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FOR APPROVAL

PROPOSED REVISIONS OF THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

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PROPOSED REVISIONS OF THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

WITH PREFATORY NOTE AND REPORTER'S NOTES

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PROPOSED REVISIONS OF THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

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.

What is the history of disclaimer legislation? 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 presents interests and six months from the time of final ascertainment of the taker or interests for rejection of future interests.

In 1972 the Uniform Law Commissioners ("ULC") approved two Uniform Acts which were "Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act" and "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 Section 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.

Since the enactment in 1976 of IRC § 2518 governing disclaimers their use has become an accepted tax planning technique extending to areas beyond the simple rejection of property by an heir or beneficiary. Disclaimers are used to correct drafting errors, modify the terms of trusts, and make adjustments to accomplish favorable results under the generation skipping transfer tax. Many of these uses, especially disclaimers by trustees and of jointly held property, are treated slightly if at all by the current Acts. In short, the statutory framework has fallen behind practice. In 1993 the Joint Editorial Board of the Uniform Probate Code noted the need for revision of the then current Acts. The promulgation in late December 1997 of final amended Treasury Regulations under § 2518 clarifying and expanding the use of disclaimers of jointly held property has made the deficiencies of the current statutes more obvious.

This new Uniform Act creates a disclaimer law which recognizes the expansion of the use of disclaimers beyond the traditional settings. It 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. At the same time it continues the core of current disclaimer law: the relation back of the disclaimer to the time of the creation of the disclaimed interest. The relation back doctrine in the disclaimer context means that the disclaimant never had the interest disclaimed.

Because the disclaimant never had the disclaimed interest, the disclaimer is not only a tool of tax planning, but can also be used to put beyond the reach of creditors property that would otherwise come to a debtor. The classic example is the debtor against whom there is an outstanding judgment and who finds himself or herself the beneficiary of an estate. By disclaiming the gift the debtor is deemed never to have possessed it and the creditor cannot levy upon it. Not every State recognizes this use of disclaimers and nothing in this Act prevents a State from limiting the use of disclaimers in that situation. *See* the Reporter's Notes to Section 10.

Finally, this Act establishes no time limit for the making of a disclaimer. While qualified disclaimers for tax purposes (those which under IRC § 2518 allow the disclaimed interest to pass without transfer tax consequences to the disclaimant) must be made within 9 month of the creation of the interest, this Act simply requires that the disclaimer be made before it is barred otherwise by this Act. *See* the Reporter's Notes to Section 10. This Act thus "decouples" the property law of disclaimers from the law of qualifying disclaimers for tax purposes.

PROPOSED REVISIONS OF THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

SECTION 1. DEFINITIONS. In this [Act]:

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

(A) an insurance or annuity policy;

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

(C) a security registered in beneficiary form;

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

(E) any other nonprobate transfer at death.

(2) "Disclaimer" means a refusal to accept an interest in, or power over, property.

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

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

(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) "Present interest" means an interest that takes effect in possession or enjoyment at the time of its creation.

(8) "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.

(9) "Trust" means

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

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

Reporter's Notes

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 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.

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 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 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).

Trust: Taken from the current draft of the Uniform Trust Act.

SECTION 2. GENERAL PROVISIONS.

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

(b) Except to the extent the fiduciary's power to disclaim is expressly limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in 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 notwithstanding a spendthrift provision or similar restriction on transfer imposed by the creator of the interest or power, or a restriction or limitation on the right to disclaim imposed by an instrument other than the instrument that created the fiduciary relationship.

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

(d) A disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the disclaimant, and be delivered or filed in the manner provided in Section 9.

(e) Delivery of a disclaimer may be accomplished by personal delivery, mailing by first-class mail, or any other method likely to result in its receipt.

(f) A disclaimer becomes irrevocable upon the later to occur of its delivery or filing as provided in Section 9, or when it becomes effective as provided in Sections 3 through 8.

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

Reporter's Notes

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," including a personal representative of a decedent, a conservator, a guardian, and an agent under a power of attorney. 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. The powers of conservators, guardians, and other fiduciaries are set out by statute and are often

tailored the specific situation as well as circumscribed by general fiduciary duty. Subsection (b), therefore, subjects a fiduciary's power to disclaim to the limitations of the instrument creating the fiduciary relationship.

The broad wording of subsections (a) and (b) 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 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 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 remote in the extreme. Nevertheless, 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.

