A Toxic Inheritance: Addressing the Legal Implications of Inheriting Hazardous Waste Land.

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I. Introduction

Inheritance law stands as a cornerstone of legal systems worldwide, governing the transfer of assets and rights from one generation to the next. Its implications, however, extend far beyond the realm of wealth management and tax strategies. This paper addresses a neglected area of overlap: inheritance law and hazardous waste. Consider Sarah, a beneficiary from Southern California, whose narrative aptly exemplifies the intersection.

As a beneficiary of her father, Sarah, found herself flooded with immense liability rather than opportunity when she inherited hazardous land.[1] In 1986, when Sarah was 18 years old, she inherited a piece of property from her father.[2] Twenty-five years later, after Sarah sold the property, she was named in a lawsuit, claiming the inherited property had residual contamination in the soil and made dozens of people sick.[3] Responding to the lawsuit, Sarah paid over $500,000 in legal fees and suffered two and a half years of extensive worry and stress.[4] She recalled, "I felt bad for these people, but I didn't do it. I was being punished for the sins of my dad. It's frustrating. There was nothing I could do."[5] Marty Babitz, senior resident of the Hawthorn Institute, commented on Sarah's situation and explained the easiest solution would be for the beneficiary to disclaim the property, and if everyone else in line to inherit also disclaimed their interest in the property, the property would end up going to the state.[6] When property escheats to the state, the costs are directly inflicted on the government. Why should Sarah be penalized for the contamination perpetrated by her father?

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[1] Paul Sullivan, *Contaminated Property Makes for Costly Inheritance*, N.Y. TIMES, (Feb. 19, 2016), https://www.nytimes.com/2016/02/20/your-money/contaminated-property-makes-for-costly-inheritance.html.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

When it comes to toxic waste sites, the United States Environmental Protection Agency has juggled individual accountability, negative externalities, and federal authority. Thousands of contaminated sites exist throughout the United States. These include manufacturing facilities, processing plants, landfills, and mining sites.[7] Due to the escalating threats to public health and the adverse impacts on the environment, federal law has homed in on regulating toxic waste site hazards.[8]

Inheriting toxic land poses a legal challenge regarding a beneficiary's ability to abandon property, both as a matter of law and policy. This raises the additional question of who should bear the clean-up liability for an inherited or abandoned waste site. This paper will argue that the law should impose clean-up liability costs on the testator's estate to reduce environmental harm, improve the public's health, and comply with the congressional intent of the Comprehensive Environmental Response, Compensation, and Liability Act.

II. Background

To regulate hazardous waste on a large scale, Congress enacted the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[9] RCRA focuses on managing hazardous waste until its ultimate disposal, and CERCLA governs abandoned waste sites and the liability and response tactics that follow.[10] Congress has directed little attention to toxic waste sites that knowingly or unknowingly pass through generations. Likewise, there is no state law directive governing how

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[7] *What is Superfund?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/what-superfund#:~:text=These%20sites%20include%20manufacturing%20facilities,environment%20posed%20by%20contaminated%20sites (last updated Nov. 1, 2022).
[8] *Id.*
[9] *Comparing RCRA and CERCLA*, U.S. ENV'T PROT. AGENCY, https://semspub.epa.gov/work/05/940202.pdf (last visited Nov. 29, 2023).
[10] *Id.*

to control liability for inherited hazardous land. There is a general lack of scholarship addressing the liability implications of inheriting hazardous waste land. This paper will focus on an undefined area of the law: the laws and policies that follow the inheritance of a toxic waste site.

A. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In 1980, Congress enacted CERCLA to regulate the cleanup of uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other releases of pollutants into the environment.[11] CERCLA rations the liability for cleanup costs among arrangers, transporters, present owners, and past owners.[12] Under this liability scheme, the past owners, current owners, operators of facilities, generators of waste, and transporters of waste are all exposed to potential liability.[13] These potentially responsible parties ("PRPs") are liable for cleanup costs, natural resource damages, and the cost of federal public health.[14]

To carry out Congress' intent, CERCLA gives the Environmental Protection Agency ("EPA") the authority to clean up contaminated sites and hold responsible parties accountable for their associated costs.[15] The EPA conducts the clean-up themselves when a PRP is unidentifiable or to respond expeditiously to a release of toxic waste.[16] To do so, CERCLA provides financing

[11] *Summary of Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act (last updated Sept. 6, 2023).
[12] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal (last updated July 28, 2023).
[13] CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012) https://crsreports.congress.gov/product/pdf/R/R41039#:~:text=Congress%20enacted%20the%20Comprehensive%20Environmental,the%20public%20from%20potential%20harm.
[14] *Id.*
[15] *What is Superfund?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/what-superfund#:~:text=These%20sites%20include%20manufacturing%20facilities,environment%20posed%20by%20contaminated%20sites (last updated Nov. 1, 2022).
[16] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal (last updated July 28, 2023).

for cleanup and enforcement actions through the Hazardous Substance Superfund (‘”Superfund”).[17] The Superfund gives the EPA the funds to clean up these contaminated sites and then the ability to assert a cause of action for reimbursement against the PRPs.[18] The three basic options for enforcement are: (1) conduct the response itself and seek to recover its costs from potentially responsible parties; (2) compel potentially responsible parties to cleanup themselves through administration or judicial proceedings; and (3) enter into a settlement with the potentially responsible parties to perform all or part of the portions of work.[19] Although the goal is to make the polluters pay all these expenses, the EPA will often have to cover the clean-up expenses with the intention of recovering these expenditures through cost-recovery actions.[20]

