



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 496 (as reported without amendment)
 Sponsor: Senator Mike Rogers
 Committee: Judiciary

Date Completed: 9-15-95

RATIONALE

The ability to give up, or "disclaim", an interest in property can be extremely helpful in estate and tax planning matters. For example, the beneficiary under a will might neither need the inheritance nor desire the tax consequences of receiving it, but prefer that his or her children take the property instead. If this person disclaims his or her interest in the property in accordance with applicable law, the property may pass to the person's children as though he or she never received it. The disclaimer of property currently is governed by Public Act 9 of 1971, as well as Section 2518 of the Internal Revenue Code. According to the Probate and Estate Planning Section of the State Bar, Public Act 9 is overly restrictive in regard to the types of disclaimers that may take place. For example, trustees cannot disclaim property interests, and if a person gives up a present interest in property (e.g., trust income), his or her future interest automatically is disclaimed also. In addition, Public Act 9 contains restrictions on the time within which a disclaimer must be made, which apparently can hinder estate and tax planning. To create maximum planning flexibility, the State Bar section has suggested replacing Public Act 9 with a broader disclaimer statute.

CONTENT

The bill would create the "Disclaimer of Property Interests Act", which would repeal and replace Public Act 9 of 1971 to do the following:

- Specify the right of a person to disclaim a disclaimable interest in property, and define "property" as anything that could be the subject of ownership.**
- Allow the disclaimer of fiduciary powers and joint property, and allow the**

disclaimer of present interests without the disclaimer of future interests.

- Prescribe requirements for the validity and delivery of a disclaimer.**
- Specify the persons to whom disclaimed interests would be transferred ("devolve").**
- Allow disclaimers without a time limit as long as specific events that would bar the right to disclaim had not occurred.**
- Specify that a disclaimer would act as a nonacceptance of the disclaimed interest, rather than as a transfer of the interest.**

"Disclaimable interest" would include property, the right to receive or control property, and a power of appointment, but would not include an interest retained by or conferred upon the disclaimant by the disclaimant at the creation of the interest.

Right to Disclaim

The bill specifies that a person, or a fiduciary representing a person to whom a disclaimable interest devolved, could disclaim a disclaimable interest in whole or in part. A trustee also could disclaim a disclaimable interest, but only to the extent that the governing instrument expressly gave the trustee that right. ("Person" would include an entity and an individual, but not a fiduciary, an estate, or a trust.)

A disclaimer could be of a fractional or percentage share or of a limited interest or estate. A provision in a power of attorney granting the agent the authority to do whatever the principal could do, or words of similar effect, would include the authority to disclaim, unless that authority were specifically excluded or limited.

A fiduciary could disclaim a fiduciary power. This right would exist notwithstanding a restriction or limitation on the right to disclaim contained in the governing instrument.

A disclaimer, or a written waiver of the right to disclaim, would be binding upon the disclaimant or person waiving the right, and all persons claiming through or under him or her. The disclaimant would be treated as never having received the interest.

The common law right of disclaimer or renunciation would be abolished. The bill would not abridge the right of a person to waive, release, disclaim, or renounce property or an interest in property under another statute.

Validity/Delivery

A disclaimer would not be valid unless it were in writing, declared the disclaimer, described the disclaimed interest, were signed by the disclaimant, and were delivered as provided below. Incumbent fiduciaries or trustees would have to sign a disclaimer as specified in the bill.

Except as provided below concerning a power of appointment, if a disclaimed interest arose under a will or testamentary trust (created in a will), or by the laws of intestacy (governing the succession of property without a will), the disclaimer would have to be delivered after the death of the owner of the property, and before any event that would bar the right to disclaim. If a disclaimed interest arose under a will or by the laws of intestacy, the disclaimer would have to be delivered to the personal representative of the deceased owner's estate. If the interest arose under a testamentary trust, the disclaimer would have to be delivered to the trustee or, if a trustee had not been appointed, to the personal representative.

Except concerning a power of appointment, if a disclaimed interest arose under a governing instrument other than a will or testamentary trust, the disclaimer would have to be delivered after the effective date of the instrument and before any barring event, in one of the following manners:

- If the disclaimer were made by a beneficiary of a trust, it would have to be delivered to the trustee.
- If the disclaimer were made by a donee with respect to a gift from a living donor, it would have to be delivered to the donor.

- If the disclaimer were made by a beneficiary under a beneficiary designation, it would have to be delivered to the payor.
- If the disclaimer were made by a trustee with respect to a separate trust that was or would be established under the governing instrument, it would have to be delivered to another incumbent trustee who had not disclaimed or to all the living beneficiaries of the trust whose whereabouts were known or reasonably ascertainable.

If a disclaimed interest were subject to, or arose under, an exercise, release, or lapse of a power of appointment, the following would apply:

- A disclaimer by an appointee would have to be delivered to the donee, to the personal representative of the donee's estate, or to the fiduciary under the instrument that created the power of appointment.
- A disclaimer by a taker in default would have to be delivered to the donee, to the fiduciary under the creating instrument, or to one of the persons entitled to the property in the event of a disclaimer. The disclaimer could be delivered before or after the lapse or release of the power of appointment and would have to be delivered before any barring event.

If the disclaimed interest arose out of joint property, the disclaimer would have to be delivered after the creation of the joint ownership and before any barring event, to the person who created the joint property, to a remaining owner who had not disclaimed, or to the person entitled to the disclaimed interest in the event of a disclaimer. The barring of the right to disclaim a present interest would not bar the right to disclaim a future interest.

