ON DISCLAIMERS: LET'S RENOUNCE
I.R.C. SECTION 2518

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I. INTRODUCTION ........................................ 694
II. THE NATURE OF DISCLAIMERS ............................. 698
   A. Origin ............................................ 698
   B. Requirements ..................................... 699
   C. Disclaimants ...................................... 703
   D. Takers ............................................ 705
   E. Interests and Powers ................................ 706
   F. Effects ............................................ 708
III. USES OF DISCLAIMER .................................. 709
   A. Many Possibilities ................................ 709
   B. Poor Lifetime Planning .............................. 709
   C. Change of Circumstances ............................ 711
   D. Fine-Tuning the Estate Plan ........................ 713
IV. SOME UNSETTLED POLICY ISSUES ......................... 713
   A. Who May Disclaim? ................................ 714
      1. Represented Person .............................. 714
      2. Debtors and Insolvents ......................... 719
   B. Devolution of the Interest ........................ 726
      1. Predeceased Disclaimant ........................ 727
      2. Manner of Distribution .......................... 727
      3. Acceleration .................................... 729
   C. Which Interests May Be Disclaimed? ................. 730
      1. Acceptance ..................................... 731
      2. Partial Interests ................................ 733
   D. Procedural Requirements ............................ 735
      1. Form of Disclaimer .............................. 736
      2. Timing Issues ................................... 738
V. THE FEDERAL LAW OF DISCLAIMERS ..................... 739
   A. Pre-1976 Tax Treatment ............................ 739
   B. I.R.C. Section 2518 ................................ 742
   C. Development of the Federal Law ..................... 744

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VI. SIMPLIFICATION ........................................ 749
   A. Continuing Conflict .................................. 749
   B. Effect of the GSTT .................................. 751
   C. Simplification for Whom? ............................ 754
   D. Disclaimers as Taxable Transfers ................. 755
   E. Fairness for Taxpayers ............................... 756

I. INTRODUCTION

The law of disclaimer is founded on two basic property law concepts: (1) a gratuitous transfer is not complete until its acceptance by the recipient, and (2) no person can be forced to accept property against his will.1 One might think that very few sensible persons decide to reject a gratuitous transfer and that if they do, rejection is easy. Not so. Today, the law of disclaimer is a topic of much discussion2 and considerable litigation.3 It is a


2. See, e.g., John M. Beehler, When Can a Survivorship Interest in Joint Tenancy Property Be Disclaimed?, 72 J. TAX’N 112 (1990) (analyzing Jewett and giving overview of disclaimer law); F. Ladson Boyle, State Law Aspects of Disclaimers, PROB. PRAC. REP., May 1989, at 1 (discussing federal tax liability and creditor-related aspects of disclaimers); Theodore M. David, Correct Estate Planning Mistakes with the Qualified Disclaimer, PRAC. LAW., Mar. 1990, at 27 (giving overview of qualified disclaimers, tax implications and specific uses of disclaimers); Gregory L. Fullerton, When Can a Fiduciary Disclaim Property on Behalf of Another?, 17 EST. PLAN. 272 (1990) (discussing I.R.C. § 2518 and requirements of valid disclaimers by fiduciaries); Linda B. Hirschon, Disclaimers of Jointly Owned Accounts, 13 REV. TAX’N INDIVIDUALS 98 (1989) (noting potential problems in estate planning when property is jointly held and analyzing how qualified disclaimers can be used to avoid these problems); Jerry A. Kasner, Qualifying Joint Bank or Brokerage Accounts for Disclaimers, 55 TAX NOTES 1239 (1992) (describing problems in disclaiming jointly held property and analyzing how I.R.S. has attempted to provided guidance); Jerome A. Manning, Using Disclaimers in Tax Planning, PRAC. TAX LAW., Summer 1989, at 11 (noting potential difficulties in making qualified disclaimer and illustrating possible uses of disclaimers); Malcolm A. Moore, The Ever-Expanding Use of Disclaimers in Estate Planning: An Update, 24 INST. ON EST. PLAN. ANN. 17-1 (1990) (discussing opportunities and problems presented by disclaimers in light of transfer tax law changes); Lee A. Sheppard, Lifestyles of the Rich: Disclaimers in Estate Planning, 52 TAX NOTES 146 (1991) (giving overview of Jewett and analyzing two recent federal appellate decisions reaffirming Jewett); Bruce D. Steiner, Disclaimers: Post-Mortem Creativity, PROB. & PROP., Nov.-Dec. 1990, at 43 (illustrating possible uses of disclaimers).

3. Since 1987 there have been seven federal appellate decisions regarding disclaimers, plus many more cases in federal district courts, the Tax Court and various state tribunals. See, e.g., Irvine v. United States, 936 F.2d 343, 347-48 (8th Cir. 1991) (holding that disclaimer of remainder interest must occur within reasonable time after beneficiary becomes aware of such interest), cert. granted, 113 S. Ct. 2958 (1999); Ordway v. United States, 908 F.2d 890, 895-96 (11th Cir. 1990) (stating that taxpayer’s disclaimer was not timely and was therefore subject to gift tax), cert. denied, 111 S. Ct. 2916 (1991); Estate of Dancy v. Commissioner, 872 F.2d 84, 86 (4th Cir. 1989) (holding that under state law, surviv-
complex field, one filled with uncertainty and hidden traps. It is a
field in need of illumination so that disclaimants may traverse in
safety.

There are countless and varied reasons why transferees, es-
pecially the recipients of testamentary gifts, choose to disclaim.4
Chief among these is the desire to carry out postmortem estate
planning. Sometimes pre-death planning for a decedent’s estate
is nonexistent, poorly done, antiquated and out-of-date, or unfair
in the opinion of the surviving family members. In appropriate
circumstances, disclaimers can be used to correct these problems.

The effectiveness of a disclaimer is dependant on state law.5
State law determines who will take the transferred property:
either the recipient intended by the original transferor or another
substituted taker.6 In addition, state law distinguishes valid dis-
claimers from all other transfers. A disclaimer is fundamentally
different from a voluntary transfer of property because it is a re-
(ing joint tenant could terminate survivorship interest by disclaimer); Poinier v.
Commissioner, 86 T.C. 478, 485 (1986) (finding that disclaimer was invalid be-
cause it was not made within reasonable time), aff’d in part, rev’d in part, 858 F.2d

4. For a discussion of the possible uses of disclaimers, see infra notes 83-96
and accompanying text.

5. State law directs the disposition of disclaimed property, but it does not
necessarily control the imposition of federal transfer taxes on such property. See
I.R.C. § 2518 (1988) (stating federal requirements for qualified disclaimer);
Treas. Reg. § 25.2518-1(b) (1986) (discussing effects of qualified transfer tax for
federal estate tax purposes).

(interpreting disclaimer statute as applying to intestate estates); Ernst v. Shaw,
783 S.W.2d 400, 401 (Ky. Ct. App. 1990) (holding that unless decedent’s will
provides otherwise, disclaimed property passes as if person disclaiming had pre-
deceased decedent); Bradley v. State, 123 A.2d 148, 151 (N.H. 1956) (holding
that intestate heirs may not disclaim their rights because they do not receive title
by gift, but by operation of law); Thompson v. Lawson, 793 S.W.2d 94, 97 (Tex.
Ct. App. 1990) (stating that if valid disclaimer present, property passes as if per-
son disclaiming had predeceased decedent).

The Uniform Probate Code (U.P.C.) holds that “the property or interest re-
nounced devolves as though the person renouncing had predeceased the dece-
state statutes have similar provisions. See, e.g., Md. EST. & TRUSTS CODE ANN.

7. See Bel v. United States, 452 F.2d 683, 693 (5th Cir. 1971) (noting that
disclaimer has been defined as “an unqualified refusal to accept the rights to
which one is entitled”), cert. denied, 406 U.S. 919 (1972). Thus, if there is no
acceptance, the interest does not transfer. Id.
claimer, or no disclaimer, may occasion two transfers (from the transferor to the would-be disclaimant, and then from the disclaimant to the substituted taker).

This distinction has important federal and state tax ramifications. Where there are two transfers, there are two occasions for the imposition of transfer taxes; but when only one transfer is recognized, the tax burden may be smaller. Tax advisors have developed a variety of techniques to use this fact to their clients' advantage; and in recent years many disclaimers have been tax motivated.

The law of disclaimer varies considerably from state to state. The disclaimer was originally a common-law concept, but now almost all states have statutes covering the subject. These statutes are not comprehensive, however, and some disclaimer policy issues remain to be resolved by the courts.

For years the federal tax consequences of a disclaimer depended almost entirely on state law. Because of state variations, there was some inconsistency in the federal treatment of disclaimers, which was viewed as inequitable. In addition, disclaimers sometimes facilitated tax avoidance. To alleviate these problems, Congress enacted Internal Revenue Code (I.R.C.) section 2518,

8. For a discussion and description of these techniques, see sources cited supra note 2.


Two states, Mississippi and New Hampshire, have almost no statutory law on disclaimers; and one state, Louisiana, has unique rules for disclaiming because of its system of forced heirship.

10. For a discussion of unsettled policy issues, see infra notes 97-273 and accompanying text.

11. Before I.R.C. § 2518 was enacted, the Ways and Means Committee Report addressed the state of the law and explained:

The Federal tax consequences of a disclaimer will largely depend upon its treatment under local law, i.e., its treatment as a disclaimer so that the person disclaiming is not considered to have held title to the property at any time. The Federal tax consequences of a disclaimer will also depend upon the effectiveness of the disclaimer in passing property to someone else.

which contains its own definition of a "qualified disclaimer." 12
State law has retained considerable importance, however, even for federal transfer tax purposes. Instead of a pure federal system, the law of disclaimers is now an amalgam of state and federal rules: rules that sometimes conflict with one another, leaving attorneys and their clients in a state of uncertainty and confusion. 13

This Article is a plea for simplification. It explores the many functions of disclaimers and highlights some of the policy issues that remain to be resolved. It suggests that these unresolved issues should be settled at the state level and that the federal government should no longer be permitted to control the definition of a valid disclaimer. I.R.C. section 2518 ought to be repealed and state laws should be returned to their prior position of pre-eminence in the realm of disclaimers. It is argued that the state law inconsistencies that worried Congress and inspired section 2518 are less significant today and that it is the conflict between federal law and the various state laws that is presently inequitable. 14

A return to a state-dominated system of disclaimer law has been made possible by the 1986 enactment of the Generation-Skipping Transfer Tax (GSTT). 15 The GSTT is designed to ensure that family wealth is taxed at least once each generation, and it has halted several important tax-avoidance techniques previously used by the very wealthy. For example, under the GSTT a gift to a grandchild is generally subject to taxation twice, regardless of whether the property passes by way of one transfer or two. 16 Accordingly, the GSTT has reduced the ability of disclaimers to affect tax receipts of the federal government. It has also reduced the need for a federal standard defining valid claim-

13. For an excellent discussion of the complexity and confusion left in the wake of the new federal statute, see John H. Martin, Perspectives on Federal Disclaimer Legislation, 46 U. Chi. L. Rev. 516 (1979) (discussing Tax Reform Act of 1976, noting alternative for preserving tax benefits and suggesting that disclaimers should be subject to taxation).
14. For a discussion on how the law of disclaimer can be simplified, see infra notes 327-58 and accompanying text.
16. A direct gift to the grandchild will generally be subject to gift or estate tax plus the Generation-Skipping Transfer Tax (GSTT). If property is transferred to a child who then transfers it to the grandchild, the property similarly will be taxed twice, once each time it is transferred. For a discussion of the effects of the GSTT, see infra notes 336-49 and accompanying text.
The GSTT has cleared the way for a meaningful reduction in the level of conflict and confusion presently found in the law of disclaimer.

II. THE NATURE OF DISCLAIMERS

A. Origin

The doctrine of disclaimer is of ancient origin. The concept is based on the common law principle that a gratuitous transfer is not complete until it is accepted. The intended recipient's freedom to accept or refuse an inter-vivos or testamentary gift has long been recognized by the courts, which usually refer to such refusal either as a "disclaimer" or as a "renunciation" (the terms are used interchangeably). It is generally agreed that an interest in property may be burdensome as well as beneficial, and that acceptance should not be forced upon any person.

Property passing by intestacy, on the other hand, could not be disclaimed under the common law. An heir accedes to his inheritance by operation of law, not by gratuitous transfer, and therefore acceptance is considered unnecessary. This theory was developed long ago in England, probably because it was essential in that setting to be able to identify the title holder of real property at all times. Today, the rationale underlying this rule is no longer justifiable, and most states have passed statutes giving heirs the right to disclaim.

17. See Martin, supra note 13, at 316 n.2 (noting that disclaimer concept existed under Roman law).
18. See Townson v. Tickell, 106 Eng. Rep. 575, 576-77 (K.B. 1819) ("The law certainly is not so absurd as to force a man to take an estate against his will.").
20. See U.D.T.W.I.A.A. § 1 cmt., 8A U.L.A. 96 (1992) (Who May Disclaim) ("It is said that no one can make another an owner of an estate against his consent by devising it to him.").
21. See Coomes v. Finegan, 7 N.W.2d 729, 733 (Iowa 1943) (holding that property passing from intestate parent to child cannot be renounced).
22. See id. at 732 (noting that title to property vested by operation of law and required no acceptance).
23. See U.D.T.W.I.A.A. § 1 cmt., 8A U.L.A. at 97 (Who May Disclaim) ("An heir at law is the only person in whom the law of England vests property, whether he will [it] or not." (quoting WILLIAMS ON LAW OF REAL PROPERTY 75 (2d American ed. 1857))).
When an interest in property is disclaimed, it is as if the interest had never been offered to the disclaimant: as if the disclaimant never possessed, even momentarily, any right respecting the property. The property interest passes from the original transferor directly to the substituted taker. This is the so-called "relation-back" theory. The act of refusal, whenever performed, relates back to the instant when the transfer was initiated. Thus, under the common law the disclaimant does not participate in the transfer. Therefore, creditors of the disclaimant have no access to the disclaimed property and the disclaimant cannot direct the disposition of the interest in property that he has refused.

B. Requirements

To be valid, a disclaimer must fulfill the requirements of applicable state law. All states have enacted statutes on disclaimers, but these statutes vary considerably. The statutes also leave some disclaimer issues untouched, to be resolved by judges. Many states' statutes are derived from the uniform acts on disclaimers promulgated by the National Conference of Commissioners on Uniform State Laws. Modern courts should have little difficulty in permitting heirs to disclaim. There has been a uniformly negative response by commentators to older decisions prohibiting such disclaimers. See, e.g., Hardenbergh v. Commissioner, 198 F.2d 63, 66 (8th Cir.) (gift tax imposed when heirs of intestate decedent relinquished their interests in estate because heirs had no power to prevent vesting of estate in them), cert. denied, 344 U.S. 836 (1952); see also Martin, supra note 13, at 319 & n.12 (discussing decreased usefulness of common law rule and listing state statutes that authorize such disclaimers); George M. Schain, The Effective Disclaimer, 34 Cath. U. L. Rev. 19, 22-23 (1984) (criticizing Hardenbergh holding).

25. See U.D.T.W.I.A.A. § 3 cmt., 8A U.L.A. at 103 (Devolution of Disclaimed Property) (noting disclaimed property will "descend to the heir or pass in some other direction under the will" (quoting People v. Flanagin, 162 N.E. 848, 850 (Ill. 1928))).

26. See id. (noting disclaimer relates back to date of death of donee and prevents succession from becoming operative in favor of disclaimant).

27. See U.D.T.W.I.A.A. § 3 cmt., 8A U.L.A. at 105 (Rights of Creditors and Others) ("As regards creditors, taxing authorities and others, the provision for 'relation back' has the legal effect of preventing a succession from becoming operative in favor of the disclaimant."). Professor Martin notes that not all courts have honored the relation-back theory where creditors are concerned. Martin, supra note 13, at 920 nn.14-15 (indicating that some states will not permit creditors' rights to be frustrated purposefully by transferee and that some states do not allow relation back for inheritance tax purposes).

All are founded on the same basic and enduring common law concepts.

The principal requirement for a valid disclaimer is that it must be clearly and unequivocally expressed. The law will not imply a disclaimer or recognize one where the disclaimant's acts are ambiguous or unconvincing. Accepting any benefit derived from the property interest is fatal to a disclaimer, because a disclaimant may not pick and choose among the burdens and benefits offered. Acceptance of even a small benefit may be considered an acceptance of the entire interest. In addition, a


30. See Webster v. Gilman, 29 F. Cas. 547, 553, 1 Story 499 (C.C.D. Me. 1841) (No. 17,335) (noting act of acknowledgment or positive act of renunciation is necessary for valid disclaimer); In re Wilson's Estate, 83 N.E.2d 852, 854 (N.Y. 1949) (stating that if legatee does not wish legacy, he must affirmatively renounce it).

31. See, e.g., Manufacturers Nat'l Bank v. Woodward, 21 A.2d 705, 707 (Me. 1941) (holding town had not rejected trust where it was unclear whether townsmen voted to reject); Garfield v. White, 92 N.E.2d 575, 579 (Mass. 1950) ("A renunciation or disclaimer . . . must be clear and unequivocal."); In re Estate of Morrissey, 182 N.Y.S.2d 508, 509 (Sur. Ct. 1958) (same); cf. Cumberland Univ. v. Caldwell, 84 So. 486, 851 (Ala. 1919) (Anderson, C.J., concurring) (devise was renounced by university when intended beneficiary department ceased to exist); Chilcoat v. Reid, 140 A. 100, 103 (Md. 1928) ("[W]hile, in the absence of evidence to the contrary, it will be presumed that [the devisee] accepted the devise, when it was beneficial to him, it has been held that there is no such presumption where the devise is not prima facie beneficial . . . ." (citation omitted)).