Additionally, CERCLA authorizes private parties to recover clean-up costs. CERCLA liability is established if: (1) the site in question is a facility; (2) the defendant is a responsible person; (3) a release or threatened release of a hazardous substance has occurred; and (4) the release or threatened release has caused the plaintiff to incur response costs.[21] If all four conditions are satisfied, CERCLA liability is established, and the EPA or a private party may hold the PRP accountable.[22]

Congress has amended CERCLA numerous times to address fairness by modifying the scope of liability and assessing the proper responsible parties.[23] Historically, under CERCLA,

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[17] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV’T PROT. AGENCY, https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal (last updated July 28, 2023).
[18] *What is Superfund?*, U.S. ENV’T PROT. AGENCY, https://www.epa.gov/superfund/what-superfund#:~:text=These%20sites%20include%20manufacturing%20facilities,environment%20posed%20by%20contaminated%20sites (last updated Nov. 1, 2022).
[19] *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, U.S. ENV’T PROT. AGENCY, https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal (last updated July 28, 2023).
[20] *Id*.
[21] Illinois v. Grigoleit Co., 104 F. Supp. 2d 967, 974-75 (C.D. Ill. 2000); 42 U.S.C. § 9607.
[22] *See* Illinois v. Grigoleit Co., 104 F. Supp. 2d 967, 974-75 (C.D. Ill. 2000).
[23] CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012)

the owner or operator of a contaminated property could be held responsible for the property's cleanup solely based on their ownership of the property.[24] In 2002, the Small Business Liability Relief and Brownfields Revitalization Act ("Act") added landowner liability protections.[25] The Act provided relief for (1) persons who contributed very small quantities of waste or only non-hazardous waste to a site; (2) owners of property that became contaminated merely as a result of migration from a contiguous property owned by another; and (3) bona fide purchasers who otherwise might be hesitant to acquire a contaminated property because of potential cleanup liability.[26]

The Act also established more specific criteria for exempting innocent owners from cleanup liability. The Act explained that a landowner is innocent if they purchased the property without knowledge of the existing contamination and were not involved in actions that led to contamination.[27] This amendment narrowed the scope of CERCLA and aimed to funnel liability to the PRPs and not innocent parties. Under CERCLA, one possible category of innocent landowners is designated as a party that "acquired the facility by inheritance or bequest."[28] CERCLA is the leading legislation regulating hazardous waste.

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https://crsreports.congress.gov/product/pdf/R/R41039#:~:text=Congress%20enacted%20the%20Comprehensive%20Environmental,the%20public%20from%20potential%20harm.

[24] *Superfund Landowner Liability Protections*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/superfund-landowner-liability-protections (last updated Dec. 9, 2022).

[25] CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012) https://crsreports.congress.gov/product/pdf/R/R41039#:~:text=Congress%20enacted%20the%20Comprehensive%20Environmental,the%20public%20from%20potential%20harm.

[26] DAVID BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012) https://crsreports.congress.gov/product/pdf/R/R41039#:~:text=Congress%20enacted%20the%20Comprehensive%20Environmental,the%20public%20from%20potential%20harm.

[27] *Id.*

[28] 42 U.S.C. §9601(35)(A).

B. Understanding Estate Law

Under inheritance law, individuals obtain interests in land through wills and intestate succession. A will is generally defined as a document or oral assertion intended to direct the disposal of an individual's personal and real property effective upon death.[29] Intestate succession occurs when a decedent dies without a will.[30] When a person dies without a will, the estate passes through the probate system.[31] The probate court will look to intestate succession statutes to determine who receives what inheritance from the estate of the deceased.[32] Simply put, the intestate succession statutes create a will on behalf of the deceased.[33]

At common law, an heir cannot renounce property that passes to him by intestacy.[34] Today, disclaiming an interest in land is permissible in all fifty states by statute under both wills and intestate succession.[35] Notably, disclaimers are also permissible for tax purposes under the Internal Revenue Code.[36] In Sarah's story, with which we began this paper, when a beneficiary incurred immense cost and liability from inheriting a toxic waste site, the possibility of disclaiming the property did not go unnoticed.[37] If all interested parties had disclaimed, it would have escheated to the estate.[38]

Escheat is the right of a government to take ownership of estate assets or unclaimed property.[39] Each state has rules and regulations governing the procedure by which property

[29] 15 West's McKinney's Forms Estates and Surrogate Practice § 7.5 (Feb. 2024).
[30] 1 Wis. Prac., Methods of Practice 20:2 (Oct. 2023).
[31] Patrick Hicks, *A Guide to Intestate Succession by State*, TRUST & WILL, https://trustandwill.com/learn/intestate-succession-by-state.
[32] *Id.*
[33] *Id.*
[34] 1 Schoenblum, Page on the Law of Wills § 49.1 (LexisNexis Matthew Bender 2023).
[35] Sterling Lander, *50 States' Disclaimer of Property Interests*, CPA AT LAW (Aug. 30, 2017), http://www.cpaatlaw.com/2017/08/50-states-disclaimer-of-property.html.
[36] I.R.C. § 2518.
[37] Paul Sullivan, *Contaminated Property Makes for Costly Inheritance*, N.Y. TIMES, (Feb. 19, 2016), https://www.nytimes.com/2016/02/20/your-money/contaminated-property-makes-for-costly-inheritance.html.
[38] *Id.*
[39] 40 Cal. Jur. 3d Escheat of Intestate's Property § 9, (database updated Nov. 2023).

escheats to the state. Often, a beneficiary will disclaim his or her interest in a property as a tax strategy or if a property is costly and burdensome. In these scenarios, escheat applies when there is no taker of the estate.[40]

III. Discussion

CERCLA regulates toxic waste on a national scale. The public policy supporting CERCLA will determine how estate law should govern the inherent liability associated with inheriting toxic waste sites. This discussion examines how Congress' legislative intent in CERCLA should be reflected in estate law principles. The policy governing CERCLA liability is analyzed in this discourse, along with the distribution of the beneficiary vs. the testator vs. the government's respective liabilities.

