D R A F T
FOR DISCUSSION ONLY

REVISION OF UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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REVISION OF UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

With Comments

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UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

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Uniform Disclaimer of Property Interests Acts (199__)

Page

PREFATORY NOTE

This Uniform Act is designed to replace the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act, and the Uniform Disclaimer of Property Interests Act.

A disclaimer is a refusal to accept property. Although under the common law one could disclaim testamentary gifts but not property passing by intestacy, statutory law has long recognized the right to do both. There is a thirty year history of drafting model legislation governing disclaimers.

In 1968, the Real Property, Probate and Trust Law Section of the American Bar Association developed legislation which dealt with disclaimers and which was based on the Model Probate Code (1948). The legislation dealt with disclaimers in testate (where there is a will) and intestate (no will) situations.

In 1969 the original Uniform Probate Code provided for "Renunciation of Succession which extended the renunciation power to personal representatives of deceased takers six months from the decedent's death for rejection of present interests and six months from the time of final ascertainment of the taker of an interest for rejection of future interests.

In 1972 the Uniform Law Commissioners ("ULC) approved two uniform acts: the "Uniform Disclaimer of Transfers by Will, Intestacy or appointment Act and the "Uniform disclaimer of Transfer Under Nontestamentary Instruments Act. In 1975 technical amendments were made.

In 1978, following federal activity limiting disclaimers recognized for federal tax purposes, ULC revisited disclaimers and produced three uniform acts entitled: "Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act , "Uniform Disclaimer of Transfer Under Nontestamentary Instruments Act and "Uniform Disclaimer of Property Interests Act. The Uniform Probate Code deals with disclaimers of both testamentary and nontestamentary transfers in § 2-801, last revised in 1993.

Today, all states have some sort of disclaimer legislation, usually based on the Uniform Acts, sometimes on the more recent UPC § 2-801.

The use of disclaimers was transformed by the enactment in 1976 of IRC § 2518 setting forth for the first time detailed rules governing disclaimers that would be recognized for tax purposes. Disclaimers conforming to the requirements of § 2518 are not treated as transfers for tax purposes. The classic example follows:

Example 1: Mother's will leaves her estate to her descendants by representation who survive her. She is survived by Son and Daughter and their children. Son decides that he does not need his share of Mother's estate and would prefer to see it pass to his children. If he accepts his share of Mother's estate and then gives it to his children, however, he will incur gift tax. If he makes a tax qualified disclaimer, the property will pass according to whatever state law applies. That law usually defers to any provision in Mother's will governing disclaimed interests, and if none, states that the property passes as if Son had predeceased Mother. In the latter case, treating Son as predeceasing Mother means that his children take. Since their father is deemed to be dead, they take as Mother's living descendants.

Section 2518 requires that a tax qualified disclaimer be made within nine months of the transfer creating the interest disclaimed, in this case, Mother's death. The statute applies the nine month period to any interest, no matter how contingent.

Example 2: W's will creates a QTIP marital deduction trust for H which on his death is to be distributed to their descendants by representation who survive H. If Son wishes to disclaim his share of the trust remainder, which he will receive only if he survives H, and not face transfer tax consequences, he must do so withing nine months of W's death.

The current Uniform Acts and statutes modeled on them as well as UPC § 2-801 do adopt a nine month limitation, but in *Example 2* the period would begin to run from the time of H's death, the time when the remainder finally comes into possession or enjoyment (is "indefeasibly vested   according to UPC § 2-801). The reason for this difference between tax law and state property law is related to the other principal use to which disclaimers are put: a disclaimant can usually insulate the disclaimed property from his or her creditors. In *Example 1*, were there an outstanding judgment against Son, his disclaimer would not only put his share of Mother's estate into the hands of his children without any tax consequences to him, but would also keep the property out of the hands of his creditors.

This second use of disclaimers is widely recognized, but not without criticism. In some states this technique is limited by statute or decision. This Act takes no position on the question, but leaves to the states the formulation of policy on this matter. (*See* the Comment to Section 10.)

The differing time limitations under federal tax law and state property law have always created problems. Many commentators believe that the use of the nine month period in the Uniform Acts and the UPC may mislead potential disclaimants into the belief that every disclaimer valid for property law purposes is also a tax qualified disclaimer.

This Act addresses the problem by removing all time limits on the making of a disclaimer, allowing a person to disclaim unless the disclaimer is barred under Section 10 of the Act. The removal of the time limit comports with the basic rationale of disclaimers. A disclaimer is a refusal to accept. It should be barred only when acceptance has occurred. In

addition, the removal of any time limit from the Act emphasizes the existence of separate requirements, set by different law, for tax qualified disclaimers. Finally, the potential for increased use of disclaimers for non-tax purposes which the removal of the time limit creates may lead the states to take considered action on the question of disclaimers and creditors.
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While this Act separates tax qualified and other disclaimers more clearly than ever, it also has numerous new provisions designed to clarify the property law rules applying to disclaimers commonly made for tax purposes. The Act creates explicit rules for the disclaimer of jointly held property, powers of appointment, property received through the exercise of powers of appointment, and for disclaimer of powers by all fiduciaries and of property by trustees. The Comments to the respective sections illustrate the uses of such disclaimers. Especially significant is Section 5 governing disclaimers of interests in jointly held property. Recently amended Regulations under IRC § 2518 greatly expand the possibilities for disclaimers relating to jointly held property. This Act clarifies the property rules relating to such disclaimers in order to facilitate their use. Finally, this Act does not in any way override or displace the existing law of fiduciary duty which governs a fiduciary's actions, including the decision to make a disclaimer.

UNIFORM DISCLAIMERS OF PROPERTY ACT (199-)
(10/15/98 DRAFT)

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Beneficiary designation" means an instrument naming a beneficiary of

(A) an insurance or annuity policy;

(B) an account with a payable on death designation;

(C) a security registered in beneficiary form or of a pension, profit-sharing, retirement, or similar benefit plan; or

(D) other nonprobate transfer at death.

(2) "Date of distribution" means the time an interest takes effect in possession or enjoyment, and need not occur at the beginning or end of a calendar day, but can occur at a time

during the course of a day.

(3) “Descendant” of an individual means all of the individual’s descendants of all generations,determined as to the relationship of parent and child at each generation by [add reference to statutory law of the jurisdiction if applicable]

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

(5) “Effective date” with respect to an instrument that does not create jointly held property, means the date on which the instrument is no longer revocable.

(6) "Fiduciary" includes a personal representative, [conservator, guardian if no conservator has been appointed,] trustee of a trust, and agent acting under a power of attorney.

