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DISCLAIMERS AND THE MARITAL DEDUCTION: A NEED FOR ADEQUATE STATE LEGISLATION*

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The anticipated devolution of a decedent's property may be altered drastically by a number of causes. One foreseeable possibility is that an intended beneficiary may refuse to accept all or part of a transfer. Such a disclaimer may be motivated by various reasons, but likely it will be the result of a post-death decision to rearrange the pattern of devolution in order to accomplish an over-all tax savings for the family unit.

The recent amendment to the estate tax marital deduction section of the Internal Revenue Code[1] provides such an opportunity for tax savings.[2] A

*A table of headings and subheadings is appended at the end of this article.

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1. Section 2056(d)(2) of the INT. REV. CODE of 1954 was amended as follows: "(2) *By any other person.*—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then— (A) if the disclaimer of such interest is made by such person before the date prescribed for the filing of the estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and (B) if subparagraph (A) does not apply, such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made." INT. REV. CODE of 1954, §2056(d)(2) [hereinafter cited as CODE].

Before the amendment, CODE §2056(d)(2) read as follows: *"By any other person.*—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for the purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made." CODE §2056(d)(2), 68A Stat. 395 (1954).

2. This article is restricted to the planning opportunities available to estates of decedents dying on or after Oct. 4, 1966. For estates of decedents dying on or after Oct. 1, 1963, and before Oct. 4, 1966, the law provides: "In the case of the estate of a decedent dying before the date of the enactment of this Act for which the date prescribed for the filing of the estate tax return (determined without regard to any extension of time for filing) occurs on or after January 1, 1965, if, under section 2056 of the Internal Revenue

"disclaimer" of an interest in property will have the effect of "passing" the disclaimed property from the decedent to the surviving spouse if, as a result of the disclaimer, the surviving spouse is entitled to receive the interest.[3] Thus, affirmative post-death action by an intended beneficiary can result in augmentation of the estate tax marital deduction.[4]

The amendment represents a significant step toward placing taxpayers who reside in noncommunity property states and those who reside in community property states in postures of equality.[5] Nevertheless, it raises several questions and problems. The purposes of this article are to explore the consequences that may flow to the taxpayer who attempts to utilize the new disclaimer provision, and to suggest the type of state statutes needed to ensure that the taxpayer's attempt will have the maximum chance of success.

Congress had at least two distinct approaches that it could have taken in legislating in the disclaimer area. One approach would have been to establish a federal standard for the circumstances under which a refusal to accept an interest would be treated as a valid disclaimer.[6] Congress chose, however,

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Code of 1954, an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of such section, be considered as passing from the decedent to the surviving spouse, if — (1) the interest disclaimed was bequeathed or devised to such person, (2) before the date prescribed for the filing of the estate tax return such person disclaimed all bequests and devices [*sic*] under such will, and (3) such person did not accept any property under any such bequest or devise before making the disclaimer. The amount of the deductions allowable under section 2056 of such Code by reason of this subsection, when added to the amount of the deductions allowable under such section without regard to this subsection, shall not exceed the greater of (A) the amount of the deductions which would be allowable under such section without regard to the disclaimer if the surviving spouse elected to take against the will, or (B) an amount equal to one-third of the adjusted gross estate (within the meaning of subsection (c) (2) of such section)." 80 Stat. 832, § (c) [1 U.S. CODE CONG. & AD. NEWS 1029-30 (1966)].

3. CODE §2056 (a) provides that only an interest that "passes or has passed" from the decedent to the surviving spouse can qualify for the marital deduction. As a result of the amendment, a disclaimed interest that passes to the surviving spouse will meet the "passing" requirement, and if all other requirements of §2056 are met, the disclaimed interest will qualify for the estate tax marital deduction. *See generally* 1 A. CASNER, ESTATE PLANNING 827-31 (3d ed. 1961, Supp. 1968) [hereinafter cited as CASNER].

4. The estate tax marital deduction has been summarized as follows: "[T]he marital deduction, in general, permits the deduction of up to one-half of the adjusted gross estate for property passing to a surviving spouse." S. REP. No. 1599, 89th Cong., 2d Sess. 9 (1966), 2 U.S. CODE CONG. & AD. NEWS 3112 (1966) [hereinafter cited as Senate Finance Comm. Rep.]. *See generally* 1 CASNER 783-874.

5. *Cf.* Commissioner v. Estate of Ellis, 252 F.2d 109, 112 (3d Cir. 1958); S. REP. No. 1013, 80th Cong., 2d Sess., 1948-1 CUM. BULL. 285, 305.

6. A federal standard that would achieve uniformity of treatment among the states has been recommended by many: *See, e.g.*, Frankel, *How To Prepare for Renunciations, Widow's Elections, and Related Problems*, in 3 J. LASSER, ESTATE TAX TECHNIQUES 2191, 2207 (1965) [hereinafter cited as Frankel]; R. STEVENS & G. MAXFIELD, THE FEDERAL ESTATE AND GIFT TAXES 305 (2d ed. 1967) [hereinafter cited as STEPHENS & MAXFIELD]; Ekman, *Can a Transferee Avoid Gift or Estate Tax Liability by Renouncing a "Transfer by Operation of Law,"* N.Y.U. 11TH INST. ON FED. TAX. 527, 532 (1953) [hereinafter cited as Ekman]; Sayles, *Re-*

to continue to rely on local law for the factual determination of what constitutes a valid "disclaimer" or "acceptance" of an interest in property.[7]

Although it seems that Congress failed to avail itself of the opportunity to ensure uniformity of treatment, the broad language of the statute coupled with the apparent congressional purpose of alleviating existing inequities and discrimination strongly suggest that the courts will construe the statute broadly.[8] Thus, the major, but perhaps insurmountable, obstacle remaining for some taxpayers is the outmoded law of disclaimers that exists in most of the states.

A few states have recognized the unfortunate federal tax results caused by uncertain or inadequate state law and, accordingly, have passed legislation.[9] The Minnesota statutes, for example, are comprehensive and represent the type of statute that should alleviate most of the problems caused by state law.[10]

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nunciations—Estate and Gift Tax Problems, U. So. CAL. 1953 TAX INST. 531, 538 [hereinafter cited as Sayles]; Note, *Disclaimers in Federal Taxation*, 63 HARV. L. REV. 1047, 1051 (1950); Note, *Taxation: Disclaimers Under Federal and Minnesota Law*, 51 MINN. L. REV. 907, 921 (1967) [hereinafter cited as Note, 51 MINN. L. REV.].

7. "A disclaimer, for the purposes of this bill . . . . [M]ust be a valid refusal under State law . . . ." Senate Finance Comm. Rep. at 3116. *Compare* the discussion, *id.* at 3113-14, concerning disclaimers for gift tax purposes, *with* the discussion, *id.* at 3115-16, concerning disclaimers for marital deduction purposes.

The local law test is also used in CODE §§2041 (a) (2), 2514 (b) with respect to disclaiming or renouncing a general power of appointment created after Oct. 21, 1942: "A disclaimer or renunciation of a general power of appointment is not considered to be a release of the power. The disclaimer or renunciation must be unequivocal and effective under local law." Treas. Reg. §§25.2514-3 (c) (5), 20.2041-3 (d) (6) (1958).

8. *Cf.* Senate Finance Comm. Rep. at 3114, which states: "Cases in the estate tax area have arisen where the nonrecognition of a disclaimer, which resulted in property passing to surviving spouses, has given rise to inequities and discrimination. Where the beneficiary disclaims his right to receive property and, as a result, the property is received by a surviving spouse, it is difficult to see why a larger tax should be recovered from the estate than would be true where the property goes directly to the surviving spouse (rather than indirectly as a result of a disclaimer). In both cases the economic effect of the transaction is the same. Moreover, frequently the failure to make provision for the marital deduction in the first instance stems from an absence of knowledge concerning estate tax law by the decedent. This is an area of the law which, of necessity, contains complexities and frequently is not fully understood by an individual preparing his own will. A special problem is created by the fact that it is possible to obtain a lesser marital deduction than intended solely because of a failure to determine the exact interrelationship of the different estate tax provisions of present law." And see the reason for the additional changes by the Senate: "[P]roperty passing to a surviving spouse by way of a disclaimer should be treated no differently than where the property passes directly to the surviving spouse. For that reason, it does not apply the limitations contained in the House bill to disclaimers made in the future (these limited the application of the House bill to disclaimers of interests bequeathed or devised to a person, required the disclaimer by a person of all bequests and devises in his favor, and limited the maximum marital deduction available by reason of disclaimers)." *See also infra* note 210.

9. *See infra* note 147 listing statutes authorizing an heir to disclaim; *infra* note 190 listing statutes authorizing donee of power of appointment to disclaim the power.

10. MINN. STAT. ANN. §§501.211, 525.532 (Supp. 1966) (*see infra* Appendix for excerpts from the statutes). Although these statutes were approved May 21, 1965, the impetus for the legislation was undoubtedly due to the result reached in Hardenbergh v. Commissioner,

The estate planner risks serious consequences if he advises that a disclaimer be made in a state where the requirements and effects of a disclaimer are uncertain.[11] If a given issue has not been decided, the planner can only predict the position that the courts of such state are likely to take. Even if a lower court judgment is obtained, which ostensibly determines a controverted property question relating to the taxpayer, the planner must face the real possibility that the federal court will disregard the state court decision to the extent that its decision indirectly affects the determination of federal tax liability.[12]

PART I. WHAT CONSTITUTES A VALID DISCLAIMER?