A. Should the Beneficiary Bear Liability?

i. Exploring the Beneficiary Bearing Liability for Clean-Up Costs

First, the law could hold a beneficiary liable for the hazardous waste clean-up costs. This scenario is analogous to a beneficiary inheriting a parcel of land and, consequently, bearing the inherited property's taxes and maintenance. Consistently, a beneficiary who inherits a parcel of land that is contaminated would be responsible for the clean-up costs. Arguably, these are parallels.

There have been numerous instances where a current owner cleans up the contaminated waste, either voluntarily or at the government's directive, and then that current owner seeks recovery.[41] Under CERCLA, parties can seek recovery against a potentially liable party by bringing a joint and several cost recovery or a contribution action.[42] Upon a beneficiary taking

[40] *Id.*
[41] 80 Am. Jur. 3d Private Cost Recovery Actions, generally § 7, (database updated Nov. 2023).
[42] *Id.*

ownership of a contaminated waste site, he or she could be liable for clean-up costs based on government directives and then sue for recovery against a PRP or the estate of the testator. This theory aligns with CERCLA, which allows private parties to recover clean-up costs. If a beneficiary can recover from a PRP, then the beneficiary will be relieved of the financial burden while still owning the asset of the cleaned-up land. This proposal recovers liability costs from a PRP while mitigating environmental harm and retaining ownership for the beneficiary, rather than a beneficiary disclaiming his or her interest.

The problem of liquidity undermines this theory. This situation assumes a beneficiary can front the clean-up costs and then seek recovery. A liquidity concern is present because a beneficiary could be required to pay thousands of dollars with a delay in reimbursement. It is unreasonable to expect a beneficiary to cover these costs. A property passed on with environmental liabilities could end up costing the beneficiary more than the property is worth, and even more than the beneficiary is worth.[43]

ii. Addressing Why the Beneficiary Should Not be Liable for Clean-Up Costs

a. Innocent Landowner Defense for Beneficiary

To best align inheritance law with the underlying CERCLA policies, a beneficiary should not bear the clean-up liability costs. The 2002 amendments to CERCLA created the innocent landowner defense, which requires the landowner to meet a set of continuing obligations similar to what is required of bona fide purchasers.[44] Under CERCLA, there are three types of innocent landowners, the relevant one to this analysis being "inheritors of contaminated property."[45]

[43] Paul Sullivan, *Contaminated Property Makes for Costly Inheritance*, N.Y. TIMES, (Feb. 19, 2016), https://www.nytimes.com/2016/02/20/your-money/contaminated-property-makes-for-costly-inheritance.html.
[44] *Third Party Defenses/Innocent Landowners*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/third-party-defensesinnocent-landowners#ild (last updated Oct. 21, 2022).
[45] 42 U.S.C. § 9601.

CERCLA sets forth that the innocent landowner defense must also meet the additional defense requirements provided.[46] To establish the innocent landowner defense, an inheritor of contaminated property must demonstrate that: (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and (b) he took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions.[47]

There is a division over whether courts preemptively apply the innocent landowner defense regarding beneficiaries inheriting hazardous property. Specifically, courts have disagreed on whether property received by inheritance is automatically excluded from CERCLA liability. The Third Circuit held a person who inherits contaminated property, becoming an owner and a PRP under CERCLA, is entitled to the innocent landowner defense and escapes liability.[48] Other courts have held property received by inheritance was not automatically excluded from CERCLA liability.[49] They explained that a responsible person who has acquired property by inheritance or bequest is liable under CERCLA unless he can establish the elements of the innocent landowner defense by a preponderance of the evidence.[50] These court splits illustrate the differences in the extent of elements a beneficiary must satisfy to assert the defense. Most importantly, these splits demonstrate the defense remains accessible and applicable to heirs of

[46] *Third Party Defenses/Innocent Landowners*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/third-party-defensesinnocent-landowners#ild (last updated Oct. 21, 2022).
[47] 42 U.S.C. § 9607(b)(3).
[48] Witco Corp. v. Beekhuis, 38 F.3d 682, 689 (3d Cir. 1994).
[49] Soo Line R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1484—85 (D. Minn. 1992); *See* Freudenberg-NOK Gen. P'ship v. Thomopoulos, 1991 WL 325290, at *1 (D.N.H. Dec. 9, 1991).
[50] *Id.*

contaminated property. Through this defense, Congress indicated that inheriting toxic waste is an exceptional situation that warrants consideration.

With fairness in mind, Congress amended the expansive reach of CERCLA liability. Congress concluded that it is unfair to impose clean-up costs on an innocent landowner who complies with the stated requirements. Likewise, as discussed above, the judiciary acknowledges situations where beneficiaries are innocent landowners. Thus, similar considerations of fairness should be used to evaluate whether an innocent beneficiary who inherited toxic waste should be liable under CERCLA. A beneficiary should be allowed to claim the innocent landowner defense if he or she establishes the elements of the defense by a preponderance of the evidence.

