

D R A F T

FOR APPROVAL

**CONFORMING AMENDMENTS TO UNIFORM
PROBATE CODE TO REFLECT APPROVAL OF
DISCLAIMER OF PROPERTY INTERESTS ACT (1999)**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR
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WITH PREFATORY NOTE AND PROPOSED COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**CONFORMING AMENDMENTS TO UNIFORM PROBATE CODE TO
REFLECT APPROVAL OF UNIFORM DISCLAIMER OF PROPERTY
INTERESTS ACT (1999)**

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1 Laws, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, Phone 312/915-0195, FAX
2 312/915-0187, www.nccusl.org.

3
4 **Historical Note.** This General Comment was revised in 1993 and in 2002.

5
6
7
8 **Amendment 2. Delete text of Section 2-801 and indicate that section number is**
9 **reserved:**

10 **SECTION 2-801. ~~Disclaimer of Property Interests~~ [RESERVED].**

11 **(a) ~~[Right to Diselaim Interest in Property.]~~** A person, or the representative of
12 a person, to whom an interest in or with respect to property or an interest therein devolves
13 by whatever means may disclaim it in whole or in part by delivering or filing a written
14 disclaimer under this section. ~~The right to disclaim exists notwithstanding (i) any~~
15 ~~limitation on the interest of the disclaimant in the nature of a spendthrift provision or~~
16 ~~similar restriction or (ii) any restriction or limitation on the right to disclaim contained in~~
17 ~~the governing instrument. For purposes of this subsection, the "representative of a~~
18 ~~person" includes a personal representative of a decedent, a conservator of a disabled~~
19 ~~person, a guardian of a minor or incapacitated person, and an agent acting on behalf of the~~
20 ~~person within the authority of a power of attorney.~~

21
22 **(b) ~~[Time of Disclaimer.]~~** The following rules govern the time when a disclaimer
23 must be filed or delivered:

24
25 (1) ~~If the property or interest has devolved to the disclaimant under a~~
26 ~~testamentary instrument or by the laws of intestacy, the disclaimer must be filed, if of a~~
27 ~~present interest, not later than [nine] months after the death of the deceased owner or~~
28 ~~deceased donee of a power of appointment and, if of a future interest, not later than [nine]~~

1 months after the event determining that the taker of the property or interest is finally
2 ascertained and his [or her] interest is indefeasibly vested. The disclaimer must be filed
3 in the [probate] court of the county in which proceedings for the administration of the
4 estate of the deceased owner or deceased donee of the power have been commenced. A
5 copy of the disclaimer must be delivered in person or mailed by registered or certified
6 mail, return receipt requested, to any personal representative or other fiduciary of the
7 decedent or donee of the power.

8 (2) If a property or interest has devolved to the disclaimant under a
9 nontestamentary instrument or contract, the disclaimer must be delivered or filed, if of a
10 present interest, not later than [nine] months after the effective date of the
11 nontestamentary instrument or contract and, if of a future interest, not later than [nine]
12 months after the event determining that the taker of the property or interest is finally
13 ascertained and his [or her] interest is indefeasibly vested. If the person entitled to
14 disclaim does not know of the existence of the interest, the disclaimer must be delivered
15 or filed not later than [nine] months after the person learns of the existence of the interest.
16 The effective date of a revocable instrument or contract is the date on which the maker no
17 longer has power to revoke it or to transfer to himself [or herself] or another the entire
18 legal and equitable ownership of the interest. The disclaimer or a copy thereof must be
19 delivered in person or mailed by registered or certified mail, return receipt requested, to
20 the person who has legal title to or possession of the interest disclaimed.

21 (3) A surviving joint tenant [or tenant by the entireties] may disclaim as a
22 separate interest any property or interest therein devolving to him [or her] by right of

1 survivorship. A surviving joint tenant [or tenant by the entirety] may disclaim the entire
2 interest in any property or interest therein that is the subject of a joint tenancy [or tenancy
3 by the entirety] devolving to him [or her], if the joint tenancy [or tenancy by the
4 entirety] was created by act of a deceased joint tenant [or tenant by the entirety], the
5 survivor did not join in creating the joint tenancy [or tenancy by the entirety], and has
6 not accepted a benefit under it.

7 (4) If real property or an interest therein is disclaimed, a copy of the disclaimer
8 may be recorded in the office of the [Recorder of Deeds] of the county in which the
9 property or interest disclaimed is located.** If Torrens system is in effect, add provisions
10 to comply with local law.

11 (c) **[Form of Disclaimer.]** The disclaimer must (i) describe the property or
12 interest disclaimed, (ii) declare the disclaimer and extent thereof, and (iii) be signed by
13 the disclaimant.

14 (d) **[Effect of Disclaimer.]** The effects of a disclaimer are:

15 (1) If property or an interest therein devolves to a disclaimant under a
16 testamentary instrument, under a power of appointment exercised by a testamentary
17 instrument, or under the laws of intestacy, and the decedent has not provided for another
18 disposition of that interest, should it be disclaimed, or of disclaimed, or failed interests in
19 general, the disclaimed interest devolves as if the disclaimant had predeceased the
20 decedent, but if by law or under the testamentary instrument the descendants of the
21 disclaimant would share in the disclaimed interest by representation or otherwise were the
22 disclaimant to predecease the decedent, then the disclaimed interest passes by

1 representation, or passes as directed by the governing instrument, to the descendants of
2 the disclaimant who survive the decedent. A future interest that takes effect in possession
3 or enjoyment after the termination of the estate or interest disclaimed takes effect as if the
4 disclaimant had predeceased the decedent. A disclaimer relates back for all purposes to
5 the date of death of the decedent.

6 (2) If property or an interest therein devolves to a disclaimant under a
7 nontestamentary instrument or contract and the instrument or contract does not provide
8 for another disposition of that interest, should it be disclaimed, or of disclaimed or failed
9 interests in general, the disclaimed interest devolves as if the disclaimant has predeceased
10 the effective date of the instrument or contract, but if by law or under the nontestamentary
11 instrument or contract the descendants of the disclaimant would share in the disclaimed
12 interest by representation or otherwise were the disclaimant to predecease the effective
13 date of the instrument, then the disclaimed interest passes by representation, or passes as
14 directed by the governing instrument, to the descendants of the disclaimant who survive
15 the effective date of the instrument. A disclaimer relates back for all purposes to that
16 date. A future interest that takes effect in possession or enjoyment at or after the
17 termination of the disclaimed interest takes effect as if the disclaimant had died before the
18 effective date of the instrument or contract that transferred the disclaimed interest.

19 (3) The disclaimer or the written waiver of the right to disclaim is binding
20 upon the disclaimant or person waiving and all persons claiming through or under either
21 of them.

1 **Subsection (a).** Subsection (a) is revised in two respects. First, the right to disclaim
2 is extended to a decedent through his or her personal representative. The Uniform
3 Disclaimer of Property Interests Act does not authorize disclaimers on behalf of a
4 deceased person. Second, the sentence authorizing a disclaimer despite a limitation or
5 restriction in the governing instrument is clarified to leave no doubt that an explicit
6 restriction or limitation on the right to disclaim in the governing instrument is ineffective.

