UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

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PREFATORY NOTE

The Uniform Disclaimer of Property Interests Acts (UDPIA) replaces three Uniform Acts promulgated in 1978 (Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and Uniform Disclaimer of Transfers under Nontestatmentary Instruments Act) and will be incorporated into the Uniform Probate Code to replace current UPC § 2-801. The new Act is the most comprehensive disclaimer statute ever written. It is designed to allow every sort of disclaimer, including those that are useful for tax planning purposes. It does not, however, include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer. In addition, in almost all jurisdictions disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant's creditors. In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property and the effect of that refusal on the power or interest while leaving the effect of the refusal itself to other law. Section 13(e) explicitly states that a disclaimer may be barred or limited by law other than the Act.

The decision not to include a specific time limit–to "decouple" the disclaimer statute from the time requirement applicable to a "qualified disclaimer" under IRC § 2518–is also designed to reduce confusion. The older Uniform Acts and almost all the current state statutes (many of which are based on those Acts) were drafted in the wake of the passage of IRC § 2518 in 1976. That provision replaced the "reasonable time" requirement of prior law with a requirement that a disclaimer must be made within nine months of the creation of the interest disclaimed if the disclaimer is to be a "qualified disclaimer" which is not regarded as transfer by the disclaimant. The statutes that were written in response to this new provision of tax law reflected the nine month time limit. Under most of these statutes (including the older Uniform Acts and former Section 2-801) a disclaimer must be made within nine months of the creation of a present interest (for example, as disclaimer of an outright gift under a will must be made within nine months of the decedent's death), which corresponds to the requirement of IRC § 2518. A future interest, however, may be disclaimed within nine months of the time the interest vests in possession or enjoyment (for example, a remainder whether or not contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary). The time limit for future interests does not correspond to IRC § 2518 which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest's creation, no matter how contingent it may then be. The nine-month time limit of the existing statutes really is a trap. While it superficially conforms to IRC § 2518, its application to the disclaimer of future interests does not. The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law.

The elimination of the time limit is not the only change from current statutes. The Act abandons the concept of "relates back" as a proxy for when a disclaimer becomes effective. Instead, by stating specifically when a disclaimer becomes effective and explicitly stating in Section 5(f) that a disclaimer "is not a transfer, assignment, or release," the Act makes clear the results of refusing property or powers through a disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not been explicitly addressed in previous statutes. The Act provides detailed rules for the disclaimer of interests in jointly held property (Section 7). Such disclaimers have important uses especially in tax planning, but

their status under current law is not clear. Furthermore, although current statutes mention the disclaimer of jointly held property, they provide no details. Recent developments in the law of qualified disclaimers of jointly held property make fuller treatment of such disclaimers necessary. Section 8 addresses the disclaimer by trustees of property that would otherwise become part of the trust. The disclaimer of powers of appointment and other powers not held in a fiduciary capacity is treated in Section 9 and disclaimers by appointees, objects, and takers in default of exercise of a power of appointment is the subject of Section 10. Finally, Section 11 provides rules for the disclaimer of powers held in a fiduciary capacity.

UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS (1999)

SECTION 1. SHORT TITLE. This [Act] may be cited as the "Uniform Disclaimer of Property Interests Act (1999)."

SECTION 2. DEFINITIONS. In this [Act]:

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

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

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

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

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

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

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

(8) "Trust" means:

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

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

Comment

The definition of "disclaimant" (subsection (1)) limits the term to the person who would have received the disclaimed property or power if the disclaimer had not been made. The disclaimant is not necessarily the person making the disclaimer, who may be a guardian, custodian, or other fiduciary acting for the disclaimant or the personal representative of the disclaimant's estate.

The term "disclaimed interest" (subsection (2)) refers to the subject matter of a disclaimer of an interest in property and provides a compact term the use of which simplifies the drafting of Section 6.

The definition of "disclaimer" (subsection (3)) expands previous definitions. Prior Uniform Acts provided for a disclaimer of "the right of succession to any property or interest therein" and former UPC Section 2-801 referred to "an interest in or with respect to property or an interest therein." These previously authorized types of disclaimers are continued by the present language referring to "an interest in . . . property." The language referring to "power over property" broadens the permissible scope of disclaimers to include any power over property that gives the power-holder a right to control property, whether it be cast in the form of a power of appointment or a fiduciary's management power over property or discretionary power of distribution over income or corpus.

Under the Act, a "fiduciary" (defined in subsection (4)) is given the power to disclaim except where specifically prohibited by state law or by the document creating the fiduciary relationship. See Section 5(b).

