

## Problems with the Texas disclaimer statutes and what to do about them

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## What we'll cover

- Use and misuse of disclaimers (only briefly)
- Evolution of Texas disclaimer law
- Problems with the current statute
- Possible solution: the Texas Uniform Disclaimer of Property Interests Act
- Paper and slides: [texasprobate.com](http://texasprobate.com)

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## Disclaimers can be a useful tool

- Fixing a plan after death
- Tax savings
- Protecting assets from creditors



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### Disclaimers: unpleasant surprises?

- Lots of tricky rules
- Can't direct property to someone
- Creditor protection may not work
  - Medicaid
  - Post-petition in bankruptcy



Photo credit: Beetha

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### Evolution of Texas disclaimer law

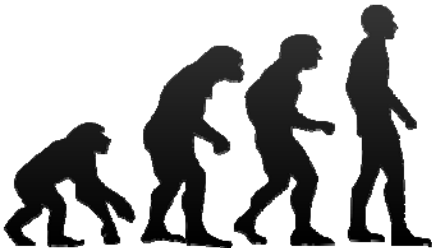


Photo credit: Tige2007

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### Pre-1971: common law



Photo credit: Daniel Dines

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### 1971 statute

- To clarify existing law, which was vague and unclear
- 6-month deadline
- Failure to comply with all provisions makes a disclaimer ineffective except as an assignment
- Judicial revocation allowed



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### 1977 amendment

- Codifies federal tax disclaimer requirements – sort of
  - 9-month deadline
    - Discrepancy: when 9 months begins to run on future interests
  - Judicial revocation is not permitted
- Permits disclaimers by personal reps and guardians
  - No mention of trustees



Photo credit: Allen Watkin

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### 1993 amendment

- Codifies the relation back doctrine
  - *Dyer v. Eckols*
  - Not subject to creditors' claims
    - Bankruptcy cases
- Permits the testator to direct the disclaimed property
- Permits a partial disclaimer by the surviving spouse



Photo credit: Thomas R. Machotzki

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### Since 1993

- Type of property
- Disclaimer by charitable org
- POA disclaimer
- Reorganized, codified statute
- “Child support obligor”



Photo credit: Allen Watkin

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### Equitable rescission of disclaimer

- *Northwest National v. Doucette*
  - Disclaimer is effective in spite of its probable unintended results
- *Baker Botts v. Cailloux*
  - Equitable trust remedy not available where executor and attorneys may have breached duties
- *McCuen v. Huey*
  - Disclaimer ineffective if maker had inadequate knowledge of what was being disclaimed
  - 2008 case, but applying pre-1971 law




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### Problems with current statutes

- Must meet **all** requirements to be effective
  - In writing and notarized
  - Include “child support obligor” statement
  - Filed in the probate proceeding within 9 months
    - Or, in some cases, with the county clerk of the county of domicile or where real property is located
  - Delivered in person or mailed by registered or certified mail to **and received by** the personal representative within 9 months
  - Cannot previously have accepted property by taking possession or exercising dominion and control

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### Practice tips

- Start early
- Line up the personal representative
- Have the personal representative acknowledge receipt of the disclaimer on its face
- Don't rely on the mailbox rule to meet the filing deadline
- Always mail it and track down the green card
- Follow an established form ("child support obligor")
- Don't forget the notary

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### Problems

- The Texas deadlines don't match up perfectly with the tax deadlines
- Can you use a disclaimer to keep property out of a trust?
  - Does a trustee have the power to disclaim?
  - The Texas Trust Code disclaimer statute is set up for beneficiary disclaimers
  - Consider:
    - Combined beneficiary and trustee disclaimer
    - Judicial approval under TTC §§ 112.054(a) and 115.001(a)

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### Possible solution

The Texas Uniform Disclaimer of Property Interests Act



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### Uniform Act

- One coherent statute in the Estates Code
  - No separate statute in the Trust Code
- No state-law time limit for disclaimers
- Less restrictive technical requirements
- Different types of property are specifically addressed
- Expanded fiduciary disclaimers

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### Issues with the Uniform Act

- Fiduciary disclaimers – How broad? How clear?
  - Trustee disclaimers
  - Can a disclaimer be revoked if it was a breach of a fiduciary’s duty?
  - When is court approval required?
  - Borrowed from Florida: a parent may disclaim for a minor child if child would receive property only because of other disclaimer

Please give feedback on the proposed statute:  
[karisch@texasprobate.com](mailto:karisch@texasprobate.com)

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### Issues with the Uniform Act

- Effect on the relation back doctrine
  - We do not want to change the current result
- Jointly held property
- One statute (Estates Code) or two (Estates Code and Trust Code)?
- Dozens of other details

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