(7) “Future interest” means an interest that takes effect in possession or enjoyment after its creation.

(8) "Jointly held property" means property held in the name of two or more persons under any circumstance that entitles the last surviving holder to the whole of the property.

(9) "Person" means an individual, fiduciary, 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.

(10) “Present interest” means an interest that takes effect in possession or enjoyment at its creation.

(11) “Trust” means an express trust, charitable or

noncharitable, with additions thereto, wherever and however created, which is used primarily for the donative transfer of property. The term includes a trust created or determined by a statute, judgment or decree under which the trust is to be administered in the manner of an express trust.

Beneficiary designation: taken with slight modification from UPC § 1-201(4).

Date of distribution: taken from UPC § 2-707(a)(4)

Descendant: taken with slight modification from UPC § 1-201(9).

Disclaimer: Prior Uniform Acts provided for a disclaimer of “the right of succession to any property or interest therein and current UPC § 2-801 refers to “in interest in or with respect to property or an interest therein. This application is continued by the present language referring to “an interest in . . . property. The further language referring to “power over property broadens the permissible scope of disclaimers to include any power over property that gives the powerholder a right to control property, whether it be cast in the form of a power of appointment, a fiduciary’s management power over property, or discretionary power of distribution over income or corpus.

Fiduciary: The definition of fiduciary includes an agent acting under a power of attorney. This Act is intended to give every fiduciary the power to disclaim except where specifically prohibited by state law or, in certain circumstances, by the document creating the fiduciary relationship.

Jointly held property: The term “joint tenancy describes a form of concurrent ownership by two or more persons with right of survivorship. This Act uses the broader term, “jointly held property, rather than “joint tenancy. in order to include 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 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 with respect to joint brokerage accounts under the law of some states. *See* Treas. Regs. § 25.2518-2(c)(4).

Trust: taken from the Uniform Trust Act, § 1-201(17).

SECTION 2. GENERAL PROVISIONS.

(a) A person may disclaim, in whole or in part, an interest in or power over property, including a power of appointment. However, a conservator or guardian may disclaim a power over property only with the approval of the court that has jurisdiction over the conservatorship ro guardianship.

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

(c) Except for a power held in a fiduciary capacity, a person may disclaim an interest in or power over property, notwithstanding a spendthrift provision or similar restriction on transfer or any restriction or limitation on the right to disclaim imposed by the creator of an interest or power. However, a creator of an interest or power may provide for the disposition of a disclaimed interest.

(d) A disclaimer must be in writing, declare the disclaimer, describe the interest or power disclaimed, be signed by the disclaimant, and be delivered or filed as provided in this [Act].

(e) Delivery required by this [Act] may be accomplished by personal delivery, mailing by first-class mail, or any other method likely to result in the receipt of the disclaimer.

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

The reference in Subsection (a) to a "person must be read in connection with the definition of person in Section 1(9) that includes "fiduciary, which in turn is defined to include personal representative, a trustee and an agent under a power of attorney. Under previous Acts, the power to disclaim was given to a “beneficiary, an appointee under a power of appointment, and the representative of a deceased, incapacitated or protected person. Section 2-801 of the UPC refers to a person or “the representative of a person, which includes a personal representative of a decedent, a conservator, a guardian, and an agent under a power of attorney. This Act sweeps all these fiduciaries into the definition of “person and includes trustees and any other entity. The 1978 Uniform Acts added the personal representative of a decedent to the list of those who may disclaim in order to overcome the traditional view that the right to disclaim was a personal one that died with the person entitled to disclaim. The addition of “trustee in this Act is related to Sections 8 and 9 which explicitly allow fiduciaries to disclaim powers and trustees to disclaim property. In every case, however, the law of fiduciary duty governs a disclaimer by every type of fiduciary. This Act’s recognition of the power to disclaim, therefore, does not mean that a fiduciary may disclaim in every instance in which a disclaimer is authorized under this Act. An agent operating under a power of attorney is governed by the law of agency which includes the specific provisions of the instrument appointing the agent. Because the powers of conservators and guardians are often tailored to the specific situation of the incapacitated person or ward by the court appointing the fiduciary, subsection (a) limits the fiduciary’s ability to disclaim those powers by requiring that the disclaimer be approved by the court that created the guardianship or conservatorship.

The broad wording of subsection (a) means that 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 that 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 by representation living at that time. If there are no descendants at any time 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 extremely remote. Nevertheless, the collateral relatives may disclaim their contingent remainders. In order to make a qualified disclaimer for tax purposes, however, they must disclaim within 9 months of Father’s death.

Subsection (b) 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 that seeks to “carve out a remainder or life estate is not a “qualified disclaimer for tax purposes; Treas. Reg. § 25.2518-3(b).) In short, any estate or interest in property that is recognized under the law can be the subject of a disclaimer.

Subsection (c) follows the provision of UPC § 2-801 making ineffective any attempt to limit the right to disclaim, whether express or implied, which the creator of an interest or nonfiduciary power seeks to impose. This provision follows from the principle behind all disclaimers: no one can be forced to accept property. The Act, however, extends the application of this principle to fiduciary powers. The Drafting Committee concluded that 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 subsection therefore does not override restrictions on disclaimers of fiduciary powers.

Because the provisions of the Act which govern the passing of disclaimed interests and powers are default provisions, coming into effect only when the relevant instrument is silent, subsection (c) also makes it clear that the limitations on the power of the creator of an interest or power to prevent a disclaimer do not prevent the creator from making provision for the dispostion of a disclaimed interest. Such provisions are not uncommon. Perhaps their most usual use is in a will which leaves the entire estate to the testator's surviving spouse with a provision that any part of the estate disclaimed by the spouse passes to a trust for the spouse in which the spouse has no interest or over which the spouse has no power that will require the inclusion of the trust in the spouse's taxable estate. The spouse can then disclaim just enough to use up the decedent's amount exempt from federal estate tax by reason of the unified credit.

Subsection (d) sets forth the formal requirements for a disclaimer. There is no requirement governing when the disclaimer must be written, and, under this Act, it is permissible to write the disclaimer before the event creating the disclaimed interest.

Subsection (e) defines delivery to include personal delivery, first-class mail, and any other method likely to result in receipt. The Drafting Committee chose not to require that a disclaimer be a paper writing and not to foreclose the possibility of delivery by electronic means.

Subsection (f): *See* the comments to Section 3(1), below.

