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### Qualified Disclaimers: When Saying “No, Thanks” Can Mean Getting More

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For a number of reasons, some of which will be discussed in this article, sometimes it makes sense for a beneficiary to refuse a lifetime gift or a bequest under a will or trust agreement, or to refuse a share that passes by intestacy if there is no will, and allow the property that has been refused to pass as if the beneficiary had not survived. Such a refusal, called a “disclaimer” by the Internal Revenue Code and many states (or a “renunciation” by some states) has the effect, for gift, estate and generation-skipping transfer tax purposes, of treating the disclaimed interest as if it had never been transferred to the person who is making the disclaimer (the “disclaimant”).

Suppose that a widower’s will or lifetime trust agreement that becomes irrevocable at death provides for the assets to pass to his daughter, and if she does not survive then to her children. The daughter is quite successful in her own right, and already has an estate that will be subject to estate taxes when it passes to her children. If the daughter were to accept the bequest in its entirety, her estate would be increased by the value of what she received from her father’s will or trust and, to the extent that the daughter had not disposed of those assets during her lifetime, they would be subject to tax in the daughter’s estate. Upon the daughter’s death, the assets that she inherited from her father would pass to her children, but those assets would be subject to estate taxes twice: first in her father’s estate, and then again in her estate.

If, instead, the daughter made a qualified disclaimer of all or a portion of the estate left to her by her father, she would be deemed to have predeceased him, and the assets so disclaimed would pass directly to her children under the terms of her father’s will or trust agreement. The estate tax would be imposed only in her father’s estate, resulting in more for her children. If the daughter’s qualified disclaimer were for an amount less than her father’s full generation-skipping transfer (“GST”) tax exemption of \$1,500,000, there would be no additional estate tax or GST tax as a result of the disclaimer.

As another example, sometimes the assets that are held in the decedent’s name alone at death are not sufficient to be able to fund fully a credit shelter trust for the benefit of the surviving spouse or others. Such a trust can shelter from federal estate tax as much as \$1,500,000 in 2005. In many such situations, however (notwithstanding the advice of counsel to divide the assets between the spouses), there are significant assets that are owned jointly by the decedent and the surviving spouse. If, within nine months after the death of the first spouse, the surviving spouse executes a qualified disclaimer of the joint assets, the surviving spouse/disclaimant will



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The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the Firm only upon engagement with respect to specific factual situations.

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be deemed to have died first. The result will be that the disclaimed joint assets will be treated as if they were owned solely by the recently deceased spouse, used to fund the credit shelter trust, and the credit shelter trust will never be subject to federal estate tax — neither in the estate of the first spouse nor when the trust finally terminates.

If the qualified disclaimer had not been made, it is quite possible that the value of the joint assets, when combined with the other assets of the surviving spouse upon his or her later death, would be subject to estate tax in the estate of the surviving spouse.

Qualified disclaimers can also be used in situations in which the decedent died without a will, when property that would otherwise pass to a surviving spouse and children under state laws of intestacy can be disclaimed by the children. The result of the disclaimer can be that not only will the surviving spouse be able to enjoy the entire estate, but estate taxes that would otherwise be due in the estate of the first spouse to die may be avoided or postponed until after the surviving spouse has died as well.

In order to be a qualified disclaimer under the Internal Revenue Code, there are a number of requirements that must be met. A qualified disclaimer must be:

- (1) A written, irrevocable and unqualified refusal to accept an interest in property;
- (2) It must be received by the transferor (in the case of a gift), his legal representatives (such as his executor in the case of property passing under a will) or the holder of legal title to the property (such as the trustee of property held in a trust) not later than nine months after the date when the transfer creating the interest in the disclaimant was made (i.e., within nine months after death in the case of a bequest under a will or a lifetime trust agreement becoming irrevocable at death) or when the disclaimant attains age 21, if that is the later date;
- (3) The disclaimant must not have accepted the interest or any of its benefits before making the disclaimer; and
- (4) The interest must pass, without any direction on the part of the disclaimant, to either the spouse of the decedent or to a person other than the disclaimant.

If these requirements and those imposed by applicable state law, such as filing with the appropriate court having jurisdiction over the matter, are met, the benefits of a qualified disclaimer can be realized, and saying, "No, thanks" can indeed result in getting more. ■

***Helpful Tip:** Often, the two most difficult requirements of a qualified disclaimer are that the disclaimant must not have accepted the interest or any of its benefits before making the disclaimer, and that the disclaimer must be made within nine months after the event that created the interest to be disclaimed. That is why it is so important to proceed slowly and cautiously after the death of a loved one, whether in terms of making major lifestyle changes or whether to start using estate or joint assets as one's own.*