Subsections (a) and (b) follow the provision of UPC § 2-801 making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary 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 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. Subsection (b) therefore does not override restrictions disclaimers contained in the instrument creating the fiduciary relationship.

Subsection (c) 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).) In short, any estate or interest in property that is recognized under the law can be the subject of a disclaimer.

Subsection (d) sets forth the formal requirements for a disclaimer. The disclaimer may be an electronic record as well as a paper writing. The delivery requirement is set forth in Section 9.

Subsection (e) defines delivery to include personal delivery, first-class mail, and any other method likely to result in receipt.

Subsection (f) makes the disclaimer irrevocable on the later to occur of delivery or filing or 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, as disclaimer under this Act will always meet the irrevocability requirement for a tax qualification. Therefore, a disclaimer filed or delivered before tax deadline may be recalled and become of no effect.

Subsection (g) 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 3. DISCLAIMER OF INTEREST IN PROPERTY. Except for disclaimers governed by Sections 4 and 5, 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 intestate's death.

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

(3) If paragraph (2) does not apply and, had the disclaimer not been made, the disclaimed interest would have passed to an individual:

(A) the disclaimed interest passes as if the individual had died immediately before the disclaimed interest would have taken effect in possession or enjoyment; and

(B) if the disclaimed interest passes to the descendants of an individual by representation under the law of intestate succession or according to terms of the instrument creating the interest specifying a distribution by representation, for purposes of determining the generation at which the division of the intestate estate or the property passing under the instrument is to be made, the individual whose interest is being disclaimed is not treated as having died before the disclaimed interest would have taken effect in possession or enjoyment unless that individual is not actually living at that time.

(4) If paragraph (2) does not apply and, had the disclaimer not been made, the disclaimed interest would have passed to a person other than an individual, the disclaimed interest passes as if that person did not exist.

(5) Upon the disclaimer of a preceding interest, a future interest held by a person other than the person whose interest is being disclaimed takes effect as if the person whose interest is being disclaimed had died or ceased to exist immediately before the disclaimed interest would have taken effect in possession or enjoyment, but a future interest held by the person whose interest is being disclaimed does not accelerate in possession or enjoyment.

Reporter's Notes

Section 3 sets for the rules for disclaimers of interests in property except disclaimers of survivorship interests in jointly held property and disclaimers of

interests by trustees. It combines into one section disclaimers of interests created by intestacy, wills, and nontestamentary instruments such as revocable trusts. Prior Uniform Acts and most existing statutes treat interests created by the death of a decedent and all other interests in separate sections. This separate treatment is a relic of a time when probate and non-probate transfers were conceptualized in very different ways. Today, the "nonprobate revolution," especially the widespread use of revocable lifetime trusts, has blurred the traditional distinctions. This Act recognizes that the traditional distinctions are no longer useful, and treats all disclaimers of interests in property (except those dealt with in Sections 4 and 5) in the same way.

Paragraph (1) makes the disclaimer 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, of course, is irrevocable at the testator's death, as is a revocable trust. Of course, trusts may be 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. 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(g) 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 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 Reporter's Notes to Section 10 below.

Paragraphs (2) and (3) provide rules for the passing of the disclaimed interest which would otherwise have passed to an individual. Paragraph (2) states that a provision in the instrument providing for the passing of the interest should it be disclaimed or of disclaimed interests in general will control. A provision indicating the creator of the interest's intent in the event of disclaimer, therefore, will dictate the recipient of the disclaimed interest. Paragraph (3) provides a default rule where paragraph (2) does not apply, either because the instrument has no relevant provision or because the interest arose under the law of intestate succession. The disclaimant is deemed to have died immediately before the

disclaimed interest would have taken effect in possession or enjoyment. In the case of interests in an intestate estate or created by will, that time is the death of the decedent. In the case of future interests, that time is the time at which the holder of the future interest is entitled to actual possession of the property.

With respect to present interests, this rule is the same as that in previous Acts.

Example 1: T's will states: "I devise Blackacre to A, if she shall survive me." A then disclaims the interest. A is deemed to have predeceased T. The will does not contain any provision applicable to all disclaimed interests. The first question to ask is whether the an anti-lapse statute is applicable to the devise to A. If it is, Blackacre will pass to A's issue, if any. If the survival requirement is sufficient to prevent application of the anti-lapse statute, or if A is not within the coverage of the anti-lapse statute, or if the anti-lapse statute is applicable but A has no issue, Blackacre will pass through the residue of T's estate.

