⁵⁸ No problem.¹⁵⁹ Acceptance of property in a fiduciary capacity is not an acceptance of the property in an individual capacity and does not bar a disclaimer in an individual capacity.¹⁶⁰ Practitioners believe that the former law would have been reached with the same result, but the former law did not expressly state it.¹⁶¹

b. What Must the Disclaimer Instrument Contain?

To qualify as effective, a disclaimer must meet the following requirements: be in writing, declare the disclaimer, describe the interest or power disclaimed, and signed by the person making the disclaimer.¹⁶² It does *not* need to be notarized, unless of course it must be recorded in the real property records.¹⁶³ If the person is disclaiming a partial interest, the individual may express that interest “as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.”¹⁶⁴

153. *See id.* § 240.009

154. *See id.*

155. *Id.* § 240.151(b)(1). A disclaimer also is barred by a written waiver, “if the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest . . . or . . . the interest sought to be disclaimed is sold under a judicial sale.” *Id.*

156. *See* TEX. EST. CODE § 122.104, (repealed 2015); PROP § 112.010(c-1), (repealed 2015).

157. *See supra* Part I.A.2.b; *Infra* Part III.B.

158. PROP. § 240.151(c).

159. *Id.*

160. *Id.*

161. *See* Glenn Karisch & Julia Jones, *Problems with Texas Disclaimer Statutes & What to do About Them*, TEX. PROB. 1, 40 (Sept. 2014), available at <http://www.texasprobate.com/download-cle-article/>, [<http://perma.cc/9R5C-TPVX>].

162. PROP. § 240.009(a). It also must be delivered or filed as provided elsewhere in the Act. *See infra* Part II.B.2.c.

163. *See* PROP. § 240.009(a).

164. *Id.* § 240.009(b).

c. What About Delivering or Filing It?

If there is a personal representative of the estate, the “disclaimer must be delivered to the personal representative,” and it does not have to be filed or recorded anywhere.¹⁶⁵ The disclaimer may be delivered “by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the disclaimer’s receipt.”¹⁶⁶ If that’s too relaxed for the disclaimant, a safe harbor exists: “[i]f the disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer’s receipt, delivery is considered to have occurred on the date of mailing regardless of receipt.”¹⁶⁷

If no personal representative of the estate exists, the “disclaimer must be filed in the official public records of any county in which the decedent: (A) was domiciled on the date of the decedent’s death or (B) owned real property.”¹⁶⁸ Thus, if it is unclear if the decedent was domiciled in Collin County, where her home is located, or in Dallas County, where the nursing home in which she resided at death is located, the disclaimant may safely file the disclaimer in any county in where the decedent owned real property.¹⁶⁹ In this situation, the disclaimer is effective with respect to other real and personal property even if the other property is not located in the county of filing or if the decedent was not domiciled in the county of filing.¹⁷⁰

d. To Whom Does the Disclaimed Property Go?

The will or other instrument that created the interest provides where the property goes in the event of a disclaimer.¹⁷¹ Under prior law, the testator or settlor had the ability to control where disclaimers went by including provisions in the instrument.¹⁷² This ability may take on greater importance under the Texas Disclaimer Act because of the abandonment of the nine-month deadline for disclaimers.¹⁷³ Currently, many well-drafted wills and trusts address what happens when a surviving spouse disclaims property—

165. *Id.* § 240.102(1).

166. *Id.* § 240.101(a).

167. *See id.* § 240.101(b).

168. *See id.* § 240.102(2).

169. *See id.*

170. *See id.* § 240.051(d).

171. *Id.* § 240.051(d).

172. *See* Steve R. Ackers, *Transfer Planning, Including Use of GRATS, Installment Sales to Grantor Trusts, and Defined Value Clauses to Limit Gift Exposure*, State Bar of Texas, 32nd Annual Advanced Estate Planning and Probate Course 1, 93 (June 2008).

173. *See* UNIF. DISCLAIMER OF PROP. INTERESTS ACT (amended 2010).

causing it to pass into a credit-shelter trust.¹⁷⁴ In the future, drafters may come up with more creative ways to plan for disclaimers.¹⁷⁵

Practice Tip: Take advantage of the safe harbor rule when delivering disclaimers. If the disclaimer is sent by certified mail to an address the disclaimant believes is valid, delivery is deemed to have occurred on the date of mailing even if the recipient never receives the disclaimer.

If the instrument does not say where the disclaimed property goes, then “the disclaimed interest passes as if the disclaimant had died immediately” prior to the decedent’s death.¹⁷⁶ The Texas Disclaimer Act contains provisions that address passage of the property in more unusual cases, such as when the disclaimant is a charity or other non-natural person or when there are unusual facts making it difficult to determine the takers of the property.¹⁷⁷

e. When Is the Disclaimer Effective?

The disclaimer takes effect upon the decedent’s death, and relates back for all purposes to the time of the decedent’s death.¹⁷⁸ The legislature intentionally added the “relates back” language to the Texas version of the uniform act to make it clear that Texas still follows the relation-back doctrine.¹⁷⁹ A disclaimed interest is not subject to the claims of any creditor of the disclaimant.¹⁸⁰

3. Disclaimers of Other Types of Property and in Other Situations

One of the benefits of the Texas Disclaimer Act is that it provides specific guidance for disclaiming property received from different sources.¹⁸¹

174. See Treas. Reg. § 25.2518-2(e)(2) (1997). This technique is possible because Treas. Reg. § 25.2518-2(e)(2) permits a surviving spouse—and only a surviving spouse—to disclaim property and still to retain an interest in and power over that property without adverse tax consequences. *Id.*

175. See *infra* Part IV.A.

176. TEX. PROP. CODE ANN. § 240.051(e)(2) (West 2015).

177. *Id.* §§ 240.051(e)(1), 240.0511.

178. *Id.* § 240.051(b).

179. See Glenn Karisch, *Drafting Opportunities Under the New Texas Disclaimer Statute*, TEX. PROB. 1, 7 (Oct. 2015), available at <http://www.texasprobate.com/download-cle-articles/> [<http://perma.cc/9R5C-TPVX>].

180. TEX. PROP. CODE ANN. § 240.051(b)(2). This may not be the case if the disclaimer is made after the disclaimant is the subject of a bankruptcy proceeding. *Id.* See *supra* Part I.A.2.b; see also *infra* Part III.B.

181. See Glenn Karisch, *2015 Legislative Update*, TEX. PROB. 1, 6 (2015) available at <http://www.texasprobate.com/download-cle-articles/> [<http://perma.cc/9R5C-TPVX>].

a. Survivorship Property

To disclaim property passing by right of survivorship, the disclaimant must give notice of the disclaimer to the person to whom the disclaimed interest passes, and the disclaimed interest “passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.”¹⁸²

b. Beneficiary Designation Property

To disclaim property passing by beneficiary designation the disclaimer occurs before the interest passing by beneficiary designation becomes irrevocable, the disclaimant must give notice of the disclaimer to the person making the beneficiary designation.¹⁸³ Thus, if a son is disclaiming benefits from his mother’s IRA while she is still living, he must deliver the disclaimer to his mother, not to the IRA custodian (assuming that the IRA beneficiary designation becomes irrevocable on the mother’s death).¹⁸⁴

If the disclaimer occurs after the interest passing by beneficiary designation becomes irrevocable, the disclaimant must give notice of the disclaimer to the person obligated to distribute the interest.¹⁸⁵ Thus, if a son is disclaiming benefits from his mother’s IRA and the disclaimer occurs after his mother’s death, he must deliver the disclaimer to the IRA custodian, because the IRA custodian is the person obligated to distribute the interest.¹⁸⁶

c. Trust Property

For a beneficiary to disclaim an interest in a testamentary trust, the beneficiary must deliver the disclaimer to the trustee then serving or, if there is no trustee then serving, to the personal representative of the settlor’s estate.¹⁸⁷ If there is no trustee or personal representative then serving, the disclaimer “must be filed in the official public record of any county in which the decedent: (A) was domiciled on the date of the decedent’s death; or owned real property.”¹⁸⁸

For a beneficiary to disclaim an interest in an *inter vivos* trust, the beneficiary must deliver the disclaimer to the trustee then serving.¹⁸⁹ If no trustee is then serving, the “disclaimer must be filed: (A) with a court having jurisdiction to enforce the trust; or (B) in the official public records of the county in which: (i) the situs of administration of the trust is maintained; or

182. PROP. §§ 240.106, 240.052(c).

183. *Id.* § 240.105(b).

184. *See id.*

185. *See id.* § 240.105(c).

186. *See id.*

187. *See id.* § 240.103.

188. *Id.* § 240.103.

189. *Id.* § 240.104.

(ii) the settlor is domiciled or was domiciled on the date of the settlor's death."¹⁹⁰ In addition, if the settlor is alive and the trust is irrevocable, the disclaimant must deliver the disclaimer to the settlor of the trust or the transferor of the interest.¹⁹¹

d. Powers of Appointment

The Texas Disclaimer Act has specific provisions regarding disclaimers of powers of appointment or other powers not held in a fiduciary capacity and disclaimers by the appointee of, or object or taker in default of exercise of, a power of appointment.¹⁹²

Example 2: Danny wishes to disclaim all property he may otherwise receive because of Teddy's death, regardless of the form in which it passes. Danny is beneficiary of a BigCo life insurance policy, a BadCo life insurance policy and a BigBank IRA. Teddy, Danny and Sue are joint owners of a SmallBank right of survivorship account. Danny is a beneficiary under Teddy's will.

- Under the former Texas law, Danny would perfect his disclaimer (assuming all other requirements were met) by delivering it to the personal representative of Teddy's estate and filing it in Teddy's probate proceeding.
- Under the new law, Danny must deliver disclaimers to:
 - BigCo, which is the entity obligated to distribute the BigCo life insurance proceeds.
 - BadCo, which is the entity obligated to distributed the BadCo life insurance proceeds.
 - BigBank, which is the entity obligated to distribute the BigBank IRA proceeds.
 - Sue, who is the party to whom the disclaimed survivorship interest in the SmallBank account passes. (It does not need to be delivered to SmallBank, and delivering it to SmallBank is not sufficient to make it effective.)
 - The personal representative of Teddy's estate, with respect to all probate property.

190. *Id.*

191. *Id.*

192. *Id.* §§ 240.054–.055.

e. Disclaimer of a Power by Agent

In the case of a disclaimer of a power by an agent, the disclaimant must deliver the disclaimer to the principal or the principal's representative.¹⁹³

4. A Potential Trap for Those Used to Using the Former Law: Delivery to Multiple Parties

A potential trap under the Texas Disclaimer Act applies if a disclaimant is disclaiming multiple types of property.¹⁹⁴

Under the former law, a timely delivery of the disclaimer to the personal representative of the estate and a timely filing in the probate proceeding would likely be sufficient to constitute a disclaimer of probate and non-probate assets.¹⁹⁵ Under the new law, because different persons are entitled to receive delivery of the disclaimers of different types of property, either multiple disclaimers may have to be prepared and delivered to the appropriate recipients or a single disclaimer may be delivered to multiple recipients.¹⁹⁶

If disclaimers must be delivered to multiple persons, should the disclaimant prepare a separate disclaimer for each recipient or one comprehensive disclaimer to be delivered to multiple recipients?¹⁹⁷ Either method should work, as long as the requirements of Property Code § 240.009 are met.¹⁹⁸ The disclaimer must “be in writing[,] declare the disclaimer[,] describe the interest or power disclaimed[,] be signed by the person making the disclaimer[,] and be delivered or filed” as required by Chapter 240.¹⁹⁹ This means, for example, that a disclaimer of life insurance proceeds should describe the policy and its proceeds as the “interest or power disclaimed;” it probably is not sufficient to say that the person is disclaiming all property passing by reason of the death of the decedent because that does not describe the insurance proceeds specifically.²⁰⁰

5. Fiduciary Disclaimers

The Texas Disclaimer Act has extensive provisions governing disclaimers by fiduciaries such as guardians, personal representatives, agents,

193. *Id.* § 240.110.

194. *See id.* § 240.001.

195. *See* TEX. EST. CODE ANN. § 122.056(a) (repealed 2015). If some of the property being disclaimed was trust property, it also may have been necessary to deliver the disclaimer to the trustee of the trust. *See* TEX. PROP. CODE ANN. § 122.010(c-2) (repealed 2015).

196. *See* PROP. § 240.001–.151.

197. *See id.* § 240.009.

198. *Id.*

199. *Id.*

200. *See id.*

and trustees.²⁰¹ Fiduciary disclaimers are different from individual disclaimers because of the dual roles the fiduciary plays.²⁰²

The person serving as fiduciary has individual interests and powers.²⁰³ For example, a trustee has the power to make distributions to trust beneficiaries based on the standard in the trust instrument.²⁰⁴ The person serving as trustee may wish to disclaim a power over property which he or she does not wish to hold or which might cause tax or creditor problems if he or she held it.²⁰⁵ The person may wish to disclaim an undesired power even before beginning to serve as fiduciary.²⁰⁶

As a fiduciary, the person serves as a representative of another (as in the case of a guardian, executor, administrator or agent) or as the holder of legal title for the benefit of beneficiaries (as in the case of a trustee).²⁰⁷ In representing a ward, estate, agent, or in acting on behalf of a trust, the fiduciary may wish to disclaim interests or property which otherwise would pass to the ward, estate, agent, or trust.²⁰⁸

While in many respects the same issues affecting individual disclaimers also affect fiduciary disclaimers, the Texas Disclaimer Act specifically addresses those issues which are unique to fiduciary disclaimers.²⁰⁹

a. Disclaimer of Powers By a Person Designated to Serve as or Serving as a Fiduciary

What if a trust instrument gives the named trustee powers which would constitute a general power of appointment?²¹⁰ The designated individual may be willing to serve as trustee, but not if the trust property would be subject to his creditors or included in his estate for tax purposes.²¹¹ The answer, of course, is that the individual may disclaim the offending powers.²¹² How does this work, and what issues may arise?²¹³

201. *See id.* § 240.008.

202. *See id.*

203. Robert D. Mitchell, *Fiduciary Duties of Trustees*, (Nov. 18, 2015) mitchel-attorneys.com/legal-articles/fiduciary-duties-of-trustees-in-investments-and-financial-matters/ [<http://perma.cc/N498-WK8Y>].

204. *Id.*

205. Steve R. Ackers, *Trustees Selection; Retaining Strings without Getting "Strung-up"*, State Bar of Texas, Advanced Estate Planning and Probate Course 1, 58 (2002), available at texasbarcollege.com/reports/ackers/pdf [<http://perma.cc/3C27-5PPT>].

206. *Id.*

207. *Id.*

208. *Id.*

209. TEX. PROP. CODE ANN. § 240.008.

210. *See* Ackers, *supra* note 205.

211. *Id.*

212. *Id.*

213. PROP. § 240.007.

Section 240.007 addresses disclaimers of this type in detail.²¹⁴ It permits the person designated to serve as, or serving as, fiduciary the power to disclaim any power over property, including a power of appointment and the power to disclaim.²¹⁵

If the person is designated to serve as a trustee, the disclaimer of this power could affect beneficiaries' rights.²¹⁶ For example, if the trustee wishes to disclaim the power to make distributions for the beneficiaries' "comfort," the disclaimer may solve a tax problem for the trustee-designatee, but it also may eliminate a beneficiary's right to receive distributions for comfort.²¹⁷ The Texas Disclaimer Act addresses this situation by:

- Requiring the person to disclaim this type of power only on or after accepting the trust.²¹⁸
- Making it clear that the disclaimer must be compatible with the trustee's fiduciary obligations.²¹⁹

If the trustee is serving when the disclaimer is made, the trustee owes the beneficiaries fiduciary duties and the disclaimer must be compatible with those duties.²²⁰ If the disclaimer improperly and adversely affects a beneficiary's rights, the beneficiary has recourse against the trustee.²²¹ Of course, because in many cases a disclaimer of distributive powers will not harm the beneficiaries and will provide tax benefits, giving the trustee the ability to disclaim is worthwhile.²²²

This requirement—that a trustee must first begin to serve as trustee before disclaiming a power affecting beneficiaries' distributive rights—does not apply to other types of fiduciaries or to trustees if the power being disclaimed does not affect beneficiaries' rights.²²³ In these other situations, the person designated to serve as a fiduciary may disclaim the power before beginning to serve as a fiduciary.²²⁴ This means that the person does not owe fiduciary duties to the beneficiary when the disclaimer is being made.²²⁵

214. *Id.*

215. *Id.*

216. *See Ackers, supra* note 205.

217. *See id.*

218. PROP. § 240.007(b)(1).

219. *See id.* § 240.007(b).

220. *See id.* § 240.007.

221. *Id.*

222. *See id.*

223. *Id.* § 240.007(a).

224. *Id.*

225. *Id.*

b. Fiduciary Duties Versus Court Approval

As discussed below, some fiduciary disclaimers require court approval, while others do not.²²⁶ “[U]nless a court of competent jurisdiction approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary’s fiduciary obligations.”²²⁷ Thus, if a fiduciary goes ahead with a disclaimer without court approval, he or she faces potential liability for breach of fiduciary duty.²²⁸

An independent executor has a duty to collect the assets of the decedent’s estate.²²⁹ A trustee has a duty to preserve the trust’s corpus.²³⁰ How can an independent executor or trustee ever disclaim without breaching his or her fiduciary duties?²³¹ The Texas Disclaimer Act addresses this by saying a disclaimer by a fiduciary acting in a fiduciary capacity “is not a per se breach of the fiduciary’s fiduciary obligations.”²³² This avoids the absurdity of having the Texas Disclaimer Act permit fiduciary disclaimers without court approval but making them impossible by imposing fiduciary duties.²³³

If fiduciary disclaimers are subject to fiduciary duties “unless a court of competent jurisdiction approves the disclaimer,” does that mean that fiduciaries who obtain court approval cannot be challenged later for the decision to disclaim?²³⁴ This is a logical reading of the statute and probably how the courts will construe the statute.²³⁵ Still, the statute stops short of saying that a fiduciary obtaining court approval has no fiduciary duties with respect to the decision to disclaim.²³⁶

c. Equitable Remedies Voiding the Disclaimer Are Not Available

If a beneficiary successfully shows that a fiduciary breached his or her fiduciary obligations in making a disclaimer, can a court declare the

226. *See id.* § 240.008(f).

227. *Id.*

228. *Id.*

229. *See generally* Mary C. Burdette, *Fiduciary Duties Within Fiduciary Duties*, State Bar of Texas, Advanced Estate Planning and Probate Course 1, 2 (2012), available at <http://www.dallasprobatelawfirm.com/documents/001/-Trusts-Owning-Interests-in-Bus.-Org.-Universal.pdf> [<http://perma.cc/2WC8-LJJ2>] (explaining the different duties associated with being a trustee).

230. *See* Laura A. Weisner, *A Guide for the Texas Independent Executor*, available at http://www.victoriacountytx.org/pdf/A_GUIDE_FOR_THE_TEXAS_INDEPENDENT_EXECUTOR_LAW.pdf [<http://perma.cc/8D2S-TLT5>] (last visited Oct. 26, 2015).