32. See Brown v. Routzahn, 63 F.2d 914, 916 (6th Cir.) ("[W]here there is a single gift, including burdensome and beneficial properties as an aggregate, then, unless a contrary intention appears from the will, the donee cannot disclaim the burdensome gift and accept the beneficial one."); cert. denied, 290 U.S. 641 (1933); Brown v. Kalene, 296 N.W. 809, 810 (Iowa 1941) (same).

33. See Niklason v. Ramsey, 353 S.E.2d 783, 784 (Va. 1987) (holding that when beneficiary, prior to disclaiming, entered contract to divide estate, beneficiary had exercised dominion over estate and was not permitted to subsequently disclaim).
disclaimer is generally irrevocable.\textsuperscript{34} A transferee may not change his mind—not after accepting an interest in property, nor after rejecting it. Most states require a writing in order to create a valid statutory disclaimer.\textsuperscript{35} This requirement clarifies whether or not a disclaimer has been made and helps to establish which interests have been disclaimed.

Modern disclaimer laws do not always require a disclaimant to reject \textit{all} interests proffered by a transferor in a single instrument.\textsuperscript{36} If the interests are distinct and separable, one interest may be accepted while another is disclaimed.\textsuperscript{37} For example, if a testator has bequeathed 1000 shares of stock to his son, the son may disclaim his undivided interest in 42 shares, in 942 shares or in all of the shares.\textsuperscript{38} Unfortunately, in many situations it may be difficult to determine whether or not interests are distinct and separable.\textsuperscript{39}

A disclaimer must be timely made.\textsuperscript{40} The apparent reason for this rule is to buttress the requirement for clarity and cer-

\textsuperscript{34} Some statutes provide specifically that a renunciation is irrevocable. See, e.g., \textsc{Conn. Gen. Stat. Ann.} § 45a-578(c) (West Supp. 1993); \textsc{Iowa Code Ann.} § 633.704(2)(c) (West 1992); \textsc{N.Y. Est. Powers & Trusts Law} § 2-1.11(g) (McKinney 1981); \textsc{Tenn. Code Ann.} § 31-1-103(b) (Supp. 1992); \textsc{Tex. Prob. Code Ann.} § 37A(d) (West Supp. 1993). Retraction has been permitted on occasion under the common law. See \textit{In re} Johnston's Will, 298 N.Y.S. 957, 961 (Sur. Ct. 1937) (indicating that courts should go to considerable lengths to effectuate testator’s wishes and must consider whether renunciation adversely affects legal rights of others); \textit{In re} Estate of Berg, 355 N.W.2d 13, 15 (S.D. 1984) (holding that surviving spouse, with court approval, could rescind disclaimer within statutory time limit, provided no prejudice resulted to other persons’ interest in estate).

\textsuperscript{35} At least a third of the states, however, continue to recognize common law disclaimers, which need not be in writing.

\textsuperscript{36} The U.P.C. states: “A person, or the representative of a person, to whom an interest in or with respect to property or an interest therein devolves by whatever means may disclaim it in whole or in part by delivering or filing a written disclaimer under this section.” \textsc{U.P.C.} § 2-801(a), 8 U.L.A. 156 (Supp. 1992). Other statutes are more specific. See, e.g., \textsc{Del. Code Ann. tit. 12, § 601} (1987) (“A disclaimer may be of a fractional share, or any limited interest or estate, or of any lesser included interest or estate, including a lesser included interest or estate having a specific monetary value.”).

\textsuperscript{37} \textsc{Brown v. Routzahn}, 63 F.2d 914, 916 (6th Cir.) (“Where a testator makes two separate and distinct gifts, one beneficial and the other burdensome, the donee may undoubtedly accept the beneficial gift and reject the other . . . .”); \textit{cert. denied}, 290 U.S. 641 (1933).

\textsuperscript{38} \textsc{Treas. Reg.} § 25.2518-3(a)(1)(ii) (1986). Under federal tax law, the son cannot disclaim solely the income from the shares. \textsc{Treas. Reg.} § 25.2518-3(a)(1)(i).

\textsuperscript{39} See, e.g., \textsc{Oglesby v. Springfield Marine Bank}, 69 N.E.2d 269, 276-77 (Ill. 1946) (discussing confusing will and deed documents that created conflict for children attempting to disclaim in order to maximize benefit).

\textsuperscript{40} \textsc{First Nat'l Bank v. United States}, 176 F. Supp. 768, 775 (M.D. Ala.
tainty. If the beneficiary does not either accept or reject the interest within a reasonable time, then it must be assumed that no renunciation is intended. Under the common law, the "reasonable time" allowed for making a disclaimer was flexible; it was decided on a case by case basis. 41

Today, statutes set time limits that are measured by the day, rather than by what is reasonable. 42 Treasury Regulations on the timing issue do not always coincide with state statutes so that a disclaimer that is valid under state law may not be "qualified" for federal tax purposes. 43 In some instances, the Internal Revenue Service (I.R.S.) may even require a "qualified" disclaimer to be made before the disclaimant is aware that the property interest exists. 44 Timing is at issue in much of the disclaimer litigation today. 45 The dispute is not usually over the length of the time


44. The federal "statute adopts an objective test for the time within which the disclaimer is required. The fact that a donee or beneficiary may be unaware of the creation of an interest . . . does not affect the time within which the disclaimer must be made." JOHN H. MCCORD, 1976 ESTATE AND GIFT TAX REFORM: ANALYSIS, EXPLANATION AND COMMENTARY § 5.28, at 248 (1977).

45. See Irvine v. United States, 936 F.2d 343, 347-48 (8th Cir. 1991) (determining whether "reasonable time" for disclaiming began to run when beneficiary learned of interest or when interest vested), cert. granted, 113 S. Ct. 2958 (1993); Ordway v. United States, 908 F.2d 890, 896 (11th Cir. 1990) (measuring reasonable time from date of transfer rather than date of vesting of interest), cert. denied, 111 S. Ct. 2916 (1991); Estate of Dancy v. Commissioner, 872 F.2d 84, 87 (4th Cir. 1989) (deciding, for purposes of measuring nine-month time limit for disclaimer, whether survivorship interest in cotenancy was deemed created at date property was acquired or at date of death of one cotenant); McDonald v. Commissioner, 853 F.2d 1494, 1499 (8th Cir. 1988) (presenting issue of
limit, which is now clearly established by statute, but rather, over
the point at which the statutory time limit starts to run.\textsuperscript{46}

Ordinarily, the purpose for which a disclaimer is made has no
bearing on its validity.\textsuperscript{47} Under the common law, if a person is
indebted or is anticipating a divorce, he may lawfully disclaim any
bequest made to him in order to frustrate the expectations of his
creditors or spouse. Although a few states prohibit disclaimers by
insolvent persons,\textsuperscript{48} this is not the general rule. Nevertheless,
 fraud is not tolerated.\textsuperscript{49} If there is evidence that the disclaimant
has made an agreement with the substituted taker that will result
in detriment to a third party, the disclaimer may be held invalid.\textsuperscript{50}

Federal tax law prohibits a disclaimant from directing dispo-
sion of the property interest that he has renounced.\textsuperscript{51} This is
because of the basic rule: acceptance precludes renunciation. A
power of disposition over a property interest may be seen as a
benefit derived from the property. Hence, the power must be dis-
claimed along with the interest if the disclaimer is to be valid for
federal tax purposes.\textsuperscript{52}

\textbf{C. Disclaimants}

The common law established the rule that donees, legatees
and devisees are entitled to disclaim both inter-vivos and testa-
mentary gifts.\textsuperscript{53} Modern statutes affirm that heirs are also entitled
whether timeliness of disclaimer was measured from date of creation of joint
tenancy or from date of transfer of survivorship interest at time of joint tenant’s
death); Kennedy v. Commissioner, 804 F.2d 1332, 1333 (7th Cir. 1986) (same).
\textsuperscript{46} For cases dealing with the statutory time limit, see cases cited supra note
45.
and Others) (stating that it is immaterial whether disclaiming operates to avoid
taxes).
\textsuperscript{48} See, e.g., FLA. STAT. ANN. § 732.801(6)(a) (West Supp. 1993); MASS. GEN.
LAWS ANN. ch. 191A, § 8 (West 1990); MINN. STAT. ANN. § 525.532, Subd. 6
(West Supp. 1993).
\textsuperscript{49} See Kalt v. Youngworth (\textit{In re Kalt’s Estate}), 108 P.2d 401, 404 (Cal.
1940) (finding that renunciation by legatee in fraud of creditors would be given
no effect); Stein v. Brown, 480 N.E.2d 1121, 1123-24 (Ohio 1985) (indicating
that transfer will be fraudulent conveyance under Uniform Fraudulent Convey-
ance Act if beneficiary seeks to disclaim with actual intent to defraud creditor).
\textsuperscript{50} See Schoonover v. Osborne, 187 N.W. 20, 23 (Iowa 1922) (holding that
renunciation was valid because there was not evidence of collusion between dis-
claimant and substituted taker to defeat lien on property).
\textsuperscript{52} See Treas. Reg. § 25.2518-2(e)(5), examples (11) and (12) (illustrating
that for trustee to make valid disclaimer of future benefits of trust, he must re-
tain no power to enjoy benefits).
\textsuperscript{53} See Martin, supra note 13, at 318.
to disclaim their inheritances. Courts and legislatures, however, do not always agree in determining when an agent or representative should be permitted to disclaim on behalf of a transferee.

A common example of the agency problem is the deceased transferee. Assume that a father has predeceased his son by only a few weeks. All the father's property passing to the son will be probated (and taxed, perhaps) twice before it reaches the grandchildren, unless the son's personal representative can execute a valid disclaimer. Usually this is permitted; most state statutes give personal representatives the power to disclaim.

If the son in the example is incompetent rather than deceased however, the issues become more difficult. Many statutes, but by no means all, permit conservators, guardians and other fiduciaries to make disclaimers for incompetents and minors. The Massachusetts Supreme Court has even allowed a trustee to disclaim property bequeathed to his trust, but this is an unusual holding. Ordinarily, only persons with a beneficial interest in trust property may disclaim such property. This leads to ques-


55. For a discussion of when a representative may or may not disclaim, see infra notes 99-195 and accompanying text.


57. For example, the U.P.C. allows a disclaimer by a guardian "when it is in the ward's interest to do so." U.P.C. § 2-801 cmt., 8 U.L.A. at 162 (Beneficiary). In Florida, a guardian can disclaim so long as it "is not detrimental to the best interest of the beneficiary." FLA. STAT. ANN. § 732.801(2)(b)(2) (West Supp. 1993).

58. McClintock v. Scahill, 590 N.E.2d 164 (Mass. 1988). The court determined that the Massachusetts disclaimer statute did not prohibit this and that there was no indication in the trust instrument that the trustee should not be allowed to disclaim. Id. at 166. The court stressed that any decision by the trustee must be made in good faith towards the beneficiaries. Id.

59. The I.R.S., at least, has so stated. See Rev. Rul. 90-110, 1990-2 C.B. 209, 209 ("Under the law of most jurisdictions, a trustee cannot make a unilateral disclaimer of a fiduciary power that affects the rights of a beneficiary unless the trust instrument expressly authorizes such a disclaimer or the affected beneficiary consents to the disclaimer." (citations omitted)). Under the common law, trustees could take no action unless it was specifically permitted by the trust instrument, whereas guardians had inherent powers to manage the affairs of their wards. See, e.g., Estate of Paine, 609 A.2d 1150, 1152 (Me. 1992) (holding
DISCLAIMERS

It is difficult to believe that an unborn person would wish to disclaim, and some courts have so held.60

D. Takers

A disclaimed interest in property passes directly from the transferor to the substituted taker, but it is not always easy to determine who the taker will be. When the instrument of transfer (usually a will or a trust agreement) provides for the possibility of a disclaimer, its terms will be honored.61 Such anticipation is quite rare, however, except in the estate plans of the most sophisticated and wealthy clients.

If an inter-vivos gift, not in trust, is rejected, title is normally revested in the donor. If a pre-residuary testamentary gift fails, it falls into the residue unless an anti-lapse statute directs otherwise. If a residuary gift is disclaimed and the will and anti-lapse statute do not effectively direct disposition, the property interest will pass by intestacy.62

The general rule is that the property passes "as if the disclaimant had predeceased the decedent."63 Most frequently, the children of the disclaimant will receive the disclaimed interest,64 but there are many other potential takers as well. A simple statement of the predeceased-disclaimant rule is found in most disclaimer statutes, and it serves well in most straightforward disclaimer situations. There are a variety of complex issues, however, that occasionally arise in identifying substituted takers.65

60. See, e.g., In re Estate of Burmeister, 594 P.2d 226, 229 (Kan. 1979) (holding that unborn beneficiaries have rights to their contingent interests and these rights are unaffected by disclaimers).

61. In discussing the devolution of disclaimed property, the Uniform Disclaiemer of Transfers by Will, Intestacy or Appointment Act begins: "Unless the decedent or donee of the power has provided for another disposition . . . ." U.D.T.W.I.A.A. § 3, 8A U.L.A. 102 (1992). The other uniform acts and virtually all state statutes contain words of similar import.

62. 6 BOWE & PARKER, supra note 41, § 49.12.

63. U.D.T.W.I.A.A. § 3, 8A U.L.A. at 102. This is the language used in most statutes. Essentially the same rule is found in the common law. See 6 BOWE & PARKER, supra note 41, § 49.12.

64. Anti-lapse statutes mandate this devolution in most cases. See, e.g., CAL. PROB. CODE § 6147 (West 1991); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(1) (McKinney Supp. 1993); U.P.C. § 2-605, 8 U.L.A. 144 (Supp. 1992).

65. For a discussion of the issues involved in the devolution of the interest, see infra notes 196-219 and accompanying text.
For the most part, state legislatures have not dealt with the difficult questions; and they must be resolved through litigation.

E. Interests and Powers

Various types of interests in property can be disclaimed—present interests, future interests, vested interests, contingent interests and sometimes even mere expectancies. Life interests, interests for a term of years, or remainder interests can also be renounced, but in some instances such disclaimers may not be "qualified" for federal tax purposes.

Both federal and state statutes authorize the disclaimer of partial interests in property. Under federal law, disclaimants are not permitted to carve out a "lesser" interest from a proffered fee, but Treasury Regulations specify that "the disclaimer of all or an undivided portion of any separate interest in property" is permissible. A "separate" interest is further defined as "each interest in property that is separately created by the transferor." Property passing by contract, rather than by gift, bequest or intestacy, may also be disclaimed. Life insurance proceeds and

66. The uniform acts and most state statutes permit the disclaimer of "any property or any interest therein." See, e.g., U.D.T.W.I.A.A. § 1, 8A U.L.A. 96 (1992). Some states are more specific. For example, the Oklahoma statute provides:

"Interest" means and includes the whole of any property, real or personal, legal or equitable, or any fractional part, share or particular portion or specific assets thereof or any estate in any such property or power to appoint, consume, apply or expend property or any other right, power, privilege or immunity relating thereto.

OKLA. STAT. ANN. tit. 84, § 22(2) (West 1990).


68. See Treas. Reg. § 25.2518-3 (1986) (stating that if applicable requirements are met, disclaimer of all or undivided portion of any separate interest in property may be qualified disclaimer but noting that disclaimer of some specific rights in property while retaining other rights is not qualified disclaimer of undivided portion). Thus, a disclaimer by a devisee of a fee simple would not be qualified if the disclaimant disclaims a remainder interest but retains a life estate.

69. Id. § 25.2518-3(a)(1)(i). If other applicable requirements of the regulations are met, the disclaimer will be "qualified" for federal tax purposes "even if the disclaimer has another interest in the same property." Id.

70. Id. For an illustrative example of this principle, see id.

71. This concept was not recognized under the common law, and the pre-1990 U.P.C. did not specifically sanction the disclaimer of contract rights. See U.P.C. § 2-801(b), 8 U.L.A. 163 (1989) (amended 1990). The 1990 U.P.C. disclaimer provisions now include both probate and nonprobate transfers. Id. § 2-801(b)(2), 8 U.L.A. 156 (Supp. 1992). The modern trend is to enlarge the scope of disclaimable interests. For example, in South Carolina one may disclaimer with
survivors' benefits under employee benefit plans are prime examples of such interests. Some statutes specifically include contract beneficiaries as valid disclaimants; others do not. The modern trend is to allow a disclaimer even if the beneficiary's interest is unmatured at the time: that is, even if the interest may be revoked by the parties to the contract.

Powers over property are generally treated as interests in property by federal and state statutes, although some disclaimer statutes omit any direct reference to powers. Powers of appointment are illustrative of the rule. The donee of a power of appointment may disclaim it and the appointee may also disclaim. It has been held that the objects of a power (the potential appointees) may disclaim as well. In addition, a trustee may disclaim specific powers granted to him by the trust instrument even though he accepts the underlying trust. A trust beneficiary may disclaim, as a separate interest in property, a power to invade, a power to purchase property or any other enumerated respect to any transfer "including transfers by any means whatsoever, lifetime and testamentary, voluntary and by operation of law, initial and successive, by grant, gift, trust, contract, intestacy, wrongful death, elective share, forced share, homestead allowance, exempt property allowance, devise, bequest, beneficiary designation, survivorship provision, exercise and nonexercise of a power, and otherwise." S.C. Code Ann. § 62-2-801(a) (Law. Co-op Supp. 1992).