Estate law that allows a beneficiary, who had no part in the contamination, to bear CERCLA liability is bad policy—a policy that is simply unfair. This is because beneficiaries can only inherit assets; they cannot inherit the sole debts of the testator. If estate law forces an innocent beneficiary to undertake the burdensome responsibility of clean-up costs, natural resource damages, and the cost of federal public health, in effect, this policy allows a testator to assign debts.[51] A testator's ability to assign debts contradicts the foundations of estate law. It would allow a testator to act out of spite and increase an individual's struggles. In estate law, this is precisely what lawmakers want to prevent. It is against inheritance policy to allow unrestricted grounds to assign debt and to encourage an increase in negative acts towards an inheritor.[52]

If a testator had the authority to assign debts, a stranger who offended the testator at the grocery store might find themselves being subjected to $20,000 of the testator's credit card debt. If estate law permitted assigning debt, a testator could vindictively pass on their debts to an

[51] *See Debts and Deceased Relatives*, FTC CONSUMER ADVICE (Feb. 2023) https://consumer.ftc.gov/articles/debts-and-deceased-relatives.
[52] *Id.*

individual through a will, much like they transfer their assets. This is not allowed. A testator who owns hazardous waste land could directly bequeath his burdensome land to someone he hates. While the bequest may be disguised as an asset, the cost, burden, and consequences of inheriting the waste site are more akin to a debt. Because of these illogical consequences, assigning debt is bad policy outside the intentions of CERCLA liability and estate law. Under this analysis, there is no justification for holding innocent beneficiaries responsible for the clean-up costs.

b. Disclaimers

Correspondingly, an innocent beneficiary should be allowed to disclaim his or her interest in hazardous land. The general acceptance of holding individuals responsible for their own actions is justified; however, holding individuals responsible for other people's actions without contribution is unsound. Principally, a bequest or gift is regarded as an offer that can be accepted or rejected.[53] That means a beneficiary's interest in property may be renounced or disclaimed.[54] A beneficiary's ability to renounce his or her interest in property is a strategic decision, and every American jurisdiction today has enacted a disclaimer statute.[55] Renunciation of a property interest is a fundamental aspect of inheritance law.[56]

Individuals typically disclaim to advance their self-interest.[57] When a disclaimer is permitted, the disclaimed property goes to whoever would have received it, if the disclaimant had predeceased the benefactor.[58] This can be done to avoid transfer taxes or to avoid the property

[53] 1 Ga. Wills & Administration § 2:8.
[54] *Id.*
[55] Adam Hirsch, *REVISIONS IN NEED OF REVISING: THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT*, 29 FLA. ST. U. L. REV. 109 (2001).
[56] Adam Hirsch, *THE PROBLEM OF THE INSOLVENT HEIR*, 74 CORNELL L. REV. 587 (1989).
[57] Adam Hirsch, *THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT: OPPORTUNITIES AND PITFALL*, 28 EST. PLAN. 571 (Dec. 1, 2001).
[58] UNIF. DISCLAIMER OF INTEREST IN PROPERTY ACT §6(b)(3).

going to the disclaimant's creditors in a bankruptcy proceeding.[59] As an example, in *United States v. Irvine*, the Supreme Court recognized tax implications as a potential justification for disclaiming a property interest.[60] The Supreme Court reasoned that although a choice to disclaim property may be made with appreciation of potential tax consequences, the disclaimant needs to determine whether the enjoyment of the property outweighs the estate and gift tax consequences.[61]

There are constraints on a beneficiary's ability to disclaim.[62] Under the Uniform Probate Code ("UPC"), a disclaimer of an interest in property is barred if the disclaimant has already accepted the interest sought to be disclaimed.[63] This raises the issue of a beneficiary accepting property with hidden contamination. Strictly applying the UPC, if the beneficiary accepts the interest that is later sought to be disclaimed, then the disclaimer is barred.[64]

The prohibition on disclaiming after acceptance raises the consideration of a beneficiary's diligence. While accepting a property presents many opportunities, one must not disregard the accompanying responsibilities and burdens. A certain level of personal responsibility flows to a beneficiary. When receiving an asset, a beneficiary must diligently inform him or herself of the property's title history and previous usage and, if necessary, conduct an environmental inspection based on the beneficiary's discretion prior to acceptance. For example, an old gas station or industrial site may necessitate an environmental inspection before accepting an interest in property; however, a beneficiary does not have an unlimited timeframe to disclaim.

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[59] Helene S. Shapo, George Gleason Bogert, George Taylor Bogert, Amy Morris Hess, *Power of beneficiary to disclaim*, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 170 (June 2023).
[60] United States v. Irvine, 511 U.S. 224, 235 (1994).
[61] *Id.*
[62] UNIF. PROBATE CODE § 2-1113.
[63] *Id.*
[64] *Id.*

Second, there is a time restraint issue when accepting before disclaiming, which means for what period should a beneficiary be allowed to disclaim because of a discovered hazardous land issue? The Internal Revenue Code ("IRC") requires that an effective disclaimer be made within nine months of the decedent's death.[65] Many states have established a deadline mirroring the IRC, although the Uniform Disclaimer of Property Interests Act ("UDPIA") in its current form sets no deadline for a disclaimer.[66] Assuming a nine-month time period, a beneficiary should be able to discover an environmental hazard and then disclaim within nine months.[67] Nine months is ample time to conduct an environmental inspection or personally inspect the property to exercise one's best judgment. The nine-month time frame aligns with expeditiously closing an estate and allowing for an unknown toxic waste concern to be discovered.[68]

For this assessment, with self-interest in mind, a beneficiary renouncing his or her interest in a hazardous waste site is unproblematic and permissible.[69] When a beneficiary disclaims a costly and burdensome property, it is undeniable that they stand to benefit; however, the harm to the environment is neglected.[70]