The Code does not define a disclaimer for purposes of section 2056 (d) (2). The only specific requirements are that disclaimer be made before the date prescribed for filing of the estate tax return and that disclaimer be made before the interest is accepted.[13]

The Senate Finance Committee Report casts some additional light: "A disclaimer . . . is a complete and unqualified refusal to accept some or all of the rights to which one is entitled. It must be a valid refusal under state law and be made without consideration."[14] In a footnote the report adds: "It is not material for this purpose whether a particular State law uses the term 'disclaimer' or uses another term describing the same legal effect. All that is necessary . . . is a refusal, made without consideration, which is valid under State law and by reason of which the interest 'disclaimed' is received by the surviving spouse either by operation of law or other provision made by the decedent."[15]

Ultimate determination of what constitutes a "disclaimer" requires an investigation of the controlling state law. It is here that the planner must

198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952), discussed following *infra* subheading *Interests Passing by Intestate Succession or Otherwise by Operation of Law.* A thoughtful analysis of interpretive problems created by the Minnesota legislation is found in Note, 51 MINN. L. REV. 922-41.

11. *See supra* note 7, *infra* notes 34, 35, and accompanying text.

12. *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), *noted in* 53 A.B.A.J. 951 (1967), 34 BROOKLYN L. REV. 156 (1967), 1967 DUKE L.J. 1055, 81 HARV. L. REV. 259 (1967), 12 ST. LOUIS U.L.J. 160 (1967), 36 U. CINC. L. REV. 728 (1967), 21 VAND. L. REV. 161 (1967), 70 W. VA. L. REV. 87 (1967). *See generally* Braverman & Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 TAX L. REV. 545 (1962); Sacks, *The Binding Effect of Nontax Litigation in State Courts*, N.Y.U. 21ST INST. ON FED. TAX. 277 (1963); Stephens & Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies*, 46 MINN. L. REV. 223, 242-51 (1961); Note, *The Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 FORDHAM L. REV. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform*, 30 U. CHI. L. REV. 569 (1963).

13. CODE §2056 (d) (2) (A). The following CODE sections contain provision for renunciation or disclaimer: §§678 (d), 2041 (a) (2), 2055 (a), 2056 (d), 2514 (b). It is instructive to review the existing regulations under these sections: Treas. Reg. §1.678 (d)-1 (1956); §§20.2041-3 (d) (6), 20.2055-2 (c), 25.2514-3 (c) (5) (1958).

14. Senate Finance Comm. Rep. at 3116.

15. *Id.*

proceed with caution because of lack of uniformity among the states.[16] Less than twenty-five per cent of the states have statutes on the subject,[17] so it is necessary to look to the multifarious judicial decisions for guidance.

Refusal To Accept

Whether a disclaimer has occurred, or can occur, may turn on whether there has been an acceptance of the interest.[18] The Senate Finance Committee Report illustrates the meaning of "acceptance" as follows: "This means, for example, that a person who has been receiving benefits under a trust during a decedent's lifetime may not disclaim the interest . . . upon the decedent's death. . . . What constitutes an acceptance is . . . a question of fact."[19] Judicial elaboration of "acceptance" under existing Code sections[20] must now be examined.

In *Commissioner v. Vease's Estate*,[21] beneficiaries of a valid will wanted to rearrange property interests in order to fulfill the objectives of an unexecuted will (prepared by testator just before his death), creating interests in persons who would not have taken otherwise.[22] The court held that the power to barter and direct the rearrangement is inconsistent with a true disclaimer; that such a transfer is more properly characterized as an acceptance and release.[23]

Release as contrasted to disclaimer was also the issue in *Keesler v. North Carolina National Bank*,[24] in which *W* accepted a legacy under *H*'s will and received benefits for twelve years before attempting a partial renunciation. The court held that *W*'s act did not constitute a renunciation: "She has merely released the trustee from the duty of paying any of these benefits from the principal and income of the specified shares of stock, and relinquished whatever rights she had to require that the payment of benefits be made from this stock."[25]

Estate of Mabel E. Morton[26] concerned acceptance of life insurance proceeds. *W* was entitled to the lump-sum proceeds, but elected an optional mode

16. *Cf.* text accompanying *supra* notes 6, 7.

17. *See infra* notes 147, 190.

18. The Senate Finance Comm. Rep. at 3116 and Treasury regulations under existing disclaimer sections, *e.g.*, Treas. Reg. §25.2511-1 (c) (1958), use the phrase "refusal to accept" as synonymous with "disclaimer."

19. Senate Finance Comm. Rep. at 3115.

20. *See supra* note 13 for CODE sections containing provision for renunciation or disclaimer.

21. 314 F.2d 79 (9th Cir. 1963).

22. A true will compromise was not involved. For a discussion of the effects of compromise agreements, *see* 1 CASNER at 74; Frankel at 2193.

23. For a discussion of the distinctions between relinquishments or releases and disclaimers or renunciations, *see* Sayles at 531. *Renunciation* and *disclaimer* are used interchangeably throughout this article.

24. 256 N.C. 12, 122 S.E.2d 807 (1961), *See also* Smith v. Bank of Delaware, ___ Del. ___ 219 A.2d 576 (1966), *aff'g* 42 Del. Ch. 335, 211 A.2d 591 (Ct. Ch. 1965).

25. 256 N.C. at 19, 122 S.E.2d at 813.

26. 12 T.C. 380 (1949).

of settlement, requesting none of the principal. At her death the proceeds were included in her gross estate as a transfer of property under section 811 of the Internal Revenue Code of 1939. The court said: "[S]he accepted the rights and interests accorded her, more particularly the right to do as she wished with the proceeds, to which she was unqualifiedly entitled. She thereupon exerted complete dominion, ownership, and control of the proceeds, with only self-imposed limitation or restriction. It was only by her acknowledgment and acceptance of her right to the proceeds under the policies that decedent could avail herself of one of the optional modes of settlement therein provided. Her renunciation of her right to the proceeds would have wiped out her right to exercise one of the settlement options."[27]

Other examples of acts and conduct that have been held to constitute acceptance include entering into possession of property, living there, treating it as one's own;[28] and joining in a trust instrument with settlor, evidencing intention to become cotrustee and beneficiary.[29]

Normally, of course, a beneficiary does not consider whether he should accept, unless he is motivated to consider a disclaimer in order to save taxes, avoid claims of creditors, or accomplish some similar purpose. Nevertheless, if the devise or bequest is *beneficial,* his acceptance is usually presumed.[30] The presumption is rebuttable, but the burden of proof is on the one alleging the disclaimer.[31] On the other hand, if the devise or bequest is *onerous,* there is no presumption of acceptance, and the burden of proof is on the one alleging the acceptance.[32]

Finally, ownership may be imposed as a matter of law – there may be no opportunity to refuse to accept. This anomaly was highlighted in the famous case of *Hardenbergh v. Commissioner,*[33] where federal gift tax was imposed upon the theory that an intestate taker's interest vests by operation of law and that an attempted renunciation of such an interest, although effective to pass title, is a taxable "transfer." Problems posed by *Hardenbergh* are developed throughout this article. There seems to be no reason to assume that a disclaimer for purposes of section 2056 (d) (2) will be viewed differently than a disclaimer for gift tax purposes.[34] If a purported disclaimer is treated

27. *Id.* at 383.

28. Blake v. Blake, 147 Ore. 43, 31 P.2d 768 (1934).

29. Cerf v. Commissioner, 141 F.2d 564 (3d Cir. 1944).

30. *In re* Pellicer's Estate, 118 So. 2d 59 (1st D.C.A. Fla. 1960); People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928); Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564 (1931); Bouse v. Hull, 168 Md. 1, 176 A. 645 (1935); Lawes v. Lynch, 7 N.J. Super. 584, 72 A.2d 414 (1950); Bradford v. Leake, 124 Tenn. 312, 137 S.W. 96 (1911); Bacon v. Barber, 110 Vt. 280, 6 A.2d 9 (1939); *In re* Berry's Estate, 29 Wis. 2d 506, 139 N.W.2d 72 (1966). *See also* Annot., 93 A.L.R.2d 8 (1964).

31. *Id.*

32. *Id.*

33. 198 F.2d 63 (8th Cir. 1952), *cert. denied,* 344 U.S. 836 (1952).

34. *Cf. supra* note 7 and accompanying text. *But cf.* 1 CASNER at 828 in the 1967 supplement to note 92: After quoting the language from the Senate Finance Comm. Rep. set forth in the text accompanying *supra* note 15, the treatise continues: "If in the case of an intestacy, for example, State law regards a refusal to accept an intestate share as the equivalent of taking it and transferring it to the one who would take if the disclaiming party

as a taxable "transfer" for gift tax purposes because of the state law effect of the devolution of intestate property, the disclaimer will be ineffective in qualifying additional property for the estate tax marital deduction.[35]

Partial Disclaimer

A problem closely related to the acceptance question is whether one can accept *part* and disclaim the balance.[36] The House of Representatives proposed that *all* bequests and devises must be disclaimed;[37] however, the Senate disagreed, and the enacted bill does not contain the *all* requirement.[38] As the Senate Finance Committee Report states: "[A] person disclaiming with respect to the estate of a decedent dying after date of enactment may accept an undivided interest in a property and still disclaim the remainder within the meaning of the bill."[39] But, again, it must be remembered that the partial disclaimer will be valid for purposes of section 2056(d)(2) only if it is valid under the controlling state law.[40]

The judicial development of partial disclaimers has centered on two factual distinctions: (1) whether there are *separate and distinct gifts* or a

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were deceased, presumably that would be a disclaimer that would cause the property to be treated as passing from the decedent to his spouse if she picked up an interest as a result of such action. This position means that a disclaimer made to improve the marital deduction picture could, under some circumstances, subject the disclaiming party to a federal gift tax (see the Hardenbergh case . . .)." This language seems to suggest that it may be possible to have an effective disclaimer for purposes of CODE §2056(d)(2) although not for purposes of the gift tax. Nevertheless, it is the position of this article that the state law test of a valid disclaimer would be the same in the case of the gift tax or the marital deduction. That is, if the disclaimer subjected the disclaiming party to gift tax, under the *Hardenbergh* rationale, the purported disclaimer would also be ineffective for purposes of CODE §2056(d)(2).

