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Fall 2016

## Defending Dependent Disclaimers

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42 ACTEC L.J. 245

ACTEC Law Journal  
Fall, 2016  
Katherine R. Guzman

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## \*245 DEFENDING DEPENDENT DISCLAIMERS

I have often wished for the privilege of testing my ideas against the responses of others such that it feels like a true conversation of ideas. Through their candid, careful essays, Jeffrey Cooper, Christina D'Elia, and Bich-Nga Nguyen have offered just that. With insight made acute through experience, their observations reveal theoretical and practical perspectives on the dependent disclaimer conundrum in ways that my own limits, suppositions, and biases might otherwise have obscured. I am genuinely grateful for their generosity, and how their work has informed my understanding and appreciation for the complexity of the issue on pragmatic, doctrinal, and philosophical fronts.

Although these scholars raise more nuance than my reactions here capture, a few significant themes emerge that have refined my view of the dependent disclaimer and judicial responses thereto.

### A. Intent and Authority

In locating subtle ways in which *Friedman's* rejection of the dependent disclaimer there sought furthers legislative or individual choice, Professor Cooper gently reframes to remind observers of animating succession principles. He extends a powerful invitation to view the Surrogate's ruling as less an unprincipled rejection of a laudable plan than "a strong defense of both legislative authority and ... a testator's presumed intent."<sup>1</sup> More specifically, he credits its consonance with an "anti-conduit" value choice that the state legislature appropriately and statutorily expressed through its intestacy scheme,<sup>2</sup> and the chance (if not likelihood) that savvy decedents implicitly endorse (thus intend) those default rules whenever they fail to write a will. As he sees it, "[t]he inference to be drawn from the decedent's inaction is that this financially sophisticated individual made a conscious choice to accept the default regime, a choice as entitled to deference as if it were set out in a \*246 valid will."<sup>3</sup> By extension, he honors intent, efficiency, and authority when he thoughtfully asks whether "[i]f the decedent made a conscious choice to follow the intestacy statutes--and the petitioner certainly didn't prove otherwise--was the Surrogate wrong to give deference to that choice?"<sup>4</sup>

Professor Cooper's observations merit serious consideration, particularly given the somewhat incontrovertible position that "we seek to effectuate the intent of the dead."<sup>5</sup> Nevertheless, I have less faith than might he in either (1) the utility of grounding judicial rejection of a second-order decision, such as the one to disclaim, on first-order distribution theory or (2) the prudence of divining too much intent--particularly over post-distributive decisions--from the mere (and too common) fact of an intestate death.

Were they able to be asked,<sup>6</sup> perhaps the majority of intestate decedents would respond that they never wrote wills precisely because they knew and liked what intestacy offered,<sup>7</sup> and perhaps even relay a preference for divvying assets over

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distributing all to a spouse. If so, and if the predominant intestacy design is to mirror that which most decedents would prefer most of the time, then reifying that majoritarian preference through default rules makes sense.<sup>8</sup> But salient variables could make the questions and answers much different when prompted by dependent disclaimers, such that assuming strong theoretical connection between basic distribution rules and disclaimer outcomes might be inapt.

Carrots and sticks are powerful. I suspect that given enough of a tax hit-- \$200,000? \$2,000,000?--many if not most decedents would respond differently, and particularly if they trusted the benevolent decisionmaking (or at least, enforceable support obligation) of the relative so disclaiming on the child's behalf. As Ms. Nguyen notes, "deadweight property loss" to families in favor of government seems wrongheaded,<sup>9</sup> particularly where an imposed GST would compound the tax burden in \*247 the hands of the minor descendant. Further, the prototypical dependent disclaimer arises only *after* the intestacy scheme as passed by the legislature is given its preliminary due. Stated differently, where (as in *Friedman*) a decedent is survived by a spouse, two surviving children, and grandchildren through one or both, and where the estate is split between the spouse and the children,<sup>10</sup> it is up to those takers alone to decide whether to disclaim and to the law alone to determine where the disclaimed interest will go. Absent a devised defeasible fee or some other private land use control, ongoing solicitousness for the decedent's presumed intent is unwarranted once the heirship die has been cast. Why muse over or suspect what decedents *may* have thought or wanted, when living vested survivors exist to decide for themselves?<sup>11</sup>

Most foundationally, I see no ineluctable link between an anti-conduit position and an anti-dependent disclaimer one. For example, a decedent's metaphorical distributive "choice" between a spouse and child differs altogether from a metaphorical choice, surfaced through dependent disclaimers, between both child (whose vested inheritance right she has chosen to reject) *and* aligned spouse, and decedent's minor grandchild (entitled to forced or volitional support from that parent, and who would not be entitled to a cent from the decedent's estate were it not for her parent's decision to seek tax savings or some other collectivist good).<sup>12</sup> Stated somewhat differently, I disagree with the premise that New York, or any state for that matter, has taken an anti-conduit position. One need only consider basic lapse and representational principles to see why.<sup>13</sup>