The term "jointly held property" (subsection (5)) includes not only a traditional joint tenancy but also other property that is "held," but may not be "owned," by two or more persons with a right of survivorship. One form of such property is a joint bank account between parties who are not married to each other which, under the laws of many States, is owned by the parties in proportion to their deposits. (*See* UPC § 6-211(b).) This "holding" concept, as opposed to "owning," may also be true with joint brokerage accounts under the law of some States. *See* Treas. Regs. § 25.2518-2(c)(4).

The term "trust" (subsection (8)) means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of "trust" is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act,

under which the trust is created. Commercial trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. *See* John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

SECTION 3. SCOPE. This [Act] applies to disclaimers of any interest in or power over property, whenever created.

SECTION 4. [ACT] SUPPLEMENTED BY OTHER LAW.

(a) Unless displaced by a provision of this [Act], the principles of law and equity supplement this [Act].

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

SECTION 5. POWER TO DISCLAIM; GENERAL REQUIREMENTS; WHEN IRREVOCABLE.

(a) A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

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

limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

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

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

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

(A) execute or adopt a tangible symbol; or

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

(d) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(e) A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 12 or when it becomes effective as provided in Sections 6 through 11, whichever occurs later.

(f) A disclaimer made under this [Act] is not a transfer, assignment, or release.

Comment

Subsections (a) and (b) give both persons (as defined in Section 2(6)) and fiduciaries (as defined in Section 2(4)) a broad power to disclaim both interests in and powers over property. In both instances, the ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. (In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (a) continues the provisions of current law by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on a person. This provision follows from the principle behind all disclaimers – no one can be forced to accept property – and extends that principle to powers over property.

This Act also gives fiduciaries broad powers to disclaim both interests and powers. A fiduciary who may also be a beneficiary of the fiduciary arrangement may disclaim in either capacity. For example, a trustee who is also one of several beneficiaries of a trust may have the power to invade trust principal for the beneficiaries. The trustee may disclaim the power as trustee under Section 11 or may disclaim as a holder of a power of appointment under Section 9. Subsection (b) also gives fiduciaries the right to disclaim in spite of spendthrift or similar restrictions given, but subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the creator of a trust or other arrangement creating a fiduciary relationship should be able to prevent a fiduciary accepting office under the arrangement from altering the parameters of the relationship. This reasoning also applies to fiduciary relationships created by statute such as those governing conservatorships and guardianships. Subsection (b) therefore does not override express restrictions on disclaimers contained in the instrument creating the fiduciary relationship or in other statutes of the State.

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

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

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

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G (*see* Section 12(e)(3)). The

disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable (*see* Section 6(b)(1)). Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

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

SECTION 6. DISCLAIMER OF INTEREST IN PROPERTY.

(a) In this section:

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

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

(b) Except for a disclaimer governed by Section 7 or 8, the following rules apply to a disclaimer of an interest in property:

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

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

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

(A) If the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution. However, if, by law or under the

instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

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

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

Comment

Subsection (a) defines two terms that are used only in Section 6. The first, "time of distribution" is used in determining to whom the disclaimed interest passes (*see* below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, If B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

The second defined term, "future interest," is used in Section 6(b)(4) in connection with the acceleration rule.

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

This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. Sections 2(3) and 5(f) taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (b)(1) of this section makes the disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the statute, however, prevents the legislatures or the courts from limiting the effect of the disclaimer as refusal doctrine in specific situations or generally. *See* the Comments to Section 13 below.

Section 6(b)(2) allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars ($10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to . . . ." is such a provision.

Section 6(b)(3)(A) applies if Section 6(b)(2) does not and if the disclaimant is an individual. Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made (Section 2(1)), this paragraph would apply to disclaimers by fiduciaries on behalf of individuals. The rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 6(a)(1). The working of this subsection for present interests given to named individuals is illustrated by the following examples:

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

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

Example 1(c). T's will devised "ten thousand dollars ($10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise.

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

Example 2(a). T's will devised "the rest, residue, and remainder of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed. The first sentence of Section

6(b)(3)(A) provides that the disclaimed interest passes as if S had predeceased T. If Section 6(b)(3)(A) stopped there, S's children would take one-half of the disclaimed interest and D would take the other half under every system of "representation" that commonly exists. S's disclaimer should not have that effect, however, but should pass what he would have taken to his children. The second sentence of Section 6(b)(3)(A) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

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

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

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

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

The problem illustrated in **Example 3** is solved by the first sentence of Section 6(b)(3)(A). The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half the trust property, at Mother's death. Under paragraph (3)(A) Son is deemed to have died immediately before Mother's death even though under Section 6(b)(1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property he would have received and, as **Examples 2(a)** and **2(b)** show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

Interests created by revocable lifetime trusts are future interests when created, but may or may not be conditioned on surviving the termination of the trust, typically at the Grantor's death. The following examples illustrate disclaimers of interests not expressly conditioned on survival of the Grantor.