7
8 **Subsection (d).** The third revision clarifies the effect of a disclaimer. The Uniform
9 Disclaimer of Property Interests Act states that "it" shall devolve "as if the disclaimant
10 had predeceased the decedent." Literally interpreted, the word "it" refers to "the
11 disclaimed interest," not to the estate as a whole. (One of the changes above is to make
12 this point unmistakable by replacing "it" with "the disclaimed interest.")

13
14 Unfortunately, even though the word "it" refers to the disclaimed interest, not to the
15 estate as a whole, there is still a plausible interpretation of the phrase "the disclaimed
16 interest devolves as if the disclaimant had predeceased the decedent" that does not
17 produce the desired result. The desired result is to prevent an heir, for example, from
18 using a disclaimer to effect a change in the division of an intestate's estate. To illustrate
19 this point, consider the following example:

20
21 [Graph to be stricken with Comments.]

22
23 Under these facts, G's intestate estate is divided into two equal parts: A takes half and
24 B's child, Z, takes the other half. Suppose, however, that A files a disclaimer. The
25 desired effect of that disclaimer is to prevent A from affecting the basic division of G's
26 intestate estate by this maneuver. If, however, the disclaimer statute merely provides that
27 the "disclaimed interest" devolves as though the disclaimant (A) had predeceased the
28 decedent, then A's one half interest would not pass only to X and Y, but to X, Y, and Z.
29 To prevent this possible interpretation of that language, the "but if" phrase is added to
30 (d)(1) and (d)(2). This added phrase explicitly provides that A's disclaimed interest
31 passes to A's descendants, if A left any descendants.

32
33 Subsection (d)(1) and (2) were amended in 1993 to clarify the effect of a disclaimer in
34 a case in which G, who died intestate, had two children, A and B. A had one child, X; B
35 had two children, Y and Z. B actually predeceased G. A survived G, but disclaimed.
36 The amendments make it clear that X takes A's disclaimed one-half by providing that if
37 "the descendants of the disclaimant would share in the disclaimed interest by
38 representation were the disclaimant to predecease the decedent then the disclaimed
39 interest passes by representation to the descendants of the disclaimant who survive the
40 decedent...." In this case, were A actually to have predeceased G, A's descendants would
41 share in the disclaimed interest under the representation system employed in the Code,
42 but would not "take" all of the disclaimed interest. The amendments clarify the point that

1 the fact that X would share in the disclaimed interest is enough to give that disclaimed
2 interest to X as a result of A's disclaimer.
3

4 **Time Allowed for Filing Disclaimer.** It should be noted that there may be a
5 discrepancy between the time allowed for filing a disclaimer under this section (and under
6 the freestanding Uniform Acts) and the time allowed for filing a qualified disclaimer
7 under the Internal Revenue Code § 2518. Lawyers are cautioned to check both the state
8 and federal disclaimer statutes before advising clients, especially with respect to
9 disclaimers of future interests.
10

11 **Historical Note.** This Comment was revised in 1993. For the prior version, see 8
12 U.L.A. 158 (Supp.1992).
13
14

1 surviving the holder of the life income interest must be disclaimed within nine months of
2 the death of the life income beneficiary). The time limit for future interests does not
3 correspond to IRC § 2518 which generally requires that a qualified disclaimer of a future
4 interest be made within nine months of the interest’s creation, no matter how contingent it
5 may then be. The nine-month time limit of the existing statutes really is a trap. While it
6 superficially conforms to IRC § 2518, its application to the disclaimer of future interests
7 does not. The removal of all mention of time limits will clearly signal the practitioner
8 that the requirements for a tax qualified disclaimer are set by different law.
9

10 The elimination of the time limit is not the only change from current statutes. The
11 Act abandons the concept of “relates back” as a proxy for when a disclaimer becomes
12 effective. Instead, by stating specifically when a disclaimer becomes effective and
13 explicitly stating in Section 2-1104(f) that a disclaimer “is not a transfer, assignment, or
14 release,” the Act makes clear the results of refusing property or powers through a
15 disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not
16 been explicitly addressed in previous statutes. The Act provides detailed rules for the
17 disclaimer of interests in jointly held property (Section 2-1107). Such disclaimers have
18 important uses especially in tax planning, but their status under current law is not clear.
19 Furthermore, although current statutes mention the disclaimer of jointly held property,
20 they provide no details. Recent developments in the law of qualified disclaimers of
21 jointly held property make fuller treatment of such disclaimers necessary. Section 2-1108
22 addresses the disclaimer by trustees of property that would otherwise become part of the
23 trust. The disclaimer of powers of appointment and other powers not held in a fiduciary
24 capacity is treated in Section 2-1109 and disclaimers by appointees, objects, and takers in
25 default of exercise of a power of appointment is the subject of Section 2-1110. Finally,
26 Section 2-1111 provides rules for the disclaimer of powers held in a fiduciary capacity.
27
28
29

30 **SECTION 2-1101. SHORT TITLE.** This Part may be cited as the “Uniform
31 Disclaimer of Property Interests Act (1999).”
32

33 **SECTION 2-1102. DEFINITIONS.** In this Part:

34 (1) “Disclaimant” means the person to whom a disclaimed interest or power
35 would have passed had the disclaimer not been made.

1 (2) “Disclaimed interest” means the interest that would have passed to the
2 disclaimant had the disclaimer not been made.

3 (3) “Disclaimer” means the refusal to accept an interest in or power over
4 property.

5 (4) “Fiduciary” means a personal representative, trustee, agent acting under a
6 power of attorney, or other person authorized to act as a fiduciary with respect to the
7 property of another person.

8 (5) “Jointly held property” means property held in the name of two or more
9 persons under an arrangement in which all holders have concurrent interests and under
10 which the last surviving holder is entitled to the whole of the property.

11 (6) “Person” means an individual, corporation, business trust, estate, trust,
12 partnership, limited liability company, association, joint venture, government;
13 governmental subdivision, agency, or instrumentality; public corporation, or any other
14 legal or commercial entity.

15 (7) “State” means a State of the United States, the District of Columbia, Puerto
16 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
17 jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan
18 native village, recognized by federal law or formally acknowledged by a State.

19 (8) “Trust” means:

20 (A) an express trust, charitable or noncharitable, with additions thereto,
21 whenever and however created; and

1 The term “trust” (subsection (8)) means an express trust, whether private or
2 charitable, including a trust created by statute, court judgment or decree which is to be
3 administered in the manner of an express trust. Excluded from the Act’s coverage are
4 resulting and constructive trusts, which are not express trusts but remedial devices
5 imposed by law. The Act is directed primarily at express trusts which arise in an estate
6 planning or other donative context, but the definition of “trust” is not so limited. A trust
7 created pursuant to a divorce action would be included, even though such a trust is not
8 donative but is created pursuant to a bargained for exchange. The extent to which even
9 more commercially-oriented trusts are subject to the Act will vary depending on the type
10 of trust and the laws, other than this Act, under which the trust is created. Commercial
11 trusts come in various forms, including trusts created pursuant to a state business trust act
12 and trusts created to administer specified funds, such as to pay a pension or to manage
13 pooled investments. See John H. Langbein, The Secret Life of the Trust: The Trust as an
14 Instrument of Commerce, 107 Yale L.J. 165 (1997).

