DRAFT

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 simply a refusal to accept property. Although under the common law one could disclaim testamentary gifts but not property passing by intestacy, the 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 revised the disclaimer topic 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."

In the development of Uniform Probate Code the ULC in 1990 set forth revisions to Section 2-801 to broaden the scope of probate and non probate transfers.

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, 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 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, of powers by 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 prevent creditors from reaching property that would otherwise come to a debtor. The classic example is the debtor against whom there is an outstanding judgment and who finds him or herself the beneficiary of an estate. By disclaiming the gift the debtor never had 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 comments to Section 9.

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 otherwise barred. *See* the comments to Section 9. This Act thus "decouples" the property law of disclaimers from the law of qualifying disclaimers for tax purposes.

UNIFORM DISCLAIMERS OF PROPERTY ACT (199-)
(1/20/98 DRAFT)

SECTION 1. DEFINITIONS.

In this Act:

(1) "Disclaimer" means an irrevocable refusal to accept an interest in or power over property and is not a transfer.

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

(3) "Jointly held property" means property held in a joint tenancy, a joint account in a financial institution, [a tenancy by the entireties] [as community property with right of survivorship], or in the name of two or more persons under any other circumstances that entitle the last survivor of them to the whole of the property.

(4) "Person" means an individual, corporation, estate, trust, fiduciary, partnership, limited liability company, association, joint venture, or any other entity.

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 operating under a power of attorney. Whether an agent is authorized to disclaim on behalf of the agent's principal is a matter of agency law. If the agent does indeed have the power to disclaim the statute governs the use of that power.

Jointly held property: The term "joint tenancy" describes a form of concurrent ownership by two or more persons. 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 IRS Proposed Reg. § 25.251802(c)(iv).]

SECTION 2. DISCLAIMER; GENERAL PROVISIONS

(a) A person may disclaim an interest in or power over property, in whole or in part. A partial disclaimer may be expressed as a fraction, percentage, dollar amount, term of years, or as any other interest or estate that is less than the whole of the property offered.

(b) The right to disclaim exists notwithstanding a spendthrift provision or similar restriction or any restriction or limitation on the right to disclaim.

(c) A disclaimer under this [Act] 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].

(d) Where delivery of a disclaimer is required by this [Act], a delivery may be accomplished by personal delivery, mailing by first-class mail, or any other method likely to result in its receipt.

Subsection (a) 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. (It must be noted, however, that a disclaimer by a devisee or donee of Blackacre 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.

Nor does it 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, and must disclaim them within 9 months of Father's death in order to make a qualified disclaimer for tax purposes.

The reference in Subsection (a) to a "person" must be read in connection with the definition of person in Section 1(4) which 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," including a personal representative of a decedent, a conservator, a guardian, and an agent under a power of attorney. This Act sweeps all these actors into the definition of "person" and adds 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 Section 8 which explicitly allows fiduciaries to disclaim not only powers but 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 does not mean that a fiduciary may disclaim in every instance in which a disclaimer is authorized under this Act. In addition, as the comment to Section 1 notes, 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. If the power of attorney is a limited one, nothing in this act can expand it to include the right to disclaim on behalf of the principal.

Subsection (b) continues the provision of UPC § 2-801 making ineffective any attempt to limit the right to disclaim, whether express or implied.

Subsection (c) sets forth the formal requirements for a disclaimer, with the delivery requirement referred to the specific sections described below.

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

SECTION 3. DISCLAIMER OF AN INTEREST ARISING UNDER INTESTACY OR CREATED BY WILL

Except as to disclaimers governed by Sections 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 becomes effective upon and relates back to the date of the decedent's death;

(2) If the decedent has not provided for another disposition of the disclaimed interest or of disclaimed or failed interests in general, the disclaimed interest passes as if the disclaimant had died before the decedent, but the disclaimant is considered to have died before the decedent only for purposes of disposition of the interest disclaimed. In addition, if by law or under the will the descendants of the disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant to die before the decedent, then the disclaimed interest passes by representation, or passes as directed by the will, to the descendants of the disclaimant who survive the decedent;

(3) A future interest that takes effect in possession or enjoyment when or after the disclaimed

interest terminates takes effect as if the disclaimant had died before the decedent;

(4) Delivery of a disclaimer must be made after the decedent's death. Delivery of a disclaimer of an interest in a testamentary trust may be made to the trustee. Delivery of a disclaimer of an interest arising under the law of intestate succession or created by a will, including an interest in a testamentary trust for which no trustee is in office, 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.

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. 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 an heir against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit. The statute continues the traditional relation back doctrine. Nothing in the statute, however, prevents the legislatures or the courts from limiting the affect of that doctrine in specific situations or generally. *See* the comments to Section 9 below.

