DISCLAIMERS:
WHEN, WHY & HOW
TO SAY "NO" TO AN INHERITANCE

By

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I. INTRODUCTION

A. General Background.

1. A disclaimer is a refusal to accept an inheritance or gift.

2. The disclaimer is a powerful estate planning tool. Predeath, an estate plan can be designed to keep options open using disclaimers that will fine tune an estate plan after death. Postdeath, the disclaimer can be used to reshape the dispositive scheme of the decedent in ways that accomplish tax or nontax results, transforming the plan into something entirely different from the decedent's original plan.

3. From a federal tax standpoint, if a qualified disclaimer is made (i.e., tax-qualified under Section 2518), the federal estate, gift and generation-skipping transfer tax provisions apply with respect to the property interest disclaimed as if the interest had never been transferred to the person making the disclaimer. A person making a qualified disclaimer is not treated as having made a gift to the person to whom the interest passes by reason of the disclaimer. In addition, the disclaimer is considered for purposes of the estate tax charitable and marital deductions. Reg. § 20.2055-2(c) and Reg. § 20.2056(d)(2). A qualified disclaimer of a general power of appointment is not treated as a release of the power. Reg. § 20.2041-3(d)(6). But if the disclaimer is not a qualified disclaimer, it is disregarded and the disclaimant is treated as having received the interest and made a subsequent transfer (and potentially as having made a gift). Reg. § 25.2518-1(b).

4. Although the Section 2518 regulations do not address income tax, disclaimers are given effect for income tax purposes in a general counsel memorandum (GCM 39858, September 23, 1991), several private letter rulings (PLRs 200435006, 200013041, 9710034, 9615043, 9609052 and 9232004), and in other regulations, such as the ones on required minimum distributions from retirement plans (Reg. § 1.401(a)(9)-4 Q&A 4). In PLR 200435006, a recent private letter ruling on the income tax effect of a disclaimer, the IRS ruled that a member of a federally recognized Indian tribe did not have to include in his income disclaimed quarterly payments of net gaming proceeds which would pass as a result of the disclaimer to the remaining enrolled (tribal) members per capita.

5. The criteria for a tax qualified disclaimer changed when the Tax Reform Act of 1976 added Section 2518 to the Internal Revenue Code, effective for transfers creating an

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interest after December 31, 1976, in the person disclaiming. Section 2518 provides rules that are fairly uniform no matter which state law applies. If the transfer creating the interest occurred before 1977, rules other than those set forth in Section 2518 apply. Those rules, however, still can be important when an individual desires to disclaim a property interest that was created before 1977. See IV for a discussion of disclaimers of pre-1977 transfers.

6. The Revenue Act of 1978 added a provision allowing a surviving spouse to receive an interest in property as a result of a qualified disclaimer by such spouse.

7. Under most, if not all state laws, unless the transferor of the interest (i.e., the donor or the decedent) has indicated otherwise in the instrument creating the interest, the person disclaiming is treated as if he had predeceased the donor (or decedent) or died before the date on which the transfer creating the interest was made.

8. The National Conference of Commissioners on Uniform State Laws approved and recommended The Uniform Disclaimer of Property Interests Act (1999) ("UDPIA 1999") at its annual conference in July 1999. As of December 31, 2022, twenty-three states have enacted the UDPIA (Alaska (2010), Arizona (2005), Arkansas (2003), Colorado (2011), Delaware (2006), Florida (2005), Hawaii (2000), Indiana (2003), Iowa (2004), Maine (2018), Maryland (2004), Mississippi (2020), Minnesota (2009), Montana (2019), Nevada (2007), New Hampshire (2021), New Mexico (2001), North Dakota (2003), Oregon (2001), Tennessee (2019), Texas (2015), Virginia (2003), and West Virginia (2002)) as well as the District of Columbia (2007) and Virgin Islands (2019).

B. Summary of Requirements.

1. The disclaimer must be irrevocable and unqualified. I.R.C. § 2518(b).

   a. In Estate of Monroe, 104 T.C. 352 (1995), rev'd, 124 F.3d 699 (5th Cir. 1997), the Tax Court stated that a disclaimer is not unqualified if it is induced or coerced, and then found disclaimers by employees and nonspouse relatives to be invalid because of the surviving spouse's efforts in obtaining the disclaimers. The Fifth Circuit, over one dissent, reversed this decision, finding that 23 of the 29 disclaimers were qualified. Focusing on actual consideration, the Fifth Circuit held that the facts did not show that the disclaimants had received consideration for their disclaimers. It sent back to the Tax Court the issue of the other six disclaimers in light of the Fifth Circuit's rulings of law. See also Estate of Lute v. United States, 19 F.Supp. 2d 1047 (D.C. Neb. 1998) in which the taxpayer also prevailed. Further discussion is at III.A.2.g.(3).

   b. In PLR 200234017, the IRS ruled that a surviving spouse who was also executrix could not make an effective QTIP election on the estate tax return for a marital trust that granted the surviving spouse a lifetime general power of appointment. The filing of the estate tax return with an attempted QTIP election did not effect a disclaimer of that power of appointment. The purported disclaimer did not meet state law requirements. It was untimely and nowhere on the return was there an irrevocable and unqualified refusal to accept the power of appointment.

c. In Production Credit Ass'n v. Mater (In re Estate of Mater), 8 P.3d 1274 (Kan. Ct. App. 2000), the executor, who was the widow, had incorrectly included in a probate inventory an undivided one-half interest in a piece of real estate as if had been held as tenants in common between the decedent and the widow, rather than as joint tenants with right of survivorship. A credit association sought to foreclose on the real estate which purportedly had been distributed to a son and subsequently mortgaged by the son. The credit association argued that the widow effectively disclaimed the interest in the real estate when she inventoried it and later "distributed" it to the son. The court ruled that actions constituting a disclaimer must be intentional and affirmative and that no disclaimer had occurred.

d. In Palmer v. White, 784 P.2d 449 (Ct. App. 1989), a disclaimer contained a provision that it would be null and void if a court of competent jurisdiction should determine that the effect of the disclaimer was other than to vest the disclaimed property outright and free of trust in the disclaimant. The court ruled that such a provision did not render the disclaimer invalid because the Oregon statute allows a person to declare the extent of her disclaimer.

2. The disclaimer must be in writing, must identify the interest in property disclaimed, and be signed either by the disclaimant or by the disclaimant's legal representative. A few states have requirements that the document be witnessed.

a. In Estate of Chamberlain, T.C.M. 1999-181, aff'd, 87 A.F.T.R. 2d (RIA) 2001-2386 (9th Cir. 2001), the court found none of these requirements had been met.

b. In another case, the Tax Court found a valid disclaimer when the attorney, under the oral direction of a vacationing disclaimant, signed the disclaimer. Estate of Robert L. Allen, T.C.M. 1989-111.

c. An oral representation that a beneficiary did not want a share of a malpractice award was found not to be a disclaimer because it was not in writing. Estate of Thomas, No. CA88-04-057, 1988 Ohio App. LEXIS 4592 (Ohio Ct. App. 1988).

d. In Daniel v. United Nat'l Bank, 505 S.E.2d 711 (W. Va. 1998), the surviving spouse and her stepdaughters sued the trustee of a family trust to compel distribution pursuant to an Agreement of Termination entered into by the surviving spouse and the stepdaughters. The beneficiaries argued that the agreement was effectively a disclaimer by the surviving spouse. The trustee contended, and the court agreed, that the agreement failed to meet several requirements of the disclaimer act, in that it did not declare the extent of the disclaimer, was not signed by the disclaimant (the letter to bank was signed by surviving spouse's attorney) and was not acknowledged in the same manner as a deed (no acknowledgment by surviving spouse). As the resolution of the case was limited to the determination of a disclaimer under the Uniform Disclaimer of Property Interests Act, the court noted that it did not consider whether some other statute might provide the surviving spouse with a right to disclaim.

3. The writing must be delivered to a particular person.

a. Under the Treasury regulations, the writing must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession. Reg. § 25.2518-2(b)(2).

b. If the disclaimer is of a testamentary bequest, most state laws provide that copies must be filed with the court where the estate is being administered and a copy either mailed or personally delivered to the personal representative. See, e.g., Va. Code § 64.2-2610(C). If the disclaimed property is real estate, generally a copy of the disclaimer must be recorded in the land records where the real estate is situated. See,e.g., Va. Code § 64.2-2613.

(1) In Garrett v. Vaughan (*In re* Vaughan), 261 B.R. 700 (Bankr. W.D. Okla. 2001), failure to comply with state law requirements resulted in a purported disclaimer being invalid under Oklahoma law and in an inheritance being reachable by the beneficiary's bankruptcy trustee. Debtor Vaughan filed a Chapter 13 bankruptcy on August 17, 1999. Vaughan's mother had established a family trust at her death with her husband, Henry, as the income beneficiary and Vaughan as a 50% remainder beneficiary. On April 1, 1998, approximately 16 months before filing bankruptcy, Vaughan executed a document stating that he disclaimed any and all interest in the family trust. He delivered the document to the trustee and to Henry but never filed it in any court as Oklahoma law required. Further, the document did not comply with the Oklahoma law requirement that a disclaimer must be signed, witnessed and acknowledged in the manner provided for deeds of real estate. Thus the disclaimer was invalid and the bankruptcy trustee could reach Vaughan's family trust interest which had become a present interest on July 5, 1998, when Henry died.

(2) In Estate of Brewington, 313 N.W.2d 182 (Mich. Ct. App. 1981), a disclaimer was invalid because it was neither made nor filed within the statutorily required ten months. The "disclaimant" died having eliminated a bequest of the property from her Will, obviously thinking that her (invalid) disclaimer had passed the property to the desired recipients.

c. If the disclaimer is of nontestamentary property, generally state laws provide that a copy must be delivered in person or by certain forms of mail (e.g., registered or certified) to the trustee or other person who has legal title to, or possession of, the disclaimed property. Again, if the disclaimed property is real property, the disclaimer must be recorded in the land records where the real property is situated. See, e.g., Va. Code § 64.2-2610.

(1) In Indiana Dep't of State Revenue v. Estate of Parker, 485 N.E.2d 1387 (Ind. Ct. App. 1985), a disclaimer by the decedent's daughter of her interest in a joint bank account was delivered to the correct party (bank) as it was the legal owner of the funds.

d. UDPIA 1999 Sections 12(c) - (l) address specifically to whom a disclaimer must be delivered in several situations. For example, Section 12(g) provides that "in the

case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer must be delivered to the person obligated to distribute the interest." This makes clear that, for example, a disclaimer must be delivered to the insurance company when the primary beneficiary is disclaiming insurance proceeds. Section 12(b) states that "delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in it receipt." The comments advise us that the rules of Section 12 are designed to notify anyone who has a duty to distribute.

4. Time for disclaiming.

   a. Under Section 2518, the deadline for a tax qualified disclaimer is nine months after the later of the date of the transfer or the date the transferee turns age 21. I.R.C. § 2518(b)(2). PLR 200333023 (disclaimer within nine months of turning age 21 and no acceptance after age 21 would be qualified disclaimer provided, as required under state law, the administrator accepts the disclaimer filed more than nine months after decedent's death).

   b. In many states, if the taker of the property or interest is not then finally ascertained, or his interest is not indefeasibly fixed both in quality and quantity, the deadline for a disclaimer is nine months after the interest is indefeasibly fixed both in quality and quantity. While a disclaimer made beyond nine months will not be tax qualified, as seen in this outline's section on Uses and Nonuses, tax is not always the paramount fact The time for disclaiming can vary depending upon the state.

   c. UDPIA 1999 eliminates all time limits. The drafters recognized that there were times when tax would not be the motivating factor and that a disclaimer should be permitted even if beyond nine months.

   d. Can a disclaimer be anticipatory? Under Louisiana law, a person may not accept or renounce rights to succeed before the death of the decedent. La. Civ. Code § 949 (2000). In Estate of Clem, No. 58,877 (Okla. Ct. App. Feb. 7, 1984), aff'd, 692 P.2d 552 (Okla. 1984), the court determined that a divorce petition did not operate as a disclaimer of property passing under a Will subsequently probated after the death of a spouse because a disclaimer of an inheritance cannot occur until death. Similarly, in Estate of Baird, 933 P.2d 1031 (Wash. 1997), the court disallowed the son's disclaimer which he had executed before his mother's death to avoid a judgment credit However, in Uber v. Hoffmann, 2002 Cal. App. Unpub. LEXI 4052 (2002), a creditor of a beneficiary was unable to reach an interest in revocable trust assets disclaimed while the debtor's mother was still living. Under the UDPIA 1999, there can be no anticipatory disclaimer because a disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable.

5. The disclaimant must not have accepted the interest disclaimed or any of its benefits. I.R.C. § 2518(b)(3). This also precludes the acceptance of consideration for the disclaimer. Reg.§ 25.2518-2(d)(i)(last sentence). See III.A, for a discussion of acceptance of benefits.

6. The interest disclaimed must pass either to the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer. I.R.C. § 2518(b)(4). See III.C, for discussion of this issue. This tax law requirement generally makes it necessary that the disclaimer be valid under state law.

7. Under the disclaimer statutes of many states (and UDPIA 1999 Section 13), a written waiver of the right to disclaim is a bar to disclaimer. See, e.g., Va. Code § 64.2-211(A).

8. The disclaimer statutes of a few states require that the disclaimer state if it is intended to comply with Section 2518 and a few require that a disclaimant or another person notify those who will be entitled to receive the disclaimed property.

C. Alternative of Section 2518(c)(3) - the Transfer Disclaimer.

1. Section 2518(c)(3) was added to the Code for transfers after December 31, 1981. The legislation was in recognition of the fact that state laws were varied and was meant to place taxpayers in the same position no matter the state in which they resided.

2. Under Section 2518(c)(3), certain transfers are treated as disclaimers. A written transfer of the transferor's entire interest in the property to a person who would have received the property had the transferor made a qualified disclaimer is treated as a qualified disclaimer if a transferor has not accepted an interest in the property and the transfer meets requirements similar to those under Section 2518(b)(2) (relating to timing and delivery).

3. In PLR 9135043, the Massachusetts disclaimer statute did not permit a surviving joint tenant to disclaim any portion of an interest in joint property allocable to amounts contributed by the disclaimant. Federal tax law, which at the time permitted a disclaimer of joint property, would have permitted a disclaimer of one-half of the property. The survivor disclaimed the survivorship interest in the property and was permitted to transfer the disclaimed one-half interest by deed to the person who would have received it had the disclaimer been valid under state law. Such actions met the requirements of writing, timeliness and delivery.

4. In TAM 9228004, the decedent, a resident of a community property state, bequeathed an income interest to her husband with the remainder to her sons. Within nine months of her death, the sons and surviving spouse entered an agreement, binding under Texas law, not to probate the Will and to allow the property to pass by intestacy. Under Texas' laws of intestate succession, the sons received the decedent's entire half of community property. The sons, both for themselves and their children, as permitted under Texas law with court approval, disclaimed everything other than $413,000. The IRS noted that everything could have been accomplished by disclaimers but still found that the facts evidenced a writing (i.e., the agreement) within nine months, no acceptance and a transfer to those who would have received the property by disclaimer (i.e., the agreement not to probate being the transfer) and thus met the requirements of Section 2518(c)(3).

5. In PLR 9610004, a surviving spouse attempted to argue that a court approved agreement between the surviving spouse and the children of the decedent not to probate a Will, but instead to have the decedent treated as intestate, constituted a qualified disclaimer under Section 2518(c)(3) by which property should be treated as passing directly to the

surviving spouse and therefore eligible for the marital deduction. Under the governing law (Virginia), however, if the surviving spouse and the children had all predeceased the decedent, the property would have passed in equal shares to the issue of the children. The agreement not to probate the Will failed to pass the property to the persons who would have received the property under a qualified disclaimer in that the grandchildren did not enter the agreement. Thus Section 2518(c)(3) was not available.

6. Be careful however. In PLR 200437032, the IRS recently took the position that, since the legislative history indicates that Section 2518(c)(3) was intended to apply in situations where the disclaimant could not effectively disclaim under local law but could satisfy federal requirements, Section 2518(c)(3) applies only if a state law disclaimer was not available to the transferor at the time of the transfer or assignment. In that ruling, the beneficiary was a member of a religious order and had taken a vow of poverty before the decedent executed her Will. Decedent's Will left all the residue to beneficiary and provided that if beneficiary predeceased, the residue was to be distributed to a religious order. The beneficiary, in her capacity as executrix, transferred the residue to the order, more than nine months after decedent's date of death. The IRS denied the charitable deduction. One of the Estate's arguments was that the actions constituted a transfer disclaimer under Section 2518(c)(3). The IRS disagreed. Its position was that Section 2518(c)(3) was not intended to be used in lieu of available state law disclaimer when state and federal law are consistent. Any other interpretation of Section 2518(c)(3) would make Sections 2518(a) and (b) superfluous. The IRS position also was that in any event, the transfer did not satisfy requirements of Section 2518(c)(3) because the assets were actually transferred by the beneficiary to the order more than nine months after the decedent's death and even if the vow is viewed as an act of transfer, the vow was not a written transfer from the disclaimant to the named person who would have received the property if a legal disclaimer had been made and the vow did not describe or designate the particular property being disclaimed or purport to assign the property to the order.

7. A state court relied on Section 2518(c)(3) in Estate of Lee, 589 N.Y.S.2d 753 (Sur. Ct. 1992), where the residuary beneficiary had signed a disclaimer within nine months but the attorney had placed it in his file without filing the disclaimer with the court. The beneficiary sought permission to file a late renunciation with the court and to have it treated nunc pro tunc as if it had been filed when executed earlier. The beneficiary was fearful that the failure to file with the New York court within nine months would result in a nonqualified disclaimer for federal tax purposes. The court said that Section 2518(c)(3) was all that was needed and accepted the late filing but not nunc pro tunc. Given the IRS position in PLR 200437032, the IRS might not concur with this court. See also Estate of Lute v. United States, 19 F.Supp. 2d 1047 (D.C. Neb. 1998).

8. See Sample Disclaimer 3, Appendix C, for a sample of language used to effect a transfer disclaimer when it was unclear whether the disclaimer on the first business day after the nine-month disclaimer period would qualify as timely under state law.

D. State Law Alternatives.

1. Some states provide by statute that if a disclaimer is valid under Section 2518, then it is valid under that state's law.

2. UDPIA 1999 Section 14 provides that any disclaimer which is qualified for transfer tax purposes under IRC Section 2518 will be a valid disclaimer. This will be helpful in situations like that which arose when the IRS finally allowed the disclaimer of tenants by the entirety property but state law did not permit such a disclaimer.

II. USES AND NONUSES

A. Charitable Deduction.

1. In the charitable area, disclaimers may be used to pass property directly to charity and thereby qualify for the charitable deduction under Section 2055. (Reg. § 20.2055-2(c) provides that property which passes directly to a charity as the result of a qualified disclaimer is eligible for the charitable deduction.)

    a. In PLR 8146038, the decedent left rental apartments to a trust, giving her surviving spouse the right to reside in one apartment and manage the project, with the remainder to charity. The surviving spouse disclaimed all interest in this nonqualifying split interest trust to qualify the bequest for a charitable deduction.

    b. In PLR 9113004, the decedent bequeathed an art collection to his son with the provision that a portion of any disclaimed artwork would pass to a museum. The son disclaimed artwork and a charitable deduction was allowed for the portion passing to the museum.

    c. In PLR 200052006, the decedent’s sister disclaimed interests in IRAs, an annuity contract, and a trust with the result that the benefits passed to a foundation.

    d. In PLR 200127007, the amount of property passing to a residuary charitable beneficiary was increased when the beneficiaries of marital trusts established under the predeceased spouse’s Will disclaimed the benefit conferred by the waiver of a Section 2207A right of recovery under the tax clause of the surviving spouse’s Will.

    e. In PLR 200149015, a child’s disclaimer of a portion of the residuary estate equal to a certain sum, reduced by the amount of inheritance taxes, resulted in the disclaimed property passing to a foundation under the terms of the decedent’s Will.

2. *Practice Pointer*. Remember, however, that disclaimed property must pass without any direction on the part of the disclaimant. Thus, when disclaimed property is to pass to a charity, the disclaimant must be careful not to retain any power to direct the disposition of the disclaimed property. Otherwise, the disclaimant would violate the requirement that the property pass without direction on the part of the disclaimant.

    a. In PLR 8626046, a disclaimer was used to increase the amount passing to a residuary charitable trust in what appeared to be a desire to fulfill the decedent's wishes. The children also were careful to disclaim the power to select alternate charities if the named charity did not qualify under Section 2055.

b. In several private letter rulings, the disclaimed property was destined for a private foundation of which the disclaimant was an officer or director. In some, the disclaimant gave up the position. PLR 9008011. In others, the disclaiming foundation officer was prevented from directing the use of the disclaimed property, either by the segregation of the disclaimed property to a separate account over which the disclaimant had no control or by amendments to the organizational documents of the foundation. PLRs 200420007, 200149015, 200127007, 199944038, 199929027, 199903019, 9823043, 9350033, 9323043, 9320008, 9317039, 9141017. See also PLR 9532027. The IRS, however, did permit the disclaimants' spouses or other relatives to have discretion over the disclaimed property. PLRs 9350032, 9319022, 9235022, 9008011.

3. The Tax Reform Act of 1969 added Section 2055(e)(2) which generally prohibits a deduction for a remainder interest to charity unless the trust is in the form of a charitable remainder unitrust or annuity trust. This requirement does not apply if the decedent did not amend any dispositive provision of a Will after October 9, 1969 and before October 9, 1972, and the decedent was on October 9, 1972 and at all times thereafter under a mental disability. Reg. § 20.2055-2(e)(3)(i)(C). In some instances, a disclaimer may result in a trust being able to qualify for this grandfathering under the 1969 Act. In PLR 8202126, a decedent (who met the mental disability requirement) left 75% of his estate residue in trust, with income to his sister and remainder to charity. The trustee was permitted to invade principal up to 10% per year for the sister. The sister's disclaimer of the right to receive discretionary principal distributions qualified the trust remainder for a charitable deduction.

   A disclaimer may be used to shape a nonqualifying split-interest trust into a reformable trust. Sometimes a nonqualifying split-interest trust can be reformed when it does not satisfy the criteria for a charitable remainder trust, such as when a trust's provisions require the distribution of all income to an individual with the remainder passing upon the individual's death to charity. I.R.C. § 2055(e)(3). However, a trust is not reformable if it permits discretionary distributions of principal to an individual. A disclaimer may be used to eliminate a power to make discretionary distributions. For example, in PLR 9004011, under a trust which became irrevocable at death, the trustee was directed to pay the income in equal shares annually to four individuals and to the survivor of them. In addition, the trustee could invade principal for the care and maintenance of the individual beneficiaries. Upon the death of the last individual, 75% passed to four named charities and 25% to an individual. Because the income beneficiaries disclaimed the right to receive discretionary invasions of principal, the estate was able to reform the trust into a charitable remainder annuity trust, holding 75% of the property, and an income trust, holding 25% of the property. In TAM 9123023, one beneficiary disclaimed the right to receive discretionary invasions of principal while another disclaimed a contingent remainder interest. See also PLRs 200428013, 200302029, 200232015, 200230022, 200006052, 9852034, 9827010, 9823037, 9716019, 9633004, 9610005, 9549016, 9529042, 9527040, 9349010, 9341003, 9347013.

4. A disclaimer may be used to increase the portion of a charitable remainder trust eligible for the charitable deduction. In PLR 200234038, the grantor had created a trust in which three individuals and two charities had income interests with the remainders passing to the two charities at the death of the last of the three individuals. Before various

severances were made to position the trust for reformation, the estate of one of the individuals disclaimed all interests in the trust, thereby decreasing the amount which would be allocable to noncharitable interests and increasing the amount of the charitable deduction.

5. *Practice Pointer*. Disclaimers can be used to plan predeath for an optional charitable deduction. If charitable goals are a part of a testator's estate plan, the planner may wish to draft a bequest, to a spouse or other family member, of the assets intended for charity, with a provision that if the beneficiary disclaims the assets, the disclaimed assets pass to charity. This strategy may preserve a potential charitable income tax deduction given the increasing Applicable Exclusion Amount. If the testator dies after the repeal of estate taxes or at a time when the decedent's Applicable Exclusion Amount is sufficient to eliminate estate taxes for the decedent, the noncharitable beneficiary may wish to accept the assets which the decedent intended to pass to charity and then make a charitable contribution, eligible for an income tax deduction, to the charity. If an estate tax otherwise would be generated without the estate tax charitable deduction, the noncharitable beneficiary can disclaim as much of the bequest as necessary to reduce estate taxes to a minimum.

B. Marital Deduction.

1. Disclaimers may be used to increase the amount passing to the surviving spouse where someone other than the surviving spouse receives "too much" property by bequest, survivorship or under state laws.

   a. Pretermitted children executed formula disclaimers so that property would pass to the surviving spouse. PLR 8145036.

   b. All intestate beneficiaries other than the surviving spouse disclaimed so that property passed to surviving spouse. PLR 8409089.

   c. Formula disclaimers whereby children disclaimed bequests other than that which could be sheltered by the decedent's unified credit. PLRs 200303020, 8514095, 8439007. See Formula #1, Appendix A.

   d. Decedent left the residue of his estate in five equal shares to his four sons and his spouse. Disclaimers by the children left the spouse as the only residuary beneficiary. PLR 8610033. See also PLRs 9251019, 9051007.

   e. Children disclaimed their interests as co-tenants of various joint bank accounts so that the interests passed to the surviving spouse through the decedent's probate estate. PLR 8625001.

   f. Minor children, through a guardian ad litem, executed formula disclaimers of interests in nonmarital trust and of remainder interests in a marital trust to cause certain property to pass into a QTIP trust. PLR 200130034.

   g. In many private letter rulings, the property passing to the surviving spouse was increased by either creating intestacy or relying on a failure-of-descendants clause

which passed property to the surviving spouse. PLRs 200303020, 200006052, 9733006, 9638014, 9629023, 9310020, TAM 9301005, PLRs 8712012, 8708069, 8650047, 8514044, 8402121, 8301040, 8245036.

h. As the Applicable Exclusion Amount increases, a cohesive family may wish to use disclaimers to pass more property to the surviving spouse, not to obtain a greater marital deduction, but because she has been left with too little under formulas which send the Applicable Exclusion Amount to a family trust or out right to nonmarital family members.

i. See Case Study 1, Appendix B. See also PLR 200303020 for another situation where a series of disclaimers was used to pass property outright to the surviving spouse.

2. Terminable interests, as described in Section 2056 (b)(1), generally are not eligible for the marital deduction. Disclaimers, however, can be used to convert a nondeductible terminable interest into an interest which is eligible for the marital deduction.

   a. In PLR 8301040, the surviving spouse was given the income from property until the earlier of her death or remarriage. The surviving spouse's interest in the property was terminable. The spouse and daughter disclaimed so that the property passed by intestacy to the surviving spouse.

   b. In TAM 9301005, the decedent left the residence to his surviving spouse for as long as she wished to occupy it. Again, this bequest was a terminable interest and was one which would not qualify for the QTIP election. The spouse and all remaindermen disclaimed so that the residence passed by intestacy to the surviving spouse.

   c. In PLR 200006052, the decedent and his spouse had a joint Will which provided that upon decedent's death, the entire estate passed to surviving spouse outright, but upon the surviving spouse's remarriage, one-half of the assets owned by the decedent and the surviving spouse were to pass immediately to their child. Further, upon the surviving spouse's death, the remaining estate was to pass to their child, and if the child was not living and had no issue, to a named charity. The spouse disclaimed all interests under the Will. The child disclaimed all interests other than the maximum amount which could pass free of transfer taxes and the charity disclaimed all amounts it would be entitled to receive by virtue of the child's disclaimer. The disclaimed property passed outright by intestacy to the surviving spouse, thereby becoming eligible for the marital deduction.

3. A frequent use of disclaimers in conjunction with the marital deduction is to shape a trust to qualify the trust for the QTIP election by eliminating the power of someone, either the surviving spouse or a trustee, to invade the trust for someone other than the surviving spouse. Estate of Lassiter v. Comm'r, 80 T.C.M. (CCH) 541 (2000), PLR 200222024, 200030012, 199949023, TAM 9247002, PLRs 9226059, 9148021, 9148018, 9119047, 8935024, 8906036, 8815038, 8725063, 8638016, 8637044, TAM 8618067, PLR 8609014, TAM 8546007, PLRs 8544019, 8543009, 8508009, TAM 8443005, PLRs 8429085, 8337069, and 8309030. When it is the trustee who holds the power, the

permissible recipients of principal invasions usually must be the ones disclaiming. See III.D. for a discussion of disclaimers of fiduciary powers. In Estate of Avery, 476 N.Y.S.2d 1013 (Sur. Ct. 1984), the parties wanted to qualify one-half of a trust as a QTIP trust, so the daughter disclaimed her right to receive one-half of the income remaining at the surviving spouse's death, causing it to pass to daughter's only heir-at-law, her mother, thus satisfying the requirement that the stub income be paid to the surviving spouse estate. The court then split the trust into two trusts so that the portion to which the disclaimer applied qualified for the QTIP election. In PLR 200234017, the failure of the surviving spouse to timely disclaim her lifetime limited power of attorney rendered a marital trust ineligible for the QTIP election.

4. Section 2056(b)(8) provides, generally, that if the surviving spouse of the decedent is the only noncharitable beneficiary of a qualified charitable remainder trust, Section 2056(b)(1) will not apply to disallow the marital deduction. That is, the value of the annuity or unitrust interest passing to the spouse will qualify for the marital deduction and the value of the remainder interest will qualify for a charitable deduction. In PLR 200204022, disclaimers were used to make the surviving spouse the only noncharitable beneficiary of a charitable remainder trust to meet the requirements of Section 2056(b)(8). The decedent and spouse established a charitable remainder unitrust ("CRUT") and funded it with jointly-held securities. The CRUT terms provided for a joint and survivor unitrust payment to the decedent and spouse. Upon the death of the survivor of decedent and spouse, a joint and survivor unitrust payment was to be made to the decedent's son and daughter. The CRUT trustees proposed to divide the CRUT into two equal trusts, each funded with one grantor's contribution and each with identical terms. The son and daughter would disclaim their interests in the CRUT holding the assets attributable to decedent's contribution. They also would disclaim their power to select the charitable remainder beneficiary if the named beneficiary lost its charity status. (This was to satisfy the rule which prohibits a disclaimant from directing the distribution of disclaimed property.) As a result of the qualified disclaimers, the decedent's CRUT met the requirements of Section 2056(b)(8).

5. Under a transitional rule, the allowable marital deduction for property passing from decedents dying after December 31, 1981, to a surviving spouse under a maximum marital deduction formula provision in a Will executed or trust created before September 12, 1981, is limited to the greater of $250,000 or 50% of the decedent's adjusted gross estate. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403 (e)(3), 95 Stat. 172, 305 (1981), reprinted in 1981-2 CB 256, 325. A disclaimer may be helpful to avoid this limitation. In some instances, disclaimers are used to qualify a trust, particularly the family trust, for a QTIP election (PLRs 9018046, 8824066, 8817031, 8706066, 8704023, 8501033) and in others they are used to pass more property directly to the surviving spouse (PLRs 9115062, 8914045, 8807026, 8622018, 8510023).

6. A disclaimer can be used to change the nature of the marital deduction. In PLR 9043055, the surviving spouse disclaimed a general power of appointment over a marital trust intended to qualify for the marital deduction under Section 2056(b)(5). The disclaimer resulted in trust meeting the criteria for a QTIP election under Section 2056(b)(7) and the executor was able to make only a partial QTIP election.

7. When it is not known whether the surviving spouse will be a United States citizen at the death of the first spouse, the first spouse could make an outright disposition to the surviving spouse but provide that any assets disclaimed by the surviving spouse are to flow to a qualified domestic trust.

8. A surviving spouse can make a qualified disclaimer of an interest in property created by a decedent even if the executor of the estate elects, before the disclaimer is made, to treat the property as qualified terminable interest property under Section 2056(b)(7). In that case, the marital deduction is not allowable. Rev. Rul. 83-26, 1983-1 C.B. 234.

9. Historically, a disclaimer can be used to obtain a marital deduction for a failed GRIT. In PLR 9340052, the decedent had established a six-year GRIT and died two years into it. Under the terms of the GRIT, the decedent had retained a general power of appointment if he died during the first five years. He failed to exercise the power of appointment. The takers in default of appointment were the children or their estates. All children and grandchildren disclaimed so that the property passed by intestacy to the surviving spouse.

10. Disclaimers may be used to increase the amount of property passing to the spouse to avail of a basis adjustment at the surviving spouse's death.

C. Equalize Estates or Produce Lowest Combined Estate Taxes.

1. Disclaimers may be used to produce the lowest combined estate taxes when both spouses die within nine months of one another. If spouses die within nine months of one another, disclaimers, including formula disclaimers, can be used to produce the lowest combined estate taxes.

2. In PLR 200030011, in which the goal must have been to equalize estates, the executor of the surviving spouse's estate was allowed to return to the decedent's estate property which had been transferred from the decedent's estate to the surviving spouse's estate after the surviving spouse's death and to disclaim that retransferred property. See further discussion at III.A.3.a.(3).

3. In PLR 8338116, the surviving spouse died one month after the decedent. The estate of the surviving spouse disclaimed property under an involved formula designed to equalize the estates. See Formula #2, Appendix A.

D. Tax on Prior Transfers Credit.

1. In some instances disclaimers can be used to make use of the credit under Section 2013 for the estate tax on prior transfers ("TPT Credit"). The general rules for a TPT Credit are that if (i) a second decedent dies within two years before or ten years after the first decedent, and (ii) the first decedent paid estate tax on property transferred to the second decedent, then the second decedent's estate is entitled to a credit equal to the lesser of the estate tax paid by the first decedent's estate or the estate tax paid by the second decedent's estate on the included property if the second decedent died within two years of the first decedent. If the second decedent died more than two years after the first decedent, the credit decreases as the number of years between the two deaths increases.

2. In TAM 8512004, the decedent bequeathed to his surviving spouse an amount in value equal to the maximum marital deduction resulting in no estate tax. The residue of the decedent's estate was to pass to a trust which required that the income be paid quarterly to the surviving spouse. The surviving spouse died three months after the decedent and her estate renounced the pecuniary marital bequest. This resulted in the disclaimed property passing as part of the residue into trust. The reduction in property qualifying for a marital deduction created an estate tax in the decedent's estate and the surviving spouse's estate was able to obtain a credit for estate tax on prior transfers for the property included in both estates (i.e., the actuarial value of the income interest in trust). The IRS permitted the disclaimer, ruling that it was not an attempt to waive the marital deduction. See In re Estate of Lacks v. Dep't of Treasury, 662 N.W.2d 54 (Ct.App.Mich. 2003), in which the surviving spouse of the second decedent (son of first decedent who had died one month earlier) disclaimed property so as to create an estate tax in the second decedent's estate which would be credited fully under Section 2013.

3. See Case Studies 2 and 2A, Appendix B.

E. Use Rate Brackets or Achieve a Certain Tax.

1. Disclaimers might be used in a situation where the surviving spouse is willing to have a specific amount, but no more, paid in estate taxes. In PLR 9513011, the surviving spouse disclaimed residue using a formula to generate a specific dollar amount of tax.

F. Obtain a Greater State Death Tax Credit.

1. In years of decreasing credit for state death taxes, by causing property to be taxed in the estate of a spouse who died in an earlier year, but within nine months, there could be a greater state death tax credit in the earlier year.

2. See Case Study 2A, Appendix B.

G. Obtain Basis Step-Up.

1. A surviving spouse who is the residuary beneficiary under the decedent's Will (or revocable trust) may be able, through disclaimers, to obtain more favorable basis adjustments in securities held jointly with right of survivorship. If a security was (i) in a bank, brokerage or other similar account held jointly with the decedent, (ii) the decedent furnished all the consideration and (iii) the decedent could have unilaterally regain control of the property interest, then the surviving spouse may disclaim the entire security or account (see III.L.3), causing it to pass through the probate estate and thence to the spouse by the residuary clause. With full inclusion of the asset in the gross estate, the spouse will obtain a complete basis step-up. This technique might be useful for those cases where the holding of Gallenstein v. United States, 975 F.2d 286 (6th Cir. 1992), is not available or applicable.

2. If the security was held in certificate form (and assuming nonavailability of Gallenstein), the same technique may enable the surviving spouse to obtain a bifurcated basis, rather than a blended basis, in the security. For example, assume that at husband's death, he and wife owned, with right of survivorship and in certificate form, 100 shares of ABC

stock worth $100 per share and with zero basis. Without a disclaimer, the surviving spouse will own 100 shares of stock with each share having a basis of $50. If the surviving spouse disclaims the survivorship interest in the security and receives one-half of the security through the residuary clause, then, arguably, she will own one block of 50 shares with a basis of $100 per share and one block of 50 shares with zero basis per share. The surviving spouse then would be able to diversify with less income tax exposure.

H. Generation-Skipping.

1. A disclaimer may be used to pass property to a lower generation. In PLR 9447033, the decedent left the residue of her estate to her two first cousins. One cousin executed a complete disclaimer of the bequest and the other executed a partial disclaimer so that the property passed to their children. This skipped the generation of the first cousins and avoided the inclusion of the property in their estates for a second time. See also PLRs 9625033, 9109058, 8752028, 8721012, 8647044, 8509092.

2. Another use of disclaimers in the generation-skipping area is to assure the use of generation-skipping transfer tax exemption. PLRs 9822014, 9815046, 9537005, 9232024, 9210014.

a. In PLR 9210014, the daughter of the decedent disclaimed property by formula so that an amount equal to the decedent's unused generation-skipping transfer tax ("GSTT") exemption passed to previously existing Gallo trusts for grandsons. The grandsons then disclaimed their general powers of appointment over the added property. See also PLR 9038051.

b. In PLR 9232024, the decedent's Will divided his estate into a family trust and a marital trust. Under the Will, any disclaimed property was to be added to a separate "disclaimer" trust, with terms identical to the family trust. Upon the surviving spouse's death, the family trust and the marital trust were to merge with one-fourth passing to a son and the balance passing to trusts for grandchildren. The surviving spouse executed a formula disclaimer of the marital trust so that the aggregate value of the family trust and the disclaimer trust, after considering all taxes, administration expenses, claims, debts and other expenses properly chargeable, would be $1,333,333. They then proposed to merge the family trust and disclaimer trust under state law followed by a division, pursuant to court order, of the merged trust into two trusts, one containing 25% of the property, which would pass upon the surviving spouse's death in its entirety to the son, and the other containing 75% of the merged trusts' assets (equal in value to the decedent's GSTT exemption), which would pass upon the surviving spouse's death in its entirety to grandchildren. The IRS permitted the allocation of the decedent's GSTT exemption to the trust ultimately payable to the grandchildren.

c. *Practice Pointer*. In predeath planning, a trust or Will could provide that if a child disclaimed property, the property would pass to a trust for the benefit of the disclaimant's descendants. The disclaiming child, if also a trustee, could not have any power to make discretionary distributions from the trust (or the disclaimer would not be tax qualified because the disclaimant would be directing the distribution of the disclaimed property). See III.B.3. An alternative approach

would be for the decedent to leave property in trust with income to be distributed to the child, remainder to grandchild, and grant a general power of appointment to the child. If merger does not occur under state law, the child could elect to disclaim the power of appointment, causing a generation skip of the remainder but preserving an income interest for life in the child.

3. Though no longer applicable, in many private letter rulings, disclaimers were used to avail of the Gallo exemption from the GSTT. PLRs 9044075, 9031011, 9009007, 9008034, 9007034, 9004015 (Formula #3, Appendix A), 8946060, 8922082, 8921083, 8919017, 8907028, 8907011, 8810076.

   a. In PLR 9009007, the decedent bequeathed the residue of her estate to a trust which would pay income to her siblings with the residue passing outright to grandchildren. The siblings disclaimed all interest in the trust greater than $1,000,000 so that the property passing outright to the grandchildren qualified under Gallo and the GSTT exemption was used.

4. Disclaimers may be used to create a reverse QTIP trust. PLRs 9537005, 9104048, 9048045, 9028005.

   a. In PLR 9028005, an individual established a revocable trust. Upon his death, the surviving spouse was entitled to all of the income from the trust and was granted both an inter vivos and a testamentary general power of appointment. The surviving spouse disclaimed the powers of appointment over one-half of the trust. The executor commenced proceedings in the local court to reform the trust into three trusts, one comprised of one-half of the original trust's assets, a second to hold an amount equal to the decedent's unused GSTT exemption and the third to hold the balance. The IRS permitted the executor then to make both a QTIP election and a reverse QTIP election for the second trust.

   b. In PLR 9523031, the children disclaimed the remainder interest in a fractional share of the marital trust so that the personal representative could sever the trust, as permitted under terms of document, and make a reverse QTIP election and allocate GSTT exemption.

5. Certain transfers are "grandfathered" so that they are not subject to the generation-skipping transfer tax. Disclaimers can be useful to avail of those grandfathering provisions.

   a. If an individual was mentally incompetent on October 22, 1986, and that incompetency continued until the decedent's death, the generation-skipping tax laws are not applicable to transfers from that decedent to skip persons. In several private letter rulings, disclaimers by nonskip persons resulted in property passing to skip persons. The IRS ruled that a trust exempt under the "mental disability" rule in Section 1433(b)(2)(C) of the 1986 Tax Reform Act (see Reg. § 26.2601-1(b)(3)) does not lose its exemption when a qualified disclaimer made by trust beneficiaries creates generation-skipping transfers. PLRs 9534006, 9340027, 9214012, 9111011, 9034057, 8815034.

b. Another use of disclaimers is to use GSTT grandfathering in conjunction with a power of appointment grandfathered as a pre-1942 general power of appointment. PLRs 199942010, 9842060, 9447021, 9424064, 9424063, 9424062, 9340053, 9245011, 9226013, 9051012.