A fiduciary power could be disclaimed at any time, before or after exercise of the power. The disclaimer would have to be delivered to the person who established the instrument that gave rise to the power or to one of the following:

- If the fiduciary were a personal representative, to all the living devisees under the will whose whereabouts were known or reasonably ascertainable.
- If the fiduciary were a trustee, to another incumbent trustee who had not disclaimed the power or to all the living beneficiaries of the trust whose whereabouts were known or reasonably ascertainable.

- If the fiduciary were a guardian or conservator, to the interested parties.
- If the fiduciary were an agent, to the principal; or if the principal were legally incapacitated, to the principal's presumptive heirs at law.

A disclaimer by would have to be delivered by personal delivery to a person or a person's fiduciary, by first class mail, or by another means that was reasonably likely to accomplish delivery. Specific provisions would apply if delivery were to a fiduciary.

A copy of a disclaimer would have to be filed in a probate court where proceedings concerning the disclaimed interest were pending, or in the probate court that would have jurisdiction if proceedings were commenced. If the disclaimed interest pertained to real property, a copy would have to be recorded in the office of the register of deeds of the county where the property was located.

Devolution of Disclaimed Interest

Except as provided below, if a disclaimed interest arose under a will or testamentary trust, or by the laws of intestacy, and the decedent had not provided for another disposition of that interest, the interest would devolve as if the disclaimant had predeceased the decedent. If by law or under the will or trust, however, the disclaimant's descendants would take the disclaimant's share by representation if the disclaimant predeceased the decedent, the interest would pass by representation to the descendants of the disclaimant who survived the decedent.

Except as otherwise provided, if the disclaimed interest arose under a governing instrument other than a will or testamentary trust, and the instrument did not provide for another disposition, the interest would devolve as if the disclaimant had died before the time when the interest was entitled to take effect in possession or enjoyment. If by law or under the governing instrument, however, the disclaimant's descendants would take the disclaimant's share by representation if the disclaimant died before the effective date of the instrument, the interest would pass by representation to the disclaimant's descendants who survived the instrument's effective date.

A future interest that took effect upon or after the termination of the disclaimed interest, would take effect as if the disclaimant had predeceased the decedent or the time the interest was entitled to take effect. A future interest that was held by the

disclaimant and that took effect at a time certain would not be accelerated.

If the disclaimed interest arose out of joint property created by a testamentary or nontestamentary governing instrument, the following would apply:

- If the disclaimant were the only living owner, the disclaimed interest would devolve to the estate of the last to die of the other joint owners.
- If the disclaimant were not the only living owner, the interest would devolve equally to the living joint owners, or all to the other living owner, if there were only one.

If the donee of a power of appointment disclaimed the power, the property that was subject to it would devolve as follows:

- If the power of appointment arose out of a will or testamentary instrument, as if the donee died before the decedent.
- If the power arose out of a governing instrument other than a will or testamentary trust, as if the disclaimant died before the instrument's effective date.

If all incumbent trustees disclaimed a disclaimable interest and the instrument did not provide for another disposition, the interest would devolve as if the trust never existed. If fewer than all incumbent trustees disclaimed a disclaimable interest and the instrument did not provide for another disposition, the trustee who disclaimed would be treated as never having had any interest in or power over the interest.

If a fiduciary disclaimed a fiduciary power, the power would cease to exist as of the disclaimer's effective date. A disclaimer of a fiduciary power by one of multiple incumbent fiduciaries would be binding only on the fiduciary who disclaimed. A disclaimer of a fiduciary power by all incumbent fiduciaries would be binding on all successor fiduciaries, unless the disclaimer stated otherwise.

Barring Events

The right to disclaim would be barred by any of the following events that occurred after the event giving rise to the right to disclaim and before the disclaimer was perfected:

- An assignment conveyance, encumbrance, pledge, or transfer of the property, or a contract for such a transaction.

- A written waiver of the right to disclaim.
- An acceptance of the disclaimable interest or a benefit under the interest after actual knowledge that a property right had been conferred.
- A sale of the property under judicial sale.
- The expiration of the permitted applicable perpetuities period.

The right to disclaim would be barred to the extent provided by other applicable law. A partial bar would not preclude the disclaimant from disclaiming all or any part of the balance of the property if the disclaimant had received a portion of it and there remained an interest that the disclaimant was yet to receive. An act that barred the right to disclaim a present interest in joint property would not bar the right to disclaim a future interest in joint property.

Existing Interests

A present interest in property that existed on the bill's effective date for which the time for delivering a disclaimer under the bill had not expired, could be disclaimed after the bill's effective date and before any barring event. A future interest that existed on the bill's effective date also could be disclaimed if the interest had not become indefeasibly vested or if the taker were not finally ascertained.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would give estate and tax planners much more flexibility than they now have in regard to the disclaimer of property interests. In the first place, while a person probably could disclaim virtually any type of property interest under current law, the bill's definitions would make this clear. The bill also would expand the types of persons who may disclaim; for example, the bill would include trustees and agents under powers of attorney. In addition, the bill would allow the disclaimer of a present interest without the disclaimer of a future interest; for example, a person could give up his or her present right to receive interest income from a trust but retain his or her future interest in receiving the body of the trust. Further, the bill would remove the time limits on the ability to disclaim property interests. While current law generally imposes a time limit of 10 months, the bill would allow disclaimer at any time as long

specific events that would bar the right to disclaim had not occurred. Although the Internal Revenue Code still imposes a nine-month requirement, the bill would enable a person to disclaim beyond that deadline and incur the gift tax liability, if that were his or her preference. These and other changes would give families maximum flexibility to plan tax and estate matters.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have no fiscal on State or local government.

Fiscal Analyst: M. Bain

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.