231. *See generally* PROP. § 240.008(f) (explaining that disclaimers are not always a breach of fiduciary obligations).

232. *Id.*

233. *See id.*

234. *Id.*

235. *Id.*

236. *Id.*

disclaimer void, or otherwise make the disclaimer ineffective?²³⁷ No.²³⁸ The Texas Disclaimer Act expressly decides the equitable rescission issue for fiduciary disclaimers: “Possible remedies for a breach of fiduciary obligations do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the disclaimer ineffective.”²³⁹ The beneficiary is limited to other remedies such as damages or removal, for example.²⁴⁰ The reason for this provision is to provide finality and certainty about the effect of a disclaimer.²⁴¹

Does this provision completely eliminate the possibility of an equitable rescission of a disclaimer?²⁴² In *McCuen v. Huey*, discussed above, the court held a disclaimer as ineffective based on a mistake of fact.²⁴³ Even though the Texas Disclaimer Act precludes rescission of a fiduciary disclaimer as a remedy for breach of fiduciary duty, the Act does not explicitly address rescission of disclaimers in any other context (such as a disclaimer by an individual, or a disclaimer by a fiduciary that did not constitute a breach of fiduciary duty).²⁴⁴

Accordingly, there may be a slight opening for equitable rescission of a disclaimer if a situation similar to the facts of *McCuen* arose after enactment of the Texas Disclaimer Act: a disclaimer based on a mistake of fact by someone other than a fiduciary.²⁴⁵ However, the most well-reasoned interpretation of Texas law is that equitable rescission of disclaimers based on a mistake of law or fact, either before or after enactment of the Texas Disclaimer Act, is not available.²⁴⁶ There are several reasons to doubt that the *McCuen* court’s reasoning applies to statutory disclaimers at all.²⁴⁷ Further, after Vermont adopted the Uniform Disclaimer of Property Interests Act, the Vermont Supreme Court considered a similar question: could a mother’s disclaimer of her interest in her son’s estate be revoked based on her claim that she did not understand the disclaimer that she executed?²⁴⁸ After considering the language of the Uniform Act and reviewing other case law, the court concluded that “disclaimers are not revocable based on disclaimant’s mistake of law.”²⁴⁹ However, the court reserved the right to rescind the disclaimer if the fact finder found undue

237. *See id.* § 240.008(g).

238. *See id.*

239. *Id.*

240. *See id.*

241. *See id.*

242. *See McCuen v. Huey*, 255 S.W.3d 716, 722 (Tex. App.—Waco 2008, no pet.).

243. *See id.*

244. *See* PROP. § 240.008(g).

245. *See id.*; *McCuen*, 225 S.W.3d at 722.

246. *The author conducted a thorough research on Westlaw and found no reported cases.*

247. *McCuen*, 225 S.W.3d at 722.

248. *Carvalho v. Estate of Carvalho*, 978 A.2d 455, 459 (Vt. 2009).

249. *Id.* at 462.

influence, coercion, or incompetence in the execution of the disclaimer.²⁵⁰ Since the Texas Disclaimer Act instructs courts to consider uniformity among states enacting the Uniform Act in applying and construing it, the Vermont court's interpretation of the Uniform Act is likely to be followed in Texas: disclaimers should almost always be irrevocable, but there may be a remedy available to victims of especially egregious cases of manipulation and abuse.²⁵¹

d. Disclaimers Requiring Court Approval

Prior court approval of a disclaimer by a fiduciary is required in these situations:

- (1) “[a] disclaimer by a personal representative who is not an independent administrator or independent executor [in other words, a guardian, temporary guardian, dependent administrator, or temporary administrator]”;
- (2) [a] disclaimer by the trustee of a court-created trust established under Chapter 1301 of the Estates Code or § 142.005 of the Texas Property Code;
- (3) “[a] disclaimer by the trustee of a trust created under § 142.005; or
- (4) [a] disclaimer that would result in an interest in or power over property passing to the person making the disclaimer.”²⁵²

The legislature added the requirement of court approval, if the disclaimer would result in an interest or power over property passing to the person making the disclaimer, (1) to assure that the fiduciary making the disclaimer does not possess a general power of appointment for federal tax purposes, and (2) to provide a layer of protection for beneficiaries.²⁵³ This requirement applies only to a disclaimer by a fiduciary.²⁵⁴ It does not require court approval of a disclaimer if, as a result of a disclaimer by an individual (non-fiduciary), an interest in or power over property passes to that individual.²⁵⁵ This allows the common technique of permitting a surviving spouse to disclaim an interest which then passes into a credit shelter trust of which the spouse is a beneficiary and trustee.²⁵⁶

250. *Id.* at 463.

251. TEX. PROP. CODE ANN. § 240.005. Because of Tex. Prop. Code § 240.008(g), rescission would not be available if a fiduciary (rather than an individual) made the disclaimer, even if the facts were egregious, if the claim is based on a breach of the fiduciary's fiduciary obligations. *Id.*

252. PROP. § 240.008(c).

253. See H.R. 2458, 84th Leg., R.S. (Tex. 2015).

254. See PROP. § 240.008(c).

255. See *id.*

256. See generally *Estate of David Katz v. Comm'r, T.C.M. (RIA) 2004-166 (2004)* (explaining the steps of a wife disclaiming an interest in property, which then passed into a credit shelter trust). A special tax rule permits a spouse to disclaim while retaining an interest in the disclaimed property. I.R.C. § 2518(b)(4)(A) (West 2015). The spouse may serve as trustee of a trust receiving the disclaimed property only if her ability to make distributions is limited by an ascertainable standard. Treas. Reg. § 25.2518-

This requirement will impede some trustee disclaimers.²⁵⁷ If the trustee is the outright recipient of disclaimed property or a current or remainder beneficiary of a trust receiving disclaimed property, the disclaimer requires court approval because the disclaimer results in an interest in or power over property passing to the person making the disclaimer.²⁵⁸ In most cases, this means that using the surviving spouse or a descendant of the decedent as trustee forces that trustee to seek court approval of a disclaimer.²⁵⁹ The estate planner can draft around this problem by using a non-family-member trustee or including a provision appointing a special trustee whose sole authority is to make disclaimers.²⁶⁰

e. Disclaimers Not Requiring Court Approval

Except for the three cases stated above where court approval is specifically required, a disclaimer by a fiduciary acting in a fiduciary capacity does not require court approval to be effective, unless the instrument that created the fiduciary relationship requires court approval.²⁶¹ This includes disclaimers by independent executors, independent administrators, or agents under powers of attorney.²⁶²

f. A Special Case: Disclaimer By Natural Guardian

Borrowing a provision from the Florida version of the Uniform Act, the Texas Disclaimer Act permits the natural guardian (parent) of a minor to disclaim, on behalf of the minor, an interest in or power over property that the minor is to receive solely as a result of another disclaimer; but only if there is no court-appointed guardian and only if the disclaimed interest does not pass to or for the benefit of the natural guardian as a result of the disclaimer.²⁶³

This provides the potential to solve a common problem with disclaimers.²⁶⁴ Under prior law, a disclaimer strategy might not work because a parent making a disclaimer has minor children who would receive the property instead of the intended recipient.²⁶⁵ If the child would only

2(e)(2) (1997). A Texas disclaimer does not have to comply with these tax rules, but adverse tax consequences may accompany noncompliance. *See generally*, Kennedy v. Plan Adm'r DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009)(where executrix faced tax consequences for non-compliance of the rule).

257. *See* PROP. § 240.008.

258. *See id.*

259. *See id.*

260. *See infra* Part IV.A.4.

261. *See* PROP. § 240.008(b).

262. *See id.* § 240.002(8).

263. *See* FLA. STAT. § 739.201(2) (2014); TEX. PROP. CODE ANN. § 240.008(e).

264. *See* PROP. § 240.008(e).

265. *See id.*

receive the property if her mother disclaimed, then there is no policy reason why the mother should not be permitted to disclaim on the child's behalf without court approval, allowing the property to pass as if the mother and all her descendants predeceased.²⁶⁶

The natural guardian is a fiduciary and owes fiduciary duties to the child when making this type of disclaimer.²⁶⁷ Without court approval, the disclaimer must be compatible with the natural guardian's fiduciary obligations.²⁶⁸

g. Trustee Disclaimers

A driving force for adoption of the Texas Disclaimer Act was to allow disclaimers by trustees that cause the disclaimed property not to pass into the trust.²⁶⁹ The former law may have allowed this, but it did not provide clear results and it required extra steps.²⁷⁰

If a trustee disclaimer results in property not passing into a trust with no action by a trust beneficiary, the trust beneficiary is vulnerable, and the trustee faces possible claims of breach of fiduciary duty.²⁷¹ Because of a trustee's duty to collect and administer the trust corpus, it might be a per se breach of trust for a trustee to disclaim.²⁷²

REPTL considered different ways to balance ease of use, protection of the trustee, and protection of beneficiaries.²⁷³ The Uniform Disclaimer of Property Interests Act itself allows trustee disclaimers without notice to beneficiaries and without court approval.²⁷⁴ Comments to the uniform act mention that a trustee who disclaims is subject to fiduciary duties, but it does not contain a statutory provision to this effect.²⁷⁵ States adopting versions of the uniform act have approached trustee disclaimers in a variety of ways:

- Follow the uniform act—permit trustee disclaimers with no notice and no court approval.²⁷⁶
- Require court approval for all trustee disclaimers.²⁷⁷
- Prohibit trustee disclaimers.²⁷⁸

266. *See id.*

267. *See id.* § 240.008(f).

268. *See id.*

269. *See supra* Part I.C.3.

270. *See supra* Part I.C.3.

271. *See infra* Part IV.A.1.

272. *See* PROP. § 240.008(g).

273. *See* UNIF. DISCLAIMER OF PROP. INTERESTS ACT, PREFATORY NOTE (amended 2010).

274. *See id.* § 8.

275. *See id.* § 8 cmt.

276. *See id.*

277. *See* PROP. § 240.008(c).

278. *See generally* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 8 cmt.

i. Court Approval or Notice

The Texas Disclaimer Act expressly allows trustee disclaimers.²⁷⁹ If the trust is a court-created trust, court approval of the disclaimer is required.²⁸⁰ If, as a result of the trustee's disclaimer, the trustee individually will receive an interest in or power over property, court approval of the disclaimer is required.²⁸¹ In all other cases, the trustee has a choice: the trustee may get court approval, or the trustee may give the beneficiaries 30 days notice prior to disclaiming.²⁸²

If the trustee chooses to give notice, the Act contains detailed provisions about which beneficiaries are entitled to notice, what must be included in the notice, and the rights of beneficiaries receiving notice.²⁸³

A trustee's disclaimer without court approval must be compatible with the trustee's fiduciary obligations.²⁸⁴

If the trustee chooses to forego court approval and instead gives notice, may he or she require adult beneficiaries to consent and release claims as a condition to making the disclaimer?²⁸⁵ The potential problem is Treas. Reg. § 25.2518-2(d)(1).²⁸⁶ In order to be a tax-qualified disclaimer, the disclaimant cannot accept "the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer."²⁸⁷ This prevents individuals from receiving consideration for making a disclaimer.²⁸⁸ Is the trustee receiving consideration if he or she conditions making the disclaimer on getting a release?²⁸⁹ And if the disclaimer is not conditioned on getting the release, is there consideration for the release?²⁹⁰ The cases on pre-arranged complex disclaimer arrangements are pretty generous for the taxpayer, so a trustee might consider this path after further research and soul-searching.²⁹¹

279. See PROP. § 240.007(a).

280. See *id.* § 240.008(c).

281. See *id.*

282. See *id.* § 240.008(c),(d).

283. See *id.* § 240.008.

284. See *id.* § 240.008(f); *supra* Part II.B.4.

285. PROP. § 1140.032 (West 2015) (stating that a written agreement, including a release, between a trustee and a beneficiary "is final and binding on the beneficiary and any person represented by the beneficiary" if the instrument is signed by a beneficiary with legal capacity who has "full knowledge of the circumstances surrounding the agreement."). *Id.*

286. See Treas. Reg. § 25.2518-2(d)(1) (1997).

287. *Id.*

288. See *id.*

289. See *Estate of Lassiter v. Comm'r*, 80 T.C.M. (CCH) 541 (2000).

290. See *id.*

291. See *id.*; *Estate of Monroe v. Comm'r*, 124 F.3d 699, 715 (5th Cir. 1997).

Practice Tip: A trustee concerned about liability for making a disclaimer can reduce or eliminate fiduciary liability by getting prior court approval. A trustee who is not worried about liability can expedite the disclaimer procedure and save money by using the notice procedure with waivers as appropriate.

ii. Where Does the Disclaimed Property Go?

If a trustee disclaims property that would have become trust property, the Texas Disclaimer Act provides that the property passes as if all current, presumptive remainder, and contingent beneficiaries of the trust died before the trust became irrevocable or never existed, in the case of non-individual beneficiaries.²⁹² In other words, the trust is treated as never having existed for the purposes of the disclaimed property.²⁹³ The property passes to the next beneficiary provided under the governing instrument.²⁹⁴

Practice Tip: A trustee's disclaimer may be a way to avoid creation of a credit shelter trust. This may be useful if basis adjustment, not estate tax savings, is the primary objective.

- The technique works in pecuniary bypass/residuary marital plans since the disclaimer of the pre-residuary gift causes the property to pass as part of the residuary.
- The technique is not likely to work in pecuniary marital/residuary bypass plans unless:
 - The surviving spouse does not need the assets that would otherwise pass into the credit shelter trust (since the disclaimer of the residuary gift is likely to cause the property to pass to descendants, not to the surviving spouse); or
 - The desired result can be obtained through a series of disclaimers by contingent remainder beneficiaries – see footnote 114; or
 - The instrument specifically provides that a disclaimer by the trustee of the credit shelter trust causes the property to pass to the surviving spouse (or into a marital deduction trust).

Drafting Tip: When drafting new wills and trusts, specify where disclaimed property goes in the event of a trustee disclaimer.

292. TEX. PROP. CODE ANN. § 240.053(c) (West 2015).

293. *See id.*

294. *See id.*

The Act treats all of the trust beneficiaries as having died only for the purpose of determining the disposition of an interest in property disclaimed by a trustee that otherwise would have passed into the trust.²⁹⁵ The Act does not treat them as having died for other purposes of the instrument.²⁹⁶ Therefore, if the next beneficiary provided under the governing instrument also was a beneficiary of the trust subject to the disclaimer, the Act treats that beneficiary as not having died for purposes of the contingent gift.²⁹⁷

For instance, consider a will with a pecuniary gift to a credit shelter trust and the residuary gift to the surviving spouse.²⁹⁸ If the trustee of the credit shelter trust disclaimed an interest in property, the property would pass to the surviving spouse as part of the residuary estate, regardless of the survival of the testamentary trust's remainder beneficiaries.²⁹⁹ The statute treats the surviving spouse as having died for purposes of the credit shelter trust disclaimer, but not as having died with respect to the residuary gift.³⁰⁰

This provides a useful planning technique for decedents with nontaxable estates who die with old tax-planned wills, but only if the credit shelter gift is the pre-residuary gift.³⁰¹ In these cases, it is usually more beneficial for the property to be taxable in the surviving spouse's estate (because of the adjustment to basis at the second death) than to establish the credit shelter trust (which is not needed for estate tax savings and which precludes basis step-up).³⁰²

If the gift to the credit shelter trust is the pre-residuary gift and the gift to the surviving spouse or to a qualified terminable interest property (QTIP) trust is the residuary gift, a disclaimer by the trustee of the credit shelter trust will cause the property to pass to the surviving spouse or to the QTIP trust, each of which qualifies for basis adjustment at the death of the surviving spouse.³⁰³

This technique is unlikely to work if the pre-residuary gift is to the surviving spouse or QTIP trust and the residuary gift is to the credit shelter trust.³⁰⁴ The Texas Disclaimer Act does not permit "upstream" disclaimers, only "downstream."³⁰⁵ In this case, if the trustee of the credit shelter trust disclaims, the property is likely to pass to the decedent's descendants, not to

295. *Id.*

296. *See id.* § 240.053(d).

297. *Id.*

298. *See id.*

299. *See id.*

300. *See id.*

301. *See id.*

302. *See* Mickey Davis, *Basis Adjustment Planning*, State Bar of Texas, Advanced Estate Planning and Probate Course, Ch. 10, at 21 (2014).

303. *Id.*

304. *Id.*

305. *See* TEX. EST. CODE ANN. § 201.003(b)(1) (West 2014).

the surviving spouse.³⁰⁶ If the residuary gift is to the credit shelter trust and the entire residuary gift is community property, it may be possible to cause the property to pass to the surviving spouse through a series of disclaimers.³⁰⁷ If the trustee of the credit shelter trust disclaims and all contingent takers under the terms of the instrument (usually this will be all of decedent's living descendants) disclaim, an intestacy may be created.³⁰⁸ An upstream disclaimer is possible if the will or trust specifically provides for it.³⁰⁹

6. Other Texas Disclaimer Act Issues

a. Effect of Spendthrift Provision and Provisions in Instrument Granting or Limiting Disclaimer Power

What if the governing instrument contains a spendthrift provision that states that "the interest of a beneficiary in gifted property may not be voluntarily or involuntarily transferred" before payment or delivery of the interest to the beneficiary by the trustee?³¹⁰ Is the beneficiary's disclaimer a prohibited "transfer" for purposes of the spendthrift provision?³¹¹ The Texas Disclaimer Act comprehensively answers, "No."³¹² A spendthrift provision never prevents a disclaimer from being effective.³¹³

If a governing instrument includes a specific restriction on the right to disclaim, the answer depends on who is attempting to disclaim.³¹⁴ A person other than a fiduciary can always disclaim, even if the governing instrument purports to forbid disclaimers.³¹⁵ Accordingly, the Act does not limit the right of an individual to disclaim.³¹⁶

The Act bars a fiduciary disclaimer if the instrument creating the fiduciary relationship explicitly prohibits disclaimers.³¹⁷ A fiduciary acting in a fiduciary capacity may nonetheless disclaim if an instrument other than

306. *See id.* All of the community estate passes by intestacy to the surviving spouse if there is no surviving descendant of the decedent. *Id.* This approach may not be as far-fetched as it sounds since a parent may disclaim for his or her minor children without court approval in this situation. TEX. PROP. CODE ANN. § 240.008(e).

307. EST. § 201.003(b)(1).

308. *Id.*

309. *See infra* Part IV.A.

310. *See* TEX. PROP. CODE ANN. § 112.035 (West 2015).

311. *See id.*

312. *Id.* § 240.006(b) (applying to a person other than a fiduciary); *Id.* § 240.007(c) (applying to a person designated to serve or serving as a fiduciary, as to disclaimer of a power); *Id.* § 240.008(a)(1) (applying to a fiduciary acting in a fiduciary capacity, as to disclaimer of an interest in or power over property).

313. *See* PROP. § 112.035.

314. *See id.*

315. *See id.* § 240.006(b).

316. *See id.* § 240.006.