35. Under Proposed Treas. Reg. §25.2511-1, 22 Fed. Reg. 53 (1957), there had been concern that a partial disclaimer, though effective under local law might attract gift tax liability because of the explicit statement in the regulation that a partial disclaimer would not be a complete and unqualified refusal. *Cf.* Ward, *Practical Aspects of Disclaimers by Donees, Heirs, and Legatees*, N.Y.U. 16TH INST. ON FED. TAX. 1037, 1041 (1958). However, the final regulations were changed as follows: "In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law." Treas. Reg. §25.2511-1(c) (1958). Thus, there do not appear to be circumstances in which a disclaimer could be effective for either gift tax purposes or marital deduction purposes without being effective for the other. *But cf. supra* note 34.

36. *See generally* 5 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION §34.16 (1959, Supp. 1967) [hereinafter cited as MERTENS]; 6 W. PAGE, WILLS §49.10 (3d ed. W. Bowe & D. Parker 1960, Supp. 1967) [hereinafter cited as PAGE]; Lentz, *Income and Gift Tax Effects of Renunciation of a Bequest or Inheritance*, N.Y.U. 21ST INST. OF FED. TAX. 313, 318-20 (1963) [hereinafter cited as Lentz]; Sayles at 545-48.

37. Senate Finance Comm. Rep. at 3112-13.

38. *See* CODE §2056(d)(2).

39. Senate Finance Comm. Rep. at 3115.

40. *See supra* note 7 and accompanying text.

single, aggregate gift;[41] and (2) whether the gifts or gift are *all beneficial* or part beneficial and *part onerous*.[42]

The only point that the courts seem to agree upon is that the recipient of a single, aggregate gift cannot accept the beneficial part and disclaim the onerous part.[43] This principle has wide support even if the gifts are separate and distinct.[44] Nevertheless, the court in *State Banking Co. v. Hinton*[45] held to the contrary. The *Hinton* case is typical of the context within which the *beneficial-onerous* distinction has often arisen.[46] The beneficiary received a devise of real estate in one section of the will and received bank stock subject to assessments exceeding the value of the stock in a separate section. The court permitted the beneficiary to accept the real estate and disclaim the bank stock.

A majority of the courts agree that the recipient of two separate and distinct gifts, both of which are beneficial, can accept one gift and disclaim the other.[47] There is, however, authority contrary to this position.[48]

The least settled, but potentially most important issue is whether the recipient of a single, beneficial gift can accept part and disclaim part. This was the issue in *Bronstein Estate*,[49] where *W* renounced all "in excess of one-

41. *See generally* 6 PAGE §49.10; Annot. 93 A.L.R.2d 8 (1964).

42. *See generally* 6 PAGE §49.7; Annot. 93 A.L.R.2d 8 (1964).

43. *E.g.*, Selzer v. Selzer, 146 Kan. 273, 69 P.2d 708 (1937); Ryan v. Monast, 67 R.I. 377, 24 A.2d 615 (1942); Bacon v. Barber, 110 Vt. 280, 6 A.2d 9 (1939).

44. *E.g.*, Foulkes v. Foulkes, 173 Ark. 188, 293 S.W. 1 (1927); Selzer v. Selzer, 146 Kan. 273, 69 P.2d 708 (1937); Cochran's Ex'r & Trustee v. Commonwealth, 241 Ky. 656, 44 S.W.2d 603 (1931); Bacon v. Barber, 110 Vt. 280, 6 A.2d 9 (1939).

45. 178 Ga. 68, 172 S.E. 42 (1933).

46. *Cf.* Annot. 93 A.L.R.2d 8, 31-34 (1964).

47. *E.g.*, Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933); Coleman v. Burns, 103 N.H. 313, 171 A.2d 33 (1961); *In re* Merritt's Estate, 155 App. Div. 228, 140 N.Y.S. 13 (1913); *In re* Matthiessen's Will, 175 Misc. 466, 23 N.Y.S.2d 802 (Sur. Ct. 1940).

48. *E.g.*, Cochran's Ex'r & Trustee v. Commonwealth, 241 Ky. 656, 44 S.W.2d 603 (1931).

49. 86 Pa. D. & C. 150 (1953). *See also* Bank of Delaware v. Smith, 42 Del. Ch. 335, 211 A.2d 591 (1965), *aff'd*, ____ Del. ____, 219 A.2d 576 (1966) in which the issue was whether the income beneficiary of a trust could renounce 60% of the income after having accepted the income therefrom for several years. The court correctly held that the renunciation was invalid but turned its decision on the question of partial disclaimer. The conceded acceptance should have been determinative. Thus, the following language, though the admitted grounds of the decision, was unnecessary to the conclusion reached: "It seems clear that a beneficiary of a single, aggregate gift lacks the power, absent evidence of a testamentary intent to the contrary, to accept part and reject part thereof. . . . Since a donee cannot accept part and disclaim part of a unitary gift at its inception, it would seem to follow, a fortiori, that she cannot reject part of the gift of income from a single such source after having accepted it for many years." 211 A.2d at 593. The case was affirmed in Smith v. Bank of Delaware,____ Del. ____, 219 A.2d 576 (1966), with the following comment: "This Court will not reverse a correct judgment even though a wrong reason was assigned by the lower Court. . . . We are here dealing with a spendthrift trust and are accordingly concerned only with the rules applicable to such a trust." 219 A.2d at 577. The court then stated the general rule to be that the beneficiary of a spendthrift trust, having once elected to accept its benefits, may not thereafter renounce those benefits unless permitted to do so by the trust instrument. It held: "The reasons which prevent the beneficiary of a spendthrift trust from renouncing those benefits in toto apply equally to the renunciation of a part of them." *Id.* at 578.

fourth of the total value." She obviously intended to take part of the renounced share by intestacy, for she added that if it was determined that she would not receive her intestate share of the renounced part, the renunciation would be effective "only with respect to one-half of the total estate . . . it being [her] intention to accept no more than half such estate. . . ." The court held that *W* could renounce her legacy in part[50] and that the renounced share would go by intestacy since *W* was residuary legatee.[51]

Notwithstanding the *Bronstein* decision, there are many ramifications of partial disclaimers that may have to be litigated before the boundaries are clearly drawn for purposes of section 2056 (d) (2). To illustrate some of the complexities, consider the various ways in which an interest in property can be carved to produce smaller interests. The interest can be divided into concurrent interests, for example, accepting an undivided interest and disclaiming the remaining undivided interest. This type of partial disclaimer appears to have congressional approval if it meets the state law requirement.[52] But can an interest be divided into successive interests, for example, accepting a remainder interest and "disclaiming" a life estate? It is doubtful that Congress considered this latter possibility.

If a disclaimer producing successive interests is held to be valid, there will be excellent planning potentialities. For example, consider the following two illustrations.

First, suppose that *H* specifically devises Blackacre to *S* in fee simple absolute, the entire residual estate being left to *W*. *S* accepts only a remainder interest in Blackacre and "disclaims" a life estate for the life of *W*. Assume for purposes of this illustration that the "disclaimed" interest will thereby pass to *W* by virtue of the residuary clause.[53] What are the tax consequences,

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50. *Id.* at 152, *citing In re* Merritt's Estate, 155 App. Div. 228, 140 N.Y.S. 13 (1913).

51. *See* text following *infra* subheading (*a*). *Interests Passing by Intestate Succession or Otherwise by Operation of Law* for problems of intestate succession.

52. "[M]ay accept an undivided interest in a property and still disclaim the remainder within the meaning of the bill." Senate Finance Comm. Rep. at 3115. *See supra* note 7.

53. To be sure, a disclaimed specific legacy or devise would normally pass under the residuary clause to *W*. *See* text accompanying *infra* notes 163, 164. And, arguably, a disclaimed life estate, as a freehold estate in land, should have the same capacity to "pass" into the residuary. However, when a life estate is disclaimed, the interest is usually thought of as having "failed," and the question usually presented is whether the remainder interest may accelerate. *See* text accompanying *infra* notes 178-83. *See generally* 5 AMERICAN LAW OF PROPERTY §§21.37-21.48 (A.J. Casner ed. 1952).

Nevertheless, in at least one jurisdiction, a disclaimed life estate may pass by intestacy if there is no residuary clause, Rocker v. Metzger, 171 Ind. 364, 86 N.E. 403 (1908); Cool v. Cool, 54 Ind. 225 (1876); Rusing v. Rusing, 25 Ind. 63 (1865); Cassedy v. Padgett, 99 Ind. App. 239, 190 N.E. 133 (1934), or by the residuary clause if there is one. Garrison v. Day, 36 Ind. App. 543, 76 N.E. 188 (1905).

Furthermore, in any jurisdiction that still recognizes the doctrine of destructibility of contingent remainders, *e.g.*, Florida, Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); *In re* Rentz Estate, 152 So. 2d 480 (3d D.C.A. Fla. 1963) (dictum), one should ask whether a contingent remainder should be destroyed if the life tenant disclaims before the remainder vests. The writer in *American Law of Property* says the remainder should not be destroyed, but should be viewed as though the life interest had never been limited and recharacterized as an executory interest. 5 AMERICAN LAW OF PROPERTY §21.39 (A.J. Casner ed.

assuming that such a "disclaimer" is valid under local law and section 2056 (d) (2)? Apparently, the actuarial value of the remainder interest will be includible in *S*'s gross estate at his death if *W* is then living,[54] or the entire value will be includible if *W* predeceases *S*.[55] Of course, the entire value is already includible in *H*'s gross estate,[56] and the life estate "passing" to *W* does not qualify for the marital deduction since it is a nonqualifying terminable interest.[57] However, the absence of gift tax consequences should still make the disclaimer route worth pursuing:[58] the life estate "disclaimed" by *S* "passes"[59] to *W* without gift tax liability,[60] and the value of the life estate is removed from (or more precisely, was never received by) *S*'s gross estate.