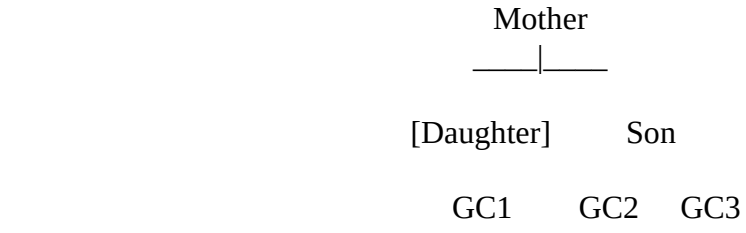
With respect to future interests, this Act resolves a possible ambiguity which exists under present law. Under the previous Acts and UPC § 2-801, a disclaimer must be made no later nine months after the event determining that the taker of the property or interest is finally ascertained and the interest 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. 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, 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 Act in paragraph (3)(A) provides the disclaimant is deemed to have died immediately before the disclaimed interest would have taken effect in possession or enjoyment. Under the present Act, Son in **Example 2** would be deemed to have died immediately before Mother's death, the time at which the trust remainder is to come into possession. There is no doubt, therefore, that his children living at that time, whenever born, are entitled to share in the trust property.

There is yet another difficulty. 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 problem.

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?



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 addresses the problem in paragraph (3)(B) by providing that individual whose interest is being disclaimed is not treated as having predeceased the time the disclaimed interest takes effect in possession or enjoyment for determining the generation at which the initial division of the property is to be made. Thus, Son is not deemed to have predeceased Mother, the division of the trust property is made at the child level, and GC1 takes one-half the property and GC2 and GC3 each take one-quarter. An exception is made, however, when the person whose interest is being disclaimed has actually predeceased the time the interest would have taken effect in possession or enjoyment. This provision is applicable to the disclaimer of future interests and is illustrated by the following example:

Example 3a: Testator's will creates a testamentary trust for Spouse. On Spouse's death, the remainder passes to the issue of Testator and Spouse by representation. With Spouse near death, Spouse is survived by the three children of a predeceased Daughter, Spouse's Son, who is critically ill, and Son's one child. Shortly before Spouse's death, Son disclaims. Son then dies and Spouse then dies. Were the Son not treated as having died, his child would receive one-half the

remainder. Son having predeceased Spouse, however, without the disclaimer the child would receive only one-fourth of the property. Since the Son is not living at Spouse's death (the time at which the interest takes effect in possession and enjoyment) distribution is made taking into account the fact of Son's death and the child receives one-fourth of the property.

Paragraph (4) provides a rule for the passing of property interests disclaimed by persons other than individuals. In essence it is applicable to disclaimers by trustees. Property disclaimed by trustees that would otherwise have passed to the trust passes as if the trust did not exist. Generally, the concept of the resulting trust would carry the property back to the person who gave it to the trust.

Paragraph (5) continues the provision of prior Uniform Acts on this subject providing for the acceleration of future interests on the making of the disclaimer. The effect is illustrated by the following example.

Example 4: Father's will creates a testamentary trust to pay income to his son for his life, and on his death to pay the remainder to the son's descendants then living, by representation. If the 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 the son actually had not survived. It is immaterial under the statute that the actual situation at the 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)).

SECTION 4. 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 the greater of:

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

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the joint holders other than the deceased joint holder.

(b) The disclaimer takes effect as of the death of the holder to whose death the disclaimer relates.

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

Reporter's Notes

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 seized "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 apprized 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 he should be able to reject the interest if he so elects, with like effect.

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 (1/2 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.

Joint bank accounts 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, 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 tenant 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).

Subsection (a) also deals with joint property arrangements, 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 B's death A can disclaim 60% of the account.

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.

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. 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. 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 subsection provides that the disclaimed interest passes to the surviving holders who have not disclaimed the interest. Cases of multiple joint holders are rare and there is very little law on the subject, but it is possible to come to a resolution of the question. Assume that A, B, and C are joint tenants with right of survivorship in Blackacre. A dies. B then disclaims. Because A would have received 1/3 of the property on severance, B has disclaimed all rights as to that 1/3. 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 5. DISCLAIMER OF INTEREST BY TRUSTEE. If a trustee disclaims an interest in property, the interest does not become part of the trust.

Reporter's Notes

The Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act ("1978 Act") allowed for disclaimer 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 the disclaimer by 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. As with

other actions taken by another in a fiduciary capacity, the disclaimer will be subject to the fiduciary's general fiduciary duty.