(1) In PLR 9226013, a pre-1942 general power of appointment under a trust was not includible in the decedent's estate because she had not exercised the general power of appointment. The decedent's daughter disclaimed shares of stock held in the trust, causing the stock to pass to grandchildren of the decedent. Further, because the trust was irrevocable on September 25, 1985, the IRS ruled that it was exempt from the GSTT provisions and the lapse of the decedent's general power of appointment was not an addition to the trust because the trust was not includible in the decedent's gross estate.

(2) In PLR 9245011, an individual released a testamentary general power of appointment which she held over property in an irrevocable trust created before 1942. Within nine months of the release, the individual's children and some of her grandchildren disclaimed all beneficial interests in and powers over the trust. The IRS ruled that the disclaimers were qualified disclaimers and did not subject the trust to generation-skipping transfer tax.

6. In some instances, a disclaimer may be used to avoid a generation-skipping transfer tax. PLRs 9203028, 9014005.

a. In PLR 9014005, the decedent's inter vivos revocable trust was to pass at her death to her two grandchildren, or their issue, when the youngest surviving grandchild reached age 30. If none of the grandchildren or their issue survived, the property was to pass to the decedent's daughter. In addition, the decedent exercised a limited power of appointment over a residuary trust created in her predeceased spouse's Will by appointing the property to the trust created in her revocable trust. No additions had been made to the residuary trust since September 25, 1985. The grandchildren proposed to disclaim all their respective interests in the decedent's trust except for (i) a fractional interest of an undivided four-sevenths (4/7) in the real property of the revocable trust, and (ii) their interests in any assets passing pursuant to the exercise of the limited power of appointment over the predeceased spouse's residuary trust. The IRS ruled that the disclaimed property would be treated as passing directly to a nonskip person.

b. In PLR 9203028, the decedent left the residue of her estate equally to her three grandchildren. The grandchildren proposed to disclaim under a formula all the bequest other than the amount which could pass free of generation-skipping transfer tax. A guardian ad litem for the great-grandchildren would disclaim all interest in the residue with the result that the disclaimed property would pass to the decedent's daughter. See Formula #4, Appendix A.

c. In PLR 9638014, the decedent's Will divided the residue of his estate into two trusts, one for each of his two children with the residue to two grandchildren or their issue. To increase the marital deduction and yet preserve the use of the generation-skipping transfer tax exemption, the children disclaimed their interest

in the trusts, the grandchildren disclaimed all of their interest in the trusts except for $500,000 each, and great-grandchildren, through guardians, disclaimed their interests in the trusts. The lapsed residue passed via intestacy to the surviving spouse and children.

d. In PLR 200001045, a grandson disclaimed, by formula, the amount of trust property greater than the decedent's available GSTT exemption so that the property would pass to the residuary estate for the benefit of decedent's daughter.

7. In some instances, a GSTT may be reduced by changing the nature of the generation-skipping transfer. For example, if a transferor's GSTT exemption has been used completely and he leaves property in trust to benefit both his children and grandchildren, the children can make qualified disclaimers of their interests in the trust, making the trust a skip person and the transfer to the trust a direct skip. Otherwise, a much more expensive (tax-wise) taxable termination will occur at the death of the last child.

8. A nontax use of disclaimers in the generation-skipping area would be to avoid having "too much" property pass to lower generations. Many existing estate planning documents contain formulas availing of the decedent's unused generation-skipping transfer tax exemption. As the exemption increases, far more assets may pass to or for the benefit of the grandchild or lower generations than a testator would have intended. For example, suppose the estate plan of an incompetent decedent with a $5,000,000 estate contains a formula bequest to grandchildren equal to the decedent's remaining GSTT exemption with the balance to decedent's children. If the GSTT exemption reaches $3,500,000, the bulk of decedent's estate will pass to grandchildren. Disclaimers may be able to shift the property back to the generation of the children.

I. <u>Retirement Benefits</u>.

1. There are several uses of disclaimers in conjunction with retirement benefits. One is to pass the benefits to someone other than the named primary beneficiary. GCM 39858, PLRs 9442032, 9319029, 9303027, 9226058, 9037048, 9016026, 8922036.

a. The rulings find that the ultimate recipient, not the disclaimant, is taxed on the income associated with the disclaimed benefits. This strategy could be used in the situation where the Will of the decedent has left the residue equally to all his children, the decedent has designated one child as the beneficiary of retirement benefits, and that child wishes to share the benefits with his siblings. Rather than the one child being taxed on the entire income at a higher rate and then making annual exclusion gifts to his siblings, the designated child could disclaim the benefits and allow the benefits, together with the income tax liability, to pass equally to all children through the Will's residuary clause.

2. Disclaimers may be useful to complete the funding of the Applicable Exclusion Amount by using retirement benefits. PLRs 9630034, 9537005, 9247026, 8838075.

a. *Practice Pointer*. In pre-death planning, one can plan for the post-death use of disclaimers in conjunction with retirement benefits by the participant designating

the surviving spouse as the beneficiary but providing that any disclaimed benefits are to flow to a family trust. See, e.g., PLRs 9723028, 9551015, 9537005. See Sample 1, Appendix D.

3. A disclaimer of retirement benefits also might be used to complete the funding of a generation-skipping transfer tax exemption.

   a. In PLR 9537005, retirement benefits disclaimed by the surviving spouse passed to a residuary trust, pursuant to the designation of contingent beneficiary. The residuary trust was divided, pursuant to authority granted the trustee, into various separate trusts, including one for which a reverse QTIP election could be made. The disclaimer planning was designed to use retirement benefits, the decedent's only significant assets, to fund the decedent's unified credit and generation-skipping transfer tax exemption. However, one must be very careful with the designations. Benefits must pass pursuant to the designation, and not via state law, for the beneficiary to meet the criteria of designated beneficiary under the retirement benefits rules. Reg. § 1.401(a)(9) - 4(A-1).

   b. In PLR 200105058, retirement benefits passed into a QTIP trust because the surviving spouse, who was the named beneficiary, disclaimed them as well as a limited power of appointment over the QTIP-eligible trust. GSTT exemption was allocated. No QTIP election was made and because of the QTIP trust benefits accorded to the surviving spouse, it was ruled that Section 401(a)(9)(B)(iv) applied and distributions did not have to commence until December 31 of the year the employee/participant/decedent would have turned 70 ½.

4. A surviving spouse is the only beneficiary of retirement benefits who may roll over benefits into her own IRA. In a situation where the surviving spouse is not the designated beneficiary, a disclaimer may be used to qualify the benefits for a spousal rollover. PLRs 200447040, 200124030, 200101038, 9847026, 9835005, 9752072, 9623064, 9615043, 9609052, 9247026, 8838075.

   a. In PLR 9247026, the surviving spouse and all other beneficiaries of a trust to which the retirement benefits were going to pass executed disclaimers of their interest in the retirement benefits. As result of disclaimers, the benefits became payable under the plan to the surviving spouse who could effect a qualifying rollover.

   b. In PLR 9437042, an attempt to obtain rollover capability for the surviving spouse failed. The deceased participant had designated his estate as the recipient of the plan benefits. The residue of his estate was to pass to a trust. The estate and all beneficiaries of the trust attempted to disclaim their interest in the plan benefits so that under the plan the benefits would pass to the surviving spouse. The IRS ruled that the estate's disclaimer was not qualified because the deceased participant had exercised dominion and control over his interest in the plan.

5. Prior to the Secure Act, the rules under Section 401(a)(9) required an annual minimum distribution based on the life expectancy of the designated beneficiary (or the life expectancy of the oldest trust beneficiary if a trust qualifies as a designated beneficiary).

Disclaimers could be used to change the designated beneficiary for purposes of determining the distribution period or to eliminate a beneficiary so that a "designated beneficiary" existed.

a. In PLR 200013041, the personal representative of the surviving spouse's estate (the surviving spouse having died several days after the decedent) disclaimed retirement benefits to pass them to contingent beneficiaries, adult children, who would be designated beneficiaries for purposes of determining the Section 401(a)(9) distribution period.

b. In PLR 200208033, the oldest of five siblings disclaimed to change the designated beneficiary. See also PLR 200234074.

c. In PLR 200438044, the surviving spouse possessed a limited power of appointment to appoint, at her death, subtrusts (i.e., the marital and family trusts) among the decedent's descendants and their spouses. She disclaimed that power. Because of the disclaimer, the terms of the trust document, and the decedent's children all had attained age 30, the children had vested remainder interests. As a result, the only beneficiaries of the trust were the surviving spouse and the children, and the trust qualified as a "see-through" trust.

d. In PLR 200444033, the decedent, who had reached her required beginning date, named Trust, by means of beneficiary designation, the beneficiary of her IRA. The assets were to be held in trust for the life of the decedent's sister, with the remainder to the decedent's nieces. The sister disclaimed her interest in the IRA and pursuant to terms of Trust, the IRA became payable to the nieces. The ruling permitted trustee to trustee transfers and the division of the one IRA into separate inherited IRAs for each niece but required that minimum distributions be made over the oldest niece's life expectancy because the regulations under Section 401(1)(9) preclude separate account treatment where amounts pass through trusts.

e. The final regulations for determination of the designated beneficiary, issued April 16, 2002, and effective January 1, 2003, state that if a person disclaims entitlement to the employee's benefit pursuant to a disclaimer qualified under Section 2518 before September 30 of the year following the year of the employee's death, the disclaiming person is not taken into account in determining the employee's designated beneficiary. Reg. § 1.401(a)(9)-4.

f. However, the retirement benefits must pass pursuant to the beneficiary designation. In PLR 200327059, the surviving spouse, the named beneficiary of a decedent's IRA, disclaimed a portion of IRA. As a result of the disclaimer, the disclaimed portion of the IRA passed into the decedent's estate and pursuant to Decedent's Will into a trust. The IRS ruled that, although the trust may have qualified as a "see-through trust" under Section 401(a)(9), the trust was not the named beneficiary of the disclaimed portion of the decedent's IRA. Therefore, the life expectancy of the eldest beneficiary of the trust could not be used to compute the minimum distribution required under Section 401(a)(9). This is why, in pre-death planning, a beneficiary designation should name the target trust as the contingent or alternate beneficiary.

6. In Steiner v. Bank One Indiana, 805 N.E.2d 421 (Ind. Ct. App. 2004), Vanguard refused to pay retirement benefits to the decedent's trust unless the decedent's ex-wife, the named beneficiary, signed a disclaimer. The decedent's estate brought an action to compel the decedent's ex-wife to sign a disclaimer of IRA benefits as the ex-wife had contracted to do in a property settlement agreement. The court found the ex-wife to be in breach of contract for refusing to execute the disclaimer and awarded the opposing side costs and attorney fees. This is an example where a disclaimer could have been used to fulfill a property settlement agreement.

7. The case of Nickel v. Estate of Estes, 122 F.3d 294 (5th Cir. 1997) causes great concern as to how a court might strictly construe the ability to disclaim for a deceased beneficiary of retirement plan proceeds. See III.F.7.

8. Formerly, a disclaimer of retirement benefits could be used to take advantage of the exclusion under the now repealed Section 2039(c).

   a. In PLR 8546115, the surviving spouse disclaimed her interest as the primary beneficiary in the profit-sharing plan benefits so that they passed outside the Will (and thus were not payable to the executors) and into the marital trust. The trustees proposed to divide the marital trust into two trusts, one containing the disclaimed profit-sharing benefits (and for which a QTIP election would not be made) and the second containing the balance of the trust assets. The IRS ruled that the benefits qualified for the exclusion so long as they were not payable to the estate.

   b. *Practice Pointer*. While the exclusion is generally not available anymore, the unlimited exclusion remains available for the estate of any decedent-participant who was in pay status on December 31, 1982, with respect to such interest, and who had irrevocably elected the form of benefit payable under the plan or IRA (including the form of any survivor benefits) with respect to such interest before January 1, 1983. Reg. § 20.2039-1T.

   c. *Practice Pointer*. A $100,000 exclusion remains available for the estate of any decedent-participant who was in pay status on December 31, 1984, with respect to such interest, and irrevocably elected the form of benefit payable under the plan or IRA (including the form of any survivor benefits) with respect to such interest before July 18, 1984. Reg. § 20.2039-1T(A-1)(c).

9. Another former use of disclaimers in the retirement benefit area was to avoid the excise tax under Section 4980A. Although the excise tax is now repealed, this ruling is instructive in how both nonqualified and qualified disclaimers can be used to achieve a desired result. In PLR 9450041, the decedent's Will divided the residuary of the estate into three trusts, Trust F being a general power of appointment marital trust and Trust D being the credit shelter trust. The trust terms provided that any property of Trust F which was disclaimed was to pass to Trust D. The executrix, who was the surviving spouse, represented that she intended to fund Trust F with the plan benefits. She, as beneficiary of Trust F, proposed to disclaim her interest in the plan benefits so that they would pass to Trust D. All beneficiaries of Trust D proposed to disclaim their interest in the benefits,

both as trust beneficiaries and as intestate heirs, so that the benefits would pass by intestacy to the surviving spouse. On the timely filed estate tax return the executrix indicated her intent to make a Section 4980A(d)(5) election. However, the surviving spouse's disclaimer would take place more than nine months after the decedent's death. The IRS found that the purported nonqualified disclaimer would result in a completed transfer by the surviving spouse to Trust D and that the disclaimers of the Trust D beneficiaries would be qualified because they would be within nine months of the surviving spouse's nonqualified disclaimer. The IRS ruled that they would treat the right to receive benefits from the plans as having passed to the surviving spouse without initially having passed through the Trust D beneficiaries. Thus, the surviving spouse did not make a gift subject to gift tax. The IRS further agreed not to treat the surviving spouse as having received the distribution of benefits from herself but instead as having received the benefits from the decedent thereby qualifying the benefits for a Section 4980A(d)(5) election.

J. Exemption Equivalent/Applicable Exclusion Amount.

1. If unified credit otherwise would be wasted, a disclaimer may generate a taxable estate to use that unified credit. For example, assets can be disclaimed so that they pass directly to someone other than the surviving spouse or so that they pass to a trust of which the surviving spouse is a beneficiary. PLRs 9435014, 9338010, 9113011, 9106016, 9036028, 8922036, 8502084, 8505054, 8432032, 8406014. See Case Study 3, Appendix B.

   a. *Practice Pointer*. In pre-death planning where the testator's true desire is to leave all of his property to his surviving spouse, one can keep options open by having the testator leave the entire estate to the surviving spouse but providing that any disclaimed property is to pass to a family trust. The document can provide further that if the surviving spouse disclaims any or all interest in the family trust, the disclaimed asset is to be distributed as if she had predeceased. See Case Study 4, Appendix B. At the time of the pre-death planning, the planner should consider having the spouse grant to someone, other than a potential recipient of disclaimed property, a limited durable power of attorney to disclaim property on her behalf. See Sample 3, Appendix D. The planner also should consider placing a warning page at the front of the documents to advise family members that disclaimer planning is involved. See Sample 2, Appendix D.

2. Generally, under the transition rule of Section 403(e)(3) of ERTA, the unlimited marital deduction does not apply to transfers under a Will executed before September 12, 1981, that contains a formula "expressly providing that the spouse is to receive the maximum amount of property qualifying for the marital deduction allowable by federal law" provided that (i) the decedent died after December 31, 1981, (ii) the formula clause was not amended at any time after September 12, 1981, and before the death of the decedent to refer specifically to the unlimited marital deduction, and (iii) there is no state law that would construe the formula clause as referring to the unlimited marital deduction. The IRS has ruled, however, that if the decedent's Will contains a "specific indication" that the decedent intended that changes in the federal estate tax law should apply, the transition rule will not apply. If the language of the Will provides that the federal estate tax law "in effect at the time of [decedent's] death" should control, the transition rule does not apply

and the surviving spouse, when bequeathed the "maximum marital deduction allowed" will receive the entire probate estate. This result can be avoided through a disclaimer by the surviving spouse. PLRs 9245021, 8624066, 8610032, 8505054, 8412078.

K. Passing Property to Another.

1. Disclaimers may be used to equalize or redistribute gifts and bequests among the family members without anyone incurring gift tax. For example, if one sibling is much wealthier than another, the wealthy sibling may wish to disclaim any inheritance from their parents so that the poorer sibling can inherit the entire estate. PLR 8648070.

2. In PLR 8908022, the decedent bequeathed his entire estate to a sister to be divided among siblings according to the decedent's previously expressed desires. The sister disclaimed a fractional interest so that the property would pass among siblings. In PLR 9043050, one grandchild disclaimed an inter vivos gift made by the decedent within nine months before her death to equalize property received by all grandchildren.

3. In PLR 9222041, disclaimers by a surviving spouse and a charity, the latter pursuant to court approval, resulted in stock passing, by intestacy, to the decedent's children.

4. In PLR 9440027, the surviving spouse proposed to receive part of her statutory share of the decedent's estate and to disclaim her right to elect against certain beneficiaries. The IRS ruled the disclaimer to be qualified so that the vesting of each interest the surviving spouse did not elect against was not a taxable gift.

5. In PLR 200028020 (a wonderful example of numerous disclaimer issues), several disclaimers were used to pass property to an omitted child. The decedent died survived by a spouse, three children, several grandchildren and nieces. The decedent's Will poured his estate to his revocable trust ("Trust"), of which Child 1 and Child 2 were trustees. The Trust provided for a typical QTIP marital trust (with remainder to Child 1 and Child 2) and outright residuary distributions, in various percentages, to Child 1 and Child 2, eight grandchildren, two nieces and caregivers. Neither the Trust nor the Will provided for the distribution of property if the beneficiaries predeceased the decedent. The Trust did authorize the trustees to disclaim any property or any interest in property if, in the discretion of the trustee, such disclaimer was advisable considering the interests of the beneficiaries as a whole. The surviving spouse (acting through Child 2 who held a durable power of attorney from spouse) disclaimed her rights under intestacy law (but not her rights to receive property under the Will or the Trust). Child 1 and Child 2 disclaimed their interests in one-third of the remainder of the marital trust and in one-third of the residuary distribution to them. The surviving spouse, Child 1, Child 2, grandchildren (including a minor acting through a guardian ad litem with court approval) and nieces disclaimed the right to receive an intestate share of the decedent's probate estate as an heir at law, to the extent the intestate share included disclaimed property. Grandchildren and nieces disclaimed the respective interests each would be entitled to receive as a result of Child 1's and Child 2's disclaimers. Child 1 and Child 2, as trustees, disclaimed the Trust's interest as sole residuary devisee under decedent's Will. As a result of all the disclaimers, one-third of the property which otherwise would have passed to Child 1 and Child 2 passed by intestacy to Child 3.

6. See Case Study 5, Appendix B.

L. <u>General Power of Appointment Issues</u>.

1. Frequently a surviving spouse has a 5/5 power over the family trust when she economically will not need the power to demand property not restricted to an ascertainable standard. Under Section 2041, 5% of the family trust will be includible in the surviving spouse's estate if the power is in existence on the date of her death. This result can be avoided by having the surviving spouse disclaim the 5/5 power within nine months of the taxable transfer creating the 5/5 power.

2. A trustee's powers may be imputed to a beneficiary who has the unrestricted right to remove the trustee. A beneficiary can disclaim the power to remove a trustee who possesses a power to invade for the disclaimant by a standard which is not ascertainable. This would prevent the disclaimant from possessing a general power of appointment by imputation. <u>See</u> PLRs 9526019, 9526018, 9329025.

3. In PLR 200225015, a grandson who was a taker-in-default under a pre-1942 general power of appointment disclaimed a specific number of shares of corporate stock within nine months of power holder's dying without exercising the power. The disclaimer was timely and qualified.

M. <u>S Corporation Status</u>.

1. In PLR 8813039, the husband created a trust with shares of corporate stock, the income of which was to be paid to his wife. At the same time, the wife created a trust with shares of stock, the income of which was to be paid to her husband. Invasions of principal were permitted for only the income beneficiary. The remaindermen were the issue per stirpes. The daughter resigned as trustee and the grandson, before accepting the trusteeship, disclaimed his contingent remainder interest in the trust to eliminate his adverse interest.

   The IRS ruled that the reciprocal trust rule applied so that the trusts were grantor trusts under Sections 671 and 676 and eligible S corporation shareholders.

2. In PLR 200401011, two trusts allowed the trustees to distribute trust net income to such charities as the trustees determined. Both trusts made timely elections to be treated as electing small business trusts (ESBT). By permanently disclaiming the power to distribute to other than a limited number of charities, the trustees enabled a corporation in which the trusts were shareholders to meet the 75-shareholder limitation for electing S corporation status. (At the time, in the case of an ESBT, each potential current beneficiary of the ESBT was treated as a shareholder for purposes of the number of shareholders limitation.)

3. *Practice Pointer*. A family trust which requires the payment of income currently could be reshaped after the death of an individual to be a qualifying S corporation shareholder if all beneficiaries except one (generally the surviving spouse) disclaim the right to income and discretionary principal payments.

N. Section 303.

1. In PLR 8149050, the decedent made a specific bequest of stock to trustees, with the income to her husband and remainder to her three children, in trust and outright. The residue of the estate was left to her grandchildren, but the bequests would be smaller than intended because of estate taxes and administration expenses. Disclaimers were made so that the stock fell into the residue and became eligible for a Section 303 redemption.

O. Section 2032.

1. *Practice Pointer*. To qualify for the alternate valuation election, both the gross estate and the combined estate and generation-skipping transfer taxes must be reduced by the election. In some instances, the alternate valuation is needed to adjust the threshold for qualifying for another election, such as one under Section 303, Section 6166, or Section 2032A. However, under a Will with a marital formula designed to reduce the estate taxes to zero, the second requirement for alternate valuation is not met. A disclaimer can be used to create an estate tax which will be reduced by the alternate valuation election if the surviving spouse disclaims assets which had a higher value at date of death than on the alternate valuation date. See Case Study 6, Appendix B.

2. *Practice Pointer*. This approach also may be desirable in times of decreasing property values. One might be able to use alternate valuation date values to pack the Applicable Exclusion Amount with more assets than if date of death values were used. One would have to consider income tax basis ramifications, the size of the surviving spouse's estate and the surviving spouse's life expectancy (i.e., whether the surviving spouse's transfer base would be below the Applicable Exclusion Amount).

P. Section 2032A.

1. The IRS' position is that no part of the real estate in a trust qualifies for a Section 2032A election if someone other than a qualified heir has an interest in the trust. In PLR 9407015, the decedent's revocable trust contained a residuary family trust and provided that the marital trust could not be funded with unmatured life insurance policies. The surviving spouse was to receive the income of the family trust during his life, as well as distributions of principal for health, support, and maintenance. Upon termination of the family trust, $5,000 was to be paid to charity, $55,000 was to be paid to some children and the balance of the trust was to pass to the decedent's other children. Here the charity's small interest in the trust would have precluded a Section 2032A election as to certain real estate in the trust. After the surviving spouse executed a disclaimer of any interest in an insurance policy on his life owned by the decedent wife, the trustee borrowed $60,000 against the policy, made the cash distributions, and distributed the policy to the remaindermen. This terminated the interest of the charity, making the real property in the trust now eligible for a Section 2032A election.

Q. Section 2519.

1. In PLR 200122036, a nonqualified disclaimer was used to effect a gift. A QTIP trust was severed into two QTIP trusts, Trust A and Trust B. The surviving spouse executed a nonqualified disclaimer of all interests in Trust A with the effect that Section 2519

applied. The nonqualified disclaimer was conditioned on the beneficiaries paying the gift tax which was generated. Thus, the net gift approach applied. Because the surviving spouse retained no interest in Trust A, Section 2702 did not apply. See also PLRs 200224016, 200223047, 200137022, 200116006, 200122036, and 200022031. This technique enables a surviving spouse to make gifts to reduce her taxable estate when that taxable estate will be comprised largely or solely of QTIP property.

R. State Inheritance Tax.

1. Under applicable state law (Oklahoma), a marital deduction was allowed for the value of any interest, beneficial or otherwise, vesting in the surviving spouse. Thus, as to a trust which would qualify for the federal QTIP election, the state allowed only a deduction for the value of the income interest. Through a series of disclaimers by the surviving spouse, children and grandchildren, the trust was extinguished, and the fee interest passed by intestacy to the surviving spouse. PLR 9427030.

2. In Estate of Hoiby, 197 Cal. Rptr. 682 (Ct. App. 1983), the surviving spouse disclaimed income and her 5/5 power but retained an interest as a potential recipient of discretionary principal invasions. In computing the inheritance tax, the state treated the remaindermen's interests as present interests. The court reversed. The income beneficiary had not disclaimed all current interests. Thus, the value of future interests had to be calculated using tables.

3. In Indiana Department of State Revenue v. Estate of Parker, 485 N.E.2d 1387 (Ind. Ct. App. 1985), a daughter's disclaimer of any interest in a joint bank account held by the decedent, the decedent's spouse and the daughter resulted in the entire account passing to the surviving spouse and a reduction in the inheritance taxes.

4. In Estate of Horowitz, 531 A.2d 1364 (N.J. Super. Ct. Law Div. 1987), the court refused to approve a disclaimer by a minor to reduce state inheritance tax. One of the reasons, the court stated, was that "[w]hile passive acceptance of a disclaimer scheme may be acceptable. . . there is no authority in New Jersey whereby its courts should affirmatively intercede to aid a plan when the sole purpose is the evasion of taxes."

5. In Herman v. Baldwin, 10 N.J. Tax 348, 1989 WL 48868 (N.J. Tax 1989), parents of deceased intestate son disclaimed interests in estate so they passed to brother of intestate. The estate tried unsuccessfully to claim exemption on inheritance tax for property passing to parents. The court held that by virtue of the disclaimers, the decedent was not "survived" by his parents.

6. In Matter of Krauss, 981 N.Y.S.2d 636 (Sur. Ct. 2013), the court granted permission to the co-executors of a surviving spouse's estate to disclaim an inheritance from her pre-deceased husband's estate (he having died one month earlier than his wife) so as to keep the surviving spouse's estate below the New York estate tax threshold.

S. Avoid Real Estate Transfer Tax.

1. In Dean v. Director of Finance, 623 A.2d 707 (Md. Ct. Spec. App. 1993), life tenants, to whom remaindermen conveyed their interests, sought to avoid a real estate transfer tax by a number of arguments, including arguing that the life tenants in effect had disclaimed their life interests. The court found the actions of the remaindermen not to be valid disclaimers and thus the real estate transfer tax was due.

2. In Leigh v. Commonwealth, 648 A.2d 1346 (Pa. Commw. Ct. 1994), the disclaimer by a charity of a small bequest removed a piece of realty from real property transfer tax which excepted intrafamily transfers.

T. Accelerate an Interest or Eliminate a Trust.

1. In some instances, surviving family members may prefer there be no trust in the estate plan. As has been illustrated in several rulings discussed above, a trust often can be eliminated by disclaimers by the current mandatory or permissible income beneficiaries. PLRs 9748034, 9521032. See Case Study 6. In PLR 200303020, a series of disclaimers by a surviving spouse, adult children, and minor grandchildren (through a court appointed guardian and with court approval) resulted, inter alia, in a marital trust passing to the surviving spouse through intestacy.

2. The language in some state statutes provides that unless the transferor of the interest has indicated otherwise in the instrument creating the interest, the effect of a disclaimer of a present interest is as if the disclaimant had predeceased the decedent. Further, the effect of a disclaimer of any future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect is as if the disclaimant had died before the event determining that the taker of the property or interest had become finally ascertained and his interest is indefeasibly vested.

3. UDPIA 1999 Section 6(b)(4) provides that, "[u]pon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment." Generally, the states adopting the UDPIA 1999, follow this provision.

4. In Weinstein v. Mackey, 408 So. 2d 849 (Fla. Dist. Ct. App. 1982), In re Estate of Gilbert, 592 N.Y.S.2d 224 (Sur. Ct. 1992), In re Estate of Vainio, 595 N.Y.S.2d 567 (App. Div. 1993), and Pate v. Ford, 360 S.E.2d 145 (S.C. Ct. App. 1987), rev'd, 376 S.E.2d 775 (S.C. 1989), the court confirmed that a disclaimer by the life tenant accelerated the interests of remaindermen, and that the class was not to be held open for unborns.

5. In Palmer v. White, 784 P.2d 449 (Or. Ct. App. 1989), the trustee of a trust established under decedent's Will was to distribute a monthly stipend to the decedent's daughter for ten years, after which the property would be distributed to the daughter. The daughter was the only heir entitled to receive intestate property, so she disclaimed the income interest with the result that the property passed to the daughter by intestacy, outright and free of trust.

6. In Estate of Tatum, Jr. v. United States, 436 Fed. Appx. 320 (5th Cir. 2011), the issue was how disclaimed property would pass before adoption of UDPIA. Decedent's will provided that if his son predeceased him, his son's descendants per stirpes would take the son's share. The IRS argued that the will's "alternate disposition" did not apply when the son did not in fact predecease the decedent, and the son had not disclaimed any interest he may have pursuant to intestacy. The court held that, even if the disclaimer effectively resulted in a lapsed bequest, by reason of the state anti-lapse statute, the disclaimed property would have passed to the son's children without any direction on the son's part. In addition, the court held the decedent's clear intent was that disclaimed property would go to the son's children in the event it did not go to the son.

7. However, Wetherbee v. First State Bank & Trust Co., 466 S.E.2d 835 (Ga. 1996), Linkous v. Candler, 508 S.E.2d 657 (Ga. 1998), Stewart v. Johnson, 362 S.E.2d 849 (N.C. Ct. App. 1987) and Estate of Reese, No. CA95-02-008, 1995 Ohio App. LEXIS 5575 (Ohio Ct. App. 1995) are four situations in which the disclaimer of an income interest did not terminate a trust because the court determined that the decedent had provided otherwise.

U. Error Correction.

1. In PLR 8318093, the terms of the trust agreement provided that the marital trust share would be the greater of $250,000 or 50 percent of the adjusted gross estate as finally determined for federal estate tax purposes but contained no provision for reducing the value of the marital trust share by the amount of property which passed to the surviving spouse outside the trust agreement and which qualified for the marital deduction. Because the decedent died in May 1981, the marital deduction was limited to the greater of $250,000 or 50 percent of the adjusted gross estate as finally determined for federal estate tax purposes. The surviving spouse received life insurance proceeds and joint property outside of the trust agreement. The IRS ruled the proposed disclaimer qualified whereby the surviving spouse would disclaim that portion of the decedent's marital trust which, when added to the value of all other property included in the decedent's gross estate that passed to her and qualified for the estate tax marital deduction, was more than the amount that would produce the maximum marital deduction allowable.

2. In PLR 8337069, it was discovered after the decedent's death that the 1982 Will contained two technical errors that created certain ambiguities. The errors were caused by verbatim copying of portions of the 1976 Will into the 1982 Will. First, the undistributed income of the marital trust (a QTIP trust in the 1982 Will, a general power of appointment trust in the 1976 Will) was payable to named beneficiaries, not to the estate of the surviving spouse. Second, it was unclear whether a trustee power to distribute principal to the decedent's daughter applied to the marital trust. The first problem was cured by a renunciation and disclaimer under Florida law of the right of the daughter and any issue to receive the undistributed income, with the result that the undistributed income would pass to the estate of the deceased income beneficiary (the surviving spouse). The second problem was cured by the daughter disclaiming the right to be a discretionary appointee of principal under the trust.

3. In PLR 8603030, it appears that instead of having the marital trust pour into the family trust at the death of the surviving spouse, the family trust was pouring into the marital trust over which the surviving spouse would possess a general power of appointment. The surviving spouse proposed to disclaim the right to appoint any or all the principal and/or any or all accrued and undistributed income that might pour over from the family trust at her death. The IRS ruled that this would be a valid disclaimer.

V. Environmentally Troubled Property.

1. To avoid inheriting a potential environmental liability, a devisee could consider a disclaimer of any real estate which may be environmentally troubled.

W. To Shift Benefits To or From Others.

1. It is unclear but one may be able to adjust the per stirpital share of property passing to one's family using a disclaimer. Suppose the decedent died intestate with one living son who had two children and one predeceased son with one child. Under the law of some states, absent a disclaimer, the living son would receive one-half of the estate and the grandson by the predeceased child would receive one-half. If the son disclaims, he is treated as having predeceased the decedent, and if the state law provides that heirs who are all in the same degree of kindred to an intestate take per capita, the grandchildren might each receive one-third of the estate.

2. This result has been statutorily prohibited in some states.

3. Even though New York has a statute addressing the issue, a court had to determine how the renounced intestate share was to pass in Estate of Fienga, 347 N.Y.S.2d 150 (Sur. Ct. 1973), where it determined that a disclaimer does not change the manner of distribution, i.e., per capita or per stirpes. In Welder v. Hitchcock, 617 S.W.2d 294 (Tex. App. 1981), a disclaimer by the decedent's only surviving brother, who had no issue, did not require per capita distribution to each niece and nephew. The court held that the legislation was intended to affect only to whom the disclaimed share was to descend. In 1998, North Carolina deleted from its statutes the following language: "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." Former N.C. Gen. Stat. § 31B-1(b) (2007).

4. On the other hand, in Estate of Bryant, 196 Cal. Rptr. 856 (Ct. App. 1983), a disclaimer by both children of an intestate decedent resulted in property passing per capita to grandchildren. It appears that, at one time, under Colorado and Utah statutes, a disclaimer turned the manner of distribution into per capita. Colo. Rev. Stat. § 15-11-801(4)(West 2005); Utah Code Ann. § 75-2-801(4) (1953).

5. Under UDPIA 1999 Section 6(b)(3)(A), those receiving property by virtue of an individual’s disclaimer receive exactly what the disclaimant would have received had the disclaimer not been made.

6. Although Richey v. Hurst, 798 So. 2d 841 (Fla. Dist. Ct. App. 5th Dist. 2001) did not involve per stirpital shares, the issue was a shifting of benefits from one group of beneficiaries to another. In that case, the decedent devised her property to the Hamor

Trust. The Hamor Trust terms provided for the creation of a Marital Trust for the decedent's husband, if he survived her, with the residue of the Marital Trust passing at the husband's death, if he did not exercise a power of appointment, equally to beneficiaries Edwards, Hurst, Stephens, and Richey. If the husband did not survive the decedent, the balance of the assets was left in equal shares to beneficiaries Edwards, Hurst and Stephens. Pursuant to a settlement agreement, the husband disclaimed his interest in the Marital Trust. However, the trial court, which approved the settlement agreement, did not explain the effect of the disclaimer. Richey argued that the disclaimer by the husband acted to accelerate the remainder interest of the four individuals in the Marital Trust. The court, however, agreed with the other beneficiaries who argued that, because the husband was treated under the disclaimer laws as having predeceased the decedent, the Marital Trust never came into existence and the assets passed into the residue of the Hamor Trust and passed according to its terms to Edwards, Hurst, and Stephens.

X. Medicaid and Other Benefits.

1. Under the laws of some states, the disclaimer of property is considered an uncompensated transfer of assets equal to the value of any interest disclaimed by any person who would, by reason of the disclaimed succession, retain Medicaid eligibility or become eligible for medical assistance. Iowa Code Ann. § 633E.15 (West Supp. 2008); Va. Code Ann. § 32.1-325.02 (2007) (within 36 months of the date the disclaimer is filed with a court (for property other than in trust) or 60 months of the date the disclaimer is filed with a court when the disclaimer relates to payment from a trust or portions of a trust); Hoesly v. State, Dep't of Soc. Servs., 498 N.W.2d 571 (Neb. 1993); Molloy v. Bane, 631 N.Y.S.2d 910 (App. Div. 1995); In re Estate of Kunkis, 618 N.Y.S.2d 488 (Sur. Ct. 1994); In re Keuning, 593 N.Y.S.2d 653 (App. Div. 1993); N.D. Cent. Code § 50-24.1-02 (1996); Lapointe v. R.I. Dep't of Human Servs., 2013 R.I. Super Lexis 80. See also In re Baird, 634 N.Y.S.2d 971 (Sup. Ct. 1995) (the court permitted the guardian to disclaim all assets other than assets needed to support the disclaimant during the Medicaid "penalty" period).

2. In State v. Culligan, No. CV-94-0705568 S, 1995 Conn. Super. LEXIS 2263 (Conn. Super. Ct. July 28, 1995), Department of Income Maintenance v. Watts, 558 A.2d 998 (Conn. 1989) and State v. Murtha, 427 A.2d 807 (Conn. 1980), the courts did not permit recipients of social benefits to disclaim because the Connecticut statute required consent of the commissioner to sell, assign, transfer, encumber or otherwise dispose of property.

3. In In re Estate of Kirk, 591 N.W.2d 630 (Iowa 1999), the court determined that the executor of the estate of the surviving spouse could validly disclaim the survivorship interest in joint property, even though the purpose of the disclaimer was to avoid a claim filed for reimbursement for Medicaid.

4. In Troy v. Hart, 697 A.2d 113 (Ct. App. Md. 1997), the court determined that a (now deceased) Medicaid recipient was not unduly influenced when his disclaimer was procured and that he could disclaim his inheritance. However, he violated his affirmative duty under the Medicaid laws when he failed to notify the department within ten working days of changes affecting his financial status (i.e., the inheritance) and thus the court

suggested that the disclaimed property was being taken subject to State claims for any Medicaid benefits improperly paid to the disclaimant.

5. In Michigan, a prisoner cannot disclaim an inheritance to avoid reimbursing the state for the cost of his incarceration. The State Correctional Facility Reimbursement Act bars a disclaimer as the interest in an estate is an asset. State Treas. V. Poitius & Estate of Pontius, 2013 Mich. App. Lexis 359 (Ct. App. Mich.); State Treas. V. Snyder, 823 N.W.2d 284 (Ct. App. Mich. 2011.)

Y. Creditor Avoidance.

One of the most frequently litigated nontax disclaimer issues at the state level is whether a disclaimer can effectively defeat creditors of the disclaimant. The issues reviewed are whether the encumbrance is one which bars a disclaimer and whether a fraudulent transfer has occurred.

1. Creditors under state law.

In some states, a disclaimer can be used to prevent the disclaimant's creditors from reaching the disclaimed property. These cases tend to apply a relation-back doctrine, that the disclaimer retroactively eliminates the disclaimant's interest and thus there can be no transfer by the disclaimant. Abbott v. Willey, 479 S.E.2d 528 (Va. 1997) (Attorney Willey converted funds of clients to his personal use. Clients obtained promissory note from Willey, personally and as president of his corporation, and from his wife. The attorney committed suicide and the court permitted the wife to disclaim insurance proceeds, which passed for the benefit of her children.) *Accord*, Ace Elec. Co. v. Butler, 2012 Va. Cir. Lexis 81 (Debtor and his siblings were devised real estate by their mother. Debtor executed a disclaimer shortly after a creditor filed suit to partition the real estate. After acknowledging that it is settled in Virginia that judgment debtors may disclaim property, even to evade creditors, the court found the disclaimer to be invalid on the basis of acceptance by the debtor prior to the execution of the disclaimer.); See also Estate of Heater v. Dep't of Public Aid, 640 N.E.2d 654 (Ill. App. Ct. 1994), in which the court acknowledged that a beneficiary could disclaim to prevent creditors from taking the inheritance, but that a personal representative of a deceased beneficiary could not do so because of the personal representative's fiduciary duty to all interested persons, including creditors of the deceased.

a. Other states, either by statute or case law, prohibit the use of a disclaimer to prevent creditors from reaching the disclaimed property. Some courts have reached this result by holding that such a renunciation is a fraudulent conveyance or a transfer. Stein v. Brown, 480 N.E.2d 1121 (Ohio 1985); Gallaher v. Riddle, 850 A.2d 748 (Pa. Super. 2004) (debtor's disclaimer was set aside as a fraudulent conveyance under the statute; debtor's disclaimer of interest in intestate wife's estate was void because debtor was insolvent at time of disclaimer). See also III.A.1.g.

2. IRS tax liens and restitution orders.

a. There was a split in the circuits on the issue of avoidance of federal tax liens using a disclaimer. The Fifth and Ninth Circuits had held that the disclaimer operates retroactively, per state law, and thus a disclaimant had no property interest to which a lien could attach. In some cases, a beneficiary was allowed to renounce property even though the sole purpose was to avoid a federal income tax lien. Leggett v. United States, 120 F.3d 592 (5th Cir. 1997) (reversing the S.D. Texas) (suggesting that Congress' failure to define property more broadly than state law or to expressly prohibit taxpayers from filing disclaimers precludes an expansive reading of Section 6321); Mapes v. United States, 15 F.3d 138 (9th Cir. 1994); United States v. McCrackin, 189 F. Supp. 632 (S.D. Ohio 1960).

b. In other cases, the courts had held that the relation-back concept with disclaimers was inapplicable, and that once a property interest was created, the federal lien attached, and a disclaimer could not eliminate the property interest. The Second and Eighth Circuits followed this approach. Drye Family 1995 Trust v. United States, 152 F.3d 892 (8th Cir. 1998), aff'g No. LR-C-96-346, 1997 U.S. Dist. LEXIS 13293 (E.D. Ark. July 14, 1997), aff'd, 528 U.S. 49 (1999) (the court found that the "right to inherit," rather than the actual assets formerly owned by the decedent, was the property interest to which a Section 6321 lien attached); United States v. Comparato, 22 F.3d 455 (2d Cir.), cert. denied, 115 S.Ct. 481 (1994); United States v. Solheim, 953 F.2d 379 (8th Cir. 1992) (however, in Solheim, the disclaimer was untimely and the state law had no relation-back language for an untimely disclaimer); Tinari v. United States, 78 A.F.T.R.2d (RIA) 96-6381, 96-2 U.S. Tax Cas. (CCH) ¶ 50460 (E.D. Pa. 1996); Estate of Adler, 869 F. Supp. 1021 (E.D.N.Y. 1994) (the court determined that the surviving spouse was not able to avoid an income tax lien when she purportedly renounced wrongful death proceeds).