Where there is no taker of an estate, escheat occurs, and the property reverts to the state.[71] *In re Estate of Coombs* depicts a valid disclaimer and the implications when there is no taker of the interest.[72] All three beneficiaries renounced their interest in a contaminated parcel of land, as did three other potential inheritors of the property.[73] Thereafter, the executor of the decedent's estate

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[65] I.R.C. § 2518.
[66] Adam Hirsch, *REVISIONS IN NEED OF REVISING: THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT*, 29 FLA. ST. U. L. REV. 109 (2001).
[67] *Id*.
[68] Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 479 (1988).
[69] Sterling Lander, *50 States' Disclaimer of Property Interests*, CPA AT LAW (Aug. 30, 2017), http://www.cpaatlaw.com/2017/08/50-states-disclaimer-of-property.html.
[70] *See* In re Est. Of Coombs, 784 A.2d 150, 152 (Pa. 2001).
[71] 40 Cal. Jur. 3d Escheat of Intestate's Property § 9, (database updated Nov. 2023).
[72] In re Est. Of Coombs, 784 A.2d 150, 152 (Pa. 2001).
[73] *Id*.

filed a Leave to Renounce Right of Administration of Specific Real Property because the property was more of a liability than an asset to the estate.[74] In this situation, because all potential beneficiaries and heirs disclaimed their interest, the property escheats to the state. This is where the second liability issue arises: considering that policy does not support a beneficiary bearing liability, should the state government bear the clean-up costs? This leads to the next evaluation.

B. Should the State Bear Liability?

CERCLA established the Hazardous Substance Superfund Trust ("Superfund") to fund clean-up costs when a PRP cannot be found, cannot pay, or immediate action is needed.[75] The Superfund is funded by special taxes on the industry and general taxpayer revenue.[76] The broad liability scheme of CERCLA is intended to encompass all parties that may have had some involvement in the contamination actions in order to minimize the burden of the costs of cleanup on the general taxpayer who had no involvement.[77] Thereafter, taxpayer dollars are used for clean-up costs.

The argument not to use general taxpayers' revenue to fund the cleanup of contaminated land is analogous to non-liability for innocent beneficiaries. Is it fair to impose the clean-up costs on general taxpayers when they had no part in the wrongdoing? Broadly speaking, no. Following the principle of fairness, general taxpayers at the federal and state levels should not bear the clean-up costs when they had no part in the contamination. Yet, government taxation has never captured perfect fairness. Arguably, taxpayers have little to no control over where their tax

[74] *Id. at* 151.
[75] DAVID BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012).
[76] *Id.*
[77] *Id.*

dollars are going. This turns into a fundamental political issue; however, for the purpose of this analysis, the tax concern is that the Superfund will require increasingly more revenue the less accountable the lawmakers hold the owners who produce the contaminated waste. If the government bears the constant burden of these clean-up costs, the tax allocation is boundless.

The main purpose of the Superfund is to allow the EPA to assume financial responsibility for clean-up costs when a PRP is unidentifiable or when an immediate response is needed to protect human health and the environment.[78] This purpose reflects human health and safety as Congress' top priority. There is a strong argument that the government should step in and bear the costs of contaminated waste clean-up to preserve the environment and prioritize public health. This is reflected in CERCLA when the EPA is authorized to assume financial responsibility. Citizens look to the government for wide-scale problem-solving; hence, threats to public health and protecting the environment.[79] While small individual acts contribute to bettering public health and the environment, these are routinely government-monitored issues.

To promote the general welfare, the government is the most efficient bearer of clean-up costs when no PRP is identified. Without the government's all-encompassing power and accessibility, these waste sites would cause perpetual environmental harm. Where a PRP is unidentifiable and immediate action is needed, the government assuming liability is justified by prioritizing public health and the environment.

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[78] *Id.*

[79] *See Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RESEARCH CENTER, (Sept. 14, 2020), https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/

C. Should the Testator Bear Liability?

i. Principle of Accountability

A final and most sound solution is holding the testator, the landowner, liable for clean-up costs for his or her contaminated property. If the law allows landowners to profit at the expense of the environment, it encourages them to ignore environmental damage for personal gain. This incentive perpetuates landowners' engagement in environmentally damaging behavior. Under economic theory, this is a common example of a negative externality. Without holding landowners accountable for their clean-up costs, a cost-benefit analysis by the landowner would encourage this behavior.

Conversely, if the law can internalize this externality and shift the burden onto the landowner, then the landowner's cost-benefit analysis reverses. While the landowner has the option to reap personal benefits, he will be doing so at his own cost. The personal cost of bearing responsibility for clean-up costs under CERCLA will typically outweigh the personal benefit of creating the contamination. This analysis suggests that there is substantial support for the estate bearing the financial burden of cleanup expenses in cases where the contamination was exclusively caused by the testator. This follows the underlying policy of prioritizing environmental concerns over personal benefit. CERCLA's approach to identifying PRPs is based on the principle that polluters should be required to pay for the environmental damage that they cause.[80] This outlook has been expressed as the "polluter pays principle."[81] The idea is rooted in accountability.

