

Trusts & Estates

WWW.NYLJ.COM



TUESDAY, JANUARY 21, 2014

Making Disclaimer Work for Minors

Navigate differences between N.Y. Law and the IRC.

BY DARCY M. KATRIS
AND EMELIA G. SHORT

Both New York's EPTL §2-1.11 and Internal Revenue Code §2518 permit an individual to disclaim¹ an interest in property transferred to him or her if certain conditions are met. Although the conditions in the EPTL and IRC are similar in many respects, there are some differences.

If the conditions in IRC §2518² are not satisfied, the disclaimer will not be a "qualified disclaimer" and will be treated as a taxable gift for federal tax purposes. Under the EPTL, unless the transferor of the disposition has provided otherwise, the disclaimed interest passes as if the disclaimant predeceased the transferor, thereby satisfying one of the requirements of IRC §2518, that the property pass without any direction on the part of the disclaimant. Tax planning is a common reason why someone would want to disclaim an interest in a trust or a bequest under a will. In certain cases, it may be desirable for a minor to disclaim an interest in an estate or trust such as to avoid estate or GST tax consequences.

The treatment of minors as disclaimants is more liberal under the IRC than under the EPTL. IRC §2518 permits a minor to disclaim property until the later of nine months after the transfer of property or nine months after the minor reaches age 21. EPTL §2-1.11 provides that a renunciation must occur within nine months after the "effective date" of the transfer and does not contain a provision similar to the IRC to extend the period for a minor to renounce. Therefore, other approaches must be explored. One option is to request the court extend the period for a minor to renounce. EPTL §2-1.11(c)(2) provides that the court may grant such extension upon a showing of reasonable cause. This option is both expensive and uncertain. Courts have found reasonable cause to extend the period for minors to renounce in some circumstances. For example, where the minor recipient was deceased and had never received distributions from a trust, the time was extended for his personal representative to renounce his interest in the trust.³

In cases not involving minors, courts have granted an extension of time to renounce where: (i) the beneficiary was afflicted by shock and grief after losing both parents in a short time span,⁴ (ii) three siblings intended to renounce

and one missed the period due to the birth of a child,⁵ (iii) the renunciation was initially filed on time, but failed to meet all of the requirements,⁶ and (iv) a trust beneficiary took no distributions for 15 years and sought to accelerate the benefits to her children.⁷ On the other hand, courts have declined to extend the period when the disclaimer would be used to pressure creditors into accepting a reduced settlement,⁸ the beneficiary had been accepting trust benefits for at least five years,⁹ and no excuse was offered for a three-year delay in requesting the extension.¹⁰

Another option is for a minor to renounce through a guardian. EPTL §2-1.11(d) allows for "the guardian of the property of an infant" to renounce on behalf of a minor, "when so authorized by the court having jurisdiction over the estate of the infant." However, courts will only grant such authorization when the renunciation actually benefits the minor. This option likely requires a parent to seek appointment as the guardian of the minor's property or limited letters of guardianship for the purpose of renouncing on the minor's behalf.

Showing that a renunciation actually benefits a minor is a high hurdle. In *Estate of Kerzner*,¹¹ the court refused to permit a mother who was guardian of

her minor child to renounce the child's interest in his father's estate in order to save approximately \$2.7 million in estate tax. The court reasoned that "a long line of cases establishes that a court cannot authorize the renunciation of an infant's right to receive a financial benefit unless there is commensurate consideration in return."¹² Offering consideration to the minor does not seem to satisfy the courts either. In *Estate of DeDominico*, a mother who was guardian of her three minor children wished to renounce part of the minors' intestate share of their father's estate and interests in totten trust accounts in order to claim the full marital deduction and save \$40,000 in estate tax. The court disallowed the renunciation despite the fact that the mother promised to use the funds solely for the benefit of the children.¹³ In *Estate of Carucci*,¹⁴ a father sought to renounce a testamentary disposition of partnership interests on behalf of his two minor children and to give the children cash in trust instead. The court denied the request, indicating that a change in form from an outright gift to a gift in trust was not beneficial to the children.