317. *Id.* § 240.007(a) (person designated to serve or serving as a fiduciary); *id.* § 240.008(a) (fiduciary acting in fiduciary capacity).

the instrument creating the fiduciary relationship prohibits disclaimers.³¹⁸ Note that the instrument that creates the fiduciary relationship will generally create the disclaimed interest or power—only in the case of a trust.³¹⁹ In the case of a guardianship, the instrument creating the fiduciary relationship is a court order.³²⁰ Even if the instrument providing for a gift of property to the ward prohibited disclaimers, the provision would not bind the guardian as the gift instrument would be “an instrument other than the instrument that created the fiduciary relationship” and, accordingly, could not bar a disclaimer.³²¹ Similarly, an executor or agent, respectively, could disclaim property passing to an estate or a principal pursuant to another individual’s gift, even if the instrument providing for the gift prohibited disclaimers (although the disclaimer would be barred by a provision in the will or power of attorney stating that the fiduciary could not disclaim on behalf of the estate or principal).³²²

In contrast, the terms of the instrument creating the fiduciary relationship binds a trustee, which in most cases, is also the instrument creating an interest or power.³²³ For example, the person designated as the trustee of a testamentary trust, governed by a will that prohibits fiduciary disclaimers, either must accept the appointment as trustee with all powers granted under the will or must decline to serve as trustee.³²⁴ There can be no disclaimer of unwanted powers if the will prohibits disclaimers.³²⁵ Similarly, after accepting the appointment as trustee, the trustee cannot disclaim any interest in property passing to the trust because of the will’s prohibition on fiduciary disclaimers.³²⁶

b. Tax Savings Catch-all

Although it is not necessary to comply with section 2518 of the Internal Revenue Code in order for a disclaimer to be effective under the Texas Disclaimer Act, the Act includes a safe harbor for disclaimers that meet qualifications for federal tax purposes.³²⁷ Specifically, section 240.057 provides that the Internal Revenue Code treats a disclaimed interest as never having been transferred to the disclaimant, thus, the disclaimer is effective as a disclaimer under the Texas Disclaimer Act.³²⁸ Under this provision, a

318. PROP. § 240.008(a)(2).

319. *See id.* § 240.008.

320. *See id.*

321. *See id.* § 240.008(a)(2).

322. *See id.* § 240.008.

323. *See id.* §§ 240.008(d), 240.007(a).

324. *See id.* § 240.007(a).

325. *See id.* § 240.008(a).

326. *See id.*

327. *See* TEX. EST. CODE ANN. § 122 (West 2014); PROP. § 240.057.

328. PROP. § 240.057.

disclaimant that is focused on making a qualified disclaimer for federal tax purposes can follow the guidance under section 2518 and the developed case law in order to comply with federal law.³²⁹ This assures that the disclaimer will be effective for state law purposes as well.³³⁰ Note that the Texas Disclaimer Act does not require compliance with section 2518; rather, section 240.057 is a permissive provision that provides an alternative method of executing an effective disclaimer.³³¹

Practice Tip: Consider using the tax savings catch-all if the desired disclaimer is not described by the Texas Disclaimer Act or when trying to fix after the fact a disclaimer which failed to meet the Act's requirements.



With section 240.057, the possibility no longer exists that a disclaimer which otherwise would qualify for tax purposes fails to qualify because Texas law does not support it.³³² Under prior Texas law, there were some disclaimers that were possible under state law which did not qualify for tax purposes, and there were some disclaimers which were possible under tax law, but only if state law permitted, and Texas law did not permit them.³³³ Now all tax-qualified disclaimers are permitted under Texas law, and there are additional

329. *Id.*

330. *Id.*

331. *Id.*

332. *See id.*

333. *See supra* Part II.A.2.

disclaimers permitted under Texas law which are not qualified for tax purposes.³³⁴

c. Do Fiduciaries Have Liability for Distributing Property Before a Disclaimer?

Consider the efficient personal representative or trustee who completes the administration of the estate or trust and distributes the property to the named beneficiaries.³³⁵ What liability does that fiduciary have if a beneficiary later wishes to disclaim?³³⁶ Must the fiduciary wait a certain period of time before distributing property, and if so, how long?³³⁷

The responsibility for disclaiming an interest in an estate or trust falls on the heir or beneficiary, not on the personal representative.³³⁸ Even if the fiduciary distributes the property, the heir or beneficiary does not have to accept it.³³⁹ Still, since a personal representative or trustee may have the duty to disclose material information known to them that might affect a beneficiary's rights, it may be prudent to warn the beneficiary that the distribution is going to occur.³⁴⁰ This is particularly true with distributions of real estate.³⁴¹ While it is relatively easy for an heir or beneficiary to refuse to accept a check (by not cashing it) or tangible personal property (by refusing delivery), recording a deed creates a presumption that the grantee has received and accepted a deed.³⁴² By sending the heir or beneficiary a letter stating that the personal representative or trustee is about to distribute the real property, the personal representative gives the beneficiary a chance to avoid the creation of this presumption by delivering the disclaimer prior to execution and recording of the deed.³⁴³

Practice Tip: Consider warning an heir or beneficiary that the fiduciary is about to distribute real property in order to give him or her the chance to disclaim before the deed is executed and recorded.

334. See *supra* Part II.A.2. The principal reason that some disclaimers permitted under the Texas Disclaimer Act will not qualify for tax purposes is that there is no time limit under Texas law, while the nine-month time limit still applies for tax law purposes. See *supra* Part II.A.2.

335. See generally TEX. PROP. CODE ANN. § 240.007 (West 2015).

336. See *id.* § 240.

337. See *id.*

338. See *id.*

339. See *id.*

340. See *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

341. *Panhandle Baptist Found., Inc. v. Clodfelter*, 54 S.W.3d 66, 71–72 (Tex. App. –Amarillo 2001).

342. *Id.* at 71–72. The presumption of delivery and acceptance may be rebutted by contrary evidence. *Id.*

343. See *id.*

d. Are Non-statutory Disclaimers Permitted?

Prior to the enactment of Texas's first disclaimer statute in 1971, common law disclaimers were permitted.³⁴⁴ The 1971 statute provided that “[f]ailure 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.”³⁴⁵ Until the enactment of the Texas Disclaimer Act, this basic language had remained a part of Texas's disclaimer statutes and most recently appeared in section 122.102 of the Estates Code.³⁴⁶ If a statute made a disclaimer “ineffective except as an assignment,” common law disclaimers were barred.³⁴⁷

House Bill 2428 repeals section 122.102.³⁴⁸ It also amends section 122.201 of the Estates Code to provide that “[a] person who is entitled to receive property . . . and does not disclaim the property under Chapter 240, Property Code, may assign the property . . . to any person.”³⁴⁹ This is not the same thing as saying that a disclaimer not in compliance with the statute is an assignment.³⁵⁰

The Texas Disclaimer Act does not have a provision similar to the repealed section 122.102.³⁵¹ Instead, section 240.003 states that Chapter 240 of the Property Code “applies to disclaimers of any interest in or power over property, whenever created”, and section 240.004 states that, “[u]nless displaced by a provision of [Chapter 240], the principles of law and equity supplement [the] chapter” and that the chapter “does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a statute [not law] other than this chapter.”³⁵²

Professor Adam Hirsch of the University of San Diego School of Law has commented on this part of the uniform act.³⁵³ He believes that, unless a state changes the uniform act, the provision that the act does not limit any right of a person to disclaim under a “law” other than the act permits common law disclaimers.³⁵⁴ He thinks this is problematic, and he urged REPTL to address it.³⁵⁵

344. See *First City Nat'l Bank of Houston v. Toombs*, 431 S.W.2d 404, 406 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).

345. TEX. PROB. CODE ANN. § 37A (1977).

346. See TEX. EST. CODE ANN. § 122.102 (West 2014).

347. See *id.*

348. H.B. 2428, 84th Leg., R.S. (Tex. 2015).

349. TEX. EST. CODE ANN. § 122.201 (West 2015).

350. See *id.*

351. TEX. PROP. CODE ANN. §§ 240.003–.004 (West 2015).

352. See *id.*

353. See Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L. J. 325, 331 (2011).

354. *Id.*

355. *Id.*

The Texas Disclaimer Act addresses the issue by changing the word “law” to “statute” in section 240.004(b) of the Property Code.³⁵⁶ The Act does not limit disclaimer rights arising under another statute.³⁵⁷ Does this mean that it limits disclaimer rights under common law?³⁵⁸ The Act does not state that common law disclaimers are barred.³⁵⁹ However, a court is likely to interpret the new Act to mean that non-statutory disclaimers are barred.³⁶⁰ Still, a tiny crack may exist through which someone may attempt to squeeze through by asserting a common law right to disclaim.³⁶¹ Because of the breadth of the Texas Disclaimer Act and because it eliminates the nine-month deadline for disclaimers, it is hard to imagine a case in which someone would intentionally try to make a common law disclaimer.³⁶² If the issue arises at all (which is unlikely), it probably will arise in an attempt to cure a problem with a disclaimer that failed to meet the requirements of the Texas Disclaimer Act, such as a failure to deliver the disclaimer to the proper person before filing a petition in bankruptcy.³⁶³

III. FEDERAL ISSUES

If a disclaimer includes making sure the disclaimant is not treated as having ever received the disclaimed property for federal tax law purposes, the disclaimer must still meet the requirements of I.R.C. section 2518.³⁶⁴ For example, the disclaimer must be made within section 2518’s nine-month rule requirements.³⁶⁵ As noted above, a tax-motivated disclaimer made pursuant to section 2518 would still be a valid disclaimer for Texas law purposes.³⁶⁶ If the disclaimer does not meet the requirements of section 2518, the disclaimant will be deemed to have made a transfer for gift tax purposes (recall donative intent is not required), perhaps requiring the filing of a gift tax return and even triggering gift tax liability.³⁶⁷

A. Federal Tax Liens

In *Drye v. United States*, the Supreme Court held that a disclaimer by the decedent’s statutory heir could not defeat a federal tax lien on the heir’s

356. H.B. 2428, 84th Leg., R.S. (Tex. 2015).

357. *Id.*

358. *See id.*

359. *Id.*

360. *See id.*

361. *See id.*

362. *See id.*

363. *See id.*

364. I.R.C. § 2515 (West 2015).

365. *Id.*

366. TEX. PROP. CODE ANN. § 240.057 (West 2015).

367. I.R.C. § 2515.

property as a matter of federal law.³⁶⁸ In that case, the decedent's insolvent heir owed unpaid income taxes at the time of the decedent's death.³⁶⁹ The heir disclaimed after the decedent's death, resulting in the property passing under state law to the disclaimant's child.³⁷⁰

In reaching its decision, the Supreme Court focused on the statutory tax lien statute, I.R.C. § 6321—the lien attaches to the taxpayer's "property and rights to property."³⁷¹ Thus, the lien attached to the disclaimant's interest in the decedent's estate at the time of the decedent's death (notwithstanding state-law relation back theory).³⁷²

B. Disclaimant's Bankruptcy

While lacking a definitive Supreme Court decision or statute on point, most federal courts have focused on whether the disclaimer was "pre-" or "post-" petition.³⁷³ If the disclaimer took place prior to filing for bankruptcy, state law applies, and the disclaimer is effective.³⁷⁴ If the disclaimant is already in bankruptcy, federal law applies, and the disclaimer is ineffective.³⁷⁵ Relevant Texas cases follow these rules.³⁷⁶

Practice Tip: Even though there is no state law time limit on disclaimers, do not forget that the nine-month deadline remains relevant for tax-motivated disclaimers. Best practice is to disclaim before the tax deadline passes even if the disclaimant is unlikely to have a taxable estate.

C. ERISA Beneficiaries

ERISA states that its provisions supersede all state laws as they may relate to any employee benefit plan.³⁷⁷ The Fifth Circuit has held that a disclaimer consistent with state law guidelines was not effective as a disclaimer of pension benefits, because it did not comply with the plan's prescribed method of disclaimer.³⁷⁸

368. *Drye v. United States*, 528 U.S. 49, 52 (1999).

369. *Id.* at 53.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Simpson v. Penner (Matter of Simpson)*, 36 F.3d 450, 453 (5th Cir. 1994); *In re Schmidt*, 362 B.R. 318, 326–27 (Bankr. W.D. Tex. 2007).

374. *See Simpson*, 36 F.3d at 451; *Schmidt*, 362 B.R. at 321.

375. *See Simpson*, 36 F.3d at 451; *Schmidt*, 362 B.R. at 321.

376. *See Simpson*, 36 F.3d at 451; *Schmidt*, 362 B.R. at 321.

377. 29 U.S.C. § 1144(a) (2006).

378. *See Nickel v. Estate of Estes*, 122 F.3d 294, 301 (5th Cir. 1997).

While not exactly on point, in *Kennedy v. Plan Administrator*, the Supreme Court held that a waiver by the participant's spouse during a divorce proceeding was not effective since it did not meet the execution requirements of the plan's "disclaimer" provisions.³⁷⁹

D. Medicaid Eligibility

In addressing Medicaid eligibility, federal law defines a resource as any property the individual is entitled to but does not receive because of an action taken by the individual.³⁸⁰ The courts have interpreted that language to treat a disclaimer as if the disclaimant received the property and then transferred it for long-term care Medicaid eligibility.³⁸¹

While states have the authority to develop their own eligibility requirements under 42 U.S.C. 1396(a)(1), the states are required to follow certain federal mandates.³⁸² Thus, Texas and federal law generally treats disclaimers as transfers.³⁸³

However, in their excellent article, Farrell and Pak discuss the possibility that a disclaimer may not be treated as a transfer if Medicaid is available as a result of SSI eligibility.³⁸⁴ They refer to 42 U.S.C. § 1382b(c)(1)(A)(i) and a paper by Reba Collins, *Questions Regarding Trusts and Other SSI Issues*, presented at the University of Texas School of Law Special Needs Trusts Conference 2011.³⁸⁵

IV. DRAFTING OPPORTUNITIES

The Texas Disclaimer Act offers estate planning attorneys drafting opportunities in four areas: (a) Drafting estate planning documents in anticipation of possible disclaimers; (b) drafting disclaimers themselves; (c) drafting notices and waivers for use by trustees wishing to disclaim; and (d) drafting pleadings and related documents seeking court approval of fiduciary disclaimers.³⁸⁶

379. See *Kennedy v. Plan Adm'r DuPont Savings & Inv. Plan*, 555 U.S. 285, 287 (2009).

380. 42 U.S.C. § 1396p(h)(1) (2015).

381. See H. Clyde Farrell & Bliss Burdette Pak, *Estate Planning for Beneficiaries Who May Need Long Term Care*, 2014 Stanley M. Johanson Estate Planning Workshop (2014).

382. See 42 U.S.C. 1396(a)(1) (2015).

383. See Tex. Health and Human Servs., *Medicaid for Elderly and People with Disabilities Handbook* § E03372 (2009), available at <http://www.dads.state.tx.us/handbooks/mepd/E/E-3000.htm#secE-3372> [<http://perma.cc/J3FL-XCGQ>].

384. See Farrell, *supra* note 381.

385. *Id.*

386. TEX. PROP. CODE ANN. § 240.0501-.058 (West 2015).

A. Anticipating Possible Disclaimers When Drafting Estate Planning Documents

The Texas Disclaimer Act provides that the instrument creating the interest to be disclaimed may state where the disclaimed interest goes.³⁸⁷ This gives planners the opportunity to create certainty and in some cases achieve creative results.³⁸⁸

1. Disclaimer into the Credit Shelter Trust

When an estate plan utilizes a credit shelter trust, planners often have provided that, if the surviving spouse disclaims property which otherwise would pass outright to the surviving spouse, the property instead passes into the credit shelter trust.³⁸⁹

This technique worked under the former Texas law and it works under the Texas Disclaimer Act.³⁹⁰ It may be used to supplement a formula-funded trust by providing a way to get assets not subject to the formula provision into the credit shelter trust.³⁹¹ It also may provide the only way to get assets into the credit shelter trust (a disclaimer trust), permitting the surviving spouse to decide whether or not to include estate tax planning or asset protection after his or her spouse's death.³⁹² This technique may also be used in life insurance and retirement plan beneficiary designations to give the surviving spouse the option of moving all or a portion of the benefits to the credit shelter trust, if circumstances warrant.³⁹³

Planners must take care to assure that the surviving spouse is given no special power of appointment over the disclaimed property.³⁹⁴ The credit shelter trust should include a savings provision negating the power of appointment over disclaimed property.³⁹⁵ The credit shelter trust also should include a provision permitting the trustee to segregate the disclaimed property into a separate trust or share; so that the property going into the trust by means other than a disclaimer still may be subject to a special power of appointment.³⁹⁶

387. *Id.* §§ 240.051(d), 240.053(b).

388. *See id.* § 240.051(d), 240.053(b).

389. I.R.C. § 2518(b)(4)(A) (1997). Treas. Reg. § 25.2518-2(e)(2) (1997).

390. *See* Estate of David Katz v. Comm'r, T.C.M. (RIA) 2004-166 (2004).

391. *See supra* Part II.B.5.g.ii.

392. *Id.*

393. *Id.*

394. *See* Treas. Reg. § 25.2518-2(e)(2) (1997).

395. Treas. Reg. § 25.2518-2(c)(ii)(5).

396. *Id.*

2. Disclaimer Out of the Credit Shelter Trust

As mentioned above, it may prove beneficial to permit the trustee of the credit shelter trust to disclaim property that otherwise would pass into the credit shelter trust to instead pass in a way which qualifies for the marital deduction (whether outright to the surviving spouse or to a QTIP trust).³⁹⁷ This permits the trustee to make an educated guess at the time of the first spouse's death whether estate tax savings or basis adjustment on the death of the surviving spouse will prove the most beneficial.³⁹⁸

If the pre-residuary gift goes to the credit shelter trust, and the residuary gift qualifies for the marital deduction, then it probably is unnecessary to include a provision specifying where property goes if the trustee of the credit shelter trust disclaims.³⁹⁹ Even so, it is beneficial to include a specific provision in every credit-shelter formula will or trust for two reasons: (a) a boilerplate provision on this point ensures that the drafter will not forget to include it when the marital deduction gift is the pre-residuary gift, and (b) it may help the trustee avoid liability for breach of fiduciary duty for making the disclaimer since it indicates that the testator or settlor anticipated this situation and considered a trustee disclaimer to be an appropriate action in some cases.⁴⁰⁰

If the gift to the credit shelter trust is the residuary gift, then a provision directing the disclaimed property "upstream" to the spouse outright or to a QTIP trust must be included.⁴⁰¹ The default rule of the Texas Disclaimer Act does not provide for upstream disclaimers.⁴⁰²

3. Going Crazy With Specific Provisions: Directing Disclaimers Into and Out of Various Trusts

Planners should consider including trust-specific provisions for each trust in the instrument directing the disclaimed property to the desired destination.⁴⁰³ This may seem extreme, but the Texas Disclaimer Act provides this tool to estate planners and it is one to consider using.⁴⁰⁴ The following provides examples to show why estate planners should use this tool:

397. See *supra* Part II.B.5.g.

398. See *supra* Part II.B.5.g.

399. See *supra* Part II.B.5.g.

400. See *infra* Part IV.A.5. In addition to specifically directing the disclaimed property to the marital deduction gift, it may be a good idea to include a statement of the testator's or settlor's intention that the trustee may consider making a disclaimer and is exonerated from liability so long as he or she acts in good faith and is not grossly negligent. See *infra* Part IV.A.5.

