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Drafting Around Disclaimer

Testators may not be aware of the potential consequences resulting from a disclaimer of an interest in an estate. A disclaimed specific bequest or legacy will generally fall into the residue of an estate, to be distributed in accordance with the residuary provisions of the Last Will and Testament. However, the treatment of a disclaimed residuary interest in an estate may either pass on intestacy or to the remaining residuary beneficiary (or beneficiaries). A disclaimer may have the effect of frustrating the testator's intentions to include or exclude certain beneficiaries if the desired treatment of a disclaimed share is unclear.

In cases of disclaimer, general interpretation rules typically apply. On an application for directions, a court will attempt to determine the subjective intention of the testator in the event of a formal disclaimer by a beneficiary. In *Tribble Estate v. McGuire*, [1993] O.J. No. 2274, 1 E.T.R. (2d) 69, one of six residuary beneficiaries disclaimed her interest in the estate. In determining that the disclaimed interest should be equally divided among the five remaining residuary beneficiaries, the Court considered a number of factors, including the following:

- the Will's residuary clause, which provided that the share to which the six beneficiaries were entitled would pass to the survivors in the event that one or more of them predeceased the testator;
- affidavit evidence that explained that a number of the individuals who would have benefitted on intestacy were left specific gifts under the Will; and
- the "golden rule" that a testator does not generally intend to die intestate.

It may be prudent for drafting solicitors to specify the preferred treatment of a disclaimed interest in the testator's estate within a Last Will and Testament. For example, a provision may be included that provides that any interest in an estate that is disclaimed be treated as if the disclaiming beneficiary had predeceased the testator or otherwise to direct how a disclaimed interest ought to be administered.