The United States Supreme Court followed the approach of the Eighth Circuit and held that the right to receive property was a property interest itself to which an income tax lien could attach and that a subsequent attempt to disclaim the underlying property did not eliminate the lien which had attached to the right to receive property. Drye v. United States, 528 U.S. 49 (1999). See E. Diane Thompson, Supreme Court to Address Effect of Disclaimers on Tax Liens, Prob. Prac. Rep., June 1999, at 1.

c. In the post-Drye case of Choate v. Tubbs, 91 A.F.T.R.2d 2003-1881, 2003-1 U.S. Tax Cas.¶ 50402 (W.D. Tenn. 2003), the decedent had designated his son, a debtor subject to income tax liens, as the beneficiary of an annuity contract. The son attempted to disclaim the annuity proceeds so that they would pass to the contingent beneficiary, the decedent's widow. The son and widow had entered into an agreement that the proceeds would be paid into the decedent's estate to satisfy the decedent's debts, as the decedent had intended, according to the debtor. The court rejected the debtor's attempt to analogize his disclaimer to the disclaimer of an *inter vivos* gift and to come within language in Drye. In the Drye opinion, the court appeared to distinguish a debtor's disclaimer of a *inter vivos*

gift, which restores the status quo, from a debtor's disclaimer of an inheritance, which does not restore the status quo.

d. In United States v. Harris, 854 F.3d 1053 (9th Cir. 2017), Harris, a beneficiary of a discretionary support trust, was subject to a federal restitution order and sought to disclaim his trust interest. The court noted that, under 18 U.S.C.S. Section 3613(c), a federal restitution order is a lien in favor of the United States on all property, and rights to property, as if the liability were for a tax assessed under the Internal Revenue Code. The court determined that the rights granted to Harris under California law as a trust beneficiary, even though discretionary, fell within the federal definition of property and then held, citing Drye, that the beneficiary's alleged disclaimer of his trust interest could not defeat the writ of garnishment.

3. Bankruptcy.

Post-petition disclaimers. The majority of bankruptcy cases hold that a beneficiary's disclaimer of a testamentary bequest within 180 days following the bankruptcy petition constitutes a transfer which a bankruptcy trustee can avoid. In Williams v. Chenoweth (In re Chenoweth), 132 B.R. 161 (Bankr. S.D. Ill. 1991), aff'd, 143 B.R. 527 (S.D. Ill. 1992), aff'd, 3 F.3d 1111 (7th Cir. 1993), the court found an attempted disclaimer was an unauthorized post-petition transfer of property that now belonged to the bankruptcy estate which could be avoided by the bankruptcy trustee under Bankruptcy Code Section 549. The court focused on the language of Section 541(a)(5)(A) of the Bankruptcy Code which included interests that the debtor "acquires or becomes entitled to acquire" within 180 days after bankruptcy and determined that the debtor was entitled to acquire the interest in the estate. See also In re Johnson, 2011 Bankr. Lexis 1803, (C.D. Ill), where a debtor's attempted disclaimer of her interest in her father's estate was denied as it was both post-petition and post-confirmation in a chapter 13 bankruptcy; In re Stambaugh, 2010 Bankr Lexis 3141 (N.D. Iowa) (disclaimer post-petition in a chapter 7 bankruptcy was invalid); Flanigan v. Lewis (In re Matter of Lewis), 45 B.R. 27 (Bankr. W.D. Mo. 1984); McGraw v. Betz (In re Betz), 84 B.R. 470 (Bankr. N.D. Ohio 1987) (specifically not addressing "bankruptcy law considerations" because Ohio law would treat the disclaimer as a fraudulent conveyance); In re Corse, 486 B.R. 241 (Bankr. R.I. 2017), (debtor's mother had transferred mother's residence to her four daughters, including debtor, retaining a life estate in 2007. In August 2010, debtor filed chapter 7 bankruptcy. Bankruptcy trustee sought to sell debtor's one-fourth remainder interest. Debtor proposed to disclaim the one-fourth remainder interest. The court ruled that debtor's disclaimer rights pursuant to Rhode Island law were a property right vested in the debtor's bankruptcy estate and once the petition was filed, only the bankruptcy trustee had the right to disclaimer the interest in the residence.); Wolfe v. Farrior (In re Farrior), 344 B.R. 483 (Bankr. W.D. Va. 2006) (post-petition disclaimer within 180 days was void).

a. Pre-petition disclaimers. There are differing views.

(1) In In re Brajkovic, 151 B.R. 402 (Bankr. W.D. Tex. 1993), the court viewed the execution of a disclaimer of a real estate inheritance, six weeks before

filing for bankruptcy, as the transfer of a property interest. See also Casciato v. Stevens (In re Stevens), 112 B.R. 175 (Bankr. S.D. Tex. 1989) (the court found that the right to control, deduct or receive a testamentary distribution constitutes an interest in property and that the date the renunciation was executed was the date of transfer); In re Perry, 40 B.R. 811 (Bankr. M.D. Tenn. 1984) (discharge denied because debtor disclaimed within one year of filing bankruptcy; treated as a fraudulent transfer of an interest in property).

(2) On the other hand, in In re Atchison, 925 F.2d 209 (7th Cir. 1991) (Ill. law), cert. denied sub nom. Jones v. Atchison, 502 U.S. 860 (1991), the court held that a beneficiary's pre-petition disclaimer of a testamentary bequest governed by Illinois law did not constitute a "transfer" which could be avoided under Bankruptcy Code Section 548(a). Accord, In re Crandall, 549 B.R. 734 (Bankr. Ala. 2016) (debtor's filing of a disclaimer one day before filing chapter 13 would have removed debtor's inheritance from the bankruptcy estate had the disclaimer not been invalid due to debtor having accepted benefits before the attempted disclaimer); Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973) (Colo. law); In re Simpson, 36 F.3d 450 (5th Cir. 1994) (Tex. law) (disclaimer filed one day before filing bankruptcy petition; specifically rejected reasoning in Brajkovic); Wood v. Bright (In re Bright), 241 B.R. 664 (B.A.P. 9th Cir. 1999) (Wash. law) (disclaimer filed three months before filing bankruptcy petition).

b. In In re Schulte, 107 B.R. 763 (Bankr. Wyo. 1989), the Bankruptcy Court applied the relation-back concept to increase property in the debtor's bankruptcy estate. After the debtor filed bankruptcy, the debtor's mother, sole beneficiary of the father's estate, disclaimed specific assets, 20% of which would pass to debtor. The court held that, due to the relation-back concept, the debtor was vested with that 20% interest when she filed bankruptcy.

c. Even after the Supreme Court's holding in Drye (regarding federal tax liens), the issue of the validity of disclaimers in a bankruptcy context is not resolved.

(1) If one looked at Drye on a superficial level, one might assume that the issue is resolved and disclaimers could not be used pre-petition. For example, in In re Kloubec, 247 B.R. 246 (Bankr. N.D. Iowa 2000), the debtor executed a disclaimer of an inheritance one day before filing a Chapter 13 petition. The court reasoned that the issue decided, in the negative, in Drye was whether the state doctrine of relationship-back can modify rights created under Federal statutes. Therefore, the court held that the debtor's disclaimer was a fraudulent transfer.

(2) In Blackwell v. Lurie (In re Popkin & Stern), 223 F.3d 764 (8th Cir. 2000), supra, p. 31, the court found Drye to be inapposite because the fraud statute at issue was Missouri's Uniform Fraudulent Transfer Act, not a federal law.

(3) In Grassmueck, Inc. v. Nistler (In re Nistler), 259 B.R. 723 (Bankr. D. Or. 2001), a debtor filed a Chapter 7 bankruptcy on July 28, 1999, within weeks

of executing disclaimers of inheritance from his father. He previously had executed a disclaimer on June 11, 1999, whereby he disclaimed his interests in his father's probate estate and in a joint revocable trust established in 1985 by his parents. The debtor's mother had died in April 1997 and the father had died on May 4, 1999. The bankruptcy trustee sought a declaratory judgment that the disclaimer was ineffective under North Dakota law, or in the alternative to avoid the transfer under either Bankruptcy Code Sections 548 or 550. The court determined that the disclaimer was valid under North Dakota law and that, because the disclaimer related back to the date of death of the decedent, the debtor never possessed an interest in the inheritance and, therefore, the disclaimer could not be a transfer of an interest in the inheritance. The court disagreed with the In re Kloubec analysis of Drye. It felt that the Supreme Court in Drye relied specifically on the language of Section 6321and that Drye should be limited to tax lien cases.

(4) In Cassel v. Kolb, 267 B.R. 861 (N.D. Cal. 2001), rev'd, 321 F.3d 868 (9th Cir. 2003), the debtor filed a disclaimer of a contingent interest in a trust five days before filing for Chapter 11 bankruptcy. The judgment creditor argued, inter alia, that the debtor's action was a fraudulent transfer, and that the relation-back feature of California's disclaimer statute was ineffective under federal law. The court found that, although state disclaimers had been determined to be transfers for federal income tax purposes, Congress had not so provided in the bankruptcy context. Before there can be a fraudulent transfer, there must first be a transfer of property and under state law there was no property. Accord, Garrett v. Bank of Oklahoma (In re Faulk), 281 B.R. 15 (Bankr. W.D. Okla. 2002) (Oklahoma law) (disclaimer filed one day before debtor filed Chapter 7 bankruptcy; court narrowly construed Drye as a tax case with a construction of the specific language of Section 6321 of the I.R.C. and declined to extend to the clearly distinguishable facts in this case).

d. See Garrett v. Vaughan (In re Vaughan), 261 B.R. 700 (Bankr. W.D. Okla. 2001), discussed infra, where the failure to comply with state disclaimer laws rendered an inheritance reachable by a bankruptcy trustee.

e. See Estate of Dearth v. Estate of Sterba (In re Estate Sterba), 56 N.E.3d 1118 (Ill. App. 2016), where debtor executed a purported disclaimer, three months before filing for chapter 7 bankruptcy of an inheritance from his mother. The language of the purported disclaimer attempted to direct the disclaimed property to one of his three siblings, rather than as it would pass if no direction were given. The court found the disclaimer to actually be an attempted assignment such that the relation-back effect of a disclaimer was not triggered, and the inheritance was part of the bankruptcy estate.

4. The UDPIA 1999 is silent on the rights of creditors of beneficiaries who disclaim property.

Z. Avoid a Conditional Bequest.

1. In Estate of Ramsey, 622 P.2d 626 (Kan. 1981), the decedent's Will was construed to require equalization among children with the result that the son owed payments to his two sisters based upon the value of property previously gifted to the son. The son disclaimed any interest in the estate and his two siblings challenged the disclaimer as being untimely because it was not made within nine months of death. The state statute allowed a disclaimer until nine months after the event when the taker becomes finally ascertained and his or her interest becomes indefeasibly fixed. This court determined that such date was when the prior court construed the Will and thus the disclaimer was timely.

2. In Estate of Balson, 515 N.W.2d 474 (Wis. Ct. App. 1994), the probate court permitted a son of the decedent, who died in September, 1978, to disclaim the remainder interest in a residence within nine months of the death of the life tenant, who died January 24, 1992. The son disclaimed because the conditional bequest required that he pay his two sisters $50,000 each and the residence was not worth $100,000.

AA. Status as Heir or Beneficiary.

1. At least seven courts have held that a disclaimer cannot be used to change the heirs or next of kin for purposes of a wrongful death suit. Mayo v. White, 224 Cal. Rptr. 373 (Ct. App. 1986); Lewis v. Reg'l Ctr., 220 Cal. Rptr. 89 (Ct. App. 1985); Boatmen's Nat'l Bank v. Direct Lines, Inc., 656 N.E.2d 1101 (Ill. 1995); Larson v. Cabrini Med. Ctr., 669 N.Y.S.2d 172 (Sup. Ct. 1998) (disclaimer by parents of 50% intestate share of unmarried son's estate ineffective to substitute pecuniary damage claims of decedent's sister and nephews); Locust v. Pitt County Mem'l Hosp., Inc., 571 S.E.2d 668 (N.C. Ct. App. 2002) (spouse who had abandoned decedent could not disclaim so as to give rise to cause of action in siblings for wrongful death)**;** Evans v. Diaz, 430 S.E.2d 244 (N.C. 1993) (tortfeasor mother, sole beneficiary of deceased minor son's estate, had no property interest to disclaim and thus disclaimer could not give rise to cause of action in siblings); Quesnel v. Town of Middlebury, 706 A.2d 436 (Vt. 1997) (surviving spouse's disclaimer could not create liability in defendants for the parents' loss); Bowen v. Am. Family Ins. Co., 811 N.W.2d 887 (Wisc. App. 2012) (husband, who was driving the car when an accident resulted in the death of his wife, could not disclaim a wrongful death claim so as to pass ownership of the claim to the adult children.)

   However, in DeLuca v. Gallo, 287 A.D.2d 222 (2d Dep't 2001), the court did allow a disclaimer to effect a change in who had the ability to sue for wrongful death. In DeLuca, a young New York police officer died intestate in a collision, survived by his mother and his 22-year-old sister. The mother renounced all interest in her son's estate, including any recovery for conscious pain and suffering and wrongful death. The issue presented was whether the sister, as the next distributee in line, was limited in her recovery to the amount of pecuniary loss suffered by the mother, or, whether, as the now sole distributee, the next in line, she was entitled to recover for her own pecuniary losses resulting from the decedent's death. The decedent had not been providing the mother any financial support, but he had been supporting his sister fully and had named her as the beneficiary on life insurance and retirement plans. The court held that, because the mother had renounced her interest in the son's estate, she was considered to have predeceased the son, and the sister, as the decedent's sole heir, was entitled to the full

wrongful death recovery and thus one must look at the sister's loss. The court rejected the defendant's claim that the sister's recovery should be limited by the amount the mother would have received. The court disagreed with the Larson decision on two grounds: (1) the distributees in Larson did not properly renounce their share of the wrongful death proceeds and (2) Larson ignored the effect of a valid renunciation which is retroactive to the creation of the disposition and operates as if the renouncing party had predeceased the decedent.

2. In Estate of Estes, 718 P.2d 298 (Kan. 1986), the court had to determine whether a disclaimer by the executors of decedent's daughter's estate had the effect of removing the daughter from the status of heir so that others were entitled to notice of probate and thus the Will could be set aside. The court determined that the daughter did not disclaim her status as an heir or her relationship to the decedent but only disclaimed the right to take property; the fiction of predeceasing has only one purpose, that of determining the disposition and descent of the disclaimed interest.

3. In Young v. Department of Administration, 524 So. 2d 1071 (Fla. Ct. App. 1988), the decedent was a member of the Florida retirement system. Although divorced, she never changed her beneficiary form and upon her death, her ex-husband was still designated. He would have been entitled to receive only the decedent's contributions. The ex-husband and two of her other children disclaimed so that the youngest child, a dependent minor and named contingent beneficiary, could receive benefits. The state wanted to pay the contingent beneficiary that which the ex-husband would have received, a return of contributions. The court held that the child, as beneficiary, was entitled to receive monthly benefits.

4. In Gillette v. Wurst, 869 A.2d 488 (Pa. 2005), rev'd, 937A.2d 430 (Pa. 2007), the issue was whether the recipient of settlement proceeds under Pennsylvania's Wrongful Death Act could disclaim her intestate share of those proceeds when her disclaimer would thwart an insurance carrier's subrogation lien. Disclaimant's husband, a teacher at a middle school, was shot and killed while chaperoning a school dance. The disclaimant collected compensation under the state workers' compensation act and, pursuant to the Pennsylvania code, the employer was subrogated to the right that the disclaimant had against a perpetrator, to the extent of the compensation the widow received. The persons entitled to compensation under the Pennsylvania Wrongful Death Act were those who would be intestate beneficiaries. The widow disclaimed her right to any recovery under the Wrongful Death Act, other than sufficient funds to bury the victim, with the result that all the wrongful death proceeds were payable to the decedent's children. The lower court held that the widow's disclaimer of her right to her intestate share of the wrongful death recovery related back to the date of her husband's death and thus she did not have any interest in a third-party recovery against which the employer (or its insurance company) could assert its lien. The Pennsylvania Supreme Court reversed, holding that the right of subrogation belonged to the insurance company and thus it was not a right which Gillette could disclaim. Compare Liberty Mutual Insurance Company v. Fisher, 557 S.E.2d 209 (Va. 2002) for a similar result largely based upon the statutory language related to employer's liens.

III. PROBLEM AREAS

A. Acceptance of Benefits.

1. Problem of acceptance.

a. One of the most frequently encountered problem areas is acceptance of benefits. Most state laws will not permit a disclaimer after acceptance has occurred. See, e.g., Va. Code § 64.2-2611(B)(i). See, e.g., Elliott v. Hardcastle, 607 S.W.2d 381 (Ark. 1980) (life tenant's execution of quit claim deed to remainderman was acceptance); American Guar. & Trust Co. v. Bourland, Civ. No. 9434, 1989 Del. Ch. LEXIS 93 (Del. Ch. July 28, 1989).

b. It does not appear that acceptance is a bar in all states.

c. UDPIA 1999 Section 13 bars a disclaimer if acceptance occurs before the disclaimer becomes effective.

d. In Estate of Goshen, 212 Cal. Rptr. 919 (Ct. App. 1985), the state maintained that a disclaimer was invalid due to acceptance and assessed state inheritance tax on the basis that the decedent had left his estate to a nonrelative. The non-relative beneficiary agreed to disclaim all interest in exchange for an annuity for life after the daughter filed a Will contest. The court determined that by entering into a settlement agreement, the beneficiary had contracted to transfer his interest and that under the California Code, contracting to transfer was acceptance. Thus, the inheritance tax would be imposed.

e. In Estate of Jacob, No. 1298, 1986 Phila. Cty. Rptr. LEXIS 12 (Common Pleas Ct. 1986), the income beneficiary sought to accelerate the remainder by disclaiming his income interest more than ten years after it began. The court held that acceptance of the income precluded a valid disclaimer.

f. In Thompson v. Lawson, 793 S.W.2d 94 (Tex. App. 1990), the disclaimant sought to invalidate her own disclaimer on the basis of acceptance.

g. The disclaimer statutes of many states treat certain actions or events as tantamount to acceptance and as a bar to a disclaimer. If a beneficiary assigns, conveys, encumbers, pledges, or transfers a property interest (or, under all the following statutes, except as noted, contracts to do so) before disclaiming that interest, a disclaimer is barred. See, e.g., Va. Code § 64.2-2611(B). See also Pennington v. Bigham, 512 So. 2d 1344 (Ala. 1987) (pre-existing lien against beneficiary was an encumbrance which barred disclaimer).

h. Likewise, a sale pursuant to judicial process taking place before the disclaimer bars the disclaimer. See, e.g., Va. Code § 64.2-2611(B)(iii). Estate of Abesy, 470 N.W.2d 713 (Minn. Ct. App. 1991) (garnishee summons in place at time of attempted disclaimer was a transfer by judicial process that barred disclaimer under Minnesota law); Citizens State Bank v. Kaiser, 750 P.2d 422 (Kan. Ct. App. 1988) (garnishment order issued before debtor's attempted disclaimer of joint

account interest effected a disposition of personal property pursuant to judicial process and thus barred the later attempted disclaimer).

i. One state provides a representation that the interest will be accepted to a person who relies thereon to his detriment bars a disclaimer. 20 Pa. Cons. Stat. Ann. § 6206(a)(4) (West 2005).

j. Even if acceptance does not bar a disclaimer under state law, it bars a qualified disclaimer under Section 2518.

2. Actions indicative of acceptance under Section 2518.

a. A qualified disclaimer under Section 2518 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. Unfortunately, a client may accept the benefits of the property which he desires to disclaim before consulting his legal advisor. In situations in which the possibility of disclaimers is the foundation of the estate plan, the drafter of the plan should consider placing a warning with the estate planning documents that acceptance of benefits will preclude the effective use of any disclaimers. See Sample 3, Appendix D. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. Reg. § 25.2518-2(d)(1).

(1) A knowing use of property for the benefit of the proposed disclaimant will be acceptance which will bar a valid disclaimer and, according to the IRS, once acceptance has occurred, it cannot be rectified by a repayment or return of the property which the beneficiary would like to disclaim. In TAM 8405003, the decedent died on August 9, 1980. From that date until May 4, 1981, the decedent's executor wrote 156 checks totaling $58,160.16 for the expenses of the surviving spouse. These expenses covered all her needs, including doctors, nurses, medicines, food, utilities, magazines and newspaper subscriptions, and auto license tags. On April 29, 1981, the surviving spouse filed a purported disclaimer of any interest in her husband's estate. Subsequently, she repaid her husband's estate on May 4, 1981, the sum of $58,160.16. The IRS found these actions to be totally inconsistent with a refusal to accept any interest in the estate and determined the disclaimer to be nonqualified.

(2) One should not be lax with the allocation of the joint income tax liability, or one may find that the payment of the surviving spouse's share could eliminate the ability to disclaim property which was the source of the payment. In PLR 9244012, the joint income tax liability of the decedent and the surviving spouse was paid out of an account into which dividends on decedent's separately owned stock were deposited. Even though the surviving spouse promised at the time to repay the estate for any portion of her income tax liability, the IRS ruled that she could not disclaim income and shares of stock that related to the dividend income used to pay the tax. The disclaimers would have allowed the use of the decedent's $1,000,000 GSTT exemption.

(3) In PLR 9437042, an attempt to obtain rollover capability for the surviving spouse failed. The deceased participant had designated his estate as the recipient of the plan benefits. The residue of his estate was to pass to a trust. The estate and all beneficiaries of the trust attempted to disclaim their interest in the plan benefits so that under the terms of the plan the benefits would pass to the surviving spouse. The IRS ruled that the estate's disclaimer was not qualified because the deceased participant had exercised dominion and control over his interest in the plan.

(4) Similarly, in Harbison v. United States, 2001 U.S. Dist. Lexis 5344 (N.D. Ga. 2001), the court indicated that the funds distributed to a beneficiary before his death would negate the ability of his estate to disclaim his interest.

(5) In many estates, survivors apply for life insurance proceeds immediately after the decedent's death, often with the well-meaning assistance of the insurance agent. This expediency in applying for life insurance, however, can foreclose disclaimer options. In PLR 8702024, the sister of the decedent proposed to disclaim insurance proceeds. She had sent a completed claim form and a copy of decedent's death certificate to the insurer. The insurance company established an account in the sister's name with the proceeds and sent her checks that could be used to draw upon the account. The IRS ruled that the sister's actions were affirmative acts with respect to the proceeds which were consistent with ownership and constituted acceptance precluding a disclaimer.

(6) The above ruling on life insurance did not address whether the application for the benefits alone, without the establishment of the bank account, would have been acceptance. However, in PLR 9210014, the IRS determined that a beneficiary's request for early distribution of trust property, which was rescinded before the trustee acted on the request, was not acceptance. This would indicate that actual receipt of property is required before acceptance is found. Likewise, under state law, seeking permission from state revenue assessor to transfer a bank account was not an acceptance by a joint owner. Indiana Dep't of State Revenue v. Estate of Parker, 485 N.E.2d 1387 (Ind. Ct. App. 1985).

(7) Rulings suggest that the action also must have been initiated by the beneficiary or the beneficiary's agent with the beneficiary's knowledge. In two unrelated rulings, a relative of the surviving spouse deposited a dividend check allocable to the decedent's interest into the joint bank account of the decedent and the surviving spouse. The action of the relative was not acceptance by the surviving spouse who had no knowledge of distribution or deposit. PLRs 9243024 and 8143022.

(8) Likewise, deposits made after death of the decedent into a joint checking account with the surviving spouse were deposits which had been initiated by the decedent (through an attorney-in-fact) before death and did not constitute acceptance by the joint tenant. PLR 8208069.

(9) In PLR 199932042, the brokerage firm issued a check for income earned on the account in accordance with a procedure followed before decedent’s death. The surviving joint tenant deposited the check into a joint bank account of the decedent and the survivor. Later the surviving tenant withdrew one-half and deposited it into an account in the estate’s name. One-half of all subsequent income checks was deposited into the estate’s account. The survivor also transferred all assets in the joint account into an account in the survivor’s sole name, but the survivor took no other action regarding the assets. The IRS ruled that neither action constituted acceptance of benefits, nor did both actions taken together constitute acceptance.

(10) To the contrary, in Hull v. Johnson, C.A. No. 02A01-9903-CH-00081, 1999 Tenn. App. LEXIS 856 (Tenn. Ct. App. Dec. 15, 1999), the court held that a transfer of funds from a joint account by the surviving joint tenant to an estate account before the execution of a disclaimer was an acceptance of benefits which rendered the transferred funds nondisclaimable. This made the transfer a taxable gift for which the state assessed a gift tax.

(11) In PLR 200003023, automatic deposits of earnings into three joint bank accounts continued for a short period after the decedent’s death. The earnings were from a joint investment account held in a joint trust and from joint Treasury Direct Accounts. Other deposits (pension, Social Security and proceeds from the sale of three securities held in the investment account) were made to the bank accounts. The decedent and the surviving spouse’s child, who was a successor trustee on the trust and who handled the spouse’s personal affairs, used some of the funds in the three accounts to pay expenses of the spouse and of the decedent’s estate. It was represented that the amount withdrawn did not exceed the date of death balance of the accounts. Thus, an amount equal to the automatic deposits was retained in the accounts. It also was represented that the decedent and the surviving spouse had contributed equally to all accounts. After the decedent’s death and before the disclaimer, the investment account and Treasury Direct Accounts were divided into equal accounts, and no distributions were made from the decedent’s one-half interest but were made from the accounts funded with the spouse’s one-half share. The spouse could make a qualified

disclaimer of one-half of the Treasury Direct Accounts and of the deposits made to the three joint accounts after the decedent's death that were attributable to the decedent's share of the Treasury Direct Accounts and trust investment account.

(12) The IRS seems to permit the acceptance of responsibility, rather than a benefit. The IRS ruled in PLR 8143022 that the action of paying a utility bill with respect to the decedent's separate property was not acceptance by the surviving spouse. Similarly, the payment of the mortgage and taxes by the disclaimant was not acceptance. PLR 9135043.

(13) In what seems an expansive interpretation of "management," in PLR 200030011, the decedent's Will created a credit shelter trust with the marital bequest passing outright to the surviving spouse. After the surviving spouse's death and before any disclaimer by the executor of the surviving spouse's estate, there were four transfers from the decedent's estate to the surviving spouse's estate. Subsequently, and pursuant to a court order authorizing a disclaimer by the surviving spouse's executor, the executor of the surviving spouse's estate transferred some funds back to the decedent's estate. These funds included the amount to be disclaimed and the income earned from that amount. After the transfer back, and within nine months of the decedent's death, the executor of the surviving spouse's estate executed a disclaimer of a portion of the marital bequest. The IRS ruled that the management by the surviving spouse's executor of the property bequeathed from the decedent to the surviving spouse did not constitute acceptance and thus the disclaimer was qualified.

(14) Reimbursement to disclaimant of ordinary administration expenses is not acceptance. PLR 8508079.

(15) The attempted disclaimer of a life estate was found invalid because the disclaimant had accepted property by executing, as personal representative of the estate, a deed of distribution to herself, executing a receipt for the life estate, procuring insurance on the property, and listing the property for sale. Will of Hall, 456 S.E.2d 439 (S.C. Ct. App. 1995). See also Estate of Selby v. United States, 726 F.2d 643 (10th Cir. 1984).

(16) Receipt of $460 for purchasing clothes for the funeral, repaid within months, by 20-year-old grandchild of decedent, was not an acceptance of the entire estate and thus the grandchild could renounce. Jordan v. Trower, 431 S.E.2d 160 (Ga. Ct. App. 1993).

(17) In In re Estate of Lyng, 608 N.W.2d 316 (S.D. 2000), the disclaimer contained a statement that the disclaimer was in favor of an irrevocable trust (which had not been created). The court held that directing the disposition of disclaimed property is an action demonstrating acceptance rather than rejection and thus the disclaimer was null and void.

(18) In Cassel v. Kolb, 267 B.R. 861 (N.D. Cal. 2001), rev'd, 321 F.3d 868 (9th Cir.), amended by 326 F.3d 1030 (2003), the debtor disclaimed a contingent remainder interest in a trust of which his mother was the income beneficiary. The judgment creditor argued that the debtor had accepted the property before disclaimer by using trust money and by listing the real estate owned by the trust on his financial statements. The claim of use of trust money was attributable to the fact that the debtor, using a power of attorney granted by his mother, had withdrawn funds from his mother's bank account, which contained income that had been distributed to the mother. The Bankruptcy Court had found that tracing money from the trust to the debtor through his power of attorney over his mother's funds was too attenuated. The District Court found no clear error by the Bankruptcy Court because there was no indication that the funds were not used for the mother. The Circuit Court agreed as to this issue.

On the second issue, the District Court found that listing the debtor's interest in the trust properties on financial statements merely stated the truth of the matter - that he held a contingent interest - and could not constitute acceptance even if the debtor received a loan on that basis. Until a beneficiary exercises dominion or control over an interest, the beneficiary has not accepted the interest. At most, according to the court, the debtor exercised de minimis use of his interest, which did not rise to the level of acceptance contemplated by the California statute. The Circuit Court reversed on this issue. Its test for acceptance was whether the beneficiary's actions produced some immediately tangible benefit that was more than de minimis. The Circuit Court found that by listing a one-third ownership in the trust, with an estimated value of $900,000, without disclosing the contingent nature, the debtor realized more than a de minimis benefit. It enabled him to greatly increase his statement net worth and increased the likelihood that his loans would be approved.

(19) In Uber v. Hoffmann, 2002 Cal. App. Unpub. LEXIS 4052 (2002), the receipt of rental income from disclaimed property after the disclaimer did not vitiate the disclaimer.

(20) In Pher Partners v. Womble (*In re* Womble), 289 B.R. 836 (Bankr. N.D. Tex. 2003), the court determined that post-disclaimer acts of dominion and control by a beneficiary do not invalidate a disclaimer.

(21) In Ace Elec. Co. v. Butler, 2012 Va. Cir. Lexis 81, the court determined that a debtor's actions of maintaining real estate, reducing the debt obligation, hunting and fishing on the real estate and hosting overnight guests were actions indicative of acceptance and therefore debtor's purported disclaimer of a real estate inheritance from his mother was invalid.

(22) Similarly, in In re Crandall, 549 B.R. 734 (Bankr. Ala. 2016), a bankruptcy debtor's disclaimer of an inheritance from his father was invalid based on acceptance. The debtor, as special administrator of his father's estate, had

used assets of the probate estate for his personal benefit in more than a de minimis amount.

(23) In Gardner v. Richardson (In re Gardner), 283 P.3d 676 (Ariz. 2012), the issue was whether a beneficiary had accepted a life estate interest such that she was barred from disclaiming. The provisions of the decedent's trust granted a life estate in his residence to his house mate with the house to be distributed to decedent's two children upon the house mate's death. The life estate provisions imposed upon the house mate the responsibility for maintaining the property as if it were her own; to pay all taxes, utilities, homeowners association fees and insurance on the property; and to be responsible for any other reasonable and customary fees that would normally accompany a property. In response to the trustee's petition for guidance, a court had determined, in August 2009, that the house mate would be responsible for paying the interest portions of the mortgage payments and the two children would be responsible for the principal portions of the mortgage payments. On May 21, 2010, the house mate mailed a letter to the trustee seeking to disclaim her interest in the property effective September 23, 2008. The court ruled that "when a devisee takes possession and exercises control over the devised property, without contemporaneously and objectively manifesting any intent to disclaim, the acts of possession and control constitute conclusive evidence of acceptance." The house mate physically occupied the property in the same manner she had prior to the decedent's death, arranged to pay the utilities and taxes as required by the life estate agreement, and made repeated and affirmative statements to the trustee asserting her right to enjoy the property to the exclusion of the two children. These were all acts of acceptance which would make ineffective a belated attempt to disclaim.

b. Merely taking delivery of an instrument of title, without more, does not constitute acceptance. Reg. § 25.2518-2(d)(1).

(1) An election by a surviving spouse to take a statutory share is not acceptance and can be disclaimed. The filing of the election is the exercise of a right to take delivery of title to the property interest. Rev. Rul. 90-45, 1990-1C.B. 175, PLR 8817061. See also PLR 9440027, where a disclaimer of the right to elect against the Will as to certain beneficiaries is a qualified disclaimer.

(2) Taking legal action to establish an interest in a portion of a trust does not constitute an acceptance of the taxpayer's interest in the trust assets. PLR 200109041.

(3) Retitling a joint brokerage account to a separate account is not acceptance. However, the surviving spouse could not disclaim an interest in one-half of stock which she ordered sold. PLR 9214022. See also PLR 199932042.

(4) Retitling of community property, which was bequeathed to the surviving spouse pursuant to a community property agreement, so as to avoid income

tax problems, was the mere taking of delivery of title because the disclaimant had not drawn on the funds or any income. PLR 9507017.

(5) Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. Reg. § 25.2518-2(d)(1); TAM 8310006.

c. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. Reg. § 25.2518-2(d)(1).

(1) The acceptance of income from the nondisclaimed fraction before a disclaimer does not render the disclaimer invalid. PLR 8637113.

(2) Generally, the IRS has been liberal in applying this rule when dealing with money or brokerage accounts. In TAM 8619002, the surviving spouse made a qualified disclaimer of assets from a joint brokerage account, even though she withdrew $1.75x for her personal use before the disclaimer. There was no acceptance of benefits from disclaimed portion which did not include the $1.75x. See also PLRs 8904041, 8827072.

(3) Withdrawals before disclaimer were considered as coming from only the surviving spouse's one-half of the joint brokerage account and did not preclude a disclaimer. Further, although the surviving spouse could not disclaim an interest in one-half of stock which she ordered sold (thus accepting the benefit) she could disclaim one-half of the stock not ordered sold. PLR 9214022. Similarly, the payment of a credit card from a joint brokerage account was not acceptance as the one-half retained by the disclaimant could cover the payment. PLR 9218015.

(4) Inconsistently, in PLR 9012053, the IRS previously had ruled that two withdrawals by use of a credit card from the money fund portion of a brokerage account were considered as coming one-half from the survivorship interest that was to be the subject of the disclaimer and that amount could not be disclaimed, even though the surviving spouse repaid the funds.

(5) Similarly, in Estate of Delaune v. United States, 79 A.F.T.R.2d (RIA) 97-1509, 97-1 U.S. Tax Cas. (CCH) ¶ 60266 (M.D. La. 1997), rev'd on this issue, 143 F.3d 995 (5th Cir. 1998), the IRS successfully argued acceptance when funds in a community property account were used to pay expenses for the surviving spouse, who desired to disclaim. The court determined that an undivided amount of those expenses consisted of the predeceased husband's succession; therefore, the surviving spouse had accepted the benefits of the property sought to be disclaimed. However, the Fifth Circuit rejected this notion and found no acceptance. It did not amount to ownership of the husband's succession for the surviving spouse to pay her expenses from funds in a joint community property account to which she had an equal

right. The expenses incurred by the surviving spouse were less than the income from her portion of the community.

(6) The IRS has allowed distributions from an estate, which took place before a disclaimer, to be allocated to the nondisclaimed property. In PLR 8729008, each child proposed to disclaim all interest other than $125,000. The IRS ruled there was no acceptance of the property to be disclaimed where the children received distributions pursuant to court order before the disclaimers in amounts not exceeding the sum they planned to accept. See also PLRs 9036028, 9008034.

(7) In Revenue Ruling 2005-36, 2005-26 IRB 1368, the IRS ruled that the acceptance by a beneficiary of the required minimum distribution, which had to be made from a decedent's retirement account before December 31 of the year of death, did not prevent the beneficiary from disclaiming the balance of the retirement account.

(8) Some states have provided that "[a] partial bar does not preclude the disclaimant from disclaiming all or any part of the balance of the property if the disclaimant has received a portion of the property and there still remains an interest that the disclaimant is yet to receive." Mich. Comp. Laws § 700.2910 (2006); See also N.J. Rev. Stat. § 3B:9-9(b) (West 2002) (provides that the disclaimant is not barred from disclaiming all or any part of the balance of the property where the disclaimant has received a portion of the property and there still remains an interest which the disclaimant is yet to receive); 20 Pa. Cons. Stat. § 6206(b) (West 2005) (acceptance of part of a single interest is partial acceptance and does not bar a subsequent disclaimer of any part of all of the balance of the interest if the partial acceptance occurs within six months from the death of the decedent or of the effective date of the transfer in case of inter vivos transfer or third party beneficiary contract).

(9) However, in Whitney v. Faulkner, 95 P.3d 270 (Utah 2004), a beneficiary failed in his attempt to avoid a creditor by disclaiming his residuary interest in his deceased mother's trust. Prior to executing a disclaimer, the beneficiary had accepted a distribution of various items of tangible personal property from the trust. Because the language of the disclaimer was "renounce, relinquish, and otherwise forfeit all right, title, interest or claim as a beneficiary" in the estate of beneficiary's mother, the court held that the attempted disclaimer failed. Even though state law would permit a partial disclaimer, the language used was not that of a partial disclaimer and "having accepted property representing a portion of the interest he purported to completely disclaim," the beneficiary was barred from disclaiming the interest.

d. The disclaimant's continued use of property already partially owned is not acceptance.

(1) In the case of residential property, held in joint tenancy by some or all the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property. Reg. § 25.2518-2(d)(1). PLRs 9733008, 9135044, 9106016, 8508079. Further, the continued occupancy after a disclaimer of one-half is not acceptance. PLRs 9151044, 8124118. The latter ruling indicates that the continued residence is not acceptance if the surviving joint tenant pays rent.

(2) If the residence was separately owned, however, the continued use of the house by the surviving spouse will be acceptance. PLR 8817061. Therefore, if planning in advance for disclaimers, do not put the entire residence in one name because the survivor may not be able to disclaim.

(3) A Washington statute provides that "a beneficiary's receipt of a benefit from property shall not necessarily bar such beneficiary's disclaimer of an interest in the same property when, prior to the date of the transfer of the interest to be disclaimed, the beneficiary already owned an interest in such property in joint tenancy, as community property or otherwise. Any such receipt, in the absence of clear and convincing evidence to the contrary, shall be presumed to be an enjoyment or use of the interest the beneficiary already owns and only after such interest and any benefit from such interest have been exhausted, shall the beneficiary be deemed to have received or accepted any part of the interest to be disclaimed." Wash. Rev. Code Ann. § 11.86.051(2) (1997).

e. Unclear whether acceptance can occur before a transfer has been made.

(1) The receipt of distributions from the husband's revocable trust before husband's death was not acceptance of benefits even though the wife, as trustee, made the distributions to herself. There was no acceptance after the

taxable transfer occurred at husband's death and thus the wife could make a qualified disclaimer. PLR 8134216.

(2) In Badouh v. Hale, 22 S.W.3d 392 (Tex. 2000), Hale conveyed all her present and future rights, title and interest in the home of her mother, then living, including her expectancy of ownership of the home by reason of inheritance, to secure a debt of $100,000. Upon her mother's death, Hale filed a disclaimer. The trial court declared the disclaimer invalid on the grounds that Hale's actions of executing the deed of trust and note were the exercise of dominion and control which constituted acceptance. The court of appeals reversed, ruling that acceptance which bars a disclaimer must be in the capacity of beneficiary and that Hale was not a beneficiary until her mother's death. However, the Supreme Court of Texas agreed with the trial court, concluding that a person who pledges an expectancy under a Will acts in a beneficiary capacity for purposes of the disclaimer statute, and that a pledge is an acceptance which precludes a disclaimer.

f. The exercise of a power of appointment to any extent by the donee of the power is an acceptance of its benefits. Reg. § 25.2518-2(d)(1). The regulations, however, focus on the actual exercise as opposed to an attempted, then abandoned, exercise. The mere execution of a Will containing the exercise of a general power of appointment, without the death of that testator, is not an exercise. In one regulation example, a disclaimer of a power of appointment was permitted even though the disclaimant had executed a Will which would have exercised the power, had the disclaimant died before the disclaimer. Reg. § 25.2518-2(d)(4), Example 7.

(1) In Estate of Rolin, 588 F.2d 368 (2d Cir. 1978), aff'g 68 T.C. 919 (1977), an individual made no attempt to exercise a power of appointment but died four months after the death of her husband, the donor of the power. The court determined that even though the power expired at her death, a disclaimer has retroactive application to powers and interests held by a decedent at death. The executors of the deceased power holder were permitted to disclaim the power of appointment.