Anticipatory renunciation is permitted by the common law. Estate of Heffner, 503 N.Y.S.2d 669 (Sur. Ct. 1986). Most modern statutes, however, do not address the subject directly.


See Central Hanover Bank & Trust Co. v. Commissioner, 118 F.2d 270, 273 (2d Cir. 1941) (stating that sons of decedent, as appointees, could renounce rights to take property under appointment).

Heffner, 503 N.Y.S.2d at 669. In Heffner, the husband's will established a trust that paid income to his wife during her life and provided that at her death the trustees were to distribute the principal to the persons appointed in the wife's will, and if the wife did not appoint anyone, the principal was to be divided among the children. Id. The two sons of the marriage executed disclaimers of any interest that they might receive after the death of their mother. Id. The court held these anticipatory renunciations were valid. Id. at 670.

See Cleaveland v. United States, 88-1 U.S. Tax Cas. (CCH) ¶ 13,766, at 84,155-56 (C.D. Ill. 1988) (holding that bank trustee could make valid disclaimer of power to direct disbursement of trust income and still hold trust, so long as bank gave no direction as to disposition of power after it was disclaimed).
powers that he holds under the instrument. The right to disclaim these powers and/or property is not affected by spendthrift provisions or by any similar restrictions mandated by the transferor.

F. Effects

The predominant effect of a valid disclaimer is to shift the ownership of property from an intended recipient to a substituted taker. In the process, probate may be avoided, the claims of creditors may be defeated, future interests may be accelerated and tax liabilities may be reduced. The desire for tax savings is a driving force behind many disclaimers.

For the most part, the tax effects of a disclaimer are not startling: any transfer from a transferor to a substituted taker is taxed under ordinary tax principles, and the fact that a disclaimer has been made is usually not taken into account. There have been exceptions to this rule, however. For example, in Connecticut prior to 1982, taxes were imposed as if the transferred interest in property had actually passed to the disclaimant. Today, Connecticut follows the majority rule.

A major anomaly in the taxation of disclaimed property has been created by the federal government. Although Congress and the Treasury Department have not recast the basic principles that govern the taxation of disclaimed property interests, they have redefined what is, and what is not, a disclaimed property interest for purposes of federal transfer taxation. Accordingly, the state-law effects of a disclaimer, regarding such issues as who holds title and how much state tax is due, may be unrelated to the federal-tax-law effects of the same disclaimer. Because of the complex interaction of the two different systems, the overall effect of a particular disclaimer may not be what was anticipated or intended by the disclaimant.

79. Many statutes specifically provide that an interest in property includes all manners of powers. See, e.g., CAL. PROB. CODE § 267(a) (West 1991); CONN. GEN. STAT. ANN. § 45a-578(b)(2) (West Supp. 1993); MO. ANN. STAT. § 474.490(1)(5) (Vernon 1992); NEV. REV. STAT. ANN. § 120.010(2) (Michie 1993); WASH. REV. CODE ANN. § 11.86.011(2) (West Supp. 1993).

80. This was not always true under the common law, but today statutes almost uniformly overrule spendthrift provisions. See, e.g., U.P.C. § 2-801(a), 8 U.L.A. 156 (Supp. 1992); CAL. PROB. CODE § 286 (West 1991).

81. See CONN. GEN. STAT. ANN. § 45a-584 (West Supp. 1993) (stating that any interest, rights or powers that have been disclaimed shall be subject to tax as if such interest had originally passed to substituted taker).

III. USES OF DISCLAIMERS

A. Many Possibilities

The overall effect of a particular disclaimer should be advantageous to the disclaimant; indeed, it is often extremely beneficial. One commentator offers a list of twenty-seven different practical uses of disclaimers in different contexts.\(^{83}\) That author modestly asserts that his compendium "is not intended to cover all disclaimer possibilities. There are many other situations in which a disclaimer may be used."\(^{84}\) No doubt he is right; the possibilities are endless.

Disclaimers are most often used in postmortem estate planning. In addition, they may reform interests passing by inter vivos gift, such as a beneficial interest in an irrevocable trust. The efficacy of disclaimers cannot be properly understood from a purely abstract or technical point of view. In order to arrive at reasonable policy decisions concerning the future of disclaimers, one must understand how they function in practice. Here are some illustrations of the more common disclaimer applications.

B. Poor Lifetime Planning

Father A has a simple will; he leaves everything to Mother A, his beloved wife. When he dies, Father A's estate is valued at $550,000, after administration expenses. Mother A owns nothing but one-half of the house, which has a total fair market value of $300,000. Thus, the family assets amount to about $700,000. Mother A lives modestly and has a very good relationship with her children and grandchildren. She would be happy to make gifts to the children, for she feels that she has more than adequate income on which to live.

Father A should have sought the advice of an estate planning expert, but he did not.\(^{85}\) Nevertheless, because of the marital de-

\(^{83}\) Steiner, supra note 2, at 43-46 (uses include avoiding tax in child's estate, avoiding state inheritance taxes, reducing income tax and permitting alternate valuation); see also Frederick R. Keydel, The Use of Disclaimers in Planning Between Death and the Filing of Form 706, Presentation to Committee on Estate and Gift Taxes, ABA, Section of Taxation 2-13 (May 16, 1992) (suggesting 24 uses for disclaimers) (on file with the Villanova Law Review).

\(^{84}\) Steiner, supra note 2, at 46. Steiner stresses that when handling estates, attorneys should always scrutinize the will and analyze the results of possible disclaimers. Id. He emphasizes that disclaimers should not be used as a substitute for proper estate planning. Id.

\(^{85}\) Because the family assets total $700,000, it will be necessary to utilize the unified credit of both spouses in order to avoid paying federal transfer taxes.
duction, his estate is not subject to any federal tax. If Mother A continues in this tradition it is likely that the family will pay an estate tax of $37,000 or more at her death. On the other hand, if Mother A receives proper counsel she can avoid the entire estate tax. Mother may wish to make annual exclusion gifts to the children and grandchildren until the "excess" of her property, the amount over $600,000, is used up. Alternatively, she may disclaim a portion of Father A's estate, so that it passes immediately to the children, tax-free.

In this scenario, it does not matter whether Father A or Mother A dies first; the tax problem is the same either way. Whether the disclaimer is the better solution depends on many factors, including the promptness with which major decisions can be made, Mother A's age and health, the children's ages and financial situations, the system of death taxes imposed by their state of domicile, the ability of Mother A to supervise the management of her assets and perhaps other considerations.

It may seem that the amount of estate tax imposed in this situation is insubstantial, but any amount of tax is important to family members. Furthermore, it is not just the tax cost that matters; it is the perceived unfairness of burdening similarly situated taxpayers with different tax liabilities. A penalty is exacted when a taxpayer fails to seek out sophisticated, expensive tax advice. After-the-fact planning can help to alleviate the injustice.

There may be additional reasons for a disclaimer in this hypothetical situation. Suppose that the As' son has started a new business that shows much promise, but is presently having cash-flow problems. The As' daughter recently has been divorced and wants to buy out her ex-husband's interest in their house. Each child has asked Father A for a loan or gift of $75,000, but he refused both requests out of concern for Mother A's welfare. After

86. However, Father A has wasted his entire unified credit, which could have protected $600,000 worth of property from federal transfer taxes. See I.R.C. §§ 2010, 2056 (1988).

87. We assume that the value of Mother A's assets does not increase or decrease during the remainder of her life. The tax bill will be high because Mother A's estate will have about $100,000 more than the unified credit can shelter, and the marginal rate on this surplus starts out at 37%. I.R.C. § 2010. State inheritance or estate taxes may also be imposed, perhaps at both Father A's death and Mother A's death.

88. Annual exclusion gifts are gifts that are not subject to federal gift tax. See I.R.C. § 2503(b) (1988). Because of the size of this estate, the GSTT is not of concern here. See I.R.C. § 2631(a) (1988) (allowing individual transferor $1,000,000 exemption from GSTT).

89. Again, state inheritance or estate tax may be imposed.
Father A's death, Mother A has an opportunity to rectify the situation by disclaiming assets she does not need. Because the property flows from Father A's estate, his memory may be enhanced in the eyes of his offspring. Even when the aggregate of family assets is well below the federal tax threshold, a disclaimer of Father A's property may be preferable to a direct gift from Mother A.

Consider another "unplanned" situation. Daughter B dies young and intestate, without spouse or issue, but with a substantial estate. Father B and Mother B, her intestate heirs, have adequate estates of their own. If the parents disclaim, Daughter B's estate will be distributed to her siblings, which is probably the best disposition for the family as a whole. Of course, this result could have been achieved quite easily if Daughter B had executed a proper will, but the young often have a sense of immortality that precludes effective estate planning.

Sometimes appropriate planning takes place, but it is unavailing for some reason. For example, a will is drawn but the testator dies before the instrument can be executed or the execution of the will is faulty. Family members in these situations can use disclaimers to achieve the plan of distribution desired by the intestate decedent.

C. Change of Circumstances.

Failure to keep estate plans current may also produce unintended consequences. Problems almost invariably arise when the decedent's estate is much larger or smaller than anticipated. In the first example above, Father A's will may have been inadequate, not because of improper advice, but because the will was drafted at a time when Father A's assets were minimal and tax considerations were insignificant. His improving financial situation destroyed a previously rational estate plan.

Suppose that Father C has a business worth over a million dollars. He makes a will leaving one-half of his estate to Mother C, his wife, and the other half to his four children. Father C becomes ill and his business ultimately goes bankrupt. At Father C's death, the children and their issue would like to disclaim their interests in his estate so that Mother C can receive what little property still remains. The children are willing and able to support their mother for the rest of her life, but they prefer that she

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90. Perhaps Daughter B was a movie star or, more likely, she carried a substantial term life insurance policy.
retain as much property and independence as possible. 91

Changes in the life circumstances of an intended recipient can also inspire a disclaimer. For example, Son D has accumulated a fortune much greater than that of his parents. Because he has no economic need, he would like to see other family members (or perhaps charity) 92 enjoy his parents’ estate. Daughter E has moved to a foreign jurisdiction with severe inheritance-tax and currency-exchange laws that would prevent her from enjoying the benefit of her inheritance. She wants her siblings, not the foreign government, to receive the property. Grandson F is a remainderman in a trust established long ago by his grandfather. Grandson F is chronically indebted and he does not want to accept property that would immediately be attached by his creditors. Wife G dies a few months after her husband. Wife G’s personal representative may disclaim her interest in Husband G’s estate so that State Z small-estate probate procedures can be used. Other similar situations can easily be imagined.

Changes in the tax laws may also necessitate a disclaimer. A dispositive instrument is drafted based on existing conditions, and it cannot reflect laws enacted after its execution. The evolution of the marital deduction is a notable example of the trouble caused by new tax developments. Because of tax rules in effect before 1982, testators frequently limited their bequests to their spouses to no more than one-half of their estates. 93 The law was subsequently changed to grant an unlimited marital deduction, 94 and many testators changed their wills, bequeathing larger amounts to their spouses. Others neglected to do so out of inadvertence, because of poor health or for other unintentional reasons. Disclaimers can sometimes be used to remedy such mistakes.

As a further example, a hidden problem may surface when the stock of a closely-held business either passes to or is held in a trust. In 1986, major changes in the taxation of corporations

91. Or perhaps the children do not trust each other. They would prefer to provide for Mother C now, rather than to have on-going negotiations and obligations for years to come.

92. A transfer to charity would be possible only if the surviving parent’s will makes provision for a gift over to charity.


gave impetus for many corporations to elect S status.\textsuperscript{95} This election cannot be maintained if the corporation's stock is held in trust, unless each share-holding trust meets certain stringent requirements.\textsuperscript{96} In some situations, a disclaimer may allow an older trust to fulfill requirements that were insignificant or nonexistent when the trust instrument was created.

D. Fine-Tuning the Estate Plan

Even when an estate plan is well designed and up-to-date, postmortem planning may be desired. Two important factors can never be known with certainty before a taxable transfer occurs: the timing of an individual's death and the final value of a transferor's estate. In order to maximize the benefit from such tax-saving techniques as equalizing spouses' estates, adopting the alternate valuation date or utilizing the credit for tax on prior transfers, hindsight is a valuable tool. A disclaimer is usually made after the event triggering the transfer of an interest in property. It gives family members and personal representatives the flexibility they need to take full advantage of various beneficial provisions in state and federal tax laws.

IV. Some Unsettled Policy Issues

Disclaimers have been in use for centuries.\textsuperscript{97} They have been the subject of much study and legislation, as well as the cause of more than a little litigation. Still, the law of disclaimers is not entirely settled. Disclaimer statutes vary from one state to another, and in some respects the statutes may be ambiguous or incomplete. Probate courts and probate officials frequently accept or reject disclaimers without much fanfare or explanation.\textsuperscript{98} Although the basic principles of disclaimer law have long been firmly established, uncertainty about some topics persists. There are important questions that have not yet been decided. Other important questions have been decided, but with varying results in

\textsuperscript{95} These changes included an increase in corporate tax rates and the so-called repeal of \textit{General Utilities}.


\textsuperscript{98} Ordinarily, few persons (other than creditors or taxing authorities) object to a disclaimer, so local officials have little reason to reject them. Interested parties may more hotly contest the issue of how the disclaimed property devolves.
different jurisdictions. Some of the more difficult issues are worthy of discussion.

A. Who May Disclaim?

1. Represented Persons

Under most disclaimer statutes, the representative of a deceased, incapacitated or protected person is authorized to make a disclaimer for such person. An attorney acting under oral instructions from his client may disclaim on behalf of the client. Trustees have also been permitted to disclaim a proffered interest in property or a power of distribution respecting trust property. Unfortunately, the statutes and the cases do not always clearly identify the purposes for which a fiduciary may disclaim and the conditions under which such a disclaimer is appropriate. These are troublesome issues.

A fiduciary who exercises a power to disclaim for his ward or beneficiary must do so in good faith with the best interests of the trust's beneficiaries in mind. Nevertheless, occasionally courts permit fiduciaries to disclaim even though their wards or beneficiaries have little to gain or may possibly suffer a detriment as a result of the disclaimer.

For example, in McClintock v. Scahill, the Massachusetts Supreme Judicial Court allowed the trustee of a "grandchildren's trust" to reject a distribution to the trust because the trustee "believed that the beneficiaries of the grandchildren's trust would benefit in the long run from the estate tax savings the disclaimer


100. See Estate of Allen v. Commissioner, 56 T.C.M. (CCH) 1494 (1989) (holding that representative of estate could orally authorize attorney to disclaim on her behalf).


102. See Cleaveland v. United States, 88-1 U.S. Tax Cas. (CCH) ¶ 13,766, at 84,156 (C.D. Ill. 1988) (ruling that trustee's disclaimer of power to distribute trust for education of beneficiary's children constituted valid disclaimer).

103. McClintock, 530 N.E.2d at 166.

would yield." 105 As a result of the disclaimer, the trust gave up $415,664, but the grandfather's estate saved $625,000 in federal and Massachusetts estate taxes. 106 The court stated that the trustee knew that the grandmother's "financial planning always included ultimately funding the grandchildren's trust." 107 Evidently, the expectation of a possible future gift from grandmother was all that remained of the grandchildren's original interest in their grandfather's property. It is questionable whether the best interest of the grandchildren was effectively served in this case.

A similar situation occurred in In re Estate of Schock. 108 Edna Schock survived her father by only ten days. 109 The executor of her estate wished to disclaim property passing from the father's estate in order to save approximately $92,000 in federal and state taxes payable by Edna's estate. 110 As a result of the disclaimer, the father's property would pass directly to Edna's daughters, rather than to trusts in which Edna's grandchildren held an interest. 111 The court held that the disclaimer was proper because, among other things, the interests of the grandchildren "could be fully protected" by the actions of Edna's children. 112 The court noted: "Each of the daughters [is] willing to fund separate trusts . . . for the benefit of their children to be administered under the same terms as set forth in their mother's will." 113 One wonders whether the grandchildren were pleased that their interests "could," perhaps, be protected. If Edna's executor had actually required the daughters to establish the separate trusts, he might be seen as receiving some benefit in exchange for his disclaimer, which would destroy the disclaimer's effectiveness under federal tax law. 114 Therefore, the grandchildren were left with only the mere hope that their mothers would do the right thing.

Not all courts are so cavalier about securing the interests of

105. Id. at 165.
106. Id. at 165 n.2.
107. Id. at 165.
109. Id. at 489.
110. Id. It is not clear that the tax calculations in the opinion reflect the total tax picture in this case.
111. Id.
112. Id.
113. Id. at 489-90.
114. See Treas. Reg. § 25.2518-2(d) (1986) ("A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer.").
minors and other protected persons. The basic rule is that a fiduciary cannot forgo his ward's or beneficiary's right to receive something of value without obtaining commensurate consideration.\textsuperscript{115} Future interests, especially contingent future interests, are sometimes disregarded by a court; however, if there is a right to receive a present interest in property, that right is hard to ignore.