Conversely, what are the tax consequences if such an attempted disclaimer is found to be invalid under local law and section 2056 (d) (2)? The entire value of Blackacre is includible in *H*'s estate,[61] with no marital deduction; and the entire value of Blackacre will be includible in *S*'s estate at his death.[62] Gift tax will be applicable to the actuarial value of the life estate transferred,[63] assuming that a bona fide relinquishment of a life estate has occurred.[64]

1952). If such a characterization occurs, presumably there would be an undisposed-of fee simple subject to a springing executory interest in the heretofore-referred-to "contingent remaindermen." In any event, the undisposed-of defeasible fee should now pass under the normal rules referred to in text accompanying *infra* notes 163, 164.

A major import of these possibilities, *i.e.*, that a disclaimed life estate might pass by the residuary clause to *W* either in the form of an estate pur autre vie or a fee simple subject to a springing executory interest, is that such an interest would be a "tainted terminable interest," not qualifying for the estate tax marital deduction, CODE §2056 (b) (1). And if *W*'s gift was a pecuniary legacy to be satisfied out of the residuary, the disqualified interest would be deemed to have been used first in satisfying the legacy, possibly reducing the marital deduction from the amount before the disclaimer. CODE §2056 (b) (2). *See generally* 1 CASNER at 832-36. Such a result can be mitigated, of course, by including in the instrument a provision such as the one suggested by Professor Casner: "Only assets which qualify for the estate tax marital deduction shall be used to pay estate tax marital deduction gifts hereunder or shall be sold to raise cash to make such payment." *Id.* at 835.

54. CODE §2033.

55. *Id.*

56. Includible, by hypothesis, under CODE §2033.

57. CODE §2056 (b) (1). *See generally* 1 CASNER at 832-36.

58. Treas. Reg. 25.2511-1 (c) (1958) states: "[A] refusal to accept ownership does not constitute the making of a gift . . . ." CODE §2501 imposes a gift tax on the "transfer" of property by gift, and §2511 imposes the tax "whether the gift is direct or indirect . . . ." Nevertheless, there has been no serious doubt since Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied,* 290 U.S. 641 (1933) (valid disclaimer under state law held not "transfer" in contemplation of death) that a disclaimed interest is not a taxable transfer for gift tax purposes. *See* Frankel at 2198-200.

59. CODE §2056 (e) (1).

60. *See supra* note 58.

61. Includible, by hypothesis, under CODE §2033.

62. CODE §2033.

63. Treas. Reg. §25.2511-1 (e) (1958).

64. If the purported "disclaimer" to *W* was shown to be a *sham* designed to shift income to *W* while maintaining control of Blackacre in *S*, the tax consequences could be worse: the transfer might be treated as an anticipatory assignment of income. *See* Harrison v. Schaffner, 312 U.S. 579 (1941); Helvering v. Horst, 311 U.S. 112 (1940); Galt v. Com-

A second illustration may focus more clearly the problems surrounding a partial disclaimer of successive interests. One writer has posed the following hypothetical fact situation: "Husband's will provides for a legal life estate to wife with remainder in undivided halves to his adult son and daughter. . . . [S]on and daughter disclaim in favor of mother a [Code section] 2056 (b) (5) power as to Parcel A [a parcel of realty owned by *H* in fee simple absolute]."[65] The proposed technique raises several questions that are considered later in this article. For example: Is a power of appointment an "interest in property" within the meaning of section 2056 (d) (2)?[66] Would the "disclaimed" power, which did not exist before the purported disclaimer,[67] "pass" from the decedent to the mother by virtue of one of the categories listed in section 2056 (e) — for example, by bequest (the residuary clause)[68] or by operation of law (assuming that *W* was *H*'s sole heir)?[69]

The very process of phrasing the foregoing illustrations suggests a conclusion that, although it is not essential that all the bequests and devises be accepted — that, indeed, one might even accept an undivided interest in a devise and disclaim the remaining interest[70] — Congress did not intend that a partial disclaimer of successive interests should be permitted if it is necessary for the disclaimant to *create* out of an accepted interest the interest disclaimed.[71] Such a conclusion seems plausible in connection with the creation of a life estate out of a fee simple; it seems inescapable with the creation of a power in another to divest the fee simple.

Surely the Commissioner would contend that the creation of an estate pur autre vie or a "section 2056 (b) (5) power" necessarily requires that the entire interest be accepted before the acts of creation and transfer can take place.[72] If the Commissioner were to prevail in such an argument, the technique suggested by the second illustration would result in an intrafamily taxpayers' nightmare instead of the panacea intended: "Parcel A" would be includible in the father's estate,[73] with no offsetting marital deduction.[74] It would be includible in the mother's estate at her death since she would

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missioner, 216 F.2d 41 (7th Cir. 1954). *But cf.* Blair v. Commissioner, 300 U.S. 5 (1937). In such case, gift tax liability would be imposed as if income payments were received by *W*, or whenever *S* relinquished control and dominion over the property. Treas. Reg. §25.2511-2 (b) (1958).

65. Nathanson, *Estate Planning with Disclaimers*, 105 TRUSTS & ESTATES 1153 (1966).

66. *See* text accompanying *infra* notes 136-38, 207-10.

67. *Cf.* text following *supra* subheading *Refusal To Accept.*

68. *See* text accompanying *infra* notes 163, 164.

69. *See* text accompanying *infra* notes 166, 167.

70. *See* text accompanying *supra* note 39.

71. A *partial* disclaimer of successive interests should be distinguished from the disclaimer of a successive interest when such interest represents the *entire* interest bequeathed to the disclaimant. Such a total disclaimer of a partial interest in property seems clearly valid. *Cf.* text following *infra* subheading *Interests in a Testamentary Trust* for discussion of disclaimers of interests in trust.

72. *Cf.* Commissioners v. Vease's Estate, 314 F.2d 79 (9th Cir. 1963).

73. CODE §2033.

74. No interest "passes" from *H* to *W* within requirement of CODE §2056 (a).

possess a power[75] that would meet the requirements of section 2041 (a) (2). It would be included in *S*'s and *D*'s estate at their deaths (subject to a lower valuation).[76] In addition, the transfer by *S* and *D* of the general power to *W* would presumably result in gift tax liability.[77]

Most of the state statutes simply provide for the right to disclaim "in whole or in part."[78] Minnesota, however, has incorporated language in its statutes that might make the above "disclaimers" possible.[79]

Timely Disclaimer

A judicially developed rule requires that disclaimer be made within a "reasonable time" after receipt of the legacy,[80] a "reasonable time" varying from fourteen years in one case[81] to four months in another.[82] Courts have tended to allow a longer period if no one has suffered by the delay.[83] Other factors that have been considered are the minority or incompetency of the beneficiary, the lack of knowledge of the bequest, or other circumstances that could affect the beneficiary's opportunity and ability to disclaim.

For example, in *Bacon v. Barber*,[84] *H* died in 1923 leaving property to *W* for life (who died in 1931), then to *D* for life (who died in 1933), with remainder to *S* (who was a minor at the death of *H*, attaining age 21 in 1926). The court held that the reasonable time began to run after the minor attained his majority.

The court in *Coleman v. Burns*[85] held that a devisee's renunciation of a life estate prior to termination of an existing life estate, and before right to possession arose, was a renunciation within a reasonable time. Likewise, it

75. A general power of appointment is typically created, say, by *H*'s bequeathing a life estate to a legatee, *e.g.*, *W*, coupled with a power to appoint the corpus of the property by will or deed. It seems unusual to suppose that the owner of a remainder interest, *e.g.*, *S* or *D*, would "transfer" or, by a partial acceptance of the remainder subject to a partial disclaimer of the general power, "disclaim" such a power.

76. CODE §2033.

77. *S*'s and *D*'s retained interest would not be susceptible of measurement on the basis of generally accepted valuation principles, since *W* would have the power to divest them of their ownership at any time. Therefore, the gift tax would be applicable to the entire value of the property subject to the power transferred to *W*. Treas. Reg. §25.2511-1 (e) (1958).

78. *E.g.*, ILL. REV. STAT. ch. 3, §15b (1963).

79. *See* MINN. STAT. ANN. §§501.211, 525.532 (1) (b), (2) (Supp. 1966) (this statute is reprinted *infra* in the Appendix). *But see* Note, 51 MINN. L. REV. 907, 921 nn.177, 178 and accompanying text for a suggestion that in view of the tax motivation behind the Minnesota statute, a valid disclaimer under the statute might not meet the more stringent test that the Commissioner would apply. To be sure, use of the word "disclaimer" is not conclusive. But if the refusal to accept property is valid under a reasonable state statute, which the Minnesota legislation seems to be, the disclaimer should meet the test of CODE §2056 (d) (2). *See supra* note 7 and accompanying text.

80. *See generally* 6 PAGE §49.8; Lentz at 321.

81. Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943).

82. *In re* Howe's Estate, 112 N.J. Eq. 17, 163 A. 234 (Prer. 1932).

83. *E.g.*, Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564 (1931) (3 years, 4 months held reasonable).

84. 110 Vt. 280, 6 A.2d 9 (1939).

85. 103 N.H. 313, 171 A.2d 33 (1961).

was held in *Cumberland University v. Caldwell*[86] that the entire period during which the prior estate lasts is available to determine whether to disclaim.

Several states have passed statutes prescribing the time within which the disclaimer must be made.[87] These statutes must be studied with care, as the time periods are crucial and usually less than the fifteen months permitted by section 2056 (d) (2). Another significant variation is the time from which the reasonable period should be measured. For example, in the case of intestacy, Ohio provides for a period of sixty days after notice of hearing on the inventory of intestate property;[88] West Virginia provides for two months after the date of death of the intestate.[89] The variations may occur within the same state, depending upon whether intestate property or property under a will is involved, for example, West Virginia's two-month period runs from the date on which the will is admitted to probate as compared with the date of death in intestacy.[90]

The Minnesota statute, which provides that the six-month period begins to run with the event that causes the disclaimant to become "finally ascertained" as a beneficiary and his interest to become "indefeasibly fixed both in quality and quantity," has been criticized as overly permissive in allowing a long period during which a beneficiary may decide whether he needs the interest.[91] It would seem, however, that this language simply codifies the rationale of *Coleman* and *Cumberland University* and is not unreasonable when the interest or the beneficiary is not certain or ascertained.