The Massachusetts Supreme Judicial Court has allowed a disclaimer of property by a trustee. *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. (Although the Court does not mention it, because the trust was for the decedent's grandchildren it seems likely that the distribution would have resulted in a direct skip subject to the generation skipping transfer tax and the avoidance of that result accounted for the tax savings.) 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 power 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 5 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 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 the trust did not exist. The doctrine of resulting trust will therefore 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.

SECTION 6. DISCLAIMER OF POWERS OF APPOINTMENT AND OTHER POWERS 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:

(A) of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the date of the last exercise of the power; or

(B) a subsequent disclaimer of a presently exercisable general power of appointment, the disclaimer is without effect;

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

Reporter's Notes

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. The effect of a disclaimer of a power under Section 6 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaimers a power before exercising it, the power is destroyed. If the power has been exercised, the power ceases to exist immediately after its last exercise by the holder; it is destroyed from the time of the disclaimer forward. There is an exception to this rule if the power is a presently exercisable general power of appointment. A general power of appointment is one while allows the holder to take the property 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. This is one of the few instances in which the Act provides that a specific act or event is an acceptance sufficient to bar a subsequent disclaimer.

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

(1) The disclaimer by the appointee takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(2) A disclaimer by the object or taker in default takes effect as of the time the instrument creating the power becomes irrevocable.

(3) Disposition of an interest in property disclaimed by an appointee is governed by Section 3(2), (3), or (4). A disclaimer of a power created in an appointee is governed by Section 6;

(4) Disposition of an interest in property disclaimed by an object or a taker in default of exercise of a power of appointment is governed by Section 3(2) or (3).

Reporter's Notes

This section deals with 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. A general power of appointment for transfer tax purposes is one that can be exercised in favor of the holder of the power, or the holder's estate, 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, creditors, or creditors of the holder's estate, although many special powers have a limited number or class of permissible appointees. The holder of a general power is considered to be the owner of the property subject to the power for transfer tax purposes. The holder of a special power suffers no transfer 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 this distinction and in paragraph (1) recognizes a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment; paragraph (2) 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 donee exercises the power. Paragraph (3), therefore, makes disposition of the disclaimed interest subject to the same rules applicable to the disclaimer of an interest in property in Section 3.

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*. If all the objects and takers in default disclaim before the power is exercised, however, the power of appointment is destroyed. *See* Restatement, Second, Property (Donative Transfers) § 12.1, *Comment g*. In addition, 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 donee of the power. That is the position taken by UPC § 2-603.

Paragraph (2) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. The effect of the disclaimer is governed by Section 3(2) or (3) (paragraph (4)). Therefore, the disclaimant will be deemed to have died just before the power is exercised (ending the possibility that the interest will take effect in possession or enjoyment) or the power lapses, usually by the death of the donee without the donee having exercised the power (at which time the interest would take effect in possession and enjoyment). These rules are illustrated by **Example 1**.

Example 1: O creates a testamentary trust, income to H for life, on H's death the trust property to be distributed among O and H's descendants as H shall appoint by will, and in default of appointment, to O and H's descendants by representation. 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, O and H's son, decides that it is unlikely H 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 H incompetent and had never written a will exercising the power, it would be certain that the power would not be exercised.) S has effectively refused any property that might come to him through the non-exercise of the power. If H does not exercise the power, S is not among the takers in default because he is deemed to have died immediately before the death of H. If H does exercise the power and does appoint some part of the property to S, the disposition of the property will be governed by the lapse statute.

SECTION 8. DISCLAIMER OF POWERS 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 other fiduciaries if expressly so provided in the disclaimer and if the fiduciary or fiduciaries disclaiming have the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

Reporter's Notes

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 disclaimer by son of his interest in the trustee's power to make discretionary distributions of principal to him

allowed 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 a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes, a power which could also be disclaimed as a power of appointment. 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 affect 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 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 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 probably disclaim the invasion power as a power of appointment and then seek the appointment of a disinterested co-trustee to exercise the power. 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 the co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

SECTION 9. DELIVERY. Delivery of a disclaimer is made:

(1) 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: by delivering the disclaimer 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 the personal representative;

(2) In the case of an interest in a testamentary trust: by delivering the disclaimer to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate, or if no personal representative is then serving, by filing the disclaimer with a court having jurisdiction to appoint the trustee;

(3) In the case of an interest in an inter vivos trust: by delivering the disclaimer to the trustee then serving, or if no trustee is then serving, by filing it with a court having jurisdiction to appoint the trustee, or if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, by delivering it to the settlor of a revocable trust or the transferor of the interest;