An example is found in in re Estate of De Domenico,\textsuperscript{116} where the petitioner sought to renounce the interests of her three minor children in her father's estate in order to increase the estate's marital deduction.\textsuperscript{117} The disclaimer was not permitted because the children would have received no consideration, except for their mother's promise that the renounced share would be used for their benefit.\textsuperscript{118}

Other courts have protected more ephemeral rights. In in re Estate of Horowitz,\textsuperscript{119} the residuary legatee wanted to disclaim in order to pass the decedent's property to the mother of the decedent (the legatee's grandmother), thus saving state inheritance taxes.\textsuperscript{120} Under the terms of the will, the legatee's child would receive any disclaimed property, so the child's disclaimer was also necessary in order to effect the tax savings.\textsuperscript{121} The court refused to allow a guardian of the child to disclaim "in that it would not be in the best interests of the infant."\textsuperscript{122} The court stated that "if the entire residue were to go to the child's great-grandmother there is no guarantee that this child will receive any benefit from such a devolution."\textsuperscript{123} The court also expressed concern for the interests of any afterborn children of the legatee that might be cut off by the guardian's disclaimer.\textsuperscript{124}

A considerable portion of the Horowitz opinion is devoted to a discussion of tax avoidance. The court observed that "[a]lthough tax avoidance is lawful, there is no authority in New

\textsuperscript{115} See, e.g., In re Estate of De Domenico, 418 N.Y.S.2d 1012, 1013 (Sur. Ct. 1979) ("Where an infant is involved there must be a showing that the renunciation would be directly advantageous to him and not merely to the parent.").

\textsuperscript{116} 418 N.Y.S.2d 1012 (Sur. Ct. 1979).

\textsuperscript{117} Id. at 1013.

\textsuperscript{118} Id.


\textsuperscript{120} Id. at 1365-66.

\textsuperscript{121} Id. at 1365.

\textsuperscript{122} Id. at 1367.

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 1367-68.
Jersey whereby its courts should affirmatively intercede to aid a plan when the sole purpose is the evasion of taxes." However, it was the effect of the disclaimer, not its purpose, that was the basis of the court's holding. The legatee pointed out that his child had no current interest in the decedent's estate; such interest would be created only if the legatee renounced his own present interest in the residue. Because the legatee's disclaimer was conditioned on the effectiveness of the guardian's disclaimer, the child did not hold any interest that could be prejudiced. The Horowitz court thought that this argument was "not convincing."

The same rationale rejected by Horowitz carried the day in a New York case: In re Kramer. There, the petitioner wished to disclaim a portion of her interest in her father's estate so that her mother would receive the property. In order to accomplish this end, petitioner's seventeen-year-old daughter had to disclaim as well. The court granted petitioner's application for limited letters of guardianship and authorized the guardian to execute a renunciation. The court found that the disclaimer "does not involve the infant giving up anything which she would otherwise possess. All that is here involved is the infant playing a ministerial role . . . without any real sacrifice whatsoever on the part of the infant." The court held that the motive for the disclaimer (tax savings) was lawful and legitimate and in no way detrimental to the infant.

It is not always clear whether or not a fiduciary's disclaimer involves any material sacrifice by the ward or beneficiary. Moreover, it may be impossible to determine whether in a specific situation the ward or beneficiary actually prefers (or would prefer if he had the capacity to understand) to suffer some detriment for the sake of others. Courts are inclined to ignore the problem.

A common example occurs when a fiduciary attempts to dis-

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125. Id. at 1367.
126. Id.
127. Id.
128. Id.
129. Id.
131. Id. at 976.
132. Id.
133. Id. at 978.
134. Id. at 977.
135. Id. at 978.
claim on behalf of an elderly incompetent who is receiving medical assistance. The government entity that is providing support for the incompetent may object to the disclaimer. Generally, the government argues that it is unfair to burden the taxpayers with an incompetent’s expenses when the incompetent is entitled to property that could be used for his support. This is an important argument, but it is not the only reason why the disclaimer may be inappropriate.

Most courts do not look at the disclaimer from the incompetent’s point of view. Is Medicaid providing optimum care and comfort for the incompetent? Would the incompetent like to have a private room, a private-duty nurse, a hundred pairs of slippers or some other “luxury” that medical assistance cannot provide? Even though the incompetent’s newly-acquired property may be dissipated in a relatively short period of time, one should not assume that the incompetent cannot benefit from the property at all. In these situations, perhaps courts should inquire whether the fiduciary’s disclaimer is actually in the best interest of his ward.

While many disclaimer statutes specifically provide that a representative of a deceased, incompetent or protected person may disclaim on behalf of such person, most statutes do not specify what factors the representative must consider in determining whether or not to disclaim. Apparently, ordinary fiduciary standards apply, and a representative should act solely in the interests of the represented person.

Yet, courts frequently seem to give short shrift to the interests of the represented individual. Commonly, it is the best interest of the family group as a whole that seems to predominate.

136. See, e.g., In re Estate of Scrivani, 455 N.Y.S.2d 505 (Sup. Ct. 1982) (conservator seeking to renounce her grandmother’s inheritance because her grandmother’s medical expenses were paid by Medicaid).

137. See id. at 509-10 (explaining that disclaimer would not prevent consideration of disclaimer amount in determining Medicaid benefits).

138. See, e.g., UNIF. DISCLAIMER OF PROPERTY INTERESTS ACT § 1, 8A U.L.A. 86 (1992) (“A person, or the representative of an incapacitated or protected person . . . may disclaim . . . under this Act.”); U.D.T.W.I.A.A. § 1, 8A U.L.A. 96 (1992) (“A person, or the representative of a deceased, incapacitated, or protected person . . . may disclaim . . . under this Act.”).

139. See, e.g., FLA. STAT. ANN. § 732.801(2)(b) (West Supp. 1993) (stating “best interests” of beneficiary test); ILL. ANN. STAT. ch. 110 1/2, para. 2-7(a) (Smith-Hurd Supp. 1992) (stating that disclaimer must benefit those interested in estate and not be “materially detrimental” to ward); 20 PA. CONS. STAT. ANN. § 6202 (Supp. 1992) (stating that disclaimer cannot “materially prejudice the rights of . . . the minor . . . or the incompetent”).
Sometimes a court will justify its actions by suggesting that the promotion of family welfare is in the best interest of the represented individual. Or a court may use circular reasoning: if a fiduciary disclaims, it must be in the best interest of his ward or beneficiary because a fiduciary may not act otherwise. Query whether an unborn contingent remainderman will ever have the opportunity to challenge the eradication of his interest by his guardian ad litem.

The problem lies in the essence of a disclaimer. To disclaim is to forgo something of value. The rationale underlying a disclaimer is that, in a particular case, some psychological or nonmaterial benefit may be of greater value to the disclaimant than the economic benefit relinquished. Is it possible for a representative to adequately evaluate such nonmaterial benefits accruing to an individual who is not competent to make a judgment for himself? Should the representative be allowed to make such subjective judgments? Courts do not articulate the issues before them in these terms, but their holdings at times reflect both positive and negative responses to these questions. The statutes seem to avoid these questions altogether. They are difficult questions.

2. Debtors and Insolvents

Under the common law, a debtor had every right to disclaim an interest in property, except where a creditor could show that actual fraud was involved. For example, if a disclaimant contracted with the substituted taker to receive some compensation for disclaiming, creditors could set aside the disclaimer. Some states have enacted statutes providing that insolvent persons are

141. See McClintock v. Scahill, 530 N.E.2d 164, 166 (Mass. 1988) (stating that court's "decision will not affect adversely the beneficiaries of trusts since the trustee's fiduciary status requires any decision to disclaim be made in good faith with the best interests of the trust's beneficiaries in mind").
142. Stein v. Brown, 480 N.E.2d 1121, 1122-23 (Ohio 1985) (noting that even prior to adoption of Uniform Fraudulent Conveyance Act, fraud was material in evaluating validity of disclaimer).
144. See Pennington v. Bigham, 512 So. 2d 1344, 1346-47 (Ala. 1987) (holding that under Alabama statute, constructive fraud was enough to invalidate disclaimer).
prohibited from disclaiming, but other states have specifically legislated the opposite rule. Courts often address the claims of creditors with a new view as to what is equitable.

In Medicaid cases, the results are mixed. If a recipient of medical assistance attempts to disclaim over government objections, the disclaimer may, or may not, be held invalid. In addition, the government agency may decide to terminate benefits. In Nielsen v. Cass County Social Services Board, the Supreme Court of North Dakota refused to permit a conservator’s disclaimer to act as grounds for termination of the medical assistance benefits of a disclaimant. The court held that the disclaimer did not constitute a disqualifying transfer because “a renunciation is not treated as a fraudulent transfer of assets, and the renouncer’s creditors cannot on that ground claim any rights to the renounced property.” The right to disclaim was not contested in the case.

By contrast, the Supreme Court of Connecticut, in State v. Murtha, barred a recipient of medical assistance from disclaiming. The relation-back provisions of the Connecticut disclaimer statute appeared to conflict with the statute governing the medical assistance program. The court reasoned, however, that “[i]f two statutes appear to be repugnant, they are to be construed, if reasonably possible, so that both are operative.” The court decided that the Medicaid statute controlled and acted as a

145. For a listing of states that do not allow insolvent persons to disclaim, see supra note 48 and accompanying text. In Louisiana, if a debtor renounces, the court may permit his creditors to accept his inheritance in his stead. La. Civ. Code Ann. art. 1021 (West 1952).

146. See, e.g., Md. Est. & Trusts Code Ann. § 9-204(f) (1991) (“Creditors of the disclaimant have no interest in the property or interest disclaimed, whether their claims are based on contract, tort, tax obligations, or otherwise.”); Mo. Ann. Stat. § 474.490(4) (Vernon 1992) (“A disclaimer under this section . . . shall not be subject to the claims of any creditor of the disclaimant.”).


149. 395 N.W.2d 157 (N.D. 1986).

150. Id.

151. Id. at 159.

152. 427 A.2d 807 (Conn. 1980).

153. Id. at 809.

154. Id. at 807-09. For a discussion of the relation-back provisions in disclaimer statutes, see supra notes 25-27 and accompanying text.

155. Murtha, 427 A.2d at 809.
bar to the relation-back provisions of the disclaimer statute.\textsuperscript{156} Accordingly, the disclaimer was invalid and the state could reconsider the disclaimant's eligibility for Medicaid.\textsuperscript{157}

The relation-back provisions of disclaimer laws may create apparent conflict with other statutes as well.\textsuperscript{158} Federal bankruptcy statutes have been given precedence over state disclaimer laws in some situations.\textsuperscript{159} Under the old Bankruptcy Act, property interests passed to the trustee in bankruptcy at the moment they vested in the debtor,\textsuperscript{160} but because state relation-back statutes prevented vesting, disclaimed interests were generally not subject to claims. Some judges thought that state law should not frustrate the purposes of the bankruptcy system, but that argument was not very successful under the old Bankruptcy Act.\textsuperscript{161}

\textsuperscript{156} Id.
\textsuperscript{157} Id. at 810.
\textsuperscript{158} See, e.g., In re Estate of Goldammer, 405 N.W.2d 693 (Wis. Ct. App.), review denied, 407 N.W.2d 500 (Wis. 1987). In Goldammer, the action of a judgment creditor was defeated by a disclaimer. Id. at 694. The court found that, despite assertions to the contrary, the creditor brought its action under a collection statute that did not conflict directly with, or override, the disclaimer statute. Id. at 693-94. Accordingly, the creditor's lien could not bar the disclaimer—a result that comports with the common law view of disclaimers.

\textsuperscript{159} See Cornelius v. Cornell (In re Cornell), 95 B.R. 219, 222 (Bankr. W.D. Okla. 1989) ("Federal bankruptcy law, and not state probate or succession law, governs the issues raised herein."); McGraw v. Betz (In re Betz), 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987) (disallowing beneficiary to disclaim interest as permitted under state law and allowing interest to be subject to trustee in bankruptcy's claim); Geekie v. Watson (In re Watson), 65 B.R. 9, 12 (Bankr. C.D. Ill. 1986) (holding that property passing to beneficiary became part of beneficiary/debtor's estate at time of petition in bankruptcy and post-petition disclaimer was void); Flanigan v. Lewis (In re Lewis), 45 B.R. 27, 30 (Bankr. W.D. Mo. 1984) (stating "[i]t is not the law of the state which here controls the issue, however, but the paramount bankruptcy law which requires restoration to the bankruptcy estate of property which is the subject of unauthorized postpetition transfers"); Nashville City Bank & Trust Co. v. Peery (In re Peery), 40 B.R. 811, 815 (Bankr. M.D. Tenn. 1984) (noting that for state law purposes "renunciation" is effective at date of testator's death but "transfer of the debtor's rights and interests for purposes of the Bankruptcy Code took place on the date of renunciation"). But see Mickelson v. Detlefsen (In re Detlefsen), 610 F.2d 512, 519 (8th Cir. 1979) (holding that Congress had no intention to "override applicable state law of disclaimer and capture the assets here in question for the trustee"); Hoecker v. United Bank, 476 F.2d 838, 841 (10th Cir. 1973) (concluding that "under the Colorado statute the disclaimers did not operate as a transfer by the bankrupt of the property to his children, and that there was no violation of the Bankruptcy Act"); Jones v. Atchison (In re Atchison), 101 B.R. 556, 557-58 (Bankr. S.D. Ill. 1989) (discussing appropriateness of looking to state law for determining validity of pre-petition transfer), aff'd, 925 F.2d 209 (7th Cir.), cert. denied, 112 S. Ct. 178 (1991); In re Jessen, 82 B.R. 490, 495 (Bankr. S.D. Iowa 1988) ("Under Iowa law, a disclaimer takes effect against creditors.").


\textsuperscript{161} For example, in Detlefsen, the bankrupt filed a voluntary petition for
The new Bankruptcy Code, enacted in 1978, provides that the bankruptcy estate includes "any interest in property . . . that the debtor acquires or becomes entitled to acquire within 180 days" after filing the petition in bankruptcy. Therefore, post-petition disclaimers are no longer effective to divest the trustee of property interests acquired by bequest, inheritance or other gratuitous transfer within the applicable time period.

Pre-petition disclaimers are still the subject of debate, however. In a recent Illinois case, a debtor disclaimed property passing under her father's will and then, three months later, filed a petition in bankruptcy. After an extensive discussion of the significance of state law in determining the nature of property interests, the court held that the disclaimer did not constitute a "transfer" so as to come within the fraudulent transfer provisions of the Bankruptcy Code. The debtor's children took title to the property because state law decreed that the debtor never held any interest in the property.

bankruptcy less than two months before the death of his mother, who was the income beneficiary of a family trust. Mickelson v. Detlefsen (In re Detlefsen), 466 F. Supp. 161, 162 (D. Minn. 1979), rev'd, 610 F.2d 512 (8th Cir. 1979). Shortly thereafter, the bankrupt filed a disclaimer (which was undisputedly valid under state law) of his remainder interest in the trust. Id. at 162. The district court held that state law could not circumscribe congressional intent or unduly restrict the operation of the federal bankruptcy law. Id. Therefore, the disclaimer was ineffective to prevent title in the trust proceeds from passing to the trustee in bankruptcy. Id. The Eighth Circuit reversed, relying on the language of the bankruptcy statute which provided that "property . . . which vests in the bankrupt within six months after bankruptcy . . . shall vest in the trustee." Detlefsen, 610 F.2d at 514 (emphasis added) (quoting 11 U.S.C. § 110(a) (1976) (repealed 1978)). The court observed that "the new Bankruptcy Act of 1978 almost certainly obviates the question presented in this case." Id. at 520; see also Hoecker, 476 F.2d at 841-42 (holding that no property vested in debtor; dissent argued that federal interest overrides state law).

164. See Detlefsen, 610 F.2d at 520 ("Full effect is still given to the express intent of Congress to prevent the bankrupt from benefiting from after-bankruptcy windfalls at the expense of his creditors and to the language of [the Bankruptcy Code] which vests in the trustee all property that vests in the bankrupt within six months of bankruptcy by bequest, devise, or inheritance."); Geekie v. Watson (In re Watson), 65 B.R. 9, 12 (Bankr. C.D. Ill. 1986) (holding that "the Bankruptcy Code supersedes the right to renounce in a case such as this one").
165. Id. at 520; see also Hoecker, 476 F.2d at 841-42 (holding that no property vested in debtor; dissent argued that federal interest overrides state law).
A Tennessee bankruptcy court reached the opposite result in a case in which the debtor filed his petition nine months after disclaiming. The court held "that the debtor's rights in a testamentary devise constitute an 'interest in property,' that the debtor's renunciation was a transfer of that interest, [and] that the transfer occurred at the time of renunciation and within one year of bankruptcy." In denying discharge to the debtor the court stated: "[L]egal fictions created for other purposes by state law cannot be used to defeat the express limitations periods created by the Bankruptcy Code."

Even when the federal law is not implicated, an increasing number of states have ruled that a disclaimer is susceptible to attack by creditors when the disclaimer is made with fraudulent intent. The traditional rule holds that the motives of a disclaimant are immaterial, and only fraudulent acts—that is, collusion—can affect the validity of a disclaimer. Today, an actual intent (as distinguished from intent presumed by law) to defraud creditors may be enough to invalidate a disclaimer. The Supreme Court of Ohio, for example, has applied the Uniform Fraudulent Conveyance Act to an attempted disclaimer. It held that where a person "seeks to disclaim . . . with the actual intent to defraud a present or future creditor, the renunciation is a fraudulent conveyance" with no legal effect.

Other courts have refused to consider disclaimers as fraudu-
lent transfers. The Supreme Court of Illinois has unequivocally stated that "a disclaimer is not a voluntary conveyance or transfer of the disclaimer estate within the meaning of the fraudulent conveyance statute." In Iowa, a bankruptcy court held that a debtor in possession "had no obligation to accept [his] inheritance and apply it to debt." Therefore, his decision to disclaim did not constitute "gross mismanagement" or a fraudulent transfer. The weight of authority continues to hold that a disclaimer is not fraudulent simply because the relatives (rather than the creditors) of the disclaimant accede to a windfall.