15
16
17
18 **SECTION 2-1103. SCOPE.** This Part applies to disclaimers of any interest in or
19 power over property, whenever created.

20
21 **SECTION 2-1104. PART SUPPLEMENTED BY OTHER LAW.**

22 (a) Unless displaced by a provision of this Part, the principles of law and equity
23 supplement this Part.

24 (b) This Part does not limit any right of a person to waive, release, disclaim, or
25 renounce an interest in or power over property under a law other than this Part.

26
27 **SECTION 2-1105. POWER TO DISCLAIM; GENERAL REQUIREMENTS;**
28 **WHEN IRREVOCABLE.**

29 (a) A person may disclaim, in whole or part, any interest in or power over
30 property, including a power of appointment. A person may disclaim the interest or power

1 even if its creator imposed a spendthrift provision or similar restriction on transfer or a
2 restriction or limitation on the right to disclaim.

3 (b) Except to the extent a fiduciary's right to disclaim is expressly restricted or
4 limited by another statute of this State or by the instrument creating the fiduciary
5 relationship, a fiduciary may disclaim, in whole or part, any interest in or power over
6 property, including a power of appointment, whether acting in a personal or
7 representative capacity. A fiduciary may disclaim the interest or power even if its creator
8 imposed a spendthrift provision or similar restriction on transfer or a restriction or
9 limitation on the right to disclaim, or an instrument other than the instrument that created
10 the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

11 (c) To be effective, a disclaimer must be in a writing or other record, declare the
12 disclaimer, describe the interest or power disclaimed, be signed by the person making the
13 disclaimer, and be delivered or filed in the manner provided in Section 2-1112. In this
14 subsection:

15 (1) "record" means information that is inscribed on a tangible medium or that
16 is stored in an electronic or other medium and is retrievable in perceivable form;

17 (2) "signed" means, with present intent to authenticate or adopt a record, to:

18 (A) execute or adopt a tangible symbol; or

19 (B) attach to or logically associate with the record an electronic sound,
20 symbol, or process.

1 subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the
2 creator of a trust or other arrangement creating a fiduciary relationship should be able to
3 prevent a fiduciary accepting office under the arrangement from altering the parameters of
4 the relationship. This reasoning also applies to fiduciary relationship created by statute
5 such as those governing conservatorships and guardianships. Subsection (b) therefore
6 does not override express restrictions on disclaimers contained in the instrument creating
7 the fiduciary relationship or in other statutes of the State.

8
9 Subsection (c) sets forth the formal requirements for a disclaimer. The definitions
10 of “record” and “signed” in this subsection are derived from the Uniform Electronic
11 Transactions Act §102. The definitions recognize that a disclaimer may be prepared in
12 forms other than typewritten pages with a signature in pen. Because of the novelty of a
13 disclaimer executed in electronic form and the ease with which the term “record” can be
14 confused with recording of documents, the Act does not use the term “record” in isolation
15 but refers to “writing or other record.” The delivery requirement is set forth in Section 2-
16 1112.

17
18 Subsection (d) specifically allows a partial disclaimer of an interest in property or
19 of a power over property, and gives the disclaimant wide latitude in describing the portion
20 disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or
21 percentage of the residue or may disclaim specific property included in the residue (all the
22 shares of X corporation or a specific number of shares). A devisee or donee may disclaim
23 specific acreage or an undivided fraction or carve out a life estate or remainder from a
24 larger interest in real or personal property. (It must be noted, however, that a disclaimer
25 by a devisee or donee which seeks to “carve out” a remainder or life estate is not a
26 “qualified disclaimer” for tax purposes, Treas. Reg. § 25.2518-3(b).)

27
28 Subsection (e) makes the disclaimer irrevocable on the later to occur of (i)
29 delivery or filing or (ii) its becoming effective under the section governing the disclaimer
30 of the particular power or interest. A disclaimer must be “irrevocable” in order to be a
31 qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes
32 effective at the time significant for tax purposes, a disclaimer under this Act will always
33 meet the irrevocability requirement for tax qualification. The interaction of the Act and
34 the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer
35 of an interest in a revocable lifetime trust.

36
37 **Example 1.** G creates a revocable lifetime trust which will terminate on G’s
38 death and distribute the trust property to G’s surviving descendants by representation.
39 G’s son, S, determines that he would prefer his share of G’s estate to pass to his
40 descendants and executes a disclaimer of his interest in the revocable trust. The
41 disclaimer is then delivered to G (see Section 2-1112(e)(3)). The disclaimer is not
42 irrevocable at that time, however, because it will not become effective until G’s death
43 when the trust becomes irrevocable (see Section 2-1106(b)(1)). Because the

1 disclaimer will not become irrevocable until it becomes effective at G's death, S may
2 recall the disclaimer before G's death and, if he does so, the disclaimer will have no
3 effect.

4
5 Subsection (f) restates the long standing rule that a disclaimer is a true refusal to
6 accept and not an act by which the disclaimant transfers, assigns, or releases the
7 disclaimed interest. This subsection states the effect and meaning of the traditional
8 "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest
9 passes without direction by the disclaimant, a requirement of tax qualification.

10
11
12
13 **SECTION 2-1106. DISCLAIMER OF INTEREST IN PROPERTY.**

14 (a) In this section:

15 (1) "Time of distribution" means the time when a disclaimed interest would
16 have taken effect in possession or enjoyment.

17 (2) "Future interest" means an interest that takes effect in possession or
18 enjoyment, if at all, later than the time of its creation.

19 (b) Except for a disclaimer governed by Section 2-1107 or 2-1108, the following
20 rules apply to a disclaimer of an interest in property:

21 (1) The disclaimer takes effect as of the time the instrument creating the
22 interest becomes irrevocable, or, if the interest arose under the law of intestate succession,
23 as of the time of the intestate's death.

24 (2) The disclaimed interest passes according to any provision in the
25 instrument creating the interest providing for the disposition of the interest, should it be
26 disclaimed, or of disclaimed interests in general.

27 (3) If the instrument does not contain a provision described in paragraph (2),
28 the following rules apply:

1 (A) If the disclaimant is an individual, the disclaimed interest passes as if
2 the disclaimant had died immediately before the time of distribution. However, if, by law
3 or under the instrument, the descendants of the disclaimant would share in the disclaimed
4 interest by any method of representation had the disclaimant died before the time of
5 distribution, the disclaimed interest passes only to the descendants of the disclaimant who
6 survive the time of distribution.

7 (B) If the disclaimant is not an individual, the disclaimed interest passes
8 as if the disclaimant did not exist.

