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## *Reduce or Eliminate Estate Taxes with a Disclaimer into Your Family Foundation or Charity!*

Disclaimers are often used in post-mortem estate planning to maximize tax reduction opportunities, move assets from one generation to another, or to correct some inequity and further the decedent's wishes. Disclaimers can also be used, as one family recently did, to achieve a charitable deduction for the estate of the decedent and benefit all of the patriarch's beneficiaries.

A man named Robert died with a will, in which he named his daughter Sarah and son-in-law John as co-executors of his estate. Before Robert died, he established a family foundation that qualified as a Section 501(c)(3) tax-exempt organization. Sarah served as the Foundation's president and John served as its vice president; each was one of six members of the Board of Directors.

In his will, Robert left the residue of his estate to Sarah and provided that if Sarah disclaimed any part of the residue, then the disclaimed amount would go to the Foundation. Within nine months after her father's death, and without having accepted any of the disclaimed property or any benefit from it (interest or dividend income, for example), Sarah filed a written disclaimer in an undisclosed dollar amount with the appropriate state court having jurisdiction over the will. If the disclaimer was valid ("qualified" in IRS parlance), then Robert's estate would get a significant estate tax charitable deduction.

Without getting too technical, the provision of the Internal Revenue Code governing disclaimers (Section 2518) permits a recipient of an interest in property to disclaim it without the interest in property being treated as having been transferred to the disclaimant for gift or estate tax purposes, so long as the disclaimant makes the disclaimer in writing, within nine months of the interest being created, and has not received any of the property or any benefit from the property. In addition, he disclaimant cannot either alone or in conjunction with another, direct where the property flows after the disclaimer (or have the power to direct the redistribution or transfer of the property or interest in property to another person) unless the power is limited by an ascertainable standard. Moreover, a disclaimant who is also a fiduciary (executor, trustee, director, partner, for example) cannot retain wholly discretionary power to direct the enjoyment of the disclaimed property.

For the Foundation, Robert's estate, and the beneficiaries, this meant that if Sarah had the wholly discretionary power as a Director of the Foundation to direct how the Foundation used the property she disclaimed, the disclaimer would be deemed unqualified. If this was the case,

then the Foundation could still receive the property, but Robert's estate would not enjoy an estate tax charitable deduction.

The Foundation's Board reviewed its charter and found that it had no provision that would ensure that Sarah, as a Director, would not have any discretionary control over the disposition of the disclaimed property. The Foundation amended its charter with a provision that charged the Board with the responsibility of ensuring that no person who disclaimed property that thereafter was received by the Foundation would have any discretionary power to direct the distribution of such disclaimed property. The Foundation also amended its bylaws such that any property received as a result of a disclaimer would be segregated into a special account controlled by a special committee. Any Director who disclaimed property to the benefit of the Foundation would not be permitted to serve on the special committee.

The Internal Revenue Service determined that Sarah's disclaimer was a qualified disclaimer under Section 2518, provided that the Foundation's amendments to its charter and bylaws were effective under governing state law. As such, the property passing to the Foundation as a result of Sarah's disclaimer qualified for an estate tax charitable deduction.

Thus, because the estate and the Foundation worked together, Sarah was able to ensure that her father's estate enjoyed a significant estate tax charitable deduction to the benefit of all the beneficiaries of the estate. In addition, the Family Foundation established by Sarah's father, received a significant donation in furtherance of the family's philanthropic legacy.

If you have questions about this case or how you can create flexibility in your estate planning to the benefit of your loved ones and in furtherance of your family legacy, please contact us or your estate planning and tax advisors.

**CIRCULAR 230 DISCLOSURE:** The following disclosure is required pursuant to IRS Circular 230, which sets forth best practices for tax advisors. Any tax advice contained herein is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties or promoting, marketing or recommending to another party any transaction or matter addressed in this communication. If you would like a written opinion on the one or more Federal tax issues addressed above upon which you may rely for the purpose of avoiding penalties please contact the law firm.