In any event, the requirements of Code section 2056 (d) (2) (A) that the disclaimer be made before the date prescribed for filing of the estate tax return should mark the outside limit within which a disclaimer must be made in order to qualify. Arguably, it states the only time limitation.[92] Nevertheless, reliance on the fifteen-month period would seem to ignore the importance of the state law requirement.[93]

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86. 203 Ala. 590, 84 So. 846 (1919). *Accord*, Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943).

87. *See infra* note 147.

88. OHIO REV. CODE ANN. §2105.06.1 (Page Supp. 1966).

89. W. VA. CODE ANN. §42-4-3 (1966).

90. *Id.*

91. MINN. STAT. ANN. §§525.532 (3), 501.211 (3) (Supp. 1966) contain the "finally ascertained" and "indefeasibly fixed both in quality and in quantity" language criticized in Note, 51 MINN. L. REV. 931-38: "The justification for allowing disclaimers tax effect seems to be that it is unjust to force a man to take something he does not want and then attach tax liability when the disclaimant does not in fact obtain possession of, or any direct benefit from, the property. However, the liberality of this statute allows a beneficiary much more than the right to disclaim an interest. He has the benefit of waiting for a long period to see whether he needs the interest before deciding whether to disclaim. Thus, he has control over the property which warrants the imposition of a tax. Yet this statute allows him the economic security of having the interest at his disposal and also the tax advantage of being able to eventually disclaim and pass the interest tax free to, in most instances, the natural objects of his bounty." *Id.* at 938 (citation omitted).

92. It could be argued that Congress, in establishing a 15-month period, intended expressly to state what is "reasonable." *But cf. infra* note 94.

93. *See supra* note 7.

Suppose, for example, that *H* dies on January 1, 1967, in a state that does not have a disclaimer statute, leaving a bequest to *S*, which *S* disclaims fourteen months after *H*'s death. Is the disclaimer effective for purposes of section 2056(d)(2) if fourteen months is held unreasonable for state law purposes? The answer must surely be "no" since the disclaimer is not effective under local law.[94]

Of course, it is unlikely that the Commissioner would attack a disclaimer made within fifteen months unless a statute requires a shorter period or unless the disclaimer has been attacked for some other reason (for example, by creditors to satisfy claims).[95]

Additional aspects of the time limitation are discussed in the section concerning interests passing by nontestamentary transfers.

Disclaimer Without Consideration

For a disclaimer to be valid within the purposes of section 2056(d)(2), it must be made without consideration.[96] As stated in the Senate Finance Committee Report: "[I]t cannot be made for the purpose of serving the interests of a person who disclaims. For example, a disclaimer for the benefit of a surviving spouse who promises to give or bequeath property to a child of the person who disclaims is not a disclaimer within the meaning of the bill."[97]

Stating that the disclaimer "cannot be made for the purpose of serving the interests" of a disclaimant is probably misleading. Many cases have held

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94. *Cf.* 5 MERTENS §34.14, where it is stated in connection with the similar provision in CODE §2055(a): "Whether the 'reasonable time' rule of the regulations is intended to apply where the state law fixes a 'shorter' period is not clear, but a negative answer is indicated in the provision of the regulations that the refusal must be 'effective under local law.'"

95. *See* text accompanying *infra* note 102.

96. It should be clear that consideration is not only unnecessary but is evidence that, instead of a disclaimer, there has been an acceptance and exchange for the consideration. Occasionally, however, opinions contain language as follows: "A consideration is not essential to the validity of a disclaimer by a devisee of his interest." Commerce Trust Co. v. Fast, 396 S.W.2d 683, 686 (Mo. 1965) (*quoting from* 96 C.J.S. *Wills* §1151) (1957).

If consideration is present, however, the exchange should not result in a gift tax liability if the consideration is "adequate and full consideration in money or money's worth." *See* CODE §2512(b); *cf.* Estate of Sarah A. Bergan, 1 T.C. 543 (1943) for a case where the Commissioner attacked a purported renunciation of a portion of an intestate share, contending that the decedent had made a "transfer," since she had accepted part and attempted to renounce the balance. The court rejected the Commissioner's argument that decedent had either to accept all or renounce all; nevertheless, it did hold that decedent had made a "transfer," thus including the property in her gross estate. "Taking all the evidence into consideration, we think it must be held that the decedent made a transfer to Mrs. Goggin of the decedent's share . . . in excess of the $50,000 block of bonds. Otherwise, there would have been no consideration for Mrs. Goggin's promise to support [decedent] for the remainder of [decedent's] life [and Mrs. Goggin's testimony had shown a binding contract]." *Id.* at 544.

If the Commissioner had argued *Bergan* after *Hardenbergh* (*see* text accompanying *infra* note 141), he would undoubtedly have prevailed simply by contending that an heir cannot renounce an intestate share.

97. SENATE FINANCE COMM. REP. at 3116.

that the motives for a disclaimer are usually immaterial.[98] If this were not true, virtually all disclaimers could be attacked for improper motive.

For example, in *Isaac Harter, Jr.*,[99] *H* renounced his interest under *W*'s will, electing to receive his intestate share, which he then transferred to his three children. The court held that *W*'s estate was entitled to the estate tax marital deduction for the interest passing to *H* in intestacy. That *H*'s transfer was consistent with *W*'s presumed desires and that he was motivated to reduce taxes were held to be immaterial motives.

In *United States v. McCrackin*,[100] the court found that the taxpayer's motive in disclaiming was to prevent the Government from satisfying a pre-existing tax lien against his property; nevertheless, the court held the disclaimer valid under Ohio law.[101] It further held that although taxpayer had power under Ohio law to revoke the renunciation,[102] the court could not compel him to do so.

Creditors constitute the other major source of attack of disclaimers on the ground of improper motive. The majority view is that the disclaimer is valid, notwithstanding the motive to defeat creditors, so long as there is no collusion with the remaindermen or other fraud.[103] Substantial inroads have been made into this doctrine: Several states have statutes that would restrict the right of disclaimer,[104] and California courts have refused to uphold such a disclaimer.[105]

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98. *See generally* Annot. 93 A.L.R.2d 8, 64 (1964).

99. 39 T.C. 511 (1962).

100. 189 F. Supp. 632 (S.D. Ohio 1960).

101. *Id.* at 635 *citing* Ohio Nat'l Bank v. Miller, 41 Ohio L. Abs. 250, 57 N.E.2d 717 (1943).

102. *Id.* at 637, *citing* Erman v. Erman, 101 Ohio App. 245, 136 N.E.2d 385 (1956).

103. *See, e.g.*, Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502 (1908); *cf.* Commerce Trust Co. v. Fast, 396 S.W.2d 683 (Mo. 1965) (dictum); *In re* Krakoff's Estate, 87 Ohio App. Abs. 387, 180 Ohio Op. 2d 116, 179 N.E.2d 566 (P. Ct. Franklin Co. 1961) (dictum). *See also* Annot. 93 A.L.R.2d 8, 64 (1964); Annot. 133 A.L.R. 1428 (1941).

104. *E.g.*, MINN. STAT. ANN. §525.532(6) (Supp. 1966); MO. REV. STAT. §474.490 (1959) ("renunciation . . . subject to the rights of creditors").

105. *E.g., In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940). Ella Kalt died in 1932, leaving the residue of her estate to her sons, Earl and Stanley. Subsequent to her death, judgment creditors attempted to attach Stanley's interest in the estate, and in 1936 Stanley filed a "renunciation," admittedly to defeat the collection of the judgments. The court said: "[W]hen a testator dies, the legatee obtains a power, in itself a limited right of ownership [see Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 at 1159 (1938)], to determine the ultimate disposition of the property regardless of acceptance on his part. If he makes no renunciation, the full title will vest in him when he acquires possession and control. If he chooses to renounce, he determines by that action that the title will pass on to some other heir or legatee. This power is essentially analogous to a general power of appointment under a will. It is well established that the donee of a general power of appointment cannot exercise it in favor of some third person, other than a bona fide purchaser for value, when the claim of his creditors would thereby be defeated. . . . The principle that the exercise of a general power of appointment by a debtor may be a fraudulent conveyance as to his creditors clearly supports the rule we adopt in the present case that a renunciation of a bequest by a legatee may likewise be a fraudulent conveyance." *Id.* at 812, 108 P.2d at 403.

Capacity and Consent To Disclaim

A question may arise whether the personal representative of an incapacitated person can disclaim.[106] The court in *In re Howe's Estate*[107] held that where a donee has had no opportunity to renounce, the right to renounce "may be exercised on the donee's behalf by the donee's executor, administrator, or guardian." But in *Andrykowski v. Theis*,[108] the court held that the right to renounce is personal and dies with the legatee or devisee; the administrator or executor has no power to renounce.

In re Estate of Glenn[109] presents a case in which an administrator's disclaimer was permitted to stand, but under a qualification that might not meet the "unqualified refusal" test of the tax law. The court, pursuant to statutory authority, approved a renunciation, but added this language: "The renunciation, however, shall not adversely affect any rights or defenses which may be asserted to defeat any claim on behalf of the estate of the decedent."[110] If the Commissioner were to contend that such a qualification invalidated the disclaimer, perhaps part of the disclaimed property could be saved for the marital deduction by arguing that the disclaimer meets the requirements of a partial disclaimer.[111]

A significant tax case in this area is *Perkins v. Phinney*.[112] *H* and *W* were killed in an automobile accident, *H* dying immediately and *W* surviving for three or four hours without regaining consciousness. *H*'s will left one-third of his estate to each of his two children and the remaining one-third to *W*. Prior to the joint funeral, *W*'s independent executrix, joined by *W*'s devisees and legatees, renounced on behalf of *W*. The court found that the renunciation was "fair, reasonable, and natural" and was "made immediately without any intention of avoiding the payment of estate taxes."[113] The renunciation was held to be authorized; thus the bequest from *H* to *W* was not includible in *W*'s gross estate.