#### \*248 B. Property and Promises

Bich-Nga Nguyen extends some of Professor Cooper's subsidiary points and freshly develops others, particularly as pertaining to the nature of the dependent interest disclaimed. While recognizing the suboptimal position into which involved parties and courts are placed, both Professor Cooper and Ms. Nguyen challenge casting the conditional, as-yet-undisclaimed-interest-that-shall-not-be-named "held" by the child as too speculative to be burdened by best interests review. Professor Cooper disagrees that all expectancies are created equally. To him, and quite distinct from the child's retention of the primary interest disclaimed, the doubled risk to the minor of spent-down assets when the disclaimed interest ends up with an ancestor twice- (rather than once-) removed must count for something given the inverse relationship between an asset's value and its perilously contingent remoteness. Ms. Nguyen agrees. While sympathetic to the task of assigning name or value to such an indefinable, unevaluable "thing," she nevertheless cautions that judges who reject dependent disclaimer petitions may simply be uncomfortable with the slippery, squonk-like notion that in this doubly-contingent expectancy, the child has no "thing of value" or nothing at all to protect.<sup>14</sup> In the main, ironically, I find myself in accord with these observations, having elsewhere argued that the very fact that an "expectancy" is even bestowed a label suggests that its treatment intermittently approaches quasi-property status and that perhaps it should be treated more like certain future interests than orthodoxy might willingly concede.

That said, extant doctrine is adamant (or at least adamantly claims) that expectancies are not property.<sup>15</sup> If not, and if the interest with which dependent disclaimers deal are equivalent or lesser in nature, they too are neither protectable nor compensable no matter how much more "expectant" they become.<sup>16</sup> Correlatively, they should trip no "best interests" trigger to safeguard what has yet not and may never come to pass. After all, if undeniable categories of "actual" property (e.g. future interests following defeasible fees) are but slightly protected under such theories as waste, condemnation, or perpetuities, it would be puzzling to \*249 grant greater protection to an arguably inferior thing. With this much, Ms. Nguyen might agree. She nevertheless proposes that the "perhaps legally sound" notion that the interest "is not even an inchoate expectancy" might simply be too technocratic and bitter a pill for courts to accept absent more familiar and articulable rationale,

particularly as “it” will at some point become something benefitting someone depending on when and in whom it takes rest.<sup>17</sup>

### C. Individuals versus Groups

Christina D’Elia turns matters yet again. She reveals having most commonly confronted disclaimers made by adults to accelerate a child’s share--a scenario where both the decision and loss fall to none but the disclaimant, benefit diverts to the children, and no court need superintend the result.<sup>18</sup> That the dependent disclaimer upends matters prompts Ms. D’Elia to contemplate the paradoxical quality of applying an individualistic “best interests to the child” standard to any determination where upsides more collectively accrue. As she surmises, at least under the paradigmatic scenario, where without the parent disclaiming there would be nothing for the child to disclaim either, neither party will actually receive any of the property and thus neither will benefit any more than the other.<sup>19</sup> She continues: “[the] property moves beyond the reach of *either* of them, to put *both* the parent and the minor child in a better position than if the dependent disclaimer had not been made.”<sup>20</sup> Finally, she suggests that given the failure of dependent disclaimer ever to generate 1-to-1 benefit for the child, perhaps best interests can never be met,<sup>21</sup> or at least has not been carefully enough explicated outside of child welfare arenas to render it workable.

\*250 How futile if so: “your petition may be granted if you can prove it is in the child’s best interests, but as it will never be in the child’s best interests, you will never actually be able to prove it. Your gambit rests on luck in convincing some court that a rising tide will lift all boats, including that of the child.” If *that* is the case, why even offer the possibility?

As earlier discussed, one might simply respond that since the child may be sacrificing no interest, no “conflict” thereof is possible thus no such review need occur. Ms. D’Elia speaks similarly when suggesting that there should be no need to prove direct benefit to (much less “best” versus good, fair, rational, or other interest of) the minor when disclaiming will neither confer direct benefit on the parent nor threaten familial bonds.<sup>22</sup> What is more, she chides that courts themselves created this conflict when they undertook best interests review in the first place and layered a “purpose requirement” to the application.<sup>23</sup>

Ms. D’Elia’s point is compelling. Reminiscent of earlier concern, however, sole reliance on this argument--particularly given that existing disclaimer statutes usually demand best interests review--is risky. Both Ms. Nguyen and Ms. D’Elia wisely counsel that delineating when best interests should be unnecessary, diluted, or presumed; supporting its rationale through adjuvant financial and familial components; and safeguarding the likelihood that some party or court will hold incentive or standing to object, might ease disclaimer assessment and discharge burdens for third-party fiduciaries, prove more palatable to struggling courts, and make the suggested reform less vulnerable to the charge that tinkering at dependent disclaimer margins creates more problems than it solves.