(2) However, once the power holder has died exercising the power, acceptance has occurred. TAM 8142008. In Estate of Engelman v. Commissioner, 121 T.C. 54 (2003), the terms of a joint revocable trust provided that upon the death of the first spouse, all assets, other than those disclaimed by the surviving spouse, were to flow into Trust A over which the surviving spouse possessed a general power of appointment. Any disclaimed assets were to flow into Trust B. On February 5, 1998, less than two months after husband died, the surviving spouse executed a document entitled "Power of Appointment." The document directed the disposition of the Trust A principal. The surviving spouse died on March 6, 1998. On May 11, 1998, the special administrator of her estate executed a disclaimer of the surviving spouse's interest in the Trust A assets. The IRS sought to include the "disclaimed" assets in the gross estate of the surviving spouse. The taxpayer argued that signing the power of appointment instrument did not result in an acceptance because it did not itself manifest any dominion and control over the property, nor did exercise of the power ever become effective due to the relation-back doctrine under the state's disclaimer laws. As a threshold matter, the court considered the requirements for a valid disclaimer under California law and concluded that the decedent would have been considered to have accepted her interest in, and power of appointment over, all the assets of Trust A. Signing a power of appointment that provided for the disposition of the Trust A assets in their entirety and then dying without having amended the document implied an intent to direct or control the property that conveyed more than a de minimis benefit to the donee of the power of appointment. (This test devolved from Cassel v. Kolb, supra.)

(3) In Estate of Greve, T.C.M. 2004-91, the decedent possessed a general power of appointment over one-sixth of a trust established under the Will of her grandmother who had died in 1933. During her lifetime, the decedent received one-sixth of the income from that trust. The decedent died on

December 27, 1998, and on September 24, 1999, the decedent's executors filed a purported disclaimer of the power of appointment. Under governing Pennsylvania law, the general residuary clause in the decedent's Will effected the exercise of the power. The only issue addressed in the court's opinion was whether the power constituted a general power of appointment. The court did not address the disclaimer issue but did state that it had considered all the contentions and arguments of the parties and found them to be without merit, irrelevant, and/or moot. The court may have found the disclaimer to be unqualified because it was not timely (i.e., not within a reasonable time of the decedent's knowledge of the pre-1977 transfer) or because the power of appointment had been accepted due to its exercise by the residuary clause of the decedent's Will.

g. The acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed. Reg. § 25.2518-2(d)(1).

(1) In PLR 8225096, the decedent had established a nonqualified split-interest trust. The income beneficiary proposed to disclaim all interest in the trust in return for payments of corpus from another trust and for payments from charities. This is acceptance.

(2) Receipt of $2.5 million for "disclaimer" invalidated the disclaimer for state law purposes. Dean v. Dir. of Finance, 623 A.2d 707 (Md. Ct. Spec. App. 1993).

(3) In Estate of Lute v. United States, 19 F. Supp. 2d 1047 (D.C. Neb. 1998), the decedent died unexpectedly on September 3, 1992. His Will could not be found so he died intestate with his estate passing one-half to his surviving spouse and one-half to his father. His father, for many years, had been making gifts to reduce his estate and had used all his unified credit. On September 16, 1992, the father disclaimed his entire interest in the estate with the result that everything passed to the surviving spouse. The testimony of the father's lawyer and of the surviving spouse was that the father decided to disclaim without having discussed it with the surviving spouse. On September 18, 1992, the surviving spouse and the father entered into an Agreement dissolving a partnership which the father and son had been operating. The partnership agreement had given the surviving partner the right to continue a ranching operation for up to three years after the death of a partner and an option to buy the assets. On September 21, 1992, the surviving spouse transferred her inherited property into a trust for her benefit with terms similar to those in the lost Will. On July 28, 1993, the father and co-trustees of the Trust entered into a new partnership agreement. On August 7, 1993, the trustees and father entered into an agreement to exchange certain parcels which was accomplished by using assessed values for determining exchange ratios.

The IRS determined the disclaimer to be invalid and sought to treat the one-half passing from the father to the surviving spouse as a gift and not eligible

for marital deduction resulting in an estate tax deficiency of $1,167,813 and a gift tax liability for the father. This position was taken even though the National Office had not once but twice, in responding to the auditing agent's request for technical advice, advised the agent to drop the issue.

In court, the IRS first argued that the disclaimer was not irrevocable and unqualified. The court found the renunciation to be unqualified on its face. Second, the IRS argued that the disclaimer was not unqualified because it was made in return for promises in the Agreement between the spouse and father. The regulations state that one must not have accepted the interest to be disclaimed or accepted any consideration for a disclaimer if it is to be a qualified disclaimer. The court said that in the estate and gift tax area, consideration must be in money or money's worth, and the father received nothing in money or money's worth for making the disclaimer. He received no benefit from the Trust, the property exchanged was on an assessed value basis and the father already had certain rights pursuant to the original partnership agreement with the decedent. The court found no expressed or implied acceptance, that there was no prearranged deal, and that renunciation came first. Finally, the IRS argued that the property did not pass without direction on the part of the disclaimant. The renunciations were not filed in two counties where the decedent had land until November 29, 1995. Instead, the transfers of land were accomplished through a series of quit claim deeds. The court held that the disclaimer was valid under Nebraska law, which did not require filing the disclaimer in the land records within nine months and found Section 2518(c)(3) to be satisfied anyway. Verdict for estate and the estate was awarded legal fees.

h. A possibility, if there is no promise, that disclaimants will benefit in the future is not acceptance. This helps alleviate concerns one might have when several disclaimers are being utilized to construct a post-mortem estate plan.

(1) For example, in TAM 8701001, minor grandchildren, with court approval, disclaimed property which passed ultimately to their grandmother. As a result, the decedent's estate benefited in the form of estate tax savings. However, the IRS ruled, in the absence of an underlying agreement, any expectancy the grandchildren may have in ultimately inheriting an enhanced estate either from their parent or from their grandparent was purely speculative and did not constitute the receipt of consideration.

(2) Similarly, in PLR 9427030, as discussed above, certain disclaimers were proposed to reduce state inheritance tax. The IRS ruled that the surviving spouse's execution of an estate plan with terms substantially like those of the decedent's plan was not consideration to the disclaiming children and grandchildren. <u>See also</u> PLR 9509003.

(3) A promise, however, to use the renounced property for the benefit of disclaiming children constitutes acceptance. In <u>Estate of De Dominic</u>, 418 N.Y.S.2d 1012 (Sur. Ct. 1979), a surviving spouse, who was also mother and guardian of three children, sought court approval of disclaimers by the

children of inheritances so as to increase the property eligible for the marital deduction. She offered a promise to use the property for the disclaiming children, but the Surrogate's Court would not approve the disclaimers and added that they would be ineffective for tax purposes because the promise would constitute an acceptance of benefits.

(4) In Estate of Monroe, 104 T.C. 352 (1995), rev'd, 124 F.3d 699 (5th Cir. 1997), the IRS claimed a deficiency of over $3,600,000, including penalties, when it posited that the disclaimers were not valid because they were not unqualified. The decedent made numerous bequests to employees and nonspouse relatives. The decedent's surviving spouse or his nephew had convinced them to disclaim. Shortly after the disclaimers, the surviving spouse had made gifts to the disclaimants in amounts close to those disclaimed. The court stated that a disclaimer is not unqualified if it is induced or coerced. The court also could have focused on acceptance because the gifts were, in effect, consideration for the disclaimers. The Fifth Circuit felt that the Tax Court erroneously focused on the issues of "unqualified and irrevocable," and instead chose to focus on consideration. It found no consideration in most of the disclaimers even though all disclaimants expected to benefit in the future.

3. Actions as a fiduciary.

a. If a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by that person in the exercise of fiduciary powers to preserve or maintain the disclaimed property are not an acceptance of the property or any of its benefits. Under this rule, for example, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. Reg. § 25.2518-2(d)(2). Note that the disclaimer statutes of two states specifically provide that the qualification as a fiduciary is not acceptance. N.C. Gen. Stat. § 31B-4 (c) (2007); Ohio Rev. Code Ann. § 5815.36(K) (2006).

(1) The IRS has not precluded the proposed disclaimant from serving as an executor or co-executor of the estate. PLRs 9051007, 8921083, 8546115, 8337071. In PLR 9707008, the IRS directly addressed the power of the executor to allocate assets and determined that fiduciary discretion to select assets to fund the various bequests was administrative in nature and not a power to allocate enjoyment of the disclaimed property.

(2) Actions as a fiduciary in listing property for sale are not acceptance. PLR 8130127.

(3) In PLR 200030011, the actions of the surviving spouse's executor in managing property distributed from the decedent's estate to the surviving spouse's estate (and later transferred back before the disclaimer) were not acceptance.

(4) In PLR 200406038, the intestate decedent's mother and sole heir-at-law sought to disclaim the decedent's interest in an LLC. Before and after decedent's death, Mother served as a co-manager of the LLC. Mother also was serving as co-personal representative of decedent's estate. The other members of the LLC proposed to amend the operating agreement to modify certain voting percentages and to designate the decedent's brother as the sole managing member. The IRS determined that Mother's execution of the amendment to the LLC agreement, in her capacity as co-personal representative of decedent's estate, would not be acceptance of benefits.

(5) Actions which benefit a beneficiary, as opposed to the estate, can constitute acceptance by the beneficiary even though the beneficiary is the fiduciary. In TAM 9123003, the decedent held general and limited partnership interests in two partnerships. His sister held limited partnership interests only. Shortly after the decedent's death, the estate's general partnership interest was recapitalized and the sister became a general partner. The IRS ruled that the recapitalization of estate's general partnership interest to a limited partnership was acceptance by the taxpayer/beneficiary/executor because, according to IRS, the executor could have consented only with acquiescence of the prejudiced residuary beneficiary.

4. Actions while under age 21.

a. The final disclaimer regulations, contrary to the first proposed disclaimer regulations, permit a beneficiary to disclaim property from which benefits are received before, but not after, the beneficiary reaches age 21. Any actions taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's 21st birthday are not an acceptance by the beneficiary of the interest. Reg. § 25.2518-2(d)(3).

B. Separate and Severable Interests.

1. A disclaimant may make a qualified disclaimer of all or an undivided portion of any separate interest in property even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. Reg. § 25.2518-3(a)(1)(i). Several PLRs provide guidance as to how the IRS defines separate interests.

a. A contingent interest in trust corpus is a separate interest from a contingent interest in trust income. PLRs 8825101, 8246041.

b. A principal interest and an income interest are separate. Thus, a principal interest (the right to be a recipient of principal for support and a special power of appointment) and an income interest are separate. In TAM 8523010 and PLRs 200029048 and 8309030, the disclaimant was permitted to retain the income interest while disclaiming the principal interest. This would not be true if the income interest and principal interest merged into a fee under state law.

c. The right to be a discretionary recipient of principal is a separate interest from the remainder interest and one can be disclaimed without disclaiming the other. PLR 200348011, TAMs 8546007, 8443005.

d. In PLR 9329025, the IRS stated that the following interests created by the decedent were separate interests: (1) the surviving spouse's right to remove the incumbent corporate trustee, (2) any right to receive distributions of principal, and (3) the lifetime special power of appointment.

e. A discretionary income interest, a special power of appointment, and the power to remove and replace a trustee are all separate interests. PLRs 9526018, 9526019 (discussed at III.C.5.d.)

f. In PLR 8824015, the IRS determined that the proposed disclaimants possessed three separate interests in property: (1) the right to receive discretionary distributions of trust income, (2) the right to receive discretionary distributions of trust principal, and (3) the right to demand certain portions of the remaining assets of the trust at certain specified ages. The disclaimants were permitted to disclaim the withdrawal rights while retaining the rights to discretionary distributions of income and principal.

g. The power to remove and replace a corporate trustee is a disclaimable interest. PLR 8122075.

h. In a situation in which income beneficiaries were disclaiming their interest in discretionary principal distributions so that a trust could be reformed to a charitable remainder unitrust, the IRS ruled that the interest which each disclaimant acquired through the reformation procedure to receive a unitrust payment which, if income was insufficient, would be paid from principal, is a separate interest from the disclaimed principal interest. PLR 9610005.

i. PLR 9827010 specifically stated that the right to CPI adjustments was a separate interest for disclaimer purposes. In that ruling, a disclaimer by an annuity beneficiary of his right, under the decedent's Will, to receive Consumer Price Index adjustments with respect to his annuity made the charitable remainder a reformable interest.

j. The Seventh Circuit determined that the right to have an estate pay the estate tax on life insurance was a separate interest, contrary to the determination of the IRS and Tax Court. In Estate of Boyd, 819 F.2d 170 (7th Cir. 1987), the only asset not disclaimed by the decedent's child was life insurance passing by beneficiary designation. The Will provided that the estate was to pay all estate taxes and the child specifically disclaimed that right. The Seventh Circuit determined it to be a separate interest, just as if it was a bequest.

k. In 200127007, the IRS followed the concept of Boyd and ruled that proposed disclaimers of benefit conferred by the waiver of a Section 2207A right of recovery under the tax clause of a surviving spouse's Will would be qualified disclaimers. The predeceased spouse's Will contained a reverse QTIP marital trust

and a regular QTIP marital trust. The predeceased spouse's Will directed that the estate tax on the marital trusts, due to their inclusion in the surviving spouse's estate, should be paid first from the regular QTIP marital trust and then, to the extent the regular QTIP was insufficient, from the reverse QTIP marital trust. The surviving spouse's Will waived the right under Section 2207A to be reimbursed for taxes and left the residuary to a charitable foundation. Thus, the surviving spouse's estate would bear the estate taxes on the two marital trusts.

The present and future beneficiaries of the QTIP trusts, after the surviving spouse's death, were descendants of the couple. The children, individually and as trustees of the of the marital trusts and as executors of the predeceased spouse's estate, and the grandchildren proposed to disclaim the benefit of the waiver of the Section 2207A right of recovery so that the estate tax would be borne by the marital trusts, rather than the foundation.

The ruling concluded that it is a matter of state law whether the benefit conferred by a waiver of Section 2207A right of recovery of estate tax attributable to the inclusion of QTIP property in a gross estate is an interest in property. The Pennsylvania law stated that "any interest in, to, or over real or personal property" could be disclaimed but did not specifically address whether the benefit at issue was a property interest. Thus, the IRS had to determine what the law of the state likely would be and, after mentioning the Boyd decision, found that Pennsylvania would treat the benefit as a property right.

l. In PLR 9633004, a trust with an individual annuity beneficiary and charitable remainder beneficiaries gave the trustees the power to use trust assets to pay the debts and burial expenses of the individual. The IRS permitted a disclaimer by the individual's guardian of the right to have the funeral expenses and debts paid so that the trust could qualify as a charitable remainder trust.

m. The power, as a beneficiary, to choose assets is a separate interest. PLR 9707008.

n. TAM 9140004 provides an example of an interest which was not separate. In it, the surviving spouse was granted the right to use the personal residence for as long as she occupied it and did not remarry. The descendants attempted to disclaim the right to receive the residence during the surviving spouse's lifetime. The IRS determined that the disclaimer was not qualified because the interest was temporal and not separately created by the decedent.

o. On the other hand, in PLR 8622018, the IRS permitted the disclaimer of the right to receive principal distributions until the later of the surviving spouse's death or the youngest child reaching age 21. The provisions of a pre-ERTA Will would have resulted in an overfunding of the family trust, so it was desired to qualify a portion of the family trust for the marital deduction. The trust terms provided that the surviving spouse was to receive all the income for her life but gave the trustee the authority to invade principal for the issue of the decedent. To qualify the family trust for a QTIP election, it was necessary to eliminate the potential of principal invasions for others, including unborns. The trust was to terminate on the later of the surviving spouse's death or when the youngest living child of the

decedent reached age 21 and the approved disclaimer removed the possibility that the trust could be invaded for someone other than the surviving spouse during her lifetime. A disclaimer of the right to receive the principal distributions until the death of the surviving spouse would have been temporal because of the possibility that the spouse could die before the youngest child reached age 21.

p. A power of appointment over property is a separate interest in property and the power of appointment with respect to all or an undivided portion of such property may be disclaimed independently from any other interests in the property separately created by the transferor. In PLR 9104041, the surviving spouse was permitted to disclaim a general power of appointment while retaining an income interest and a discretionary principal interest. In PLR 8337071, the surviving spouse was allowed to disclaim the special power of appointment over the disclaimed property and retain the power over the remaining assets.

q. The interest in an intestate's estate and interest in wrongful death proceeds are separate interests even though both pass to the heirs at law. While the court did not permit a disclaimer to change the heirs for determining damages in a wrongful death suit, it did intimate that the recipient of wrongful death damages could disclaim the proceeds. Larson v. Cabrini Med. Ctr., 669 N.Y.S.2d 172 (Sup. Ct. 1998).

2. A disclaimant is treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer which would be a qualified disclaimer if such property were the only property in which the disclaimant had an interest. Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. Reg. § 25.2518-3(a)(1)(ii).

a. Disclaimer of a fraction of a residuary bequest is a qualified disclaimer. PLRs 8326033, 8138044.

b. Oil, gas, and mineral rights are severable. PLR 8326110.

c. A disclaimer of number of shares of stock under a formula was permitted as severable. PLRs 9437029, 8702023. Likewise, a fractional interest in a farm is severable and a disclaimer of such was permitted. PLR 9646010.

d. A disclaimer of such portion of a son's share of his mother's residuary estate other than the amount necessary to repay the debt of the son to the mother, was a disclaimer of a severable portion. PLR 8113061.

e. A disclaimer of that portion of real estate as is necessary to fund the insufficiency in residuary estate to pay legacies, debts, funeral and administrative expenses and taxes is a severable interest. PLR 8130127.

f. A disclaimer of property in a trust is not a qualified disclaimer if the beneficiary disclaims income, or income and a remainder interest, in a specific property transferred in trust unless the disclaimer results in the removal of the property from

the trust and a passing, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent. The IRS applied this concept to find valid a disclaimer of specific trust assets although the transfer creating the interest was a pre-1977 transfer. PLR 9745008. The disclaimer of an undivided portion of an interest in a trust may be a qualified disclaimer. Reg. § 25.2518-3(a)(2) and PLR 200045026. When drafting instruments containing trusts, one should consider directing the removal of disclaimed property from the trust if the income beneficiary disclaims the income.

g. Reg. § 25.2518-39(c) permits the disclaimer of a pecuniary amount out of a pecuniary or nonpecuniary bequest or gift provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either before or after the disclaimer. The regulation further provides that a segregation of assets making up the disclaimer of a pecuniary amount must be made based on the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes that may have occurred between the date of transfer and the date of the disclaimer. In effect, this can turn the disclaimed amount into a fractional amount.

h. In <u>Estate of Christiansen v. Commissioner</u>, 586 F.3d 1061 (8th Cir. 2009), decedent’s will provided that 25% of any disclaimed property would pass to charity. Decedent’s daughter disclaimed her interest in the estate “as finally determined for federal estate tax purposes” as to all amounts over $6.35 million. The value of the estate was increased upon audit, but the IRS denied an increased charitable deduction. The court held that revaluation of the estate was not a post-death, post-disclaimer contingency that disqualified the disclaimer. All that remained uncertain following the disclaimer was the valuation of the estate, and therefore, the value of the charitable donation.

3. One can disclaim an undivided portion of a separate interest in property.

   a. For example, a taxpayer was permitted to disclaim an undivided interest (the largest amount that could pass free of transfer taxes) in the one-half interest in real estate to which the disclaimant was entitled under the Will except that the disclaimer did not apply to the one-third acre, more or less, on which the disclaimant's home was located. PLR 8624103. <u>See also</u> PLR 8637108.

   b. An undivided portion of a disclaimant's separate interest in 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. A disclaimer of some specific rights while retaining other rights with respect to an interest in the property is not a qualified disclaimer of an undivided portion of the disclaimant's interest in property. Reg. § 25.2518-3(b).

4. The interest must be separately created by the decedent, however, for the disclaimer to be qualified under Section 2518. For example, if the decedent bequeaths a life estate to A, A cannot disclaim a term of years. Reg. § 25.2518-3(a)(1)(i). However, see PLR 8138059 which permitted a devisee to disclaim a remainder in real estate while keeping a life

estate.

a. In Walshire v. United States, 288 F.3d 342 (8th Cir. 2002), the court upheld the validity of the regulation. The decedent Walshire previously had attempted to disclaim the remainder interest in some inherited certificates of deposit while retaining the income interest. At Walshire's death, his executors omitted the certificates of deposit from his estate tax return. The IRS successfully challenged the omission, claiming that the attempted disclaimer violated the regulations.

b. In TAM 8146020, the decedent devised a life estate to her son and gave him a limited power of appointment over the remainder. The estate desired to elect special use valuation under Section 2032A so the son filed a disclaimer refusing to accept the special power of appointment to the extent that the power would permit him to appoint the property to any person who was not a qualified heir. Although the disclaimer was valid under local law, the ruling determined that it was not qualified under Section 2518 because the son disclaimed only certain rights with respect to the testamentary power of appointment while retaining others. He neither disclaimed a separate interest in its entirety nor an undivided portion of his entire interest.

5. If the portion of the disclaimed interest in property which the disclaimant has a right to receive is not severable property or an undivided portion of the property, then the disclaimer is not a qualified disclaimer with respect to any portion of the property. Reg. § 25.2518-2(e)(3).

a. The IRS applied this concept in PLR 8617065. The children received specific bequests greater than the exemption equivalent. They desired to increase the marital deduction so the children and grandchildren disclaimed specific bequests. The disclaimed bequests fell into the residue and passed to a QTIP trust of which the disclaimants were remaindermen. The disclaimer was not qualified because the "effect of the proposed disclaimers would be to first divide the interests in the property on a temporal basis and then to disclaim only a life income interest while retaining a remainder interest." It is not possible to use a disclaimer to divide a fee into an income and remainder interest.

6. Given that the property interest generally must be a disclaimable interest under state law to be a qualified disclaimer (unless the provisions of a "transfer disclaimer," discussed at supra, are met), it is necessary to ascertain if an interest is disclaimable under governing state law.

a. Some state statutes (e.g., California's) currently contain a lengthy laundry list of the types of interests which can be disclaimed while the statutes of other states have a general description of the interests which can be disclaimed.

b. The types of interests which can be disclaimed under UDPIA 1999 are very broad. The definition of "Disclaimed interest" is "the interest that would have passed to the disclaimant had the disclaimer not been made." UDPIA 1999 § 2(2). The UDPIA 1999 permits a person to disclaim, "in whole or part, any interest in or power over property, including a power of appointment . . . even if its creator

imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim." UDPIA 1999 § 5(a). Further, a partial disclaimer may be expressed as "a fraction, percentage, monetary amount, term of years, limitation of a power or any other interest or estate in the property." UDPIA 1999 § 5(d). This would permit the holder of a general power of appointment to reduce the power to a limited power of appointment and would permit a devisee or donee to "carve out" a remainder or life estate. Some states permit this. See, e.g., Estate of Lamoureux, 412 N.W.2d 628 (Iowa 1987). However, it would not be a qualified disclaimer under the Section 2518 regulations.

c. Some states which have not adopted the UDPIA 1999 contain language similar to UDPIA 1999 Section 5(d).

C. Passing to Someone Other than the Disclaimant Without Direction on the Part of the Disclaimant.

1. Generally, to constitute a qualified disclaimer, the disclaimed interest must pass without any direction on the part of the disclaimant to a person other than the disclaimant, except that it may pass to or for the benefit of a decedent's surviving spouse, even though she is the disclaimant. Reg. § 25.2518-2(e). The laws of a few states specifically mention the exception applicable to a surviving spouse disclaimant.

2. A disclaimer is not treated as a qualified disclaimer under Section 2518 unless it is effective under applicable local law because state law determines whether a property interest has passed. Estate of Dancy v. Comm'r, 872 F.2d 84 (4th Cir. 1989); Estate of Bennett, 100 T.C. 42, 67 (1993). However, see the discussion on the "transfer disclaimer," discussed supra at 1.C for one way to circumvent state law when a qualified disclaimer is sought.

3. If a disclaimer made by a person other than the surviving spouse is not effective to pass completely an interest in property to a person other than the disclaimant because the disclaimant also has a right to receive the property as an heir at law, residuary beneficiary, or by any other means, and the disclaimant does not effectively disclaim these rights, the disclaimer is not a qualified disclaimer with respect to the portion of the disclaimed property which the disclaimant has a right to receive. Reg. § 25.2518-2(e)(3).

a. Joint bank account disclaimed by the surviving joint tenant became part of the residue of the decedent's estate, of which the joint tenant was a 50% beneficiary. Because the disclaimant did not disclaim his interest in the residue, only 50% of the bank account qualified for the disclaimer. PLR 8824033. However, the receipt of 50% did not vitiate the disclaimer of the other 50% of the bank account. If the disclaimant had desired to disclaim the entire account (this assumes that he had not furnished any of the consideration for the account), the disclaimer would have had to extend not only to the bank account itself, but also to any interest in the bank account as part of the residue.

b. Similarly, in PLR 9051007, the decedent left his entire estate to a residuary trust benefiting his children. Each child disclaimed some of his interest in the trust and the grandchildren disclaimed all their interest, causing the disclaimed property to pass by intestacy to the surviving spouse and the children. The portion passing to children by intestacy did not invalidate the disclaimer of the portion which would pass to the surviving spouse by intestacy.

c. In PLR 9501036, property passed to charitable lead trusts by virtue of disclaimers by the individuals who were to be the remainder beneficiaries. The disclaimants also disclaimed the remainder interests in charitable lead trusts to qualify the trusts for a charitable deduction.

d. A Washington statute provides that, "[u]nless the beneficiary provides otherwise in the disclaimer, in addition to the interest disclaimed, the beneficiary shall also be deemed to have disclaimed the minimum of all interest in the disclaimed property necessary to make the disclaimer a qualified disclaimer" under Section 2518. Wash. Rev. Code § 11.86.041(2) (West 2006).

4. The statutes of a few states specifically recognize that a disclaimer of property under one provision is not a disclaimer of that same property under another provision.

a. In Barker v. Jackson National Life Ins.Co., 888 F. Supp. 1131 (N.D.Fla. 1995), discussed supra at p. 736, the disclaimer of the right to receive life insurance proceeds as the policy's beneficiary did not bar the disclaimant from being a beneficiary of the estate which would receive those proceeds as a result of the disclaimer. The insurance company had argued that because the statute provides that the disclaimed property should pass as if the disclaimant had predeceased, the disclaimant could not take the property in any manner.

b. In Palmer v. White, 784 P.2d 449 (Or. Ct. App. 1989), the disclaimer of an income interest in a trust did not prevent the disclaimant from inheriting the assets outright and free of trust via intestacy.

5. The disclaimant may not direct or have the power to direct, either alone or in conjunction with another, the redistribution or transfer of the property or interest in property to another person unless the power is subject to an ascertainable standard. See, e.g., PLR 200443030. If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant shall be treated as directing the transfer of the property interest. Reg. § 25.2518-2(e)(3). The power of direction is present if the disclaimant has a power of appointment over a trust receiving the disclaimed property or if the disclaimant is a fiduciary over the disclaimed property. The legal advisor must make sure not only that property is disclaimed but that any impermissible powers associated with the property are not retained.

a. When the surviving spouse's disclaimer causes property to pass from a marital trust to a trust over which she has a special power of appointment, she must disclaim that special power of appointment. PLRs 200443030, 8412078, 8337071.

b. Similarly, the surviving spouse had to disclaim a special power of appointment over a residuary trust which was to be the recipient of retirement benefits also disclaimed by the surviving spouse. PLR 9537005.

c. If an individual disclaims his income interest in a trust, of which he is one of the trustees, the disclaimant also must disclaim the power to direct income distributions to the trust beneficiaries and the power to extend any of trusts. PLR 8439008.

d. In PLRs 9526018 and 9526019, the trust terms granted each child, with respect to the generation-skipping trust established for his family, a discretionary income interest, a special power of appointment and the power to remove and replace the trustee under a standard which was not ascertainable. A disclaimer of the power to remove and replace the trustee was necessary to avoid a general power of appointment and the disclaimer of the special power of appointment was necessary to avoid the direction of disclaimed property.

e. In PLR 8509092, the decedent's son, who desired to disclaim his interest in the residuary estate so that it would pass to trusts for his children, had to disclaim his power as trustee to terminate the trust early but was able to retain the power granted to him to invade the principal for a beneficiary's health, support, maintenance and education.

   (1) To avoid inadvertently disqualifying a disclaimer, document drafters might consider including in documents a provision which precludes a trustee from making any decisions on the discretionary distribution of property if the standard is not ascertainable and the trustee disclaimed the property. See Sample 4, Appendix D.

   (2) In 1997, Washington added a section to its disclaimer statute which provides that if a disclaimer results in property passing to a trust over which the disclaimant has any power to direct the beneficial enjoyment of the disclaimed property, the disclaimant is deemed to have disclaimed the power to direct the beneficial enjoyment of the disclaimed property, unless the power is limited by an ascertainable standard for health, education, support or maintenance as described in Section 2041 or 2514 of the Internal Revenue Code. Wash. Rev. Code § 11.86.041(6) (West 2006).

f. Interesting to note, PLR 9818008 contains no requirement or discussion of the disclaimer of certain powers. In that ruling, the decedent and his spouse executed a joint trust consisting of community property and separate property of each. The document called for a division, upon the death of the decedent, into a Decedent's Trust, to hold the largest amount of decedent's community property and separate property which could pass free of estate taxes, and a Survivor's Trust, to hold the survivor's separate property, her one-half of the community property, and all decedent's property not allocated to the Decedent's Trust. The surviving spouse was a trustee of the Decedent's Trust. The trustees had the power to distribute income to the surviving spouse for her proper care, support, comfort, and education. The surviving spouse had a 5/5 power over the Decedent's Trust and

arguably a power to amend and revoke not only the Survivor's Trust but also the Decedent's Trust. The surviving spouse disclaimed the power to amend and revoke the Decedent's Trust and the IRS ruled that it was a qualified disclaimer such that the surviving spouse's estate would include none of the Decedent's Trust, except to the extent of any annual power of withdrawal over principal exercisable at the time of the surviving spouse's death. The ruling mentioned, without discussion of the standard of distribution of income, that the surviving spouse would remain as a trustee and did not discuss at all why the retention of the 5/5 power was not controlling the distribution of the property.

Similarly, in Regulation Section 25.2518-2(e)(5), Example 7, the surviving spouse disclaimed marital trust property such that under the terms of the decedent's Will, the disclaimed property was directed to a nonmarital trust over which the surviving spouse had a 5/5 power. This was determined to be a qualified disclaimer.

See also PLR 200003023 in which, as to the decedent's one-half interest in the joint trust's investment account, the surviving spouse disclaimed her powers to withdraw or appoint trust assets and her power to amend or revoke the Trust.

g. However, precatory language, not binding under state law, as to whom property will pass, is not a direction. PLR 9509003.

h. Another area in which control over the disclaimed property arises is when the disclaimed property is passing to a family foundation or charity. In rulings, the IRS has required mechanisms to prevent the disclaimant from participating in any decision as to charitable distributions of the funds or the use of the funds by the foundation. PLRs 200420007, 9635011, 9532027, 9141017, 9008011, 8626046.

6. The court in Estate of Lassiter v. Comm'r, 80 T.C.M. (CCH) 541 (2000) held, however, that Regulation Section 25.2518-2(e)(2) permits the surviving spouse to retain a power to direct the beneficial enjoyment of the disclaimed property, even if the power is not limited by an ascertainable standard, if the surviving spouse ultimately will be subject to estate or gift tax on the disclaimed property. In Estate of Lassiter, the executor sought to QTIP a family trust through a series of disclaimers, but the surviving spouse did not disclaim the testamentary limited power of appointment. Relying upon the cited regulation, the court found that the retention of the testamentary limited power of appointment did not render the disclaimer nonqualified. See infra for further discussion of the case.

D. Disclaimer of Fiduciary Powers.

A distinction must be made between a power which a particular fiduciary needs to disclaim to qualify a disclaimer and a power which needs to be disclaimed by all fiduciaries for a particular purpose. The former power is considered a personal power and is generally disclaimable. The latter generally is not disclaimable under the laws of many states but this is a changing area. If the power is not disclaimable under state law, the desired tax result will not be achieved.

1. A few states, mostly ones which have adopted the UDPIA 1999, permit the disclaimer of discretionary powers by a fiduciary. Va. Code § 64.2-2600 (definition of fiduciary includes a personal representative and a trustee) and Va. Code § 64.2-2609 (unless limited by another statute or the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property).

2. In Cleaveland v. United States, 62 A.F.T.R.2d (RIA) 88-5992, 88-1 U.S. Tax Cas. (CCH) ¶ 13,766 (C.D. Ill. 1988), the court recognized the disclaimer of a power in the trustee to divert trust funds for the education of children from a trust which otherwise would qualify for the QTIP election. This appears to be litigation of the facts in TAM 8527009.

3. In the Estate of Bennett, 100 T.C. 42 (1993) (Kansas), the court concluded that the trustees could not disclaim certain powers to invade for beneficiaries. The same result was reached in Rev. Rul. 90-110, 1990-2 C.B. 209, TAM 8729002 (Texas), PLR 8726030 (New York), TAM 8605004 (Georgia).

4. In TAM 9135003, the Will of the nonresident alien decedent provided that 10% of the estate's net value was to be distributed among charities. Section 2106(a)(2) permitted a charitable deduction to a nonresident alien only for bequests to domestic charities. Because the class of permissible charities was not limited to domestic charities, the bequest did not qualify for the Section 2106 deduction. The executor attempted to disclaim the fiduciary power to distribute to foreign charities. The IRS determined that such a fiduciary power of distribution was not disclaimable. The only way a disclaimer could yield a charitable deduction would be if all foreign charities executed disclaimers of the right to receive any bequest.

5. On the other hand, in PLR 200401011, two trusts allowed the trustees to distribute trust net income to such charities as the trustees determined. Both trusts made timely elections to be treated as electing small business trusts (ESBTs). By permanently disclaiming the power to distribute to other than a limited number of charities, the trustees enabled the corporation to meet the 75-shareholder limitation. Presumably, governing state laws permitted the trustees to disclaim or limit the distribution power.

6. In PLR 8409024, the executor wished to make a QTIP election for a trust in which the surviving spouse did not have a qualifying income interest for life. The trust terms provided that "during any period in which the trustees determine that decedent's surviving spouse is incapable of attending to her financial affairs because of any mental or physical ailment, the trustees are directed to distribute to her only such portion of the net income, as when added to her income from all other sources, shall be necessary or proper in the judgment of the trustees to provide for her support, care, health, and welfare." The trustees attempted to disclaim the fiduciary power to withhold income. The IRS analyzed the state law (Ohio) and determined that a fiduciary could disclaim fiduciary rights, privileges, powers, and immunities which are administrative powers but could not disclaim the rights of beneficiaries unless the instrument creating the fiduciary relationship authorizes such a disclaimer. Thus, according to the IRS, the fiduciary could not disclaim mandatory dispositive powers, such as the subject power, which directly affect the rights of beneficiaries. The disclaimable administrative powers are powers the exercise of which do not enlarge or shift any of the beneficial interests in the trust, except as an incidental consequence of the discharge of the trustee's duties in the general

administration of the trust. Dispositive fiduciary powers, which include the subject power, are mandatory powers which are conferred upon the trustee or executor to enable them to carry out the settlor's or testator's dispositive scheme. Exercise of this type of power is intended to, and does, directly affect the beneficial interest involved. In addition, according to the IRS, under the statute involved, a fiduciary power is held for the benefit of the recipient of the power, unlike a power of appointment which is personal. A fiduciary disclaimer only has the effect of freeing the disclaiming fiduciary from exercising the power. The power does not disappear and is not eliminated, except with respect to the disclaiming fiduciary.

7. In TAM 9818005, the Will of Husband, executed many years before his accidental death, limited the marital bequest to 50% of the adjusted gross estate. An attempt was made through disclaimers, approved by the court, to fashion the Residuary Trust so that it would qualify for a QTIP election. The terms of the Residuary Trust (1) permitted the trustee to "use such part of the income and/or principal . . . for the support in reasonable comfort of [spouse]" and to provide for the support and education of children and descendants of any deceased child and (2) gave the wife an inter vivos special power of appointment in favor of descendants and spouses of descendants. The Will gave the trustee the power to purchase and hold unproductive property. The wife disclaimed the inter vivos limited power of appointment but retained a testamentary limited power of appointment. The children and unborn and unascertained descendants (through court-appointed guardian) disclaimed the right to receive principal and income during the life of the spouse. These disclaimers were found to be effective, the result being that spouse was the only permissible recipient of income and principal during her life. However, the same individuals could not disclaim the right to have income accumulated for their benefit. Further, the trustee's attempt to disclaim the power to accumulate income was not valid under state law. Thus, there was no requirement that all income be distributed to the surviving spouse and the trust did not qualify for the QTIP election. The ruling further determined that the trustee could not disclaim the trustee power to invest in unproductive property.

   Over $14,000,000 in estate taxes was at stake. The facts in TAM 9818005 were litigated, and in a 23-page opinion, the Tax Court found for the taxpayer. Estate of Lassiter v. Comm'r, 80 T.C.M. (CCH) 541 (2000). Among the several issues that were before the court was whether, after the series of disclaimers, the surviving spouse was entitled to all the income of the Residuary Trust. The court determined that, when the instrument was silent as to the time and frequency of income distribution, Georgia law requires that all the income must be distributed at least annually. As Mrs. Lassiter was the only permissible income beneficiary, after the disclaimers, she was entitled to all the income of the Residuary Trust. See earlier discussion of the impact of the retention of the testamentary limited power of appointment.

8. In PLR 8815038, the ruling determined that the trustee, with a court order modifying the power, could disclaim the power to lend money to any person without security or interest.

9. The UDPIA 1999 grants fiduciaries broad disclaimer powers, including the disclaimer of fiduciary powers.

   a. Section 5 provides that, "[e]xcept to the extent a fiduciary's right to disclaim is

expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity." Included within the definition of fiduciary are a personal representative and a trustee. UDPIA 1999 § 2(4).

b. UDPIA 1999 Section 11 addresses issues associated with the disclaimer of powers held in a fiduciary capacity.

(1) If the power has not been exercised before the fiduciary disclaims the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable. UDPIA 1999 § 11(a).

(2) If the fiduciary disclaims a power which has been exercised, the disclaimer takes effect immediately after the last exercise of the power. In many of the tax situations in which a disclaimer of a fiduciary power is needed, it would be important for the fiduciary never to exercise the power. For example, a trustee should never exercise a power to distribute principal currently to descendants if it is desired to qualify the trust for QTIP treatment.

(3) A disclaimer will be effective as to another fiduciary if the disclaimer so provides and the disclaiming fiduciary has the authority to bind the estate, trust, or other person for whom the fiduciary is acting. UDPIA 1999 § 11(c).

10. If your state does not permit a fiduciary to disclaim powers, consider adding that provision to estate planning documents. A personal representative's or a trustee's power to disclaim may be useful to modify estate plans which decedents have failed to update.

E. Disclaimers of Property by Trustees.

1. A few states permit the disclaimer of assets by a trustee of a trust. Va. Code § 64.2-2600 (definition of fiduciary includes a trustee) and Va. Code § 64.2-2609 (unless limited by another statute or the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property).

2. In TAM 8549004, the trustee of a residuary trust attempted to disclaim property designated for the residuary trust so that the property would pass by intestacy to the surviving spouse. The IRS determined that Texas law would not permit such a disclaimer, that any action by the trustee to defeat the trust would be in derogation of its duties and that, even if this trustee could disclaim, a court would appoint a successor trustee to fulfill the trust. The same result was reached in PLR 8804004. The IRS noted in PLR 8804004 that (as is often the case) the desired result could have been obtained if all beneficiaries had renounced their interests.

3. In McClintock v. Scahill, 530 N.E.2d 164 (Mass. 1988), the court, in response to IRS inquiry, construed the Massachusetts disclaimer statute as permitting a trustee of a trust to disclaim an interest in property.

4. In Will of Dickstein, 549 N.Y.S.2d 595 (Sur. Ct. 1989), the court interpreted a trust provision as permitting a trustee to disclaim a pour over (which was done to save generation-skipping transfer tax).

5. In PLR 200028020, a disclaimer by trustees was recognized when the settler of a revocable trust had authorized the trustees to disclaim any property or any interest in property if, in the discretion of the trustees, such disclaimer was advisable considering the interests of the beneficiaries as a whole.

6. As noted above, the UDPIA 1999 Section 5 permits a trustee to disclaim, in whole or part, any interest in property. UDPIA 1999 Section 8 further provides: "If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property."

F. Disclaimers of Property by Personal Representatives.

1. Many states permit the disclaimer by a personal representative of an estate.

   a. Some require court approval.

   b. The majority of states which permit a personal representative to disclaim do not require court approval.

2. In PLRs 9109058 and 8737034, executors disclaimed property which otherwise would pass into their decedents' estates.

3. In Estate of Morgan, 411 N.E.2d 213 (Ill. 1980), the Supreme Court of Illinois affirmed the lower court's denial of a disclaimer. Decedent's mother predeceased her by three months. Decedent's Will established trusts for her daughters with remainder to daughters' descendants. If the decedent's personal representative disclaimed the inheritance, it would pass outright to the daughters and save inheritance tax, but the court felt it would frustrate the decedent's desires. See also Estate of Heater, 640 N.E.2d 654 (Ill. App. Ct. 1994).

   In Estate of Delaune v. United States, 79 A.F.T.R.2d (RIA) 97-1509, 97-1 U.S. Tax Cas. (CCH) ¶ 60266 (M.D. La. 1997), reversed on this issue, 143 F.3d 995 (5th Cir. 1998), the court found that none of the executors, the succession representatives, or the attorneys for the heirs of the surviving spouse had authority under Louisiana law to disclaim any part of the surviving spouse's interest after her death. The Fifth Circuit disagreed and concluded, after making a historical analysis back to the Code of Napoleon, that the heirs of a deceased heir may renounce a succession on behalf of the dead heir.