401. See *supra* Part II.5.g.ii.

402. See *supra* Part II.5.g.

403. See *supra* Part II.5.g.

404. See TEX. PROP. CODE ANN. § 240.051 (West 2015).

- A disclaimer by the trustee of credit shelter trust causes property to pass into the QTIP trust, and a disclaimer by the trustee of the QTIP trust causes property to pass into the credit shelter trust.⁴⁰⁵
- A combination disclaimer by the trustee of the credit shelter trust and the trustee of the QTIP trust causes the property to pass to the surviving spouse, outright and free of trust.⁴⁰⁶
 - A disclaimer by the trustee of a generation skipping tax (GST) exempt trust causes the property to pass into a non-GST exempt trust.⁴⁰⁷
- A disclaimer by a trustee causes the property to pass into a special needs trust.⁴⁰⁸
 - A disclaimer by the trustee causes the property to pass into a qualified subchapter S trust or an electing small business trust.⁴⁰⁹
- A disclaimer by the trustee causes retirement plan benefits to pass into a conduit trust.⁴¹⁰

4. Drafting to Permit a Special Trustee to Make Disclaimers

If a family member is the trustee of a trust, that trustee may be forced to seek court approval of a disclaimer (rather than using the notice provisions) because an interest in or power over property is likely to pass to that person as a result of the disclaimer.⁴¹¹ For example, if the surviving spouse is the trustee of the credit shelter trust, and the trustee wishes to disclaim so that the property passes to the spouse outright or into a QTIP trust, the surviving spouse cannot use the notice provisions to avoid going to court.⁴¹² The same result occurs if a descendant of the testator is the trustee and the disclaimer causes property to pass into a QTIP trust of which the descendant is a remainder beneficiary.⁴¹³

The settlor or testator may avoid this result by using a non-family member as trustee.⁴¹⁴ However, other reasons may make this an undesirable option.⁴¹⁵

405. *See id.*

406. *See id.*

407. *See id.*

408. *See id.*

409. *See id.*

410. *See id.* § 240.051.

411. *Id.* § 240.008(c)(4).

412. *See id.*

413. *See supra* Part II.B.5.g.ii. On the other hand, the descendant/trustee of a credit shelter trust could disclaim using the notice provisions to avoid the need for court approval if the disclaimer results in the property passing outright to the surviving spouse. *See supra* Part II.B.5.g.

414. *See supra* Part II.B.5.d.

415. *See supra* Part III.

The estate planner can solve this problem by including a provision appointing a special trustee who has sole authority to make a disclaimer on behalf of the trust.⁴¹⁶ If the special trustee is a disinterested person, this would permit a disclaimer without court approval (by following the notice provisions) while permitting a family member to serve as trustee.⁴¹⁷ This also may be a good idea if a corporate trustee is used, since the corporate trustee may be too conservative to make a disclaimer without court approval.⁴¹⁸

When using this approach, consider the following:

- As special trustee, the disinterested person is subject to fiduciary duties.⁴¹⁹ If the trustee disclaims without court approval, the disclaimer must be compatible with his or her fiduciary obligations.⁴²⁰ The Trust Code may exculpate the special trustee, but only to the extent the code permits.⁴²¹
- The disinterested party given the power to disclaim must be a “trustee.”⁴²² An individual cannot have a title of a “trust protector” or “advisor.”⁴²³ Section 240.008(d) of the Property Code permits a trustee to disclaim; it does not permit someone other than a trustee to disclaim on behalf of a trust.⁴²⁴
- May a family member who could benefit from the disclaimer be given the power to appoint the special trustee?⁴²⁵ The authors can think of no reason this would not work, although it would be more conservative to have a different method of selecting the special trustee.⁴²⁶ The Internal Revenue Service may attack disclaimers that are a part of a pre-arranged plan.⁴²⁷

5. Exculpating the Trustee for Making Disclaimers

To overcome the reluctance of a trustee to disclaim, the settlor may wish to exculpate the trustee from liability for making a disclaimer.⁴²⁸ This should happen only in appropriate cases and not with a boilerplate provision.⁴²⁹

416. See *supra* Part II.B.5.d.

417. See *supra* Part IV.A.4.

418. See *supra* Part IV.A.4.

419. See *supra* Part II.B.5.d.

420. TEX. PROP. CODE ANN. § 240.008(f) (West 2015). This subsection also provides that a trustee disclaimer is not a per se breach of fiduciary obligations. *Id.*

421. *Id.* §114.007(a). See *infra* Part IV.A.5.

422. See PROP. § 240.008(d).

423. See *id.*

424. See *id.*

425. See Steve Akers, *Post Mortem Planning – It’s Not Too Late to Plan: A Review of Income, Gift and Estate Tax Planning Issues and Strategies*, A.L.I.–CLE, Estate Planning for the Family Business Owner 917 (July 2015); *Estate of Monroe v. Comm’r*, 124 F. 3d 699 (5th Cir. 1997).

426. See Ackers, *supra* note 425.

427. See *id.*; *Estate of Monroe*, 124 F. 3d at 714–16.

428. See *supra* Part IV.A.5.

429. See *supra* Part IV.A.2.

Also, a trustee cannot be exculpated for breaches of fiduciary duty which are committed in bad faith, intentionally or with reckless indifference, nor may the trustee be exculpated for any profit derived by the trustee from a breach of trust.⁴³⁰

6. Prohibiting Trustee Disclaimers

Perhaps all of this trustee disclaimer business is too much for the settlor (or the planner) to handle.⁴³¹ The instrument creating the trust may expressly prohibit trustee disclaimers.⁴³²

The instrument creating the fiduciary relationship must include a prohibition of a disclaimer.⁴³³ It cannot be included in the instrument making the gift unless that same instrument creates the fiduciary relationship.⁴³⁴ For example, if the will makes a gift to the trustee of a testamentary trust established under that will, the testator may prohibit the trustee from disclaiming.⁴³⁵ However, if the will makes a pour-over gift to a living trust, the testator cannot prohibit a disclaimer by the trustee by including a provision in the will because the will did not create the fiduciary relationship.⁴³⁶ To prohibit a trustee disclaimer of a pour-over gift to a living trust, the trust instrument, not the will, must include the provision prohibiting a disclaimer because the trust instrument creates the fiduciary relationship.⁴³⁷

7. Using a Disclaimer to Make a Defined-value Gift or to Defer the Decision to Pay Gift Tax or Estate Tax

Since the Texas Disclaimer Act permits the transferor to state in the instrument creating the interest to be disclaimed where the interest goes if it is disclaimed, a donor could include a provision in the gift instrument that provides for the property to return to the donor if the donee disclaims.⁴³⁸ This makes it possible for the donor to give property which may be finally determined for gift tax purposes to be worth more than the available remaining exemption amount and then rely on the donee to make a formula disclaimer of the excess.⁴³⁹ This is an alternative to including the defined-

430. TEX. PROP. CODE ANN. § 114.007(a) (West 2006).

431. *See supra* Part I.C.1.

432. TEX. PROP. CODE ANN. § 240.008(a) (West 2015).

433. *See id.*

434. *Id.*; *see supra* Part II.B.6.a.

435. *Id.* § 240.008; *see supra* Part II.B.6.a.

436. *See* PROP. § 240.008.

437. *See id.*

438. *Id.* § 240.051(d).

439. *See Ackers, supra* note 172. Many practitioners have grown comfortable putting the defined-value clause in the gift instrument itself since *Wandry v. Commissioner*, T. C. Memo 2012-88 (2012). *Id.*

value clause in the gift instrument itself.⁴⁴⁰ In a happy marriage situation, a more conservative approach to achieve close to the same result would be for the gift instrument to provide that, in the event of a disclaimer by the donee, the disclaimed property would pass into a *inter vivos* QTIP trust for the spouse of the donor.⁴⁴¹ In this way, the argument that the donor somehow retained an interest by directing the disclaimed property to himself or herself is avoided.⁴⁴²

This technique can be taken a step further.⁴⁴³ Assume that the donor fears that the Internal Revenue Service will announce new § 2704 regulations within the next nine months and that those regulations (1) will apply to transfers after the date the regulations are announced and (2) will eliminate or reduce discounting on the estate tax return for lack of marketability and lack of control.⁴⁴⁴ The donor may give a much larger gift to the donee—large enough that the donor is certain to incur gift tax if no disclaimer is made—and provide in the gift instrument that disclaimed property passes back to the donor or into a QTIP trust for the donor’s spouse.⁴⁴⁵ For the nine months following the gift, the donee should have the option to choose between exposing the portion of the gifted property in excess of the exemption amount to gift taxation or to estate taxation:

- If the regulations are issued during the nine-month period and they do indeed severely limit discounts available on the donor’s estate tax return, the donee can do nothing and cause a gift tax to be incurred and paid on the discounted value of the gift.⁴⁴⁶
- If the regulations are not issued during the nine-month period, or if during the nine-month period it begins to seem likely that the estate tax will be repealed, the donee can disclaim, causing part or all of the property to be includible in the donor’s, or the donor’s spouse’s, estate for estate tax purposes.⁴⁴⁷

Could the Internal Revenue Service attack this as a pre-arranged plan in a manner similar to its attack in *Estate of Monroe v. Commissioner*?⁴⁴⁸ It is hard to see such an attack prevailing so long as the facts do not show collusion.⁴⁴⁹ Persons often make decisions whether to disclaim for tax reasons, so the mere fact that the donee’s decision is intended to save taxes

440. *See id.*

441. *See id.*

442. *See id.*

443. *See generally id.*

444. *See generally id.*

445. *See generally id.*

446. *See generally id.*

447. *See generally id.*

448. *Estate of Monroe v. Comm’r*, 124 F.3d 699, 715 (5th Cir. 1997). The I.R.S. attack based on a pre-arranged plan was successful in the Tax Court, but the Fifth Circuit overturned the Tax Court’s decision. *Id.*

449. *See id.*

should not make it a pre-arranged plan.⁴⁵⁰ Also, while the donee may expect to receive the property in question at the donor's death, this result is not assured.⁴⁵¹ The donor could change his or her mind or could have creditor problems.⁴⁵² There is economic substance to the donee's decision to disclaim or refrain from disclaiming.⁴⁵³

Note that, while the Texas Disclaimer Act does not place a time limit on disclaimers, the disclaimers discussed in this section must be completed within nine months of the transfer because of the nine-month limit for gift tax purposes.⁴⁵⁴

B. Drafting Disclaimers Under the Texas Disclaimer Act

Drafting disclaimers under the Texas Disclaimer Act is pretty straightforward.⁴⁵⁵ The Act sets the requirements for each type of property.⁴⁵⁶

C. Using the Notice Provisions for Trustee Disclaimers

The trustee of a non-court created trust may disclaim property without court approval so long as (a) the trustee in his or her individual capacity does not receive the property or an interest in the property as a result of the disclaimer, and (b) the beneficiaries are notified in the manner prescribed in section 240.0081 of the Property Code.⁴⁵⁷ The notice provisions are based on those used in the decanting statutes.⁴⁵⁸ A beneficiary may waive the right to receive a notice.⁴⁵⁹

1. Who Is Entitled to Notice?

To disclaim without court approval, the trustee must give notice to all of the current beneficiaries and presumptive remainder beneficiaries of the trust.⁴⁶⁰ For purposes of determining who is a current beneficiary or a presumptive remainder beneficiary entitled to notice, a "beneficiary is determined as of the date the notice is sent."⁴⁶¹

450. *See id.*

451. *See id.*

452. *See id.*

453. *See id.*

454. *See* TEX. PROP. CODE § 240.001-.51 (West 2015).

455. *Id.*

456. *Id.*

457. *Id.* § 240.008.

458. *See* TEX. PROP. CODE ANN. §§ 111.071, 111.074 (West 2015).

459. *See id.*

460. PROP. § 240.0081(a).

461. *See id.* § 240.0081(b).

a. Current Beneficiary

A “ ‘current beneficiary,’ with respect to a particular date, means a person who is receiving or is eligible to receive a distribution of income or principal from a trust on that date.”⁴⁶² If the trust permits the trustee to spray distributions among a primary beneficiary and his or her descendants, all are current beneficiaries entitled to notice.⁴⁶³

b. Presumptive Remainder Beneficiary

A “presumptive remainder beneficiary,” with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if the trust terminated on that date, or the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.⁴⁶⁴

While this definition says who a presumptive remainder beneficiary is in the absence of notice of the exercise of a power of appointment, it does not say who the presumptive remainder beneficiary is if the trustee is notified that a power of appointment has been exercised.⁴⁶⁵ For example, assume that the only current beneficiary has a broad special testamentary power of appointment over the trust property, and that the remainder beneficiaries in default of exercise of the power are the current beneficiary’s two adult children.⁴⁶⁶

- If the trustee is not notified of the exercise of the power of appointment, the two adult children are presumptive remainder beneficiaries and are entitled to notice.⁴⁶⁷
- If the beneficiary sends the trustee a copy of his or her will exercising the power in favor of his accountant, who are the presumptive remainder beneficiaries entitled to notice?⁴⁶⁸
 - Is the accountant the only presumptive remainder beneficiary?⁴⁶⁹

462. *See id.* § 240.002(1). The Texas Disclaimer Act uses the same definition that the decanting statutes use. TEX. PROP. CODE ANN. § 112.071(3) (West 2015).

463. *See* PROP. § 240.0081.

464. *See id.* § 240.002(1). The Texas Disclaimer Act uses the same definition that the decanting statutes use. TEX. PROP. CODE § 112.071(7).

465. PROP. § 240.002(1).

466. *See id.* § 240.081.

467. *See id.*

468. *See id.*

469. *See id.*

- Are the current beneficiary's children the only presumptive remainder beneficiaries?⁴⁷⁰

Unless the trustee is notified of an irrevocable exercise of a power of appointment, the safest course is to treat the appointee of a revocable exercise of a power of appointment and the persons who would be presumptive remainder beneficiaries, had the power not been exercised, all as presumptive remainder beneficiaries entitled to notice.⁴⁷¹

c. Notice to Minor or Incapacitated Beneficiaries

If a minor or incapacitated beneficiary has a court-appointed guardian or conservator, the notice must be given to the guardian or conservator.⁴⁷² If a minor beneficiary has no court-appointed guardian or conservator, the notice must be given to a parent of the minor.⁴⁷³

d. Notice to the Attorney General

Notice to the attorney general is required in the following situations:

[if] a charity is entitled to notice; a charity entitled to notice is no longer in existence; the trustee has the authority to distribute trust assets to one or more charities that are not named in the instrument; or the trustee has the authority to make distributions for a charitable purpose . . . but no charity is named as a beneficiary for that purpose.⁴⁷⁴

Notice to the attorney general is not required merely because a charity is a permissible appointee of a power of appointment held in a non-fiduciary capacity, or merely because a charity is a remote contingent beneficiary.⁴⁷⁵

e. Waiver and Other Exceptions to the Notice Requirement

Section 240.0081(e) provides that "the trustee is not required to provide the notice to a beneficiary who:

- (1) is known to the trustee and cannot be located by the trustee after reasonable diligence;
- (2) is not known to the trustee;
- (3) waives the notice requirement; or
- (4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have

470. *See id.*

471. *See id.*

472. *See id.*

473. *See id.* § 240.0081(d).

474. *Id.* § 240.0081(c).

475. *See id.* §§ 240.002(1), 240.0081(a)–(c).

similar interests in the trust and no apparent conflict of interest exists between them.⁴⁷⁶

Because of the way section 240.0081(e)(4) is worded, in order to take advantage of its virtual representation exception, notice must be given to the ancestor virtually representing his or her descendants; however, a waiver by the ancestor is insufficient.⁴⁷⁷ The exception only works for an ancestor “to whom the trustee has given notice;” if that ancestor waives the notice, the trustee has not given him or her notice, so subsection (e)(4) is not invoked.⁴⁷⁸ Even though a notice to a minor child with no guardian or conservator must be given to the child’s parent under subsection (d), that parent is not authorized to waive the notice, since subsection (e) forgives notice given to a beneficiary who waives notice, not to a parent who receives the notice on the minor’s behalf.⁴⁷⁹

Similarly, the attorney general probably is not able to waive notice since the attorney general is not a beneficiary for purposes of section 240.0081(e).⁴⁸⁰

The trustee has a duty to disclose material facts known to the trustee that might affect the beneficiaries’ rights.⁴⁸¹ While the scope of this duty is subject to debate, a court will likely consider a disclaimer a material fact that the trustee must disclose.⁴⁸² Therefore, the trustee should disclose the underlying facts, and the reason for making the disclaimer.⁴⁸³ This disclosure should be included in the waiver form itself, but it may be better to keep the waiver simple and make the disclosure in one or more separate documents.⁴⁸⁴ The waiver should include an acknowledgement of receipt of the disclosure by the beneficiary.⁴⁸⁵

The drafter should use extreme caution about including a release in the waiver.⁴⁸⁶ The trustee often wants consideration to support a beneficiary’s release in order to assure its effectiveness.⁴⁸⁷ Often the consideration for a

476. *Id.* § 240.0081(e).

477. *Id.* § 240.0081(e)(4).

478. *Id.*

479. *Id.* § 240.0081(e). Unlike a parent of a minor with no guardian or conservator, a court-appointed guardian of the estate of a minor or incapacitated beneficiary probably can sign a waiver under TEX. PROP. CODE ANN. § 240.0081(e) since the guardian is the beneficiary’s legal representative. *Id.* Of course, the guardian probably needs to get court approval before disclaiming. *See id.*

480. PROP. § 240.0081(e).

481. *Montgomery v. Kennedy*, 669 S. W. 2d 309, 313 (Tex. 1984).

482. *Id.*

483. *Id.*

484. *See* PROP. § 114.005.

485. *Id.*

486. *Id.*

487. *Id.* Section 114.005 of the Trust Code does not say that a release by a beneficiary must be supported by consideration. *Id.* It says the beneficiary must be acting on “full information.” *Id.* Section 114.032 of the Trust Code does not say that a written agreement between a beneficiary and a trustee must be supported by consideration in order to be binding on the beneficiary. TEX. PROP. CODE ANN. § 114.032.

beneficiary's release is to induce the trustee not to incur the expense of a judicial proceeding to approve the trustee's action.⁴⁸⁸ If the trustee includes a release—especially a release supported by consideration—it may be deemed to have received consideration for making the disclaimer, which could make the disclaimer ineffective for tax purposes.⁴⁸⁹ In order for the release to be effective, the beneficiary must act on full information and must have full knowledge of the circumstances surrounding the agreement.⁴⁹⁰

f. Examples

The following examples help illustrate who is entitled to notice.⁴⁹¹ In these examples, Parent is the parent of two adult children, Son and Daughter. Parent has no deceased children. Son has two children, Grandchild 1, who is an adult, and Grandchild 2, who is a minor. Daughter has no children or other descendants.