The Minnesota legislation, rather than giving the personal representative an absolute right to disclaim, subjects the right to a "best interests" standard.[114]

The question of fraud and undue influence was raised in *Larson v. Smith*.[115] An eighty-four year old woman renounced her interest in her brother's will, thereby causing the property to descend as intestate property to the brother's widow. Five years later, the disclaimant was adjudged mentally incompetent. Her daughter was appointed guardian and instituted an action alleging that the renunciation was procured by the fraud and undue influence of the administrator of the testator's estate and the testator's widow.

106. *See generally* 6 PAGE §49.4.
107. 112 N.J. Eq. 17, 163 A. 234 (Prer. 1932).
108. 40 Ill. App. 2d 182, 189 N.E.2d 3 (1963).
109. 258 N.C. 351, 128 S.E.2d 408 (1962).
110. *Id.* at 353, 128 S.E.2d at 409.
111. *Cf.* text following *supra* subheading *Partial Disclaimer.*
112. 61-1 U.S. Tax Cas. ¶11,997, 7 Am. Fed. Tax R.2d 1753 (W.D. Tex. 1961).
113. 61-1 U.S. Tax Cas. ¶11,997, 7 Am. Fed. Tax R.2d 1754 (W.D. Tex. 1961).
114. MINN. STAT. ANN. §525.532 (2) (Supp. 1966).
115. 18 Wis. 2d 366, 118 N.W.2d 890 (1963).

The Supreme Court of Wisconsin affirmed the judgment of the trial court, which held that the facts indicated that the renunciation was not the product of undue influence and fraud. But the opinion added: "[A]n executor or administrator . . . is in a position of trust and confidence toward a beneficiary under the will and an action in which he participates and which deprives the beneficiary of substantial rights without adequate consideration in favor of a third party to whom the administrator is related or closely associated raises a presumption that the transfer of rights is procured by undue influence. The inference to be drawn from this presumption is sufficient proof of undue influence without other affirmative evidence of the exercise of undue influence unless the trial court can reasonably conclude that the evidence as a whole negatives the presence of the undue influence in procuring the transfer."[116]

Method of Evidencing Disclaimer

Absent a statute to the contrary, a disclaimer need not be in writing; a verbal disclaimer, consistent with other conduct, has traditionally been adequate.[117] Moreover, neither the language of section 2056(d) nor the Senate Finance Committee Report refers to the necessity of a writing. Nevertheless, the disclaiming party should *always* disclaim the interest in writing and file it in the appropriate records. Unnecessary problems of proof are otherwise virtually certain to arise.

It may be necessary to argue that an oral disclaimer, timely communicated to the attorney, but reduced to writing beyond the permitted time period, is valid. Such a contention was rejected, in *Selig v. United States*[118] under the similar disclaimer provision of section 2055(a).

The issue of oral disclaimer may also arise in an income tax context.[119] In *First National Bank of Portland, Executor*,[120] the taxpayer, who was trustee and life beneficiary of a trust under his wife's will, orally disclaimed his beneficial interest in 1933, confirming the disclaimer by a written instrument in 1936. The instrument was subsequently held by a state court to be a valid disclaimer of all rights to income from the estate. Accordingly, the Board of Tax Appeals held that the trust income was not taxable as amounts distributable to the taxpayer under section 162 of the Revenue Act of 1934. *Grant v. Commissioner*,[121] however, held that a disclaimer may not operate retroactively so as to relieve the beneficiary of a tax on the share of income for prior years. Thus, it would seem difficult to argue successfully that the

116. *Id.* at 375, 118 N.W.2d at 895.

117. *E.g.*, Coleman v. Burns, 103 N.H. 313, 171 A.2d 33 (1961) (writing not necessary to renunciation of life estate in realty); Albany Hosp. v. Hanson, 214 N.Y. 435, 108 N.E. 812 (1915). *See generally* Annot. 93 A.L.R.2d 8, 71 (1964).

118. 73 F. Supp. 886 (E.D. Pa. 1947), *aff'd per curiam*, 166 F.2d 299 (3d Cir. 1948).

119. The income tax effect of disclaimers is beyond the scope of this article. *See generally* the discussion in Lentz at 322; Note, *Disclaimers in Federal Taxation*, 63 HARV. L. REV. 1047, 1051 (1950); *see* Rev. Rul. 64-62, 1964-1 CUM. BULL. 221.

120. 39 B.T.A. 828 (1939).

121. 174 F.2d 891 (5th Cir. 1949), *aff'g* 11 T.C. 178 (1948). *See also* Robert E. Cleary, 34 T.C. 728 (1960).

income from date of death to the date of a written disclaimer should be taxed to one other than the disclaimant, provided no earlier oral disclaimer had been made.

Conceivably, a disclaimer could be shown solely on the basis of acts and conduct. However, where such attempts have been made the beneficiary has usually alleged acceptance.[122]

The taxpayer in charitable deduction cases has had difficulty proving a disclaimer in absence of clear, unequivocal language. For example, in *Seubert v. Shaughnessy*[123] the life tenant intended to disclaim a power to invade principal in order to qualify property for the charitable deduction. He filed an affidavit, which stated he had "no intention of invading the principal of decedent's estate for any purpose whatsoever." The court held the affidavit was insufficient to save the deduction. In *City National Bank & Trust Co. v. United States*,[124] a bequest failed because of the beneficiary's death before the bequest took effect, but within the time for filing of the estate tax return. As a result, the residuary estate passed to qualified charities. Nevertheless, the court refused the administrator's contention that death constituted a disclaimer; thus the estate did not get the charitable deduction. In *Hight v. United States*,[125] a bequest of the residuary estate to "such charitable, benevolent, religious, or educational institutions as my executors . . . may determine" was held to be beyond the scope of the charitable deduction. The court rejected the executor's contention that he had disclaimed the power by expressly committing the property to qualifing charities; the executor's act was held to be "an effort to change the nature of the legal interest described by the testatrix in her will." The case was reversed, however, on the grounds

122. Examples of acts and conduct constituting a disclaimer are Cook v. Dove, 32 Ill. 2d 109, 203 N.E.2d 892 (1965) (legatees' (appointees') objecting to mother's (donee's) estate tax return held refusal of property tendered in exercise of power of appointment); *In re* Pendergrass' Will, 251 N.C. 737, 112 S.E.2d 562 (1960) (parties to "consent judgment" (family settlement), estopped from taking under will which they agreed not to offer, but required, nevertheless, to offer).

In the following cases, attempts to show disclaimer by acts and conduct were unsuccessful. *In re* Moulton's Estate, 176 Cal. App. 2d 87, 1 Cal. Rptr. 407 (Dist. Ct. App. 1959) (no disclaimer shown when beneficiaries recovered judgment for services rendered even though will did not show that bequests were intended as compensation); *In re* Pellicer's Estate, 118 So. 2d 59 (1st D.C.A. Fla. 1960) (act of legatee in filing petition for revocation of probate of will did not constitute renunciation); *In re* Slawson's Estate, 41 So. 2d 324 (Fla. 1949) (letters from *H* to *W*'s son, indicating a "probable intention" to renounce, corroborated by memoranda from *W* to son suggesting that *H* would likely renounce, held insufficient evidence of *H*'s renunciation); Parenteau v. Gaillardetz, 103 N.H. 92, 166 A.2d 112 (1960) (surviving owner of joint bank account held not to have disclaimed by changing registration to the estate of the deceased coowner in order to pay debts of decedent); *In re* Snell's Estate, 30 Misc. 2d 373, 223 N.Y.S.2d 395 (Sur. Ct. 1961) (legatee was given bequest subject to his electing before age 21 to obtain an education. He timely commenced the education and his subsequent interruption of the education did not constitute renunciation of the legacy); *In re* Carpenter's Estate, 36 Misc. 2d 346, 232 N.Y.S.2d 892 (Sur. Ct. 1962) (affidavit filed by executor in probate proceeding to explain gift was not a renunciation).

123. 233 F.2d 134 (2d Cir. 1956).

124. 312 F.2d 118 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

125. 151 F. Supp. 202 (D. Conn. 1957), *rev'd*, 256 F.2d 795 (2d Cir. 1958).

that the term "benevolent" when coupled with "charitable" fell within the charitable deduction provision.[126]

Most state statutes provide expressly for the method of evidencing a disclaimer.[127] But even a statute may not clarify whether the statutory method is exclusive. For example, the Ohio statute refers only to renunciations of an interest received in intestate succession.[128] The purpose of the statute was undoubtedly to give legislative approval to an heir's right to renounce. Certainly it would be unreasonable to assume that beneficiaries under a will cannot disclaim since they are not included in the statute. Nevertheless, such patchwork legislation does raise legitimate questions: Does the required procedure, that is, "written statement . . . within 60 days after notice of the hearing on inventory," also apply to renunciations of interests under a will? It is doubtful that a court would ignore such a statute in judging a purported renunciation.

Revocation of Valid Disclaimer

There should be no question that a right once waived cannot be reclaimed.[129] For purposes of the "complete and unqualified refusal" requirement was attempting to satisfy a tax lien by attaching "renounced" property, indicate where no one has undergone a change of position, it is sometimes possible to withdraw a renunciation.[131] Most of the cases permitting withdrawal have involved charitable beneficiaries.[132]

If it could be shown that the state law provided for withdrawal of a renunciation, there would seem to be a danger that a disclaimer in such a state could not qualify for purposes of section 2056(d)(2). One of the questions raised in *United States v. McCrackin*,[133] a case where the Government was attempting to satisfy a tax lien by attaching "renounced" property, was whether the court could order the taxpayer to withdraw his renunciation. The court held that, although taxpayer could revoke his renunciation under Ohio law (citing *Erman v. Erman*,[134] it was not within the court's jurisdiction to compel taxpayer to renounce.