Paragraph (2) provides a default rule for the passing of the disclaimed interest. The will may provide for the disposition of a disclaimed interest, but if it does not, or if the disclaimer is of an interest arising by intestacy, the interest passes as if the disclaimant had predeceased the decedent. For example, Mother dies, leaving a will, the residuary clause of which gives the residue of her estate to her descendants surviving her by representation.

She is survived by a daughter who has two children and a grandchild who is the child 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.

This Paragraph also provides that the disclaimer does not affect any other provision of the will. For example, if a beneficiary under a will receives both a specific bequest and a share of the residue, a disclaimer of the specific bequest will not affect the disclaimant's rights in the residue. (If the disclaimant wishes to make a tax qualified disclaimer under IRC § 2518, however, the disclaimant will also have to disclaim his or her share of the disclaimed property which would be part of his or her share of the residue.)

There is a difficulty, however. 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. In the example above, Mother's residuary estate would be divided into two parts, one part passing to the surviving child, the other to the child of the predeceased child. If both children had actually predeceased Mother, each grandchild would receive one-third of the residue. Should the daughter's disclaimer have the effect of altering the distributional pattern of the residue of the estate?

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 to those who would take should the disclaimant have predeceased. (*Welder v. Hitchcock*, 617 S.W.2d 294 (Tex.Civ.App. 1981)). This Act adopts the language of the 1993 amendment to UPC § 2-801 codifying this provision. In the example above, because the children of the disclaimant would share in the disclaimed interest under Mother’s will had their mother predeceased their grandmother--they and their cousin each taking one-third of Mother’s entire estate--, the disclaimed interest, one-half of Mother’s estate, passes to them by reason of the disclaimer.

Paragraph (3) continues the provision of prior Uniform Acts on this subject providing for the acceleration of future interests on the making of the disclaimer. For example, assume that 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)).

Paragraph (4) requires delivery of a disclaimer be made after decedent's death. See Section 2(d) for method of delivery. The requirements relating to the person to whom the disclaimer must be delivered comport with the requirements of Treas.Reg. §25.2518-2(b)(2) that the disclaimer be delivered "to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession of such property."

SECTION 4. DISCLAIMER OF INTEREST ARISING UNDER INSTRUMENT OTHER THAN WILL.

Except as to disclaimers governed by Sections 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:

(1) The disclaimer relates back to the effective date of the instrument;

(2) If the instrument does not provide for another disposition of the disclaimed interest or of disclaimed or failed interests in general, the disclaimed interest passes as if the disclaimant had died before the effective date of the instrument, but the disclaimant is considered to have died before the effective date of the instrument only for purposes of disposition of the interest disclaimed. In addition, if by law or under the instrument the descendants of the disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant to die

before the effective date of the instrument, then the disclaimed interest passes by representation, or passes as directed by the instrument, to the descendants of the disclaimant who survive the effective date of the instrument. The effective date of the instrument is the date on which the maker no long has power to revoke it or to transfer to the maker or another the entire legal and equitable ownership of the interest;

(3) A future interest that takes effect in possession or enjoyment when or after the disclaimed interest terminates, takes effect as if the disclaimant had died before the effective date of the instrument, except that a future interest that is held by the disclaimant is not accelerated;

(4) Delivery of a disclaimer may be made before or after the effective date of the instrument. Delivery of a disclaimer of an interest in an inter vivos trust must be made to the trustee, or if no trustee is then in office, 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, to the settlor of an inter vivos trust or the transferor of the interest. Delivery of a disclaimer by a beneficiary of a beneficiary designation made after the effective date of the instrument must be made to the payor. Delivery of a disclaimer of a

gift, other than a gift made by trust or beneficiary designation, must be made to the donor.

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. Disclaimers of interests created under that trust would relate back to and disclaimant would be considered to predecease the effective date, which is the date of Mother's death, at which time she may no longer revoke the trust. If the disclaimant is the beneficiary of a life insurance contract, the effective date would be the death of the insured/owner. Similarly, the beneficiary of an IRA who disclaims would be treated as predeceasing the owner's death, unless, of course, the owner of the IRA had made an irrevocable beneficiary designation at any earlier time, which time would be the effective date.

The disclaimer may be delivered before or after the effective date of the instrument, which allows a beneficiary under a revocable lifetime trust to disclaim an interest before the death of the grantor. For example, Mother creates a revocable trust which on her death will pass by representation to her descendants. Under this Act, Son may disclaim his interest any time after Mother creates the trust (so long as his disclaimer is not barred under Section 9). If he does so, at Mother’s death his interest will pass as if he had predeceased Mother. However, such a disclaimer would *not* be a qualified disclaimer for tax purposes. Internal Revenue Code § 2518(b)(2) requires that a qualified disclaimer be made within 9 months after the later of the date of the transfer creating the interest or the day on which the disclaimant turns 21 years of age. Under Treas. Reg. § 25.2518-2(c)(3)(ii) the date of the transfer creating the interest is the date when there is a completed gift for federal gift tax purposes. In the example in this paragraph, that date is the date of Mother’s death or an earlier date when she releases her power to revoke the trust. A disclaimer made before Mother’s death (or before the date of release) is not a qualified disclaimer.