Example one, the trust terms provide for health, education, maintenance and support (HEMS) distributions to Parent for life. When Parent dies, the trust terminates and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants are living, on termination the trust property passes to Charity. Notice must be given to Parent, who is the only current beneficiary, and to Son, and Daughter, who are the only presumptive remainder beneficiaries.⁴⁹² Parent, Son, and Daughter may waive the notice requirement.⁴⁹³

Example two, the trust terms provide for HEMS distributions to Parent for life. When Parent dies, the trust continues, with separate shares for Son and Daughter, who are entitled to receive HEMS distributions for life. The trust terminates on the deaths of Son and Daughter, and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants are living, on termination the trust property passes to Charity. If no beneficiary waives notice, notice must be given to Parent, who is the only current beneficiary, to Son, and Daughter, who are the only presumptive remainder beneficiaries.⁴⁹⁴ Parent, Son, and Daughter may waive the notice requirement.⁴⁹⁵

It says that the beneficiary must have "full knowledge of the circumstances surrounding the agreement."
Id.

488. Treas. Reg. § 25.2518-2(d)(1) (1997).

489. *Id.* "[T]he acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed," and a qualified disclaimer cannot be made if the disclaimant has accepted any of the benefits of the disclaimed property. *Id.*

490. PROP. § 114.032(a)(3).

491. *Id.* § 240.0081.

492. *Id.* § 240.0081(a).

493. *Id.* § 114.005.

494. *See id.* § 240.0081(a).

495. *See id.* § 114.005.

Example three, the trust terms provide for HEMS distributions to Parent and Parent's descendants for life. When Parent dies, the trust terminates and passes outright to Parent's descendants, per stirpes. If none of Parent's descendants are living, on termination the trust property passes to Charity. Notice must be given to Parent, Son, Daughter, Grandchild 1, and Grandchild 2, since all are current beneficiaries.⁴⁹⁶ Parent, Son, Daughter, and Grandchild 1 may waive notice.⁴⁹⁷ Since Grandchild 2 is a minor, the notice must be given to his or her parent, so the notice may be given to Son.⁴⁹⁸ Son can waive notice on his own behalf, but he cannot waive notice on behalf of Grandchild 2, so formal notice to Son, as parent of Grandchild 2, must be given.⁴⁹⁹

Example four, the trust terms provide for HEMS distributions to Parent for life. When Parent dies, the trust terminates and passes to Charity. Notice must be given to Parent, who is the only current beneficiary, to Charity, who is the only presumptive remainder beneficiary, and to the attorney general pursuant to § 240.0081(c).⁵⁰⁰ Parent and Charity may waive notice.⁵⁰¹ The attorney general may not waive notice, so formal notice must be given to the attorney general even if Charity waives notice.⁵⁰²

Example five, the trust terms provide for HEMS distributions to Parent for life. Parent has a broad special testamentary power of appointment.⁵⁰³ When Parent dies, the trust terminates. If Parent has not exercised Parent's power of appointment, the trust property passes outright to Parent's descendants, per stirpes. If none of Parent's descendants are living, on termination the trust property passes to Charity. The trustee has not been notified whether or not Parent exercised Parent's power of appointment.⁵⁰⁴ Notice must be given to Parent, who is the only current beneficiary, and to Son, and Daughter, who are the only presumptive remainder beneficiaries.⁵⁰⁵ Parent, Son, and Daughter may waive the notice requirement.⁵⁰⁶

Example six, the trust terms provide for HEMS distributions to Parent for life. Parent has a broad special testamentary power of appointment. When Parent dies, the trust terminates. If Parent has not exercised Parent's power of appointment, the trust property passes outright to Parent's descendants, per stirpes. If none of Parent's descendants are living, on termination the

496. *See id.* § 240.0081(a).

497. *See id.* § 114.005.

498. *See id.* § 240.0081(d).

499. *Id.*

500. *Id.*

501. *Id.* § 240.0081(c).

502. *Id.*

503. *See id.* § 113.002.

504. *See id.* § 240.0081.

505. *Id.* § 240.0081(a).

506. *Id.* § 240.0081(e)(3).

trust property passes to Charity. The trustee has been notified that Parent has made a (revocable) will exercising Parent's power of appointment in favor of Charity. Notice must be given to Parent, who is the only current beneficiary.⁵⁰⁷ It is not clear under Texas Property Code § 112.071(7) who the presumptive remainder beneficiaries are, so the safest course is to give notice to Son, Daughter, Charity, and the attorney general.⁵⁰⁸ The attorney general cannot waive notice, so formal notice must be given to the attorney general even if Charity waives notice.⁵⁰⁹

2. *What Must the Notice Contain?*

Section 240.0081(f) provides that the notice must state that: "(A) the trustee intends to disclaim an interest in property; (B) if the trustee makes the disclaimer, the property will not become trust property and will not be available to distribute to the beneficiary from the trust; (C) the beneficiary has the right to object to the disclaimer; and (D) the beneficiary may petition a court to approve, modify, or deny the disclaimer."⁵¹⁰ While the notice must say that the trustee "intends to disclaim," the statute does not obligate the trustee to disclaim just because the notice is sent.⁵¹¹ Rather, it anticipates that the trustee may not disclaim despite giving the notice.⁵¹²

The notice also must "describe the interest in property the trustee intends to disclaim, specify the earliest date the trustee intends to make the disclaimer, and include the name and mailing address of the trustee."⁵¹³ The notice must "be given not later than the 30th day before the date the disclaimer is made."⁵¹⁴ It must "be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt."⁵¹⁵

The trustee has a duty to disclose material facts known to the trustee that might affect beneficiaries' rights.⁵¹⁶ While the scope of this duty is subject to debate, a court will likely consider a disclaimer a material fact that the trustee must disclose.⁵¹⁷ Therefore, the trustee should disclose the underlying facts and the reason for making the disclaimer.⁵¹⁸ This disclosure could be included in the notice itself, but it may be better to keep the notice form

507. *Id.* § 240.0081(a).

508. *Id.* § 112.07(7).

509. *See id.*

510. *Id.* § 240.0081(f).

511. *Id.*

512. *See, e.g.,* § 240.0081(h), which begins "If the trustee makes the disclaimer for which notice is provided. . .".

513. *See id.* § 240.0081(f)(2)-(4).

514. *Id.* § 240.0081(f)(5).

515. *Id.* § 240.0081(f)(6).

516. *Montgomery v. Kennedy*, 669 S.W. 2d 309, 313 (Tex. 1984).

517. *See id.*

518. *See id.*

simple and make the disclosure in one or more separate documents included with the notice.⁵¹⁹ A form of notice is included in Appendix 2.

3. *When May the Trustee Disclaim?*

The notice “must specify the earliest date the trustee intends to make the disclaimer”, and it must “be given not later than the 30th day before the date the disclaimer is made.”⁵²⁰

The statute does not state whether a notice is deemed to have been given on the date of sending or on the date of receipt.⁵²¹ Since multiple methods of delivery are authorized, including personal delivery, fax and email, the trustee can eliminate this uncertainty by using personal delivery with proof of delivery.⁵²² If personal delivery is impractical or undesirable, the trustee may send the notice by multiple methods, including a method such as fax or email that assures immediate delivery and including a method that requires acknowledgement of receipt, such as first-class certified mail, return receipt requested.⁵²³

Since the notice must state the earliest possible date of the disclaimer and must be “given not later than the 30th day before the date the disclaimer is made,” the “earliest date the trustee intends to make the disclaimer” stated in the notice should be the 30th day after the notice is sent, even if the trustee conservatively treats the date notice is given as the date of receipt rather than the date of sending.⁵²⁴ Of course, the trustee should not disclaim before the 30th day after notice is actually given.⁵²⁵

Is the trustee required to wait 30 days if all beneficiaries waive notice—probably not.⁵²⁶ The only mention of the 30-day requirement is in the notice itself.⁵²⁷ If no notice is required because all of the beneficiaries waive notice, then the 30-day waiting period should not apply.⁵²⁸

If the nine-month deadline for tax purposes is relevant, the trustee wishing to disclaim must give the notices sufficiently early so that the 30-day

519. *Id.*

520. *Id.* § 240.0081(f)(3), (5).

521. *See id.*

522. *Id.* § 240.0081(f)(6).

523. *See id.*

524. *Id.* § 240.0081(3), (5).

525. *Id.* § 240.0081(f)(5).

526. *Id.*

527. *Id.*

528. *Id.* § 240.0081(d)(2). Requires the trustee desiring to disclaim without court approval to provide written notice of the disclaimer in accordance with Section 240.0081. *Id.* If under Section 240.0081 no notice is required because all beneficiaries waive the notice requirement, then the trustee has not provided written notice, but the trustee has complied with the notice requirements of Section 240.0081. *Id.* The most conservative approach would be to send at least one notice so that Section 240.008(d)(2) is clearly triggered. *Id.*

period expires before the deadline.⁵²⁹ It is dangerous to believe that waivers will permit delaying the notice beyond the eight-month mark.⁵³⁰ As mentioned above in the section entitled “Waiver and Other Exceptions to the Notice Requirement,” if a current or presumptive remainder beneficiary is a minor, an incapacitated person, or a charity, it is likely to be impossible to avoid the need to give at least one notice.⁵³¹ This means that, even if all of the adults are in agreement about filing a disclaimer, the trustee may be barred from making a disclaimer without court approval if he discovers the need for a notice at the last minute.⁵³²

4. *What Should a Beneficiary Do If He or She Does Not Want the Trustee to Disclaim?*

The notice provides that a beneficiary has the right to object to the disclaimer and that the beneficiary may petition a court to approve, modify, or deny a disclaimer.⁵³³ Section 240.0081(h) provides that a beneficiary receiving a notice does not lose the beneficiary’s right, if any, to sue the trustee for breach of the trustee’s fiduciary obligations in connection with making the disclaimer.⁵³⁴

While the notice must say that a beneficiary may object to the disclaimer, the statute does not provide a mechanism for or the consequences of an objection.⁵³⁵ While in many cases a trustee receiving a beneficiary’s objection in any form may choose either not to disclaim or to seek court approval of the disclaimer, nothing prevents the trustee from ignoring the objection and disclaiming without court approval.⁵³⁶

The only way for a beneficiary to block a disclaimer is to petition a court to modify or deny the disclaimer.⁵³⁷ While the notice mentions this right, the statute does not describe the procedure or basis for this action.⁵³⁸ To prevent the trustee from disclaiming, the beneficiary should seek injunctive relief or similar equitable relief rather than simply filing a petition.⁵³⁹ If the disclaimer is tax-motivated, the trustee must disclaim within nine months of the event triggering the disclaimer (usually the decedent’s death).⁵⁴⁰ Even when faced with a lawsuit, once the trustee has given the notice and the 30-day period

529. *Id.* § 240.0081(f)(5).

530. *See id.*

531. *See supra* Part IV.C.1.

532. *See supra* Part IV.C.1.

533. PROP. § 240.0081(f)(1).

534. *Id.* § 240.008(f). Provides that, unless a court approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary’s obligations. *Id.*

535. *See id.* § 240.0081(f)(1).

536. *Id.* § 240.0081(a).

537. *See id.* § 240.0081(f)(1)(D).

538. *See id.* § 240.0081(f).

539. *See id.* § 240.0081(g).

540. *See id.* § 240.057.

elapses, the trustee has the power to disclaim unless ordered not to do so by the court.⁵⁴¹

Once the disclaimer is made, the beneficiary may pursue a breach of fiduciary duty claim against the trustee.⁵⁴² However, the beneficiary cannot undo the disclaimer based on breach of fiduciary duty, so his or her remedies would be limited to damages, removal of the trustee, etc.⁵⁴³ The disclaimed property would be gone.⁵⁴⁴ If the trustee is judgment-proof, as a practical matter the beneficiary may have no remedy.⁵⁴⁵

D. Seeking Court Approval of Fiduciary Disclaimers

1. Necessary Parties

A fiduciary's suit to approve a disclaimer would be subject to the same necessary party rules as any action involving that type of fiduciary.⁵⁴⁶ The Texas Disclaimer Act does not add or remove necessary parties.⁵⁴⁷ The guardian of an estate wishing to disclaim has to notify those persons who have made appearances in the guardianship proceeding.⁵⁴⁸ The court may wish to appoint an attorney *ad litem* or guardian *ad litem* for the ward.⁵⁴⁹ However, the statute does not expressly require an *ad litem*.⁵⁵⁰ Since the guardian of the estate is the ward's legal representative, logically an *ad litem* should not be necessary, assuming that the guardian will not personally benefit from the disclaimer.⁵⁵¹

The agent under a durable power of attorney must make the principal a party.⁵⁵² If the principal is incapacitated, the court may appoint an attorney *ad litem* or guardian *ad litem* for the principal.⁵⁵³ The principal's heirs and presumptive will beneficiaries should not be necessary parties and may not be permissible parties.⁵⁵⁴

The personal representative of a decedent's estate should make all persons interested in the estate parties.⁵⁵⁵

541. *See id.* § 240.0081(a), (f)(5).

542. *Id.* § 240.0081(h).

543. *See id.* § 240.008(g).

544. *See id.*

545. *See id.*

546. *See id.* § 240.008(a).

547. *See id.*

548. *See id.*

549. *See id.*

550. *See id.*

551. *See id.* § 240.008(f).

552. *See* TEX. EST. CODE ANN. § 752.109 (West 2014).

553. *See id.* § 1301.054.

554. *See id.* § 752.109; PROP. § 115.001(b).

555. PROP. § 115.011. “ ‘Person interested’ means an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered.” EST. § 22.018(1).

The trustee of a trust created under § 142.005 of the Property Code or under Chapter 1301 of the Estates Code probably needs to make the beneficiary of the trust a party, and if that beneficiary is incapacitated, the court may appoint a guardian *ad litem* or attorney *ad litem*.⁵⁵⁶ The person for whom one of these trusts is created is the sole beneficiary of the trust, so remainder beneficiaries or family members with expectancies should not be necessary parties to the action.⁵⁵⁷

While current beneficiaries and presumptive remainder beneficiaries of a non-court created trust are entitled to notice if the trustee chooses not to seek court approval of the disclaimer, the Texas Disclaimer Act does not say that current beneficiaries and presumptive remainder beneficiaries are necessary parties to an action to approve a disclaimer.⁵⁵⁸ The only necessary parties are (a) a beneficiary designated by name in the trust instrument (unless that beneficiary's "interest has been distributed, extinguished, terminated or paid"), (b) "a person who is actually receiving distributions from the trust at the time the action is filed," and (c) the trustee.⁵⁵⁹ However, a person who is not made a party may not be bound by the judgment, so the trustee may wish to make all beneficiaries not virtually represented by another beneficiary, parties to the action.⁵⁶⁰

2. Forum

A suit to approve a disclaimer brought by a guardian or personal representative should be brought in the court in which the guardianship or administration is pending.⁵⁶¹

A trustee of a court-created trust should file a suit to approve a disclaimer in the court which created the trust.⁵⁶²

An agent under a power of attorney may bring a suit to approve a disclaimer in the district court or in a statutory probate court.⁵⁶³

A trustee of a non-court-created trust may file a suit to approve a disclaimer in a district court or a statutory probate court.⁵⁶⁴ If the trust is a testamentary trust created by a decedent whose will was probated in a county court at law, or if the trust is an *inter vivos* trust created by a decedent whose

556. See *id.* § 142.005; EST. §§ 1301.001-204.

557. PROP. § 142.005(b)(1); EST. § 1301.101(a)(1). See PROP. § 115.011(b).

558. PROP. § 240.0081(a).

559. *Id.* §115.011(b). A beneficiary of a trust on whose act or obligation the action is predicated also is a necessary party, but a trustee's action to approve a disclaimer is not predicated on an act or obligation of a beneficiary. *Id.*

560. See *id.* § 115.013.

561. EST. §§ 1021.001, 1151.102(c)(6).

562. *Id.* § 1301.151; PROP. § 142.005(d).

563. EST. § 32.006.

564. PROP. § 115.001; EST. §§ 32.006, 32.007.

will was probated in a county court at law, the suit may be brought in that county court at law.⁵⁶⁵

3. Judgment

If the fiduciary and the beneficiaries agree to the judgment approving a disclaimer, is the disclaimer ineffective for tax purposes?⁵⁶⁶ The Internal Revenue Service has attacked disclaimers based on a pre-arranged plan, and the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed.⁵⁶⁷ Merely agreeing to the terms of the judgment does not involve consideration, and the Texas Disclaimer Act provides for and in some cases requires court approval, so having the parties sign an agreed judgment should not keep the disclaimer from qualifying for tax purposes.⁵⁶⁸ Still, to distance the disclaimer from a *Monroe*-type attack, it is preferable for the court to enter a judgment without the agreement of the fiduciary.⁵⁶⁹

V. CONCLUSION

Disclaimers can be effective tools in planning and administration.⁵⁷⁰ The Texas Uniform Disclaimer of Property Interests Act should make disclaimers easier and more effective.⁵⁷¹

565. EST. §§ 31.002(b), 32.001(a).

566. See *Estate of Monroe v. Comm’r*, 124 F. 3d 699, 715 (5th Cir. 1997). In *Monroe*, the I.R.S.’s attack based on a pre-arranged plan was successful in the Tax Court, but the Fifth Circuit overturned the Tax Court. *Id.*

567. See *id.*

568. See PROP. § 240.057.

569. TEX. PROB. CODE ANN. § 37A. A judgment which is not agreed to by all parties does not become final and nonappealable for 30 days after the judgment is signed. TEX. R. CIV. P. 329b(d), (f). Ideally the trustee can time the proceeding so that the judgment becomes final and nonappealable before the disclaimer is made. See *id.* Assuming no party appeals, this means that ideally the judgment should be signed more than 30 days before the disclaimer. See *id.*

570. See *supra* Part IV.

571. See *supra* Part II.

APPENDIX 1—THE TEXAS UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT. TEXAS PROPERTY CODE CHAPTER 240—TEXT AND COMMENTARY

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
§ 240.001. Short Title.	This chapter may be cited as the Texas Uniform Disclaimer of Property Interests Act.	The disclaimer act is found in the Property Code, but it is not a part of the Trust Code. Just like Tex. Prop. Code § 111.001 permits a reference to the “Texas Trust Code,” this section permits practitioners to refer to this chapter by title.
§ 240.002. Definitions.	In this chapter: (1) “Current beneficiary” and “presumptive remainder beneficiary” have the meanings assigned by § 112.071. (2) “Disclaim” means to refuse to accept an interest in or power over property, including an interest or power the person is entitled to: (A) by inheritance; (B) under a will; (C) by an agreement between spouses for community property with a right of survivorship; (D) by a joint tenancy with a right of survivorship; (E) by a survivorship agreement, account, or interest in which the interest of the decedent passes to a surviving beneficiary; (F) by an insurance, annuity, endowment, employment, deferred	(1) The definitions of “current beneficiary” and “presumptive remainder beneficiary” are needed to determine to whom a trustee must give notice of intention to disclaim under § 240.0081. (3) A trust can be a “disclaimant” even though it is not a “person” under § 240.002(10). The purpose of the definition of “disclaimant” is to identify the person, estate or trust to whom disclaimed property would have passed, not the fiduciary holding legal title. (13) “Survivorship property” (governed by § 240.052 and § 240.106) includes multiple party accounts with rights of survivorship and community property with right of survivorship. It does not include pay on