4. In Estate of Lamson, 662 A.2d 287 (N.H. 1995), the court held that the document of the decedent did not have to specifically authorize the disclaimer. Court approval, as required by state statute, was sufficient.

5. In Estate of Schock, 543 A.2d 488 (N.J. Super. Ct. Law Div. 1988), Edna Schock's Will provided for funding of trusts for each of her two daughters, with income to the daughters for life, remainder to grandchildren. Each daughter had two minor children. Edna,

whose estate exceeded $3.5 million, had survived her father by ten days. The personal representative of Edna's estate sought permission to disclaim the inheritance from her father. Because the disclaimer would result in each daughter's trust receiving approximately $49,500 less, the daughters agreed to fund $49,500 into each trust for their children. (One would think the IRS might argue "consideration furnished" here. The counter argument would be that the disclaiming personal representative did not receive any consideration.) The court, departing from its previous holding in Estate of Horowitz, permitted the disclaimer, even though the sole purpose was avoidance of estate tax. For discussion of Estate of Horowitz, see discussion at pp. 26, 67.

6. Nickel v. Estate of Estes, 122 F.3d 294 (5th Cir. 1997), causes great concern as to how a court might strictly construe the ability of a deceased beneficiary to disclaim retirement plan proceeds. Benny Estes designated his parents as beneficiaries of his plan benefits but did not list any contingent beneficiaries. Benny was divorced with two children. Benny died survived by his mother, Lurline, and by his two children. Lurline died three weeks after Benny, without ever receiving any of the proceeds or designating a beneficiary for them. Besides her grandchildren, she was survived by a sister, Annie. Annie then died seven months later; her Will left her estate to her children and a stepchild. The plan provided that each participant or entitled beneficiary (of which Lurline was one by virtue of being Benny's beneficiary) could designate a primary beneficiary and a contingent beneficiary. If no such designation was on file, the plan benefits passed, in the following order of priority, to a surviving spouse, surviving children, surviving parents, surviving sisters and brothers, or the beneficiary's estate. Thus, under the plan, Annie would receive the benefits by virtue of the death of Lurline. Shortly after his appointment, the independent executor of Lurline's estate executed a disclaimer on behalf of Lurline's estate of all the interest in the plan. One of the plan's provisions provided that the person executing a disclaimer of benefits would be deemed to have failed to survive the deceased entitled beneficiary from whom he otherwise would have taken. The issue then became whether the disclaimer was valid. If so, Benny's children would receive the plan benefits; if not, his cousins would receive them. The plan administrator brought an interpleader.

   The Circuit Court, reversing the District Court, citing the "plain" meaning of the plan language, found that it made no provision for anyone disclaiming on behalf of an entitled beneficiary, and determined the disclaimer to be invalid. Further, the Circuit Court reasoned, even if the defendants could show that the plan would permit the executors to disclaim on behalf of a dead beneficiary, Lurline ceased being the beneficiary of the proceeds the instant she died, the proceeds never passed to her estate, and hence Lurline's executor could never disclaim them.

   The dissenting judge, in a better reasoned opinion, felt that the majority's interpretation of the phrase "entitled [b]eneficiary" was overly narrow and that a plain meaning interpretation of "beneficiary" includes agents and representatives of beneficiary because such interpretation is commonplace in the law.

This case should give one pause, however, as to how courts might view the use of disclaimers in dealing with retirement benefits. Although the Fifth Circuit did not decide the case on a preemption basis, because of the "plain meaning within the plan," a court might apply the concept of federal preemption in the ERISA area to eliminate the use of accepted concepts from the common law of the states.

G. Disclaimers by Minors, Incompetents and Unborns.

1. Disclaimers by representatives of wards, minors and incompetents are permitted in many states without court approval.

2. Other states require court approval.

a. In Estate of Horowitz, 531 A.2d 1364 (N.J. Super. Ct. Law Div. 1987), a nephew of a New Jersey decedent desired to disclaim specific bequests so that the property would pass to the decedent's mother and result in less inheritance tax. Under the decedent's Will, if the nephew had predeceased, the bequest would pass to a trust for the nephew's children. Nephew had a minor child whose disclaimer also would be required to achieve the intended result.

The plaintiffs had initiated the action in New Jersey but attempted to withdraw the application on the premise that the court having jurisdiction over the minor, who did not reside in New Jersey, should hear the request, not the court having jurisdiction over the estate. The New Jersey court would not permit withdrawal of the action. The court determined that New Jersey was the proper jurisdiction for such a hearing because the statutory language requiring court approval of a disclaimer by a minor's guardian required the court to "first make a determination that the disclaimer is advisable, and secondly, that it will not materially prejudice the rights of creditors, devisees, heirs or beneficiaries *of the decedent*." The court determined that the legislature would not attempt to direct a court of another state as to what findings and conclusions it must make.

On the issue of the disclaimer itself, the court refused to permit the disclaimer for three reasons. First, the court stated, if the nephew disclaimed, the disclaimed bequest would pass to a trust and, according to the court, there was no authority to authorize a disclaimer by a trustee. (This seems to ignore the fact that the minor would be treated as predeceased if the minor were permitted to disclaim and hence the trust would not have been established.) Second, the court found it would not be in the best interests of the minor in that the minor would benefit more from the inheritance if it passed to his father, rather than his great-grandmother, who might diminish it. Third, the court refused to participate in a scheme which would reduce taxes. The court stated that "[w]hile passive acceptance of a disclaimer scheme may be acceptable. . . there is no authority in New Jersey whereby its courts should affirmatively intercede to aid a plan when the sole purpose is the evasion of taxes." *Id.* at 1367.

b. In Estate of Azie, 694 N.Y.S.2d 912 (Sur. Ct. 1999), the court refused to allow disclaimers because the minors would net less after the disclaimers. The decedent father had named his two minor children, ages 11 and 8, as beneficiaries of

$1,000,000 life insurance. The guardian, who was the mother of the minors, proposed to disclaim $50,000 on behalf of each child so that the proceeds would pass to the mother, be eligible for the marital deduction and save approximately $40,000 in estate taxes. The court determined that, where minors are involved, the standard to be applied is "whether the renunciation will be advantageous to the infants, not merely the parent." The court intimated that a different result might obtain in cases where the infants have no vested interest in the property being renounced but instead have interests which arise only upon a renunciation by the infants' parents.

c. In <u>In re Velma Caddell</u>, 538 S.E.2d 626 (N.C. Ct. App. 2000), the court refused to allow the guardian of an 82-year-old woman to disclaim an inheritance on her behalf. The ward was in good health but had been born with mental disabilities. The guardian argued that a renunciation would serve the best interests of the ward because it would preserve her inheritance for her heirs and would maintain the ward's government benefits. The court determined that the ward would net more with the inheritance, even after losing government benefits, and refused to allow the creation of an artificial need for government benefits.

d. In <u>Guardianship of Hougard</u>, 321 N.W.2d 313 (Wis. Ct. App. 1982), the court affirmed denial of disclaimer by an incompetent of his interest in wife's estate because wife's Will excluded one child and, since incompetent's Will was not before the court, his dispositive scheme was not known to be the same. It would be in the incompetent's best interest to assure his dispositive scheme.

3. The UDPIA 1999 does not specifically mention disclaimers on behalf of minors, but the definition of "Fiduciary" includes a "person authorized to act as a fiduciary with respect to the property of another person." UDPIA 1999 § 2(4).

4. The IRS has found disclaimers on behalf of incompetents to be qualified if permitted under state law but in at least two cases challenged them where the disclaimed property interest was not arising because of someone else's disclaimer.

a. In PLR 8544026, the court-appointed guardian of the surviving spouse was permitted to disclaim, pursuant to court approval, her interest in the family trust.

b. In several rulings, the disclaimers by minors were necessary to accomplish the desired tax results. PLRs 200028020 (Florida), 199949023, 199944038 (Florida), 9835005, 9638014 (New Jersey), 9310020 (California), 9203028, 9119047 (Pennsylvania), 9115062 (South Carolina), 9051007, 8807026, TAM 8701001, PLRs 8622018, 8510023, 8337069, 8245036 (Texas).

c. In <u>Estate of Goree</u>, T.C.M. 1994-331, <u>nonacq</u>. 1996-1 C.B. 4, the decedent died intestate in a plane crash, survived by his wife and three minor children. The wife, as the children's conservator, obtained court approval, with guardian ad litem approval, for the minor children to disclaim all but $200,000 each. The decedent's father also disclaimed his intestate share to pass the estate to the surviving spouse. The IRS claimed that the disclaimers were not valid under Alabama law because they were not in the best interests of the children and thus were not qualified,

resulting in a significant reduction in the marital deduction. The IRS sought to apply Commissioner v. Bosch, 387 U.S. 456 (1967), to upset the decision of the probate judge. The surviving spouse testified that she sought the disclaimers to preserve the capital of the decedent's estate to provide for the minor children. The disclaimers helped prevent the sale of closely-held stock which had been in the family for at least three generations. The Tax Court determined that the standard of review of the highest court of Alabama would be whether the judge's action was plainly and palpably erroneous. The Tax Court upheld the disclaimers.

d. Similarly, in Estate of Lassiter v. Commissioner, 80 T.C.M. (CCH) 541 (2000), discussed supra, the IRS attempted to question the validity of the disclaimers by the guardian ad litem of discretionary income interests on the grounds that they failed to protect the best interests of the beneficiaries. The court found that the disclaimers were an endeavor to preserve over $14,000,000 in a trust in which the descendants were ultimate remainder beneficiaries.

e. In PLR 200130034, minor children, through a guardian ad litem, disclaimed interests in a nonmarital share. While otherwise approving the disclaimers, the ruling, citing Goree, stated that it expressed no opinion as to whether the disclaimers by the minor children were valid under local law.

5. States adopting the UDPIA 1999 should consider including a provision which permits the disclaimer by a parent on behalf of a minor when the only interest or power the minor is receiving is that resulting from someone else's disclaimer.

a. Virginia granted the custodial parent such a power by adding the following provision to its adoption of the UDPIA 1999:

> A custodial parent of a minor for whom no guardian of the property has been appointed may disclaim, in whole or in part, an interest in or power over property, including a power of appointment, that (but for the custodial parent's disclaimer) would have passed to the minor as the result of another disclaimer. The custodial parent may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim. Va. Code § 64.2-2603(C).

b. Similarly, Florida's statute provides that, in that absence of a court-appointed guardian, a natural guardian under section 744.301 may disclaim, without court approval, on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, which the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer. Fla. Stat. Ann. § 739.104(2) (West Supp. 2008).

6. In some instances, a disclaimer on behalf of unborns may be necessary when a class does not close.

a. Two states have specifically mentioned unborn and/or unascertained persons as being within the class of persons for whom a guardian can execute a disclaimer. Idaho Code § 15-2-801(a)(1) (2001) (includes representative of an unascertained person); Mont. Code Ann. § 72-2-811(1) (2007) (includes guardian ad litem of an unborn person, an unascertained person, or a person whose address is unknown).

b. The UDPIA 1999 does not specifically mention disclaimers on behalf of unborns or unascertained persons. The definition of "Fiduciary" in Section 2(4) of the UDPIA 1999 (someone "authorized to act ... with respect to the property of another person") probably is not broad enough to include unborns and unascertained persons, without a court appointment. At least in the case of unborns, they are not persons.

c. In Estate of Burmeister, 594 P.2d 226 (Kan. 1979), disclaimers by grandchildren were not binding on their unborn issue. Mr. Burmeister's Will established a trust to benefit his son, the son's former wife and four grandchildren. The trust was to terminate upon the later of (a) the death of the last to die of the son or his former wife or (b) when the youngest living grandchild reached age 35. Two of the grandchildren, neither of whom had children, disclaimed. The court determined that their disclaimers were not binding on their unborn issue because such issue would have the independent right, under the Will's language, to take at the distribution time if the issue outlived their ancestor.

d. In PLR 8622018, a pre-ERTA Will would have resulted in the overfunding of the family trust. The family trust met the requirements for a QTIP election except that the trustees could invade principal for children and any issue of a deceased child. Because issue could be born after the disclaimer, it was necessary to have the unborns disclaim. This was accomplished with court approval. In TAM 8851002, the failure of the unborns to disclaim prevented property from passing by intestacy to the surviving spouse. The IRS determined that under the Will and state law (Oklahoma), the class of contingent remaindermen would not close until the death of the surviving spouse, the trust income beneficiary. The ruling did note that beneficiaries or heirs of the decedent could execute disclaimers within nine months after attaining age 21 and that, if such disclaimers caused the property to pass to the surviving spouse under state law, the estate could claim a refund of estate tax. See also PLRs 199949023, 199944038, 9629023 and 9623064.

H. Disclaimers by Attorneys-in-Fact.

1. Some state disclaimer statutes address disclaimers by attorneys-in-fact with court approval.

2. In re Estate of Kunkis, 618 N.Y.S.2d 488 (Sur. Ct. 1994), the court addressed the issue of whether an attorney-in-fact could, without prior court approval, renounce an intestate share and insurance proceeds which otherwise would pass by operation of law to an incapacitated person and determined that court review was required, particularly when the attorney-in-fact had a conflict of interest in that he, as a child of the principal, would receive one-third of the disclaimed interest.

3. Many state disclaimer statutes address disclaimers by attorneys-in-fact without court approval.

4. Disclaimers by the attorneys-in-fact for an incompetent surviving spouse were found effective under Delaware law. PLR 9015017. See also PLR 200028020 (Florida).

5. UDPIA 1999.

   a. Section 2(4) includes within the definition of "Fiduciary" "an agent acting under a power of attorney." Thus, under Section 5 of the UDPIA 1999, an attorney-in-fact would be permitted to disclaim without court approval as long as the right to disclaim is not expressly restricted or limited by another state statute or by the power of attorney.

   b. In adopting the UDPIA 1999, states should consider adding a clause prohibiting an agent from exercising the power to disclaim if the agent would benefit thereby. The power to disclaim and receive the disclaimed property could cause the agent tax problems if an IRS agent pressed the issue. For example, assume Dad dies, Mom has given Son a power of attorney which Son does not exercise, and Son dies within nine months of Dad. Does Son have a power of appointment over the property which Mom inherits because he had the power to disclaim on Mom's behalf and pass the property to himself (and maybe siblings)? What if Son does not die within nine months and does not exercise the power to disclaim? Has Son made a taxable gift of the portion he would have received had he disclaimed because he released a power of appointment?

I. Disclaimers by Persons Other than Individuals.

1. Under UDPIA 1999, entities other than individuals may disclaim.

   a. UPDIA Section 2(1) defines "Disclaimant" as "the person to whom a disclaimed interest or power would have passed had the disclaimer not been made."

   b. UDPIA 1999 Section 2(6) defines "Person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity." Thus, a disclaimant does not have to be an individual.

2. UDPIA 1999 Section 6(b)(3)(B) provides: "If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist."

J. Capacity in Which Disclaimer is Made.

It is important to focus on the capacity in which a disclaimer is being made and to ensure that a disclaimer is being made in the proper capacity.

1. In PLR 8146045, the spouses died simultaneously but the wife was presumed to have survived. The personal representatives of her estate, who were also the beneficiaries of

husband's estate, proposed to execute disclaimers of 40% of the property passing from his estate. The IRS ruled that although the property would pass to those persons making the disclaimer, the "passing" rule of Section 2518(b)(4) was not violated because the disclaimers would be made by the beneficiaries in their capacity as personal representatives.

2. In PLR 8326110, the daughter of the decedent, as guardian for the surviving spouse, proposed to disclaim on behalf of the surviving spouse. The IRS determined that the disclaimer would be qualified even though the disclaimed property would pass to the daughter because the disclaimant was the representative of the decedent's wife, not the daughter in her individual capacity.

3. In PLR 8522003, the surviving spouse died within three months of his wife. The daughter filed an "Affidavit of Heirship" with the county clerk, stating that the wife's Will would not be probated, a few weeks after the death of the husband and several months before she was appointed as the executrix of the husband's estate. The daughter maintained that the Affidavit of Heirship operated as a disclaimer of the husband's interest in his wife's estate and that the doctrine of "relation back" validated the action of the daughter in her individual capacity. The IRS determined that the actions taken by an executrix before her appointment can be validated upon her appointment if the acts are beneficial in nature to the estate and within the scope of the executor's authority. The IRS found that the filing of the document and the resultant nonprobating of wife's Will was intended to preclude property from passing to the husband's estate. In effect, the filing was intended to eliminate a benefit the estate was entitled to receive and was undertaken in the daughter's individual capacity as sole beneficiary of the estate of the husband, rather than as a fiduciary charged with the duty of protecting the estate from loss. Accordingly, the doctrine of relation back did not validate the daughter's execution of the Affidavit of Heirship as the act of the husband's estate and thus the disclaimer was not executed by the appropriate representative.

   In PLR 8749041, the surviving spouse died within nine months of her husband. The executor of the surviving spouse's estate disclaimed an inheritance on behalf of the surviving spouse. As a result, the disclaimed property passed to the executor, individually. The IRS ruled that this did not violate the "passing" rule (discussed above at III.C.) but was a qualified disclaimer because the property passed to her in her individual capacity while the disclaimer was in her capacity as an executor.

K. Timeliness.

1. The laws of the states vary as to the time period within which a disclaimer can be made.

   a. Some state disclaimer statutes contain an absolute time limit for all disclaimers.

   b. The majority require that a present interest be disclaimed within nine months but permit a future interest to be disclaimed within nine months after the taker becomes finally ascertained and such taker's interest becomes indefeasibly vested in quality and quantity.

(1) In Barker v. Jackson National Life Insurance Co., 888 F. Supp. 1131 (N.D.Fla. 1995), decedent's husband, primary beneficiary on decedent's life insurance policy, was suspected of killing the decedent in May 1991. The insurance company declared the policy void and refused to pay. The husband filed suit, alleging bad faith denial. In May 1995, after the trial date had been set, the husband disclaimed his right as beneficiary of the policy but specifically did not disclaim his right as an intestate heir of the decedent's estate, which was the contingent beneficiary of the policy. The court determined the disclaimer was timely, and that while the husband's interest in the policy proceeds vested upon his wife's death, they were not "indefeasibly fixed both in quality and quantity" because the husband's interest in the proceeds would be defeated if the Florida slayer statute were found to apply.

(2) In Estate of Ramsey, 622 P.2d 626 (Kan. 1981), a remainderman's disclaimer, made within nine months after the death of the life tenant, was timely.

(3) In Estate of Chamberlain, No. L-82-023 (Ohio Ct. App. 1982), the court determined that the date of probate was the date takers were ascertained and because the disclaimer was not made within nine months of that date, the court disallowed a disclaimer at the request of a creditor.

In Estate of Balson, 515 N.W.2d 474 (Wis. Ct. App. 1994), the court upheld a disclaimer within nine months of a life tenant's death. The issue was at what time a person's interest "is finally ascertained and his or her interest indefeasibly fixed." The court analyzed comments and history of Uniform Disclaimer Act and determined that the life tenant's death was that event.

c. Some states allow a disclaimer within nine months of gaining knowledge of the transfer.

d. Some, such as Virginia, have no time limit since adopting the UDPIA 1999.

e. Some permit the time to be extended by court. See Estate of Ford, 2002 N.Y. Slip Op. 50026U (Sur. Ct. 2002), in which the court refused to grant an extension under the guise of reasonable cause when a beneficiary requested an extension of time to negotiate with a creditor.

f. California allows a disclaimer within a reasonable time. Cal. Prob. Code § 279 (West 2002) (reasonableness presumed if within nine months).

g. Many state disclaimer statutes extend the disclaimer time until nine months after reaching the age of 18 or 21.

h. Only Wisconsin specifies that a disclaimer may be made nine months after the day on which a prior instrument of disclaimer is delivered. Wis. Stat. § 854.13(4)(e) (West 2001).

2. Although the state laws vary on the time within which a disclaimer must be made, a timely disclaimer under state law may not be timely for purposes of a qualified disclaimer under Section 2518.

   a. The 9-month period for making a qualified disclaimer under Section 2518 generally is determined with reference to the transfer creating the interest in the disclaimant.[1] With respect to inter vivos transfers, the transfer creating the interest occurs when there is a completed gift for federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. With respect to transfers made by a decedent at death or transfers which become irrevocable at death, the transfer creating the interest occurs upon the date of the decedent's death. When there is a transfer creating an interest during the transferor's lifetime of an interest for federal gift tax purposes and the interest is later included in the transferor's gross estate for federal estate tax purposes, the 9-month period for making a qualified disclaimer is determined with reference to the earlier transfer creating the interest. Reg. § 25.2518-2(c)(3).

   b. In PLR 8911028, the incomplete nature of a transfer afforded beneficiaries of an irrevocable trust the opportunity to disclaim. The decedent had established a trust at age 18 but retained the right to revoke the trust with the consent of the trustees, her father, and a trust company. The terms of the trust provided that the income was payable to the decedent during her lifetime, then to her father, if living, during his lifetime, with the remainder passing to her siblings (due to her dying childless and her father having predeceased her). One of the siblings died shortly after the decedent and the sibling's executor desired to disclaim the interest. First the IRS determined that the father's income interest was less than 5% and therefore not substantial such that he did not have a substantial adverse interest to the decedent's exercise of her power to revoke. Thus, the decedent's gift was not complete until her death and the time to disclaim ran until nine months after her death. See also PLR 9710025.

   c. Although community property subject to a community property agreement could not be disposed of unilaterally by either spouse, the decedent's obligations and liabilities could be enforced against the decedent's share following the death of a contracting spouse. Thus the 9-month period for disclaimer began at death. PLR 9507017.

   d. The disclaimer must become irrevocable and unqualified within the 9-month period. Under New York law at the time, a disclaimant could apply to court within three months of executing a disclaimer for permission to revoke the disclaimer. The IRS ruled that where a disclaimer is executed more than six months after death, the disclaimer is not qualified because it is not an irrevocable and unqualified refusal made within nine months. TAM 8239002, 8228012.

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[1] For many years the regulations referred to a "taxable transfer" as beginning the 9-month disclaimer period. The regulations issued on December 30, 1997 ("1997 Regulations"), changed the language to "transfer creating the interest."

e. When powers of appointment are involved, a disclaimer is timely when a taker in default disclaims within nine months of the death of the holder of the general power of appointment. PLR 8234110. A person to whom any interest passes by reason of the exercise or lapse of a general power of appointment must disclaim with nine months of the exercise or release. Reg. § 25.2518-2(c)(3). In PLR 8501030, the surviving spouse failed to exercise a general power of appointment with the result that the property subject to the power poured to the family trust. A child's disclaimer of all interests in the property added to the family trust was found to be qualified. In PLR 9812015, the partial release of a pre-1942 general power of appointment was not a taxable transfer and thus the IRS ruled that a 9-month disclaimer period did not begin running. In PLR 9818053, a contingent beneficiary timely disclaimed when she disclaimed within nine months of the release of a pre-1942 general power of appointment by her husband.

f. On the other hand, a permissible appointee or a taker in default of the exercise of a limited power of appointment must disclaim within nine months of the original transfer creating the interest. PLR 8607013. Reg. § 25.2518-2(c)(3). This is true even if there is no knowledge of the existence of the power.

g. The beneficiary of a preexisting irrevocable trust can, in some instances, disclaim assets or a general power of appointment over assets being added to the trust, even though it is too late to disclaim assets previously transferred to the trust. PLRs 9210014, 8951041. In PLR 8951041, the assets of the disclaimant's mother's estate were to pour to a preexisting irrevocable insurance trust which benefited the disclaimant, in part. The disclaimant proposed to disclaim all interest in the assets coming from his mother's estate. The IRS determined that the disclaimer would be qualified if made within nine months of the mother's death. It also determined that the assets poured over were a separate interest in a trust and that the disclaimant's being deemed to have predeceased the mother would result in the disclaimed assets being removed from the trust.

3. Executor actions prior to a disclaimer by a beneficiary do not preclude a disclaimer.

a. A surviving spouse can make a "qualified disclaimer" of an interest in property created by a decedent even if the executor of the estate elected, before the disclaimer was made, to treat the property as qualified terminable interest property under Section 2056(b)(7). In that case, the marital deduction is not allowable. Rev. Rul. 83-26, 1983-1 C.B. 234.

b. In TAM 9509003, a sale of an asset by the personal representative did not prevent the beneficiary from disclaiming.

L. Jointly Owned Property.

The proper time period for the disclaimer of jointly held assets is an area which has received considerable focus.

1. Under a series of private letter rulings and old regulations, the time for disclaiming joint bank accounts and brokerage accounts generally was nine months after the date of death because under the laws of most states or under the contract with the brokerage house, either account holder may withdraw, directly or indirectly, all the assets so that a taxable transfer does not occur until the death of the transferor.

   a. In several private letter rulings, the IRS determined that the surviving joint tenant of a joint brokerage account had until nine months after the date of the other joint tenant's death to execute a disclaimer. PLRs 9420031, 9218015, 9113011, 9044062, 9012053, 8750023, TAM 8619002, PLR 8609083.

   b. The same was true of joint bank accounts where the funds could be withdrawn completely by either tenant. PLRs 9012053, 8728012.

   c. Under the same rationale, in PLR 9017026, the surviving spouse and joint tenant on several United States savings bonds was permitted to disclaim the bonds. The IRS reasoned that the gift was not completed before death because the deceased joint tenant could have cashed the bonds at any time. The disclaimant filed her disclaimer with the Bureau of Public Debt and the bonds ultimately passed to charity through a provision in the decedent's Will. See also PLR 9043043. Federal form PDF 1849 is to be used for disclaiming bonds, in addition to any required disclaimers under state law.

   d. The 1997 Regulations adopted this rule for joint bank accounts and brokerage accounts and expanded it to include other investment accounts (e.g., accounts held at mutual funds) but premised it upon the transferor being able to regain his own contributions unilaterally.

   e. What if the transferor cannot unilaterally regain his contributions to joint bank, brokerage, or investment accounts? One commentator suggested that in this situation, the surviving co-tenant may disclaim only that amount contributed to the account by the decedent within nine months prior to his death. Roy M. Adams, "Ask the Expert Q & A ," Trusts & Estates, July 1998, at p. 75. However, it seems one could argue that a disclaimer of one-half, that being the survivorship interest, would be permitted under Regulation Section 25.2518-2(c)(4).

2. For many years, the time for disclaiming property held as tenants by the entirety and real estate held jointly with right of survivorship was unclear.

   a. Until August 21, 1996, when proposed regulations were issued ("1996 Proposed Regulations"), the regulations ("Former Regulations") (representing the former position of the IRS) provided that a disclaimer of any interest in a joint tenancy (other than a wholly revocable transfer such as a bank account) or a tenancy by the entirety had to be disclaimed no later than nine months after the transfer creating the tenancy. Former Reg. § 25.2518-2(c)(4)(i).

   b. The Former Regulations made an exception for tenancies in real property between spouses created after 1976 and before 1982 where no election was made under Section 2515 (so that the creation of the tenancy was not a taxable transfer under

the then applicable law). For those properties, the surviving spouse could disclaim the entire property no later than nine months after the date of death if death occurred before 1982 and could disclaim one-half of the property for deaths occurring after 1981. Former Reg. § 25.2518-2(c)(4)(ii). PLR 9151044. See also Estate of Lamoureux, 412 N.W.2d 628 (Iowa 1987).

c. The Tax Court accepted the Former Regulation position, but three Circuit Courts rejected it. The courts uniformly held that the period for disclaimer began to run when the first joint tenant died, regardless of when the tenancy was created because either joint tenant could partition the property and thus cut off the survivorship interest of the other. Estate of Dancy v. Comm'r, 872 F.2d 84 (4th Cir. 1989); McDonald v. Comm'r, 853 F.2d 1494 (8th Cir. 1988), rev'g (on this issue) 89 T.C. 293 (1987), on remand, 56 T.C.M. 1598 (1989), cert. denied, 490 U.S. 1005 (1989); Kennedy v. Comm'r, 804 F.2d 1332 (7th Cir. 1986), rev'g 51 T.C.M. 232 (1986). See also Estate of Lamoureux, 412 N.W.2d 628 (Iowa 1987) (dealing with same issue in an inheritance tax setting), and Estate of Lastella, 448 N.Y.S.2d 1017 (Sur. Ct. 1982).

d. In an Action on Decision dated February 7, 1990, the IRS announced that it would acquiesce in McDonald, with respect to the following: "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 no 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. The Service will also no longer contend that a joint tenant cannot make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that joint tenant. Reg. § 25.2518-2(c)(4)(i) will be revised accordingly."

The court cases and the Action on Decision did not address the issue of the time for disclaiming real estate held as tenants by the entirety, but the foreseeable result was that even though a state's disclaimer statute would permit the disclaimer of tenancy by the entirety property, the federal tax laws would find a disclaimer of tenancy by the entirety property to be untimely unless it was made within nine months of the titling of the property. (Excepted from this rule, of course, would have been a tenancy in real property between spouses created after 1976 and before 1982 where no election was made under Section 2515.) This is because both parties must act together to sever the tenancy by the entirety.

e. The IRS ruling positions were not consistent after the Action on Decision.

(1) The initial rulings after the Action on Decision appeared to permit the disclaimer of property held as tenants by the entirety. In PLR 9012053, the IRS permitted a disclaimer of bonds held jointly with survivorship and of real estate acquired in 1969 and held as tenants by the entirety. The ruling did not discuss the inability to partition tenants by the entirety property (Virginia) and stated that the regulation's rationale of permitting a disclaimer of property acquired after 1976 and before 1982 was equally applicable to tenancies created before the effective date of Section 2518.

(2) In PLR 9038031, the IRS permitted the disclaimer of jointly held real estate while noting that "in situations like the present one where applicable state law allows any joint tenant to partition jointly held property at will ... the survivorship interest is deemed to be created upon the death of the first joint tenant." Similarly in PLR 9733008, the IRS permitted a disclaimer of the one-half survivorship interest of a residence held as joint tenants with right of survivorship. This was because "the transfer creating the one-half survivorship interest occurs on the date of death of the first joint tenant."

(3) The disclaimer of property held as tenants by the entirety (Missouri) was permitted without any discussion of whether Missouri would permit tenants by the entirety property to be partitioned unilaterally. PLR 9106016.

(4) Similarly, in PLR 9135044, the surviving spouse was permitted to disclaim the survivorship one-half of tenants by the entirety property. The ruling noted that the law of the state would permit a disclaimer of tenants by the entirety property but never discussed whether the law of the state would permit a unilateral partition of tenants by the entirety property.

(5) Later rulings began to focus on the ability or inability to sever unilaterally the joint ownership. In PLR 9411014, a mother had titled stock jointly in her name and her daughter's. The IRS permitted a disclaimer of the survivorship interest, focusing on the ability to partition the stock under Ohio law.

(6) However, without this unilateral ability to partition, a gift or transfer becomes complete at the time of titling. Thus, in TAMs 9208003 and 9427003, the IRS determined that under state law (Arkansas and Maryland, respectively), tenants by the entirety who are not divorced cannot partition the tenancy except by the voluntary action of both parties. Therefore, the IRS ruled that such a disclaimer was nonqualified. That was true even though the Arkansas disclaimer statute permitted a disclaimer of property held as tenants by the entirety.

(7) In TAM 9529001, the IRS permitted the disclaimer of bank accounts held as tenants by the entirety but not of bonds so titled. The IRS focused on the rights of the parties under the governing state law (Pennsylvania). In that state, all property titled in the name of a husband and wife is considered to be held as tenants by the entirety and, as is true in many states, property titled that way cannot be partitioned by either spouse unilaterally. Thus, the IRS ruled, the bonds could not have been partitioned unilaterally and the transfer occurred on the date the bonds were so titled. As to the bank accounts and certificates of deposit, the Pennsylvania code provided that a joint account belongs to the parties in proportion to the net contribution by each. Thus, the transfer by the contributing party was not complete until the death of the first spouse to die, resulting in the surviving spouse having nine months from the date of death in which to disclaim. Accord PLR 9612002, also involving Pennsylvania bank accounts.

f. On August 21, 1996, the 1996 Proposed Regulations were issued to amend provisions related to jointly owned property. They provided:

(1) If the property was unilaterally severable, a qualified disclaimer of the survivorship interest to which the survivor succeeded by operation of law upon the death of the first joint tenant to die had to be made no later than nine months after the death of the first joint tenant to die. Prop. Reg. § 25.2518-2(c)(4)(i).

(2) If the interest was created after 1954 and before 1982 and no election was made under Section 2515, the time period for disclaiming was nine months after the death of the first spouse to die for tenancies in real property created between spouses. In the Former Regulations, this window period had been for interests created after 1976 and before 1982. Prop. Reg. § 25.2518-2(c)(4)(iii).

(3) If an interest in joint property with right of survivorship or an interest held as a tenant by the entirety was not unilaterally severable under local law, a qualified disclaimer of the interest or any portion of the interest to which the disclaimant succeeded upon creation of the tenancy had to be made no later than nine months after the transaction creating the tenancy. Prop. Reg. § 25.2518-2(c)(4)(i). Thus property held as tenants by the entirety in states which did not allow unilateral severance would not have been disclaimable under the 1996 Proposed Regulations unless it was so titled after 1954 and before 1982.

(4) In Hennessy v. United States, 81 A.F.T.R.2d (RIA) 98-383, 98-1 U.S. Tax Cas. (CCH) ¶ 60298 (S.D. Ind. 1997), the personal representative of the estate of the husband, who died in March 1993, four months after his wife, sought to disclaim a one-half interest in tenants by the entirety property within nine months of the wife's death. The court would not permit the estate to rely upon the Proposed Regulations issued in May 1996. The court held the 9-month disclaimer period began when the property was titled as tenancy by the entirety, which was before 1972.

g. On December 30, 1997, the 1997 [Final] Regulations were issued with significant modifications to the 1996 Proposed Regulations. They provide:

(1) For joint bank accounts, brokerage accounts and other investment accounts (e.g., mutual fund accounts), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other co-tenant, the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased co-tenant. Reg. § 25.2518-2(c)(4)(iii). This means that the noncontributing survivor may disclaim all and the contributing survivor may disclaim none. This rule would not apply to securities held in certificate form. Query how the IRS will view the ability regarding mutual funds if the transferor can regain the value of the account but through circuitous means. Many mutual funds and brokerage houses will issue the shares or proceeds only in the joint names

on the account but will accept a sell order from any account holder. The transferor could order the sale of the assets and if the account had check writing privileges, draw a check to himself alone. If the account itself did not have check writing privileges, the account holder could receive the check made payable to both account holders, deposit it into an existing joint checking account and write a check to himself.

(2) The window period for interests created after 1954 and before 1982, which was previously in the regulations, was eliminated because of the changes in treatment of property held as tenants by the entireties.

(3) For all other interests held jointly with right of survivorship or as tenants by the entirety, a qualified disclaimer of the interest to which the disclaimant succeeds upon creation must be made no later than nine months after the creation; a qualified disclaimer of the survivorship interest or acretive share must be made no later than nine months after the death of the first tenant. This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant; regardless of the portion of property that is included in the decedent's gross estate under Section 2040; and regardless of whether the land can be unilaterally severed under local law.

(4) A noncitizen spouse may disclaim any portion of the joint property includible in the decedent's gross estate under Section 2040 where the joint property is a tenancy in real property created on or after July 14, 1988. Reg. § 25.2518-2(c)(4)(ii).

(5) The effective date for the 1997 Regulations is for disclaimers made on or after December 31, 1997. Reg. § 25.2518-2(c)(4)(iv).

(6) The agreement executed to open an account may impact the determination of what can be disclaimed. PLR 199932042 was the first ruling on jointly-held property issued after the promulgation of the 1997 Regulations (and it focused mainly on acceptance issues). In that ruling, the taxpayer and the decedent had opened a brokerage account with community property funds. The agreement with the brokerage firm stated that the account would "hereafter be owned one-half by each of us respectively as our separate property" and was to be held as joint tenants with rights of survivorship. The ruling recited the provisions of state law on the ownership of joint accounts, discussed the acceptance issues and permitted the surviving spouse to disclaim the decedent's one-half survivorship interest. The ruling did not address any ability of one owner to access all assets and did not give the reason why the disclaimer of one-half was permitted (i.e., whether it was because the decedent could not unilaterally regain the account or because each was considered to have furnished one-half of the consideration because the source was community property funds or because each was considered to be a one-half owner by virtue of the brokerage agreement and state law and had a legal right to only one-half during the lifetimes of the joint tenants).

3. Before the 1997 Regulations, the ruling positions on the amount of joint property that could be disclaimed had not been consistent with the theory on the time of transfer.

   a. In PLR 8827072, the decedent and his spouse held a joint brokerage account with right of survivorship. The IRS agreed that the brokerage account was like a joint bank account and that no gift was completed before death. The ruling went on to state that because only one-half of the account is included in the decedent's estate when the joint tenants of the account are spouses, only one-half may be disclaimed. See also PLRs 9214022, 9113011. This ruling position made no sense. Although only one-half was included in the gross estate, none of the transfer occurred until the date of the decedent's death because the decedent could have withdrawn all the assets in the account. The entire brokerage account should have been disclaimable and would be under the 1997 Regulations.

   b. In some rulings the issue was not addressed because the surviving spouse only proposed to disclaim one-half of the property. PLRs 9420031, 9218015, 8904041.

   c. In PLR 9017026, a disclaimer was permitted by the surviving spouse (without discussion on the amount) of all the interest in United States bonds.

   d. In PLR 9336011, the surviving spouse was permitted to disclaim 100% of certificates of deposit because she did not furnish any of the consideration. The IRS stated that the transfer did not occur until death.

   e. In PLR 9411014, a mother had titled stock jointly in her name and her daughter's. The IRS permitted a disclaimer of the survivorship interest, focusing on the fact that the stock could be partitioned under Ohio law.

   f. The 1996 Proposed Regulations had provided that, for tenants by the entirety property acquired during the special window discussed at III.L.2.f.(2), the surviving spouse could disclaim any portion of the property which was includible under Section 2040. Prop. Reg. § 25.2518-2(c)(4)(iii).

   g. Under the 1997 Regulations, for survivorship property other than certain bank, brokerage and investment accounts, the interest that the surviving tenant may disclaim within nine months after the death of the first joint tenant to die is only the one-half survivorship interest. Reg. § 25.2518-2(c)(4)(i). This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property included in the decedent's gross estate under Section 2040.

   h. Regarding bank accounts, brokerage accounts and investment accounts, if a transferor may unilaterally withdraw his contributions without the consent of the cotenant, then the surviving cotenant may disclaim all the contributions made by the deceased cotenant. Reg. § 25.2518-2(c)(4)(iii).

4. Consideration furnished. Another issue that arose with jointly owned property was whether an individual could disclaim property for which he furnished the consideration.

a. Prior to the trilogy of Circuit Court cases discussed at III.L.2.c, the Former Regulations prohibited a disclaimer by an individual who had originally furnished the consideration. Former Reg. § 25.2518-2(c)(4)(i). In the Action on Decision, as noted above, the IRS reversed its position.

b. In PLR 9135043, the IRS permitted the surviving spouse to disclaim the survivorship interest in a residence even though he had furnished all the original consideration.

c. In TAM 9140005, the surviving spouse was allowed to disclaim 50% of a bank account even though she may have furnished more than 50% of the account.

d. Under the 1996 Proposed Regulations and the 1997 Regulations, for survivorship property (other than certain bank accounts, brokerage accounts and investment accounts where either joint tenant could sever title unilaterally), the surviving joint tenant could disclaim the survivorship interest regardless of who furnished the consideration or the portion includible in the decedent's gross estate. Prop. Reg. § 25.2518-2(c)(4)(i) and Reg. § 25.2518-2(c)(4)(i).

e. Under the 1996 Proposed Regulations, a tenant who could not unilaterally sever the interest under applicable local law could not make a qualified disclaimer of any portion of the joint interest to the extent attributable to consideration furnished by that tenant even if the disclaimer was made within nine months of the creation of the tenancy. Prop. Reg. § 25.2518-2(c)(4)(ii). Under the 1997 Regulations, the distinctions of severability and consideration furnished were dropped when dealing with property other than certain bank accounts, brokerage accounts or investment accounts.

f. Under the 1997 Regulations, regarding bank accounts, brokerage accounts and investment accounts, if a transferor may unilaterally withdraw his contributions without the consent of the cotenant, then the surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant. Reg. § 25.2518-2(c)(4)(iii).

5. Summary of Section 2518 rules on disclaimers of joint property interests.

a. In conclusion, jointly held property (other than real property titled with a noncitizen spouse on or after July 14, 1988) is divided into two categories. (i) Joint bank, brokerage, and other investment accounts (such as mutual funds), where the transferor may unilaterally regain his contributions, can be disclaimed by the surviving co-tenant within nine months of the transferor's death, to the extent the survivor did not furnish the consideration. This rule would not apply to securities held in certificate form. (ii) For all other interests held jointly with right of survivorship or as tenants by the entirety, a qualified disclaimer of the interest to which the disclaimant succeeds upon creation must be made no later than nine months after the creation; a qualified disclaimer of the survivorship interest must be made no later than nine months after the death of the first tenant. This is the case regardless of the portion of the property attributable to consideration

furnished by the disclaimant; regardless of the portion of property that is included in the decedent's gross estate under Section 2040; and regardless of whether the property can be unilaterally severed under local law. For tenancies in real property between spouses created on or after July 14, 1988, to which Section 2523(i)(3) applies (i.e., where the spouse of the donor is not a citizen), the surviving spouse may disclaim any portion of the joint interest that is includible in the decedent's gross estate under Section 2040.

b. See Case Study 7, Appendix B.