9 (4) Upon the disclaimer of a preceding interest, a future interest held by a
10 person other than the disclaimant takes effect as if the disclaimant had died or ceased to
11 exist immediately before the time of distribution, but a future interest held by the
12 disclaimant is not accelerated in possession or enjoyment.

13 **Comment**

14 Subsection (a) defines two terms that are used only in Section 2-1106. The first,
15 “time of distribution” is used in determining to whom the disclaimed interest passes (see
16 below). Possession or enjoyment is a term of art and means that time at which it is
17 certain to whom the property belongs. It does not mean that the person actually has the
18 property in hand. For example, the time of distribution of present interests created by will
19 and all interests arising under the law of intestate succession is the death of the decedent.
20 At that moment the heir or devisee is entitled to his or her devise or share, and it is
21 irrelevant that time will pass before the will is admitted to probate and that actual receipt
22 of the gift may not occur until the administration of the estate is complete. The time of
23 distribution of present interests created by non-testamentary instruments generally
24 depends on when the instrument becomes irrevocable. Because the recipient of a present
25 interest is entitled to the property as soon as the gift is made, the time of distribution
26 occurs when the creator of the interest can no longer take it back. The time of
27 distribution of a future interest is the time when it comes into possession and the owner of
28 the future interest becomes the owner of a present interest. For example, if B is the owner
29 of the remainder interest in a trust which is to pay income to A for life, the time of
30 distribution of B’s remainder is A’s death. At that time the trust terminated and B’s
31 ownership of the remainder becomes outright ownership of the trust property.

1 The second defined term, “future interest,” is used in Section 2-1106(b)(4) in
2 connection with the acceleration rule.

3
4 Section 2-1106(b)(1) makes a disclaimer of an interest in property effective as of
5 the time the instrument creating the interest becomes irrevocable or at the decedent’s
6 death if the interest is created by intestate succession. A will and a revocable trust are
7 irrevocable at the testator’s or settlor’s death. Inter vivos trusts may also be irrevocable at
8 their creation or may become irrevocable before the settlor’s death. A beneficiary
9 designation is also irrevocable at death, unless it is made irrevocable at an earlier time.
10 This provision continues the provision of Uniform Acts on this subject, but with different
11 wording. Previous Acts have stated that the disclaimer “relates back” to some time
12 before the disclaimed interest was created. The relation back doctrine gives effect to the
13 special nature of the disclaimer as a refusal to accept. Because the disclaimer “relates
14 back,” the disclaimant is regarded as never having had an interest in the disclaimed
15 property. A disclaimer by a devisee against whom there is an outstanding judgment will
16 prevent the creditor from reaching the property the debtor would otherwise inherit.

17
18 This Act continues the effect of the relation back doctrine, not by using the
19 specific words, but by directly stating what the relation back doctrine has been interpreted
20 to mean. Sections 2-1102(3) and 2-1104(f) taken together define a disclaimer as a refusal
21 to accept which is not a transfer or release, and subsection (b)(1) of this section makes the
22 disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the
23 statute, however, prevents the legislatures or the courts from limiting the effect of the
24 disclaimer as refusal doctrine in specific situations or generally. See the Comments to
25 Section 2-1113 below.

26
27 Section 2-1106(b)(2) allows the creator of the instrument to control the
28 disposition of the disclaimed interest by express provision in the instrument. The
29 provision may apply to a particular interest. “I give to my cousin A the sum of ten
30 thousand dollars (\$10,000) and should he disclaim any part of this gift, I give the part
31 disclaimed to my cousin B.” The provision may also apply to all disclaimed interests. A
32 residuary clause beginning “I give my residuary estate, including all disclaimed interests
33 to” is such a provision.

34
35 Section 2-1106(b)(3)(A) applies if Section 2-1106(b)(2) does not and if the
36 disclaimant is an individual. Because “disclaimant” is defined as the person to whom the
37 disclaimed interest would have passed had the disclaimer not been made (Section 2-
38 1102(1)), this paragraph would apply to disclaimers by fiduciaries on behalf of
39 individuals. The rule is that the disclaimed interest passes as if the disclaimant had died
40 immediately before the time of distribution defined in Section 2-1106(a)(1). The working
41 of this subsection for present interests given to named individuals is illustrate by the
42 following examples:

1 **Example 1(a).** T’s will devised “ten thousand dollars (\$10,000) to my brother,
2 B.” B disclaims the entire devise. B is deemed to have predeceased T, and, therefore
3 B’s gift has lapsed. If the State’s antilapse statute applies, it will direct the passing of
4 the disclaimed interest. Under UPC § 2-603(b)(1), for example, B’s descendants who
5 survive T by 120 hours will take the devise by representation.

6
7 **Example 1(b).** T’s will devised “ten thousand dollars (\$10,000) to my friend, F.”
8 F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed.
9 Few antilapse statutes apply to devises to non-family members. Under UPC
10 § 2-603(b), which saves from lapse only gifts made to certain relatives, the devise
11 would lapse and pass through the residuary clause of the will.

12
13 **Example 1(c).** T’s will devised “ten thousand dollars (\$10,000) to my brother, B,
14 but if B does not survive me, to my children.” If B disclaims the devise, he will be
15 deemed to have predeceased T and the alternative gift to T’s children will dispose of
16 the devise.

17
18 Present interests are also given to the surviving members of a class or group of
19 persons. Perhaps the most common example of this gift is a devise of the testator’s
20 residuary estate “to my descendants who survive me by representation.” Under the system
21 of distribution among multi-generational classes used in the Uniform Probate Code
22 §2-709 and similar statutes, division of the property to be distributed begins in the eldest
23 generation in which there are living people. The following example illustrates a problem
24 that can arise.

25
26 **Example 2(a).** T’s will devised “the rest, residue, and remainder of my estate to
27 my descendants who survive me by representation.” T is survived by son S and
28 daughter D. Son has two living children and D has one. S disclaims his interest. The
29 disclaimed interest is one-half of the residuary estate, the interest S would have
30 received had he not disclaimed, and it passes as if S had predeceased T. If the one-
31 half the residue passed as if S predeceased, however, his children would take one-half
32 the disclaimed interest and D would take the other half under every system of
33 “representation” that commonly exists. S’s disclaimer should have the effect of
34 passing what he would have taken to his children. The second sentence of Section 2-
35 1106(b)(3)(A) solves the problem. It provides that the entire disclaimed interest
36 passes only to S’s descendants because they would share in the interest had S truly
37 predeceased T.

38
39 This provision also solves a problem that exists when the disclaimant is the only
40 representative of an older generation.

41
42 **Example 2(b).** Assume the same facts as **Example 2(a)**, but D has predeceased
43 T. T is survived, therefore, by S, S’s two children, and D’s child. S disclaims.

1 Again, the disclaimed interest is one-half the residuary estate and it passes as if S had
2 predeceased T. Had S actually predeceased T, the three grandchildren of T would
3 have shared equally in T's residuary estate because they are all in the same generation.
4 Were the three grandchildren to share equally in the disclaimed interest, S's two
5 children would each receive one-third of the one-half while D's child would receive
6 one-third the one-half in addition to the one-half of the residuary estate received as the
7 representative of his or her late parent. The second sentence of Section 2-
8 1106(b)(3)(A) again applies to insure that S's children receive one-half the residue,
9 exactly the interest S would have received but for the disclaimer.