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>compensation, or other contract or arrangement;</p> <p>(G) under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual; or</p> <p>(H) by an instrument creating a trust.</p> <p>(3) “Disclaimant” means:</p> <p>(A) the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;</p> <p>(B) the estate to which a disclaimed interest or power would have passed had the disclaimer not been made by the personal representative of the estate; or</p> <p>(C) the trust into which a disclaimed interest or power would have passed had the disclaimer not been made by the trustee of the trust.</p> <p>(4) “Disclaimed interest” means the interest that would have passed to the disclaimant had the disclaimer not been made.</p>	<p>death or transfer on death accounts, which are “beneficiary designation” property subject to § 240.105.</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>(5) “Disclaimed power” means the power that would have been possessed by the disclaimant had the disclaimer not been made.</p> <p>(6) “Disclaimer” means the refusal to accept an interest in or power over property.</p> <p>(7) “Estate” has the meaning assigned by § 22.012, Estates Code.</p> <p>(8) “Fiduciary” means a personal representative, a trustee, an attorney in fact or agent acting under a power of attorney, or any other person authorized to act as a fiduciary with respect to the property of another person.</p> <p>(9) “Guardian” has the meaning assigned by § 1002.012, Estates Code.</p> <p>(10) Notwithstanding § 311.005, Government Code, “person” means an individual, corporation, including a public corporation, business trust, partnership, limited liability company, association, joint venture, governmental entity, including a political subdivision, agency, or instrumentality, or any other legal entity.</p> <p>(11) “Personal representative” has the meanings assigned by § 22.031 and § 002.028,</p>	

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>Estates Code.</p> <p>(12) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a state.</p> <p>(13) “Survivorship property” means property held in the name of two or more persons under an arrangement in which, on the death of one of the persons, the property passes to and is vested in the other person or persons. The term includes:</p> <p style="padding-left: 2em;">(A) property held by an agreement described in § 111.001, Estates Code;</p> <p style="padding-left: 2em;">(B) property held by a community property survivorship agreement defined in § 112.001, Estates Code; and</p> <p style="padding-left: 2em;">(C) property in a joint account held by an agreement described in § 113.151, Estates Code.</p> <p>(14) “Trust” has the meaning assigned by § 111.003.</p> <p>(15) “Ward” has the meaning assigned by § 22.033, Estates Code.</p>	

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
§ 240.003 Applicability of Chapter.	This chapter applies to disclaimers of any interest in or power over property, whenever created.	The new statute applies to all disclaimers of interest in or power over property, even if the interest or power (or the right to disclaim it) arose prior to the new law's effective date of September 1, 2015. HB 2428's effective date provisions make the old law continue to apply to any disclaimer where the time period for notice or filing had lapsed prior to the new law becoming effective. Because of the nine-month time limit under the prior law, December 1, 2014, is an important date. If the decedent died before that date, the old law applies. If the decedent died on or after December 1, 2014, but before September 1, 2015, the person disclaiming has a choice: (a) disclaim before September 1, 2015, using the old law or (b) disclaim on or after September 1, 2015, using the new law, which would mean that the nine-month deadline under the old law would not apply. If the decedent died on or after September 1, 2015, the new law applies.

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
§ 240.004. Chapter Supplemented by Other Law.	(a) Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter. (b) This chapter does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a statute other than this chapter.	Because this section does not limit disclaimer rights under another “ <i>statute</i> ,” not another “ <i>law</i> ,” this section probably bars common law disclaimers. The prior disclaimer statute effectively barred common law disclaimers, but the new act is not as clear on this point.
§ 240.005. Uniformity of Application and Construction.	In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law, with respect to the subject matter of this chapter, among states that enact a law based on the uniform act on which this chapter is based.	Eighteen states have enacted versions of the Uniform Act. Texas courts are directed to consider judicial decisions in other states when interpreting the uniform act.
§ 240.006. Power to Disclaim by Person Other Than Fiduciary.	(a) A person other than a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. (b) A person other than a fiduciary may disclaim an interest or power under this section even if the creator of the interest or power imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.	This states the general rule that a person may disclaim an interest in or power over property in whole or in part. A person’s power to disclaim is not limited by spendthrift provisions or restrictions on transfers or disclaimer rights contained in the instrument. An individual named as a beneficiary cannot be forced to accept property even if the testator or settlor purports to prohibit disclaimers in the will or trust instrument.

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
<p>§ 240.007. Power to Disclaim Power Held in Fiduciary Capacity by Person Designated to Serve As or Serving As Fiduciary.</p>	<p>(a) Subject to Subsection (b) and except to the extent the person's right to disclaim is expressly restricted or limited by a law of this state or by the instrument creating the fiduciary relationship, a person designated to serve or serving as a fiduciary may disclaim, in whole or in part, any power over property, including a power of appointment and the power to disclaim, held in a fiduciary capacity.</p> <p>(b) If a power being disclaimed under Subsection (a) by a person designated to serve or serving as a trustee affects the distributive rights of any beneficiary of the trust:</p> <p>(1) the person may disclaim only on or after accepting the trust;</p> <p>(2) the disclaimer must be compatible with the trustee's fiduciary obligations; and</p> <p>(3) if the disclaimer is made on accepting the trust, the trustee is considered to have never possessed the power disclaimed.</p>	<p>This section provides that a person named as a fiduciary (such as the executor of an estate) may disclaim a power given to the person in a fiduciary capacity before or after the person begins to serve as a fiduciary. The person may wish to do so before beginning to serve so that he or she will not be acting as a fiduciary (and, therefore, subject to fiduciary duties) when making the disclaimer. If a trustee wishes to disclaim a power that could adversely affect trust beneficiaries' distributive rights, he or she may do so only after becoming trustee, and the disclaimer must be compatible with his or her fiduciary obligations as trustee. This gives the beneficiaries recourse to sue the trustee if, by disclaiming the distributive power, the interests of the beneficiaries are harmed.</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	(c) A person designated to serve or serving as a fiduciary may disclaim a power under this section even if the creator of the power imposed a spendthrift provision or similar restriction on transfer.	
§ 240.008. Power to Disclaim by Fiduciary Acting in Fiduciary Capacity.	(a) Subject to this section and except to the extent the fiduciary's right to disclaim is expressly restricted or limited by a law of this state or by the instrument creating the fiduciary relationship, a fiduciary acting in a fiduciary capacity may disclaim, in whole or in part, any interest in or power over property, including a power of appointment and the power to disclaim, that would have passed to the ward, estate, trust, or principal with respect to which the fiduciary was acting had the disclaimer not been made even if: <p style="margin-left: 40px;">(1) the creator of the interest or power imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim; or</p> <p style="margin-left: 40px;">(2) an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation</p>	This section provides the rules for disclaimers by fiduciaries acting in a fiduciary capacity. It specifies different requirements for court-supervised personal representatives than for independent executors and for trustees of court-created trusts than for trustees of other trusts. <p>Any disclaimer by a fiduciary that would cause the property to pass to the fiduciary personally must be approved by a court. This could apply, for example, if a trustee disclaims property on behalf of a trust which causes the property to pass to the trustee individually.</p> <p>A trustee of a trust that is not court supervised must either give the notice required by § 240.0081 or obtain court approval before disclaiming. Seeking court approval provides greater protection for the trustee, because a fiduciary disclaimer</p>

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	<p>on the right to disclaim.</p> <p>(b) Except as provided by Subsection (c), (d), or (f), a disclaimer by a fiduciary acting in a fiduciary capacity does not require court approval to be effective unless the instrument that created the fiduciary relationship requires court approval.</p> <p>(c) The following disclaimers by a fiduciary acting in a fiduciary capacity are not effective unless approved by a court of competent jurisdiction:</p> <p>(1) a disclaimer by a personal representative who is not an independent administrator or independent executor;</p> <p>(2) a disclaimer by the trustee of a management trust created under Chapter 1301, Estates Code;</p> <p>(3) a disclaimer by the trustee of a trust created under Section 142.005; or</p> <p>(4) a disclaimer that would result in an interest in or power over property passing to the person making the disclaimer.</p> <p>(d) A trustee acting in a fiduciary capacity may not disclaim an interest in property that would cause the interest in property</p>	<p>without court approval must be compatible with a trustee's fiduciary obligations.</p> <p>The remedies for a breach of fiduciary duty do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the disclaimer ineffective. This helps assure finality in disclaimers. A beneficiary may have an action for damages or removal against the fiduciary who disclaims, but the beneficiary cannot undo the disclaimer based on breach of fiduciary duty.</p>

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	<p>not to become trust property unless:</p> <p>(1) a court of competent jurisdiction approves the disclaimer; or</p> <p>(2) the trustee provides written notice of the disclaimer in accordance with § 240.0081.</p> <p>(e) In the absence of a court-appointed guardian, without court approval, a natural guardian as described by § 1104.051, Estates Code, may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, that the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer.</p> <p>(f) Unless a court of competent jurisdiction approves the disclaimer, a disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary's fiduciary obligations. A disclaimer by a fiduciary acting in a fiduciary capacity is not a per se breach of the</p>	

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	fiduciary's fiduciary obligations. (g) Possible remedies for a breach of fiduciary obligations do not include declaring an otherwise effective disclaimer void or granting other legal or equitable relief that would make the disclaimer ineffective.	
§ 240.0081. Notice Required by Trustee Disclaiming Certain Interests in Property; Effect of Notice.	a) A trustee acting in a fiduciary capacity may disclaim an interest in property that would cause the interest in property not to become trust property without court approval if the trustee provides written notice of the disclaimer to all of the current beneficiaries and presumptive remainder beneficiaries of the trust. (b) For the purpose of determining who is a current beneficiary or presumptive remainder beneficiary entitled to the notice under Subsection (a), a beneficiary is determined as of the date the notice is sent. (c) In addition to the notice required under Subsection (a), the trustee shall give written notice of the trustee's disclaimer to the attorney general if: (1) a charity is entitled to notice; (2) a charity entitled to notice is no longer in existence;	These notice provisions are modeled on the notice required before a trustee may decant (see § 112.074 of the Texas Trust Code). A beneficiary may waive notice. No notice is required to be given to descendants of a beneficiary who virtually represents his or her descendants—similar interests with no apparent conflict of interest. The notice must include specific information, including a statement that the beneficiary has a right to object to the disclaimer or to petition a court to approve, modify, or deny the disclaimer. Acting or not acting on receipt of a notice of disclaimer does not constitute acceptance of the property.

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	<p>(3) the trustee has the authority to distribute trust assets to one or more charities that are not named in the trust instrument; or</p> <p>(4) the trustee has the authority to make distributions for a charitable purpose described in the trust instrument, but no charity is named as a beneficiary for that purpose.</p> <p>(d) If the beneficiary has a court-appointed guardian or conservator, the notice required to be given by this section must be given to that guardian or conservator. If the beneficiary is a minor for whom no guardian or conservator has been appointed, the notice required to be given by this section must be given to a parent of the minor.</p> <p>(e) The trustee is not required to provide the notice to a beneficiary who:</p> <p>(1) is known to the trustee and cannot be located by the trustee after reasonable diligence;</p> <p>(2) is not known to the trustee;</p> <p>(3) waives the requirement of the notice under this section; or</p>	<p>Even if the beneficiary does not object or petition a court prior to the disclaimer, he or she does not lose his or her right to sue the trustee for breach of fiduciary obligations. However, once the disclaimer is made after notice, the disclaimer cannot be voided or declared ineffective based on breach of fiduciary duty. See § 240.008(g).</p>

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	<p>(4) is a descendant of a beneficiary to whom the trustee has given notice if the beneficiary and the beneficiary's ancestor have similar interests in the trust and no apparent conflict of interest exists between them.</p> <p>(f) The notice required under Subsection (a) must:</p> <p>(1) include a statement that:</p> <p>(A) the trustee intends to disclaim an interest in property;</p> <p>(B) if the trustee makes the disclaimer, the property will not become trust property and will not be available to distribute to the beneficiary from the trust;</p> <p>(C) the beneficiary has the right to object to the disclaimer; and</p> <p>(D) the beneficiary may petition a court to approve, modify, or deny the disclaimer;</p> <p>(2) describe the interest in property the trustee intends to disclaim;</p> <p>(3) specify the earliest date the trustee intends to make the disclaimer;</p> <p>(4) include the name and mailing address of the trustee;</p>	

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	<p>(5) be given not later than the 30th day before the date the disclaimer is made; and</p> <p>(6) be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt.</p> <p>(g) A beneficiary is not considered to have accepted the disclaimed interest solely because the beneficiary acts or does not act on receipt of a notice provided under this section.</p> <p>(h) If the trustee makes the disclaimer for which notice is provided under this section, the beneficiary does not lose the beneficiary's right, if any, to sue the trustee for breach of the trustee's fiduciary obligations in connection with making the disclaimer. Section 240.008(g) applies to remedies sought in connection with the alleged breach.</p>	
<p>§ 240.009. Power to Disclaim; General Requirements; When Irrevocable.</p>	<p>(a) To be effective, a disclaimer must:</p> <p>(1) be in writing;</p> <p>(2) declare the disclaimer;</p> <p>(3) describe the interest or power disclaimed;</p>	<p>A disclaimer must be in writing and signed by the disclaimant. It does not need to be notarized, although it may have to be notarized if it is to be filed in the real property records.</p>

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	<p>(4) be signed by the person making the disclaimer; and</p> <p>(5) be delivered or filed in the manner provided by Subchapter C.</p> <p>(b) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.</p> <p>(c) A disclaimer is irrevocable on the later of the date the disclaimer:</p> <p>(1) is delivered or filed under Subchapter C; or</p> <p>(2) takes effect as provided in §§ 240.051–240.056.</p> <p>(d) A disclaimer made under this chapter is not a transfer, assignment, or release.</p>	<p>Partial disclaimers are permitted and may be expressed in many ways – fractional, monetary amount, term of years, etc.</p> <p>As under prior Texas law, a disclaimer is not a transfer of property since the disclaimant is treated as never having received the property. However, since the nine-month deadline for disclaiming is removed from Texas law but remains for federal gift tax purposes, the disclaimant may be treated as having made a taxable transfer if the disclaimer is made after the tax deadline.</p>
<p>§ 240.0501. Definition.</p>	<p>In this subchapter, “future interest” means an interest that:</p> <p>(1) takes effect in possession or enjoyment, if at all, later than the time at which the instrument creating the interest becomes irrevocable; and</p> <p>(2) passes to the holder of the interest at the time of the event that causes the taker of the interest to be finally ascertained and</p>	

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	the interest to be indefeasibly vested.	
§ 240.051. Disclaimer of Interest in Property.	<p>(a) This section and § 240.0511 and § 240.0512 apply to a disclaimer of an interest in property other than a disclaimer subject to § 240.052 or 240.053.</p> <p>(b) If an interest in property passes because of the death of a decedent:</p> <p style="padding-left: 2em;">(1) a disclaimer of the interest:</p> <p style="padding-left: 4em;">(A) takes effect as of the time of the decedent's death; and</p> <p style="padding-left: 4em;">(B) relates back for all purposes to the time of the decedent's death; and</p> <p style="padding-left: 2em;">(2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant.</p> <p>(c) If an interest in property passes because of an event not related to the death of a decedent:</p> <p style="padding-left: 2em;">(1) a disclaimer of the interest:</p> <p style="padding-left: 4em;">(A) takes effect:</p> <p style="padding-left: 6em;">(i) as of the time the instrument creating the interest became irrevocable; or</p> <p style="padding-left: 6em;">(ii) in the case of an irrevocable transfer made without an instrument, at the time of the irrevocable transfer; and</p>	<p>The Texas Disclaimer Act retains the relation-back doctrine. A disclaimer relates back for all purposes to the time of the decedent's death (or the time of irrevocable transfer), and the disclaimed interest is not subject to the claims of any creditor of the disclaimant. Federal law may make the disclaimer ineffective in some cases. For example, a disclaimer made after a bankruptcy petition is filed probably is ineffective, and disclaimers may be treated as transfers for Medicaid qualification purposes.</p> <p>This section distinguishes between disclaimers of interests passing because of a death and interests passing because of an event not related to a death. Examples of an interest passing because of an event not related to the death of a decedent are: (1) an irrevocable gift of property during the donor's lifetime; (2) an interest created when a trust becomes irrevocable prior to the death of a settlor; and (3) an interest created when an income interest in a trust terminates after a set number of years or on a specific date rather than on the death of the</p>

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	<p>(B) relates back for all purposes to the time the instrument became irrevocable or the time of the irrevocable transfer, as applicable; and</p> <p>(2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant.</p> <p>(d) A disclaimed interest passes according to any provision in the instrument creating the interest that provides for:</p> <p>(1) the disposition of the interest if the interest were to be disclaimed; or</p> <p>(2) the disposition of disclaimed interests in general.</p> <p>(e) If the instrument creating the disclaimed interest does not contain a provision described by Subsection (d) and:</p> <p>(1) if the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist; or</p> <p>(2) if the disclaimant is an individual:</p> <p>(A) except as provided by § 240.0511, if the interest is passing because of the death of a decedent, the disclaimed interest passes as if the disclaimant had died immediately before the time as of which the</p>	<p>income beneficiary. The relation-back doctrine applies to both death-related and non death-related situations.</p> <p>If the instrument creating the disclaimed interest (usually a will or trust, but also possibly a deed, beneficiary designation or other writing) states where an interest goes if it is disclaimed, the terms of the instrument control. If not, this section and the following two sections give the rules for determining who is entitled to receive the disclaimed interest.</p>

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	<p>disclaimer takes effect under Subsection (b); or</p> <p>(B) except as provided by § 240.0512, if the interest is passing because of an event not related to the death of a decedent, the disclaimed interest passes as if the disclaimant had died immediately before the time as of which the disclaimer takes effect under Subsection (c).</p> <p>(f) A disclaimed interest that passes by intestacy passes as if the disclaimant died immediately before the decedent.</p>	
<p>§ 240.0511. Disposition of Interest Passing Because of Decedent's Death and Disclaimed by Individual.</p>	<p>(a) Subject to Subsection (b):</p> <p>(1) if by law or under the instrument creating the disclaimed interest the descendants of a disclaimant of an interest passing because of the death of a decedent would share in the disclaimed interest by any method of representation under § 240.051(e)(2)(A), the disclaimed interest passes only to the descendants of the disclaimant who survive the decedent; or</p> <p>(2) if the disclaimed interest would have passed to the disclaimant's estate under</p>	<p>If the disclaimant's descendants are next in line, only those descendants who survive the decedent take.</p> <p>If the disclaimant's estate is next in line, the disclaimed interest passes instead to the surviving descendants of the disclaimant.</p> <p>If no descendant of the disclaimant survives the decedent, the interest passes to the transferor's heirs at law, with no benefit to a remarried surviving spouse.</p>