Even if a minor is unable to make a renunciation under the EPTL, there may be an escape hatch to make a qualified disclaimer under the IRC. Pursuant to IRC §2518(c)(3), a written transfer of a person's entire interest in property to the person or persons who would have received the property had a qualified disclaimer been made and which satisfies the other requirements of IRC §2518 will be treated as a qualified disclaimer. Therefore, a minor who makes a written transfer of property between the time he or she reaches age 18 and nine months after he or she reaches age 21 to the person or persons who would have received the property if a qualified disclaimer had been made, will be treated as having made a qualified

disclaimer. A valid disclaimer under state law is not required nor does the property have to pass "without any direction on the part of the disclaimant" in order to utilize IRC §2518(c)(3). However, the other requirements of IRC §2518 must be met. The transfer will be a gift for New York law purposes and a qualified disclaimer for federal tax purposes. Since New York does not currently impose a gift tax, there are no tax consequences resulting from a transfer made pursuant to this escape hatch.

Moreover, the IRC relaxes the requirement that the beneficiary must not accept the gift or its benefits while the beneficiary is a minor. Treasury Regulations §25.2518-2(d)(3) states that "any actions taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's twenty-first birthday will not be an acceptance by the beneficiary of the interest." One example given in the regulations shows a minor who receives trust distributions as being able to make a qualified disclaimer so long as she does not take any additional distributions after turning 21.

For example, assume a grantor created an inter vivos trust that passed to her descendants, per stirpes, upon its termination. At the time the trust was created, the grantor had three children and GST exemption was not allocated to the trust. During the trust term, one of the grantor's three children died and was survived by a minor child. Under these facts, there would be a taxable distribution for GST purposes upon the termination of the trust with respect to the share passing to the grantor's minor grandchild. Since there was only one trust for all descendants, a late GST exemption allocation would have to be made to the entire trust to shelter the portion that incurs a GST tax. The grantor may not want to waste her GST exemption, especially if the trust assets have appreciated.

If, following the termination of the trust, the grandchild's share is held for him pursuant to a power in trust and prior to nine months after he reaches age 21, the grandchild transfers his share to the two surviving children of the grantor, the transfer will be a qualified disclaimer due to the IRC §2518(c)(3) escape hatch. All three requirements of IRC §2518(c)(3) will have been met: The transfer will be effected within nine months after the grandchild reaches age 21, the grandchild will not have accepted any of the benefits (the grandchild may receive distributions prior to reaching age 21), and the property will pass to the individuals who would have received it pursuant to a qualified disclaimer.

Because of the IRC §2518(c)(3) escape hatch, the difference in requirements for disclaimers by minors under the IRC and EPTL is not insurmountable. Although a minor may be unable to renounce under the EPTL, a qualified disclaimer under the IRC is not precluded.



1. IRC §2518 uses the term "disclaimer" whereas EPTL §2-1.11 uses the term "renunciation."

2. The disclaimer must be in writing signed by the disclaimant and made within 9 months after the property interest is created; the disclaimant must not have accepted the property interest or any of its benefits; and as a result of the disclaimer, the property interest must pass without any direction on the part of the disclaimant to the spouse of a decedent/transferor or to a person other than the disclaimant.

3. *Estate of Kravis*, N.Y.S.2d 274 (Surr. Ct. 1992).

4. *Estate of Sittler*, 2008 N.Y. Misc. LEXIS 4904 (Surr. Ct. 2007).

5. *Estate of Siesel*, NYLJ, April 10, 1996 at 30, Col. 1 (Surr. Ct. 1996).

6. *Estate of Fernandez*, 2008 N.Y. Misc. LEXIS 6039 (Surr. Ct. 2008).

7. *Estate of Hahn*, NYLJ, July 10, 2006 at 28, Col. 1 (Surr. Ct. 2006).

8. *Estate of Ford*, NYLJ, Feb. 5, 2002 at 19, Col. 1 (Surr. Ct. 2002).

9. *Estate of Blachly*, NYLJ, Jan. 23, 2006 at 14, Col. 1 (Surr. Ct. 2006).

10. *Estate of Neely*, NYLJ, June 24, 2011 at 34, Col. 1 (Surr. Ct. 2011).

11. 2007 N.Y. Misc. LEXIS 6199 (Surr. Ct. 2007).

12. *Id.* (citing *Estate of DeDominico*, 48 N.Y.S.2d 1012 (Surr. Ct. 1979)).

13. The court indicated that if a parent promises to use the renounced funds for the benefit of the minor, it would probably not be a qualified disclaimer for federal tax purposes.

14. 769 N.Y.S.2d 866 (Surr. Ct. 2003).