SECTION 5. DISCLAIMER OF RIGHTS IN JOINTLY HELD PROPERTY.

(a) A surviving holder of jointly held property may disclaim as a separate interest any property or interest therein passing to him by right of survivorship.

(b) A surviving holder of jointly held property may disclaim the entire interest in jointly held property devolving to him, if the jointly held property was created by the act of a deceased holder of the jointly held property and the survivor did not contribute any of the consideration in money or money's worth towards the acquisition of the jointly held property.

(c) A disclaimer of an interest in joint property relates back to the date of death of the deceased holder of the joint property to whose death the disclaimer relates. If the disclaimant is the only surviving holder, the disclaimed interest passes as part of the estate of 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.

(d) Delivery of a disclaimer of joint property must be made after the death of the joint holder to whose death the disclaimer relates. Delivery must be made to each person

entitled to the disclaimed interest.

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 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 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.

Even 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.

The position taken by this Act follows that taken in UDTUNIA 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 9, leaves to the particular circumstances whether he 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.

The amended Regulations, § 25.2518-2(c)(4)(I) allow a surviving joint tenant or tenant by the entirety 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 severed under local law and regardless of the proportion of consideration furnished by the disclaimant.

Joint bank accounts are largely, if not always, creatures of statute (e.g. UPC Section 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 Regulations, § 25.2518-2(c)(4)(iii) recognize the special rules applicable to joint bank accounts and allow the disclaimer by a survivor of that part of the account contributed by the decedent and bars the disclaimer of that part of the account attributable to the survivor's contributions. Subsection (b) recognizes this situation by allowing the survivor to disclaim the entire interest in the joint tenancy if the tenancy was created solely by the decedent.

Subsection (b) is also applicable to joint tenancies that are really testamentary substitutes. For example, A creates a joint tenancy in shares of stock with B, providing all the consideration. A probably intends the account to be a testamentary substitute rather than a true joint tenancy and B under the law of many jurisdictions would have no right to any of the property before A's death. B should then be able to disclaim the entire

account on A's death. B's disclaimer might not be a tax qualified disclaimer or be tax qualified only in part, depending the rights of A and B on severance of the tenancy. The amended Regulations, § 25.2518-2(c)(4)(iii) extends the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

Subsection (c) provides that the disclaimer relates back to the death of the joint holder to whom the disclaimer relates. In the usual two person joint tenancy, the disclaimed property would then pass as part of the estate of the deceased joint holder. In a three person joint tenancy after the death of the first joint tenant each survivor would be able to disclaim 1/6 of the property. If one survivor did so, the two remaining tenants would be joint tenants as to 2/3 of the property and the joint tenancy and the non-disclaiming survivor would be tenants in common as to 1/3 of the property.

Subsection (d) requires that delivery of the disclaimer be made after the death of the joint holder to whose death the disclaimer relates. Delivery must be made to each person entitled to the disclaimed interest. In the case of a two-person joint tenancy, that person is the personal representative of the estate of the deceased joint tenant. In a multi-person joint tenancy delivery would be made to the other surviving joint tenants.

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 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 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.

Even 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.

The position taken by this Act follows that taken in UDTUNIA 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 9, leaves to the particular circumstances whether he 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.

The amended Regulations, § 25.2518-2(c)(4)(I) allow a surviving joint tenant or tenant by the entirety 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 severed under local law and regardless of the proportion of consideration furnished by the disclaimant.

Joint bank accounts are largely, if not always, creatures of statute (e.g. UPC Section 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 Regulations, § 25.2518-2(c)(4)(iii) recognize the special rules applicable to joint bank accounts and allow the disclaimer by a survivor of that part of the account contributed by the decedent and bars the disclaimer of that part of the account attributable to the survivor's contributions. Subsection (b) recognizes this situation by allowing the survivor to disclaim the entire interest in the joint tenancy if the tenancy was created solely by the decedent.