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	<p>Section 240.051(e)(2)(A), the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the decedent.</p> <p>(b) If no descendant of the disclaimant survives the decedent, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died immediately before the decedent, except that if the transferor's surviving spouse is living but remarried before the decedent's death, the transferor is considered to have died unmarried immediately before the decedent's death.</p> <p>(c) On the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died immediately before the decedent, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.</p>	

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<p>§ 240.0512. Disposition of Interest Passing Because of Event Other Than Decedent's Death and Disclaimed by Individual.</p>	<p>(a) Subject to Subsection (b):</p> <p>(1) if by law or under the instrument creating the disclaimed interest the descendants of a disclaimant of an interest passing because of an event not related to the death of a decedent would share in the disclaimed interest by any method of representation under § 240.051(e)(2)(B), the disclaimed interest passes only to the descendants of the disclaimant living at the time of the event that causes the interest to pass; or</p> <p>(2) if the disclaimed interest would have passed to the disclaimant's estate under § 240.051(e)(2)(B), the disclaimed interest instead passes by representation to the descendants of the disclaimant living at the time of the event that causes the interest to pass.</p> <p>(b) If no descendant of the disclaimant is living at the time of the event described by Subsection (a)(1), the disclaimed interest passes to those persons, including the state but excluding the</p>	<p>The rules for an interest passing because of an event other than a decedent's death (addressed in § 240.0512) are essentially the same as those for interests passing because of a decedent's death (addressed in § 240.0511), but they are stated in a separate section for clarity.</p>

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	<p>disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died immediately before the event described by Subsection (a)(1), except that if the transferor's surviving spouse is living but remarried before the event, the transferor is considered to have died unmarried immediately before the event.</p> <p>(c) On the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died immediately before the time the disclaimer takes effect under § 240.051(c)(1)(A), but a future interest held by the disclaimant is not accelerated in possession or enjoyment.</p>	
§ 240.052. Disclaimer of Rights in Survivorship Property.	(a) On the death of a holder of survivorship property, a surviving holder may disclaim, in whole or in part, an interest in the property of the deceased holder that would have otherwise passed to the surviving holder by reason of the deceased holder's death.	A disclaimer by a person receiving property by right of survivorship applies to that portion of the survivorship property that would otherwise have passed to the disclaimant. For community property, this is the decedent's one-half of survivorship property. For multi-party

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	<p>(b) If an interest in survivorship property is disclaimed by a surviving holder of the property:</p> <p>(1) the disclaimer:</p> <p>(A) takes effect as of the time of the deceased holder's death; and</p> <p>(B) relates back for all purposes to the time of the deceased holder's death; and</p> <p>(2) the disclaimed interest is not subject to the claims of any creditor of the disclaimant.</p> <p>(c) An interest in survivorship property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.</p>	<p>accounts with right of survivorship, this is the portion of the account the decedent owned immediately prior to death using the proportional contribution rule found in § 113.102 of the Estates Code. For survivorship property under § 111.001 of the Estates Code, it is whatever portion of the survivorship property the decedent is treated as owning immediately prior to death.</p>
<p>§ 240.053. Disclaimer Of Interest By Trustee.</p>	<p>(a) If a trustee disclaims an interest in property that otherwise would have become trust property:</p> <p>(1) the interest does not become trust property;</p> <p>(2) the disclaimer:</p> <p>(A) takes effect as of the time the trust became irrevocable; and</p> <p>(B) relates back for all purposes to the time the trust became irrevocable; and</p> <p>(3) the disclaimed interest is not subject to</p>	<p>Disclaimed property that would have become trust property passes pursuant to the terms of the instrument. This gives the estate planning attorney drafting the will or trust the ability to direct what happens if the trustee disclaims. If no provision is made for passage of a disclaimed interest, the trust is treated as never having existed for purposes of the disclaimed interest, and the interest passes to the next beneficiary in line after the</p>

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	<p>the claims of any creditor of the trustee, the trust, or any trust beneficiary.</p> <p>(b) If the instrument creating the disclaimed interest contains a provision that provides for the disposition of the interest if the interest were to be disclaimed, the disclaimed interest passes according to that provision.</p> <p>(c) If the instrument creating the disclaimed interest does not contain a provision described by Subsection (b), the disclaimed interest passes as if:</p> <p>(1) all of the current beneficiaries, presumptive remainder beneficiaries, and contingent beneficiaries of the trust affected by the disclaimer who are individuals died before the trust became irrevocable; and</p> <p>(2) all beneficiaries of the trust affected by the disclaimer who are not individuals ceased to exist without successor organizations and without substitution of beneficiaries under the cy pres doctrine before the trust became irrevocable.</p> <p>(d) Subsection (c) applies only for purposes of determining the disposition of an interest</p>	<p>trust, under the terms of the instrument.</p> <p>Because a beneficiary of the trust affected by the disclaimer is likely to be an outright recipient of the disclaimed property or a beneficiary of the trust, which receives disclaimed property, § 240.053(d) provides that the beneficiary is treated as having predeceased only for purposes of the trust affected by the disclaimer and not for other purposes of the instrument.</p> <p>For example, in a credit shelter/QTIP trust plan with an up-front gift to the credit shelter trust and a residuary gift to a QTIP trust, property disclaimed by the trustee of the credit shelter trust passes directly into the QTIP trust under § 240.053(c), regardless of the status and identity of the income and remainder beneficiaries of the credit shelter trust and the QTIP trust. If the surviving spouse is a beneficiary of both the credit shelter trust and the QTIP trust, under § 240.053(c), he or she is treated as having predeceased with respect to the credit shelter trust, but under § 240.053(d) is not treated as having predeceased with respect</p>

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	<p>in property disclaimed by a trustee that otherwise would have become trust property and applies only with respect to the trust affected by the disclaimer. Subsection (c) does not apply with respect to other trusts governed by the instrument and does not apply for other purposes under the instrument or under the laws of intestacy.</p>	<p>to the QTIP trust. Therefore, the surviving spouse is allowed to be a beneficiary of the QTIP trust notwithstanding the disclaimer by the trustee of the credit shelter trust.</p>
<p>§ 240.054. Disclaimer of Power of Appointment or Other Power Not Held in Fiduciary Capacity.</p>	<p>(a) If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, this section applies.</p> <p>(b) If the holder:</p> <p>(1) has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable; or</p> <p>(2) has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.</p> <p>(c) The instrument creating the power is construed as if the power had expired when the disclaimer became effective.</p>	

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§ 240.055. Disclaimer by Appointee of, or Object or Taker in Default of Exercise of, Power of Appointment.	(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable. (b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.	
§ 240.056. Disclaimer of Power Held in Fiduciary Capacity.	(a) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable. (b) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power. (c) A disclaimer subject to this section is effective as to another person designated to serve or serving as a fiduciary if:	

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	<p>(1) the disclaimer provides that it is effective as to another person designated to serve or serving as a fiduciary; and</p> <p>(2) the person disclaiming has the authority to bind the estate, trust, or other person for whom the person is acting.</p>	
<p>§ 240.057. Tax Qualified Disclaimer.</p>	<p>(a) In this section, “Internal Revenue Code” has the meaning assigned by § 111.004.</p> <p>(b) Notwithstanding any other provision of this chapter, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated under the Internal Revenue Code as never having been transferred to the disclaimant, the disclaimer or transfer is effective as a disclaimer under this chapter.</p>	<p>This is a tax savings catchall provision. Even if a disclaimer would not otherwise be effective under the Texas Disclaimer Act, if a disclaimer is a qualified disclaimer for federal tax law purposes, it is effective under the Texas act.</p> <p>For this reason, there are no tax-qualified disclaimers that fall outside of the Texas Disclaimer Act, but there are disclaimers permitted under the Texas Disclaimer Act that are not tax-qualified.</p>
<p>§ 240.058. Partial Disclaimer by Spouse.</p>	<p>A disclaimer by a decedent’s surviving spouse of an interest in property transferred as the result of the death of</p>	<p>This section was carried over from former law so that there is no question that it continues to apply.</p>

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	the decedent is not a disclaimer by the surviving spouse of any other transfer from the decedent to or for the benefit of the surviving spouse, regardless of whether the interest that would have passed under the disclaimed transfer passes because of the disclaimer to or for the benefit of the surviving spouse by the other transfer.	
§ 240.101. Delivery or Filing Generally.	(a) Subject to applicable requirements of this subchapter, a disclaimant may deliver a disclaimer by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the disclaimer's receipt. (b) If a disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer's receipt, delivery is considered to have occurred on the date of mailing regardless of receipt.	Section 240.101 fixes some of the problems with delivery of a disclaimer. Delivery methods are expansive, and § 240.101(b) imports a good-faith mailbox rule. If the disclaimer is mailed to the appropriate person by certified mail, return receipt requested, at an address the disclaimant in good faith believes is "likely to result in the disclaimer's receipt," the delivery is considered to have occurred on the date of mailing (not the date of receipt), and it is considered to be delivered even if the intended recipient never receives it.
§ 240.102. Disclaimer of Interest Created Under Intestate	In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a	If there is a personal representative of a decedent's estate, then the disclaimer must be delivered to the personal

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Succession or Will.	testamentary trust: (1) a disclaimer must be delivered to the personal representative of the decedent's estate; or (2) if no personal representative is then serving, a disclaimer must be filed in the official public records of any county in which the decedent: (A) was domiciled on the date of the decedent's death; or (B) owned real property.	representative and does not have to be filed anywhere. If there is no personal representative of an estate (even if there is a probate proceeding, such as the probate of a will as a muniment of title or a determination of heirship), the disclaimer is filed in the official public records (real property records) of any county in which the decedent was domiciled at death or owned real property. Filing in the probate proceeding accomplishes nothing. If there is no personal representative, is not necessary to file in the county of domicile <i>and</i> in a county where real estate is owned; rather, the disclaimant may file in either. If the disclaimer covers real property in more than one county, or property other than real property (such as tangible or intangible personal property), filing in <i>any</i> county where real estate is located (or in the county of domicile) makes the disclaimer effective for all property described in the disclaimer.
§ 240.103. Disclaimer of Interest in Testamentary	In the case of an interest in a testamentary trust: (1) a disclaimer must be delivered to the trustee	If the person wishes to disclaim an interest in a testamentary trust, the disclaimer must be

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
Trust.	<p>then serving;</p> <p>(2) if no trustee is then serving, a disclaimer must be delivered to the personal representative of the decedent's estate; or</p> <p>(3) if no trustee or personal representative is then serving, a disclaimer must be filed in the official public records of any county in which the decedent:</p> <p style="padding-left: 2em;">(A) was domiciled on the date of the decedent's death; or</p> <p style="padding-left: 2em;">(B) owned real property.</p>	<p>delivered to the trustee if a trustee is serving at that time. If there is no trustee serving (for example, if the trust has not yet been funded or the trustee has resigned), the disclaimer must be delivered to the personal representative of the estate. If there is no personal representative or trustee, the disclaimer is filed in the official public records (real property records) of any county that the decedent was domiciled or owned real property. Filing in the probate proceeding accomplishes nothing. The filing requirement is not necessary to file in the county of domicile <i>and</i> in a county where real estate is owned; rather, the disclaimant may file in either. If the disclaimer covers real property in more than one county or property other than real property (such as tangible or intangible personal property), filing in <i>any</i> county where real estate is located (or in the county of domicile) makes the disclaimer effective for all property described in the disclaimer.</p>
§ 240.104. Disclaimer of Interest in Inter Vivos Trust.	<p>In the case of an interest in an inter vivos trust:</p> <p>(1) a disclaimer must be delivered to the trustee then serving, or, if no</p>	<p>For all <i>inter vivos</i> trusts (revocable and irrevocable), the disclaimer must be delivered to the trustee, or</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>trustee is then serving, a disclaimer must be filed:</p> <p>(A) with a court having jurisdiction to enforce the trust; or</p> <p>(B) in the official public records of the county in which:</p> <p>(i) the situs of administration of the trust is maintained; or</p> <p>(ii) the settlor is domiciled or was domiciled on the date of the settlor's death; and</p> <p>(2) if a disclaimer is made before the time the instrument creating the trust becomes irrevocable, a disclaimer must be delivered to the settlor of a revocable trust or the transferor of the interest.</p>	<p>if there is no trustee, the disclaimer must be filed with a court having jurisdiction to enforce the trust (which isn't likely to happen unless a lawsuit involving the trust already is pending), or in either (1) the county of situs of administration or (2) the county where the settlor is domiciled if living or was domiciled at death if not living.</p> <p>If the trust is revocable, the disclaimer also must be delivered to the settlor. This is an extra requirement for revocable trusts, not an alternative requirement.</p>
<p>§ 240.105. Disclaimer of Interest Created by Beneficiary Designation.</p>	<p>(a) In this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:</p> <p>(1) an annuity or insurance policy;</p> <p>(2) an account with a designation for payment on death;</p> <p>(3) a security registered in beneficiary form;</p> <p>(4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or</p>	<p>Section 240.105(c) requires recording a disclaimer in the real property records in the unusual case of a disclaimer of real property passing pursuant to an irrevocable beneficiary designation.</p> <p>If beneficiary designation property is disclaimed before the designation becomes irrevocable (usually this means before the death of the person making the designation), the disclaimer must be delivered to the person making the designation</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>(5) any other nonprobate transfer at death.</p> <p>(b) In the case of an interest created by a beneficiary designation that is disclaimed before the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation.</p> <p>(c) In the case of an interest created by a beneficiary designation that is disclaimed after the designation becomes irrevocable:</p> <p>(1) a disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and</p> <p>(2) a disclaimer of an interest in real property must be recorded in the official public records of the county where the real property that is the subject of the disclaimer is located.</p>	<p>(for example, the owner of the insurance policy or participant in a retirement plan), not to the third party (for example, the insurance company or plan administrator) holding the property subject to the beneficiary designation.</p> <p>If the property is disclaimed after the designation becomes irrevocable (usually this means after the death of the person making the designation), the disclaimer must be delivered to the person obligated to distribute personal property (insurance company, plan administrator, etc.) or filed in the county where real property is located, if the beneficiary designation property is real property.</p> <p>If the person making the disclaimer wishes to disclaim benefits passing because of the death of the insured/participant from multiple policies and retirement plans, disclaimers must be delivered to multiple recipients—each insurance company and plan administrator.</p>
<p>§ 240.106. Disclaimer by Surviving Holder of</p>	<p>In the case of a disclaimer by a surviving holder of survivorship property, the disclaimer must be</p>	<p>Section 240.106 is the only section that requires delivery of a disclaimer to the person to whom the</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
Survivorship Property.	delivered to the person to whom the disclaimed interest passes.	<p>disclaimed interest passes. If the decedent and the disclaimant were the only parties to a survivorship account, then the disclaimer will cause the disclaimed interest to pass to the personal representative of the decedent's estate, so delivery to the personal representative is required. If there were three or more parties to the survivorship account, then the disclaimed interest would pass to the other surviving account owners, so delivery to these account owners is required.</p> <p>Delivering a copy of the disclaimer to the third party holding the survivorship property (bank, brokerage firm, etc.) may be wise for practical reasons, <i>but it is not sufficient to make the disclaimer effective.</i></p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
§ 240.107. Disclaimer by Object or Taker in Default of Exercise of Power of Appointment.	In the case of a disclaimer by an object or taker in default of an exercise of a power of appointment at any time after the power was created: (1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or (2) if no fiduciary is then serving, the disclaimer must be filed: (A) with a court having authority to appoint the fiduciary; or (B) in the official public records of the county in which the creator of the power is domiciled or was domiciled on the date of the creator's death.	
§ 240.108. Disclaimer by Certain Appointees.	In the case of a disclaimer by an appointee of a nonfiduciary power of appointment: (1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate, or the fiduciary under the instrument that created the power; or (2) if no fiduciary is then serving, the disclaimer must be filed: (A) with a court having authority to appoint the fiduciary; or	

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	(B) in the official public records of the county in which the creator of the power is domiciled or was domiciled on the date of the creator's death.	
§ 240.109 Disclaimer by Certain Fiduciaries.	In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided by § 240.102, § 240.103, or § 240.104 as if the power disclaimed were an interest in property.	
§ 240.110. Disclaimer of Power by Agent.	In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.	
§ 240.111. Recording of Disclaimer.	If an instrument transferring an interest in or power over property subject to a disclaimer is required or authorized by law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or registered as that instrument. Except as otherwise provided by § 240.105(c)(2), failure to file, record, or register the disclaimer does not affect the disclaimer's validity between the disclaimant and persons to whom the property interest or power	This applies to disclaimers that are required or authorized by law to be filed, recorded, or registered. Section 12.001 of the Property Code provides that any instrument concerning real or personal property may be recorded if it has been acknowledged. If the disclaimer is acknowledged, it is "authorized" to be filed by § 12.001. Does this give the disclaimant an alternative way to make a disclaimer effective—filing it instead of

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	passes by reason of the disclaimer.	<p>delivering it to the persons entitled to receive it under other sections of Subchapter C? Section 240.009(a)(5) provides that, to be effective, a disclaimer must be “delivered or filed in the manner provided by Subchapter C.”</p> <p>It is clear that (1) disclaimers do not have to be filed or recorded in order to be effective except in specific circumstances; (2) in those specific circumstances (such as when the interest passes by intestacy and there is no personal representative of the estate — see § 240.102) disclaimers must be filed or recorded in order to be effective; and (3) any disclaimer is permitted to be filed or recorded if it is acknowledged.</p> <p>It is <i>not</i> clear that filing or recording a disclaimer that other sections of Subchapter C say must be delivered to a person is a safe alternative to that delivery. This approach may work, but it may not, so it should not be relied upon.</p>
§ 240.151. When Disclaimer	(a) A disclaimer is barred by a written waiver of the right to disclaim.	Section 240.151(b)(1) imports the definition of “acceptance” of a

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
Barred or Limited.	<p>(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:</p> <p>(1) the disclaimant accepts the interest sought to be disclaimed by:</p> <p>(A) taking possession of the interest; or</p> <p>(B) exercising dominion and control over the interest;</p> <p>(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or</p> <p>(3) the interest sought to be disclaimed is sold under a judicial sale.</p> <p>(c) The acceptance of an interest in property by a person in the person's fiduciary capacity is not an acceptance of the interest in the person's individual capacity and does not bar the person from disclaiming the interest in the person's individual capacity.</p> <p>(d) A disclaimer, in whole or in part, of the future exercise of a power held in a fiduciary capacity is not barred by the previous exercise of the power.</p> <p>(e) A disclaimer, in whole</p>	<p>disclaimed interest from Chapter 122. This provides continuity in the law. In Texas, acceptance continues to mean taking possession of property or exercising dominion and control of property.</p> <p>Acceptance of property as a fiduciary is not acceptance of the property individually. For example, if the surviving spouse is the executor of the deceased spouse's estate, the surviving spouse, as executor, may take control and possession of estate property without precluding a later disclaimer by the surviving spouse individually, so long as he or she has not accepted the property individually.</p> <p>As with prior law, an attempted disclaimer that is barred by the Texas Disclaimer Act is treated as an assignment to the person or persons who would have received the property if the disclaimer had been effective. In some states, an ineffective disclaimer causes the property to revert to the disclaimant. That is not the rule in Texas.</p> <p>A disclaimer by a "child support obligor" as</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	<p>or in part, of the future exercise of a power not held in a fiduciary capacity is not barred by the previous exercise of the power unless the power is exercisable in favor of the disclaimant.</p> <p>(f) A disclaimer of:</p> <p style="padding-left: 2em;">(1) a power over property that is barred by this section is ineffective; and</p> <p style="padding-left: 2em;">(2) an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under Subchapter B had the disclaimer not been barred.</p> <p>(g) A disclaimer by a child support obligor is barred as to disclaimed property that could be applied to satisfy the disclaimant's child support obligations if those obligations have been:</p> <p style="padding-left: 2em;">(1) administratively determined by the Title IV-D agency as defined by § 101.033, Family Code, in a Title IV-D case as defined by § 101.034, Family Code; or</p> <p style="padding-left: 2em;">(2) confirmed and reduced to judgment as provided by § 157.263, Family Code.</p> <p>(h) If Subsection (g)</p>	<p>defined in the statute is barred only as to disclaimed property that could be applied to satisfy the specified child support obligations. If the disclaimant is not a "child support obligor," he or she is not affected and does not have to include language about this in the disclaimer.</p>

<i>Title</i>	<i>Text of Statute</i>	<i>Commentary</i>
	applies, the child support obligee to whom child support arrearages are owed may enforce the child support obligation against the disclaimant as to disclaimed property by a lien or by any other remedy provided by law.	