[80] DAVID BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012).
[81] *Id.*

ii. Exploring the Testator's Estate Bearing Liability

When the testator is the polluter, the principles of inheritance law dictate that the estate should bear the clean-up costs. The Court in *Illinois v. Grigoleit Co.* ("Grigoleit Co.") addressed a related scenario.[82] In *Grigoleit Co.*, the State of Illinois asserted a CERCLA liability claim against the Grigoleit Company ("Company"), the alleged source of toxins, and the beneficiary, who inherited the hazardous waste site from his father.[83] Among the many claims and motions made, the Company sought to hold the testator's estate liable by suing the testator's daughter, the other beneficiary.[84] The Company argued a beneficiary is deemed to hold the assets received from a liable party's estate in trust for the benefit of satisfying the environmental liabilities of a deceased, responsible person.[85] The Company claimed, based on a trust fund theory, that the beneficiaries hold the property, which they own and from which they receive lease payments as trustees, and that these assets should satisfy the environmental liabilities of the decedent.[86] The court rejected this argument, concluding that estates that have been fully distributed and closed and whose beneficiaries have not been involved in the activities that gave rise to the CERCLA liability apart from inheritance are not subject to liability under the statute.[87]

The court in *Grigoleit* reasoned that the possibility of a CERCLA claim arising long after the settlement of the estate would cast a dark cloud over any such settlement.[88] This compromises the certainty, promptness, and situation of distributing the decedent's assets.[89] *Grigoleit* raises a key question: how long should a testator's estate remain responsible for clean-up costs to

[82] *See* Illinois v. Grigoleit Co., 104 F. Supp. 2d 967 (C.D. Ill. 2000)
[83] *Id*. at 981.
[84] *Id*.
[85] *Id*.; *see* State ex rel. Howes v. W.R. Peele, Sr. Tr., 876 F. Supp. 733, 741 (E.D.N.C. 1995).
[86] *Id*. at 982 (internal citations omitted).
[87] *Id.* at 981 (internal citations omitted).
[88] *Id.*; Witco Corp. v. Beekhuis, 38 F.3d 682, 690 (9th Cir. 1994).
[89] *Id.*

maintain the certainty and promptness in distributing an estate? The law needs to impose a time limit that allows for any underlying environmental and public harm to surface while still ensuring the certainty and promptness of distributing a decedent's estate. *Grigoleit* did not allow recovery from an estate that was fully distributed and closed, but under this new proposal, the estate would not be closed nor fully distributed if it was land that could potentially be subject to CERCLA liability.[90] A time restraint prevents a dark cloud hovering over the certainty, promptness, and situation of a decedent's assets.

The next determination is the appropriate time restraint for filing a CERCLA liability claim against an estate. The Supreme Court has recognized the universal public policy of expeditiously closing and distrusting a decedent's estate.[91] Under this policy, virtually all states have enacted nonclaim statutes that require a creditor to file claims within an abbreviated period.[92] This limited period allows creditors to proceed with their claims, but not at the cost of beneficiaries waiting years to receive their inheritances. Without creditor nonclaim statutes, it could take years to probate an estate as courts waited for statutes of limitations on creditors' claims to expire, which would be contrary to public policy.[93] These statutes also mandate that creditors receive adequate notice that they must file their claims on an accelerated schedule to meet the statutory deadline.[94]

The timeline for CERCLA liability claims must follow the policy of expeditiously closing an estate. Hence, CERCLA liability could follow the timeline of creditor nonclaim statutes; however, the issue here is that creditor claims are less burdensome to file promptly in

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[90] Grigoleit, 104 F. Supp. 2d at 981 (internal citations omitted).
[91] Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 479 (1988).
[92] Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice be Good Notice if Some Notice is Not?*, 24 REAL PROP., PROBATE & TRUST J. 433, 433-68 (1990).
[93] *See* Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 479 (1988).
[94] *Id.* (determining reasonably ascertainable creditors receive actual notice before they are barred by a notice-based statute running from the commencement of probate proceeding).

comparison to environmental liability claims. This is because creditor claims are recorded, tracked, and apparent at the time of death. In contrast, environmental harm and toxic waste are not always apparent at the time of death. Finding the damage caused by toxic land that adversely affects the environment and the public may take longer than a few months. As a result, the state or EPA should have more time to file a CERCLA claim against an estate than general creditors are granted—but not so long that the efficiency of probate is compromised. This extended period is also justified by prioritizing the well-being of the environment and the public's health while also minimizing state costs.

iii. Proposal for the Estate Bearing CERCLA Liability

To harmonize estate law and environmental law policies, CERCLA liability plaintiffs should have a clearly defined timeframe to assert a cause of action against a probate estate. There is a teetering balance between expeditiously closing an estate and allowing a CERCLA claim to surface. Under this proposal, the government or beneficiary will have to act promptly to identify a CERCLA claim against a facility or waste site. Notably, it is likely that the state or beneficiary will bear the expense of an environmental inspection; nonetheless, the cost of the inspection is minuscule in comparison to the liability expenses they could face if the estate is closed. If the estate is closed, recovering from it is unattainable.[95] Thus, coordinating and expensing an environmental inspection is a fraction of the burden as compared to assuming full liability if hazardous waste is detected after the six-month period.

Specifically, there should be a six-month period from the opening of the probate process to file a CERCLA claim against an estate. This period offers a reasonable window for potential

[95] *See* Illinois v. Grigoleit Co., 104 F. Supp. 2d 967 (C.D. Ill. 2000)

claimants to come forward and initiate the necessary legal actions, as well as conduct an environmental inspection.

Should a cause of action arise, the estate's assets should be placed into a constructive trust to settle the estate's environmental liabilities.[96] The trust would be held for one year after the CERCLA claim is asserted.[97] The constructive trust serves as a legal mechanism to manage the inherited asset, while addressing the environmental liabilities associated with it. The constructive trust ensures that the contaminated land is held separately from the rest of the estate's assets facilitating their potential use in funding the cleanup efforts or allowing parties to seek recovery against the responsible estate. In the absence of a claim within the six-month period, the estate could be closed and exempt from future CERCLA liability. The constructive trust serves to hold the testator liable for the clean-up costs they were responsible for, treating them as if they were alive. Policy and reason dictate that the testator should bear the cost of their own contamination if they were still living.

