

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Revisions to Certain Provisions of Chapter 739, Florida Statutes

I. SUMMARY

The proposed legislation is the product of study and analysis by The Estate and Trust Tax Planning Committee (the “Committee”) of the Real Property, Probate and Trust Section of The Florida Bar.

The legislative proposal would add a savings provision to Florida Statutes Chapter 739, the Florida Uniform Disclaimer of Property Interests Act (the “Act”), intended to protect practitioners from inadvertently disqualifying certain post-mortem disclaimers under Section 2518 of the Internal Revenue Code. The legislative proposal would also modify certain other provisions of the Act to assure consistency in light of the addition of the savings clause, and correct a minor typographical error in the Act. Lastly, the proposed legislation would add a proviso to ensure that the traditional statutory prohibition on disclaimers by insolvent beneficiaries remains unquestionably intact.

II. CURRENT SITUATION

(A) Savings Provision.

Unless a disclaimer of an interest in property qualifies under Section 2518 of the Internal Revenue Code, the disclaimant will be treated for federal gift tax purposes as if he or she had made a transfer subject to federal gift taxes. A disclaimer of an interest in property will *not* qualify under Section 2518 unless the disclaimant has no power to direct the disposition of the disclaimed interest, whether in a fiduciary or non-fiduciary capacity, unless the power of disposition is limited by a so-called ascertainable standard. Code Section 2518; Treas. Regs. §§ 25.2518-2(d)(2), -(2)(e).

A common post-mortem planning technique involves a disclaimer, by a surviving spouse, of interests in property where the disclaimed interests pass to a trust for the lifetime benefit of the surviving spouse. Such a disclaimer often arises from a desire to fully utilize the first deceased spouse’s estate tax exemption amount. The trust into which the disclaimed assets pass frequently confers upon the surviving spouse a testamentary power of appointment. Unless this power is also disclaimed, the surviving spouse’s disclaimer will fail under Section 2518. Practitioners familiar with the federal tax disclaimer rules will know that the surviving spouse must separately disclaim the testamentary power of appointment to qualify the disclaimer under Section 2518; inexperienced or non-specialized attorneys may not.

(B) Disclaimers by Insolvent Beneficiaries.

Florida’s statutory disclaimer law has long barred disclaimers by certain persons. Prior Sections 689.21 (disclaimers of non-testamentary interests) and 733.801 (disclaimers of testamentary

interests) contained explicit prohibitions. Current law provides likewise: Sections 739.402(1) and (2) bar disclaimers by persons who have waived the right to disclaim, where the interest sought to be disclaimed has been accepted, where such interest has been sold, assigned or purchased at a judicial sale, or when the disclaimant is insolvent.

However, in the case of the last of the bars to disclaimer under the state statute, the insolvency of the disclaimant is not necessarily a bar to the effectiveness of a disclaimer for federal law. In this regard, federal law defers to state law. If there is a state law provision that bars disclaimers by insolvents, the disclaimer will not be valid. *See* Treas. Regs. §25.2518-1(c)(2) (“a disclaimer that is wholly void [under state law]...cannot be a qualified disclaimer.”) On the other hand, where state law provides that a disclaimer by an insolvent person is void, such a disclaimer is not a qualified disclaimer.

However, F. S. §739.501 states that “Notwithstanding any other provision of this chapter” a disclaimer that qualifies under Code Section 2518 and (implicitly) accompanying Treasury Regulations qualifies as a disclaimer under Florida law. One of the provisions of “this chapter,” e.g., the Act, is §739.103, which makes the Act “the exclusive means by which a disclaimer may be made under Florida law.” The “notwithstanding” proviso of §739.501 would nullify §739.103 for purposes of determining whether a disclaimer by an insolvent can qualify for federal tax purposes. This means that common law would apply to the question of the qualification of the disclaimer for federal tax purposes and, therefore, for state law purposes.

That was not the intent of the Act. *Kearley v. Crawford*, 112 Fla. 43, 151 So. 2d 293 (Fla. 1933) may be authority for the ability at common law of an insolvent person to make an effective disclaimer under state law. Common law may or may not permit a disclaimer or renunciation in other circumstances intended to be barred by §739.402. To preserve the intent and integrity of the statute, and to clarify that the bars on disclaimers in §739.402 mean what they say, those bars should be carved out of the “notwithstanding” proviso of §739.501.

III. EFFECT OF PROPOSED CHANGES **(DETAILED ANALYSIS OF PROPOSED REVISIONS)**

(A) Addition of Savings Clause and Related Revisions.

The legislative proposal would add new subsection (4) to F. S. §739.201. The proposed addition of §739.201(4) will operate, in the circumstance described in Section II(A) above, to treat the surviving spouse’s disclaimer of an interest in property that passes to a trust for the surviving spouse’s benefit also as a disclaimer of any fiduciary or non-fiduciary power over the disclaimed property interest, unless the instrument of disclaimer specifically provides otherwise.

The savings provision will, of course, operate in other circumstances. For example, where a person disclaims an interest as a trust beneficiary but is designated to serve as a trustee with wholly discretionary powers to distribute trust assets, §739.201(4) would act to treat the disclaimer as one also of the power to act as trustee over all the trust assets, and not merely the part of the trust attributable to the disclaimed property.

The addition of the §739.201(4) savings provision requires certain conforming changes.

Section 739.104(2) permits a fiduciary to disclaim a power with court approval if the instrument governing the fiduciary's power does not explicitly give the fiduciary the ability to disclaim a fiduciary power. Section 739.104(2) requires revision to ensure that a disclaimer of a fiduciary power resulting from the application of the savings provision does not require prior court approval.

Section 739.207(3) permits a fiduciary who disclaims a power under Ch. 739 to bind successor fiduciaries under certain circumstances. That section requires revision so that a disclaimer of a power traveling under the savings provision binds only the disclaimant.

(C) of Typographical Error.

The legislative proposal would change the word "disclaimer" in F.S. §739.402(2)(a) to "disclaimant".

(B) Revisions to F.S. §739.501

The legislative proposal would add the phrase "other than s. 739.402" immediately after the words "Notwithstanding any other provision of this chapter" at the beginning of F.S. §739.501. As so revised, §739.501 would clearly provide that the statutory bars to disclaimer set forth in §739.402 would still apply to disqualify the disclaimer under state law, even though Section 2518 and accompanying Treasury Regulations and §739.501 might otherwise act to salvage the disclaimer. A disclaimer that is void under state law cannot qualify as a disclaimer under the federal tax laws.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The revisions to §739.201 to include the savings provision will protect consumers from mistakes made by inexperienced or non-specialist attorneys. Such revisions will ease the burden on civil courts who might otherwise be called upon to hear cases brought by clients who were harmed by substandard lawyering.

The revisions to §739.501 will solidify Florida's long-standing bar against disclaimers by insolvent beneficiaries, thereby lending predictability to legal outcomes and preserving the intended balance between the rights of creditors and debtors in this important and sometimes controversial area.

VI. CONSTITUTIONAL ISSUES

The Committee believes that the legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar and the Florida Bankers Association.

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