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

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

If the gift under the revocable trust is conditioned on surviving the grantor, the result of the disclaimer is the same as that of a disclaimer of a gift under a will. For example, the result of a disclaimer of an interest in the gift of the residuary estate by representation to the testator's descendants who survive the testator illustrated by **Examples 2(a)** and **(b)** are the same for a gift of the residue of the trust estate by representation to the descendants of the grantor who survive the grantor. Both gifts require survival to the time of distribution (the death of the testator or grantor). In both cases the disclaimant is deemed to predecease the distribution date, and therefore has no gift. The disclaimed interest passes under the second sentence of Section 6(b)(3)(A) only to the disclaimant's descendants. If the distribution date of a gift under a revocable trust is not the Grantor's death but some future time, for example, termination of the trust on the death of a surviving spouse, the situation illustrated by **Example 3** can arise, and the result is the same.

If the designated beneficiary of a life insurance policy disclaims the policy proceeds, he or she will be deemed to have predeceased the insured because the time of distribution is the insured's death. If a contingent beneficiary has been named, the contingent beneficiary will take the proceeds. If a contingent beneficiary has not been named, the traditional rule is that the proceeds will pass to the insured's estate. Under UPC § 2-706, however, in the absence of a contingent beneficiary, the proceeds would pass by representation to the descendants of the designated beneficiary who survive the insured by 120 hours.

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

Section 6(b)(3)(B) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because Section 8 applies to disclaimers by trustees of property that would otherwise pass to the trust, Section 6(b)(3)(B) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 2(6). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Section 6(b)(4) continues the provision of prior Uniform Acts and UPC § 2-801 on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Section 6(b)(4) are illustrated by the following examples.

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

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

SECTION 7. DISCLAIMER OF RIGHTS OF SURVIVORSHIP IN JOINTLY HELD PROPERTY.

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

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

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

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

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

Comment

The various forms of ownership in which "joint property," as defined in Section 1(5), can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

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

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

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

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

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

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

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

Example 1. A, B, and C are joint tenants with right of survivorship in Blackacre. A dies. B then disclaims 1/3 of the property under subsection (a)(1) (one divided by three, the number of joint holders immediately before A's death). B is deemed to have predeceased A, which would leave A and C as the surviving joint owners of the 1/3 disclaimed. Since A is now dead, C is the sole owner of the 1/3 B disclaimed and C and the joint tenancy as an entity are tenants in common in Blackacre. If B predeceases C, C will be the sole owner of Blackacre in fee simple. If C predeceases B, B will own 2/3 of Blackacre outright and 1/3 of Blackacre will pass through C's estate. *See*, *Cortelyou v. Dinger*, 62 Misc.2d 1007, 310 N.Y.S.2d 764 (1970); 2 American Law of Property, § 6.2.

SECTION 8. DISCLAIMER OF INTEREST BY TRUSTEE. If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

Comment

Section 8 deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's fiduciary obligations.

SECTION 9. DISCLAIMER OF POWER OF APPOINTMENT OR OTHER POWER NOT HELD IN FIDUCIARY CAPACITY. If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

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

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

(3) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

Comment

Section 5(a) authorizes a person to disclaim an interest in or power over property. Section 9 provides rules for disclaimers of powers which are not held in a fiduciary capacity. The most common non-fiduciary power is a power of appointment. Section 4(a) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 9 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer affects only the holder of the power and will not affect other aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

SECTION 10. DISCLAIMER BY APPOINTEE, OBJECT, OR TAKER IN DEFAULT OF EXERCISE OF POWER OF APPOINTMENT.

(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

Comment

Section 10 governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment. At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

Section 10 provides rules for disclaimers by all of these persons: subsection (a) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (b) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same

position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (a), therefore, makes the disclaimer effective as of the time the instrument exercising the power–giving the interest to the disclaimant–becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 6. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 9.

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (a) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 6(b). If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 6(b)(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. *See* Restatement, Second, Property (Donative Transfers) § 18.5. The Restatement, Second, Property (Donative Transfers), § 18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. (See also Restatement, Third, Property (Wills and Other Donative Transfers) § 5.5, Comment *l*.) That is the position taken by UPC § 2-603. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

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

Subsection (b) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 6. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as **Example 1**, except A disclaims before D's death and D's will does not exercise the power. Under subsection (b) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 6(b). If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 6(b)(2)), the interest passes under Section 6(b)(3) as if the disclaimant had died immediately before the time of distribution. Thus, A is deemed to have died immediately before D's death, which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in **Example 1**. If A does predecease D he would have received nothing and there is no

disclaimed interest. The disclaimer has no effect on the passing of the trust property.