10
11 The disclaimer of future interests created by will leads to a different problem. The
12 effective date of the disclaimer of the future interest, the testator's death, is earlier in time
13 than the distribution date. This in turn leads to a possible anomaly illustrated by the
14 following example.

15
16 **Example 3.** Father's will creates a testamentary trust for Mother who is to
17 receive all the income for life. At her death, the trust is to be distributed to Father and
18 Mother's surviving descendants by representation. Mother is survived by son S and
19 daughter D. Son has two living children and D has one. Son decides that he would
20 prefer his share of the trust to pass to his children and disclaims. The disclaimer must
21 be made within nine months of Father's death if it is to be a qualified disclaimer for
22 tax purposes. Under prior Acts and UPC § 2-801, the interest passes as if Son had
23 predeceased Father. A problem can arise if at Mother's death, one or more of S's
24 children living at that time have been born after Father's death. It is possible to argue
25 that had S predeceased Father the afterborn children would not exist and that D and
26 S's two children living at the time of Father's death are entitled to all of the trust
27 property.

28
29 The problem illustrated in **Example 3** is solved by the first sentence of Section 2-
30 1106(b)(3)(A). The disclaimed interest would have taken effect in possession or
31 enjoyment, that is, Son would be entitled to receive one-half the trust property, at
32 Mother's death. Under paragraph (3)(A) Son is deemed to have died immediately before
33 Mother's death even though under Section 2-1106(b)(1) the disclaimer is effective as of
34 Father's death. There is no doubt, therefore, that S's children living at the distribution
35 date, whenever born, are entitled to the share of the trust property he would have received
36 and, as **Examples 2(a)** and **2(b)** show, they will take exactly what S would have received
37 but for the disclaimer. Had S actually died before Mother, he would have received
38 nothing at Mother's death whether or not the disclaimer had been made. There is nothing
39 to pass to S's children and they take as representatives of S under the representational
40 scheme in effect.

41
42 Interests created by revocable lifetime trusts are future interests when created, but
43 may or may not be conditioned on surviving the termination of the trust, typically at the

1 Grantor's death. The following examples illustrate disclaimers of interests not expressly
2 conditioned on survival of the Grantor.

3
4 **Example 4(a).** G's revocable trust directs the trustee to pay "ten thousand dollars
5 (\$10,000) to the grantor's brother, B" at the termination of the trust on G's death. B
6 disclaims the entire gift immediately after G's death. B is deemed to have
7 predeceased G because it is at G's death that the interest given B will come into
8 possession and enjoyment. Had B not disclaimed he would have received \$10,000 at
9 that time. The recipient of the disclaimed interest will be determined by the law that
10 applies to gifts of future interests to persons who die before the interest comes into
11 possession and enjoyment. Traditional analysis would regard the gift to B as a vested
12 interest subject to divestment by G's power to revoke the trust. So long as G has not
13 revoked the gift, the interest will pass through B's estate and should pass to B's heirs
14 determined as of G's death. Under UPC § 2-707(b) the interest would pass to B's
15 descendants who survive G by 120 hours by representation. Because the antilapse
16 mechanism of UPC § 2-707 is not limited to gifts to relatives, a disclaimer by a friend
17 rather than a brother would have the same result.

18
19 **Example 4(b).** G's revocable trust directed that on his death the trust property is
20 to be distributed to his three children, A, B, and C. A disclaims immediately after G's
21 death and is deemed to predecease the distribution date, which is G's death. The
22 traditional analysis applies exactly as it does in Example 4(a). The only condition on
23 A's gift is G's not revoking the trust. A is not explicitly required to survive G (See
24 First National Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989).) The
25 interest passes to A's heirs. UPC § 2-707(b) would pass the interest by representation
26 to A's descendants who survive G by 120 hours.

27
28 If the gift under the revocable trust is conditioned on surviving the grantor, the
29 result of the disclaimer is the same as that of a disclaimer of a gift under a will. For
30 example, the result of a disclaimer of an interest in the gift of the residuary estate by
31 representation to the testator's descendants who survive the testator illustrated by
32 Examples 2(a) and (b) are the same for a gift of the residue of the trust estate by
33 representation to the descendants of the grantor who survive the grantor. Both gifts
34 require survival to the time of distribution (the death of the testator or grantor). In both
35 cases the disclaimant is deemed to predecease the distribution date, and therefore has no
36 gift. The disclaimed interest passes under the second sentence of Section 2-
37 1106(b)(3)(A) only to the disclaimant's descendants. If the distribution date of a gift
38 under a revocable trust is not the Grantor's death but some future time, for example,
39 termination of the trust on the death of a surviving spouse, the situation illustrated by
40 Example 3 can arise, and the result is the same.

41
42 If the designated beneficiary of a life insurance policy disclaims the policy
43 proceeds, he or she will be deemed to have predeceased the insured because the time of

1 distribution is the insured's death. If a contingent beneficiary has been named, the
2 contingent beneficiary will take the proceeds. If a contingent beneficiary has not been
3 named, the traditional rule is that the proceeds will pass to the insured's estate. Under
4 UPC § 2-706, however, in the absence of a contingent beneficiary, the proceeds would
5 pass by representation to the descendants of the designated beneficiary who survive the
6 insured by 120 hours.

7
8 The result of a disclaimer of an interest created under a will is seldom in doubt.
9 Even if the will does not provide for the death of the disclaimant before the testator, the
10 doctrine of lapse and the antilapse statutes will give a clear answer. The law of lapse as it
11 applies to non-testamentary instruments and the interests they create is far less certain. In
12 the absence of comprehensive lapse statutes like those incorporated into the UPC, the
13 exact result of the disclaimer of an interest created in an instrument other than a will may
14 be dictated by general principles the exact application of which to any particular situation
15 may not be obvious.

16
17 Section 2-1106(b)(3)(B) provides a rule for the passing of property interests
18 disclaimed by persons other than individuals. Because Section 2-1108 applies to
19 disclaimers by trustees of property that would otherwise pass to the trust, Section 2-
20 1106(b)(3)(B) principally applies to disclaimers by corporations, partnerships, and the
21 other entities listed in the definition of "person" in Section 2-1102(6). A charity, for
22 example, might wish to disclaim property the acceptance of which would be incompatible
23 with its purposes.

24
25 Section 2-1106(b)(4) continues the provision of prior Uniform Acts and UPC
26 § 2-801 on this subject providing for the acceleration of future interests on the making of
27 the disclaimer, except that future interests in the disclaimant do not accelerate. The
28 workings of Section 2-1106(b)(4) are illustrated by the following examples.