6. Even if a disclaimer of jointly owned property is permitted under Section 2518, one must review state law to assure that jointly owned property may be disclaimed. Many state statutes permit such a disclaimer but the amount which can be disclaimed varies.

a. Some specifically permit the disclaimer of the survivorship interest, and the entire interest if the survivor did not join in the creation of the tenancy.

b. Other statutes incorporate varying provisions on jointly-held property. However, in Hull v. Johnson, C.A. No. 02A01-9903-CH-00081, 1999 Tenn. App. Lexis 856 (Tenn. Ct. App. Dec. 15, 1999), supra, the court determined that a survivor cannot disclaim tenancy by the entirety property, because the survivor takes no new title or estate upon the death of the first since the survivor is in possession of the whole from its inception.

c. The UDPIA 1999 speaks in terms of joint holders of property, not joint owners, and thus does not focus on ownership during lifetime. "Jointly held property" means "property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property." UDPIA 1999 § 2(5).

(1) UDPIA 1999 Section 7 permits a surviving holder to disclaim, in whole or in part, the greater of: (1) a pro rata share of property (determined by the number of holders immediately before the death of the holder to whose death the disclaimer relates); or (2) all the property except for the portion attributable to the consideration furnished by the disclaimant. In In re Estate of Kirk, 591 N.W.2d 630 (Iowa 1999), the court determined that the executor of the estate of the surviving spouse could disclaim validly only the survivorship or accretive interest in joint property and not the proportional and accretive interest (in other words, not 100%). This would appear to no longer be the law in Iowa due to the adoption of the UDPIA 1999.

(2) The disclaimed interest passes as if the disclaimant predeceased the holder to whose death the disclaimer relates. UDPIA 1999 § 7(c).

(3) The amount disclaimable under UDPIA 1999 might not also qualify under Section 2518 for a qualified disclaimer. For example, suppose the survivor furnished all the funds in the joint bank account and could have unilaterally withdrawn those funds prior to the decedent's death. The survivor would

not be able to effect a qualified disclaimer of any of the funds. Reg. § 25.2518-2(c)(4)(iii); Reg. § 25.2518-2(c)(5), Examples (12), (13), and (14). Yet the UDPIA 1999 would permit a disclaimer of one-half.

M. Invalidation or Revocation of Prior Disclaimer.

1. Disclaimants sometimes later contest the validity of their own disclaimers.

   a. In Estate of Griffin, 812 P.2d 1256 (Mont. 1991), the court determined that a disclaimer was not valid until filed and, because a renunciation of the disclaimer was filed at the same time as the disclaimer, there was no intent to disclaim.

   b. In another case styled Estate of Griffin, 599 P.2d 402 (Okla. 1979), the disclaimer by a husband, which was filed seven months after the death of his wife, was not binding because the applicable statute required that a filing occur within six months.

   c. In Estate of Hamill, 866 S.W.2d 339 (Tex. App. 1993), the daughter had disclaimed because she did not want to incur legal fees and then sought to rescind. The court determined that her disclaimer was not valid because it was not timely as she had disclaimed over 13 years after the decedent's death.

   d. In Thompson v. Lawson, 793 S.W.2d 94 (Tex. App. 1990), the disclaimant, wife of the decedent, sought to invalidate her own disclaimer based on acceptance. She had disclaimed property intending it to pass to her two children by the decedent. Three children of a prior marriage of the decedent claimed an interest in the disclaimed property. The disclaimant sought to have her disclaimer deemed ineffective because she made it after she took control of the property. The court ruled that summary judgment was improper and sent the case back to try the facts.

2. Disclaiming beneficiaries sometimes seek to revoke or reform a prior disclaimer, and a few have been permitted to do so.

   a. In Kaufman v. Richmond, 811 N.E.2d 987 (Mass. 2004), the court permitted the reformation of a disclaimer to avoid an unintended generation-skipping transfer tax. The decedent's daughter had learned that she herself was terminally ill a month before the decedent died. The daughter was advised that she could disclaim all or a portion of assets inherited from the decedent mother and that the disclaimed property would pass tax-free to the daughter's children. After executing the disclaimers, the daughter learned that her mother's remaining generation-skipping transfer tax exemption was insufficient to cover the disclaimed property. Two days before she died, the daughter executed an affidavit that if she had been advised that a federal generation-skipping transfer tax would be payable, she would have limited the disclaimer to the amount which could pass free of generation-skipping transfer tax. The court determined that a disclaimer could be reformed in circumstances where there is decisive evidence of intent to minimize tax consequences and where that intent was clearly frustrated.

b. In Wallin v. Torson, 279 N.W.2d 310 (Mich. Ct. App. 1979), the court affirmed the probate judge's ruling that a disclaimer was to be given no effect because the defendant executed it based upon the trustee's incorrect assurance that she was not entitled to trust property.

c. In Estate of Berg, 355 N.W.2d 13 (S.D. 1984), the court allowed a beneficiary to revoke a disclaimer within the time limit for a disclaimer to be made. In fact, the rescission was filed before the disclaimer was filed, even though the disclaimer had been executed before the rescission.

d. In Breakiron v. Gudonis, 106 A.F.T.R.2d (RIA) 2010-5999, 2010-2 U.S. Tax Cas. (CCH) ¶ 60597 (D. Mass. 2010), upon expiration of the retained term of his parents' QPRTs, the taxpayer sought to disclaim his 1/2 interest in the property and allow it to pass to his sister. He was erroneously advised that he could make a qualified disclaimer within 9 months after the expiration of the QPRTs' term, rather than within 9 months after the QPRTs' creation. He filed for reformation in state court, and the IRS removed to federal court, which held that the disclaimers were inconsistent with taxpayer's intent and granted rescission nunc pro tunc to the date of the disclaimers.

3. Most disclaimants, however, have not been permitted to revoke a prior disclaimer.

a. In Davis v. Davis, 494 So. 2d 393 (Ala. 1986), daughters sought unsuccessfully to contest, on the basis of fraud and undue influence, their disclaimers, which were obtained from them by their mother.

b. In Richardson v. Young, 2005 WL 1050569 (Ky. App.), the surviving spouse, within nine months of his wife's death, disclaimed certain nontestamentary property as well as his right to withdraw any principal from, and a general power of appointment over, what was to be the marital trust. Within two weeks, the surviving spouse and his counsel determined that the disclaimer contained fundamental errors which defeated the couple's estate plan. Still within nine months of the wife's death, the surviving spouse executed and filed a second disclaimer which did not specifically disclaim either the principal of the marital trust or the general power of appointment. The court noted that the first disclaimer contained language that it was made in compliance with Section 2518. Thus, it had to be irrevocable and unqualified and the court held that the first disclaimer was irrevocable.

c. In Estate of Munch, 480 N.Y.S.2d 95 (Sur. Ct. 1984), the court denied the daughter's request to revoke her renunciation of bequests from her father.

d. In Chandler v. Denton, 747 P.2d 938 (Okla. 1987), a disclaimant sought, over six years after the fact, to avoid her disclaimer as being untimely filed (17 months after death of husband rather than within six months) to protect the property from a judgment creditor of son, to whom the disclaimed property passed. The appellate court held that, although the lower court erred in entering the Decree of Distribution despite the untimely disclaimer, its decree was not subject to collateral attack so that the disclaimer was to stand.

e. In Southwick v. Southwick, 259 P.3d 1071 (Ct. App. Utah 2011), as part of a divorce settlement, a trust, from which the husband and wife could withdraw assets, was to be turned over to the wife. The named remainder beneficiaries were husband's son and wife's two children. Wife did not want to have to establish a new trust and retitle assets, so a disclaimer was obtained from her step-son. After wife's death, step-son claimed a one-third interest in the trust, alleging that his disclaimer was not valid because it did not strictly comply with Utah's disclaimer statutes and his signature was forged. The court found that the disclaimer strictly complied with three of the statute's four requirements. The disclaimer identified the property to be disclaimed, it described the extent of the disclaimer and was signed by the disclaimant (the lower court having found the signature to be genuine.) As to the fourth statutory requirement, that the disclaimer state it was proper under the statute and was made within the time limits, the court found those requirements to be directory and could "ascertain no reason why an otherwise valid disclaimer that is in fact timely and not barred . . . should lack legal effect merely because it fails to assert its own timeliness and validity."

4. Most disclaimants who seek to revoke do so because they were mistaken as to where the disclaimed property would pass upon disclaimer.

a. In Fleenor v. Williamson (In re Estate of Fleenor), 17 P.3d 520 (Or. Ct. App. 2000), the decedent's son mistakenly thought that disclaimed real estate would pass to his brother. Instead, the real estate passed to the son's minor children. The court determined that "permitting a revocation would subvert the operation of the comprehensive statutory scheme governing disclaimers" and ruled that an heir who has executed a complete and unconditional disclaimer cannot later revoke or reform that disclaimer based on a unilateral mistake of law.

b. In Estate of Ciaffoni, 787 A.2d 971 (Pa. Super. 2001), the court refused to allow a beneficiary to revoke a written, valid disclaimer made 17 years earlier at the beginning of a Will contest. The disclaimant had renounced all interest in his grandfather's estate under a Will which he, and many family members, believed to be invalid. Upon the eventual upholding of the grandfather's Will, the disclaimant sought to revoke his disclaimer on the basis that no prejudice would accrue to other interested parties because distributions from the estate had not been made. The court found no authority for that as a standard. (The case of the grandfather's Will was contested before 14 state and federal judges).

c. In In re Estate of Holden, 539 S.E.2d 703 (S.C. 2000), the court refused to permit sons of the decedent to revoke disclaimers. They had operated under a mistake of law, believing that the disclaimed property would pass to their mother instead of to their children. A mistake of law is not subject to equitable relief.

d. In Tate v. Siepielski, 740 S.W.2d (Tex. App. 1987), the court refused to declare a document to be an assignment rather than a disclaimer. The daughter of an intestate decedent had executed a document entitled "disclaimer," reciting the appropriate state disclaimer statute, with the stated purpose of passing title to the disclaimed real estate to the disclaimant's mother (who was the decedent's

surviving spouse). When it was learned that the disclaimed real estate instead would pass to the daughter's minor child, the daughter and other heirs brought a construction action to have the executed document declared an assignment to mother rather than a disclaimer. The court held that the court "is not required to construe the disclaimer to be an assignment to a specific person when the disclaimer meets all other requirements of the statute, and the statute otherwise provides what the distribution will be." *Id.* at 94.

e. In Webb v. Webb, 301 S.E.2d 570 (W. Va. 1983), a son, who failed to reveal to counsel that he had a child, disclaimed, thinking that his one-half share would pass to his mother, as his father would have wanted. The court would not allow the disclaimer to be set aside as it was a mistake of law, not fact.

N. Failure to Consider a Disclaimer.

1. In Murphy v. Fischer, 618 So. 2d 238 (Fla. Dist. Ct. App. 1993), an attorney serving as the personal representative for the estates of a husband and wife was surcharged $64,000 for failing to have the husband's estate disclaim stock and real property back to the wife's, despite having received erroneous advice from a CPA that no estate tax savings could be achieved. The personal representative also was ordered to pay $240,000 in attorney's fees for the other side.

2. In Sims v. Hall, 592 S.E.2d 315 (S.C. Ct. App. 2003), the plaintiff was awarded damages in a legal malpractice action. The attorney had failed to advise the plaintiff's deceased mother about the possibility of a disclaimer. The entire estate of the plaintiff's sister had passed to their mother, by intestacy, when the sister died on January 14, 1997. The mother died later that year on September 1, 1997. The court determined that the mother's estate tax liability was $191,543 higher than it would have been if the mother had disclaimed her interest in the sister's estate and awarded that sum as damages against the attorney.

3. In Leiphan v. Adams, 894 P.2d 576 (Wash. Ct. App. 1995), beneficiaries of the estates of a husband and wife brought a legal malpractice suit and negligence claim against the personal representative and bank trust officer for the wife's failure to disclaim a joint tenancy interest in a cash management account and thereby reduce the combined estate tax. The court refused to find the attorney liable for malpractice in failing to advise the surviving spouse to disclaim. The beneficiaries failed to establish duty in that the attorney had not been engaged to provide estate planning for the surviving spouse but only to file claims for life insurance benefits. The court further stated that even if a duty had been found, there was no evidence that the surviving spouse would have felt a disclaimer was prudent (i.e., she was not so rich or death so imminent), and the surviving spouse's acceptance of the accounts precluded a disclaimer.

O. Know Where the Disclaimed Property Will Pass and the Consequences of the Disclaimer.

1. It is crucial to disclaimer planning to understand to what persons or trusts the disclaimed property will pass and the consequences of the proposed disclaimer. Generally, if the decedent's documents have not provided for the disposition in the event of a disclaimer, the disclaimant is treated as having predeceased the decedent. One must know all the

necessary facts, analyze where the property would pass if the disclaimant had predeceased, applying both the provisions of the instrument and state law (e.g., anti-lapse provisions), and make sure that all necessary disclaimers are made by all necessary parties.

2. One must analyze for each disclaimant exactly where the property would have passed had that disclaimant predeceased the decedent. See Case Study 1, Appendix B.

   a. In many of the rulings regarding attempts to obtain a marital deduction, for example, the disclaimer by children would result in the property passing to grandchildren of the decedent. Hence the need for the grandchildren to disclaim their interest, also. PLR 8409089. In TAM 8926001, the decedent died intestate, with the result that under applicable state law the children and the surviving spouse shared equally in the estate. The children executed disclaimers of their interests, but the grandchildren did not. Although the state chancery court determined that the property passed to the surviving spouse, the IRS applied the Bosch rule and determined that the property would pass to the grandchildren, and was not eligible for the marital deduction, and that to the extent the surviving spouse received an increased share of the estate, the grandchildren were making gifts.

   b. In PLR 8510023, disclaimers by siblings, nieces and nephews of the decedent were required to achieve the desired result because of their intestate interest under state law.

   c. In PLR 8910043, the surviving spouse disclaimed a life estate in two tracts of land, thereby removing any qualifying income interest that she may have had and rendering the property ineligible for a QTIP election.

   d. In PLR 9625033, the decedent bequeathed his entire estate to siblings A and B, or to their children if neither A nor B survived him. Sibling B disclaimed all interest, sibling A disclaimed one-half and A's children disclaimed so that one-half of the estate passed to B's children.

   e. In PLR 9629023, the decedent bequeathed $600,000 to a trust for her grandchildren and their issue with the residue of her estate to her child. The trust terms provided that the trust assets would pass to her child if there was a time when no grandchild or issue of a grandchild was living. The Will also provided that if the child did not survive the decedent, the residue would pass to the trust for the grandchildren. To pass most of the estate, other than the $600,000 bequeathed to the trust, to the surviving spouse, the child had to disclaim the residue, the grandchildren and unborns had to disclaim the interest in the residue which would have passed to the trust, and the child further had to disclaim the residue as it passed out of the trust.

   f. In some instances, the trust provision regarding disposition on death of all beneficiaries resulted in the property passing to the surviving spouse as an intestate heir. PLRs 8708069, 8514044.

3. One also must be careful to understand the collateral consequences that a disclaimer can have on the marital deduction, charitable deduction, apportionment of estate tax, allocation of the administration expense burden and determination of amounts passing to beneficiaries.

   a. In Estate of McInnes, T.C.M. 1992-558, the widow, who was the residuary beneficiary, disclaimed all property other than that amount necessary "to reduce [decedent's] taxable estate, as finally determined for federal estate tax purposes, to the pecuniary amount of $500,000." The estate chose to deduct some of its administration expenses on the income tax return and the IRS claimed that the widow had disclaimed a pecuniary amount of $500,000, and thus the administration expenses did not reduce the disclaimed amount and an estate tax was due. The court, commenting that the language of the disclaimer was "crystal clear," found for the taxpayer.

   b. In Estate of Nix, T.C.M. 1996-109, the Tax Court addressed the calculation of the marital deduction when the Will contains a formula designed to reduce the estate tax to zero and the surviving spouse makes a partial disclaimer. The taxpayer argued that the marital deduction had to be calculated after considering the disclaimer. If the taxpayer's position were adopted, the disclaimed property would become part of the estate used to fund the credit equivalent and the effect of the disclaimer would be that the surviving spouse, rather than the executors, would be making the decision on the allocation of assets. The Tax Court determined that the formula should be applied without considering the property disclaimed, thereby reducing the marital deduction, and increasing the estate tax.

   c. n Estate of Katz, T.C.M. 2004-166, the decedent's Will established a trust to be funded with an amount equal to the aggregate federal estate tax exemption equivalent. The funding formula also stated that "[t]his amount shall not be reduced on account of any disclaimer by my wife." The surviving spouse not only disclaimed all interest in the trust but also disclaimed any interest in five securities. The estate argued that the disclaimer resulted in the trust being funded with only those five securities. The court agreed with the IRS that the disclaimer resulted in the trust being funded not only with the exemption equivalent but also with the five disclaimed securities.

   d. In TAM 9616001, the effect of a partial disclaimer on the apportionment of estate taxes was determined. The ruling determined that the partial disclaimer resulted in two residuary clauses under state law (North Carolina). Article I of decedent's Will directed the payment of all expenses of last illness, funeral, and administration, as well as taxes payable by reason of the decedent's death. Under Article II, the decedent gave Brother all property which decedent owned, if Brother survived. Article III provided that if Brother did not survive, certain real estate (which Brother did not in fact disclaim) would pass to a third party and all the rest was to be sold with $49,500 to be distributed to certain individuals and the balance to Charity. Within nine months of the decedent's death, Brother disclaimed everything except the specified real estate, some personal property and a specific amount of cash. The issue was the amount of the charitable deduction, i.e., how much of the estate tax and administration expense was chargeable against

the charitable interest and thereby reduced the charitable deduction. The District Office contended that the effect of the disclaimer was to treat the undisclaimed property as specific bequests and thus all taxes and administration expenses would be chargeable against the charitable bequest. The ruling, though, followed the estate's contention that the effect of the disclaimer was to create two residuary clauses. The administration expenses were to be allocated proportionately between the two residues. As for the death taxes, the ruling found that, although the decedent's Will directed that taxes were to be paid from the residue, it did not direct the apportionment within the residue and that under state law, such taxes were to be apportioned among all residuary beneficiaries other than exempt (i.e., charitable) interests. The death taxes on property not disclaimed by Brother were apportioned to Brother under the first residuary clause and the taxes on the specific cash bequests, which came out as preresiduary gifts of the second residuary clause, were apportioned against the charity.

e. At least one court has determined that the disclaimer of specific assets from the residuary did not cause the disclaimed assets to pass by intestacy, but rather the assets passed to alternate residuary beneficiaries and thus the disclaimed property had to bear its proportionate share of the taxes and administration expenses. Bahan v. Citizens & S. Nat'l Bank, 227 S.E.2d 671 (S.C. 1976). Contra Horwitz v. Ritholz, 465 N.E.2d 642 (Ill. App. Ct. 1984).

f. In TAM 199924002, the IRS dealt with a disclaimer of specific assets out of a pecuniary marital bequest and found that as a result of the disclaimer of the closely held stock, the stock became a part of the residue and that under the provisions of the revocable trust, the estate taxes were to be paid from that residue.

g. In In re Widener University, Inc. v. Estate of Boettner, 726 A.2d 1059 (Pa. Super. Ct. 1999), a husband and wife had executed identical, reciprocal Wills in which Widener University was to receive $1,000,000 at the death of the second spouse. Before the death of either, the husband made an inter vivos gift of approximately $500,000 and obtained a written acknowledgment from Widener University that the $500,000 was an advancement of the amount to be received from either spouse's estate. Upon the death of the husband, a guardian of the incompetent wife disclaimed on her behalf enough funds to complete the funding of the $1,000,000 to Widener University. Upon the death of the wife, Widener University sought a second $1,000,000, claiming that because the wife had *actually* survived, her Will was operative to leave the charity a second $1,000,000. The court said no, finding that judicial estoppel applied. Because the charity had taken the position that the wife was treated as having predeceased the husband when it accepted the funds from the husband's estate, it was prohibited from taking an inconsistent position in a subsequent judicial proceeding. This case indicates that one must be careful with partial disclaimers when cash bequests are involved.

4. The disclaimed property may not pass where one anticipates.

a. In Hunt v. United States, 566 F. Supp. 356 (E.D. Ark. 1983), four surviving children and five grandchildren by a deceased son executed disclaimers of their

interest in an intestate decedent's estate with the aim of passing the property to the surviving spouse and obtaining a marital deduction. Twelve other grandchildren and ten great grandchildren did not execute disclaimers. The IRS denied the marital deduction on the basis that the property passed to those twelve other grandchildren and the ten great grandchildren and not to the surviving spouse. The personal representative of the estate argued that the disclaimer statute binds all parties claiming by, through or under a disclaimant and thus, since the twelve grandchildren and ten great grandchildren could inherit only through the relationship with their parents, the parents' disclaimers cut off their claims. The court found that the Arkansas legislature specifically omitted a prior statutory provision which had allowed a disclaiming party to bar the claims of his or her lineal descendants. Thus, the nondisclaiming descendants would inherit in their own right and their disclaimers would have been necessary to pass the property to the surviving spouse.

b. In Estate of Bryant, 196 Cal. Rptr. 856 (Ct. App. 1983), the children of an intestate decedent disclaimed property, intending the disclaimed property to pass to their mother, the surviving spouse, and thereby reduce inheritance tax. The court agreed with the state controller's assertion that the property should pass to decedent's grandchildren.

c. In Ernst v. Shaw, 783 S.W.2d 400 (Ky. App. 1990), the decedent devised his residuary estate equally to his three children. Son disclaimed his interest believing that his interest would pass to his sisters. The court ruled in favor of the children of the disclaimant who argued that the real estate passed to them, despite their father's mistake of law. In other cases, children of a decedent disclaimed believing that the disclaimed property would pass to the surviving parent when instead the property passed to children of the disclaimants. In re Estate of Holden, 539 S.E.2d 703 (S.C. 2000); Zebug v. Manos, No. 03-99-0234-CV, 2000 Tex. App. Lexis 4139 (Tex. App. 2000). In Fleenor v. Williamson (In re Estate of Fleenor), 17 P.3d 520 (Or. Ct. App. 2000), a disclaimed home that was intended to pass to the disclaimant's brother (with physical disabilities) instead passed to the disclaimant's minor children (whose guardian ad litem was the disclaimant's former wife).

d. Under Louisiana law, charitable transfers could not exceed one-third of the decedent's property if he died leaving three or more children or their issue. According to the IRS, the disclaimer by one forced share beneficiary, however, did not increase the amount of property qualifying for the charitable deduction because the law of Louisiana provided that the right to claim the renounced share passes to the other forced heirs, rather than being extinguished. TAM 8442006. It appears that the estate litigated the case and the court determined on other grounds that the entire charitable deduction would be permitted. Estate of Harvey v. U.S., 678 F. Supp. 1268 (E.D. La. 1988).

e. In Matter of Pfeiffer, No. CA-2451 (Ohio Ct. App. 1987), the appellant had entered into a separation agreement which provided that he would give to his wife 50% of any future distribution from either of his parents' estates (both being alive at the time), up to $50,000. The father died one year later. The mother, not

knowing of the separation agreement, disclaimed some property. The appellant claimed that the property he received was a gift from his mother. The court agreed with the wife that it was a distribution from the father's estate and thus she was entitled to 50% of the disclaimed property up to $50,000.

f. Pennsylvania practitioners should proceed with great caution in light of In re Estate of McCutcheon, 699 A.2d 746 (Pa. Super. 1997). In that case, the decedent died intestate, survived by a spouse and three children. The heirs entitled to inherit were the three children because the surviving spouse did not contest the determination that she had deserted the decedent. One daughter disclaimed. Because it had not been ascertained whether the disclaiming daughter had issue, the lower court ordered the funds, which would have passed to the disclaiming daughter, be held in escrow for any issue who surfaced. Upon appeal, the court reversed, relying upon a provision of the statute governing disclaimers stating that a disclaimer is binding upon the disclaimant and all parties claiming through or under him. The court reasoned that if the daughter had issue, the statutory language would bar them from receiving the disclaimed property.

   This decision is highly questionable. It ignores the fact that the same statute says that a disclaimer results in the distribution which would have prevailed had the disclaimant died before the decedent. Often the goal of a disclaimer is to pass property to the disclaimant's descendants. The language the court relied upon probably was intended to cut off heirs of the disclaimant, and maybe creditors, from later complaining.

g. In McInnis v. McInnis, 560 S.E. 2d 632 (S.C. Ct. App. 2002), Husband had named his children as beneficiaries of an IRA with his grandchildren as contingent beneficiaries. After that designation, Husband executed a Will bequeathing to Wife any IRA account which he might own at his death, as well as a percentage of the cash composing the residuary of his estate. Subsequent to Husband’s death, the named beneficiaries and the contingent beneficiaries, represented by a guardian, disclaimed their interests in the IRA. According to the trial court’s finding, this was done so that the proceeds would become payable to the estate as cash that would be available to pay debts and expenses. Wife argued, and the appellate court agreed, that the provision of the Will bequeathing the IRA account to Wife acted as a designation rather than a specific bequest (which might have been adeemed). Thus, the IRA account passed to Wife as a designated beneficiary and did not pass to the estate. The appellate court found that the disclaimers were unconditional, as required by Section 2518, and that the lower court erred in finding that the disclaimers were made so that the proceeds would pass to the estate.

h. In Tate v. Siepielski, 740 S.W.2d (Tex. App. 1987), disclaimed real estate passed to the disclaimant’s minor daughter rather than to the surviving spouse, disclaimant’s mother, even though the stated purpose of the disclaimer was to pass title to the surviving spouse.

i. In Northwestern National Casualty Co. v. Doucette, 817 S.W.2d 396 (Tex. App. 1991), the daughter of decedent disclaimed her interest, thinking that the entire inheritance would pass to her mother, decedent's wife. A child from a prior marriage of the decedent, who was later adopted by his stepfather, came forward to claim one-half of the estate. The court determined the disclaimer to be valid, that it met the statute, and that Texas law allowed a natural son to take even though he had been adopted by another. Thus, one-half of the estate passed to the natural son.

j. Michael J. Cenatiempo of Houston shares the story of a Texas-sized disclaimer disaster that occurred in the mid-80s. An elderly couple obtained a well-drafted testamentary estate plan. Several years passed and the husband, who probably was losing some of his capacity, decided that the Wills were too complicated. With the consent of his wife, he tore up both Wills with the intent of obtaining a new, simpler estate plan. The husband died intestate before the new estate plan could be achieved. At that time in Texas, descendants were heirs for purposes of inheriting the decedent's share of community property. Thus, one-half of the couple's $5,000,000 in community property would pass by intestacy to the descendants. The family was adamant that they did not want to pay estate taxes at that time. All children and (known) grandchildren, who were all adults, disclaimed. There were no great-grandchildren. Thus, because after the disclaimers there were no living descendants who had not disclaimed (or so they thought), the decedent's $2,500,000 share of the community property would have passed to the surviving spouse. A disgruntled relative (and one who must have been miffed about the disclaimer) had knowledge that other family members did not possess. The relative had been a confidant of a son who had predeceased his father and knew that the son had fathered and legitimized a child. The relative informed the grandchild of the events that had transpired. Because all other descendants had disclaimed, the previously unknown grandchild would be entitled to the entire inheritance. The surviving spouse would take only if there were no descendants who had not disclaimed. A settlement was reached with the grandchild.

k. In Wait v. Wait, 2013 Cal. App. Unpub. Lexis 7531, the trust provided that at the death of the grantor, 65% of the trust was to be distributed to grantor's son, Stephen, and 35% was to be distributed to grantor's son, Rexford. The residuary of the trust was to be divided into "as many equal shares as there are sons of mine then living and sons of mine then deceased with issue then living." Rexford disclaimed all his interest in the trust with the intent that his two daughters would receive his 35%. The court, however, agreed with Stephen that Stephen was to receive 82.5%, that being the 65% specific distribution and 50% of the residue which was comprised of 35% of the trust.

l. The case of Estate of DePaoli, T.C.M. 1993-577 (1993), rev'd, 62 F.3d 1259 (10th Cir. 1995), serves as another warning of the dire consequences which can result if the property does not pass upon disclaimer as one had anticipated. The decedent bequeathed all his property to his son. The son wanted all property, other than that which could pass free of transfer taxes, to pass to the decedent's surviving spouse. So, he entered an agreement with the surviving spouse and argued that it amounted to a disclaimer. The IRS argued that even if the agreement did constitute a

disclaimer, the taxpayer had two illegitimate sons (acknowledged in writing because he had claimed them on his income tax return as his sons) and that under New Mexico's antilapse statute, any disclaimed property would have passed to those sons. The Tax Court agreed that the property passed to the surviving spouse by the agreement and not by operation of law because disclaimed property would have passed to the illegitimate sons. The decision resulted in increased estate taxes of $2,243,000. Further, because the son had not received adequate consideration for the relinquished property, the Tax Court determined that he had made a taxable gift of almost $2,000,000. Fortunately, for the family, the decision was reversed on appeal. The Circuit Court disagreed with the type of acknowledgment necessary for illegitimate sons to inherit.

IV. DISCLAIMERS OF PRE-1977 TRANSFERS

A. Requirements for Disclaimers of Pre-1977 Transfers.

Regulation Section 25.2511-1(c)(2) provides that, in the case of transfers before January 1, 1977, creating an interest in the beneficiary disclaiming, where the law governing the administration of the decedent’s estate gives the beneficiary a right completely and unqualifiedly to 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), a refusal to accept ownership does not constitute the making of a gift if the refusal (1) is made within a reasonable time after knowledge of the existence of the transfer, (2) is unequivocal, (3) is effective under local law, and (4) is made before the disclaimant has accepted the property.

B. Disclaimer within Reasonable Time.

The disclaimant must disclaim the interest in the property within a reasonable time after knowledge of the existence of the transfer. For the purpose of disclaiming a trust interest, the transfer occurs when the trust is established if the transferor has no reserved power over the trust. Jewett v. Commissioner, 455 U.S. 305 (1982). In general, a disclaimer of an interest in trust created at any time before 1977 is made within a reasonable time if it is made within nine months of the creation of the interest. However, the running of the nine-month period may be delayed if the disclaimant has been under a legal disability, which includes not having reached the age of majority. If that is the case, the running of the nine-month period may be delayed until the disclaimant reaches the age of majority. Thus, for gift tax purposes, the disclaimer may be made within nine months after the individual reaches the age of majority.

C. The Position of the Courts on Disclaimers of Pre-1977 Transfers.

1. In Cleary v. Commissioner, 34 T.C. 728 (1960), Cleary’s father died testate in May 1945, designating the taxpayer, her sister and their husbands as executors and trustees of his estate. In 1950, Cleary indicated to her husband that she wanted her income bequest of $2,000 per year to be paid to her children. In 1957, Cleary signed a written statement purporting to confirm her oral statements in 1950 as a renunciation of her bequest. The IRS challenged the fiduciary’s reporting of trust income for 1953-1955 as income to Cleary’s children, rather than as income to Cleary.

   The court determined that prior to 1957, there was no clear, unequivocal renunciation by

Cleary, and that neither the conversation with her husband in 1950 nor a writing in 1953 would have been, under New Jersey law, an effective renunciation of her bequest. The distribution and authorization with respect to the distribution of the income was no more than a direction as to the manner in which a distribution of her own income was to be made. The Tax Court followed a prior holding that a disclaimer could not operate retroactively to relieve the beneficiary of a tax on the income for prior years and thus Cleary was held liable for reporting the 1953-1955 income. The court also noted that under New Jersey law, five years would appear an unreasonable period for an effective rejection of the bequest.

2. In Keinath v. Commissioner, 480 F.2d 57 (8th Cir. 1973), rev'g 58 T.C. 352 (1972), the court determined that a son's disclaimer of his one-half remainder interest in his father's testamentary trust, shortly after the death of the life tenant but 19 years after the father's death, was within a reasonable time. The court reasoned that the time within which a disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed both in quality and quantity."

3. In Estate of Dreyer, 68 T.C. 275 (1977), the court held that the value of the residuary estate bequeathed to the decedent by his predeceased spouse was not includible in the decedent's gross estate when executors of his estate renounced more than two years after the first spouse died. At the time of the spouse's death, the disclaimant was incompetent and had a court-appointed committee. The committee had to petition the local court for approval of the disclaimer after determining that such would be advisable, and in the meantime the decedent died. The court determined that under state law an executor could disclaim on behalf of the estate and that the disclaimer was made within a reasonable time.

4. In Estate of Halbach, 71 T.C. 141 (1978), decedent's father created a testamentary trust in 1937 which directed the income to her mother for life with remainder over to decedent, or if not living, to her appointees or her issue in default of appointment. In 1945, the decedent partially released her general power of appointment, making it a special power, and in 1970, a few days after her mother's death, she disclaimed her interest in the trust. The disclaimer was required to be made within a reasonable time and since the decedent received an indefeasible interest in the trust, reasonable time to disclaim commenced when her father, the settlor, died in 1937, not when her mother, the life tenant, died in 1970, and the disclaimer was a transfer for purposes of inclusion under Section 2035. This was true even though the probate court held the disclaimer timely, valid and effective under New Jersey law. (In a later supplementary opinion, it was determined that the transfer was not in contemplation of death. Estate of Halbach, T.C.M. 1980-309.)

5. The case of Cottrell v. Commissioner, 628 F.2d 1127 (8th Cir. 1980), rev'g 72 T.C. 489 (1979), involved the sister of Halbach and the same trust. Mrs. Cottrell's disclaimed remainder interest was worth over $10,000,000. The Eighth Circuit followed Keinath, reasoning that the time within which a disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed both in quality and quantity." Until the death of the mother 16 days before her disclaimer, Cottrell did not know whether she would receive anything, considering the trustee's authority to invade principal for the mother. The court specifically stated that it saw nothing unfair in the taxpayer knowing what property is involved before having to make the disclaimer decision.

6. In Jewett v. Commissioner, 455 U.S. 305 (1982), aff'g 638 F.2d 93 (9th Cir.), aff'g 70 T.C. 430 (1980), a disclaimer of a contingent remainder in trust 33 years after its creation and 24 years after the disclaimant reached the age of majority was a taxable gift, even though the disclaimant's mother was still alive and the remainder would be divested if the disclaimant did not outlive his mother. Although the disclaimer was unequivocal and effective under state (Massachusetts) law, it was not made within a reasonable time of the transfer, which is measured from the creation of the trust for federal gift tax purposes. This case renders a disclaimer of a pre-1977-transfer a gift unless the disclaimant has been under a disability or has lacked knowledge of the transfer.

7. In Estate of Bunn, 3 Cl. Ct. 547 (1983), the court felt that Jewett controlled and determined that the income beneficiary of a trust made a taxable gift of corpus when, in 1973, he relinquished his right to receive corpus of a testamentary trust one day after the end of its 20-year term, with the result that over $2,500,000 passed to the income beneficiary's children. The beneficiary did not disclaim within a reasonable time because the time to disclaim started to run when the trust was created, not when the remainder vested. In any event, the relinquishment was not a disclaimer because the beneficiary received the trust income for 20 years and was absolutely entitled to the corpus when he disclaimed it.

8. In Griswold v. Commissioner, 812 F.2d 712 (2d Cir. 1987), aff'g 81.T.C. 141 (1983), cert. denied, 484 U.S. 824 (1987), the taxpayers attempted to disclaim contingent income and remainder interests in a trust shortly after the death of the life income beneficiary in 1974, 33 years after the creation of the trust and at least 17 years after the contingent beneficiaries had knowledge of their interests in the trust. Because this case was tried and briefed but not decided before the Jewett decision, the parties were allowed to file supplemental briefs to argue the issue that the taxpayers did not have knowledge within the meaning of the gift tax regulations. In 1957, the taxpayers had been served with a petition for judicial settlement of the first accounting covering the period of 1945-1954, which the court felt served to place the taxpayers on notice of a trust, and the taxpayers could have obtained a copy of the Will which was a public record. The requisite knowledge required by the regulations was only that "some property interest has been transferred" not "active knowledge . . . as to the nature and value of the trust property and . . . specific interest therein." Thus, the disclaimers were taxable transfers as they were not made within a reasonable time after the taxpayers had knowledge of the transfers. The identical facts were dealt with in Hallenbeck, T.C.M. 1983-523.

9. In Irvine v. United States, 981 F.2d 991 (8th Cir. 1992), the Eighth Circuit faced the issue of whether a disclaimer of property transferred before the effective date of the gift tax was a taxable gift. In an en banc decision, the court vacated the decision of a three-judge panel and held that a taxpayer who disclaimed her interest in a 1917 trust 48 years after learning of its existence, but only two months after the contingent remainder interest vested, was not liable for gift tax because the transfer that created her interest was made before the gift tax was enacted and her disclaimer was otherwise valid under state law. However, the United States Supreme Court reversed in United States v. Irvine, 511 U.S. 224 (1994).

D. The Position of the IRS on Disclaimers of Pre-1977 Transfers.

1. The IRS has determined generally that a disclaimant can execute a qualified disclaimer of a pre-1977 transfer if the disclaimer is made within a few months of reaching the age of majority. PLRs 200348011 (within nine months of attaining age of majority); 200238039 (within nine months of attaining age of majority); 9801036 (within nine months of turning the age of majority), 9745008 (within nine months of learning of the creation of the interest shortly before turning age 21), 9515034 (within nine months of turning the age of majority), 9413026 (within nine months of turning the age of majority), 8825101, 8638022 (within three months of turning age 18), 8527087 (within three months of turning age 18) 8327014 (within three months of turning age 18), 8310080 (within three months of turning age 18), 8246041 (within three months of turning age 18). In PLR 9436041, the IRS ruled that if Rhode Island granted an extension of time beyond nine months after reaching age 18, then the IRS would consider the disclaimer to have been within a reasonable time. The disclaimer can be of a contingent interest in corpus even if the disclaimant will continue to receive the income. PLRs 9413026, 8825101, 8327014, 8310080, 8151130. This is true even if the minor disclaimant received a benefit from property to be disclaimed. PLRs 9436041, 8351120.

2. A disclaimer 20 years after the creation of the trust but within 60 days of the division date by one of the grantor's adult children who had not received any distributions was not timely. PLR 9027026. Likewise, a disclaimer of a vested remainder interest subject to divestiture made ten years after knowledge of the transfer is not within a reasonable time. PLRs 8116055, 8114090 (pre-Jewett).

3. In PLR 9431022, a mother established an inter vivos trust for her married son in 1965, giving him a testamentary special power of appointment. The class of permissible appointees included his spouse. The wife represented that she first learned of the trust when the son died in 1993 and she disclaimed her interest as a potential appointee within nine months of her husband's death. The IRS ruled that, as a permissible appointee under a special power of appointment created before 1977, a disclaimer made within nine months of the disclaimant's learning of the transfer creating the interest generally would satisfy the "reasonable time" requirement, but the IRS expressed no opinion on when the wife first obtained the requisite knowledge of the transfer.

4. The IRS also generally has permitted the disclaimer of a pre-1977 trust interest within nine months of the taxpayer learning of the trust's existence. PLRs 200248020, 200240015, 200238039, 200202036, 200150020, 200109041, 200047027, 200040014, 200029048, 199934011, 9845013, 9840009, 9840007, 9839019, 9839015, 9823041, 8601017 (disclaimer in 1985 within nine months after taxpayer first learned of his contingent remainder interest in four trusts created before 1977).

APPENDIX A
SAMPLE FORMULAS

The formulas contained herein are included for the interest in how another practitioner approached the issue. The author makes no recommendation on the use or efficacy of a formula.

Formula #1 from PLR 8514095:

I hereby irrevocably refuse to accept and I hereby disclaim an undivided portion of any property or interests in property to which I may be entitled under the laws of intestacy relating to my father's domiciliary and ancillary intestate estates, namely that fractional share of my intestate interest in my father's estate described by the following fraction: a fraction, the numerator of which shall be the value of my intestate interest in my father's estate, reduced by $325,000, and increased by all administration expenses claimed or to be claimed as income tax deductions rather than as estate tax deductions, and further increased by the value of any property or interests in property includible in my father's gross estate for Federal estate tax purposes which passes to my mother, B in a manner which does not qualify for the Federal estate tax marital deduction and by the value of any other property or interests in property includible in my father's gross estate for Federal estate tax purposes (other than the property or interests in property described in paragraph (b) hereof) which passes to someone other than my mother, and increased further by the amount of any adjusted taxable gifts made by my father; and the denominator of which shall be the value of my intestate interest in my father's estate. For purposes of establishing the numerator and denominator of the aforesaid fraction, the values as finally determined in the Federal estate tax proceedings relating to my said father's estate shall control. This disclaimer of an undivided portion of my interest in my father's intestate estate shall be construed as a disclaimer of each and every interest or right that I would have had in other property into which such disclaimed property is converted.

For purposes of establishing the numerator and denominator of the fraction set forth in paragraph (a) hereof and for purposes of establishing the denominator of the fraction set forth in paragraph (b) hereof, any reference to "the value of my intestate interest in my father's estate" shall be deemed to mean the value of my intestate interest in both my father's domiciliary as well as his ancillary intestate estates prior to the exercise of this Disclaimer. Additionally, for purposes of paragraph (a) and paragraph (b) hereof the only deductions to be taken into account in valuing the interests to which I may be entitled under the laws of intestacy relating to my father's estate (prior to this Disclaimer) shall be those deductions payable from my father's intestate estate which are finally allowed on schedule J, K and L of Form 706 in the Federal estate tax proceedings relating to my father's estate.