SECTION 3. DISCLAIMER OF INTEREST ARISING UNDER INTESTACY OR CREATED BY WILL. Except as to a disclaimer governed by Section 5, 6, 7, or 8, the following rules apply to a disclaimer of an interest arising under the law of intestate succession or created by will, including an interest in a testamentary trust:

(1) The disclaimer is effective as of the decedent's death.

(2) If the interest disclaimed is a present interest,

the interest disclaimed passes according to the terms providing for such a contingency in the instrument creating the disclaimed interest. Except as otherwise provided in paragraph (4), if the instrument does not contain a provision disposing of the disclaimed interest or if the interest disclaimed arose in an intestate succession, the disclaimed interest passes from the decedent to the disclaimant's descendants by representation who survive the decedent or, if none, as if the disclaimant had died immediately before the decedent.

(3) If the interest disclaimed is a future interest, the interest disclaimed passes according to the terms providing for such a contingency in the instrument creating the disclaimed interest. Except as otherwise provided in paragraph (4), if the instrument does not contain a provision disposing of the disclaimed interest, the disclaimed future interest passes from the decedent to the disclaimant's descendants by representation who survive the date of distribution, or if none, as if the disclaimant had died [intestate] immediately before the date of distribution.

(4) Except for a future interest held by the disclaimant, a future interest that takes effect in possession or enjoyment when or after the disclaimed interest terminates takes effect in possession or enjoyment as if the disclaimant had died before:

(A) the decedent if the disclaimed interest is a present interest; or

(B) the date of distribution if the disclaimed interest is a future interest.

(5) Except as otherwise provided in paragraph (6), delivery of a disclaimer of an interest arising under the law of intestate succession or created by a will must be made to the personal representative of the decedent’s estate or, if no personal representative is then serving, by filing it with the court having jurisdiction to appoint or qualify the personal representative.

(6) Delivery of a disclaimer of an interest in a testamentary trust must be made to all trustees then serving. If no trustee is then serving, delivery must be made to the personal representative of the decedent’s estate. If no personal representative is then serving, delivery must be made by filing the disclaimer with the court having jurisdiction to appoint or qualify the trustee.

Section 3 governs disclaimers of interests arising by intestacy or created by will except if the disclaimer involves joint property or a power of appointment or is made by a taker in default under a power of appointment, or by a fiduciary.

Paragraph (1) 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. Creditors of the disclaimant, therefore, generally have nothing to attach. 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. Section 2(f) defines a disclaimer as a refusal to accept which is not a transfer or release and paragraph (1) of this Section makes the disclaimer effective as of the creation of the interest. In the situation governed by Section 3, the death of the intestate or testator. 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 10 below.

Paragraphs (2) and (3) provide rules for the passing of the disclaimed interest. Previous Acts and UPC § 2-801 state that the disclaimant of an interest created by will or intestacy is deemed to have predeceased the decedent and that the disclaimed interest passes accordingly, unless the will provides for the disposition of disclaimed interests. The following example illustrates a straightforward application of this provision:

Example 1: Mother dies, leaving a will, the residuary clause of which gives the residue of her estate to her descendants by representation who survive her. She is survived by a daughter who has two children and two grandchildren who are the children of a predeceased son. The surviving child would prefer to have her share of Mother's estate pass to her children. If she disclaims her share of the residue of Mother's estate, her share will pass to her children, just as it would if she had actually predeceased Mother.

A ambiguity arises however, where the disclaimer involves a future interest created by will. Under the previous Acts and UPC § 2-801, a disclaimer must be made no later nine months after the event determining that the taker of the property or interest is finally ascertained and the interest is indefeasibly vested. Under this Act, there is no time bar to a disclaimer. The following example illustrates the potential problem:

Example 2: Father dies, and his 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 descendants by representation who survive Mother. At Mother's death, she is survived by Son, two children of Son, Daughter, and one child of daughter. Son decides that he would prefer his share of the trust to pass to his children and disclaims. While the disclaimer is not qualified for tax purposes if it is made more than nine months after Father's death, it is effective to prevent Son from acquiring the property. Under prior Acts and UPC § 2-801, the interest passes as if Son had predeceased Father. The ambiguity arises when Son's children have been born after Father's death. It is possible to argue that had Son predeceased Father his children would not have been born and that Daughter is entitled to all of the trust property.

In order to resolve the possible ambiguity in *Example 2*, this Section in paragraphs (2) and (3) provides that disposition of the disclaimed interest is determined differently for present and future interests. In both instances, a provision in the will providing for the disposition of disclaimed interests will govern. In the absence of such a provision (or in the case of intestate succession), paragraph (2) provides that a disclaimed present interest passes to the disclaimant's descendants who survive the creation of the interest, that is, the death of the testator or intestate (Mother, in *Example 1*), thus preserving the result in *Example 1*. If there are no descendants, the interest passes as if the disclaimant predeceased the decedent. This provision would apply to the following variation of *Example 1*.

Example 1a: The facts are the same as in *Example 1*, except that Daughter has no children. A disclaimer by Daughter would result in all of Mother's property passing to the children of her predeceased son. Since daughter would be deemed to have died before Mother, the grandchildren are Mother's only surviving descendants.

Under paragraph (3), however, a disclaimed future interest passes first to the disclaimant's descendants *who survive the date of distribution of the interest*, the date on which the interest comes into possession or enjoyment. In *Example 2*, therefore, Son's children take his share of the trust property since they are living at the end of Mother's life estate when the contingent remainders in Father's trust come into possession and enjoyment. If there are no surviving descendants of the disclaimant, the disclaimant is deemed to have died immediately before the distribution date.

The word "intestate has been placed in square brackets because not every state has adopted UPC § 2-707. Under that section, the death of any holder of a future interest before the date of distribution will pass the interest to the holder of the future interest's descendants, and if there are none, the interest passes as part of the estate of the person who created the future interest. Under traditional law, a remainder not contingent on survival to a certain point in time does not require survival to the date of distribution and passes through the remainder person's estate. A disclaimant who is deemed to predecease will not have a will effective to govern the passing of the interest and the only way under the traditional rule to determine who takes the disclaimed future interest is to deem the disclaimant to have died intestate.

Pargraphs (2) and (3) also resolve a potential ambiguity related to questions of distribution 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 the potential ambiguity and its solution.

Example 3. Assume the facts of *Example 2*, except that Daughter has predeceased Mother. Mother is survived, therefore, by the Daughter's child, Son and his two children. Son disclaims and under this Act the trust property is to be distributed as if he predeceased the distribution date, Mother's death. Since the people who will receive the trust property are all grandchildren of Father and Mother, should they each take one-third of the estate, thus allowing Son's disclaimer to increase the share of the trust property going to his family from one-half to two-thirds?