Creditors frequently fight the effects of a disclaimer by asserting that their debtor is barred from disclaiming. Sometimes they win on this ground. The quintessential bar to a disclaimer is acceptance. Any exercise of dominion over property may constitute acceptance, and whether the disclaimant has accepted is essentially a question of fact. Creditors are quite inventive in making use of statutory bars to renunciation. In \textit{Citizens State Bank v. Kaiser}, the court held that a judgment in garnishment proceedings was a disposition of property, and this barred the debtor's right to disclaim. The judgment was entered after the death of the transferor but before the debtor executed the disclaimer; and the relation-back theory did not apply because the disclaimer was ineffective.

In \textit{National City Bank v. Oldham}, a deficiency judgment was entered against the disclaimant some years prior to the death of the transferor. The creditor bank argued that an involuntary encumbrance attached to the disclaimed interest at the moment

\begin{thebibliography}{9}
\bibitem{177} \textit{In re Jessen}, 82 B.R. 490, 495 (Bankr. S.D. Iowa 1988).
\bibitem{178} \textit{Id.} at 494-95.
\bibitem{179} See 6 \textit{Bowe & Parker}, \textit{supra} note 41, \textit{§} 49.5.
\bibitem{180} See, e.g., Niklason \textit{v. Ramsey}, 353 S.E.2d 783, 784 (Va. 1987) (holding that "by contracting away whatever interest he may have had in [the] estate, [the disclaimer] exercised dominion over [the] estate contrary to [the applicable statute]").
\bibitem{181} For additional discussion of acceptance, see \textit{infra} notes 226-45 and accompanying text.
\bibitem{184} \textit{Kaiser}, 750 P.2d at 428.
\bibitem{185} 537 N.E.2d 1193 (Ind. Ct. App. 1989).
\bibitem{186} \textit{Id.} at 1194.
\end{thebibliography}
DISCLAIMERS

of the decedent's death, so that the right to disclaim was barred. The Indiana Court of Appeals held otherwise, stating that the disclaimant never possessed an interest in the decedent's estate that could become encumbered. The court carefully distinguished those situations in which an encumbrance arises after the event creating the interest that the disclaimant later attempts to renounce. As in Kaiser, "post-event" judgments or encumbrances were seen as a bar to renunciation.

Thus, the precise timing of a disclaimer is important, in spite of the relation-back theory. A creditor may bar a disclaimer if he perfects his lien or otherwise encumbers the transferred interest after the event creating the interest but before the disclaimer is properly made under the provisions of state law. This rule has equitable underpinnings (at least the creditor has a fighting chance), but it abrogates the basic principle of disclaimer law. The transferee is forced to accept a gratuitous transfer; the doctrine of acceptance-as-bar is stretched out of shape.

The conundrum underlying all these cases is clear: is it equitable to allow insolvent persons and debtors to avoid their obligations through the use of disclaimers? Most transferors probably do not intend to benefit the creditors of the objects of their beneficence. In the case of a hopelessly indebted transferee, if all pertinent circumstances were known, it is likely that the transferor would independently redirect the gift. Therefore, disclaimers may be viewed merely as an instrument to implement the presumed desires of the transferor. Furthermore, the principle that an individual is entitled to refuse a gift is unquestioned.

On the other hand, disclaimers may be seen as the exercise by the disclaimant of a general power of appointment. Justice Traynor used this analogy in determining that the disclaimer of a debtor was invalid. The common-law rule provides that when a debtor-donee exercises a general power of appointment "in favor of some third person, other than a bona fide purchaser for value," creditors of the donee may reach the appointed prop-

187. Id. at 1196.
188. Id. at 1197.
189. Id.
191. Kalt v. Youngworth (In re Kalt's Estate), 108 P.2d 401, 403 (Cal. 1940) (noting that by renouncing property, legatees exercise power "analogous to a general power of appointment under a will").
Justice Traynor's analogy is flawed, however, because a disclaimer is more closely akin to the lapse or release of a general power than to its exercise. The lapse of a general power does not give creditors any rights. Nonetheless, it may seem inequitable to permit a debtor to deflect assets away from his rightful creditors and to provide a windfall to his relatives instead.

Some state legislatures have made a clear policy choice regarding this problem. Florida, Massachusetts and Minnesota, for example, do not permit insolvent persons to disclaim. Other disclaimer statutes do not mention the issue. Many courts have made difficult judgments regarding debtor disclaimants based on the particular facts at hand as well as policy considerations. Still, no consensus has been reached; if there is a “right answer” to the question of debtors and insolvents who disclaim, it has not yet been found.

B. Devolution of the Interest

Where the instrument creating an interest provides for its devolution in the event of a disclaimer, the transferor's instructions are ordinarily honored. In cases where no specific provisions have been made, both the common law and most statutes treat a disclaimant as having predeceased the decedent or the event precipitating the transfer. Thus, the identity of substituted takers may be determined by the residuary clause of a will, a designation of trust remainders, an applicable anti-lapse or in-
testacy statute, or the contingent beneficiary designation of an insurance or employee benefit contract.

1. **Predeceased Disclaimant**

Ambiguities, however, inhere in this system. Is the disclaimant deemed to have predeceased for all, or only some, purposes? The Supreme Court of Kansas has held that a daughter is still considered an heir of her mother even though she disclaimed all interests in her mother's estate. The issue was whether collateral relatives were entitled to notice of probate, which would have been the case had no lineal descendant survived. The court held that the disclaimant did not disclaim her status as an heir: "A disclaimer is a renunciation of a property right, not a change of status or relationship." 200

2. **Manner of Distribution**

Other disclaimer cases have also limited the scope of the "deemed predeceased" rule. In most states, statutes direct the devolution of property passing by representation. Frequently these statutes provide for *per stirpes* distribution if the surviving issue are of unequal degree and *per capita* distribution where the survivors are of equal degree of kinship. Thus, probate courts must sometimes decide whether the disclaimant "survives" or not for purposes of determining the manner of devolution of the disclaimed property.

To illustrate the problem, assume that Granny H dies intestate survived by six descendants: Son H and his four daughters, and also Grandson H, who is the child of Granny H's predeceased...
child. If Son H disclaims, will the five grandchildren take in equal shares because they are of equal degree of kinship? Not ordinarily. It would be inequitable for Son H to increase his family’s inheritance from one-half to four-fifths of Granny’s estate in this manner. Courts and commentators generally agree that a disclaimers controls disposition of only the disclaimed property, and that it cannot effect a change in the division of the entire estate. Grandson H will take his parent’s half of the estate (as he would have done without the disclaimer) while the children of Son H will share the other half. The 1990 revised version of the Uniform Probate Code (U.P.C.) reflects this sensible rule.

The wording of the U.P.C. does not resolve all difficulties of this type, however. Suppose, in our hypothetical, that Son H has no children and the four granddaughters are offspring of a second predeceased child of Granny H. Will a disclaimer by Son H pass his one-third share equally to the five grandchildren, or will Grandson H take half of his uncle’s one-third share while the granddaughters split the other portion? The language of the U.P.C. does not specifically answer this question, but it appears to direct that the five collateral relatives of Son H divide his share equally. On similar facts, New York and Texas courts have held to the contrary.

It remains to be seen whether many states will adopt the new U.P.C. provision and how the courts will ultimately interpret it. The underlying issue is this: Should the disclaimant be deemed predeceased for purposes of determining the manner of distribution (i.e., per stirpes or per capita)? The new U.P.C. seems to say sometimes yes, sometimes no. The meaning of most state statutes on this point is even more uncertain and needs to be

203. U.P.C. § 2-801 cmt. (Supp. 1992) (Subsection (d)). For a discussion of cases supporting this point, see supra note 201.
205. Id. The pertinent language is as follows:
[T]he disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would take the disclaimant’s share by representation were the disclaimant to predecease the decedent, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the decedent.

Id.
DISCLAIMERS

clarified.208

3. Acceleration

Another devolution problem concerns the acceleration of future interests. Many statutes, but not all, specify that the disclaimer of a present interest will accelerate any succeeding interests.209 This cuts afterborn children out of the dispositive plan. A vivid example can be found in *Pate v. Ford*.210 In *Pate*, two brothers, Wallace and Billy, survived their parents.211 Wallace had children at the time and Billy did not.212 The parents’ wills established a trust for each brother and the remainder of these trusts was to be distributed in equal shares to the “natural born grandchildren” of the parents.213 Wallace disclaimed.214

208. A few states have at least partially addressed the problem in their statutes. See CAL. PROB. CODE § 282(b) (West 1991) (“The beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is to be made . . . .”); IOWA CODE ANN. § 633.704(3)(a) (West 1992) (“Unless the transferor has otherwise provided, the interest . . . which is to take effect in possession or enjoyment at or after the termination of the interest . . . disclaimed, descends . . . as if the disclaimant has died prior to the date of the transfer . . . .”); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney Supp. 1993) (“[F]iling of a renunciation . . . has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent . . . .”); N.C. GEN. STAT. § 31B-1(b) (1989) (“In no event shall the persons who succeed to the renounced interest receive from the renouncement a greater share than the renouncer would have received.”); 20 PA. CONS. STAT. ANN. § 6205(b) (Supp. 1992) (“[T]he disclaimer shall . . . be equivalent to the disclaimant’s having died before the decedent . . . .”).

209. See, e.g., ALASKA STAT. § 13.11.295(c) (1985) (“A future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as if the person renouncing had predeceased the decedent or the donee of the power.”); HAW. REV. STAT. § 560:2-801(c) (1985) (same); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney Supp. 1993) (“[T]he filing of a renunciation . . . shall have the effect of accelerating the possession and enjoyment of subsequent interests . . . .”); OHIO REV. CODE ANN. § 1339.60(G) (Anderson Supp. 1992) (“[U]nless the donative instrument expressly provides that . . . there shall not be any acceleration, . . . any future interest . . . shall descend, be distributed . . . and shall be accelerated . . . .”); WIS. STAT. ANN. § 853.40(6)(c) (West 1991) (“[A] future interest to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had predeceased the deceased transferee of the property . . . .”); cf. WYO. STAT § 2-1-404 (1980) (“[T]he interest disclaimed reverts to the transferor if he is living on the date disclaimed; or . . . passes under the residuary clause of transferor’s will if he died prior to the disclaimer.”).

211. Id. at 776.
212. Id.
213. Id.
214. Id.
South Carolina Supreme Court permitted acceleration of the grandchildren's interest, thus enabling Wallace's children to take the entire corpus of one trust. Presumably, assets in the second trust will one day be distributed equally to Wallace's children and Billy's children, if any are born. No wonder Billy objected to the accelerated distribution of his brother's trust and asked that the takers be determined at Wallace's actual (rather than "deemed") demise.

Although this holding seems unfair, the principles underlying the decision are venerable and sound. The common-law rule of convenience closes a class of potential takers at the time when distribution will occur. To do otherwise would create endless waiting, complexity and confusion. The rule of disclaimers is generally consistent with the rule of convenience. Where the disclaimed interest is a future interest, the ultimate takers may not be determined until the succeeding future interests become possessory. When the disclaimed interest is a present interest, acceleration will occur unless the instrument governing the devolution provides otherwise. Although this seems like a simple and clear rule, the meaning of a specific governing instrument may well be the subject of controversy—and even litigation.

C. Which Interests May Be Disclaimed?

Typical modern disclaimer statutes provide that "any property or interest therein" may be disclaimed "in whole or in part." Many states elaborate on what constitutes an "interest." For example, California law states:

"Interest" includes the whole of any property, real or

215. Id. at 777.

216. From the facts of the case, one would guess that Billy will never have children, so the unfairness is more theoretical than real.

217. See Restatement (Second) of Property ch. 26 (Introductory Note) (1988) ("When the rule that is adopted closes the class at a time a class member is entitled to a possessory interest, it has been referred to as 'the rule of convenience.'").

218. See, e.g., In re Estate of Burmeister, 594 P.2d 226, 229 (Kan. 1979) (determining "whether the disclaimers are effective as to the unborn issue of the disclaimants").

219. See Commerce Trust Co. v. Fast, 396 S.W.2d 683, 689 (Mo. 1965) (renunciation of income interest in trust accelerates succeeding interests and terminates trust).

personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property.\textsuperscript{221}

The statute also lists fourteen specific disclaimable interests, ending with "[a]ny other interest created by any testamentary or inter vivos instrument or by operation of law."\textsuperscript{222}

Such detailed provisions have resolved most of the older controversies, such as whether a spendthrift provision prevents renunciation or whether an intestate heir may disclaim property passing by intestacy. Statutory bars to the right to disclaim are usually set forth with clarity. The \textit{Uniform Disclaimer of Property Interests Act} specifies those events that bar a disclaimer:

The right to disclaim property or an interest therein is barred by (1) an assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor, (2) a written waiver of the right to disclaim, (3) an acceptance of the property or interest or a benefit thereunder, or (4) a sale of the property or interest under judicial sale made before the disclaimer is effected.\textsuperscript{223}

Similar language appears in the U.P.C.\textsuperscript{224} and in many state statutes.\textsuperscript{225}

1. \textit{Acceptance}

Of the several bars to renunciation, the concept of acceptance still creates difficulty in many jurisdictions. Although the general rule is simple to state—once an interest has been accepted, it can no longer be disclaimed—it is not always easy to apply the rule to specific facts. In some cases, ministerial acts by the disclaimant have not precluded renunciation. For example, in

\begin{footnotesize}
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  \item \textsuperscript{221} Cal. Prob. Code § 267(a) (West 1991).
  \item \textsuperscript{222} Id. § 267(b)(14).
  \item \textsuperscript{223} Unif. Disclaimer of Property Interests Act, § 5, 8A U.L.A. 90 (1992).
  \item \textsuperscript{224} U.P.C. § 2-801(e), 8 U.L.A. 157 (Supp. 1992).
\end{itemize}
\end{footnotesize}
National City Bank v. Oldham, the court decided that there was no acceptance where the disclaimant had executed an affidavit for transfer of real estate that had been owned by the decedent. In In re Estate of Ramsey, decedent's son received $162.50 worth of tangible personal property from the estate and a fee for services rendered to the estate. Nevertheless, the court held the son's renunciation valid.

Family agreements respecting the distribution of a decedent's estate are sometimes viewed as an acceptance of benefits under the will. For instance, in Niklason v. Ramsey, the disclaimant's mother left a will giving virtually her entire estate to one of her grandchildren. The disclaimant's brother contested the will, and eventually the family reached an agreement whereby the estate was divided among all the decedent's grandchildren. Although the disclaimant had no interest in the estate, either under the will or under the family agreement, he signed the agreement and then executed a disclaimer. The Virginia Supreme Court held that because the disclaimant had, prior to disclaiming, entered into a contract to divide his mother's estate, he exercised dominion over her property and thus was not permitted to renounce.

On a different set of facts, in the Texas case of Estate of Anderson, the Tax Court held that a family agreement not to probate decedent's will did not bar a subsequent disclaimer by the decedent's spouse. The court specifically found that the disclaiming spouse received no consideration or other benefit from the family agreement. In both Niklason and Anderson, the families made the agreements in order to carry out the decedent's last

227. Id. at 1198.
229. Id. at 628, 630.
230. Id. at 631.
231. 353 S.E.2d 783 (Va. 1987).
232. Id. at 784.
233. Id.
234. Id.
235. It is not at all clear what the disclaimant's creditors hoped to achieve by bringing this suit. The court held that the creditors could satisfy their claims out of assets that would have passed to the disclaimant had he not disclaimed. Id. It is not self-evident that the disclaimant was entitled to any of the property in his mother's estate, even before disclaiming. Id.
236. 56 T.C.M. (CCH) 78 (1988).
237. Id.
238. Id. at 82.
wishes, which were not reflected in the decedent’s will. 239

More often, family agreements are made for the purpose of modifying the decedent’s estate plan. In Commerce Trust Co. v. Fast, 240 trust assets were to be distributed to three of the decedent’s children while a fourth share was to be held in trust for the fourth child. 241 The fourth child offered to renounce her interest in the trust, thus accelerating distribution of the entire trust, and the four agreed to split the trust assets among themselves equally. 242 The Supreme Court of Missouri held that the disclaimer was valid because the fourth child did not accept any property from the estate, but only from the largess of her siblings. 243 This holding is probably superseded by the current Missouri disclaimer statute, 244 but the case demonstrates that “acceptance” lies often in the eye of the beholder. In most situations, a family agreement will benefit each of the parties to some extent, and therefore it will probably serve as a bar to all subsequent disclaimers. 245

2. Partial Interests

Under the common law, disclaimants are not permitted to pick and choose among the benefits and burdens of a gift, but they may accept one gift while renouncing others. 246 Therefore, it may be necessary to determine whether the decedent has transferred one single interest or several separate ones. Accepting part of a single interest will bar the renunciation of any other portion of that interest. 247 For example, if income from property is accepted, the principal can no longer be disclaimed. Accepting

239. See id. at 78 (noting that purpose of agreement was to effect decedent’s intention); Niklason, 353 S.E.2d at 784 (same).
240. 396 S.W.2d 683 (Mo. 1965).
241. Id. at 685.
242. Id.
243. Id. at 686-87.
244. See Mo. Ann. Stat. § 474.490(5) (Vernon 1992) (“A disclaimer may not be made under this section with respect to any transfer . . . which the disclai-

245. Without consideration, the agreement cannot be binding under contract law. See Restatement (Second) of Contracts §§ 71-81 (1981) (discussing various forms of required consideration). On the other hand, disclaimers are effective without consideration. See 6 Bowe & Parker, supra note 41, §§ 49.1-.12 (noting that consideration is not required for valid renunciation).
246. 6 Bowe & Parker, supra note 41, § 49.10.
247. See, e.g., Oglesby v. Springfield Marine Bank, 69 N.E.2d 269, 274 (Ill. 1946) (holding that acceptance of any interest under will constituted acceptance of all interests under will).
one interest, however, will not prevent renunciation of a second, different interest. Ordinarily, the wording of the controlling instrument must be analyzed to determine whether the transferor has created a unitary gift or several separate interests.