The average time to probate an estate varies. Mitch Mitchell, product counsel at Trust & Wills reports that an estate can take, on average, anywhere between nine and twenty-four months to be fully closed.[98] This is all dependent on the size of the estate, the creditors being paid, tax returns filed, and assets distributed or sold.[99] In this light, an eighteen-month timeframe falls within expeditiously probating an estate if a CERCLA claim arises. Without this lenient period, the environment suffers harm, and innocent taxpayers are burdened with substantial cleanup expenses.

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[96] Laurel Adcock, *Trustee and Beneficiary Liability for Contaminated Property*, ORANGE COUNTY LAW, (Dec. 2010) at 19.
[97] *Id.*
[98] Mitch Mitchell, *Average Probate Process Timeline*, TRUST & WILL, https://trustandwill.com/learn/probate-timeline (last visited Nov. 29, 2023).
[99] *Id.*

The most balanced solution is to allow a six-month period for CERCLA liability claims on potentially contaminated land, and if a testator's estate faces such a claim, the estate's assets will be held in a constructive trust for one year to address the environmental liabilities that surface. As explained for the state bearing liability, if a CERCLA claim is not established within the six-month window and a beneficiary disclaims the property or there is no taker, the state will have to bear the clean-up costs. As for a beneficiary, if a CERCLA claim is not established and the estate is fully closed, the beneficiary lacks a defense against being named in a lawsuit, unless they can reestablish an innocent landowner defense. This situation mirrors Sarah's experience of being named in a lawsuit years after selling her inheritance.

iv. Addressing the Issue of Insolvency

When holding a testator's estate liable for clean-up costs, the issue of insolvency is material. An estate is insolvent if its liabilities exceed its assets.[100] Insolvency raises the issue of priority among debts including the government's priority.

According to the federal statute, CERCLA claims could take the form of a lien.[101] CERCLA provides that all costs for which a person is liable to the United States shall constitute a lien in favor of the United States upon all real property and rights to such property that: (1) belongs to such person; and (2) are subject to or affected by a removal or remedial action.[102] This lien ensures that the government has the means to secure payments for the costs associated with environmental cleanup and remediation efforts. The property owner may challenge the perfection of the lien if they contend that the EPA failed to meet these requirements.[103]

[100] 28 U.S.C. § 3302.
[101] 42 U.S.C. § 9607(l).
[102] *Id.*
[103] *Id.*

The EPA's financial interest would be secured should the PRP file for bankruptcy, sell the property, or die.[104] A lien creditor has a proprietary interest in the property and takes priority over all unsecured creditors. If the EPA perfects a CERCLA liability lien, under the statute, the lien only covers the property subject to or affected by the removal or remedial action.[105] If the property is valued at more than the clean-up actions, then the CERCLA liability debt is satisfied with the lien; however, this is unlikely. It is more likely that a property subject to CERCLA remedial action is going to be worth less than the total clean-up expenses. This is because the cleanup of hazardous waste sites is meticulous and costly.[106] Often, these sites are condemned or abandoned properties with inconsequential value. When the clean-up costs exceed the value of the property covered by the lien, then the EPA becomes an undersecured creditor. In that case, the EPA has an unsecured claim for the difference between the lien and the claim.

To ensure CERCLA liability takes priority if it is unsecured, the clean-up costs of a contaminated parcel of land should take precedence over other unsecured creditor claims. First, CERCLA liability is justified as a priority over general creditor claims because CERCLA claims are a form of involuntary debt. In general, involuntary creditors should take precedence over voluntary creditors because voluntary creditors decide whether to offer credit and establish their interest rates to maximize profits. For instance, when American Express extends credit to an individual, it's going to profit in the aggregate whether or not a default occurs. As a voluntary creditor, American Express, will not extend credit if it does not generate profit. By contrast, involuntary creditors do not choose to become creditors. Other types of involuntary debt include alimony and child support payments, which already enjoy special status under the law of many

[104] *Id.*
[105] *Id.*
[106] Paul Sullivan, *Contaminated Property Makes for Costly Inheritance*, N.Y. TIMES, (Feb. 19, 2016), https://www.nytimes.com/2016/02/20/your-money/contaminated-property-makes-for-costly-inheritance.html.

states. The distinction between voluntary and involuntary creditors justifies granting an involuntary creditor, such as the EPA, precedent over voluntary creditor claims. Furthermore, CERCLA is a taxpayer-funded program in which costs should remain low for the general public's benefit.

The federal priority statute establishes that when a debtor to the United States is insolvent and not in bankruptcy, he or she must first pay its debts to the Government before any other creditor.[107] When the EPA initiates a legal action to reclaim clean-up costs against an estate, its unsecured claim should take priority as a United States Government claim.[108] As stated above, this is because the EPA is an involuntary creditor and the spillover costs impact the general public.[109]

Under bankruptcy law, the Second Circuit affirmed that CERCLA response costs for post-petition remedial action qualify as administrative expenses in a bankruptcy proceeding.[110] Under the bankruptcy code, certain claims resulting from domestic and child support obligations are the only claims taking priority over administrative expenses.[111] Although a probate estate cannot enter bankruptcy[112], it is important to note that in bankruptcy law, a CERCLA claim takes a prioritized position. Analogous to bankruptcy law, CERCLA liability claims should take the same priority when probating an estate.