APPENDIX 2

Disclaimer Forms Index

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**Disclaimer Form 1.1.1
Decedent’s estate with personal representative – mailed—
full disclaimer**

Disclaimer

_____, 20__ [date of mailing]

Certified Mail, Return Receipt Requested⁵⁷²

No. _____

To: _____ [name of personal representative]
_____ [address]

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁷³ of _____ [name of decedent], referred to in this disclaimer as the “Decedent.”

I, _____ [name of disclaimant], disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent’s estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

[Add if appropriate. I do not disclaim my interest in _____ [describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.].⁵⁷⁴

[signature of disclaimant]⁵⁷⁵

572. If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. TEX. PROP. CODE Sec. 240.101(b). Care should be taken to retain proof of mailing.

573. If a personal representative of the decedent’s estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

574. If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer delivered to the personal representative is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.

575. The disclaimant’s signature does not need to be notarized, see TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant’s signature notarized, there is no reason not to do so.

Disclaimer Form 1.1.2
Decedent's estate with personal representative – mailed—specific asset

Disclaimer

_____, 20__ [date of mailing]

Certified Mail, Return Receipt Requested⁵⁷⁶

No. _____

To: _____ [name of personal representative]
_____ [address]

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁷⁷ of _____ [name of decedent], referred to in this disclaimer as the “Decedent.”

I, _____ [name of disclaimant], disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy:

_____ [describe
specific asset or interest being disclaimed]

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

[signature of disclaimant]⁵⁷⁸

576. If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. TEX. PROP. CODE Sec. 240.101(b). Care should be taken to retain proof of mailing.

577. If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

578. The disclaimant's signature does not need to be notarized, see TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

Disclaimer Form 1.1.3
**Decedent's estate with personal representative – mailed—pecuniary
 formula**

Disclaimer

_____, 20__ *[date of mailing]*

Certified Mail, Return Receipt Requested⁵⁷⁹

No. _____

To: _____ *[name of personal representative]*
 _____ *[address]*

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁸⁰ of _____ *[name of decedent]*, referred to in this disclaimer as the “Decedent.”

I, _____ *[name of disclaimant]*, disclaim a pecuniary amount⁵⁸¹ of property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy, determined as follows:

_____ *[include the
 formula provision defining the pecuniary amount being
 disclaimed]*

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

*[signature of disclaimant]*⁵⁸²

579. If the disclaimer is mailed by certified mail, return receipt requested, at an address believed in good faith to be likely to result in receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. TEX. PROP. CODE Sec. 240.101(b). Care should be taken to retain proof of mailing.

580. If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

581. A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property. TEX. PROP. CODE Sec. 240.009(b).

582. The disclaimant's signature does not need to be notarized, *see* TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

Disclaimer Form 1.2.1
Decedent's estate with personal representative – hand-delivered—
full disclaimer

Disclaimer

To: _____ *[name of personal representative]*
_____ *[address]*

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁸³ of _____ *[name of decedent]*, referred to in this disclaimer as the “Decedent.”

I, _____ *[name of disclaimant]*, disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

*[Add if appropriate. I do not disclaim my interest in _____ [describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.].*⁵⁸⁴

*[signature of disclaimant]*⁵⁸⁵

Receipt acknowledged on _____, 20 ⁵⁸⁶

[signature of personal representative]
_____ *[name of personal representative]*,
Personal Representative of the
Estate of _____ *[name of decedent]*

583. If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

584. If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer delivered to the personal representative is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.

585. The disclaimant's signature does not need to be notarized, *see* TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

586. A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer's receipt. TEX. PROP. CODE Sec. 240.101(a). If the certified mail safe harbor is not used (*see* Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Disclaimer Form 1.2.2
**Decedent’s estate with personal representative – hand-delivered—
specific asset**

Disclaimer

To: _____ [*name of personal representative*]
_____ [*address*]

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁸⁷ of _____ [*name of decedent*], referred to in this disclaimer as the “Decedent.”

I, _____ [*name of disclaimant*], disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent’s estate by will or intestacy:

_____ [*describe
specific asset or interest being disclaimed*]

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent’s estate.

[*signature of disclaimant*]⁵⁸⁸

Receipt acknowledged on _____, 20 ⁵⁸⁹

[*signature of personal representative*],
_____ [*name of personal representative*],
Personal Representative of the
Estate of _____ [*name of decedent*]

587. If a personal representative of the decedent’s estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

588. The disclaimant’s signature does not need to be notarized, *see* TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant’s signature notarized, there is no reason not to do so.

589. A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer’s receipt. TEX. PROP. CODE Sec. 240.101(a). If the certified mail safe harbor is not used (see Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Disclaimer Form 1.2.3
Decedent's estate with personal representative – hand-delivered—
pecuniary formula

Disclaimer

To: _____ [*name of personal representative*]
_____ [*address*]

This disclaimer is delivered to you in your capacity as personal representative of the estate⁵⁹⁰ of _____ [*name of decedent*], referred to in this disclaimer as the "Decedent."

I, _____ [*name of disclaimant*], disclaim a pecuniary amount⁵⁹¹ of property or interest in property which I otherwise might be entitled to receive from Decedent's estate by will or intestacy, determined as follows:

_____ [*include the
formula provision defining the pecuniary amount being
disclaimed*]

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent's estate.

[*signature of disclaimant*]⁵⁹²

Receipt acknowledged on _____, 20 ⁵⁹³

[*signature of personal representative*]
_____ [*name of personal representative*],
Personal Representative of the
Estate of _____ [*name of decedent*]

590. If a personal representative of the decedent's estate is then serving, the disclaimer must be delivered to the personal representative. TEX. PROP. CODE Sec. 240.102.

591. A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property. TEX. PROP. CODE Sec. 240.009(b).

592. The disclaimant's signature does not need to be notarized, *see* TEX. PROP. CODE Sec. 240.009, unless it is to be recorded. If it is convenient to have the disclaimant's signature notarized, there is no reason not to do so.

593. A disclaimer may be delivered by personal delivery, first-class mail, facsimile, email or any other method likely to result in the disclaimer's receipt. TEX. PROP. CODE Sec. 240.101(a). If the certified mail safe harbor is not used (*see* Section 240.102(b)), then having the personal representative acknowledge receipt of the disclaimer is a way to assure compliance with the delivery requirement.

Disclaimer Form 2.1
Decedent's estate with no personal representative – full disclaimer

Disclaimer

*Choose one of these three options.*⁵⁹⁴

[Option 1 -- Will probated as muniment of title:]

_____ [name of decedent], referred to in this disclaimer as the "Decedent," died on or about _____, ____ [date of death], and the Decedent's will was admitted to probate as a muniment of title in Cause No. _____ in the _____ [name of court] of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 2 – Estate proceeding but no current personal representative:]

_____ [name of decedent], referred to in this disclaimer as the "Decedent," died on or about _____, ____ [date of death]. The Decedent's estate was the subject of a proceeding in Cause No. _____ in the _____ [name of court] of _____ County, Texas. No personal representative is now serving with respect to the Decedent's estate.

[Option 3 – No estate proceeding:] _____ [name of decedent], referred to in this disclaimer as the "Decedent," died on or about _____, ____ [date of death]. No personal representative is now serving with respect to the Decedent's estate.

*Choose one of these two options.*⁵⁹⁵

[Option 1 -- Domiciled in county:] The Decedent was domiciled in _____ County, Texas, on the date of the Decedent's death.

594. If no personal representative is then serving, the disclaimer must be filed in the official public records of any county in which the decedent was domiciled on the date of death or owned real property. TEX. PROP. CODE Sec. 240.102(2). The three most likely ways in which a personal representative would not be serving are (1) the will was probated as a muniment of title, (2) there was an estate proceeding but no personal representative is now serving, or (3) there was no estate proceeding. Although the statute does not require the disclaimer to include information about the estate proceeding, if there was an estate proceeding it is prudent to include information about it.

595. If there is no personal representative, the disclaimer may be filed in any county in which the decedent was domiciled on the date of death or owned real property. TEX. PROP. CODE Sec. 240.102(2). It is not necessary to file in both places. Also, filing a disclaimer in a county where the decedent owned real property makes the disclaimer effective with respect to personal property wherever located and with respect to real property not located in that county.

[Option 2 – Owned real property in county:] The Decedent owned real property in _____ County, Texas.

I, _____ [name of disclaimant], disclaim any and all right, title and interest in and to any property which I otherwise might be entitled to receive from Decedent’s estate by will or intestacy. This is a full disclaimer of all of my right, title and interest in any property or interest in property created by will or intestacy.

[Add if appropriate. I do not disclaim my interest in _____ [describe interest in non-probate assets not being disclaimed – trust property, beneficiary designation property, survivorship property, etc.].⁵⁹⁶

Dated _____, 2015.

[signature of disclaimant]

Acknowledgment⁵⁹⁷

The State of Texas
County of _____

This instrument was acknowledged before me on _____,
20____, by _____ [name of disclaimant].

Notary Public, State of Texas [Seal]

After recording, return to:

[name and address]

596. If non-probate assets also are being disclaimed, the disclaimer should be perfected by delivering the disclaimer to the appropriate person under Sections 240.103 – 240.110. Mentioning the disclaimer of these assets in the disclaimer filed in the official public records is unlikely to be sufficient to make the disclaimer effective. On the other hand, if the disclaimant is disclaiming property from the probate estate but accepting certain non-probate property, it probably is a good idea to mention this here to avoid confusion.

597. An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law. TEX. PROP. CODE Section 12.001(a).

Disclaimer Form 2.2
Decedent's estate with no personal representative – specific asset

Disclaimer

*Choose one of these three options.*⁵⁹⁸

[Option 1 -- Will probated as muniment of title:]

_____ [name of decedent], referred to in this disclaimer as the “Decedent,” died on or about _____, ____ [date of death], and the Decedent’s will was admitted to probate as a muniment of title in Cause No. _____ in the _____ [name of court] of _____ County, Texas. No personal representative is now serving with respect to the Decedent’s estate.

[Option 2 – Estate proceeding but no current personal representative:]

_____ [name of decedent], referred to in this disclaimer as the “Decedent,” died on or about _____, ____ [date of death]. The Decedent’s estate was the subject of a proceeding in Cause No. _____ in the _____ [name of court] of _____ County, Texas. No personal representative is now serving with respect to the Decedent’s estate.

[Option 3 – No estate proceeding:] _____ [name of

decedent], referred to in this disclaimer as the “Decedent,” died on or about _____, ____ [date of death]. No personal representative is now serving with respect to the Decedent’s estate.

*Choose one of these two options.*⁵⁹⁹

[Option 1 -- Domiciled in county:] The Decedent was domiciled in _____ County, Texas, on the date of the Decedent’s death.

598. If no personal representative is then serving, the disclaimer must be filed in the official public records of any county in which the decedent was domiciled on the date of death or owned real property. TEX. PROP. CODE Sec. 240.102(2). The three most likely ways in which a personal representative would not be serving are (1) the will was probated as a muniment of title, (2) there was an estate proceeding but no personal representative is now serving, or (3) there was no estate proceeding. Although the statute does not require the disclaimer to include information about the estate proceeding, if there was an estate proceeding it is prudent to include information about it.

599. If there is no personal representative, the disclaimer may be filed in any county in which the decedent was domiciled on the date of death or owned real property. TEX. PROP. CODE Sec. 240.102(2). It is not necessary to file in both places. Also, filing a disclaimer in a county where the decedent owned real property makes the disclaimer effective with respect to personal property wherever located and with respect to real property not located in that county.

[Option 2 – Owned real property in county:] The Decedent owned real property in _____ County, Texas.

I, _____ [name of disclaimant], disclaim any and all right, title and interest in and to the following property or interest in property which I otherwise might be entitled to receive from Decedent’s estate by will or intestacy:

_____ [describe
specific asset or interest being disclaimed]⁶⁰⁰

I am not disclaiming any other property or interest in property I might otherwise receive by will or intestacy from Decedent’s estate.

Dated _____, 2015.

[signature of disclaimant]

Acknowledgment⁶⁰¹

The State of Texas
County of _____

This instrument was acknowledged before me on _____,
20____, by _____ [name of disclaimant].

Notary Public, State of Texas [Seal]

After recording, return to:

[name and address]

600. Even if the asset being disclaimed is not located in a county where the decedent was domiciled or owned real property, the only way to meet the delivery and filing requirements for an asset passing by will or intestacy when there is no personal representative then serving is to file in one of those counties.

601. An instrument concerning real or personal property may be recorded if it has been acknowledged, sworn to with a proper jurat, or proved according to law. TEX. PROP. CODE Section 12.001(a).

Disclaimer Form 3.1
Trustee's notice of intent to disclaim

[Trustee's letterhead]

_____, 20__ [date of notice]⁶⁰²

Certified Mail, Return Receipt Requested⁶⁰³

No. _____

To: _____ [name of beneficiary]⁶⁰⁴
 _____ [address]

Re: Trustee's notice of intent to disclaim

Dear _____ [name of beneficiary]:

I am the trustee of the _____ [name of trust], referred to in this notice as the "Trust." You are a current beneficiary or presumptive remainder beneficiary of the Trust. This notice is being given to you in accordance with Section 240.0081 of the Texas Property Code.

1. In my capacity as trustee of the Trust, I intend to disclaim all right, title and interest in and to the following described property (referred to in this notice as the "Property").⁶⁰⁵

[describe property or interest to be disclaimed]

602. The notice must be given not later than the 30th day before the date the disclaimer is made. TEX. PROP. CODE Sec. 240.0081(f)(5). The statute does not specify if the 30 days is measured from the date of the notice or the date of receipt.

603. The notice may be sent by personal delivery, first-class mail, facsimile, e-mail, or any other method likely to result in the notice's receipt. TEX. PROP. CODE Sec. 240.0081(f)(6). Unlike the delivery requirements for disclaimers (see TEX. PROP. CODE Sec. 240.101(b)), there is no safe harbor for certified mail. Therefore, the safest practice would be to collect the acknowledgments of receipt of certified mail and use the latest of these as the beginning of the 30-day period.

604. The trustee must give notice to current beneficiaries and presumptive remainder beneficiaries. These terms are defined in TEX. PROP. CODE Sec. 240.002. In addition, notice must be given to the attorney general if a charity is a beneficiary or potential beneficiary. TEX. PROP. CODE Sec. 240.0081(c). If the beneficiary is has a court-appointed guardian or conservator, the notice must be given to the guardian or conservator. If a minor beneficiary has no court appointed guardian or conservator, the notice must be given to a parent of the minor. TEX. PROP. CODE Sec. 240.0081(d). The notice does not have to be given to a beneficiary who waives notice (see Form 3.2), who is not known to the trustee, who is known to the trustee but cannot be located after reasonable diligence, or who is a descendant of a beneficiary to whom the trustee has given notice if they have similar interests and no apparent conflict of interest. TEX. PROP. CODE Sec. 240.0081(e).

605. TEX. PROP. CODE Sections 240.0081(f)(1)(A) and 240.0081(f)(2).

2. If I make the disclaimer, the Property will not become trust property and will not be available to distribute to you from the Trust.⁶⁰⁶
3. You have the right to object to the disclaimer.⁶⁰⁷
4. You may petition a court to approve, modify, or deny the disclaimer.⁶⁰⁸
5. The earliest date I intend to make the disclaimer is _____, 20__ [date of intended disclaimer].⁶⁰⁹
6. My name and mailing address is:⁶¹⁰

_____ [name of trustee]
_____ [mailing address of trustee]

Optional: I intend to make this disclaimer because _____
[state reasons for disclaimer].

Optional: If you have questions, need additional information or wish to discuss this matter, please contact me.

_____ [signature of trustee]
_____ [name of trustee], Trustee of the
_____ [name of trust]

606. TEX. PROP. CODE Section 240.0081(f)(1)(B).

607. TEX. PROP. CODE Section 240.0081(f)(1)(C).

608. TEX. PROP. CODE Section 240.0081(f)(1)(D).

609. TEX. PROP. CODE Section 240.0081(f)(3). The earliest date stated in the notice should not be earlier than 30 days after the date of the notice. As a practical matter, the earliest date for the disclaimer will be the date stated here or 30 days after the last notice is given, whichever is later.

610. TEX. PROP. CODE Section 240.0081(f)(4).

Disclaimer Form 3.2
Waiver of trustee’s notice of intent to disclaim

Waiver of Notice

I, _____ *[name of beneficiary]*, hereby waive the requirement of notice under Section 240.0081 of the Texas Property Code of the intention of _____ *[name of trustee]*, trustee of the _____ *[name of trust]*, to disclaim the following described property which otherwise may pass into the trust:

[describe property or interest to be disclaimed]

[Optional: Include acknowledgments of receipt of material information, understanding the effect of the disclaimer, etc.].⁶¹¹

[Use extreme caution about including a release.].⁶¹²

_____ *[signature of beneficiary]*
[name of beneficiary]

Acknowledgment⁶¹³

The State of Texas
County of _____

This instrument was acknowledged before me on _____,
20____, by _____ *[name of beneficiary]*.

_____ *[Seal]*

NOTARY PUBLIC, STATE OF TEXAS

611. Section 240.0081 of the Property Code does not require the beneficiary waiving notice to acknowledge receipt of material information or understanding the effect of the disclaimer, but the trustee may wish to have these acknowledgments for the trustee’s protection.

612. Caution: While some trustees may wish to include a release, the release may be deemed to be consideration received by the trustee for making the disclaimer, which could make the disclaimer ineffective for tax purposes. In order for the release to be effective, the beneficiary must be acting on full information in order for the release to be effective. TEX. PROP. CODE Sec. 114.005.

613. Section 240.0081 of the Property Code does not require the waiver to be notarized, but the trustee may wish to require an acknowledgment for his or her protection.