To a great extent, the importance of this distinction has been reduced by statutes that specifically permit the renunciation of partial interests. Thus, in many states an heir can retain a life estate in property while disclaiming a remainder interest in the same property. Other states require the disclaimant to renounce his entire interest or an undivided portion thereof. This is the rule under federal tax law. Many states simply use the "in whole or in part" language, which is ambiguous at best, for it does not specify which parts the disclaimant may disclaim. Some statutes explicitly permit a portion of the disclaimed property to pass, by direction of a residuary clause or through intestacy, to the disclaimant.


249. See, e.g., S.C. Code Ann. § 62-2-801(a) (Law. Co-op. Supp. 1992) ("[I]f a person... as a disclaimant, makes a disclaimer... with respect to any transferor's transfer... to him of any... undivided portion... of property... such portion... shall be deemed never to have been transferred to the disclaimant.").

250. I.R.C. § 2518(c)(1) (1988) ("A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding section shall be treated as a qualified disclaimer... .").

251. See, e.g., Ala. Code § 43-8-291(a) (1991) (disclaimant "may disclaim in whole or in part"). These states include Alabama, Arkansas, Arizona, Colorado, Connecticut, Georgia, Indiana, Iowa, Kentucky, Maryland, Michigan, Montana, New Mexico, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia and Wisconsin.

252. See Conn. Gen. Stat. Ann. § 45a-579(e) & 583(e) (West Supp. 1993) ("[S]uch interest may devolve to or for the benefit of the disclaimant under other provisions of such instrument or by intestacy."); Ill. Ann. Stat. ch. 110 1/2, para. 2-7(d) (Smith-Hurd Supp. 1992) ("A disclaimer of property or an interest in property shall not preclude any disclaimer from receiving the same property in another capacity or from receiving other interests in the property to which the disclaimer relates."); Minn. Stat. Ann. § 525.532 Subd. 5 (West Supp. 1993) ("[O]ne disclaiming an interest in a non-residuary gift, devise or bequest shall not be excluded, unless the disclaimer so provides, from sharing in a gift, devise or bequest of the residue even though, through lapse, such residue includes the assets disclaimed."); Ohio Rev. Code Ann. § 1339.60(I) (Anderson Supp. 1992) ("A disclaimant is not precluded from receiving, as an alternative taker, a beneficial interest in the property disclaimed, unless a contrary intention appears in the disclaimer instrument or in the donative instrument."); Okla. Stat. Ann. tit. 84, § 26 (West 1990) ("[O]ne disclaiming an interest in a nonresiduary gift, devise or bequest shall not be excluded, unless his disclaimer so provides, from
Apparently, partial disclaimers were prohibited by the common law because of the doctrine of acceptance-as-bar. A disclaimer must be clear and unequivocal, but partial disclaimers have the potential to obscure any act of acceptance. Today, statutes prescribe clear and unequivocal procedures for making disclaimers. This helps to reduce uncertainty and to identify any incidence of acceptance. As long as acceptances and renunciations can be easily recognized and they remain irrevocable, there does not seem to be any urgent reason to disallow partial disclaimers. Indeed, most states are in agreement on this point.

The federal law on disclaimers takes a more restrictive approach, however. For federal gift and estate tax purposes, a partial disclaimer of property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest in such property and in other property into which such property is converted.

This rule was probably designed to reduce tax avoidance through the creation of remainder interests that would not be subject to transfer taxes. It does not entirely prohibit partial disclaimers, but it restricts them in ways foreign to the laws of many local jurisdictions.

D. Procedural Requirements

Another subject of continuing debate is what constitutes a valid disclaimer? The common law prescribes no specific procedure for creating a disclaimer, other than to require that it be effected by an affirmative act. Statutes, on the other hand, often

sharing in a gift, devise or bequest of the residue even though, through lapse, such residue includes the assets disclaimed.

253. 6 Bowen & Parker, supra note 41, § 49.9, at 49.

254. No state specifically disallows partial disclaimers, except for Ohio and Texas, which prohibit partial disclaimers of burdensome interests only. Ohio Rev. Code Ann. § 1399.60(C) (Anderson Supp. 1992) ("A partial disclaimer of property that is subject to a burdensome interest created by the donative instrument is not effective unless the disclaimed property constitutes a gift that is separate and distinct from the undisclaimed gifts."); Tex. Prob. Code Ann. § 37A(e) (West Supp. 1993) ([A] partial disclaimer of property which is subject to a burdensome interest created by the decedent's will shall not be effective unless such property constitutes a gift which is separate and distinct from undisclaimed gifts.").


contain detailed requirements for making a disclaimer.

1. Form of Disclaimers

The U.P.C. is typical in that it requires a disclaimer to be in writing and to "(i) describe the property or interest disclaimed, (ii) declare the disclaimer and extent thereof, and (iii) be signed by the disclaimant." In most states the writing must be filed or recorded with appropriate authorities and delivered to the personal representative or other appropriate stake holder. Are all other renunciations invalid? Probably not.

Commonly, disclaimer statutes state that their provisions are not exclusive and that renunciations or releases under other statutes are also valid. Often common-law renunciations are specifically approved as well. In New York, common-law disclaimers have been upheld even without authority of the disclaimer statute. Comments to the uniform acts, however, declare that the disclaimer acts are intended to constitute an


260. See, e.g., Mo. Ann. Stat. § 474.490(6) (Vernon 1992) ("This section does not abridge the right of any person to assign, convey, release, disclaim or renounce any property, interest or power under any other statute or the common law."); S.D. Codified Laws Ann. § 43-4-33 (1983) (stating rights and means provided in statute "for the making of a disclaimer are not exclusive but are in addition to every other right and means of a person to make disclaimer, and nothing in [the statute] shall prevent the making of a disclaimer in any lawful manner"); Wis. Stat. Ann. § 853.40(8) (West 1991) ("This section does not abridge the right of any person to waive, release, disclaim or renounce property or an interest in property under any other statute, the common law or as provided in the creating instrument.").

261. See Estate of Hoenig v. Commissioner, 66 T.C. 471, 475 (1976) (stating that New York common law permits legatee to disclaim testamentary legacy, provided there is no affirmative act demonstrating acceptance, if he or she does so "soon enough" after testator's death and probate of will so property rights of others are not prejudiced); In re Estate of Heffner, 503 N.Y.S.2d 669, 670 (Sur. Ct. 1986) (finding that although filing and notice provisions of renunciation stat-
exclusive remedy and to supplant the common-law right to disclaim. 262

The necessity of observing statutory procedures is viewed differently in different jurisdictions. Courts in New York and North Carolina have held that a separation agreement may be effective as a disclaimer if so intended by the parties. 263 On the other hand, generalized language in a divorce petition does not necessarily effect a renunciation of all interests in a spouse’s estate. 264 According to the Tax Court, a family agreement regarding distribution of a Texas decedent’s estate did not meet statutory requirements and could not function as a disclaimer. 265 Also, in an interesting Tennessee case, 266 a renunciation that was otherwise proper under the Tennessee statute was held invalid because it did not describe the renounced property in sufficient detail, it was filed in the probate court by the wrong person and it was (probably) not filed in the county register’s office. 267
Thus, following statutory procedures may or may not be mandatory under state law. Although prudence would dictate that the prescriptions of local statutes be scrupulously observed, relief may still be available where such observance is not possible.

2. Timing Issues

Specific time limitations are the most stringent procedural requirements added to the common law by disclaimer statutes. Although some states retain the "reasonable time" standard for renouncing,268 most follow the uniform acts by setting a specific number of months (commonly nine) for the execution and delivery of a disclaimer.269 Although federal tax law was the impetus for this change, the nine-month state limitation frequently does not coincide with the nine-month federal time limit.

For disclaiming present interests, state and federal time limits are usually the same. The period for renouncing future interests, however, is measured quite differently under state and federal rules. State statutes usually start the limitation period running when "the taker of a future interest is finally ascertained and his interest is indefeasibly vested."270 Some states also require that the taker have actual knowledge of his interest in order to start the clock running.271 By contrast, the federal statute provided the right to renounce by an "otherwise binding agreement." Id.; see also TENN. CODE ANN. § 31-1-103(f) (1984). Thus, the determinative issue was whether or not the written agreement between the parties was effective as a waiver. Faught, 730 S.W.2d at 325. The court held that the husband's decision to enter into the waiver agreement was not a "knowing" one because the co-administrators failed to inform him of all his rights in the estate. Id. at 327. Therefore, the waiver agreement executed by the parties was not effective. Id.

268. See CAL. PROF. CODE § 279(a) (West 1991) (stating disclaimer must be filed within reasonable time after person able to disclaim acquires knowledge of interest); NEV. REV. STAT. ANN. § 120.030 (Michie 1993) (same; establishing guidelines for when disclaimer is or is not conclusively presumed to have been filed within reasonable time).

269. For a discussion of statutory time limits established under the uniform acts and state law, see supra notes 42-46 and accompanying text.

270. See, e.g., ARIZ. REV. STAT. ANN. § 14-2801(C)(1) (Supp. 1992) (stating that renunciation must be filed within nine months after taker of future interest is ascertained and interest indefeasibly vested); see also MASS. GEN. LAWS ANN. ch. 191A, § 3 (West 1990) (delineating similar nine-month requirement); MICH. COMP. LAWS ANN. § 54.502(2)(1) (West 1988) (establishing 10 month requirement); VA. CODE ANN. § 64.1-192 (Michie 1991) (creating nine-month requirement).

271. See, e.g., ARK. CODE ANN. § 28-2-107(b)(1)(B) (Michie 1987) ("If the person entitled to disclaim does not have actual knowledge of the existence of the interest, the disclaimer shall be delivered not later than nine (9) months after he has actual knowledge of the existence of the interest."); COLO. REV. STAT. § 15-11-801(2) (1987) (same); D.C. CODE ANN. § 21-2092(b)(2) (Supp. 1992)
measures the nine month period from "the day on which the transfer creating the interest . . . is made." This divergence is the cause of considerable uncertainty and confusion. The conflict has raised the timing question to a position of prominence in determining the validity of a disclaimer, and it will be discussed in detail in a subsequent section of this Article.

Because federal rules often diverge from state statutes, an additional layer of complexity is added to the already complex field of disclaimer law. Partial disclaimers and timing issues are only two of the aspects of disclaimer law that are plagued with inconsistencies. In order to understand the reasons for these differences and the potential for resolving them, we must turn our attention to the development of the federal law of disclaimers.

V. THE FEDERAL LAW OF DISCLAIMERS

A. Pre-1976 Tax Treatment

Until 1976, federal tax treatment of disclaimers generally mirrored the state law treatment of disclaimers. Rules regarding disclaimers were spread throughout the gift and estate provisions of the Code. For example, former section 2056(d) regulated the effect of disclaimers on the marital deduction, and former section 2055(a) dealt with the estate tax charitable deduction. The general rule for gift taxes—section 2511—did not mention disclaimers, but the Treasury Regulations provided as follows:

Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under


273. See infra notes 299-319 and accompanying text.


the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin.\footnote{276}{Treas. Reg. § 25.2511-1 (1958).}

Thus, state law was instrumental in determining the effectiveness of a disclaimer for federal gift tax purposes.

In various parts of the Code, the relation-back principle of disclaimer law was recognized, and federal taxes were imposed on property transfers as defined by local property law.\footnote{277}{For a discussion of the relation-back principle, see supra notes 25-27 and accompanying text.} Where state law viewed a transfer as flowing from the transferor directly to the substituted taker, so, generally, did federal tax law.\footnote{278}{For a discussion of transfers to substituted takers under state and federal law, see generally Martin, supra note 13, at 320-21.} This followed the venerated maxim that property law is a state matter, not a federal one.

State disclaimer laws were then, as now, not entirely uniform. Disparate tax treatment of similarly situated taxpayers occurred in some cases. One case that inspired much comment was \textit{Hardenbergh v. Commissioner}.\footnote{279}{Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952).} In \textit{Hardenbergh}, an intestate decedent’s wife and daughter disclaimed their interests in the decedent’s estate so that the provisions of the decedent’s unexecuted will could be carried out.\footnote{280}{Id. at 65. The decedent was survived by his widow, son and daughter.} Because applicable state law did not permit heirs to renounce property that passed by intestacy, federal gift taxes were imposed on the transfer from the wife and daughter to the substituted taker.\footnote{281}{Id. at 66. The Eighth Circuit stated that “[t]he general rule as to intestate succession is that the title to the property of an intestate passes by force of the rules of law . . . and . . . those so entitled by law have no power to prevent the vesting of title in themselves.” Id. (emphasis added).} Had the decedent’s property passed by will, or had the decedent resided in a state that permitted renunciation of intestate interests, no gift tax would have been

\begin{quote}
\footnote{276}{Treas. Reg. § 25.2511-1 (1958).}
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\footnote{279}{Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952).}
\footnote{280}{Id. at 65. The decedent was survived by his widow, son and daughter.}
\footnote{281}{Id. at 66. The Eighth Circuit stated that “[t]he general rule as to intestate succession is that the title to the property of an intestate passes by force of the rules of law . . . and . . . those so entitled by law have no power to prevent the vesting of title in themselves.” Id. (emphasis added).}
\end{quote}
levied.\textsuperscript{282}

Such variations in tax consequences caused by the differences in underlying state law produced considerable dissatisfaction. In particular, states differed widely in the time limits they prescribed for making disclaimers. In some jurisdictions disclaimants could postpone the decision to accept or reject their interests for many years while still reaping substantial tax savings when they ultimately disclaimed. In \textit{Keinath v. Commissioner},\textsuperscript{283} for example, the Eighth Circuit upheld the disclaimer of a remainder interest in a trust that had been in existence for nineteen years.\textsuperscript{284} The family saved at least $150,000 in federal taxes on a remainder interest that was worth about $335,000 at the time of the disclaimer.\textsuperscript{285} Congress responded to these perceived inequities by removing the scattered disclaimer provisions in the I.R.C. and by enacting section 2518.\textsuperscript{286}

\textsuperscript{282}Id. The court explained that the rule differed as to legatees or devisees under a will, “since the beneficiary under a will may accept or reject a testamentary gift.” \textit{Id.} The court emphasized that “[t]he controlling fact here is that title to an interest in decedent’s [intestate] estate vested in the taxpayers by operation of law which neither had the power to prevent.” \textit{Id.}

\textsuperscript{283}480 F.2d 57 (8th Cir. 1973).

\textsuperscript{284}Id. at 59-60. In \textit{Keinath}, the testator bequeathed most of his estate to a trust. \textit{Id.} at 59. The income from the trust was to be paid to his widow for life, and upon her death, the principal was to be divided between his two sons. \textit{Id.} Because one son predeceased the widow, his one-half share of the principal was to be distributed to his children. \textit{Id.} Following the death of the life beneficiary (the widow), the other son renounced his one-half interest in the trust by filing a disclaimer in the local court. \textit{Id.} Although the local court recognized the disclaimer as valid, the Tax Commission claimed that the attempted renunciation was, in fact, a gift of one-half of the trust’s assets to the testator’s children and therefore assessed a gift tax on each beneficiary. \textit{Id.} at 60.

The Tax Court upheld the Commissioner’s assessment, relying on a two prong test to determine the validity of a disclaimer: (1) the disclaimer must be valid under local law, and (2) it must be made within a reasonable time after the disclaimant learns of the transfer. \textit{Id.} (citing Fuller v. Commissioner, 37 T.C. 147 (1961)). The Eighth Circuit discussed whether the “reasonable time” period should be calculated from the date the remainderman acquired the right of possession or control of the property, or from the date the trust was established. \textit{Id.} at 60-64. The court held that “the holder of a vested remainder interest subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life beneficiary.” \textit{Id.} at 64 (emphasis added). Ultimately, the court determined that the disclaimer, which was filed within six months after the life beneficiary’s death, was made within a reasonable time. \textit{Id.}

\textsuperscript{285}Id. at 60. The assets of the trust were valued at $669,797. \textit{Id.} Cargill, the decedent’s son who disclaimed his interest, was entitled to one-half of these trust assets. \textit{Id.} at 59-60. The gift tax that Cargill’s family avoided by the disclaimer was nearly $150,000. \textit{Id.} at 60.

\textsuperscript{286}Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1), 90 Stat. 1520, 1893 (codified as amended at I.R.C. § 2518 (1988)) (“[I]f a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall...
B. I.R.C. Section 2518

The Tax Reform Act of 1976 created a new federal law of disclaimer. As the Joint Committee on Taxation explained:

Reasons for change

The Congress believed that definitive rules concerning disclaimers should be provided for estate and gift tax purposes to achieve uniform treatment. In addition, the Congress believed that a uniform standard should be provided for determining the time within which a disclaimer must be made.

Several professional study groups offered suggestions for definitive rules on the federal tax treatment of disclaimers, and the proposal submitted by the American Bankers Association, was—for the most part—adopted.