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                 Mother
        __________|_____
         |               |
    [Daughter]         Son
              |        __ |____
            GC1      GC2     GC3
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Courts have had little difficulty in answering this question in the negative. They have taken the position that the disclaimer should only allow the passing of what the disclaimant would otherwise have taken. (*Welder v. Hitchcock,* 617 S.W.2d 294 (Tex.Civ.App. 1981)). This Act mandates the same solution by specifically passing the disclaimed interest (and only the disclaimed interest) to the disclaimant's descendants and requires distribution as if the disclaimant had predeceased the decedent or date of distribution only where there are no descendants of the disclaimant. If there are no descendants of the disclaimant, the disclaimer cannot have any effect on the size of the shares under the system of representation.

Paragraph (4) continues the provision of prior Uniform Acts providing for the acceleration of future interests on the making of the disclaimer and makes the rules of paragraphs (2) and (3) subject to it. The effect is illustrated by the following example.

Example 4: Father's will creates a testamentary trust to pay income to Son for his life, and on his death to pay the remainder to Son's descendants then living, by representation. If Son disclaims his life income interest in the trust, the remainder will immediately become possessory in the son's descendants determined as of Father's death, just as if Son actually had not survived. It is immaterial under the statute that the actual situation at Son's death might be different with different descendants entitled to the remainder.

This result is common to all modern disclaimer statutes, and is generally regarded as necessary to provide a clear rule. As such, similar provisions have been rigorously applied (*Matter of Gilbert,* 156 Misc.2d 379, 592 N.Y.S.2d 224 (1992), *Matter of Thomson*, 642 N.Y.S.2d 32 (1996)).

The rule of paragraph (4) does not apply, however, to a future interest held by the disclaimant. The effect of this exception is illustrated by the following example:

Example 5: Father's will creates a testamentary trust to pay income to Son for ten years and then to pay the remainder to Son. Son disclaims the income interest. Since the remainder is also held by Son, it is not accelerated and Son must wait until the passing of the entire ten years in order to come into possession of the remainder.

Paragraphs (5) and (6) give rules for the delivery of a disclaimer and provide for filing of the disclaimer with the appropriate court when there is no person to whom delivery can be made. Because delivery must be made to the personal representative of the decedent whose death created the disclaimed interest, or to the trustee of a testamentary trust, or filing accomplished with the court having jurisdiction to appoint those persons, delivery of a disclaimer must be made after the death of decedent to whose estate the disclaimer relates. The disclaim could be written before death, however.

SECTION 4. DISCLAIMER OF INTEREST ARISING UNDER INSTRUMENT OTHER THAN WILL. Except as to a disclaimer governed by Section 5, 6, 7, or 8, the following rules apply to a disclaimer of an interest created or transferred by an instrument other than a will, including a beneficiary designation:

(1) The disclaimer is effective as of the effective date of the instrument.

(2) If the interest disclaimed takes effect in possession or enjoyment as of the effective date of the instrument, the interest disclaimed passes according to the terms providing for such a contingency in the instrument creating the disclaimed interest. Except as otherwise provided in paragraph (4), if the instrument does not contain a provision disposing of the disclaimed interest, the disclaimed interest passes from the creator of the instrument to the disclaimant's descendants by representation who survive the effective date of the instrument or, if none, as if the disclaimant had died immediately before the effective date of the instrument.

(3) If the interest disclaimed takes effect in possession or enjoyment after the effective date of the instrument, the interest disclaimed passes according to the terms

providing for such a contingency in the instrument creating the disclaimed interest. Except as otherwise provided in paragraph (4), if the instrument does not contain a provision disposing of the disclaimed interest, the disclaimed interest passes from the creator of the instrument to the disclaimant's descendants by representation who survive the date of distribution or, if none, as if the disclaimant had died [intestate] immediately before the date of distribution.

(4) Except for a future interest held by the disclaimant, a future interest that takes effect in possession or enjoyment when or after the disclaimed interest terminates takes effect in possession or enjoyment as if the disclaimant had died before:

(A) the effective date of the instrument if the disclaimed interest takes effect in possession or enjoyment as of the effective date of the instrument; or

(B) the date of distribution if the disclaimed interest takes effect in possession or enjoyment after the effective date of the instrument.

(5) Delivery of a disclaimer of an interest created other than by a trust or a beneficiary designation must be made to the transferor of the interest.

(6) Delivery of a disclaimer of an interest in a trust must be made to the trustee or, if no trustee is then serving, by filing it with the court having jurisdiction to appoint or qualify the trustee or, if the disclaimer is made before the

effective date of the instrument creating the trust, to the settlor of a revocable trust or the transferor of the interest.

(7) Delivery of a disclaimer of an interest created by a beneficiary designation made before the effective date of the instrument must be made to the transferor. Delivery of a disclaimer of an interest created by a beneficiary designation made after the effective date of the instrument must be made to the person obligated to make payment of the interest.

Section 4 adapts the provisions of Section 3 for disclaimers of interests arising under instruments other than wills. The principal difference is the use of the effective date of the instrument as the measuring point for the effect of the disclaimer rather than the inapplicable “death of the decedent. For example, Mother may create a revocable inter vivos trust as a will substitute. The effective date of the instrument is the date of Mother's death, at which time she may no longer revoke the trust. Interests that take effect in possession and enjoyment as of the effective date are analogous to present interests created by will. Disclaimer of such interests are effective as of the effective date of the instrument, and the disclaimed interest passes to the disclaimant’s descendants who survive the effective date, and if none, as if the disclaimant had died immediately before the effective date. The following example illustrates this provision:

Example 1: Mother creates a revocable lifetime trust. On her death, the trustee is directed to make a distribution of $100,000 to Daughter, and to hold the remainder in trust for Mother’s descendants for the maximum period allowed under the jurisdiction’s version of the Rule Against Perpetutities. Mother is survived by Daughter, Daughter’s children, and Daughter’s grandchildren, all of whom are children of Daughter’s living children. Shortly after Mother’s death, Daughter disclaims the $100,000 outright gift. At the time of the creation of the trust, the $100,000 gift is technically a future interest, vested in the Daughter subject to divestment through the exercise of Mother’s power to revoke. At Mother’s death, however, the power to revoke can no longer be exercised and the $100,000 takes effect in possession and enjoyment, just as would a bequest of $100,000 in Mother’s will. Daughter’s disclaimer passes the $100,000 to Daughter’s children.