29
30 **Example 5(a).** Father's will creates a testamentary trust to pay income to his son
31 S for his life, and on his death to pay the remainder to S's descendants then living, by
32 representation. If S disclaims his life income interest in the trust, he will be deemed
33 to have died immediately before Father's death. The disclaimed interest, S's income
34 interest, came into possession and enjoyment at Father's death as would any present
35 interest created by will (see **Examples 1(a), (b), and (c)**), and, therefore, the time of
36 distribution is Father's death. If at the income beneficiary of a testamentary trust does
37 not survive the testator, the income interest is not created and the next interest in the
38 trust comes takes effect. Since the next interest in Father's trust is the remainder in
39 S's descendants, the trust property will pass to S's descendants who survive Father by
40 representation. It is immaterial under the statute that the actual situation at the S's
41 death might be different with different descendants entitled to the remainder.
42

1 Example 5(b). Mother's will creates a testamentary trust to pay the income to her
2 daughter D until she reaches age 35 at which time the trust is to terminate and the
3 trust property distributed in equal shares to D and her three siblings. D disclaims
4 her income interest. The remainder interests in her three siblings accelerate and they
5 each receive one-fourth of the trust property. D's remainder interest does not
6 accelerate, however, and she must wait until she is 35 to receive her fourth of the trust
7 property.

8
9
10
11 **SECTION 2-1107. DISCLAIMER OF RIGHTS OF SURVIVORSHIP IN**
12 **JOINTLY HELD PROPERTY.**

13 (a) Upon the death of a holder of jointly held property, a surviving holder may
14 disclaim, in whole or part, the greater of:

15 (1) a fractional share of the property determined by dividing the number one
16 by the number of joint holders alive immediately before the death of the holder to whose
17 death the disclaimer relates; or

18 (2) all of the property except that part of the value of the entire interest
19 attributable to the contribution furnished by the disclaimant.

20 (b) A disclaimer under subsection (a) takes effect as of the death of the holder of
21 jointly held property to whose death the disclaimer relates.

22 (c) An interest in jointly held property disclaimed by a surviving holder of the
23 property passes as if the disclaimant predeceased the holder to whose death the disclaimer
24 relates.

25 **Comment**

26 The various forms of ownership in which "joint property," as defined in Section
27 2-1102(5), can be held include common law joint tenancies and any statutory variation
28 that preserves the right of survivorship. The common law was unsettled whether a
29 surviving joint tenant had any right to renounce his interest in jointly-owned property and

1 if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B
2 owned real estate or securities as joint tenants with right of survivorship and A died, the
3 problem was whether B might disclaim what was given to him originally upon creation of
4 the estate, or, if not, whether he could nevertheless reject the incremental portion derived
5 through the right of survivorship. There was also a question of whether a joint bank
6 account should be treated differently from jointly-owned securities or real estate for the
7 purpose of disclaimer.

8
9 This common law of disclaimers of jointly held property must be set against the
10 rapid developments in the law of tax qualified disclaimers of jointly held property. Since
11 the previous Uniform Acts were drafted, the law regarding tax qualified disclaimers of
12 joint property interests has been clarified. Courts have repeatedly held that a surviving
13 joint tenant may disclaim that portion of the jointly held property to which the survivor
14 succeeds by operation of law on the death of the other joint tenant so long as the joint
15 tenancy was severable during the life of the joint tenants (*Kennedy v. Commissioner*, 804
16 F.2d 1332 (7th Cir 1986), *McDonald v. Commissioner*, 853 F.2d 1494 (9th Cir 1988),
17 *Dancy v. Commissioner*, 872 F.2d 84 (4th Cir 1989).) On December 30, 1997 the Service
18 published T.D. 8744 making final proposed amendments of the Regulations under IRC
19 § 2518 to reflect the decisions regarding disclaimers of joint property interests.

20
21 The amended final Regulations, § 25.2518-2(c)(4)(i) allow a surviving joint tenant
22 or tenant by the entireties to disclaim that portion of the tenancy to which he or she
23 succeeds upon the death of the first joint tenant (½ where there are two joint tenants)
24 whether or not the tenancy could have been unilaterally severed under local law and
25 regardless of the proportion of consideration furnished by the disclaimant. The
26 Regulations also create a special rule for joint tenancies between spouses created after
27 July 14, 1988 where the spouse of the donor is not a United States citizen. In that case,
28 the donee spouse may disclaim any portion of the joint tenancy includible in the donor
29 spouse's gross estate under IRC § 2040, which creates a contribution rule. Thus the
30 surviving non-citizen spouse may disclaim all of the joint tenancy property if the
31 deceased spouse provided all the consideration for the tenancy's creation.

32
33 The amended final Regulations, § 25.2518-2(c)(4)(iii) also recognize the unique
34 features of joint bank accounts, and allow the disclaimer by a survivor of that part of the
35 account contributed by the decedent, so long as the decedent could have regained that
36 portion during life by unilateral action, bar the disclaimer of that part of the account
37 attributable to the survivor's contributions, and explicitly extend the rule governing joint
38 bank accounts to brokerage and other investment accounts, such as mutual fund accounts,
39 held in joint name.

40
41 These developments in the tax law of disclaimers are reflected in subsection (a).
42 The subsection allows a surviving holder of jointly held property tenant to disclaim the
43 greater of the accretive share, the part of the jointly held property which augments the

1 survivor's interest in the property, and all of the property that it not attributable to the
2 disclaimant's contribution to the jointly held property. In the usual joint tenancy or
3 tenancy by the entireties between husband and wife, the survivor will always be able to
4 disclaim one-half the property. If the disclaimer conforms to the requirements of IRC
5 § 2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all
6 of the property attributable to the decedent's contribution, a provision which will allow
7 the non-citizen spouse to take advantage of the contribution rule of the final Regulations.
8 The contribution rule of subsection (a)(2) will also allow surviving holders of joint
9 property arrangements other than joint tenancies to make a tax qualified disclaimer under
10 the rules applicable to those joint arrangements. For example, if A contributes 60% and
11 B contributes 40% to a joint bank account and they allow the interest on the funds to
12 accumulate, on B's death A can disclaim 40% of the account; on B's death A can
13 disclaim 60% of the account. If the account belonged to the parties during their joint
14 lives in proportion to their contributions, the disclaimers in this example can be tax
15 qualified disclaimers if all the requirements of IRC § 2518 are met.