The new federal standards regarding disclaimers inspired a flurry of activity among state legislatures. Many states enacted statutes derived from the Uniform Disclaimer of Transfers by Will, Intestacy, or Appointment Act and other related uniform statutes; but still, most states continued to demonstrate individuality and non-conformity in their treatment of disclaimers. Although the new federal law was intended to eradicate the significance of such local distinctions, the “holy grail of uniformity” was never actually obtained.

apply with respect to such interest as if the interest had never been transferred to such person.

287. See id.


289. These included the American Bar Association, the American Law Institute, the U.S. Treasury Department and the American Bankers Association. Id. 590 n.8.

290. See Martin, supra note 13, at 329 n.52.

291. For a list of these statutes, see supra note 29.

292. This is Professor Martin’s expression. Martin, supra note 13, at 323.

293. Even after the 1981 amendments to § 2518, uniformity has not been achieved. There are still very few occasions when a disclaimer is valid for federal tax purposes while being invalid for state property law purposes. See Michael D. Mulligan, Proposed Regulations Do Not Solve Ambiguities in Planning for Effective Use of Disclaimers, 10 Est. Plan., Jan. 1983, at 8, 12-13. Mulligan notes:

However, one of the requirements for a qualified disclaimer established by section 2518(b)(4) is that disclaimed property pass without any direction on the part of the disclaimant. Since Section 2518 contains no provisions governing how property is to pass as a result of a qualified disclaimer, reference to state law is indispensable.

Id. at 12. Complete uniformity cannot result under this system because the id-
DISCLAIMERS

At its inception, section 2518 of chapter 12 (the gift tax provisions) of the I.R.C. read as follows:

Section 2518. DISCLAIMERS.

(a) General Rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified Disclaimer Defined.—For purposes of subsection (a), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the date on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes to a person other than the person making the disclaimer (without any direction on the part of the person making the disclaimer).

(c) Other Rules.—For purposes of subsection (a)—

(1) Disclaimer of Undivided Portion of Interest.—A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers.—A power with respect to property shall be treated as an interest in such property.294

The central features of the new law were that (1) it recog-

nized the relation-back principle for purposes of all federal transfer taxes (title B includes estate, gift and generation-skipping taxes), and (2) it set a specific limitations period for making disclaimers. The statute also required a writing, and it incorporated the common-law concept of acceptance-as-bar to disclaimers. In addition, the disclaimant was not permitted to receive the disclaimed property or to direct its disposition—a requirement that inheres in the basic idea of disclaimer as nonacceptance.

C. Development of the Federal Law

Immediately, the statute required revision. Subsection (b)(4) was amended to permit the spouse of "the decedent" to disclaim while continuing to receive some benefit from the disclaimed property. Later, subsection (c)(3) was added for the purpose of clarifying that a transfer could be a "qualified disclaimer" even though it did not constitute a disclaimer under applicable state law.

Despite the good intentions of Congress, even the addition of subsection (c)(3) failed to achieve uniformity in the treatment of disclaimants; many disclaimer issues are still governed by state law. Some examples will illustrate this point. In determining whether two interests are separable, and thus separately disclaimable, local law regarding the merger of interests will control. Where the survivorship interest in a joint tenancy or tenancy by the entirety is disclaimed, state law regarding the tenants' power to partition may decide the disclaimer's validity. In addition, state law governs whether precatory language in a disclaimer will disqualify it for federal purposes, and local law determines to


(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

Id.


297. Treas. Reg. § 25.2518-3(a)(1)(i) (1986) ("[W]here local law merges interests separately created by the transferor, a qualified disclaimer will be allowed only if there is a disclaimer of the entire merged interest . . . .").

298. For a discussion of disclaimers in the survivorship interest context, see infra notes 316-19 and accompanying text.

299. Treas. Reg. § 25.2518-2(e)(4) ("[P]recatory language . . . will not be considered as directing the redistribution or transfer of the property or interest in property . . . if the applicable State law gives the language no legal effect.").
whom property must be transferred in order to qualify a disclaimer under section 2518(c)(3).

Arriving at a clear and comprehensive interpretation of the federal disclaimer statute has not been simple. The government expended ten years of study before the Treasury Regulations on section 2518 were finally promulgated in 1986.\(^{300}\) Even today uncertainty persists. The professional literature is filled with discussions on how to navigate the hidden shoals of federal disclaimer law,\(^{301}\) and seminars on the subject abound. It is not the purpose of this Article to duplicate those efforts, so only the most salient problems will be discussed in an effort to illustrate the current lack of clarity in the law.

Timing was the central issue addressed by Congress when it enacted section 2518.\(^{302}\) As the tax laws stood in 1976, very considerable tax savings could be realized through the use of disclaimers.\(^{303}\) In order to plug this tax loophole—or at least reduce its size—Congress imposed a precise, uniform and short time limit on the use of disclaimers.\(^{304}\) Prior federal standards had required a disclaimer to be made within a "reasonable" time.\(^{305}\) State law varied, not only from state to state, but also according to the type of interest disclaimed. Usually, present interests had to be disclaimed quickly (commonly, within six months of the transfer) and future interests had to be disclaimed soon after the interest was vested indefeasibly.\(^{306}\)


\(^{301}\) For a listing of articles on federal disclaimer law, see supra note 2.

\(^{302}\) For a discussion of Congress' purpose in enacting § 2518, see supra note 288 and accompanying text.

\(^{303}\) See Keinath v. Commissioner, 480 F.2d 57 (8th Cir. 1973) (stating that remainderman is not subject to gift tax when he disclaims 19 years after receiving contingent interest). Keinath is cited as one example of how the law, in 1976, did not provide "either definitive rules as to what constitute[d] a 'disclaimer' or rules of general application concerning the tax consequences of a disclaimer." H.R. Rep. No. 1380, supra note 11, at 66 & n.4, reprinted in 1976 U.S.C.C.A.N. at 3420. In Keinath, the disclaimant "passed" his parent's property to his children without paying either gift or estate tax. For a discussion of Keinath, see supra notes 284-85 and accompanying text.

\(^{304}\) Uniformity was not the only impetus for the passage of § 2518. Congress was evidently appalled by the tax avoidance that could be achieved through the use of disclaimers. See Keinath, 480 F.2d at 64.

\(^{305}\) Treas. Reg. § 25.2511-1(c)(2) (1986). The "reasonable" time standard applied to transfers made prior to 1977. Id. "In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer." Id. (emphasis added).

\(^{306}\) See, e.g., Minn. Stat. Ann. § 525.532 Subd. 3 (West 1965) (amended
Under federal law, the time limit for disclaimers is nine months from the date of the transfer. This limit applies to all types of interests, present and future. Although there is an exception for minors—who may disclaim at any time before reaching the age of twenty-one years, nine months—there is no exception for persons who are unaware that they have received a gratuitous interest in property. While transferees are normally informed when they acquire a present interest, the recipient of a contingent future interest may not know about the transfer, particularly in the case of an inter vivos transfer in trust that is entirely private and not recorded anywhere. Such an uninformed recipient is precluded from disclaiming under section 2518.

Nine months is easily measured, but the statute does not clarify every instance when the nine month period begins to run. This basic question was answered in 1982 by the Supreme Court in Jewett v. Commissioner, although variations on the problem still remain. Jewett was decided under pre-1976 law, which provided that gift tax liability was not imposed if a disclaimer was effective under local law and made "within a reasonable time after knowledge of the existence of the transfer." The taxpayer in Jewett was a contingent beneficiary of a testamentary trust established by his grandmother. At the time of his disclaimer, the taxpayer was entitled to receive half of the trust corpus if he survived his mother (the current income beneficiary) and nothing if he predeceased her. The disclaimer was valid under state law because the remainder interest had not yet vested in the taxpayer.

The Supreme Court held that the "transfer" contemplated by the Treasury Regulations occurred at the time of the grandmother's death, not at the time (if ever) when the contingent in-

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1993) (requiring disclaimer of present interest "within six months after the death of the person by whom the interest was created" and including provisions for disclaimer of future interests).

307. I.R.C. § 2518(b)(2) (1988). A disclaimer is qualified under § 2518 if made within nine months after "the day on which the transfer creating the interest in such person is made, or the day on which such person attains age 21." Id.


309. 455 U.S. 305 (1982).

310. Id. at 306 (quoting Treas. Reg. § 25.2511-1(c)).

311. Id. In Jewett, the petitioner executed a disclaimer of his contingent interest 33 years after the interest was created. Id. Thus, the Court had to decide "whether the 'transfer' referred to in [the Treasury] Regulation occurs when the interest is created . . . [or] when the interest either vests or becomes possessory." Id.

312. Id.

313. Id. at 311.
In deciding that the taxpayer was properly subject to gift tax on property that he had no clear right to receive, the majority stated that a "timeliness" requirement imposed by local law "would not absolve the taxpayer from the separate timeliness requirement imposed by the federal Regulation." Thus, the Court endorsed a significant divergence between federal tax rules and the state laws that determine the property law effect of a disclaimer.

More recently, however, three federal circuits have decided an important timeliness issue on the basis of state law. In contravention to the Tax Court, the Fourth, Seventh and Eighth Circuits have each held that the transfer of a survivorship interest in jointly-held property occurs at the joint tenant's death, not at the creation of the joint tenancy. This result was because state law permitted either party to sever the joint tenancy. Accordingly, the survivorship interest was terminable and therefore not "transferred" when the joint tenancy was created. The Service has acquiesced in this analysis, but currently takes the position that entireties property is not subject to the same rule because tenants

314. Id. at 318. The Court reasoned that, "since the relevant 'transfer' in this case occurred when petitioner's grandmother irrevocably transferred her assets to a testamentary trust, petitioner's disclaimers of the rights created by that trust were not made within a reasonable time." Id. (emphasis added).

315. Id. at 316. The Court disagreed with the petitioner's argument that Treasury Regulation § 25.2511-1(c) merely modified earlier decisions in which state law controlled both the right to renounce and the timeliness of the renunciation. Id. at 315-16. Because the regulation explicitly imposed two requirements, the Court reasoned that "if timeliness were governed solely by local law, the second requirement [that a disclaimer must be made within a reasonable time] would be redundant." Id. at 316. If the separate (federal) timeliness requirement were not imposed, the Court stated that "the Regulation would be complete with a single requirement that the disclaimer be effective under local law." Id.

316. Estate of Dancy v. Commissioner, 872 F.2d 84, 88 (4th Cir. 1989) ("[T]he survivorship interest in a joint tenancy that is subject to partition by either cotenant is created upon the death of a cotenant."); Kennedy v. Commissioner, 804 F.2d 1332, 1336 (7th Cir. 1986) (stating that "transfers occur on the death of other joint tenants"); McDonald v. Commissioner, 853 F.2d 1494, 1501 (8th Cir. 1988) ("[T]he relevant transfer for the purpose of the disclaimer provisions occurs at the death of the joint tenant and not at the creation of the joint tenancy.").

317. McDonald, 853 F.2d at 1494, action on decision, 1990-06 (June 14, 1989).

The court stated:

Where a joint tenant has the right to sever the joint tenancy or cause the property to be partitioned under state law, the Service will not longer litigate that the transfer relative to which the timeliness of the disclaimer of a survivorship interest is measured refers to the transfer creating the joint tenancy.

Id.
by the entireties cannot ordinarily demand partition.\textsuperscript{318} The Service intends to rewrite the portion of section 2518 regulations invalidated by these cases.\textsuperscript{319} At this point, however, the precise wording of the new regulations remains uncertain.

Other areas of the federal disclaimer law are also less than crystal clear. The ABA has adopted legislative recommendations to amend and clarify the provisions of section 2518.\textsuperscript{320} One proposal would affirm that a "qualified" disclaimer is effective for income tax purposes, as well as gift, estate, and GST tax purposes.\textsuperscript{321} It would also modify the language of section 2518(c)(3) to specifically include partial disclaimers and spousal disclaimers.\textsuperscript{322} Another suggestion would assure that a disclaimer of benefits from a qualified employee benefit plan would not violate the anti-alienation rules of the Employee Retirement Income Security Act of 1974 (ERISA).\textsuperscript{323}

On the whole, however, commentators emphasize the need for careful planning and drafting, rather than legislative reform, to facilitate the use of disclaimers.\textsuperscript{324} This is somewhat anomalous because the primary use of disclaimers is to correct errors in estate planning.\textsuperscript{325} Nevertheless, appropriate preplanning can clarify and resolve some potentially difficult issues. For example, proper preplanning can ensure that a disclaimed interest will be considered a "separate interest" for tax purposes. It can also establish how disclaimed property will devolve. Careful drafting can even create structures that satisfy federal tax requirements while disregarding state disclaimer laws.

In 1940, the Supreme Court stated that "[s]tate law creates legal interests and rights. The federal revenue acts designate

\begin{footnotes}
\item[318] See Tech. Adv. Mem. 92-08-003 (Oct. 28, 1991) (stating that fact that interest in property held as tenancy by entirety can be disclaimed under state law is not significant for purposes of § 2518). But cf. Priv. Ltr. Rul. 91-35-044 (June 3, 1991) (stating that interest of tenant in tenancy by entirety is treated same as tenant in joint tenancy for purposes of § 2518).
\item[319] See McDonald, 853 F.2d at 1494, action on decision, 1990-06 (June 14, 1989).
\item[321] See id., Tax Simplification Proposal No. 18.
\item[322] Id.
\item[323] Id., Tax Simplification Proposal No. 19.
\item[324] For a discussion of various articles written by learned commentators on how to facilitate the use of disclaimers, see supra note 2.
\item[325] For a general discussion of disclaimers, see supra notes 17-82 and accompanying text.
\end{footnotes}
what interests or rights, so created, shall be taxed.”³²⁶ Today, the
federal revenue acts and the I.R.S. seem to ignore or attempt to
supersede state law with increasing frequency. Since 1982, sec-
tion 2518 has taken on a life of its own. It attempts to operate
independently of any legal interests or rights created by state law,
even though the states continue to control their citizens’ actual
ownership of property.

VI. SIMPLIFICATION
A. Continuing Conflict

This two-tiered system is confusing and sometimes unfair.³²⁷
Disclaimants may be subject to a substantial federal tax liability
on property that, under state law, is entirely beyond their reach.
The federal rules are filled with complexities and uncertainties
that are not easily mastered. Similarly, state disclaimer statutes—
even those derived from the uniform acts—are not models of clar-
ity, and there is a paucity of case law to aid in their interpreta-
tion.³²⁸ The fact that the two systems overlap while operating
independently of one another adds to the confusion.

In the legal literature, federal law dominates most discus-
sions concerning disclaimers; few commentators address the seri-
ous state disclaimer law issues. It is easy to forget that state
disclaimer law is the decisive factor for most modest estates.
Where local law does control federal issues, the I.R.S. and the
Tax Court sometimes take great liberty in interpreting state law

³²⁶. Morgan v. Commissioner, 309 U.S. 78, 80 (1940). The Court went on
to note that “[i]f it is found in a given case that an interest or right created by
local law was the object intended to be taxed, the federal law must prevail no
matter what name is given to the interest or right by state law.” Id. at 81.

³²⁷. See Jewett v. Commissioner, 455 U.S. 305, 328 (1982) (Blackmun, J.,
dissenting). According to Justice Blackmun:
The Court’s and the Commissioner’s position also seems to me to em-
brace a distinct element of unfairness. . . . To require the disclaimer
long before the interest could ripen into enjoyment means that the de-
cision must be made at a time when the disclaimant does not know what
he is disclaiming or whether he ever would receive and enjoy any
interest.

The vast bulk of the law of decedents’ estates involves persons attempt-
ing to gain a share or increase their share of the estate rather than to
divest themselves of their interest. It may be more blessed to give than
to receive, but the case law indicates the litigants are usually concerned
with more worldly interests.

Id. at 229.
to suit their own purposes.\(^{329}\) Often, state law issues are resolved in the federal courts, where state court decisions, other than those of the highest court of each state, may be ignored.\(^{330}\)

At one time, the dominance of federal disclaimer law served a valid purpose. In addition to pursuing "uniformity," the stated objective of section 2518,\(^{331}\) Congress was also seeking to forestall a common tax avoidance technique used by well-to-do families. An adult child would disclaim property passing from his deceased parent so that the property would then pass to the decedent's grandchildren with only one layer of transfer tax imposed.\(^{332}\) Had the adult child not disclaimed, transfer taxes would have been imposed twice before the grandchildren received the family wealth.\(^{333}\) This plan can function in situations

\(^{329}\) See, e.g., Estate of Ware v. Commissioner, 480 F.2d 444, 447 (7th Cir. 1973) (reversing Tax Court decision that held that Illinois trustee could not resign without court approval). The problem is most egregious in private letter rulings, where the I.R.S. is able to invent state law without any check by the courts. As state disclaimer law becomes better developed, the problem should be alleviated.

\(^{330}\) See, e.g., Estate of Charles Bennett, 100 T.C. 42 (1993); Estate of Dancy v. Commissioner, 872 F.2d 84, 88 (4th Cir. 1989) (reversing tax court decision that disclaimer of survivorship interest in jointly held personal property was invalid for federal estate tax purposes); see also Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (holding that, where federal estate tax liability turns upon character of property interest held and transferred by decedent under state law, federal authorities are not bound by state trial court's determination of such property). The I.R.S. takes the position that even a decision of the highest state court is not necessarily binding. See Gen. Couns. Mem. 39,183 (Mar. 6, 1984) (stating that Service is not bound by decision of state's highest court covering substantially similar issue when such court did not actually adjudicate property interests); F. Ladson Boyle, Letting the State Law Dog Wag the Tax Tail, PROB. PRAC. REP., Feb. 1990, at 1 (discussing implications of Bosch for practitioners).