Many cures exist to the dependent disclaimer concern, some more likely than others, and none that I care to promote: abolish estate taxes, abolish marital deductions, abolish disclaimers or tax linkages thereto. But there remains one cheap and easy corrective on which these authors, myself, and even the jurists who’ve confronted the issue agree: plan, which is perversely just what cases like *Friedman* might impel. For as Ms. D’Elia reminds, lawyers should advise clients when law changes, clients should inform lawyers when their lives change.<sup>24</sup> Invoking *Goree*, her closing conviction summarizes: “An individual with a [valuable] principal asset, the worth of which is immeasurably more valuable as a result of the history and livelihood it has provided for so many [family \*251 members], seems deserving of more than naïve over-reliance upon the default laws of the state.”<sup>25</sup>

As my own grandmother might have said, “and how.”

### Footnotes

<sup>1</sup> Jeffrey A. Cooper, *In Defense of Friedman: A Reply to Professor Guzman*, 42 ACTEC L.J. (forthcoming 2017) (manuscript at 1) (on file with the ACTEC Law Journal).

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<sup>2</sup> *Id.* at 3. By dividing the decedent's estate among surviving spouse and children, such intestacy statutes reject the "conduit theory," under which the decedent's descendants would presumptively enjoy sufficient pass-through benefits were everything to end up in their parent's (i.e. the decedent's spouse's) hands.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* I say "somewhat" because some have convincingly argued that testamentary freedom is more stated than real, particularly when courts assess the estate plans made by those who may or do lack capacity or contain provisions that run counter to some majoritarian norm.

<sup>6</sup> Which in some sense, they can be through reviewing the wills of similarly situated testators.

<sup>7</sup> Arguably, "if you choose not to decide, you still have made a choice." RUSH, FREEWILL (7th Studio Recording 1980).

<sup>8</sup> Particularly so if opting out through an individualized estate plan is relatively, quick, cheap and easy.

<sup>9</sup> Bich-Nga H. Nguyen, Commentary, 42 ACTEC L.J. (forthcoming 2017) (manuscript at 3) (on file with the ACTEC Law Journal).

<sup>10</sup> See *In re Friedman*, 7 N.Y.S.3d 845, 845 (Sur. Ct. 2015) (the estate was split between decedent's spouse, son, and daughter). More remote descendants of the decedent cannot inherit where their surviving parent can.

<sup>11</sup> Prof. Cooper accedes this point by cautioning against being read to imply that post-mortem planning is subordinate to testamentary intent. He nicely cabins his remarks to the broader observation that the Surrogate may have factored or furthered testamentary intent by refusing to permit the petitioned-for disclaimer, particularly as the petitioners opened that intent door. See Cooper, *supra* note 1, at 231 n.27.

<sup>12</sup> It would be interesting to check the strength of the presumed tie between succession and dependent disclaimer rules by assessing whether (1) states that statutorily permit dependent disclaimers as of virtual right embrace conduit succession theory (the existence of which would seem to obviate the problem), or (2) states strictly assessing dependent disclaimers through best interests similarly insulate children from the effects of parental release, assignments, advance, or powers of appointment.

<sup>13</sup> Assume that X is survived by two children and each of their two children. Although six descendants exist, in no state will X's estate be divided into sixths, which would represent a pure per capita scheme. Instead, X's children will each take 1/2 of X's estate, a result that stems from a conduit theory.

<sup>14</sup> See Nguyen, *supra* note 9, at 241. Wittgenstein might thus err to assert that "the limits of my language mean the limits of my world." LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 115 (D.F. Pears & B.F. McGuinness trans., London, Routledge & Kegan Paul 1974) (1961).

<sup>15</sup> RESTATEMENT (THIRD) OF TRUSTS, § 41 cmt. a (AM. LAW INST. 2003) ("[B]y all traditional and current concepts of property, expectancies are not property interests.").

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<sup>16</sup> For example, negative 10 and negative 3 are both negative numbers, even though one is farther from “positive” than the other. Of course, these interests are no longer mere expectancies once a parent unconditionally disclaims the subject interest into the hands of the child.

<sup>17</sup> Nguyen, *supra* note 9, at 242. One issue with which I might quarrel is Ms. Nguyen’s suggestion that courts might be solicitous of the dependent interest given its inchoate to “very choate” transformation upon the death of a parent having not yet disclaimed. Where that happens, it would seem that dependent disclaimer would be off the table and the interest would fall within the parent’s estate (as the parent need only survive the original decedent rather than the administration of her estate). Of course, the child could disclaim at that point, but only if, e.g., she had not been disinherited by the parent’s will.

<sup>18</sup> Christina Ciaramella D’Elia, *Dependent Disclaimers--Who Wields the Power?*, 42 ACTEC L.J. 233, 234 (2017).

<sup>19</sup> *Id.* at 234-35. Prof. Cooper might remind that if the result of Parent A and Child B’s dual disclaimers is ownership by B’s grandparent, C, then A’s closer kinship to C might be more likely to generate pass-through benefit to her than to B. *See* Cooper, *supra* note 1, at 230.

<sup>20</sup> D’Elia, *supra* note 18, at 235 (emphasis added).

<sup>21</sup> *Id.* at 235-36. Barring the presumably rare situation where, for example, the child seeks to disclaim interests in which liability exceeds value.

<sup>22</sup> D’Elia, *supra* note 18, at 4.

<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 6.

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