(4) In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable: by delivering the disclaimer to the transferor;

(5) In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable: by delivering the disclaimer to the person obligated to distribute the interest;

(6) In the case of a disclaimer by a surviving holder of jointly held property: by delivering it to the person to whom the disclaimed interest passes;

(7) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment: by delivering it to the holder of the power or to the fiduciary acting under the instrument that created the power, or if no fiduciary is then serving, by filing it with the court having authority to appoint the fiduciary. Delivery of the disclaimer may be made at any time after the power was created;

(8) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment: by delivering it to the personal representative of the holder's estate or to the fiduciary under the instrument that created the power, or if no fiduciary is then serving, by filing it with the court having authority to appoint the fiduciary;

(9) In the case of a disclaimer by a fiduciary of a power over a trust or estate: by delivering the disclaimer as provided in paragraphs (1), (2), or (3), these paragraphs to be applied as if the power disclaimed were an interest in property;

(10) In the case of a disclaimer of a power by an agent: by delivering the disclaimer to the principal.

Reporter's Notes

Section 9 sets for the rules for deliver of a disclaimer. The rules are designed to make sure that anyone who has the duty to distribute the disclaimed interest will know of the disclaimer. For example, a disclaimer of an interest in an 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 10. WHEN DISCLAIMER BARRED OR LIMITED.

(a) A disclaimer of an interest in or power over property 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 is delivered or filed:

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

(2) the disclaimant voluntary assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or makes a contract to do so;

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

(c) A disclaimer, whether partial or complete, of the future exercise of a power held in a fiduciary capacity is not barred by its past exercise.

(d) A disclaimer, whether partial or complete, of the future exercise of a power not held in a fiduciary capacity, is not barred by its past 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.

(g) A disclaimer is not barred by this section if it meets the requirements of a qualified disclaimer under Section 2518 of the Internal Revenue Code of 1986, 26

U.S.C. Section 2518; nor does the failure of a disclaimer to qualify under that section operate as a bar under this section.

Reporter's Notes

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. Only events occurring after the right to disclaim has arisen will act as a bar. (*See 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). Thus, for example, 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. Ministerial acts and post-disclaimer curative acts are similarly to be ignored in determining whether the right to disclaim is barred.

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); *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 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. Failure to object to a known and vested right over along period of time may however create a presumption of acceptance or receipt of a benefit. Proof of an assignment, involuntary sale or written waiver will be easier to come by, to establish a bar.

This Act, unlike the 1978 Act, 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), *Tannler v. Wisconsin Dept. of Health & Social Services*, 211 Wis. 2d 179, 564 N.W.2d 735 (1977); *but see*, *Estate of Kirk*, ___ N.W.2d ___, 1999 WL 160053 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who is 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.

Another open issue involves the relationship between federal tax liens and disclaimers. The Courts of Appeal have disagreed on the question of whether a valid disclaimer under state law will defeat a federal tax lien. *Compare*, *Leggett v. United States*, 120 F.3d 592 (5th Cir. 1997), *United States v. Camparato*, 22 F.3d 455 (2d Cir. 1994), and *Dyre Family 1995 Trust*, 152 F.3d 892 (8th Cir. 1998) (disclaimer does not defeat lien) *with Mapes v. United States*, 15 F.3d 138 (9th Cir. 1994) (disclaimer does defeat lien). The United States Supreme Court has granted *certiorari* in the *Dyre* case, 119 S.Ct. 1453 (1999) on the question of whether a state law disclaimer will defeat the federal tax lien.

Subsections (c) and (d) rephrase the rules of Sections 6 and 8 governing the effect of disclaimers of powers.

Subsection (f) provides a rule giving effect to disclaimers of property interests barred by Section 10. Although the disclaimer is invalid as a disclaimer, it 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.

Subsection (g) 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.

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 between the person whose interest is being disclaimed and persons to whom the property interest or power passes by reason of the disclaimer.

Reporter's Notes

Section 11 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. Section 11, therefore, makes a disclaimer recordable. This section does not change the law of the State governing notice.

SECTION 12. APPLICABILITY. This [Act] does not limit the right of a person to waive, release, disclaim, or renounce property or an interest in or power over property under any other law other than this [Act].

SECTION 13. EXISTING INTERESTS.

(a) This [Act] applies to all interests in and powers over property, whenever 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 law superseded by this [Act] 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.

SECTION 16. REPEALS.