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

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

SECTION 11. DISCLAIMER OF POWER HELD IN FIDUCIARY CAPACITY.

(a) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

Comment

Section 11 governs disclaimers by fiduciaries of powers held in their fiduciary capacity. Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in *Cleaveland v. U.S.*, 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶ 13,766 (C.D.Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each State relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power but yet preserve the possibility of another trustee exercising the

power would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

As with any action by a fiduciary, a disclaimer of fiduciary powers must be compatible with the fiduciary's duties.

SECTION 12. DELIVERY OR FILING.

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

(1) an annuity or insurance policy;

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

(3) a security registered in beneficiary form;

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

(5) any other nonprobate transfer at death.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power ; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent , the disclaimer must be delivered to the principal or the principal's representative.

Comment

The rules set forth in Section 12 are designed so that anyone who has the duty to distribute the disclaimed interest will be notified of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only when there is no one person or entity to whom delivery can be made.

SECTION 13. WHEN DISCLAIMER BARRED OR LIMITED.

(a) A disclaimer is barred by a written waiver of the right to disclaim.

(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or

(3) a judicial sale of the interest sought to be disclaimed occurs.

(c) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(d) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(e) A disclaimer is barred or limited if so provided by law other than this [Act].

(f) A disclaimer of a power over property which is barred by this section is ineffective. A disclaimer of an interest in property which is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this [Act] had the disclaimer not been barred.

Comment

The 1978 Act required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a "reasonable" time.

This Act specifically rejects a time requirement for making a disclaimer. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

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

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

The addition in this Act of the word "voluntary" to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (*See Troy v. Hart*, 116 Md.App. 468, 697 A.2d 113 (1997), *Estate of Opatz*, 554 N.W.2d 813 (N.D. 1996), *Frances Slocum Bank v. Martin*, 666 N.E.2d 411 (Ind.App. 1996), *Brown v. Momar, Inc.*, 201 Ga.App. 542, 411 S.E.2d 718 (1991), *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 130 Ill.Dec. 207, 537 N.E.2d 274 (1989).) An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may

work an estoppel. *See Hale v. Bardouh*, 975 S.W.2d 419 (Tex.Ct.App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest and any benefit received during the deceased joint tenant's life is ignored.

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

Subsection (c) rephrases the rules of Section 11 governing the effect of disclaimers of powers.

Subsection (d) is applicable to powers which can be disclaimed under Section 9. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

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

Subsection (f) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. A disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. This provision removes the ambiguity that would otherwise be

caused by an ineffective refusal to accept property. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

SECTION 14. TAX QUALIFIED DISCLAIMER. Notwithstanding any other provision of this [Act], if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this [Act].

Comment

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC § 2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if its does not otherwise meet the Act's more specific requirements.

SECTION 15. RECORDING OF DISCLAIMER. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

Comment

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which only referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice.

SECTION 16. APPLICATION TO EXISTING RELATIONSHIPS. Except as otherwise provided in Section 13, an interest in or power over property existing on the effective date of this [Act] as to which the time for delivering or filing a disclaimer under law superseded by this [Act] has not expired may be disclaimed after the effective date of this [Act].

Comment

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Acts and former UPC § 2-801, allows the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X cannot disclaim the general devise, irrespective of the application of Section 13 of the Act, because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 13 without regard to the nine month period of prior law.

SECTION 17. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [Act] modifies, limits, and supercedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et seq.) but does not modify, limit, or supercede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

Comment

This Section adopts standard language approved by the Uniform Law Conference that is intended to preempt application of the federal Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign). Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. Not subject to preemption by the states are E-Sign's consumer consent provisions (Section 101(c)) and its notice provisions (Section 103(b)), neither of which have substantive impact on the Disclaimers Act. The effect of this Section is to reaffirm state authority over the formal requirements for the making of a disclaimer. For these requirements, see Section 5, and, specifically, Section 5(c), which allow a disclaimer to be made by means of a signed record.

SECTION 18. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 19. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any

person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 20. EFFECTIVE DATE. This [Act] takes effect on ..... .

SECTION 21. REPEALS. The following acts and parts of acts are repealed:

(1) .....

(2) .....

(3) .....

Comment

Existing acts dealing with disclaimers are superseded by this Act and should be repealed. Among such acts are the previous Uniform Acts on this subject (*see* Prefatory Note).