16
17 Subsection (b) provides that the disclaimer is effective as of the death of the joint
18 holder which triggers the survivorship feature of the joint property arrangement. The
19 disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.
20

21 Subsection (c) provides that the disclaimed interest passes as if the disclaimant
22 had predeceased the holder to whose death the disclaimer relates. Where there are two
23 joint holders, a disclaimer by the survivor results in the disclaimed property passing as
24 part of the deceased joint holder's estate because under this subsection, the deceased joint
25 holder is the survivor as to the portion disclaimed. If a married couple owns the family
26 home in joint tenancy, therefore, a disclaimer by the survivor under subsection (a)(1)
27 results in one-half the home passing through the decedent's estate. The surviving spouse
28 and whoever receives the interest through the decedent's estate are tenants in common in
29 the house. In the proper circumstances, the disclaimed one-half could help to use up the
30 decedent's unified credit. Without the disclaimer, the interest would automatically
31 qualify for the marital deduction, perhaps wasting part of the decedent's applicable
32 exclusion amount.
33

34 In a multiple holder joint property arrangement, the disclaimed interest will
35 belong to the other joint holder or holders.
36

37 **Example 1.** A, B, and C are joint tenants with right of survivorship in Blackacre.
38 A dies. B then disclaims 1/3 of the property under subsection (a)(1) (one divided by
39 three, the number of joint holders immediately before A's death). B is deemed to
40 have predeceased A, which would leave A and C as the surviving joint owners of the
41 1/3 disclaimed. Since A is now dead, C is the sole owner of the 1/3 B disclaimed and
42 C and the joint tenancy as an entity are tenants in common in Blackacre. If B
43 predeceases C, C will be the sole owner of Blackacre in fee simple. If C predeceases

1 B, B will own 2/3 of Blackacre outright and 1/3 of Blackacre will pass through C's
2 estate. See, *Cortelyou v. Dinger*, 62 Misc.2d 1007, 310 N.Y.S.2d 764 (1970); 2
3 American Law of Property, § 6.2.

4
5
6
7 **SECTION 2-1108. DISCLAIMER OF INTEREST BY TRUSTEE.** If a trustee
8 disclaims an interest in property that otherwise would have become trust property, the
9 interest does not become trust property.

10 **Comment**

11 This section deals with disclaimer of a right to receive property into a trust, and
12 thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary
13 acting on behalf of an individual, such as a personal representative, conservator, guardian,
14 or agent is governed by the section of the statute applicable to the type of interest being
15 disclaimed.) The instrument under which the right to receive the property was created
16 may govern the disposition of the property in the event of a disclaimer by providing for a
17 disposition when the trust does not exist. When the instrument does not make such a
18 provision, the doctrine of resulting trust will carry the property back to the donor. The
19 effect of the actions of co-trustees will depend on the state law governing the action of
20 multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's
21 fiduciary obligations.

22
23
24
25 **SECTION 2-1109. DISCLAIMER OF POWER OF APPOINTMENT OR**
26 **OTHER POWER NOT HELD IN FIDUCIARY CAPACITY.** If a holder disclaims a
27 power of appointment or other power not held in a fiduciary capacity, the following rules
28 apply:

29 (1) If the holder has not exercised the power, the disclaimer takes effect as of the
30 time the instrument creating the power becomes irrevocable.

1 Second, Property (Donative Transfers), § 18.6 suggests that any requirement of the
2 antilapse statute that the deceased devisee be related in some way to the testator be
3 applied as if the appointive property were owned either by the donor or the holder of
4 the power. That is the position taken by UPC § 2-603. Since antilapse statutes
5 usually apply to devises to children and grandchildren, the disclaimed interest would
6 pass to A's descendants by representation.

7
8 A taker in default or a permissible object of appointment is traditionally regarded
9 as having a type of future interest. See Restatement, Second, Property (Donative
10 Transfers) § 11.2, Comments c and d. The future interest will come into possession and
11 enjoyment when the question of whether or not the power is to be exercised is resolved.
12 For testamentary powers that time is the death of the holder.

13
14 Subsection (b) provides that a disclaimer by an object or taker in default takes
15 effect as of the time the instrument creating the power becomes effective. Because the
16 disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the
17 disclaimer is governed by Section 2-1106. The effect of these rules is illustrated by the
18 following examples.

19
20 **Example 2(a).** The facts are the same as Example 1, except A disclaims before
21 D's death and D's will does not exercise the power. Under subsection (b) A's
22 disclaimer is effective as of Mother's death which is the time when the instrument
23 creating the power, Mother's will, became irrevocable. Because A disclaimed an
24 interest in property, the effect of the disclaimer is governed by Section 2-1106(b). If
25 Mother's will makes no provision for the disposition of the interest should it be
26 disclaimed or of disclaimed interests in general (Section 2-1106(b)(2)), the interest
27 passes and under Section 2-1106(b)(3) and A is deemed to have died immediately
28 before D's death which is the time of distribution. If A actually survives D, the
29 disclaimed interest is one-third the trust property; it will pass as if A predeceased D,
30 and the result is the same as in Example 1. If A does predecease D he would have
31 received nothing and there is no disclaimed interest. The disclaimer has no effect on
32 the passing of the trust property.

33
34 **Example 2(b).** The facts are the same as in Example 2(a) except D does exercise
35 her power of appointment to give one-third of the trust property to each of her three
36 children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if he
37 predeceased D and the result is the same as in Example 1.

38
39 In addition, if all the objects and takers in default disclaim before the power is
40 exercised the power of appointment is destroyed. See Restatement, Second, Property
41 (Donative Transfers) § 12.1, Comment g.

1 herself. The subsection thus makes the disclaimer effective only as to the disclaiming
2 fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind
3 other fiduciaries, be they co- fiduciaries or successor fiduciaries, the effect of the
4 disclaimer will depend on local law.

5
6 As with any action by a fiduciary, a disclaimer of fiduciary powers must be
7 compatible with the fiduciary's duties.
8
9

10
11 **SECTION 2-1112. DELIVERY OR FILING**

12 (a) In this section, "beneficiary designation" means an instrument, other than an
13 instrument creating a trust, naming the beneficiary of:

14 (1) an annuity or insurance policy;

15 (2) an account with a designation for payment on death;

16 (3) a security registered in beneficiary form;

17 (4) a pension, profit-sharing, retirement, or other employment-related benefit
18 plan; or

19 (5) any other nonprobate transfer at death.

20 (b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected
21 by personal delivery, first-class mail, or any other method likely to result in its receipt.

22 (c) In the case of an interest created under the law of intestate succession or an
23 interest created by will, other than an interest in a testamentary trust:

24 (1) a disclaimer must be delivered to the personal representative of the
25 decedent's estate; or

26 (2) if no personal representative is then serving, it must be filed with a court
27 having jurisdiction to appoint the personal representative.

1 (d) In the case of an interest in a testamentary trust:

2 (1) a disclaimer must be delivered to the trustee then serving, or if no trustee is
3 then serving, to the personal representative of the decedent's estate; or

4 (2) if no personal representative is then serving, it must be filed with a court
5 having jurisdiction to enforce the trust.

6 (e) In the case of an interest in an inter vivos trust :

7 (1) a disclaimer must be delivered to the trustee then serving;

8 (2) if no trustee is then serving, it must be filed with a court having
9 jurisdiction to enforce the trust; or

10 (3) if the disclaimer is made before the time the instrument creating the trust
11 becomes irrevocable, it must be delivered to the settlor of a revocable trust or the
12 transferor of the interest.

13 (f) In the case of an interest created by a beneficiary designation made before the
14 time the designation becomes irrevocable, a disclaimer must be delivered to the person
15 making the beneficiary designation.

16 (g) In the case of an interest created by a beneficiary designation made after the
17 time the designation becomes irrevocable, a disclaimer must be delivered to the person
18 obligated to distribute the interest.