Disclaimers of interests that take effect in possession or enjoyment after the effective date of the instrument, which are analogous to future interests created by wills, are effective as of the effective date of the instrument but the interest passes to the disclaimant’s descendants by representation who survive the date of distribution, or if none, as if the disclaimant had predeceased the date of distribution. The following example illustrates this provision:

Example 2: Father creates a revocable lifetime trust. On his death the trust is to continue;

the trustee is to pay the trust income to Daughter, and on her death the trust is to be distributed to her living descendants by representation. Father is survived by Daughter, Granddaughter, Granddaughter's two children, Grandson, and Grandson's two children. Both Granddaughter and Grandson are Daughter's children. Shortly after Father's death, Granddaughter disclaims her interest in the trust remainder. Because the interest is to come into possession or enjoyment after the effective date of the instrument (Father's death), the disclaimed interest will pass to Granddaughter's descendants who survive the date of distribution, which is Daughter's death.

In the usual situation, if the disclaimant is the beneficiary of a life insurance contract, the effective date of the instrument would be the insured's death. If the owner of the policy (which is often, but not necessarily, the insured) made an irrevocable beneficiary designation, however, the effective date of the instrument is the date of the making of the irrevocable beneficiary designation. Similarly, the beneficiary of an IRA who disclaims would be treated as predeceasing the death of the creator of the IRA, unless, of course, an irrevocable beneficiary designation is made at any earlier time, which time would be the effective date.

Paragraphs (5), (6), and (7) state rules for delivery designed to insure that the disclaimer is delivered to the person or entity who has created the interest disclaimed or who has control of the property an interest in which has been disclaimed. If delivery is required to a trustee and no trustee is serving, the disclaimer must be filed with the appropriate court. There is no requirement as to when the disclaimer must be written.

SECTION 5. DISCLAIMER OF SURVIVORSHIP RIGHTS IN JOINTLY HELD PROPERTY. The following rules apply to a disclaimer of an interest in jointly held property:

(1) A surviving holder may disclaim the greater of

(A) any part of the interest which the deceased joint holder would have been entitled to receive on severance before death; or

(B) all of the interest except such part of the entire value of the interest attributable to the amount of consideration in money or money's worth furnished by the joint holders other than the deceased joint holder.

(2) A disclaimer of an interest is effective as of the death of the deceased holder of the joint property to whose death

the disclaimer relates.

(3) If the disclaimant is the only surviving holder or the only surviving holder who has not disclaimed the interest, the disclaimed interest passes as if it were wholly owned by the last to die of the other holders of the joint property. If the disclaimant is not the only surviving holder, the disclaimed interest passes to the other surviving holders of the joint property who have not disclaimed the interest.

(4) Delivery of the disclaimer must be made to the person to whom the interest passes under paragraph (3).

Section 5 greatly expands on the treatment of disclaimers of joint property in prior Uniform Acts on this subject. 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 unilaterally 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).) That rationale, however, does not apply to tenancies by the entireties which are severable only on the end of the marriage of the parties to the tenancy. On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC § 2518 to reflect those decisions regarding disclaimers of joint property interests. The amended final Regulations, § 25.2518-2(c)(4)(i), however, are more generous than the judicial precedents, and 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 provide a special rule for disclaimers by non-citizen surviving spouses of jointly tenancies in real property created after July 14, 1998 (Reg. §25.2518-2(c)(4)(ii)). The non-citizen spouse is allowed to disclaim all of the interest that would be included in the decedent's estate under IRC §2040 which creates a contribution rule--the decedent must include all of the joint property except for that part attributable to consideration the other joint tenant contributed to the acquisition of the joint tenancy. Paragraph (1) recognizes this exception by allowing all joint tenants to disclaim the greater of the decedent's proportional interest or that part attributable to the decedent's contribution.

The various forms of ownership in which "joint property," as defined in Section 1, can be held include common law joint tenancies and any statutory variation thereof 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.

The general rule at common law was embodied in the concept of dual ownership expressed by the phrase "per my et per tout". On the one hand, each tenant was seised "per my" or by the moiety or undivided fractional share which would be all he would receive upon severance. On the other hand, he also initially held "per tout," or the entire property and the right to enjoy the entire estate. Powell on Real Property, ¶617(2). It is possible to argue that a disclaimer of the survivor's original undivided interest comes too late at the death of the first tenant because an acquiescence in the establishment of the tenancy is in effect an acceptance of the interest which cannot be shed except by transfer. Casner, op. cit., p. 22. But if the survivor was not apprised of the creation of the tenancy and did nothing before the death of the first tenant to show his acquiescence, he should be able to reject both the original and the accretive portions. Casner, op. cit., p. 22.

Where the survivor has acquiesced in the establishment of the estate, it can be argued that, even in the absence of a specific statute, the accretive portion derived through survivorship should stand differently from the original interest and that the accretion should be subject to disclaimer for the reason that it is contingent, uncertain and (except as to tenancies by the entirety) defeasible until the death of the first tenant like a legacy under a will or a beneficial designation under an insurance policy. Barring conduct indicative of acceptance, the survivor should be able to reject the interest if the survivor so elects, with like effect.

The position taken by this Act follows that taken in previous uniform Acts and UPC Section 2-801 and confers the right of disclaimer upon a surviving joint holder (which includes "joint tenant) and, consistent with the general bar provisions of Section 10, leaves to the particular circumstances whether he or she may disclaim all of the interest or only the accretive part and the effect of knowledge of the existence of the tenancy or other form of ownership, acceptance of benefits, and the like.

Joint bank accounts today are largely, if not always, creatures of statute (e.g. UPC § 6-101 et seq.), with basis in contract rather than the laws of succession. It has been held that a joint bank account may properly be made the subject of a disclaimer, particularly if the survivor was not aware of the existence of the account. *Hershey, Ex'r'x. v. Bowers*, 708 Oh.St.2d 4, 218 N.E.2d 455 (Ohio 1966). In many states, the statutes state that a joint account belongs to the joint tenants in proportion to their contributions to the account. For instance, if A and B are joint tenants of an account to which A made all the contributions, A can withdraw the entire amount in the account without B's consent and B can take nothing without A's consent. Therefore, for tax purposes, B could disclaim the *entire* joint account on the death of A. The IRS has gone so far as to recognize a disclaimer of a survivorship interest in tenancy by the entirety accounts governed by the general rule for joint accounts (TAM 9612002, 9521001 [both applying Pennsylvania law]). While there appears to be no authority on point, it would seem that in the hypothetical just given, A could disclaim nothing on the death of B since B's death does not mean anything passes to A given the law of joint accounts. (In TAM 9612002, the ruling states that the spouses each made one-half the contributions to the account; TAM 9521001 says nothing about the source of contributions.) The amended final Regulations, § 25.2518-2(c)(4)(iii) recognize the special rules applicable to joint bank accounts, allow the disclaimer by a survivor of that part of the account contributed by the decedent, bar the disclaimer of that part of the account attributable to the survivor's contributions, and explicitly extends 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 paragraph (1). The subsection allows a surviving holder of jointly held property to disclaim whatever the deceased joint holder would have received had the joint property arrangement been ended. In the typical situation of two joint tenants, on severance each would receive one-half of the property. On the death of the first to die, therefore, the survivor can disclaim one-half of the property, that part that would have been lost to him or her by a severance during life. A tenancy by the entireties could be severed by divorce with each spouse taking one-half. Therefore the surviving tenant by the entireties can disclaim one-half the entireties property, as is allowed under the amended final Regulations, § 25.2518-2(c)(4)(i).