An alternative way to deal with this problem would be for lawmakers to extend the EPA's lien to all property of the PRP, like a federal tax lien.[113] In that case, federal preemption would apply, and CERCLA liability claims would supersede other claims irrespective of state

[107] 31 U.S.C. § 3713.
[108] *See* 31 U.S.C. § 3713.
[109] *Id*.
[110] In re Chateaugay Corp., 944 F.2d 997, 1010 (2d Cir. 1991).
[111] 11 U.S.C. § 507(a).
[112] *See* 11 U.S.C. §101(15), (41), 109(a) (by implication).
[113] I.R.C. § 6321.

law, both inside and outside of probate. This alternative approach would strengthen the enforcement of CERCLA liability by providing the EPA with greater authority to secure assets and ensure the availability of funds for environmental cleanup and remediation efforts, while also streamlining the resolution of conflicting claims.

v. Innocent Landowner Defense for Testator

There is a strong policy argument that the landowner should not bear responsibility if contamination is not the landowner's fault. This argument falls within the scope of CERCLA's innocent landowner defense.[114] This defense accounts for the absence of knowledge and participation in contamination, resembling a scenario where a testator previously owned contaminated land unknowingly and uninvolved.[115] To an extent, this scenario feels uncommon. A court will have to consider if a testator who owned a parcel of land for a certain number of years had no knowledge or involvement in the contamination.

For example, an individual may own a factory in a different state and have hired a team to operate the factory. If the factory was contaminated without the testator's contribution, the testator or the attorney to the estate would raise the innocent landowner defense. Here, the operator of the facility would be a more suitable PRP. Estate law constantly struggles with the so-called "worst evidence rule," meaning the witness who is best able to authenticate a will, verify intent, or clarify knowledge at the time of death is deceased.[116] In the scenario depicted,

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[114] *Third Party Defenses/Innocent Landowners*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/third-party-defensesinnocent-landowners#ild (last updated Oct. 21, 2022).
[115] DAVID BEARDEN, CONG. RSCH. SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012) https://crsreports.congress.gov/product/pdf/R/R41039#:~:text=Congress%20enacted%20the%20Comprehensive%20Environmental,the%20public%20from%20potential%20harm.
[116] John Langbein, *Will Contests*, 103 YALE L. J. 2039, 2044 (1994).

the testator would ideally testify about his lack of knowledge and involvement in the contaminated factory he owned; however, he will be unable to do so.

To measure a testator's involvement and knowledge, the court should turn to the facts and circumstances as extrinsic evidence. For instance, the court could examine payments to the factory, trips to the factory, employee testimony, and communication levels with the management team. If the testator was not involved in the contamination, the executor of the probate estate should be able to raise the innocent landowner defense, and the estate should not bear liability. This rationale stems from holding individuals responsible for their own actions. In this situation, the EPA will identify a more suitable and responsible PRP.

IV. Conclusion

Three CERCLA liability policies arise in connection with estate law: fairness, protecting public health and minimizing environmental harm, and accountability.

First, fairness. A contaminator should bear clean-up costs, while an uninvolved party should not. Likewise, fairness guides estate law policy, allowing a beneficiary to disclaim their interest in property. Inheritance law disallows debt assignment and protects innocent parties from liability. Inheritance law and Congress' legislative intent did not intend to subject beneficiaries to individual liability for clean-up expenses.

Second, protect the public. In certain circumstances, the government will bear clean-up liability for contaminated waste sites. The government plays a pivotal role in bearing liability costs to promote public wellbeing and environmental safety. This notion stems from the government handling issues that surpass the capacity of individuals to manage independently. The government's intervention plays a pivotal role in two scenarios concerning toxic waste site liability. First, when there is no identified PRP or taker of the property. Second, when the testator

is a PRP but the estate is insolvent, the government must bear the cost and seek recovery as a primary creditor. This reasoning aligns with Congress' intent under CERCLA liability, prioritizing human health and minimizing environmental harm.

Third, accountability. In sum, when the testator is a PRP, CERCLA policy and estate law impose liability on the estate. The most effective way to make landowners responsible is to hold their estates accountable. Death does not excuse the contamination, and the law aims to internalize a landowner's negative externalities. To achieve this, states should universally grant a six-month period to assert a CERCLA liability claim against potentially contaminated land. Subsequently, if a testator's estate faces a CERCLA claim and the testator is deemed a PRP, the assets of the estate will be held in a constructive trust for one year to address the estate's environmental liabilities before distribution is finalized. This approach harmonizes the efficiency and assurance of probating an estate with considerations of environmental welfare and public health.

Toxic waste sites remain a pressing concern for Congress to tackle in order to mitigate the harm to public health and tax revenue. In 2012, an estimated 12.6 million people died as a result of an unhealthy environment; toxic waste sites containing chemical exposures and pollution are included as risk factors causing these deaths.[117] To control a portion of toxic waste sites, inheritance law should universally establish liability on the estate of a testator who is a PRP. Adopting uniform inheritance laws would minimize generations passing down hazardous land and improve laws rooted in fairness and accountability. In the absence of uniform laws, differing

[117] *An estimated 12.6 million deaths each year are attributable to unhealthy environments*, WORLD HEALTH ORGANIZATION, (March 15, 2016), https://www.who.int/news/item/15-03-2016-an-estimated-12-6-million-deaths-each-year-are-attributable-to-unhealthy-environments.

parties are held liable, excess money is wasted, legal disputes are constant, and the adverse impact on the environment is disregarded.