It does not seem likely that the Commissioner would accept the defeat in *McCrackin* without attempting to use it to his advantage—say, for example, to show that a section 2056(d)(2) disclaimer failed to meet the requirement of a "complete and unqualified refusal to accept." An even

126. 256 F.2d 795 (2d Cir. 1958).
127. *E.g.*, MINN. STAT. ANN. §525.532 (Supp. 1966).
128. OHIO REV. CODE ANN. §2105.06.1 (Page Supp. 1966).
129. *Cf., e.g.*, Johnson v .Tuttle, 108 Vt. 291, 187 A. 515 (1936).
130. "A disclaimer . . . is a complete and unqualified refusal to accept some or all of the rights to which one is entitled." Senate Finance Comm. Rep. at 3116.
131. *Cf.* 1 A. SCOTT, TRUSTS §36.1 (2d ed. 1956, Supp. 1962) [hereinafter cited as SCOTT].
132. *See, e.g., In re* Angel's Will, 33 Misc. 2d 122, 225 N.Y.S.2d 419 (Sur. Ct. 1962); *In re* Copeland's Estate, 123 Vt. 32, 179 A.2d 475 (1962) (withdrawal permitted even though right of beneficiary named in will was prejudiced thereby).
133. 189 F. Supp. 632 (S.D. Ohio 1960).
134. 101 Ohio App. 245, 136 N.E.2d 385 (1956).

stronger contention under such a law would be that the property "passing" to the surviving spouse failed to qualify because it is a nonqualifying terminable interest[135] – disqualified because of the power remaining in the disclaimant to revoke the disclaimer.

PART II. TYPES OF INTERESTS SUBJECT TO DISCLAIMERS; THE EFFECTS OF DISCLAIMING SUCH INTERESTS

The statute does not provide specifically for the types of interests that may be disclaimed. Section 2056 (d) (2) refers only to an "interest," the reference throughout section 2056 being to an "interest in property." Athough the words "interest in property" will bear various meanings,[136] the congressional purpose of the statute seems to call for a broad interpretation. The Senate Finance Committee Report states: "[P]roperty passing to a surviving spouse by way of a disclaimer should be treated no differently than where the property passes directly to the surviving spouse."[137] Thus, it seems fair to conclude that any "interest in property" that, either alone or in conjunction with other interests, would qualify for the estate tax marital deduction if it passed directly to the surviving spouse, should also qualify as an "interest" capable of being disclaimed for purposes of section 2056 (d) (2).[138]

Interests Passing by Testamentary Transfers and Intestate Succession

(a). Interests Passing by Intestate Succession or Otherwise by Operation of Law

No court that has considered the matter recognizes a common law right of an heir to disclaim an inherited interest.[139] As mentioned earlier,[140] the significance of such a right was first appreciated because of the holding in *Hardenbergh v. Commissioner*.[141] The facts of *Hardenbergh* were, briefly, as follows: *H* died intestate on April 2, 1944. Under Minnesota law his surviving wife, *W*, their daughter, *D*, and his son by a former marriage, *S*, were entitled to his net estate (consisting at date of death of realty and personalty) – one-third to each. *W* and *D* were independently wealthy, so shortly before his death *H* had asked his attorney to draft a will, leaving virtually all of his estate to *S*. The will was prepared for execution on Saturday, April 1, but

135. CODE §2056 (b) (1); *see* 1 CASNER at 832-36.

136. "Doubtless, the same group of legal relations may be regarded as a property interest for one purpose and not for another. And it may be said at the outset that, until we know the purpose for which the classification 'interest in property' is to be applied, it is futile to attempt to decide whether a given situation presents such an interest." L. SIMES & A. SMITH, FUTURE INTERESTS §942 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

137. SENATE FINANCE COMM. REP. at 3114.

138. *Cf.* text following *infra* subheading *(e). Interests of Donee of a Power of Appointment Created by Testamentary Instrument* for additional discussion of disclaimers of power of appointment.

139. *See* PAGE §49.1.

140. *See* text accompanying *supra* note 33 (no opportunity to refuse to accept).

141. 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952).

because of the decedent's illness, it was decided to wait until Monday, April 3. Decedent died on Sunday without executing the will. In order to carry out decedent's intention, *W* and *D* filed a disclaimer of their interests on September 20, 1944. The estate was then distributed to *S* pursuant to court order.

The Commissioner determined that *W* and *D* had each made a gift to *S* of one-third of the net estate, and his action was sustained by the Tax Court. Taxpayers appealed on grounds that the Minnesota probate court was "invested with jurisdiction to determine decedent's heirs and to adjudicate the taxpayer's right to renounce," and that the court's decree — not the act of taxpayers — was the source of *S*'s title to the property.

In affirming the decision of the Tax Court, the court said: "The controlling fact here is that *title* to an interest in decedent's estate *vested* in the taxpayers by *operation of law* which neither had the power to prevent. . . . The source of the rights acquired by [*S*] was not the decree of the Probate Court, but the affirmative acts of taxpayers in relinquishing the shares of the estate which Minnesota law *vested* in them."[142]

The *Hardenbergh* decision has been criticized as a formalistic distinction justified only in the feudal emphasis upon seisin;[143] as a distinction that, although perhaps supportable in the local law of decedents' estates, should not be controlling on federal tax questions;[144] and on constitutional grounds.[145] Nevertheless, the distinction seems firmly entrenched. The extent to which it is followed is shown in *William L. Maxwell*,[146] in which *H* disclaimed all interests passing to him under *W*'s will (which the court recognized as a valid disclaimer); but, recognizing that the disclaimed interest would thereby pass by intestate succession, he also disclaimed his intestate share in the same instrument. The court held that *H*'s disclaimer of the intestate share failed to prevent passage of title; thus, *H* was held to have made a taxable gift.

Minnesota law was at issue in *Hardenbergh*, so it is not surprising that Minnesota has passed the most comprehensive disclaimer legislation to date. Unfortunately, the "trap" of intestate interests still exists in too many states.[147] Thus, the decedent who relies upon the law of intestate succession as a

142. 198 F.2d at 66.

143. Westfall, *Estate Planning and the Widow's Election*, 71 HARV. L. REV. 1269, 1288-89 (1958).

144. Boger, *Taxation of Renunciations of Interests in Decedents' Estates Under the Federal Estate and Gift Taxes*, 2 DUKE L.J. 5, 7 (1951).

145. Roehner & Roehner, *Renunciation as Taxable Gift — An Unconstitutional Federal Tax Decision*, 8 TAX L. REV. 289 (1953).

146. 17 T.C. 1589 (1952).

147. *See* the following state statutes that authorize an heir to disclaim or renounce interests passing by intestacy: COLO. REV. STAT. ANN. §153-5-43 (1963); ILL. REV. STAT. ch. 3, §§15b, 15c, 15d (1963); IND. ANN. STAT. §6-604 (1953); LA. CIV. CODE ANN. art. 977 (West 1952); MINN. STAT. ANN. §§501.211, 525-532 (Supp. 1966); MO. REV. STAT. §474.490 (1959); N.Y. DECD. EST. LAW §87a (McKinney 1949); N.C. GEN. STAT. §29-10 (Supp. 1965); OHIO REV. CODE ANN. §2105.06.1 (Page Supp. 1966); PA. STAT. ANN. tit. 20, §301.3 (Purdon Supp. 1966); R.I. GEN LAWS ANN. §§34-5-1 to 34-5-12 (1956); W. VA. CODE ANN. §42-4-3 (1966); WIS. STAT. §237.01 (1961).

"general will" has created a situation that will have unfortunate tax consequences if a "disclaimer" is attempted.[148]

Suppose a particular state gives an heir the right to disclaim. An important question still remains. Will the disclaimed interest thereby pass to the surviving spouse and qualify for the marital deduction? Stated differently: it seems clear that the disclaimant cannot *direct* that the disclaimed interest pass to the surviving spouse without the transfer having the effect of an "acceptance and release."[149] Furthermore, the marital deduction will not be increased if the otherwise valid disclaimer does not pass to *W* in such form or otherwise affect property passing to *W* in such a way as to qualify additional property for the deduction.[150]

To illustrate, assume that *H* is survived by *W* and two children, *S* and *D*, only one of whom, *S*, is 21 years of age and competent to disclaim. Assume further that the net distributable estate before estate taxes is worth 300,000 dollars. A typical statute of descent and distribution[151] would give *W* a one-third interest in the personalty and realty and divide the balance among the children, as follows:

	No Disclaimer	*S* Disclaims All
W (one-third)	$100,000	$100,000
Children (balance in equal shares):		
S	100,000	-0-
D	100,000	200,000
	$300,000	$300,000

As a result, *W* gets only one-third, and the effect of *S*'s disclaimer would be to augment not the property passing to *W* but the property passing to *D*. This undesirable result will obtain in any case where more than one child (or children of a deceased child) survives and when less than all disclaim. The problem is important because it is not unlikely that one of the children or children of a deceased child will be a minor.

148. Much has been written on *Hardenbergh* and the gift tax problems it presents. In addition to articles cited elsewhere in this article, *see* Arenson, *1964 Legislation Affecting Law of Trusts and Estates: Renunciation of Intestate Share*, 11 N.Y.L.F. 211, 222-23 (1965); Black, *The Effect of Renunciations and Compromises on Death and Gift Taxes*, 3 VAND L. REV. 241 (1950); Bowe, *How To Provide for a Widow's Disclaimer Without Risking Gift Tax*, 8 J. TAXATION 68 (1958); Dobbs, *Renunciations and Disclaimers—Boon or Bane?*, 50 A.B.A.J. 590 (1964); Harmsen, *Careful Handling of Family Allowances and Renunciations Can Save Taxes*, 14 J. TAXATION 50 (1961); Kay, *Renunciations, Disclaimers and Releases*, 35 TAXES 767 (1957); Lauritzen, *Only God Can Make an Heir*, 48 NW. U.L. REV. 568 (1953); Smith, *Renunciations and Disclaimers*, 96 TRUSTS & ESTATES 744 (1957); Comment, *Effective Renunciation of a Succession in Louisiana*, 26 TUL. L. REV. 81 (1951); 31 TEXAS L. REV. 599 (1953); 5 VAND. L. REV. 852 (1952).