Section 5 also deals with joint property arrangements other than those involving real property, such as joint bank accounts, that belong to the joint holders in proportion to their contributions to the joint property arrangement. A surviving joint holder can disclaim that part of the joint property which the deceased joint holder could have regained on the destruction or severance of the arrangement. 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 B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account.

Paragraph (2) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement.

Paragraph (3) deals with two distinct situations. 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. If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor results in one-half 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. Without the disclaimer, the interest would automatically qualify for the marital deduction. If the family home accounts for a large portion of the couple's wealth, the first spouse to die might not have enough property not passing to the survivor to fully utilize the exlusion amount created by the unified credit. The following example illustrates this situation:

Example 1: H and W own their home as tenants by the entireties. The home is worth $400,000. H dies in 1998, survived by W. H's will leaves his entire estate to H and W's children. H's probate estate is worth $425,000. H's estate includes ½ the value of the house under IRC § 2040(b) and the $200,000 qualifies for the marital deduction. If W disclaims the ½ the value of the house as allowed by the newly amended Regulations, H's taxable estate will increase by $200,000 to $625,000 the exclusion amount for 1998 and the unified credit available to H's estate (assuming none of the credit was used during life to offset gift tax) is fully utilized.

In a multiple holder joint property arrangement, the subsection provides that the disclaimed interest passes to the surviving holders who have not disclaimed the interest. The following example illustrates this provision:

Example 2: A, B, C, and D are joint tenants with right of survivorship in Blackacre. A dies and D disclaims the entire interest coming to D from A. B and C are joint tenants as to 1/4 of the property and B, C, and D are joint tenants as to 3/4 of Blackacre. On C's death, B and D are joint tenants as to 3/4 of the property and B is tenant in common with the joint tenancy as to 1/4 of the property. If B dies next, 1/4 of Blackacre passes through his estate and D and whoever takes from B are tenants in common in Blackacre, D with a 3/4 undivided interest and B's successor with a 1/4 undivided interest.

Paragraph (4) requires that delivery of the disclaimer be made to whomever the disclaimed interest passes under paragraph (3). That person would then be able to use the disclaimer, along with any other necessary documentation, to assert ownership over the disclaimed interest.

SECTION 6. DISCLAIMER OF POWERS NOT HELD IN FIDUCIARY CAPACITY. The following rules apply to disclaimers of powers not held in a fiduciary capacity:

(1) If the holder has not exercised the power, a disclaimer with respect to a power created by a will is effective as of the date of the decedent's death, and a disclaimer with respect to a power created by any other instrument is effective as of the effective date of the instrument.

(2) If the holder has exercised the power, the disclaimer is effective immediately after the date of the last exercise of the power.

(3) The will or other instrument creating the power is construed as if the power ceased to exist as of the effective date of the disclaimer.

(4) Delivery of the disclaimer must be made as prescribed by Section 3 (5) and (6) or Section 4 (5), (6) and (7), as if the power disclaimed were an interest in property.

Section 2(a) allows a person to disclaim an interest in or power over property. The latter part of the definition includes a power of appointment. This was not specifically addressed in the prior uniform acts. The practical effect of this type of disclaimer is as if the disclaimed power never existed. In addition, it is possible to disclaim a part of a power, 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. Delivery of the disclaimer depends on the whether the power was created by will or by another instrument. In the former case the delivery provisions of Section 3 apply, in the latter, those of Section 4.

SECTION 7. DISCLAIMER BY APPOINTEE, OBJECT OR TAKER IN DEFAULT OF POWER OF APPOINTMENT. The following rules apply to disclaimers by an appointee, an object, or a taker in default of a power of appointment:

(1) A disclaimer by an appointee of a power of appointment is effective as of the death of the holder of the power if the power is exercised by will, or as of the effective date of the instrument exercising the power if the power is exercised other than by will.

(2) A disclaimer by an object or taker in default under a nonfiduciary power of appointment is effective as of the

date of the death of the creator of the power if the power is created by will, or as of the effective date of the instrument creating the power if the power is created other than by will.

(3) A disclaimer of an interest by an appointee is governed by Section 3 (2), (3), and (4) if the disclaimed interest is created by the exercise of the power in a will and by Section 4 (2), (3), and (4) if the disclaimed interest is created by the exercise of the power in an instrument other than a will. A disclaimer of a power created in an appointee is governed by Section 6.

(4) A disclaimer of an interest by an object or a taker in default of a power of appointment is governed by Section 3 (3) and (4) if the power is created by will and by Section 4 (3) and (4) if the power is created by an instrument other than a will.

(5) Delivery of a disclaimer under this section must be made pursuant to the following rules:

(A) Delivery of a disclaimer by an object or a taker in default of exercise of a power of appointment must be made to the holder of the power or to the fiduciary acting under the instrument that created the power. Delivery of the disclaimer may be made at any time after the creation of the power.

(B) Delivery of a disclaimer by an appointee of a nonfiduciary power of appointment must be made to the personal representative of the holder's estate or to the fiduciary under the instrument that created the power.

(C) If delivery is to be made to a fiduciary and no fiduciary is in office, the disclaimer must be filed with the court having jurisdiction to appoint or qualify the fiduciary.

This Section deals with disclaimers by those who may or do receive an interest in property through the exercise or creation 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 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 who are referred to as takers in default. A general power of appointment for transfer tax purposes is one that can be exercised in favor of the holder of the power, the holder's estate, the holder's creditors, or creditors of the holder's estate. The broadest possible special power of appointment is one that can be exercised in favor of anyone *except* the holder of the power, the holder's estate, the holder's creditors, or creditors of the holder's estate, although many special powers further limit the class of permissible appointees. The holder of a general power is considered to be the owner of the property for transfer tax purposes. The holder of a special power suffers no estate or gift tax consequences. For purposes of making a qualified disclaimer for tax purposes, an appointee or taker in default under a general power may disclaim property subject to the power within 9 months of the exercise or lapse of the power. A permissible taker under a special power, however, must disclaim with 9 months of the creation of the power.