Subsection (b) is also applicable to joint tenancies that are really testamentary substitutes. For example, A creates a joint tenancy in shares of stock with B, providing all the consideration. A probably intends the account to be a testamentary substitute rather than a true joint tenancy and B under the law of many jurisdictions would have no right to any of the property before A's death. B should then be able to disclaim the entire account on A's death. B's disclaimer might not be a tax qualified disclaimer or be tax qualified only in part, depending the rights of A and B on severance of the tenancy. The amended Regulations, § 25.2518-2(c)(4)(iii) extends the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

Subsection (c) provides that the disclaimer relates back to the death of the joint holder to whom the disclaimer relates. In the usual two person joint tenancy, the disclaimed property would then pass as part of the estate of the deceased joint holder. In a three person joint tenancy after the death of the first joint tenant each survivor would be able to disclaim 1/6 of the property. If one survivor did so, the two remaining tenants would be joint tenants as to 2/3 of the property and the joint tenancy and the non-disclaiming survivor would be tenants in common as to 1/3 of the property.

Subsection (d) requires that delivery of the disclaimer be made after the death of the joint holder to whose death the disclaimer relates. Delivery must be made to each person entitled to the disclaimed interest. In the case of a two-person joint tenancy, that person is the personal representative of the estate of the deceased joint tenant. In a multi-person joint tenancy delivery would be made to the other surviving joint tenants.

SECTION 6. DISCLAIMER OF NON-FIDUCIARY POWERS

A holder of a non-fiduciary power, including a power of appointment, may disclaim the power. If the holder has not

exercised the power, 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. In either case the instrument is construed as if the disclaimed power never existed. If the holder has exercised the power, the disclaimer relates back to the date of its last exercise. Delivery of the disclaimer must be made as provided by Sections 3(4) or 4(4), with those sections to be applied 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. If a partial disclaimer is to be a qualified disclaimer for tax purposes, however, it must be of all or of an undivided portion of the property subject to the power; it does not seem to possible to "carve up" a power with a qualified disclaimer (*See* Treas. Reg. § 25.25218-3(d), Ex. 9,21). 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

(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 non-fiduciary 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. Delivery of the disclaimer must be made after the exercise of 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 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 possible appointees of property 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. A 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. 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 subsection (a) provides a method for making a disclaimer by a taker in default or permissible appointee before the power is exercised. Subsection (b) provides a method for making a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment.

The Section deals only with the mechanics of making a disclaimer, because the effect of the disclaimer is governed by whichever of Sections 3 and 4 is applicable. Section 3 applies to disclaimers of interests under powers created by will; section 4 to powers created by other instruments.

SECTION 8. DISCLAIMER BY FIDUCIARIES

(a) Any power granted to a fiduciary, including a dispositive or administrative power, may be disclaimed, but a conservator or guardian may disclaim a power only with the consent of the court which has appointed the conservator or guardian. If the fiduciary has not exercised the power, 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 partially 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 provided in Sections 3(4) or 4(4), to be applied as if the power disclaimed were an interest in property.

(b) If a trustee disclaims an interest in property that would otherwise be 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 to never have been included

in the trust or as never added to the trust.

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 section 2-801 of the UPC 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 duty of care.

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.

The Massachusetts Supreme Judicial Court has gone much farther. *McClintock v. Scahill*, 403 Mass. 397, 530 N.E. 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.

Subsection (a) deals with a fiduciary's disclaimer of a power over property. 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. 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.

Subsection (b) 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 the trust had never existed. The effect of the actions

of co-trustees will depend on the state law governing the action of multiple trustees. For example, Grantor establishes Trust No. 1. At grantor's death, the trust property is divided into Trust A and Trust B. If the trustee disclaims any part or all of the property that would be part of Trust A, only trust A is treated as never having existed with respect to that property.

SECTION 9. WHEN DISCLAIMER BARRED.

(a) A right to disclaim is barred if any of the following events occur before the disclaimer is delivered:

(1) acceptance of the property interest 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;

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

(b) The right to disclaim a power is not barred by its past exercise.

(c) A right to disclaim is barred or limited as provided by other law.

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 avoidance, 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. 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.

This section lays out a framework for determining when a person will be deemed to have "accepted" the property or interest and will therefore be barred from a later attempt to reject it by disclaimer. 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 Section 2-801 of the UPC. 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))

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). 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.

SECTION 10. 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, but any purchaser of the property or interest who does not have actual notice shall not be deemed to have notice of the disclaimer until it is properly filed, recorded or registered.

Section 10 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. The provision remains permissive, recognizing that not every disclaimer, even if of real property needs 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 which results in the passing of the property to the residuary devisee will lead to the executor executing a deed to the residuary devisee and the disclaimer need not be recorded to complete the chain of title. The Section assures, however, that a disclaimer can be recorded when necessary or advisable.

SECTION 11. 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 12. EXISTING INTERESTS.

An interest in or power over property existing on the effective date of this [Act] as to which the time for delivering a disclaimer under superseded law has not expired may be disclaimed after the effective date of this [Act], and before any event that bars a disclaimer.

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

[**SECTION 14. REPEAL OF INCONSISTENT STATUTES**].

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