Formula #2 from PLR 833816:

The disclaimer provides, in pertinent part:

All of right, title and interest in and powers over the principal and income of the Family Trust created under Article SIXTH . . . ; and

All of W's right, title and interest in and powers over an undivided portion of the pecuniary marital deduction bequest under Article FIFTH . . . , said undivided portion to be expressed as an undivided percentage interest in the pecuniary marital deduction bequest which, when taken together with all other interests and property qualifying for the marital deduction and passing (or which have passed) to W from H shall obtain for the Estate of H a marital deduction which will result in an equalization of the "taxable estate" of H, deceased, and the "taxable estate" of W, deceased, as that term is defined in Section 2051 of the Internal Revenue Code . . . based upon the assumption that W died after, but on the same date of death as her spouse, H. In calculating the undivided percentage interest disclaimed herein, (i) the value of the estate of H as finally determined for Federal estate tax purposes shall be controlling, and (ii) the estate of W shall be valued as of the date on (and the manner in) which the estate of H is valued for Federal estate tax purposes.

Formula #3 from PLR 9004015

A Will disclaim that fractional share of her one-half interest in the residuary estate, the numerator of which is an amount equal to the per grandchild generation-skipping transfer tax exemption provided for in Section 1433(b)(3) of P.L. 99-514, less the aggregate of any transfers after September 25, 1985, from D to his grandson, C, that are not otherwise exempt from the generation- skipping transfer tax imposed under Section 2601 of the Code, other than any transfer that occurs as a result of the proposed disclaimer, and the denominator of which is the value of one-half of D's residuary estate (after deducting a bequest to A under Item V A).

Formula #4 from PLR 9203028

refuse that pecuniary amount of the residue of the decedent's estate equal to --

a. The total value of the property that would otherwise be treated as a direct skip (as that term is defined in Section 2612 of the Code) to the undersigned on the United States Estate and Generation-Skipping Transfer tax return filed by the executrix for the decedent's estate (using values finally fixed in the federal estate tax proceedings relating to the decedent's estate) reduced by --

b. The amount equal to --

(i) The maximum amount that can pass free of federal generation-skipping transfer tax under Article V of the Will taking into account only --

A. The amount of any GST exemption (as that term is defined in Section 2631 of the Code) allocated to the property passing under Article V of the Will, and

B. The sum of any taxes and other charges which reduce the value of the property passing under Article V of the Will for purposes of determining the inclusion ratio of such property under Section 2642 of the Code, multiplied by --

(ii) Thirty-three and 33/100 percent (33.33%).

APPENDIX B
CASE STUDIES

Case Study 1

Facts:

Mom and Dad are in their mid-fifties. They have two adult sons residing in Virginia, both of whom have minor children, and two adult daughters, one of whom has minor children and resides in Maryland. The family is a close family. Dad dies unexpectedly in December, 1989. Other than specific bequests to Mom, his Will contains specific bequests of farm stock worth $700,000 to the sons, specific bequests of bank stock worth $300,000 to the daughters. The residuary estate is left equally to the four children and Mom. The Will contains a general direction to pay all taxes. The residue consists principally of family lands.

Desired Result:

No estate tax with the children receiving the maximum amount which can pass free of federal estate tax (i.e., $600,000).

Solution:

The children disclaimed their specific bequests. That which would have passed to the sons and the Maryland daughter would pass to their minor children pursuant to the antilapse statute. Va. Code § 64.1-64.1. Approval had to be obtained for disclaimers by minor grandchildren in both Virginia and Maryland. In Virginia, I filed a petition requesting the appointment of a guardian ad litem and a guardian who would disclaim (arguing that the execution of disclaimers on behalf of his wards fell within the ambit of a guardian's responsibilities under Virginia Code Section 31-8, which gave to a guardian the possession, care and management of the estate, both real and personal, of each ward). With the disclaimer of the grandchildren's interest in the specific bequests, the failed specific bequests would fall into the residue. Va. Code § 64.1-65.1.

Then the sons and daughters each disclaimed all their interest in the residue other than one-fourth of the amount which could pass free of estate tax. By the antilapse statute, the disclaimed portion of the residue would pass to the minor grandchildren and the grandchildren's disclaimer had to include a disclaimer of any interest in the residue.

Finally, the only beneficiary remaining as a residuary beneficiary of everything over $600,000 was Mom. Va. Code § 64.1-65.1B (failed bequest of residue passes to other residuary beneficiaries proportionately). The property passing to Mom, including the disclaimed property, qualified for the marital deduction. Reg. § 20.2056(d)-2(b).

The fact that the children and grandchildren might ultimately receive inheritances and gifts from Mom was not acceptance or consideration as there were no promises made. See, e.g., PLR 9509003, 9427030 and TAM 8701001. See III.A.2.i.

<u>Disclaimer of Child in Case Study 1</u>:

Disclaimer of Bequest under Will of [Decedent]

I, [son], declare that I am a child of [decedent], who died on [date], domiciled in [place], leaving a Will which was duly admitted to probate in the Clerk's Office of the Circuit Court of the County of ___________ on [date] and recorded in Will Book [no.], at page [no.].

In Article [no.] of his Will, [decedent] named me as the beneficiary of one-half of his [farm stock] and of one-fifth of his residuary estate.

I hereby disclaim, renounce and refuse to accept any and all interest in the specific bequest of the stock of [farm] by [decedent] to me.

I hereby disclaim, renounce and refuse to accept any interest in the residuary estate of [decedent] other than one-fourth of a fractional share of the residuary estate. The numerator of the fraction shall be a number equal to the largest value of the assets of the Estate of [decedent](“Estate”) that can pass free of federal estate tax by reason of the unified credit and the credit for state death taxes (to the extent the use of such credit does not increase state death taxes) allowable to said Estate, after reduction by reasons of (1) adjusted taxable gifts (2) other dispositions of property included in the gross estate of [decedent] for which no marital, charitable or other deduction is allowed in computing the federal estate tax for said Estate and (3) administration expense and other charges to principal that are not claimed and allowed as federal estate tax deductions. The denominator of the fraction is a number equal to the value of the residuary estate as finally determined for federal estate tax purposes.

I affirm that I have not accepted any interest in or benefit from the property interests hereby disclaimed, and that I have not received and I will not receive any consideration in money or money's worth for making this disclaimer.

It is my intention that this disclaimer constitute a qualified disclaimer as defined in Section 2518 of the Internal Revenue Code of 1986, as amended, and that it, coupled with other substantially identical disclaimers being made by my issue, my siblings and the issue of my siblings will result in the Estate of [decedent] obtaining the marital deduction necessary to reduce the federal estate tax to zero.

In witness whereof, I have executed this disclaimer on [date].

____
Son

[Notary]

Disclaimer of Grandchild in Case Study 1:

Disclaimer of Bequest under Will of [Decedent]

I, [grandchild], declare that I am a child of [son] and the grandchild of [decedent], who died on [date], domiciled in [place], leaving a Will which was duly admitted to probate in the Clerk's Office of the Circuit Court of the County of _____ on [date] and recorded in Will Book [no.], at page [no.].

In Article [no.] of his Will, [decedent] named my father, [son], as the beneficiary of one-half of his [farm stock] and of one-fifth of his residuary estate. Pursuant to Section 64.1-188 of the Code of Virginia, 1950, as amended, my father disclaimed his interest in the stock of [farm] and in a fraction of the residuary estate of [decedent]. Under the laws of the Commonwealth of Virginia, I succeeded to the interests which my father disclaimed.

I hereby disclaim, renounce and refuse to accept any and all interest in the bequest of the stock of [farm] by [decedent] and in the residuary estate of [decedent].

I affirm that I have not accepted any interest in or benefit from the property interests hereby disclaimed, and that I have not received and I will not receive any consideration in money or money's worth for making this disclaimer.

It is my intention that this disclaimer constitute a qualified disclaimer as defined in Section 2518 of the Internal Revenue Code of 1986, as amended, and that it, coupled with other substantially identical disclaimers being made by the issue of [decedent] will result in the Estate of [decedent] obtaining the marital deduction necessary to reduce the federal estate tax to zero.

In witness whereof, I have executed this disclaimer on [date].

____
Grandchild
BY ____________________________________,
Guardian of [grandchild] in the Matter of the Estate of [decedent]

[Notary]

Case Study 2

Facts:

Husband died September 1, 2000 survived by Wife, age 60. The following assets, valued at date of death and alternate valuation date, comprised his gross estate:

	09/01/2000 DOD	03/01/2001 AVD
Principal residence -tenants by the entirety	$ 500,000.00	$ 500,000.00
Closely-held stock in probate estate	$ 2,000,000.00	$ 1,800,000.00
Publicly traded securities in revocable trust	$ 5,000,000.00	$ 4,500,000.00
Gross Estate	$ 7,500,000.00	$ 6,800,000.00

Adjusted taxable gifts totaled $1,000,00.00 ($925,000 given away in 1990 and $75,000 in 1992).

Husband's Will provides:

1. Any interest in principal residence devised to Wife, if living, if not, add to residue.

2. Specific bequest of closely-held stock to Wife, if living. If Wife disclaims, stock goes to the children.

3. Any residue to Husband's Revocable Trust.

4. Tax clause says pay all taxes and pay first from any disclaimed closely-held stock.

The terms of Husband's Revocable Trust provide that the trustees are to use funds to pay administration expenses, debts and estate taxes to the extent the probate estate does not have sufficient intangible assets to do so.

The debts and administration expenses of Husband's estate totaled $200,000.00.

Everything remaining in Husband's Revocable Trust is to be held as a marital trust. The terms of the marital trust provide:

1. All income to be paid to Wife at least annually.

2. Trustee bank can use principal for Wife's support, maintenance and comfort.

3. Wife can withdraw all assets from trust upon 30 days notice.

4. Wife has testamentary general power of appointment.

Wife died in a car accident on May 1, 2001. She had received no distribution from either Husband's estate or Husband's Revocable Trust. Wife's assets, excluding any inheritance from Husband, were held in a Wife's Revocable Trust and consisted of securities worth $4,500,000. She, too, had adjusted taxable gifts of $1,000,000.

At the time of her death, the securities in the Husband's Revocable Trust had rebounded to $5,000,000 and had earned $50,000 in income. The closely-held stock remained worth $1,800,000 on May 1, 2001.

With no post-mortem planning, Husband's taxable estate would be zero because of the marital deduction and all assets would pass from Husband's estate so that Wife's taxable transfer base (assuming Wife's debts and expenses total $150,000) would be:

Item	Amount
Residence	$ 500,000.00
Closely-held stock	1,800,000.00
Publicly traded securities from Husband	5,000,000.00
Post 9/1/2000 earnings on securities	50,000.00
Less Debts and expenses	< 200,000.00 >
	$ 7,150,000.00
Publicly traded securities in Wife's Revocable Trust	4,500,000.00
Less Debts and expenses of Wife	< 150,000.00 >
	11,500,000.00
Plus Adjusted taxable gifts	1,000,000.00
	$12,500,000.00
Gross tax	6,640,800.00
Unified Credit	< 220,550.00 >
Gift Tax Credit	< 153,000.00 >
Combined federal and Virginia tax	6,267,250.00

Desired Result:

To pay the least combined estate taxes possible.

Solution:

Let's try some disclaimers. Under Virginia Code §§ 64.1-188 and 64.1-191(for the year 2000 and now §§ 64.1-196.1 and 196.4), an executor can disclaim property passing under testamentary and nontestamentary instruments, respectively, on behalf of a deceased person.

First, so that Wife's estate can achieve a credit for tax on prior transfers ("TPT credit"), we will structure the marital trust so that it will not result in an automatic marital deduction. A general power of appointment trust results in an automatic deduction under § 2056(b)(5). Thus the marital trust must be converted from a general power of appointment trust. The executor of Wife's estate executes a disclaimer 1) of the power to withdraw assets during her lifetime upon 30 days notice and 2) of the testamentary general power of appointment. See PLR 9043055. After the disclaimer, the Wife's income interest in the marital trust is an included interest eligible for the TPT credit. See PLR 8512004. The credit is limited to the lesser of 1) the federal estate tax paid in Husband's estate on the included interest and 2) the federal estate tax paid on the included interest in the Wife's estate. Thus a tax must be created in Husband's estate to obtain a TPT credit.

There are some other reasons for creating a tax in the Husband's estate. First, the Wife's transfer base, without any disclaimers, will exceed $10,000,000. Every dollar above $10,000,000 (and less than $17,184,000) is taxed at a marginal rate of 60% rather than 55%. Thus, lowering Wife's transfer base from $12,500,000 to $10,000,000 (even without a TPT credit) will save $125,000.00 (i.e., $2,500,000 x 5%) in combined estate taxes. Second, without a disclaimer, the Husband's transfer base will be $1,000,000 (i.e., the adjusted taxable gifts) and will not have run through the Husband's lower rate brackets (the rates reach 55% at $3,000,000). Moving $2,000,000 into Husband's transfer base lowers the combined estate taxes by $155,000 (i.e., the difference between the estate tax which would be incurred in Wife's estate [55% x $2,000,000 = $1,100,000]) and $945,800 (the estate taxes on Husband's transfer base from $1,000,000 to $3,000,000)).

Third, if the alternate valuation election could be made, the value of the total assets taxed could be reduced by $500,000. That is, the securities in the Husband's Revocable Trust would be valued at $5,000,000 in Wife's gross estate (i.e., the value the securities had rebounded to) or at $4,500,000 in Husband's gross estate. To be eligible for the

alternate valuation election, the gross estate of Husband must be less at the alternate valuation date than at date of death and the sum of estate tax and GST tax must be less by making the alternate valuation election.

Failing to make a QTIP election on the marital trust will accomplish the three goals above, as well as make Wife's interest in the marital trust eligible for a TPT credit.

The resulting estate tax for Husband's taxable estate, using the alternate valuation date, is as follows:

Residence	$ 250,000.00
Closely-held stock	1,800,000.00
Publicly traded securities from Husband	4,500,000.00
Less Debts and expenses	< 200,000.00 >
	$ 6,350,000.00
Less Marital deduction for residence	<250,000.00>
Closely-held stock	<1,800,000.00>
	4,300,000.00
Plus Adjusted taxable gifts	1,000,000.00
	$ 5,300,000.00
Gross tax	2,555,800.00
Unified Credit	< 220,550.00 >
Gift Tax Credit	< 153,000.00 >
Combined federal and Virginia tax	2,182,250.00

The resulting estate tax for the Wife's estate is as follows :

Residence	$ 500,000.00
Closely-held stock	1,800,000.00
Publicly traded securities	4,500,000.00
Post 9/1/2000 earnings on securities	50,000.00
Less Debts and expenses	< 150,000.00 >
	$ 6,700,000.00
Plus Adjusted taxable gifts	1,000,000.00
	$ 7,700,000.00
Gross tax	3,875,800.00
Unified Credit	< 220,550.00 >
Gift Tax Credit	< 153,000.00 >
Net tax before TPT credit	$3,502,250.00
TPT Credit	< 649,125.00 >
Combined federal and Virginia tax	2,853,125.00

(The Section 7520 rate for September, 2000 was 7.6%. The factor for a person age 60 was .71810.)

Thus the combined taxes for Husband and Wife, using the above-described disclaimer, is $5,035,375 versus $6,267,250 resulting in a savings of $1,231,875.

The amount of the TPT credit can be increased further by the executor's disclaiming the closely-held stock and the survivorship interest in the residence. The disclaimer of the survivorship interest in the residence throws one-half of the residence into the probate estate. A further disclaimer of the devise of the residence under the Will is necessary to cause the residence to pass to Husband's Revocable Trust. The disclaimer of the closely-held stock makes that stock available for the payment of estate taxes, pursuant to the terms of the Will. Therefore, Husband's Revocable Trust will

be diminished $1,800,000 less than it otherwise would be if the estate taxes were paid from Husband's Revocable Trust. With the additional disclaimers, the Husband's estate tax, using the alternate valuation date, would be:

Residence	$ 250,000.00
Closely-held stock	1,800,000.00
Publicly traded securities from Husband	4,500,000.00
Less Debts and expenses	< 200,000.00 >
	$ 6,350,000.00
Plus Adjusted taxable gifts	1,000,000.00
	$ 7,350,000.00
Gross tax	3,683,300.00
Unified Credit	< 220,550.00 >
Gift Tax Credit	< 153,000.00 >
Combined federal and Virginia estate tax	3,309,750.00

The resulting estate tax for the Wife's estate is as follows:

Publicly traded securities	4,500,000.00
Post 9/1/2000 earnings on securities	50,000.00
Less Debts and expenses	< 150,000.00 >
	$ 4,400,000.00
Plus Adjusted taxable gifts	1,000,000.00
	$ 5,400,000.00
Gross tax	2,610,800.00
Unified Credit	< 220,550.00 >
Gift Tax Credit	< 153,000.00 >
Net tax before TPT credit	$2,237,250.00
TPT Credit	< 992,506.00 >
Combined federal and Virginia tax	1,244,744.00

These additional disclaimers increase the value of the assets flowing to the QTIP trust by $2,050,000 and result in additional estate tax savings of $480,881. The final estate tax totals $4,554,494 versus $6,267,250 if the executors made no disclaimers.

<u>Disclaimer 1 in Case Study 2</u>:

DISCLAIMER

Child and Bank, Co-Trustees of the Husband Revocable Trust dated Date 1 and of the Marital Trust created thereunder
[Address]

This Disclaimer made this ______ day of June, 2001, by **Child and Bank**, Co-Executors under the Will of **Wife,** (herein "Disclaimant") of [Address].

<u>WITNESSETH</u>

WHEREAS, Husband died on September 1, 2000, a resident of Charlottesville, Virginia; and

WHEREAS, Husband was the grantor of a revocable trust dated Date 1 ("Trust Agreement"); and

WHEREAS, Article V(1) of Trust Agreement directs that, after the death of Husband, all of the Trust Fund remaining, after the distributions required under Article IV of the Trust Agreement, are to be held in a Marital Trust if the grantor's wife, Wife, survived him; and

WHEREAS, Wife did survive the grantor; and

WHEREAS, by Article VI(1) of the Trust Agreement, Husband directed that all net income from the Marital Trust be distributed to Wife; and

WHEREAS, by Article VI(2) of the Trust Agreement, Husband granted to Wife the right to distributions of principal of the Marital Trust under certain circumstances; and

WHEREAS, by Article VI(3) of the Trust Agreement, Husband granted to Wife the right to withdraw all or any portion of the Marital Trust thirty (30) days after delivering written notice to the Trustees; and

WHEREAS, by Article VI(4) of the Trust Agreement, Husband granted to Wife a general testamentary power of appointment over the undistributed income and principal of the Marital Trust; and

WHEREAS, by Article VIII(5) of the Trust Agreement, Husband granted to Wife the power to direct the Trustees to take certain actions; and

WHEREAS, Wife , widow of Husband, died on May 1, 2001, a resident of Charlottesville, Virginia; and

WHEREAS, her Will dated Date 3 was probated in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia on Date 5; and

WHEREAS, Child and Bank, qualified as Co-Executors of the Estate of Wife on Date 5; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended), permits a beneficiary under a nontestamentary instrument (or the personal representative of a deceased person) to disclaim in whole or in part the succession to any property, real or personal, or interest therein; and

WHEREAS, pursuant to Section 64.1-191 of the Code of Virginia (1950, as amended), the undersigned, as Co-Executors of the Estate of Wife, desire to disclaim, on behalf of Wife and her estate, the right granted to her under Article VI(3) of the Trust Agreement to withdraw all or any portion of the Marital Trust thirty (30) days after delivering written notice to the Trustees; and

WHEREAS, pursuant to Section 64.1-191 of the Code of Virginia (1950, as amended), the undersigned, as Co-Executors of the Estate of Wife, desire to disclaim, on behalf of Wife and her estate, the general testamentary power of appointment over the undistributed income and principal of the Marital Trust granted to her under Article VI(4) of the Trust Agreement; and

WHEREAS, pursuant to Section 64.1-191 of the Code of Virginia (1950, as amended), the undersigned, as Co-Executors of the Estate of Wife, desire to disclaim, on behalf of Wife and her estate, the power granted to her under Article VIII(5) of the Trust Agreement to direct the Trustees "to take contrary action or any action she deems appropriate as to the Trust Fund"; and

WHEREAS, neither Wife nor the Co-Executors of the Estate of Wife have accepted any part of the property to be disclaimed nor any of the benefits inherent therein, nor have Wife or the Co-Executors of the Estate of Wife received, nor do they expect to receive, any consideration, whatsoever, for this disclaimer;

NOW, THEREFORE, Disclaimant hereby disclaims any and all of the rights and powers granted to Wife under Articles VI(3) and VI(4) of the Trust Agreement, including, without limitation, the right to withdraw all or any portion of the Marital Trust thirty (30) days after delivering written notice to the Trustees and the general testamentary power of appointment over the undistributed income and principal of the Marital Trust, and the Disclaimant hereby further disclaims the power granted to Wife under Article VIII(5) of the Trust Agreement to direct the Trustees "to take contrary action or any action she deems appropriate as to the Trust Fund". The Disclaimant specifically does NOT disclaim any of the rights granted to Wife under Articles VI(1) and VI(2), including, without limitation, the right to receive all the net income from the Marital Trust and the right to receive discretionary distributions of principal of the Marital Trust under certain circumstances.

IN WITNESS WHEREOF, the Co-Executors of the Estate of Wife have hereunto set their hands the day and year first above written.

Bank, Co-Executor of the Estate of Wife

____
By Chief Administrative Officer

Child, Co-Executor of the Estate of Wife

[Notary]

<u>Disclaimer 2 in Case Study 2</u>:

DISCLAIMER
OF
SHARES OF STOCK IN CLOSELY-HELD COMPANY

Child and Bank, Co-Executors under the
Will of **Husband**
[Address]

This Disclaimer made this ___ day of June, 2001, by **Child and Bank**, Co-Executors under the Will of **Wife,** (herein "Disclaimant") of [Address].

<u>WITNESSETH</u>

WHEREAS, Husband died on September 1, 2000, a resident of Charlottesville, Virginia; and

WHEREAS, his Will dated Date 3 was probated in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia on Date 4; and

WHEREAS, Child and Bank, qualified as Co-Executors of the Estate of Husband on Date 4; and

WHEREAS, Wife, widow of Husband, died on May 1, 2001, a resident of Charlottesville, Virginia; and

WHEREAS, her Will dated Date 3 was probated in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia on Date 5; and

WHEREAS, Child and Bank, qualified as Co-Executors of the Estate of Wife on Date 5; and

WHEREAS, under Article IV(3) of the Will of Husband, he bequeathed to Wife all of his shares of stock in Closely-Held Company;

WHEREAS, Section 64.1-188 of the Code of Virginia (1950, as amended) permits a beneficiary under a testamentary instrument (or the personal representative of a deceased person) to disclaim in whole or in part the succession to any property, real or personal; and

WHEREAS, the undersigned, as the Co-Executors of the Estate of Wife, desire to disclaim any and all of the shares of stock in Closely-Held Company bequeathed to Wife under Article IV(3) of the Will of Husband; and

WHEREAS, neither Wife nor the Co-Executors of the Estate of Wife have accepted any part of the property to be disclaimed nor any of the benefits inherent therein, nor have Wife or the Co-Executors of the Estate of Wife received, nor do they expect to receive, any consideration, whatsoever, for this disclaimer;

NOW, THEREFORE, Disclaimant hereby disclaims any and all of the shares of stock in Closely-Held Company bequeathed to Wife under Article IV(3) of the Will of Husband.

IN WITNESS WHEREOF, the Co-Executors of the Estate of Wife have hereunto set their hands the day and year first above written.

Bank, Co-Executor of the Estate of Wife

____
By Chief Administrative Officer

Child, Co-Executor of the Estate of Wife

[Notary]

<u>Disclaimer 3 in Case Study 2</u>:

DISCLAIMER OF REAL PROPERTY

Child and Bank, Executors under the
Will of **Husband**
[Address]

This Disclaimer made this ______ day of June, 2001, by **Child and Bank**, Co-Executors under the Will of **Wife,** (herein "Disclaimant") of [Address].

<u>WITNESSETH</u>

WHEREAS, Husband died on September 1, 2000, a resident of Charlottesville, Virginia; and

WHEREAS, his Will dated Date 3 was probated in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia on Date 4; and

WHEREAS, Child and Bank, qualified as Co-Executors of the Estate of Husband on Date 4; and

WHEREAS, Wife, widow of Husband, died on May 1, 2001, a resident of Charlottesville, Virginia; and

WHEREAS, her Will dated Date 3 was probated in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia on Date 5; and

WHEREAS, Child and Bank, qualified as Co-Executors of the Estate of Wife on Date 5; and

WHEREAS, by Deed dated Date 6 recorded in Deed Book__ at page ___ in the Clerk's Office for the Circuit Court of the City of Charlottesville, Husband and his wife, Wife, acquired title, as tenants by the entirety with right of survivorship, to certain real estate which is described on Exhibit A attached hereto, which said real estate constituted the principal residence of Husband and Wife at the death of Husband (hereafter "Real Estate"); and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a surviving joint tenant by right of survivorship and further permits the personal representative of a deceased person to disclaim on behalf of such deceased person; and

WHEREAS, the undersigned, as the Co-Executors of the Estate of Wife, the surviving joint tenant, desire to disclaim any and all of the interest in Real Estate devolving to her by right of survivorship, <u>such survivorship interest being an undivided one-half interest</u>; and

WHEREAS, by virtue of the disclaimer by the Co-Executors of the Estate of Wife, the survivorship interest (i.e., an undivided one-half interest) in the Real Estate will pass into the estate of Husband; and

WHEREAS, under Article III of the Will of Husband, he devised his interest in the Real Estate to his wife, Wife; and

WHEREAS, Section 64.1-188 of the Code of Virginia (1950, as amended) permits a beneficiary under a testamentary instrument (or the personal representative of a deceased person) to disclaim in whole or in part the succession to any property, real or personal, or interest therein; and

WHEREAS, the undersigned, as the Co-Executors of the Estate of Wife, desire to disclaim, on behalf of Wife and her estate, any and all of the devise of the interest in the Real Estate under Article III of the Will of Husband; and

WHEREAS, neither Wife nor the Co-Executors of the Estate of Wife have accepted any part of the property to be disclaimed nor any of the benefits inherent therein, nor have Wife or the Co-Executors of the Estate of Wife received, nor do they expect to receive, any consideration, whatsoever, for this disclaimer;

NOW, THEREFORE, Disclaimant hereby disclaims any and all right to the survivorship interest (i.e., an undivided one-half interest) in the Real Estate which otherwise would have devolved to Wife by right of survivorship and Disclaimant further disclaims any and all of the devise of the interest in the Real Estate under Article III of the Will of Husband.

IN WITNESS WHEREOF, the Co-Executors of the Estate of Wife have hereunto set their hands the day and year first above written.

Bank, Co-Executor of the Estate of Wife

____
By Chief Administrative Officer

Child, Co-Executor of the Estate of Wife

[Notary]

Case Study 2A

Facts:

Husband died in October, 2001, survived by Wife, age 88. The following assets, valued at his date of death, comprised his gross estate:

	DOD
Assets passing to wife by survivorship (½)	$ 300,000.00
Life insurance with Child as beneficiary	$50,000.00
Other assets in Husband's Revocable Trust	$1,350,000.00
Gross Estate	$1,700,000.00

Adjusted taxable gifts, made in 1998, totaled $200,000.00.

Husband's Revocable Trust document provides:

1. Distribution of $500,000 to Child.

2. Formula distribution to Marital Trust of everything else which cannot pass free of estate taxes.

The debts and administration expenses of Husband's estate totaled $50,000.00.

Thus, because the assets passing to Child, along with the adjusted taxable gifts, exceeded the decedent's Applicable Exclusion Amount, which was $675,000.00 in 2001, everything remaining in Husband's Revocable Trust, after estate tax, is to be held as the Marital Trust. The terms of the Marital Trust provide:

1. All income to be paid to Wife at least annually.

2. Trustee can use principal for Wife's support, maintenance and comfort.

3. Wife can withdraw assets from trust for certain purposes.

4. Wife has testamentary general power of appointment.

Wife died unexpectedly on February 21, 2002. She had received no distributions from Husband's Revocable Trust. Wife's assets, excluding any inheritance from Husband, were held in Wife's Revocable Trust and consisted of securities worth $1,300,000. She, too, had adjusted taxable gifts of $200,000 made in 1998.

At the time of her death, the assets in the Husband's Revocable Trust had increased in value by $80,000.

With no post-mortem planning, and assuming Wife's debts and expenses total $50,000, the transfer taxes in Wife's estate would be determined as follows:

Assets in Husband's Revocable Trust	$ 1,350,000.00
Increase in value in Husband's Revocable Trust	80,000.00
Less Distribution to Child	< 500,000.00 >
Less Estate taxes paid on Husband's Estate	< 45,491.81 >
Less Debts and expenses in Husband's Estate	< 50,000.00 >
Marital Trust	$ 834,508.19
Survivorship Assets	600,000.00
Assets in Wife's Revocable Trust	1,300,000.00
Less Debts and expenses of Wife	< 50,000.00 >
	2,684,508.19
Plus Adjusted taxable gifts	200,000.00
	$ 2,884,508.19
Gross tax	1,218,054.10
Unified Credit	< 345,800.00 >
State Death Tax Credit	< 115,677.54 >
Federal tax	756,576.56
Virginia Estate tax	154,236.72
Total Estate Tax in Wife's Estate	$ 910,813.28

Desired Result:

To pay the least combined estate taxes possible.

Solution:

Let's try some disclaimers. Under Virginia Code §§ 64.1-188 and 64.1-191 (for 2001 and now §§ 64.1-196.1 and 64.1-196.4), an executor can disclaim property passing under testamentary and nontestamentary instruments, respectively, on behalf of a deceased person.

First, so that Wife's estate can achieve a credit for tax on prior transfers ("TPT credit"), we will structure the Marital Trust so that it will not result in an automatic marital deduction. A general power of appointment trust results in an automatic deduction under § 2056(b)(5). Thus Marital Trust must be converted from a general power of appointment trust. The executor of Wife's estate executes a disclaimer of Wife's power to receive principal distributions, 1) power to withdraw assets during her lifetime and 2) of the testamentary general power of appointment. See PLR 9043055. After the disclaimer, the Wife's income interest in Marital Trust is an included interest eligible for the TPT credit. See PLR 8512004. The credit is limited to the lesser of 1) the federal estate tax paid in Husband's estate on the included interest and 2) the federal estate tax paid on the included interest in the Wife's estate. Thus a tax must be created in Husband's estate to obtain a TPT credit and, up to a point, the greater the estate tax in the Husband's estate, the greater the TPT credit.

There are some other reasons for creating a greater estate tax in the Husband's estate. First, without a disclaimer, the Husband's transfer base will be $795,491.81 and his marginal estate tax bracket would be 39% while the Wife's bracket would be 53%. Moving dollars into Husband's transfer base narrows the difference in the Husband's and the Wife's brackets.

Second, due to the change in the federal estate tax laws regarding the quantity of credit for state death taxes, state death taxes paid on the Husband's estate will be fully creditable in 2001 while state death taxes paid on the Wife's estate in 2002 will be only 75% creditable.

Third, the value of the total assets taxed could be reduced by $80,000. That is, the assets passing into the Marital Trust were worth $80,000 more at the Wife's date of death than they were worth at the Husband's date of death.

Failing to make a QTIP election on Marital Trust will accomplish the three goals above, as well as make Wife's interest in Marital Trust eligible for a TPT credit.

The resulting estate tax for Husband's taxable estate is as follows:

Survivorship Assets (½)	$ 300,000.00
Life Insurance passing to Child	50,000.00
Revocable Trust Assets	1,350,000.00
Less Debts and expenses	< 50,000.00 >
	$ 1,650,000.00
Less Marital deduction for survivorship assets	<300,000.00>
	1,350,000.00
Plus Adjusted taxable gifts	200,000.00
	$ 1,550,000.00
Gross tax	578,300.00
Unified Credit	< 220,550.00 >
Combined federal and Virginia tax	$ 357,750.00

The resulting estate tax for the Wife's estate is as follows:

Survivorship Assets	$ 600,000.00
Wife's Revocable Trust	1,300,000.00
Less Debts and expenses	< 50,000.00 >
	$ 1,850,000.00
Plus Adjusted taxable gifts	200,000.00
	$ 2,050,000.00
Gross tax	805,300.00
Unified Credit	< 345,800.00 >
State Death Tax Credit (at 75%)	< 66,600.00 >
TPT Credit	< 25,599.13 >
Net federal tax	367,300.87
Virginia estate tax	88,800.00
	456,100.87

(The factor for a person age 88 was .2278 in October, 2001)

Thus the combined taxes for Husband and Wife, using the above-described disclaimer, is $813,850.87 versus $956,305.09 without the disclaimer, resulting in a savings of $142,454.22.

Disclaimer in Case Study 2A:

Child, Trustee of the **Husband** Revocable Living Trust, dated Date 1, as amended and restated on Date 2, and of the Marital Trust created thereunder
[Address]

This Disclaimer made this ____ day of June, 2002, by **Child,** Executor under the Will of **Wife** (herein "Disclaimant") of **Address.**

WITNESSETH

WHEREAS, Husband died on October 1, 2001, a resident of Virginia Beach, Virginia; and

WHEREAS, Husband was the grantor of a revocable trust dated Date 1, as amended and restated Date 2 ("Trust Agreement"); and

WHEREAS, Article IV(B)(1) of Trust Agreement directs that, after the death of Husband, a certain fraction of the Remaining Trust Estate, as defined in said Trust Agreement, is to be held in a Marital Trust if the grantor's wife, Wife, survived him; and

WHEREAS, Wife did survive the grantor; and

WHEREAS, by Article IV(B)(4)(a) of the Trust Agreement, Husband directed that all net income from the Marital Trust be distributed to Wife; and

WHEREAS, by Article IV(B)(4)(b) of the Trust Agreement, Husband granted to Wife the right to distributions of principal of the Marital Trust under certain circumstances; and

WHEREAS, by Article IV(B)(4)(c) of the Trust Agreement, Husband granted to Wife the limited right to appoint principal during her lifetime; and

WHEREAS, by Article IV(B)(4)(d) of the Trust Agreement, Husband granted to Wife a general testamentary power of appointment over the Marital Trust; and

WHEREAS, Wife , widow of Husband, died on February 21, 2002, a resident of Virginia Beach, Virginia; and

WHEREAS, her Will dated _______ was probated in the Clerk's Office of the Circuit Court of the City of Virginia Beach, Virginia on Date 5; and

WHEREAS, Child qualified as Executor of the Estate of Wife on Date 6; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended), permits a beneficiary under a nontestamentary instrument (or the personal representative of a deceased person) to disclaim in whole or in part the succession to any property, real or personal, or interest therein; and

WHEREAS, pursuant to Section 64.1-191 of the Code of Virginia (1950, as amended), the undersigned, as Executor of the Estate of Wife, desires to disclaim, on behalf of Wife and her estate, the right granted to her under Article IV(B)(4)(c) of the Trust Agreement to appoint principal during her lifetime; and

WHEREAS, pursuant to Section 64.1-191 of the Code of Virginia (1950, as amended), the undersigned, as Executor of the Estate of Wife, desires to disclaim, on behalf of Wife and her estate, the general testamentary power of appointment over the Marital Trust granted to her under Article IV(B)(4)(d) of the Trust Agreement;

WHEREAS, neither Wife nor the Executor of the Estate of Wife have accepted any part of the property to be disclaimed nor any of the benefits inherent therein, nor have Wife or the Executor of the Estate of Wife received, nor do they expect to receive, any consideration, whatsoever, for this disclaimer;

NOW, THEREFORE, Disclaimant hereby disclaims any and all of the rights and powers granted to Wife under Articles IV(B)(4)(c) and IV(B)(4)(d) of the Trust Agreement, including, without limitation, the right to appoint principal during her lifetime and the general testamentary power of appointment over the undistributed income and principal of the Marital Trust. The Disclaimant specifically does NOT disclaim any of the rights granted to Wife under Articles IV(B)(4)(c) and IV(B)(4)(d), including, without limitation, the right to receive all the net income from the Marital Trust and the right to receive discretionary distributions of principal of the Marital Trust under certain circumstances.

IN WITNESS WHEREOF, the Executor of the Estate of Wife has hereunto set his hand the day and year first above written.

____
Child, Executor of the Estate of Wife

STATE OF VIRGINIA
CITY OF _______________, to-wit:

The foregoing Disclaimer was acknowledged before me this _____ day of __________________, by Child, Executor of the Estate of Wife.

____
Notary Public

My commission expires:

____

Case Study 3

Facts:

Mr. Williams died on January 1, 1996, survived by Mrs. Williams and two adult children. Their assets consisted of a joint bank account with $25,000 and stocks held in certificate form and titled as joint tenants with right of survivorship. The stocks were worth $1,000,000 on Mr. Williams' death. Daughter, while visiting Mrs. Williams after her father's death and trying to handle her father's affairs, deposited some dividend checks into the joint bank account. On April 1, 1996, Mrs. Williams died. On that date, Mrs. Williams' assets, including all those received from Mr. Williams, were worth $1,150,000 (which included a refund from a retirement community). Mr. Williams' Will bequeathed his entire estate to Mrs. Williams and provided that if Mrs. Williams predeceased him, all of his assets would pass to his two children.

Desired Result:

To reduce or eliminate the $200,000 plus in estate taxes which would be due because of Mrs. Williams' death.

Issue 1:

The first issue is whether Mrs. Williams accepted the benefits of the stocks when the daughter deposited dividends into the joint bank account after Mr. Williams' death. Assuming that Mrs. Williams' had no knowledge of the daughter's depositing of the dividend checks, the action of the daughter was not acceptance on the part of Mrs. Williams. PLRs 9243024 and 8143022. (Even if Mrs. Williams had made the deposits herself, in an aggressive posture she might still be able to argue that she could disclaim the joint bank account, along with the deposited dividends which were payable to both Mr. and Mrs. Williams.)

Issue 2:

The second issue is whether jointly held assets could be disclaimed. The securities were held in certificate form as joint tenants with right of survivorship. On February 7, 1990, the IRS acquiesced in McDonald. See III.J.2.d. Therefore, even in 1996, under the tax laws the survivorship interest could be disclaimed. Further, under state law the survivorship interest also could be disclaimed. Va. Code § 64.1-191 (now § 64.1-196.6). What if the securities had been held as tenants by the entireties? Probably in 1996, the IRS would have maintained that the survivorship interest was not disclaimable because it was not unilaterally severable by the joint tenant. However, final regulations issued December 31, 1997 permit the survivor to disclaim a one-half interest within nine months of the first joint tenant's death regardless of whether the tenancy was unilaterally severable and regardless of who furnished the consideration. Reg. §25.2518-2(c)(4).

Issue 3:

With Mrs. Williams' having died, is it too late to use disclaimer planning? No. Virginia Code Section 64.1-191 permits a personal representative to disclaim property passing under a nontestamentary instrument and 64.1-188 permits a personal representative to disclaim property passing under a testamentary instrument.

Conclusion:

By having the two children qualify as the executors of both estates, the executors of Mrs. Williams' estate could effect a disclaimer of the survivorship interest in the jointly owned stocks. This caused a one-half interest in the securities to pass into the probate estate of Mr. Williams. Thus, the children, as executors of Mrs. Williams' estate, had to disclaim the right of Mrs. Williams to inherit under Mr. Williams' Will. The result of the disclaimers was that the gross estate of each was under the $600,000 filing requirement, thus not only eliminating estate taxes but also eliminating the requirement that an estate tax return be filed. Further, by having both of the beneficiaries (of each estate) qualify as executors of each estate, affidavits in lieu of accountings could be filed in both estates.

The fact that the children disclaimed in their capacity of executors and received the disclaimed property does not disqualify the disclaimer. PLR 8749041.

Case Study 4

Facts:

At the time Mr. and Mrs. Hardworker engaged in estate planning, they owned assets with a collective value of $900,000 and desired to leave their entire estate to the other, should the other survive, with all assets passing to descendants per stirpes upon the death of the survivor. One of their assets was a tower business which they viewed as having potential. They accepted the advice to include a provision in their estate planning documents which would send any disclaimed assets to a family trust for the survivor, with any asset disclaimed from the family trust to be distributed as if the survivor had predeceased.

Mrs. Hardworker became ill and about 90 days before her death, the towers were deeded to her revocable trust. At the time of her death, the collective assets exceeded $4,000,000. Under Section 1014(e), the basis of the towers would not receive a full step-up for any of the towers returning to Mr. Hardworker. Further, without a disclaimer, none of Mrs. Hardworker's applicable exclusion amount would be used.

The value of Tower 80, which was in the rent-up stage at Mrs. Hardworker's death, increased the most rapidly of all the towers between the date of Mrs. Hardworker's death and nine months after her death.

Desired Result:

To achieve the best overall estate tax and income tax result and to get some funds to the children.