Section 7 recognizes the distinction between appointees on one hand and takers in default and objects on the other: paragraph (1) makes a dislciamer by an appointee effective as of the exercise of the power and paragraph (2) makes a disclaimer by an object or taker in default effective as of the creation of the power.

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 donee exercises the power. Paragraph (3), therefore, refers to the appropriate paragraphs of Sections 3 and 4 for rules governing the effect of a disclaimer by an appointee who receives a present or future interest in property. A disclaimer by an appointee who recevies a power over property is governed by Section 6.

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 is created by the will or other governing instrument that creates the power of appointment. Paragraph (4), therefore, refers to the appropriate paragraphs of Sections 3 and 4 for rules govering the effect of a disclaimer by an object or taker in default.

Example 1. H creates a testamentary trust, income to W for life, on W's death the trust property to be distributed among H and W's descendants as W shall appoint by will, and in default of appointment, to H and W's descendants by representation who survive W. This is a special power of appointment and in order for a disclaimer to be qualified for tax purposes, the disclaimer must be made within 9 months of the creation of the power. S, H and W's son, decides that it is unlikely W will exercise the special power and that he would prefer not to take as a taker in default but rather as have his share of the property pass to his descendants. (Were W incompetent and had never written a will exercising the power, it would be certain that the power would not be exercised.) S then disclaims both as a taker in default and as a possible appointee. S has effectively refused any property that might come to him through the non-exercise or exercise of the power. If W does not exercise the power, under paragraph (4), S's interest passes to his descendants living at the time the interest is to come into possession or enjoyment, *i.e.*, the termination of the trust at W's death. If there are no descendants of S living at that time, the interest passes as if S had predeceased W. If W does exercise the power and does appoint some part of the property to S, under paragraph (3), the present interest will pass to his descendants living at that time, and if there are none, the present interest will pass as if S had predeceased W.

SECTION 8. DISCLAIMER OF POWERS HELD IN FIDUCIARY CAPACITY. If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, with respect to a power created by a will, the disclaimer relates back to the date of the decedent's death, and, with respect to a power created by any other instrument, the disclaimer relates back to the effective date of the instrument. If the fiduciary has previously exercised the power, the disclaimer relates back to the date of its last exercise. Except as otherwise provided by the terms of the disclaimer, a disclaimer of a fiduciary power is effective only as to the fiduciary disclaiming. Delivery of the disclaimer must be made as persuant to Section 3 (5) and (6) or Section 4 (5), (6), and (7), with those sections to be applied as if the power disclaimed were an interest in property.

It is difficult for a trustee to disclaim powers, whether granted by law or by the governing instrument, or property passing to the trust. Attempts by trustees to make tax qualified disclaimers have been rebuffed by the IRS on the ground that such disclaimers are not allowed by state statute and are ineffective without statutory sanction since they involved a repudiation of the trust. (Rev. Rul. 90-110, 1990-2 CB 209, PRLs 8527009, 8549004) On the other hand, a disclaimer by a trust beneficiary is possible. (*See* PRL 8543009 where a son disclaimed his status as a permissible recipient of discretionary distributions of principal, allowing the trust to qualify for the marital deduction.) The Tax Court agreed in *Estate of Bennett v. Commissioner*, 100 TC 43 (1993), citing the direct authority of *Matter of Witz*, 95 Misc.2d 36, 406 N.Y.S.2d 671 (Sur.Ct. 1978) in which the Surrogate wrote: "The trustee's purported disclaimer [of the power to invade principal] annexed to the petition is a nullity. Testator imposed an obligation upon the trustee which the fiduciary could not disclaim without renouncing his right to letters of trusteeship. (95 Misc.2d at 40, 406 N.Y.S.2d at 673).

There is contrary authority, however. In *Estate of Ware v. Commissioner*, 480 F.2d 444 (7th Cir. 1973) the court found that the Illinois Termination of Powers Act was broad enough to allow a trustee to "release a power to accumulate trust income. In *Cleaveland v. U.S.*, 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶ 13,766 (C.D.Ill. 1988) the court held that a disclaimer by a trustee of the power to invade principal of a testamentary trust for the education of the decedent's children was a valid disclaimer and made the trust eligible for the marital deduction.

This Act makes it clear that trustees may disclaim powers. Such powers over property include managerial powers such as powers to make investments or to allocate receipts between principal and income, and beneficial powers to make discretionary distributions of income or principal to beneficiaries. Section 2(c) provides that a fiduciary's ability to disclaim such powers may be limited by the creator of the fiduciary relationship. In any event, the fiduciary's decision to disclaim a power must comport with the fiduciary's duties.

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 by making the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. 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 that has not been exercised will destroy the power unless the third co-trustee follows whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee holding 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 could disclaim the power and then seek the appointment of a disinterested co-trustee to exercise the power.

The last sentence of the Section requires that delivery of the disclaimer be made according to whether the source of the fiduciary's power is a will or another type of instrument.

SECTION 9. DISCLAIMER OF INTEREST BY TRUSTEE. If a trustee disclaims an interest in property that would otherwise be included in or added to the trust, and the instrument creating the trust or making the addition to the trust does not provide for another disposition of the disclaimed interest or of disclaimed or failed interests in general, the interest is deemed not to have been included in the disposition or addition to the trust.

Section 9 deals with the 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 Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) permitted disclaimers by "... an heir, next of kin, devisee, legatee, person succeeding to a disclaimed interest, beneficiary under a testamentary instrument, or appointee under a power of appointment. This was an extension of the common law rule which allowed for disclaimer by a devisee or legatee, but not an heir. The 1990 amendments to UPC § 2-801 further extended the right to disclaim to a decedent through his personal representative. In recognizing a disclaimer by a fiduciary, this section conforms to the UPC and extends that rationale to analogous situations. A trustee who disclaims property that would, if accepted into the trust, otherwise belong to a beneficiary is acting in much the same way as a personal representative of a decedent who disclaims for the beneficiaries.

The instrument under which the right to receive the property or disclaim the property was created will generally govern the disposition of the property in the event of a disclaimer. When the instrument does not provide for the property in the event of a disclaimer the property passes as if it were never to be included in the trust. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. As with other actions taken by another in a fiduciary capacity, the disclaimer will be subject to the fiduciary's general fiduciary duty.