\(^{331}\) For a discussion of Congress' motivation in enacting § 2518, see supra note 288 and accompanying text.

\(^{332}\) Under certain circumstances, a surviving spouse could also ensure the imposition of only one transfer tax by disclaiming his or her interest in the decedent spouse's property. See, e.g., Brown v. Routzahn, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933). Brown was decided before the unlimited marital deduction was enacted. Mr. Brown was predeceased by his wife, and he later renounced his interest in one-third of her estate. Id. at 915. The renounced property became part of a residuary trust, which was permitted to pass to the Brown children without being included in Mr. Brown's estate. Id. at 916-17. Except for the renunciation, the property would have been taxed at Mrs. Brown's death and again at Mr. Brown's death. Id. Today, this double taxation is precluded by the unlimited marital deduction, and disclaimers are commonly used to pass property to grandchildren. I.R.C. §§ 2056 & 2056(a) (1988).

\(^{333}\) See, e.g., Pointier v. Commissioner, 858 F.2d 917, 920-23 (3d Cir. 1988) (holding that initial transferor was subject to gift tax and subsequent donee transferees were also subject to gift tax based on value of gift), cert. denied, 490 U.S. 1019 (1989); Cottrell v. Commissioner, 628 F.2d 1127, 1131 (8th Cir. 1980) (holding transfer of devised interest by unequivocal disclaimer was not
where the adult child has sufficient property and is willing to forgo an inheritance in order to protect family assets from the taxman. In plain words, disclaimers provided tax loopholes for the rich.

By creating uniform federal disclaimer rules, Congress apparently intended to tighten up on the use of such "planning tools." Congress wanted to reduce reliance on state law not only because state law was conflicting and unclear, but also because the states are inclined to pass laws—or support judicial decisions—that benefit their citizens at the expense of the federal fisc, if that is possible.\(^{334}\) Congress did not go so far as to disregard state disclaimer law entirely,\(^ {335}\) but it did manage to limit the power of state law disclaimer statutes to frustrate the collection of federal gift and estate taxes. Today, the Generation-Skipping Transfer Tax (GSTT) is quite effective in performing this important function.

**B. Effect of the GSTT**

The disclaimer has never been a predominant tax-reducing tool in the arsenal of estate planners. Other planning methods have been more popular. For instance, wealthy families have routinely used multigenerational trusts to avoid federal transfer taxes for as many as two or three generations.\(^ {336}\) In 1976, at the same taxable transfer because all conditions of Treasury Regulation were met). In many cases a grandchild attempts to disclaim, thus passing property to great-grandchildren with only one layer of tax. See, e.g., Jewett v. Commissioner, 455 U.S. 305, 306-07 (1982) (involving attempt by testator's grandchild to disclaim share of principal of testamentary trust); Irvine v. United States, 936 F.2d 343, 344-45 (8th Cir. 1991) (same), cert. granted, 113 S. Ct. 2958 (1993); Ordway v. United States, 908 F.2d 890, 891 (11th Cir. 1990) (involving attempt by grandchild to disclaim contingent remainder interest in trust established by his grandfather), cert. denied, 111 S. Ct. 2916 (1991).

\(^ {334}\) Another example of Congress' response to potential state legislation is the marital deduction. I.R.C. § 2056 (1988). The marital deduction was created to counterbalance the states' rush to the community property scheme in order to save federal tax dollars for their citizens. I.R.C. § 2056 note 6 (West 1989). Additional examples of anti-fed bias may be found in Boyle, supra note 330, at 3-4.

\(^ {335}\) Such an independent federal rule, however, has been proposed. For this proposal, see infra notes 351-54 and accompanying text.

\(^ {336}\) Trusts were potent tax-savings tools because the interest of the income beneficiary expired at his death, and so the interests of succeeding generations could mature without any "transfer." In many of the federal tax cases on disclaimers, multigenerational trusts had already produced transfer tax savings, and the disclaimer was an effort to extend this tax avoidance for an additional generation. See, e.g., Jewett, 455 U.S. at 306-07. For a discussion of cases in which subsequent generations attempted to disclaim a property interest to avoid federal gift tax liability, see supra notes 332-33 and accompanying text.
time that section 2518 was enacted, Congress imposed a generation-skipping tax in order to reduce the use of tax-saving trusts and similar tax avoidance techniques. The original generation-skipping tax contained such large loopholes, however, that it was generally ineffective and in 1986 it was repealed retroactively.

To replace the original generation-skipping tax, an entirely new GSTT was added to the I.R.C. The new GSTT is a well-thought-out, cohesive system. A number of modifications and clarifications have been made since its enactment, but on the whole the GSTT has worked well from the start. The GSTT imposes a tax (calculated at the highest marginal rate of the estate tax) on transfers to any individual who is more than one generation younger than the transferor. Thus, if a transferor gives or devises property to his grandchild, the transfer is subject to two distinct taxes: (1) the gift or estate tax and (2) the GST tax.

This combination of taxes produces approximately the same result as if the transferor had devised the property to his child who later gave it to the transferor’s grandchild. Such a two-step transfer is subject to the gift or estate tax twice: once in the transferor’s estate, and again when the child transfers the property. Under the new GSTT, the one-step transfer is subject to two transfer taxes as well. Ordinarily, the one-step transfer will cost more because of the GSTT’s high rate, but the actual amount of tax paid varies depending on the specific circumstances of the various family members and their assets. In addition, there are exclusions, exceptions and a multitude of other tax law considerations that affect the total tax liability of the family. The overall

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339. Id. § 1431(a), 100 Stat. at 2717-32 (codified as amended at I.R.C. §§ 2601-2663 (1988)).

340. Most of the changes to the GSTT were made by the Technical and Miscellaneous Revenue Act of 1988, and were effective as if included in the original act. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1014(g), 102 Stat. 3342, 3562-67.

341. See I.R.C. § 2641(a) (1988) (“[T]he term ‘applicable rate’ means, with respect to any generation-skipping transfer, the product of—(1) the maximum Federal estate tax rate, and (2) the inclusion ratio with respect to the transfer.”).


343. The GSTT may also be payable sooner than the second tax in a two-step transfer.
effect, however, is to create a system where family wealth is taxed at least once every generation, regardless of the form of transfer.

Unlike the old generation-skipping tax, the GSTT is not easily circumvented. Today, estate planning focuses on achieving the most effective use of the various credits, exclusions, deductions and other relief provisions that are built into the transfer-tax system. Tax savings through an advantageous application of the tax statutes is the taxpayer's goal. Tax avoidance—that is, evading the reach of the tax statutes—has become difficult, if not impossible. Multigenerational trusts no longer create an impenetrable tax shield and disclaimers no longer produce huge transfer-tax windfalls. 344

Thus, the GSTT has greatly reduced the tax incentives for using disclaimers. Disclaimers can still produce transfer-tax savings, but those savings are quite modest and could have been secured by appropriate planning. For example, where tax benefits such as the GSTT exemption 345 or the unified credit 346 have been overlooked or inadequately utilized by the decedent, family members can sometimes secure the benefit of these statutory provisions by disclaiming. 347 Such use cannot be considered tax avoidance, however, because the disclaimants are merely taking advantage of tax-saving provisions that were deliberately created by Congress for the benefit of taxpayers. The disclaimants are not exploiting loopholes.

Today, section 2518 does little to discourage tax avoidance. 348 Because most pre-1986 trusts have been "grandfathered"—that is, protected from the reach of the GSTT because of their age—section 2518 continues to play a useful role in limiting the tax-avoidance potential of these older trusts. 349 In all other cases, state disclaimer laws and the GSTT combine to ade-

344. The savings achieved by avoiding federal estate taxes for a single generation could be as much as 60% of the family fortune. See I.R.C. § 2001 (1988).

345. I.R.C. § 2631 (1988) ("[E]very individual shall be allowed a GST exemption of $1,000,000 which may be allocated by such individual . . . to any property with respect to which such individual is the transferor.").

346. I.R.C. § 2010 (1988) (stating generally that "[a] credit of $192,800 shall be allowed to the estate of every decedent").

347. For an illustration of foregone tax benefits, see supra notes 84-96 and accompanying text. The situation of the A family is a fairly typical scenario in which the unified credit has been "wasted."

348. In addition, § 2518 does not discourage more legitimate forms of tax savings. Because § 2518 specifically endorses the relation-back principle, it does not obstruct the kind of tax planning discussed in part III of this Article. For this discussion, see supra notes 84-96 and accompanying text.

349. The GSTT applies to all interests created after Oct. 22, 1986, and in-
quately protect fairness and the federal fisc. Therefore, for all gifts made after 1986 section 2518 is no longer necessary, and it should be revoked.

C. Simplification for Whom?

Simplification of the tax laws is something everyone approves of—in principle at least. Fairness requires that tax laws be comprehensible. But when simplification produces revenue losses or perceived unfairness in distributive effect, simplification may lose popularity. Furthermore, proponents of simplification may disagree on what is “simple.” Federal disclaimer laws were enacted to create greater national uniformity in the tax treatment of citizens of the various states. But uniformity does not necessarily engender simplicity.\(^{350}\)

Local lawyers who represent an array of clients in diverse matters must question whether section 2518 helps to simplify their practice. Although disclaimers are not a part of their daily routine, these attorneys must master the local disclaimer law (no matter how complex) in order to identify those occasions when its use may be beneficial. When a disclaimer is appropriate, the complexities of federal law must be explored as well, because neither common sense nor any rule of thumb can predict the federal tax results of a valid disclaimer. The extensive literature on the tax aspects of disclaimers generally disregards local law and gives the false impression that practitioners may do so also. It creates a climate where the uncertainties and potential difficulties that lurk in many state statutes are overlooked easily.

Whose simplicity should take priority? Where disclaimers are concerned, relative simplicity for the I.R.S. means greater complexity for taxpayers and attorneys. The Service may be able to ignore state law, but the testator, the disclaimant and their advisors cannot. Tax planning is NOT the central goal of estate planning. The appropriate devolution of property is paramount, and this is controlled by state law. Federal tax considerations should not be allowed to preempt the field.

Although I.R.S. employees may find that section 2518 does simplify their work, it seems un-American to elevate the conver-

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\(^{350}\) One could argue that uniformity is more important than simplicity, but—as is self-evident—one must also concede that any rational policy decision must achieve a balance between the two.

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EXEMPTIONS

1993

755

Disclaimers

ience of the bureaucracy above the legitimate interests of the people. Granted, taxpayers can employ estate planning specialists who are fully competent to untangle the relationship between the federal and state rules, but why should such expensive expertise be necessary? Do we wish to limit the use of disclaimers to wealthy clients with large estates? Or should the disclaimer rules be simple enough that everyone can use them?

D. Disclaimers as Taxable Transfers

Some commentators have suggested a simplification strategy that is the converse of the proposal made here. They believe that all disclaimers should be treated as taxable transfers. The rationale for this view lies in the analogy between disclaimers and general powers of appointment. Under both concepts, an individual can choose between taking property personally or deferring to another recipient. Initially, Congress had difficulty in determining how to tax general powers, but it was ultimately agreed that the right to acquire property is tantamount to outright ownership. Accordingly, the exercise, release or lapse of a general power is now treated as a taxable transfer.

The same rationale might be applied to disclaimers. A blanket rule defining disclaimers as taxable transfers would put an end to the problem of determining which disclaimers are “qualified.” In addition, such a rule would simplify the federal tax laws and would, perhaps, increase revenues. Such a rule would also disassociate tax law from property law and it would place a new burden of uncertainty on taxpayers. Individuals with non-taxable estates would be free to disclaim, while taxpayers with larger estates would generally have to avoid disclaimers. Moreover, at the

351. See 5 Boris I. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 121.9.1 (1984) (suggesting that Congress could have achieved uniformity in disclaimer law “by legislation explicitly treating disclaimers as transfers”); see also Martin, supra note 13, at 356-69 (recommending that disclaimers should be considered equivalent to taxable transfers).

352. Justice Traynor has pointed out the analogy between disclaimers and general powers of appointment. See Kalt v. Youngworth (In re Kalt’s Estate), 108 P.2d 401, 403 (Cal. 1940) (“The principle that the exercise of a general power of appointment by a debtor may be a fraudulent conveyance as to his creditors clearly supports the rule . . . that a renunciation of a bequest by a legatee may likewise be a fraudulent conveyance.”).


355. For a discussion of the analogous rationales behind the tax treatment of general powers of appointment and disclaimers, see Bittker, supra note 351, ¶ 121.9.1.
moment of decision, potential disclaimants might not know whether their estates ultimately would be taxable. New traps for the unwary would be laid.

Imposing a transfer tax on all disclaimers would be unfair and unwise. It would interfere with long-established property law doctrine by creating a corresponding but diametrically opposed tax law doctrine. While tax law can be, and sometimes is divorced from property law, this has never been favored in our country. The common-law rule of disclaimers has a long and venerable history; disclaimers do serve important and legitimate purposes. To permit the I.R.C. to hobble this ancient rule of law would be imprudent and unnecessary. A better way to reduce conflicts between state and federal disclaimer laws is to eliminate section 2518 altogether and to forgo imposing federal transfer taxes on any validly disclaimed property.

E. Fairness for Taxpayers

Taxwriters seem to approach their work with the assumption that tax benefits are the motivating force behind almost every property transaction. This view is unfounded. As we have seen, there are many reasons why a person may wish to execute a disclaimer. Some individuals' motives are questionable—such as the desire to avoid creditors—and, as a society, we have yet to determine where we will draw the line in the more difficult cases. Different states have taken different positions on the hard issues, and that is as it should be. Gradually, the results of these varied approaches can be evaluated, and a consensus may be reached on how to handle the most serious disclaimer problems. Or, perhaps agreement will never be reached and regional differences will prevail. That, too, is reasonable in a federation of sovereign states.

It is unlikely that anyone will soon propose a federal law of property, but that is the direction in which the I.R.C. seems to be leaning. By trying to supersede state law, Congress creates two unfortunate trends. First, citizens will be less willing to participate in the governmental process because local efforts may appear fruitless. Excessive centralization can produce a variety of unfortunate consequences ranging from apathy to alienation.

356. See Morgan v. Commissioner, 309 U.S. 78, 80 (1940) (stating that federal revenue acts will designate whether interests or rights created by states will be taxed).

357. For a discussion of the uses of disclaimers, see supra notes 84-96 and accompanying text.
Second, preemption impedes the orderly development of local law. When decisions of the state legislatures and the state judiciaries are rendered insignificant, there is little impetus to produce a clear and coherent system of rules. The difficult problems are left unresolved.

Logic dictates that state law should control all important disclaimer issues. Federal disclaimer law is generally derived from the common law and does not differ in fundamental ways from the common law or most state statutes. What the federal law does is to superimpose on local law a very detailed and stringent set of restrictions that may distort the normal, expected course of events surrounding a disclaimer. It does not control the disposition of property; it creates a potential disparity between the disposition of property and the tax results of that disposition.

Without section 2518, the federal tax consequence of a disclaimer that is valid under state law will be obvious. The transfer will be taxed as if the disclaimed interest had never existed. Property will pass directly from the transferor to the substituted taker, and the transfer will be taxed accordingly. The question of whether the disclaimer is valid will be decided under state law and there will be no federal tax law questions.

It is clear that some federal tax law advantages may be gained by disclaimers. Where a bypass trust is underfunded because too much property is held in joint tenancy, where a marital-deduction trust fails to qualify because of poor drafting, where two spouses die in rapid succession and their property must be probated twice—in all these cases and others, taxpayers may be able to achieve tax savings through the use of disclaimers. Yet in none of these situations is there tax avoidance. Instead, a mistake is rectified; the inadvertent loss of a legitimate tax benefit is corrected. If we deny taxpayers the right to perform postmortem planning—that is, the right to take remedial action—we place undue emphasis on sophisticated and expensive representation. We enhance the perception that ordinary people pay taxes but the well-advised do not.

With respect to pre-1986 transactions and "grandfathered" trusts, section 2518 was, and still is, necessary. While not a perfect solution, it does keep some forms of tax avoidance in check. For current and future transfers, however, the GSTT has made section 2518 obsolete. Although some small amount of tax advantage can be prereserved under the GSTT—especially by leveraging the one million dollar exemption—this advantage is
deliberately provided by Congress and need not be policed by the continued presence of section 2518.\textsuperscript{358} Other than serving as a transition rule to deal with "grandfathered" trusts, section 2518 should be repealed entirely.

The chief advantages of discarding section 2518 are simplicity and fairness. Taxpayers and their representatives will have to work with only one disclaimer law: the property law of their domicile. Tax ramifications of a disclaimer will follow automatically and in a reasoned, predictable manner. If state disclaimer laws vary considerably, the burden of that complexity will fall on government lawyers who are specialists in the field. The use of disclaimers for legitimate purposes will no longer be circumscribed by rigid rules and interpretations invented by the I.R.S., and this important form of postmortem planning will be made more accessible to all. The ancient wisdom of the common law will be returned to its appropriate place of prominence in our legal system. Inertia and indifference are not valid excuses for retaining this obsolete and senseless statute; let us now renounce section 2518!

\textsuperscript{358} If the million dollar exemption constitutes a tax "loophole," the problem should be remedied directly by amending I.R.C. § 2631. Disclaimer rules are not the cause of this type of bonanza.