Conclusion:

After a review of various scenarios, Mr. Hardworker disclaimed a fractional share of Tower 80 (which was over 90%) such that the fraction had a value of $1,000,000. This used Mrs. Hardworker's applicable exclusion amount, removed the appreciation between the date of Mrs. Hardworker's death and the date of sale (of the towers) from either of the Hardworker's estates (although a capital gain would be generated on such appreciation), used some of the lower brackets of the estate tax tables in Mrs. Hardworker's estate, eliminated most of the recapture of depreciation for Tower 80 (which had the largest depreciation recapture) and significantly reduced the capital gain which would have been incurred otherwise if Mr. Hardworker had not disclaimed and had sold the towers himself. A further disclaimer of a specific dollar amount of the Family Trust was used to get property out to the children. Reg. § 25.2518-3(a)(2) permits a disclaimer of a specific trust asset as long as a result of the disclaimer the trust asset is removed from the trust and passes to persons other than the disclaimant. Reg. § 25.2518-3(c) permits the disclaimer of a pecuniary amount out of a pecuniary or nonpecuniary bequest or gift provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either before or after the disclaimer. The regulation further provides that a segregation of assets making up the disclaimer of a pecuniary amount must be made on the basis of the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes that may have occurred between the date of transfer and the date of the disclaimer. In effect, this can turn the disclaimed amount into a fractional amount.

<u>Disclaimer in Case Study 4</u>:

DISCLAIMER

Mr. Hardworker, **Trustee under**
the Mrs. Hardworker Trust dated
[address]

This Disclaimer made this [date], 1998 by **Mr. Hardworker**, individually (herein "Disclaimant") of [place].

<u>WITNESSETH</u>

WHEREAS, Mrs. Hardworker died on [date], 1997, a resident of [place], Virginia; and

WHEREAS, Mr. Hardworker is the successor trustee of the Mrs. Hardworker Trust dated [date], as amended (hereafter "Trust"); and

WHEREAS, Article IV(B)(1) directs the Trustee of the Trust to distribute the entire remaining Trust Estate, as defined in the Trust, to Mr. Hardworker; and

WHEREAS, Article IV(B)(2) provides that any portion of the Trust Estate disclaimed by Mr. Hardworker is to be held in a Family Trust to be administered as directed in Article IV(B)(2) (hereafter "Family Trust"); and

WHEREAS, Article IV(B)(2)(d) provides that if Mr. Hardworker disclaims all interest in a specific property transferred to the Family Trust, such specific property shall be distributed as if Mr. Hardworker predeceased Mrs. Hardworker; and

WHEREAS, by Deed dated [date], 1997, and recorded in Deed Book [no] at page [no] in the aforesaid Clerk's Office, Mrs. Hardworker conveyed certain real property described therein, and certain towers affixed thereon, to the Trust; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a beneficiary under a nontestamentary instrument; and

WHEREAS, the undersigned, as the beneficiary of the remaining Trust Estate under Article IV(B)(1), desires to disclaim, along with any income accrued thereon, any and all interest in a fractional interest in that certain tower known as Tower 80 and which is the northern most tower shown on that certain site plan entitled [Site Plan] ("Tower 80") such that the numerator of the fraction is One Million Dollars ($1,000,000) and the denominator is the value of Tower 80 as finally determined for federal estate tax purposes; and

WHEREAS, the undersigned, as beneficiary of the Family Trust created under Article IV(B)(2), desires to disclaim, as permitted under Article IV(B)(2)(d), any and all interest in One Hundred Eighty Thousand Dollars ($180,000); and

WHEREAS, the undersigned desires to disclaim the limited power granted to him under Article IV(B)(2)(c) to withdraw principal from the Family Trust.

NOW, THEREFORE, I hereby disclaim the following:

1. A fractional interest in Tower 80 along with any income accrued thereon such that the numerator of the fraction is One Million Dollars ($1,000,000) and the denominator is the value of Tower 80 as finally determined for federal estate tax purposes;

2. Any and all interest in One Hundred Eighty Thousand Dollars ($180,000) which otherwise would be a part of the Family Trust; and

3. The power granted to me under Article IV(B)(2)(c) to withdraw principal from the Family Trust.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on triplicate originals the day and year first above written.

____

Mr. Hardworker

[Notary]

Case Study 5

Facts:

Widowed Mom has two children, Son and Daughter. Son and Daughter both have two adult children. Daughter has a minor grandchild. At the encouragement of her broker, Mom titles her brokerage account (holding approximately $1,000,000 of securities at death) so as to avoid probate: Transfer on death to Son and Daughter.

The rest of her assets (bank accounts, certificates of deposit and real estate) are titled in Mom's name and thus will remain subject to probate.

Son dies in December 1996.

Mom dies in January 1997.

Mom's Will names Son and Daughter, or survivor, as the executor. After some specific bequests of real estate, Mom's Will leaves the residue of her estate to Son and Daughter.

What happens to the brokerage account at date of death?

Under the Transfer on Death designation, Daughter becomes the sole owner. Well-meaning broker provides Daughter with papers to open her own brokerage account and all assets are transferred from Mom's account into Daughter's account. Daughter makes no withdrawals from either account, although dividends are paid into both Mom's old brokerage account and Daughter's new brokerage account, before daughter consults you.

Desired Result:

Daughter knows that Mom would have wanted Son's children to receive one-half of the account and asks if she can give them one-half of the account. Of course she can . . . if she wants to make a taxable gift of approximately $500,000 less applicable annual exclusions! Perhaps a disclaimer of part or all of the brokerage account could effect daughter's desires.

Issue 1:

The first issue is whether Daughter accepted the benefits of Mom's brokerage account by transferring the assets into a brokerage account newly established in Daughter's name.

Position: No. This is merely taking delivery of an instrument of title. PLRs 9507017 and 9214022. See III.A.2.b. Because acceptance has not occurred, Daughter can disclaim.

Issue 2:

What is the best way to accomplish the desired result, bearing in mind that Daughter could disclaim (1) specific assets, (2) the entire account or (3) 50% of the account. Each of these interests is separate and severable. See III. H.

If Daughter disclaims 50% of the account (retaining 50%), the disclaimed 50% becomes part of the probate estate. Under the residuary clause of the Will, 50% of the disclaimed 50% would pass to Daughter and 50% of the disclaimed 50% would pass to Son's children collectively (Va. Code § 64.1-64.1). This is not the desired result because Daughter ends up with 75% of the account and Son's children collectively have 25%.

Note: Daughter's receipt of some of the brokerage account through the residuary clause of the Will does not vitiate the disclaimer of 50% of the brokerage account: Reg. 25.2518-2(d)(1) & PLR 8824033. See III.B.2.a.

If Daughter were to further disclaim the 25% of the brokerage account received through the residue, it would pass by Virginia's antilapse statute to her children. If her children then disclaimed, part would pass by the antilapse statute to Daughter's minor grandchild and court approval for the disclaimers by a minor would have to be obtained.

The better approach is for Daughter to disclaim the entire brokerage account. Thus, the brokerage account becomes part of probate estate and 50% will pass under the residuary clause to Son's children and 50% to Daughter. A copy of the disclaimer should be mailed to brokerage firm. Va. Code § 64.1-192 (now § 64.1-19611(G)). Daughter is treated as having predeceased Mom. Va Code § 64.1-193.

<u>Disclaimer for Case Study 5</u>:

DISCLAIMER

This Disclaimer made this [date] by Daughter**,** individually (herein "Disclaimant") of [address].

<u>WITNESSETH</u>

WHEREAS, [decedent] died on [date], a resident of [place]; and

WHEREAS, her Will dated [date] was probated in the Clerk's Office of the Circuit Court of _____ on [date] as Will No. 96-XX; and

WHEREAS, pursuant to Article Fourth of such Will, Daughter was appointed and qualified as Executrix of the Estate of [decedent]; and

WHEREAS, a certain brokerage account, namely XYZ account number 55555 was titled in the names of [decedent] Transfer on Death to Daughter; and

WHEREAS, upon the death of [decedent], XYZ closed the account and established account number 4444 in the sole name of Daughter; and

WHEREAS, the retitling of account number 55555 into the sole name of Daughter as account number 4444 is merely taking delivery of title as described in Treasury Regulation Section 25.2518-2(d)(1); and

WHEREAS, the undersigned, as the Transfer on Death beneficiary desires to disclaim any and all interests which she may have the Transfer on Death beneficiary (but not as a residuary beneficiary under the Will of [decedent]) in all the assets which are now contained in account number 4444; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving by nontestamentary instrument;

NOW, THEREFORE, the undersigned hereby disclaims any and all interest which she has as the Transfer on Death beneficiary (but not as a residuary beneficiary under the Will of [decedent]) in all the assets which are now contained in account number 4444 all of which represent the assets, and the income therefrom, which were in XYZ account number 55555.

IN WITNESS WHEREOF, the undersigned has hereunto set her hand and seal the day and year first above written.

____
Daughter

[Notary]

Case Study 6

Facts:

Decedent died in 1990. Pertinent provisions of Decedent's Will:

1. To certain children, equalizing bequests for gifts made to other children during lifetime (which work out to be $250,000).

2. To wife, the residence (which was titled solely in decedent's name).

3. To the trustee of the Family Trust, that amount which can pass free of estate tax after taking into account other provisions of the Will and the assets passing outside the probate estate which do not qualify for the marital or charitable deduction.

4. The Family Trust provides all income to the surviving spouse and gives the trustee discretion to invade principal for the surviving spouse, subject to an ascertainable standard.

5. To surviving spouse, a pecuniary bequest of the amount necessary to reduce estate taxes to zero or as close to zero as possible.

Assets	Date of Death Value of Gross Estate	Date of Death Value for Farming Property	Alternate Value	Alternate Value for Farm Property
1. Numerous stocks in separate brokerage account*	$2,000,000		$1,600,000	
2.Various securities and bank accounts titled jointly with spouse $600,000 total @ dod $500,000 total @ avd	300,000		250,000	
3.Closely held stock titled jointly with grandchild	150,000	150,000	150,000	150,000
4. Residence in decedent's separate name	100,000	100,000	100,000	100,000
5. Farm land and some personalty	1,600,000	1,600,000	1,700,000	1,700,000
TOTAL	$4,150,000	$1,850,000	$3,800,000	$1,950,000

* One of which is 200 shares of Bank Co. held in certificate form and valued at $6,000 at date of death and $5,000 at the alternate valuation date.

There are no debts.

Using the date of death values, the adjusted value of the farming property does not equal or exceed 50% of the adjusted value of the gross estate, (i.e., $1,850,000/$4,150,000 = 44.58%.) Using alternate valuation date values, the

adjusted value of the farming property would exceed 50% of the adjusted value of the gross estate (i.e., \$1,950,000/\$3,800,000 = 51.32%).

(So no one will wonder how a special use election could pass more to family members other than the surviving spouse when the residue was passing to the widow, the grandsons purchased two-thirds of the land interest (which qualifies as passing under I.R.C. § 2032A(e)(9)), paying fair market value for the land. Yet in computing the pecuniary amount due to the surviving spouse, the special use value was used.)

Desired Result:

1. Qualify the estate for special use election under I.R.C. § 2032A, thereby reducing the value of the farm land passing by \$750,000 and thereby reducing the pecuniary amount required to be distributed to the surviving spouse.

2. Eliminate the Family Trust which otherwise would be funded with approximately \$200,000 (i.e., \$600,000 minus \$250,000 (specific bequests to children), minus \$150,000 (stock jointly held with grandson), minus any estate taxes and assuming all administration expenses are deducted on the estate tax return).

Issue 1:

The estate can qualify for I.R.C. § 2032A special use election, under the decedent's facts, only if alternate valuation can be elected. The estate can elect alternate valuation only if both (1) the gross estate is reduced and (2) the sum of the estate tax and generation-skipping transfer tax is reduced.

Solution: The gross estate is clearly lower at the alternate valuation date. However, because the Will contained a formula designed to reduce the estate tax to zero, the tax is not reduced. Thus, a tax must be created which will be reduced by the alternate valuation election.

Among the assets owned by the decedent was stock in Bank Co. If the widow disclaims the value of the 200 shares of Bank Co., a taxable estate of \$6,000 will be generated using date of death values and a taxable estate of \$5,000 will be generated using alternate valuation date values. Thus, the estate tax will be less if alternate valuation is used. With the reduction in tax, the second criteria for its use is met. (This same approach could be used with jointly titled securities.)

An amount of bequest equal to the value of the Bank Co. stock is a severable interest from other assets passing to the surviving spouse. See III. H.

The disclaimer must be executed within nine months of date of death. Under Virginia Code § 64.1-192, a copy must be delivered in person or by registered or certified mail to "the person who has legal title to, or possession of, the property disclaimed." Under Reg. § 25.2518-2(b)(2), the disclaimer must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to which the interest relates, or the person in possession. We delivered a copy to the transfer agent of Bank Co. and to the executors of the estate. Although the Virginia Code does not require filing a copy of the disclaimer with the Clerk's Office when the disclaimer is of property passing under a nontestamentary instrument, and thus would not be required if the disclaimer was of a survivorship interest in stock, generally I still file a copy with the appropriate Clerk's Office.

Issue 2:

Can the Family Trust be eliminated by disclaimer? If the surviving spouse disclaims all interests in the testamentary Family Trust, she will be treated as having predeceased the decedent, unless the decedent has provided otherwise by his Will. Va. Code § 64.1-190 (now § 64.1-196.5). More specifically, "the property or part thereof or interest therein disclaimed and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, shall descend or be distributed as if the disclaimant had predeceased the decedent." See discussion at II.P.

With the widow treated as having predeceased the decedent, the class closed and the Family Trust could be distributed to the children.

Again, under the law in effect at the time, this disclaimer necessitated a filing with the Clerk Office's wherein the estate was being administered. Va. Code § 64.1-189.

Disclaimer in Case Study 6:

Disclaimer of Bequest under Will of _________

I, [widow], declare that I am the wife of [decedent] who died on [date] domiciled in [place], leaving a Will duly admitted to probate in the Clerk's Office of the Circuit Court of the County of ___________ on [date] and recorded in Will Book [no.], at page [no.].

In Subparagraph [no], Article [no] of his Will, [decedent] granted me an income interest in that part of the residuary estate known and designated as Part B. In Subparagraph [no.], Article [no.], [decedent] authorized the trustees of Part B to invade principal for my support, maintenance and medical care. I hereby disclaim, renounce and refuse to accept any and all interest in Part B of the residuary estate of [decedent], including, without limitation, my interest in the income from said Part B and my interest as a permissible recipient of principal distributions.

In Paragraph [no.] of Article [no.] of his Will, [decedent] bequeathed to me the smallest amount of assets of his estate that qualify for the marital deduction as will be sufficient to result in the lowest federal estate tax being imposed upon his estate. I hereby disclaim, renounce and refuse to accept an amount of that bequest equal to the value of the 200 shares of Bank Co., as such value is finally determined for federal estate tax purposes, owned by my husband at the date of his death and owned by the estate of my husband on [alternate valuation date].

I affirm that I have not accepted any interest in or benefit from the property interest hereby disclaimed, and that I have not received and I will not receive any consideration in money or money's worth for making this disclaimer.

It is my intention that this disclaimer constitute a qualified disclaimer as defined in Section 2518 of the Internal Revenue Code of 1986, as amended.

In witness whereof, I have executed this disclaimer on [date].

____

Spouse

[Notary]

Case Study 7

Facts:

At decedent's death in December 1997, he and Wife owned the following assets, with a fair market value as noted and titled as noted:

1. 17,000 shares of stock in Airways Co., held in certificate form as joint tenants with right of survivorship $1,700,000
(received by husband as compensation at $400,000 and titled jointly upon retirement in 1994)

2. Joint certificate of deposit with ABC Bank with a face amount of $200,000

3. Joint checking account with ABC Bank with a date of death balance of $50,000

4. Joint mutual funds with RRSV Company with a date of death value of $75,000

5. Miscellaneous tangible personal property

6. Residence titled as tenants by the entirety with right of survivorship

The Will of Husband left the entire estate to Wife and provided that if she predeceased him, assets would pass to their children (all adults). Husband had been the only wage earner during their marriage and Wife had no other source of assets (such as an inheritance). Unfortunately, despite instruction to Wife, she deposited two quarters of dividends from Airways Co. into the joint checking account. In addition, she had her social security check automatically deposited into the joint checking account and wrote checks to pay household expenses off the account.

Desired Result:

To utilize Husband's applicable exclusion amount, none of which had been used during his lifetime. To do so, have to consider which assets are "safest" to disclaim.

Issue 1:

Did the depositing of dividends constitute acceptance of benefits on the Airways Co. stock such that none of the stock could be disclaimed? An analysis of the checking account revealed that withdrawals from the checking account (through the checks drawn by Wife) did not exceed the balance of the funds on hand at Husband's death plus the social security deposited by Wife. Thus could consider taking the position that the Wife never accepted the dividends. To possibly solidify the position, could consider having Wife disclaim the interest in the joint checking account except to the extent that funds had been accepted. Remember the acceptance of one interest does not preclude the disclaimer of another. See, e.g., PLRs 9214022, 9218015, 8904041, 8827072, 8637113, and 8619002. See III.A.2.d.

Issue 2:

Was the interest in the certificate of deposit disclaimable in full? The 1997 Regulations provide that for joint bank accounts, if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other co-tenant, the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased co-tenant and the survivor may disclaim any part of the account for which the survivor did not furnish consideration. A conversation with ABC Bank revealed that ABC Bank would have allowed either Wife or Husband to withdraw the certificate of deposit without the signature of the other. Thus, because Wife had furnished none of the consideration, the entire ABC certificate of deposit was disclaimable by Wife.

Issue 3:

Were the shares of mutual funds of RRSV Company disclaimable in full or partially? The 1997 Regulations apply the same rules to mutual fund and other investment accounts as it applies to bank accounts. RRSV Company confirmed that they would have issued any certificate out to the two joint tenants, together. However, RRSV Company would have accepted a direction to sell from either joint tenant and issued a check to them jointly which Husband could have negotiated into the joint checking account and then written a check for the complete proceeds to himself. Thus there is an argument that the Husband could have unilaterally regained his own contribution (100%) but it does not address the legal rights of the parties. Did Husband have the legal right to regain the entire mutual fund account? This seems to be a gray area.

Issue 4:

Can any basis benefit be achieved in the Airways Co. stock by the use of disclaimers?

Conclusion:

The order of safest disclaimer to least safe appeared to be: certificate of deposit, joint checking account, mutual fund accounts and stock in Airways Co., the concern on the stock being whether Wife had accepted the benefits because of her actions with regard to the dividends. The disclaimer of these survivorship interests would result in the assets becoming part of the probate estate. Because Wife was the sole beneficiary of the probate estate, Wife had to disclaim assets as the residuary beneficiary so that they would pass to the children. This part of the disclaimer was accomplished by a formula after disclaiming a certain number of shares of Airways Co. out of the probate estate (this being the number of shares the widow wished to have in the hands of the children).

After an initial disclaimer was made, we focused upon the fact that Gallenstein was not available because the date of joint titling for the Airways Co. stock had been in 1994. Thus we had the Wife execute a second disclaimer to complete the disclaimer of the entire survivorship interest in the Airways Co. stock, causing it to pass into the probate estate and out to the Wife as residuary beneficiary. Arguably, this would generate one block of stock with an entirely stepped-up basis and another block with a basis attributable to the original cost, rather than a single block of stock with a blended basis.

<u>Disclaimer 1 in Case Study 7</u>:

DISCLAIMER

Wife, Executor under the
Will of **Decedent**
[address]

This Disclaimer made this [date] by **Wife**, individually (herein "Disclaimant") of [address].

<u>WITNESSETH</u>

WHEREAS, Decedent died on [date], 1997, a resident of [place]; and

WHEREAS, his Will dated [date] was probated in the Clerk's Office of the Circuit Court of the County of ____, Virginia on [date], 1998; and

WHEREAS, Wife qualified as Executrix of the Estate of Decedent on [date], 1998; and

WHEREAS, more than 6,000 shares of common stock of Airways Co. were titled in the names of Decedent and his wife, Wife, as joint tenants with rights of survivorship; and

WHEREAS, certain certificates of deposit and ABC Bank checking account number 1234 were titled in the names of Decedent and his wife, Wife, as joint tenants with rights of survivorship; and

WHEREAS, a certain mutual fund account, namely RRSV Investment Program account number 0123 456 which contained shares in RRSV GNMA & US Treasury Fund and RRSV Tax Free General Bond Fund were titled in the names of Decedent and his wife, Wife, as joint tenants with rights of survivorship; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a surviving joint tenant by right of survivorship including the right to disclaim the entire property if the decedent furnished all of the consideration; and

WHEREAS, Decedent provided all of the consideration for the acquisition of such shares of stock in Airways Co., Certificates of Deposit (as hereafter defined) and of the RRSV Mutual Fund Interests (as hereafter defined); and

WHEREAS, the undersigned, as the surviving joint tenant, desires to disclaim any and all of the survivorship interest in 6,000 shares of common stock of Airways Co., with all accrued dividends (the survivorship interest in 6,000 shares equaling 3,000 shares of stock) (hereafter referred to as "Stock Interest"); and

WHEREAS, the undersigned, as the surviving joint tenant, desires to disclaim the entire interest in the following assets:

A. The entire interest in RRSV GNMA & US Treasury Fund in RRSV Investment Program account number 0123 456 including, without limitation, the 5,500.949 shares in the account on [date of death] and all dividends which have been reinvested since then;

B. The entire interest in RRSV Insured Tax-Free General Bond Fund in RRSV Investment Program account number 0123 456 including, without limitation, the 2,947.533 shares in the account on [date of death] and all dividends which have been reinvested since then;

3. The entire interest in ABC Bank Co. certificate of deposit number ______ or any renewal of such certificate of deposit and which said certificate had an approximate balance of $200,000.00 on [date of death];

4. The entire interest in ABC Bank Co. checking account 13285 and the funds therein, other than funds previously accepted by the undersigned.

(hereafter Items 1 and 2 are collectively referred to as "RRSV Mutual Fund Interests," Item 3 is referred to as "Certificate of Deposit Interest" and Item 4 is referred to as "Checking Account").

WHEREAS, under Article IV of his Will, Decedent named the undersigned as the beneficiary of his residuary estate; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended), the undersigned desires to disclaim any and all interests in the Stock Interest, including, without limitation, any dividends received thereon, and the RRSV Mutual Fund Interests, which she has, or may have in the future, as part of the residuary estate of Decedent; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended), the undersigned desires to disclaim from the residuary estate the maximum amount that can pass free of transfer taxes upon the Estate of Decedent;

NOW, THEREFORE, I hereby disclaim any and all interests which I have, or may have in the future, in the Stock Interest and RRSV Mutual Fund Interests, both as the surviving joint tenant and as the residuary beneficiary of the estate of Decedent under Article IV of his Will; and

FURTHER, THEREFORE, I hereby disclaim any and all interests in the Certificate of Deposit and Checking Account as a joint tenant (but not all interest in such Checking Account, Certificates of Deposit Interest, or their proceeds, as the residuary beneficiary of the estate of Decedent under his Will); and

FURTHER, THEREFORE, I hereby disclaim a sum equal to the largest amount, if any, that can pass from Decedent free of federal estate tax by reason of the unified credit and the state death tax credit (provided use of this credit does not require an increase in the state death taxes paid) allowable to Decedent's estate but no other credit and after taking account of his adjusted taxable gifts, property disposed of other than by this Disclaimer, whether by his Will or otherwise, which is includible in his gross estate and for which the marital or charitable deduction is not allowable, after taking account of charges to principal that are not allowed as deductions in computing his federal estate tax and after taking account of my disclaimer of the Stock Interest and the disclaimer of the RRSV Mutual Fund Interests. For the purposes of establishing the sum disposed of herein, the values finally fixed in the federal estate tax proceeding relating to Decedent' estate shall be used. I recognize that the sum disposed of by this provision may be affected by the action of the Executor of the Estate of Decedent in exercising certain tax elections.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

____
Wife

[Notary]

<u>Disclaimer 2 in Case Study 7</u>:

DISCLAIMER

Wife, Executor under the
Will of **Decedent**
[address]

This Disclaimer made this [date] by **Wife**, individually (herein "Disclaimant") of [address].

<u>WITNESSETH</u>

WHEREAS, Decedent died on [date], 1997, a resident of [place]; and

WHEREAS, his Will dated [date] was probated in the Clerk's Office of the Circuit Court of the County of ____, Virginia on [date], 1998; and

WHEREAS, Wife qualified as Executrix of the Estate of Decedent on [date], 1998; and

WHEREAS, 17,000 shares of common stock of Airways Co. were titled in the names of Decedent and his wife, Wife, as joint tenants with rights of survivorship; and

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a surviving joint tenant by right of survivorship; and

WHEREAS, by a disclaimer dated [date], 1998, Wife disclaimed her survivorship interest in 6,000 shares of common stock of the Airways Co.; and

WHEREAS, the undersigned, as the surviving joint tenant, desires to disclaim any and all of the survivorship interest in the remaining 11,000 shares of common stock of Airways Co., with all accrued dividends (the survivorship interest in 11,000 shares equaling 5,500 shares of stock);

NOW, THEREFORE, I hereby disclaim, as the surviving joint tenant but not as a residuary beneficiary of the Estate of Scott R. Jones, any and all of the survivorship interest in 11,000 shares of the common stock of Airways Co. (the survivorship interest in 11,000 shares equaling 5,500 shares of stock).

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

____
Wife

[Notary]

APPENDIX C
SAMPLE DISCLAIMER FORMS

Samples of disclaimers used previously by the author follow. The author makes no recommendation on the use or efficacy of a particular format.

Sample Disclaimer 1

DISCLAIMER

______________, Executor under the
Will of _____________[DECEASED]
[EXECUTOR'S ADDRESS]

This Disclaimer made this ___ day of _______________, 199__, by __________, individually (herein "Disclaimant") of _______________________________ [DISCLAIMANT'S ADDRESS].

WITNESSETH

WHEREAS, [DECEASED] died on ___________, 199__, a resident of _____________, ____________; and

WHEREAS, his/her Will dated ________________ was probated in the Clerk's Office of the Circuit Court of the City/County of ___________, Virginia on __________, 199__; and

WHEREAS, pursuant to Article ________ of such Will, ____________________ was appointed and qualified as Executor of the Estate of [DECEASED]; and

WHEREAS, by Article __________ of his/her Will, [DECEASED] named the undersigned as the beneficiary of one-half of his/her residuary estate; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended) the undersigned desires to disclaim any and all interests, which he/she has, or may have in the future, in the residuary estate of [DECEASED];

NOW, THEREFORE, I hereby disclaim any and all interests which I have, or may have in the future, in the residuary estate of [DECEASED].

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written, in several counterparts, each of which shall have the effect of an original.

____
[DISCLAIMANT'S NAME]

STATE OF __________________,
CITY/COUNTY OF ___________, to-wit:

The foregoing instrument was acknowledged before me this _____day of _________________, 199___, by ____________________[disclaimant].

____
Notary Public

My commission expires:________________

Sample Disclaimer 2

DISCLAIMER OF VIRGINIA PERSONAL AND REAL PROPERTY

_____________, Administratrix [Administrator]
Estate of ______________[DECEASED]
[DISCLAIMANT'S ADDRESS]

This Disclaimer made this ____ day of _______, 199__ by **[BENEFICIARY]** individually (herein "Disclaimant") of ______________________________________.

WITNESSETH

WHEREAS, Disclaimant's husband, _____________(herein "Decedent"), died on ____________, 19___a resident of ______, Virginia; and

WHEREAS, Decedent died intestate; and

WHEREAS, pursuant to Sections 64.1-1 and 64.1-11 of the Code of Virginia (1950, as amended) Disclaimant is Decedent's sole heir-at-law; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended) the undersigned, as the sole heir-at-law, desires to disclaim any and all interests in the following assets owned by the Decedent at the time of his death:

1.Certain ____________ real estate legally described on Exhibit "A," which is attached hereto and made a part hereof;

2.___ shares of common stock in ________________ which number of shares represents a ___% interest;

3.___% beneficial interest in Partnership 1, which represents the Decedent's entire interest in said partnership;

4.___% beneficial interest in Partnership 2, which represents the Decedent's entire interest in said partnership; and

5.____% limited partnership interest in Partnership 3, which represents the Decedent's entire interest in said partnership.

As to item numbered 1 ("Real Estate) and items numbered 3-5, inclusive, ("Partnership Interests"), the interest being disclaimed is the Decedent's entire interest, even if the percentage interest of the Decedent is incorrectly stated. As to item numbered 2 ("Stock"), the interest being disclaimed is the percentage of stock ownership specified, even if the number of shares is stated incorrectly.

NOW, THEREFORE, Disclaimant hereby disclaims any and all interests in Partnership Interests, Stock and Real Estate which would otherwise pass to the Disclaimant by intestacy from the Decedent.

IN WITNESS WHEREOF, Disclaimant has hereunto set his/her hand and seal the day and year first above written.

____
[BENEFICIARY]

STATE OF VIRGINIA
CITY/COUNTY OF ______________, to-wit:

The foregoing instrument was acknowledged before me this _____ day of ___________, 199__ by ______________________ [BENEFICIARY].

____
Notary Public

My commission expires:

Sample Disclaimer 3

DISCLAIMER

_____________, Executrix under the
Will of [DECEASED]
[DISCLAIMANT'S ADDRESS]

This Disclaimer made this ____ day of __________, 19__ by **____________________,** individually (herein "Disclaimant") of _______________________________________ [DISCLAIMANT'S ADDRESS].

WITNESSETH

WHEREAS, [DECEASED] died on ___________________, a resident of ____________________; and

WHEREAS, his/her Will dated __________________ was probated in the Clerk's Office of the Circuit Court of the City/County of _______________, Virginia on _____________; and

WHEREAS, pursuant to Article ___ of such Will, ___________________ was appointed and qualified as Executrix(or) of the Estate of [DECEASED]; and

WHEREAS, a certain certificate of deposit was titled in the names of [DECEASED] and his/her wife/husband, _____________, as joint tenants with rights of survivorship; and

WHEREAS, certain brokerage accounts, namely __________________ account number _____________ and _____________ account number ______________, were titled in the names of [DECEASED] and his/her husband/wife, ______________, as joint tenants with rights of survivorship; and

WHEREAS, [DECEASED] provided all of the consideration for the acquisition of such certificate of deposit and of the assets contained in said brokerage accounts as of ___________; and

WHEREAS, the undersigned, as the surviving joint tenant, desires to disclaim any and all interests which she may have in the following assets:

1. _________________ Bank C/D #____________, with all accrued interest;

2.$_______ [MUNICIPAL BOND] dated _________, ____%, ____/19__, with all accrued interest; and

3.$_______ [MUNICIPAL BOND], dated _________, ___%, ______, with all accrued interest,

(hereafter collectively referred to as "Certificate of Deposit and Brokerage Accounts Assets")

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a surviving joint tenant by right of survivorship including the right to disclaim the entire property if the decedent furnished all of the consideration; and

WHEREAS, by Article ___ of his/her Will, [DECEASED] named the undersigned as the beneficiary of his/her residuary estate; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended) the undersigned desires to disclaim any and all interests, other than interests in tangible personal property, which he/she has, or may have in the future, in the residuary estate of [DECEASED] under Article ___ of his/her Will; and

WHEREAS, both Treasury Regulation Section 25.2518-2(c)(2) and Virginia Code Section 1-13.3:1 provide that if the last day of the nine month disclaimer period falls on Saturday, Sunday or a legal holiday, then delivery of the writing shall be considered timely if delivery is made on the first succeeding day which is not Saturday, Sunday or a legal holiday. **[THIS LANGUAGE WAS SPECIAL TO THE SITUATION].**

NOW, THEREFORE, I hereby disclaim any and all interests which I have, or may have in the future, in the Certificate of Deposit and Brokerage Accounts Assets, both as the surviving joint tenant and as the residuary beneficiary of the estate of [DECEASED] under Article __ of his/her Will.

FURTHER, as permitted by Internal Revenue Code Section 2518, to the extent that any attempted disclaimer herein should fail to meet state law requirements, I hereby transfer and assign to the trustees of that certain trust created under Article ___ of the Will of [DECEASED] any and all of my interest in the Certificate of Deposit and the Brokerage Account Assets. **[THIS LANGUAGE WAS SPECIAL TO THE SITUATION].**

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

____
[DISCLAIMANT]

CLAIMANT'S ADDRESS]

STATE OF VIRGINIA
CITY/COUNTY OF ______________, to-wit:

The foregoing instrument was acknowledged before me this ___day of ____________, 19___, by [DISCLAIMANT].

____
Notary Public

My commission expires:

Sample Disclaimer 4

DISCLAIMER

_________________, Administratrix(or) C.T.A. under the
Will of ________________[DECEASED]
[DISCLAIMANT'S ADDRESS]

This Disclaimer made this ____ day of _______, 19___ by **______________,** individually (herein "Disclaimant") of ______________________________________.

WITNESSETH

WHEREAS, _____________ [DECEASED] died on ___________________, a resident of ______________, Virginia; and

WHEREAS, his/her Will dated ____________ was probated in the Clerk's Office of the Circuit Court of the City/County of _____________, Virginia on ____________; and

WHEREAS, _________________ qualified as Administratrix(or) C.T.A. of the Estate of [DECEASED]; and

WHEREAS, certain securities were titled in the names of [DECEASED] and his/her wife/husband, ________________, as joint tenants with rights of survivorship; and

WHEREAS, the undersigned, as the surviving joint tenant, desires to disclaim any and all of the survivorship interest (i.e., one-half of the total number of shares standing in the name of [DECEASED] and ______________ on ___________) which he/she has in the following assets:

1. __________ shares __________ common stock, with all accrued dividends (one-half being _______ shares, together with accrued dividends on _____ shares);

2. ____ shares ___________ stock (one-half being ____ shares).

(hereafter collectively referred to as "Stock Interests")

WHEREAS, Section 64.1-191 of the Code of Virginia (1950, as amended) permits a disclaimer of an interest in any property devolving to a surviving joint tenant by right of survivorship; and

WHEREAS, under his/her Will, [DECEASED] named the undersigned as the beneficiary of his/her residuary estate; and

WHEREAS, pursuant to Section 64.1-188 of the Code of Virginia (1950, as amended) the undersigned desires to disclaim any and all interests in the Stock Interests, which he/she has, or may have in the future, as part of the residuary estate of [DECEASED].

NOW, THEREFORE, I hereby disclaim any and all of the survivorship interest (i.e., one-half of the total number of shares standing in the name of [DECEASED] and ______________) which I have, or may have in the future, in the Stock Interests, and any and all interest I have in the Stock Interests as the residuary beneficiary of the estate of [DECEASED] under his/her Will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

____
[DISCLAIMANT]

STATE OF ____________
CITY/COUNTY OF _______, to-wit:

The foregoing instrument was acknowledged before me this ____ day of ________, 19__, by [DISCLAIMANT].

____
Notary Public

My commission expires: _________________________

APPENDIX D
SAMPLE FORMS

Sample 1 - Retirement Benefits Designation

SCHEDULE A

(CLIENT)
BENEFICIARY DESIGNATION

PRIMARY BENEFICIARY: (Client Spouse), my spouse, SSN 012-34-5678, (Address), DOB January 1, 1967, if she survives me; provided, however, if (Client Spouse), her attorney-in-fact or her personal representative disclaims any interest therein, then the beneficiary of such disclaimed interest shall be the Trustee of the Family Trust created under Article IV(B) of the (Client) Trust dated (Trust Date), as amended ("(Client) Trust") and held pursuant to the terms of Article IV(B)(5) of the (Client) Trust.

CONTINGENT BENEFICIARY: If (Client Spouse) fails to survive me, then to my then living descendants, per stirpes; provided, however, (i) if any living child of mine has not attained the age of 23 years, then the beneficiary shall be the Trustee of the trust held for my descendants pursuant to Article IV(D) of the (Client) Trust, and (ii) if all of my living children are over the age of 23 years, and any child of mine has not attained the age of 35 years, then the beneficiary of such child's share shall be the Trustee of the Children's Trust held for such child under Article V of the (Client) Trust, and (iii) if any other descendant of mine (other than a child of mine) has not attained the age of 25 years, then the beneficiary of said portion hereof to which such descendant otherwise would have been entitled shall be the Trustee of the trust held for such descendant under Article VII of the (Client) Trust. I have two children now living, namely, (Child 1), January 1, 1999, and (Child 2), born January 1, 2001.

Dated:________________________ ____(Client)

Sample 2 - Notice of Disclaimer Planning

#

IMPORTANT NOTICE

Your estate plan includes provisions which direct the disposition of assets which are disclaimed by the survivor or on his or her behalf. A disclaimer is an unequivocal refusal to accept a power or interest in property to which one is otherwise entitled by a gift, Will or operation of law. There are several very technical requirements which must be met in order for a disclaimer to be valid under the Internal Revenue Code and under applicable state law. This warning does **not** explain all of the technical requirements which apply to disclaimers. You should, however, be aware of the following requirements:

1. Upon the death of the first of you to die, the survivor must **not** accept the interest (property, income, etc.) to be disclaimed or any of its benefits. For example, interest on a jointly held certificate of deposit should not be accepted by the survivor of you if the decedent's one-half interest in the certificate will be disclaimed **AND LIFE INSURANCE BENEFITS SHOULD NOT BE APPLIED FOR BY THE SURVIVOR OF YOU IF ANY INTEREST THEREIN WILL BE DISCLAIMED**.

2. To be a qualified disclaimer under federal estate and gift tax law the disclaimer must be executed and delivered within nine (9) months of the date of the taxable transfer (death, gift, etc.) creating the interest. If the property to be disclaimed is property passing under the Will of a decedent, the disclaimer must be executed and delivered within nine (9) months of the date of death.

Your personal representative and your surviving spouse should seek legal counsel immediately upon your death regarding the disclaimer of an interest in all or part of your estate. We request that a copy of this notice be appended to all copies of your Will or trust. We will be available to answer any questions you or they may have.

LAW FIRM NAME

By______________________________________

Sample 3 - Limited Durable Power of Attorney
#

LIMITED DURABLE
POWER OF ATTORNEY

I, (Client), of (City), (State), appoint (Attorney) of ____________, State, as my attorney-in-fact ("Attorney").

1. Specific Powers. My Attorney shall have the limited power to act for me in my name as follows:

a. Disclaimers. To disclaim for me any gift, inheritance, legacy, bequest, devise or other transfer of money or property, or both, to me.

b. Appointing Additional or Substitute Attorneys. To add or substitute any person, firm or corporation as Attorney hereunder, by an instrument in writing signed by my Attorney. Such additional or substitute Attorney shall have all the rights and powers of my Attorney named herein, notwithstanding the disability or death of my named Attorney, unless my named Attorney, in the instrument appointing such additional or substitute Attorney, (i) specifies that such additional or substitute Attorney shall have limited rights or powers, and/or (ii) specifies that the powers of such additional or substitute Attorney shall terminate upon the disability or death of the named Attorney. My named Attorney shall have the power to revoke the authority of any additional or substitute Attorney appointed by such named Attorney, by an instrument in writing signed by such named Attorney, and my named Attorney shall again act as my Attorney hereunder upon revocation of the authority of any substitute Attorney who had acted in place of such named Attorney.

2. Power Not Affected By Disability. This limited durable power of attorney shall not terminate on my disability. All acts lawfully done by my Attorney pursuant to Paragraph 1 above, during any period in which I am disabled shall have the same effect and inure to the benefit of and bind me and my heirs, devisees, legatees and personal representatives as if I were mentally competent and not disabled. I hereby, for myself, heirs, devisees, legatees and personal representatives, ratify and confirm whatever my Attorney may do.

3. Exoneration of Third Persons. Each person relying or acting upon this durable power of attorney shall be entitled to presume conclusively that this durable power of attorney is in full force and effect. Any person may rely on a copy of this durable power of attorney certified by my Attorney to be in effect and to be a true and correct copy. Such certified copy shall be considered as an original and shall relieve any person to whom or which a certified copy is delivered of any duty to inquire further. No person relying in good faith upon this durable power of attorney shall be required to see to the application and disposition of any moneys or other property paid or delivered to my Attorney.

4. Invalidity. If any provision of this durable power of attorney shall be invalid or unenforceable under applicable law, said provision shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this durable power of attorney.

5. Other Powers of Attorney. This durable power of attorney shall not revoke any prior durable power of attorney signed by me, including that certain durable power of attorney dated ______________________.

6 Headings. The headings in this durable power of attorney are inserted for convenient reference and shall be ignored in its construction.

7. Governing Law. The laws of the Commonwealth of Virginia shall govern all questions pertaining to the validity and construction of this durable power of attorney.

IN WITNESS WHEREOF, I have signed this Limited Durable Power of Attorney this _____ day of (Month), (Year).

__________________________________(SEAL)
(Client)

____
Witness

____
Witness

STATE OF (STATE)
CITY OF ____________, to-wit:

The foregoing instrument was acknowledged before me this ______ day of (Month), (Year) by (Client).

____
Notary Public

My Commission Expires: __________________

Sample 4 - Document Provision

Individual as Trustee. Notwithstanding any other provision, whenever an individual, other than me, is serving as a Trustee, he or she shall not make or participate in any Trustee decision with respect to (i) discretionary distributions of principal or income to himself or herself, or for his or her benefit, other than for an ascertainable standard relating to health, education or support, (ii) discretionary distributions of principal or income to or for the benefit of any beneficiary of a trust holding assets as the result of a disclaimer by or on behalf of such individual, other than for an ascertainable standard relating to health, education or support, (iii) discretionary distributions of principal or net income to or for the benefit of any person whom he or she is legally obligated to support and which distribution constitutes support under applicable state law at the time of such distribution, (iv) discretionary distributions of principal or net income from any trust of which such Trustee is also a beneficiary (other than a remote contingent beneficiary) to another beneficiary, or for the benefit of another beneficiary, other than for a reasonably definite standard relating to support, maintenance, health and medical care, maintenance of such beneficiary's accustomed standard of living or meeting such beneficiary's emergencies, or (v) the early termination of a trust of which he or she is a beneficiary.

#

#