A example of a disclaimer by a trustee can be found in a 1997 decision of the Massachusetts Supreme Judicial Court. *McClintock v. Scahill*, 403 Mass. 397, 530 N.E.2d 164 involved a disclaimer by trustees of property pouring over to the trust on the death of one of the grantors. The trustees indicated that the disclaimer of some $415, 000 would decrease the taxes on the decedent's estate by $625,000. The court concluded that the trustee could disclaim. The Massachusetts statute allowed "beneficiaries to disclaim, a definition which clearly included the trust. The question was, who disclaims on behalf of the trust, the beneficiaries (who presumably were minors and perhaps unborns) or the trustee. The trustee does have legal title to the trust property and acts for the trust in dealing with third parties and also has implied powers necessary to carry out the purpose of the trust in addition to the express powers contained in the trust instrument. Finally, the statutory definition of beneficiary clearly included those who act on the behalf of others, such as an estate or a corporation. Since no claim was made that the trustee's action violated his fiduciary duty, the court found the disclaimer valid and effective.

SECTION 10. WHEN DISCLAIMER BARRED OR LIMITED.

(a) A disclaimer is barred if any of the following events occur before the disclaimer is filed or delivered:

(1) acceptance of the property interest or power sought to be disclaimed;

(2) voluntary assignment, conveyance, encumbrance, pledge, or transfer of the property to which the right to disclaim related or a contract therefor;

(3) written waiver of the right to disclaim; or

(4) involuntary sale or other involuntary transfer for the account of the disclaimant of the property to which the right to disclaim related.

(b) A disclaimer, whether partial or complete, of the future exercise of a power is not barred by its past exercise.

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

(d) A disclaimer of an interest barred solely by this Section is governed by the following rules:

(1) if the disclaimer is of an interest, the disclaimer 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;

(2) if the disclaimer is of a power, it is without effect.

The 1978 Act required that an effective disclaimer be made within 9 months of the event giving rise to the right to disclaim (e.g., 9 months from the death of the decedent or donee of a power or the vesting of a future interest). The 9 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 UPC § 2-801. Whether particular activities will be found to constitute an "acceptance or "receipt of a benefit as those terms are used in the statutory language 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) (changing title of jointly held account to name of survivor and use of survivor's Social Security number on account indicates acceptance); Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439 (Ct.App. 1995) (acceptance of deed from estate, execution of receipt and release, procuring insurance on the property, and listing it for sale indicate acceptance and bar disclaimer); Jordan v. Trower, 208 Ga.App. 552, 431 S.E.2d 160 (1993) (acceptance of "de minimis sum from estate before filing of will for probate without more is not acceptance by sole beneficiary of estate); Matter of Gates, 189 A.D.2d 427, 596 N.Y.S.2d 194 (3d Dept. 1993) (minor beneficiary of funds advanced from the estate for his use did not accept and may still disclaim).)

The Drafting Committee does not contemplate that a mere failure to object to a gift (for example, additions to an existing trust) would alone constitute acceptance of the gift. The Committee also contemplates that acts not considered as constituting an acceptance under the Treasury Regulations pertaining to tax qualified disclaimers will not amount to acceptance under the Act. For example, Treas. Reg. § 25.2518-2(d)(1) states taking delivery of an instrument of title, "without more is not an acceptance, nor is a disclaimant "considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. In addition, "[i]n the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint tenancy merely because the tenant resided on the property prior to disclaiming his interest in the property. Treas. Reg. § 25.2518-2(d)(2) allows a fiduciary who is also a beneficiary to take actions in the exercise of fiduciary powers to perserve or maintian the disclaimed property without such acts constituting an acceptance. For example, a personal representative who pays real estate taxes on real property of which the presonal representative is the devisee is not barred from disclaiming. Finally, Treas. Reg. § 25.2518-2(d)(3) provides that "[a]ny actions taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's twenty-first birthday will not be an acceptance by the beneficiary of the interest.

Failure to object to a known and vested right over along period of time, however, may create a presumption of acceptance or receipt of a benefit. Proof of an assignment, involuntary sale or written waiver, in most cases, should be conclusive to establish a bar. Because a disclaimer is effective as a refusal as of the creation of the disclaimed interest, a “Mother Hubbard or after acquired property clause in a mortgage will not prevent the disclaimer of property after the mortgage is executed since the disclaimant will never have had the disclaimed property.

This act, unlike the 1978 Acts, specifies that “other law may bar the right to disclaim. In some states, such as Minnesota, insolvency of the disclaimant will invalidate the disclaimer. (M.S.A. § 525.532 (c)(6)) 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. 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). 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 imposing on the state, as title holder of last resort, any resulting liability. These larger policy issues are not addressed in this act and must, therefore, continue to be addressed by the states.

Subsection (d) sets forth the treatment of disclaimers barred by this section. A disclaimer of an interest results in a transfer of the interest to the persons who would have taken it under the Act had the disclaimer not been barred. The disclaimer becomes a gift. Since a disclaimed power does not “pass to anyone but is destroyed by a proper disclaimer, a barred disclaimer of a power has no effect. The operation of this subsection is limited to disclaimers barred solely by Section 10. It is expected that other statutes barring or limiting disclaimers will provide for the treatment of the interest or power disclaimed.

SECTION 11. 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 to the disclaimant or persons to whom the property or power passes by reason of the disclaimer.

Section 11 permits the recordation of a disclaimer of an interest in property ownership of or title, that is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts that only referred to permissive recording of a disclaimer of an interest in real property. The provision remains permissive, and recognizes that not every disclaimer, even if of real property, requires recordation. For example, if local practice in respect to devises of real property involves a deed from the executor to the devisee, a disclaimer of a specific devisee's interest in the real property that results in the passing of the property to the residuary devisee will lead to the executor executing a deed to the residuary devisee. Thus, the disclaimer need not be recorded to complete the chain of title. Nevertheless, the Section permits a disclaimer to be recorded when necessary or advisable.

SECTION 12. REMEDY NOT EXCLUSIVE. This [Act] does not abridge the right of a person to waive, release, disclaim, or renounce property, or an interest in or power over property under any other law.

SECTION 13. EXISTING INTERESTS.

(a) This [Act] applies to all interests in and powers over property regardless of when they were created.

(b) Except as otherwise provided in Section 10, 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 superseded law has not expired may be disclaimed after the effective date of this [Act].

SECTION 14. EFFECTIVE DATE

This [Act] takes effect on ________.

SECTION 15. 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 the States that enact it.

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