19 (h) In the case of a disclaimer by a surviving holder of jointly held property, the
20 disclaimer must be delivered to the person to whom the disclaimed interest passes.

21 (i) In the case of a disclaimer by an object or taker in default of exercise of a
22 power of appointment at any time after the power was created:

1 disclaiming the property or interest or has not waived the right to disclaim. Persons
2 seeking to make tax qualified disclaimers will continue to have to conform to the
3 requirements of the Internal Revenue Code.
4

5 The events resulting in a bar to the right to disclaim set forth in this section are
6 similar to those found in the 1978 Acts and UPC § 2-801. Subsection (a) provides that a
7 written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver
8 might be sought, for example, by a creditor who wishes to make sure that property
9 acquired in the future will be available to satisfy the debt.
10

11 Whether particular actions by the disclaimant amount to accepting the interest
12 sought to be disclaimed within the meaning of subsection (b)(1) will necessarily be
13 determined by the courts based upon the particular facts. (See *Leipham v. Adams*, 77
14 Wash.App. 827, 894 P.2d 576 (1995); *Matter of Will of Hall*, 318 S.C. 188, 456 S.E.2d
15 439 (Ct.App. 1995); *Jordan v. Trower*, 208 Ga.App. 552, 431 S.E.2d 160 (1993); *Matter*
16 *of Gates*, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); “What Constitutes or
17 Establishes Beneficiary’s Acceptance or Renunciation of Devise or Bequest,” 93 ALR2d
18 8).
19

20 The addition in this Act of the word “voluntary” to the list of actions barring a
21 disclaimer which also appears in the earlier Acts reflects the numerous cases holding that
22 only actions by the disclaimant taken after the right to disclaim has arisen will act as a
23 bar. (See *Troy v. Hart*, 116 Md.App. 468, 697 A.2d 113 (1997), *Estate of Opatz*, 554
24 N.W.2d 813 (N.D. 1996), *Frances Slocum Bank v. Martin*, 666 N.E.2d 411 (Ind.App.
25 1996), *Brown v. Momar, Inc.*, 201 Ga.App. 542, 411 S.E.2d 718 (1991), *Tompkins State*
26 *Bank v. Niles*, 127 Ill.2d 209, 130 Ill.Dec. 207, 537 N.E.2d 274 (1989).) An existing lien,
27 therefore, will not prevent a disclaimer, although the disclaimant’s actions before the
28 right to disclaim arises may work an estoppel. See *Hale v. Bardouh*, 975 S.W.2d 419
29 (Tex.Ct.App. 1998). With regard to joint property, the event giving rise to the right to
30 disclaim is the death of a joint holder, not the creation of the joint interest and any benefit
31 received during the deceased joint tenant’s life is ignored.
32

33 The reference to judicial sale in subsection (b)(3) continues a provision from the
34 earlier Acts and ensures that title gained from a judicial sale by a personal representative
35 will not be clouded by a possible disclaimer.
36

37 Subsection (c) rephrases the rules of Section 2-1111 governing the effect of
38 disclaimers of powers.
39

40 Subsection (d) is applicable to powers which can be disclaimed under Section 2-
41 1109. It bars the disclaimer of a general power of appointment once it has been
42 exercised. A general power of appointment allows the holder to take the property subject
43 to the power for him or herself, whether outright or by using it to pay his or her creditors

1 (for estate and gift tax purposes, a general power is one that allows the holder to appoint
2 to himself, his estate, his creditors, or the creditors of his estate). The power is presently
3 exercisable if the holder need not wait to some time or for some event to occur before
4 exercising the power. If the holder has exercised such a power, it can no longer be
5 disclaimed.

6
7 Subsection (e), unlike the 1978 Act, specifies that “other law” may bar the right to
8 disclaim. Some States, including Minnesota (M.S.A. § 525.532 (c)(6)), Massachusetts
9 (Mass. Gen. Law c. 191A, § 8), and Florida (Fla. Stat. § 732.801(6)), bar a disclaimer by
10 an insolvent disclaimant. In others a disclaimer by an insolvent debtor is treated as a
11 fraudulent “transfer”. See *Stein v. Brown*, 18 Ohio St.3d 305 (1985); *Pennington v.*
12 *Bigham*, 512 So.2d 1344 (Ala. 1987). A number of States refuse to recognize a
13 disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These
14 decisions often rely on the definition of “transfer” in the federal Medical Assistance
15 Handbook which includes a “waiver” of the right to receive an inheritance (see 42
16 U.S.C.A. § 1396p(e)(1)). See *Hinschberger v. Griggs County Social Services*, 499
17 N.W.2d 876 (N.D. 1993); *Department of Income Maintenance v. Watts*, 211 Conn. 323
18 (1989), *Matter of Keuning*, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and
19 *Matter of Molloy*, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), *Troy v. Hart*,
20 116 Md.App. 468, 697 A.2d 113 (1997), *Tannler v. Wisconsin Dept. of Health & Social*
21 *Services*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, *Estate of Kirk*, 591 N.W.2d
22 630 (Iowa, 1999)(valid disclaimer by executor of surviving spouse who was Medicaid
23 beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies
24 will begin to address the question of disclaimers of real property on which an
25 environmental hazard is located in order to avoid saddling the State, as title holder of last
26 resort, with the resulting liability, although the need for fiduciaries to disclaim property
27 subject to environmental liability has probably been diminished by the 1996 amendments
28 to CERCLA by the Asset Conservation Act of 1996 (PL 104-208). These larger policy
29 issues are not addressed in this Act and must, therefore, continue to be addressed by the
30 States. On the federal level, the United States Supreme Court has held that valid
31 disclaimer does not defeat a federal tax lien levied under IRC § 6321, *Dyre, Jr. v. United*
32 *States*, 528 U.S. 49, 120 S.Ct. 474 (1999).

33
34 Subsection (f) provides a rule stating what happens if an attempt is made to
35 disclaim a power or property interest who disclaimer is barred by this section. A
36 disclaimer of a power is ineffective, but the attempted disclaimer of the property interest,
37 although invalid as a disclaimer, will operate as a transfer of the disclaimed property
38 interest to the person or persons who would have taken the interest had the disclaimer not
39 been barred. This provision removes the ambiguity that would otherwise be caused by an
40 ineffective refusal to accept property. Whoever has control of the property will know to
41 whom to deliver it and the person attempting the disclaimer will bear any transfer tax
42 consequences.

1 National Commerce Act of 2000 (E-Sign) . Section 102(a)(2)(B) of that Act provides
2 that the federal law can be preempted by a later statute of the State that specifically refers
3 to the federal law. Not subject to preemption by the states are E-Sign’s consumer consent
4 provisions (Section 101(c)) and its notice provisions (Section 103(b)), neither of which
5 have substantive impact on the Disclaimers Act. The effect of this Section is to reaffirm
6 state authority over the formal requirements for the making of a disclaimer. For these
7 requirements, see Section 2-1105, and, specifically, Section 2-1105(c), which allow a
8 disclaimer to be made by means of a signed record.