

You Want me to Give up What? – Disclaimer, Renunciation, Release, Surrender and Waiver

By Jonathon Kappy

On most occasions, clients seek to maximize their interests or benefits. They are reluctant to give up any rights or entitlements they may have. There are, however, circumstances where either it is in their best interest to do so, or they choose to do so for other, more virtuous reasons.

Without casting judgment on whether such decisions are rooted in selfish or selfless motivations, it is worthwhile to examine the different means by which rights can be forfeited.

A. Disclaimers and Renunciations

The proper application of disclaimers and renunciations begins with the appreciation that a beneficiary cannot be compelled to accept a gift from a testator. This was aptly put by Abbott C.J. in *Townson v. Tickell*,ⁱ in 1819, as follows

The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge, and if it turn[s] out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. ... A man "cannot have an estate put into him in spite of his teeth". [quoting Ventris, J., in *Thomson v. Leach*, 2 Ventris 198.]

The core consideration as to whether disclaimer is an available means of forfeiture (absent limited exceptions) is whether the forfeiting party has yet to receive a benefit from the interest to be disclaimed. Once that interest has been accepted, a disclaimer or renunciation is no longer available.ⁱⁱ

There is no legal form for a disclaimer. A gift may be disclaimed in writing, orally, or by conduct. It is, however, worth noting that Form 74.11 of the *Rules of Civil Procedure* provides a particular form for the Renunciation of Right to Certificate of Appointment of Estate Trustee. While, at law, a renunciation has no legal form or mandatory language, it is recommended that Form 74.11 be adopted for that

purpose to ensure a Certificate of Appointment of Estate Trustee is granted without undue delay.

The concept of renouncing a right to a Certificate of Appointment of Estate Trustee is the same as renouncing an interest in a gift. It can only be renounced before it is accepted. Consequently, if an individual has already taken steps as Estate Trustee, it is generally accepted that renunciation is no longer available. The Estate Trustee will have to be removed by court order.ⁱⁱⁱ

The law has also recognized the principle of partial disclaimer. While certain benefits may have already been accepted, those interests that have not yet been accepted may be disclaimed or renounced. In *Coulson, Re*,^{iv} a beneficiary who had received income annually from a testamentary trust sought to disclaim her interest in the income of the trust for a one-year period, and thereafter resume her entitlement to income. While the court considered certain limitations on a beneficiary's entitlement to do so, the court found that a partial disclaimer, or disclaimer of a future interest, was permissible even after part of the gift had been accepted.

Where a beneficiary has disclaimed a gift, the law may permit the beneficiary to retract the renunciation so long as no one has acted to their detriment in reliance on the disclaimer.^v

Distinguishing between a disclaimer and other forms of forfeiture may have significant impact on what becomes of that forfeited gift. Section 23 of the *Succession Law Reform Act* directs, in the absence of a contrary intention expressed in a testamentary document, what is to become of a devise or bequest which is disclaimed.

Disposition of property in void devise

23 Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,

(a) the death of the devisee or donee in the lifetime of the testator; or

(b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,

is included in the residuary devise or bequest, if any, contained in the will. R.S.O. 1990, c. S.26, s. 23.

B. Release and Surrender

Whereas a disclaimer applies to an interest not yet accepted, releases and surrenders apply to interests already accepted or owned by the person giving up those interests.

Releases and surrenders differ from disclaimers in two notable ways:

1. Releases and surrenders abandon interests already accepted, or interests the benefit of which have already been enjoyed; and
2. As releases and surrenders apply to gifts already accepted, the testator or the originator of the interest does not dictate what becomes of the forfeited interest. Instead, the person granting the release and surrender will dictate who will subsequently enjoy that benefit.

In this respect, releases and surrenders inherently include an element of assignment. This is no more obvious than in the *Trustee Act*,^{vi} which defines the term ‘assign’ as follows:

“assign” means the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring land of which such person is possessed, either for the whole estate of the person so possessed or for any less estate, and “assignment” has a corresponding meaning; (“céder”, “cession”)


C. Waiver

While a waiver is similar to a release in that someone abandons an existing interest or right, it is used in a different context. As set out above, the implication of a release and surrender is a transfer of that interest to another person.

In contrast, an interest or right that is waived simply disappears. It is eliminated such that no one receives that benefit. Some common examples include waivers of contractual rights, intellectual property rights or the right to independent legal advice. If a mortgagee waives its right to interest payments, the obligation on the mortgagor to pay interest is gone: no other person possesses the right to seek that interest.

In the estate context, reference to waiver appears in Part V of the *Succession Law Reform Act*. Subsection 63(4), in reference to the court’s jurisdiction to award a dependant support from an estate, provides:

63(4) An order under this section may be made despite any agreement or waiver to the contrary. R.S.O. 1990, c. S.26, s. 63 (4).

Given the differing applications and implications of disclaimers, renunciations, releases, surrenders and waiver, consideration should be given as to what is really intended when a client desires to forfeit specific rights or benefits. 



Hull & Hull LLP

Editor: Suzana Popovic-Montag
spopovic@hullandhull.com

141 Adelaide St. W., Suite 1700
Toronto, Ontario M5H 3L5

Tel: 416.369.1140 | Fax: 416.369.1517

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ⁱ *Townson v. Tickell* (1819), 3 B. & Ald. 31, 106 E.R. 575 (Eng. K.B.), stated at pp. 576-577.

ⁱⁱ *Biderman v. R.*, 2000 CarswellNat 215, 2000 CarswellNat 4742, [2000] 2 C.T.C. 35, [2000] F.C.J. No. 194, 2000 D.T.C. 6149, 253 N.R. 236, 95 A.C.W.S. (3d) 198; also see *Bence v. Gilpin* (1868), L.R. 3 Ex. 76, *Montreal Trust Co. v. Matthews* (1979), 99 D.L.R. (3d) 65 (B.C. S.C.) at p. 70; Mellows, *The Law of Succession*, 5th ed., Butterworths, London, 1993, at p. 420; Williams on Wills, *The Law of Wills*, vol. 1, Butterworths, London, 1995, at p. 480.

ⁱⁱⁱ Although it is noted that some jurisprudence has permitted an Estate Trustee to renounce at any time before probate is granted, notwithstanding steps taken in the administration of an estate.

^{iv} (1977), 16 O.R. (2d) 497 (Ont. C.A.).

^v See *Re Cranstoun*, [1949] Ch.523, also see *Coulson, Re* 1977 CarswellOnt 2623, [1977] 1 A.C.W.S. 369.

^{vi} *Trustee Act*, RSO 1990, c T.23.



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