149. *Cf.* Commissioner v. Vease's Estate, 314 F.2d 79 (9th Cir. 1963); text following *supra* subheading *Refusal To Accept*.

150. CODE §2056. *See generally* 1 CASNER 824-74.

151. MASS. ANN. LAWS ch. 190 §§1,2,3 (1955); *cf.* 1 CASNER 24-28.

Some states, such as Florida, have intestate statutes providing that the surviving spouse shall take the same as if he or she were one of the children.[152] Under such a statute, an effective disclaimer by a child would augment the amount passing to the surviving spouse by reducing the number taking as children. Using the same facts as above, a disclaimer in Florida would produce the following result:

	No Disclaimer	*S* Disclaims All
W (child's part)	$100,000	$150,000
Children:		
S	100,000	-0-
D	100,000	150,000
	$300,000	$300,000

The Florida statute provides some planning flexibility not possible in the typical state. Although the minor daughter's share is also augmented, *S*'s disclaimer successfully shifts 50,000 dollars to *W*; there is no gift tax in either case,[153] and the 50,000 dollars additional to *W* qualifies under section 2056 (d) (2) to augment the marital deduction. It is not unlikely that a taxpayer in *S*'s position might want to shift inherited wealth in such a manner.

(*b*). *Interests Passing Under a Will—Including Interests Passing Under a Testamentary Trust*

Devises and Bequests. The will draftsman should foresee the possible advantages of disclaimers and should provide expressly for the right to disclaim and for the alternate disposition of any disclaimed property.[154] Absent such a provision, however, it is well settled that interests under a will can usually be disclaimed, if not contrary to testator's intent.[155]

Although the courts are unanimous in recognizing disclaimers of interests passing by will, they have not agreed upon the theory underlying the condition of the title during the period from testator's death to date of the disclaimer. One view compares the gift to an offer that does not become a binding obligation until accepted. Upon acceptance, the title is treated as relating back to the date of death; upon renunciation, the gift is treated as void *ab initio*.[156] The other view treats the title as having vested subject to being divested by the renunciation, in which case the renunciation is treated as relating back to the date of death.[157] Since the final result is the same

152. FLA. STAT. §731.23 (1) (1967).

153. *See supra* note 58.

154. *See, e.g.*, Estate of Devlin, 46 Misc. 2d 399, 259 N.Y.S.2d 531 (Sur. Ct. 1964) (testatrix provided for alternate gift to charity in case of renunciation).

155. Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933). *See generally* PAGE §49.2; Ekman at 530; Frankel at 2198.

156. *E.g.*, Albany Hosp. v. Hanson, 214 N.Y. 435, 108 N.E. 812 (1915); Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945); *see* PAGE §49.4.

157. *E.g.*, Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); *see* PAGE §49.4; *cf.* Smith, *Renunciations and Disclaimers*, 96 TRUSTS & ESTATES 744 (1957).

under either theory, the distinction might be regarded as irrelevant if it were not for the *vesting* language in *Hardenbergh*: After recognizing the right of a legatee or devisee to renounce, citing *Brown v. Routzahn*[158] as authority, the court distinguished *Routzahn* since "those so entitled by law have no power to prevent the vesting of title in themselves. . . . The controlling fact . . . is that title . . . vested . . . by operation of law which neither had the power to prevent".[159] This language has caused several writers to suggest that a devisee might not have the right to renounce if the controlling state law vests title in the devisee immediately upon death.[160] This uncertainty may partly explain why states such as Minnesota have given a specific right of disclaimer to devisees and legatees as well as to intestate takers.[161]

The effect of a disclaimer of an interest under a will often depends upon whether the interest is specifically bequeathed or is part of the residual estate.

(*1*). *Specific Gift.* Assume that *H* makes a specific pecuniary bequest to each of his children, *S* and *D* (both of whom are 21 and competent), the residual estate to be divided into a "Marital Deduction Trust"[162] for *W* and a trust for *H*'s grandchildren. Assume further that because of nonprobate property includible in *H*'s gross estate but not qualified for the marital deduction, *W*'s trust is significantly lower than the desired maximum marital deduction. These facts suggest the opportunity for *S* and *D* to consider disclaiming all or part of their bequests. First, however, each must determine with certainty that the disclaimed interest will pass as desired.

The cardinal rule is, of course, that testator's intention controls the devolution of disclaimed property.[163] Very often, however, the will is silent as to the passing of disclaimed devises or legacies. In such case, the renounced

158. 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933).

159. Hardenbergh v. Commissioner, 198 F.2d 63, 66 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952).

160. *E.g.*, Bowe, *How To Provide for a Widow's Disclaimer Without Risking Gift Tax*, 8 J. TAXATION 68, 69 (1958). *But see* Frankel at 2210 for a discussion suggesting that the "archaic distinction between 'vested' and 'non-vested' property rights for renunciation purposes" may have been abolished due to the change from the proposed regulations to the final Treas. Reg. §25.2511-1(c) (1958). Mr. Frankel points out that the proposed regulations contained the following: "The *renunciation of a vested property interest, such as the interest of an heir or next-of-kin*, or devisee in whom title immediately *vests* [emphasis added] upon a decedent's death under local law, *constitutes a gift* to those persons who receive the property interest by means of the renunciation. *On the other hand the renunciation of a gift, bequest, or inheritance*, if under local law title does not immediately *vest*, [emphasis added] *is not a gift* if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest." Proposed Treas. Reg. §25.2511-1(c), 22 Fed. Reg. 53 (1957). He then emphasizes the significant fact that in the final regulations the "vested" language is omitted entirely. Mr. Frankel concludes: "Considered in context, the new section thus perhaps indicates an abandonment of the rigid and unrealistic distinction made by the *Hardenbergh* and *Maxwell* cases." Frankel at 2212.

161. *Cf.* MINN. STAT. ANN. §525.532(1)(a) (Supp. 1966).

162. Reference to a "Marital Deduction Trust" in this article means a trust for benefit of *W* that meets all the requirements of CODE §2056(b)(5). *See generally* 1 CASNER at 839-56.

163. *In re* Estate of Loranz, 256 Iowa 818, 128 N.W.2d 224 (1964).

legacy passes under the residuary clause, if there is one.[164] Assuming then that *S*'s and *D*'s disclaimed specific bequests pass by the residuary clause to the trusts for *W* and for the grandchildren, the marital deduction is increased, and property passes to the grandchildrens' trust without any gift taxes payable by *S* and *D* since the Code's disclaimer provision treats the property as having passed directly from *H*.[165]

(2). *Residuary Gift.* Suppose that instead of the above disposition, *H* makes a few specific bequests to collateral relatives, but disposes of most of his estate by means of a clause that divides the residual estate into three parts — one-half being in a "Marital Deduction Trust" for benefit of *W*, one-quarter being in a trust for benefit of the grandchildren, and the remaining one-quarter passing outright to *D* and *S* in equal shares. Again, assume that as a result of nonprobate transfers, there is an opportunity to qualify additional property for the estate tax marital deduction.

This residuary gift to *D* and *S* forecloses the possibility of augmenting the "Marital Deduction Trust" because the disclaimed portion of a residuary bequest does not remain in the residue to be divided among the nondisclaiming residual legatees.[166] Rather, the disclaimed portion passes under the controlling statute of descent and distribution.[167] Nevertheless, the result of a disclaimer may be desirable because of the devolution of intestate property under the typical statute of descent and distribution, as illustrated by the following:

PROPERTY PASSING BY INTESTACY:

	Without Any Disclaimer	*S* and *D* Each Disclaim Residual Shares Worth $45,000
W (one-third)	-0-	$30,000
Children (balance in equal shares):		
S	-0-	30,000
D	-0-	30,000
		$90,000

Thus, by disclaiming their residual gifts, *S* and *D* are able to shift property to *W* without gift tax liability[168] and yet achieve an augmentation of the property qualifying for the estate tax marital deduction.

Many times *W* will have the right to renounce her rights under a will in order to take a statutory dower share.[169] When such an election is contem-

164. *Id.*

165. CODE §§2056 (d) (2), (e) (1).

166. *E.g.*, Lehr v. Switzer, 213 Iowa 658, 239 N.W. 564 (1931).

167. *Id.*

168. *Cf. supra* note 58 concerning gift tax question. *See* text accompanying *supra* notes 151-53 for differences in result under a statute such as FLA. STAT. §731.23 (1) (1967).

169. A full discussion of the widow's election is beyond the scope of this article. *See generally* 1 CASNER 57-67; Brawerman, *How To Draft a Will with the Widow's Election*, U. So. CAL. 1956 TAX INST. 359 (1956); Kaufman & Shapiro, *Incipient Tax Benefits in in Widow's Election Wills: the Vardell and Gregory Cases*, 41 TAXES 553 (1963); Westfall,

plated, it is important to determine whether the dower interest will be disqualified for the marital deduction as a terminable interest.[170] In Florida, although it seems that *W*'s dower interest should qualify for the estate tax marital deduction, it has been suggested that the interest may be terminable.[171]

Interests in a Testamentary Trust. The right of a devisee or legatee to disclaim an interest under a will generally extend to the beneficiary of a trust established under the terms of the will.[172] But a spendthrift provision in the trust may limit this right.

The majority view, adopted by the American Law Institute, is that the interest subject to the spendthrift provision may be disclaimed.[173] California, nevertheless, seems committed to the contrary view, as shown by *In re Nicely's Estate*.[174] A significant fact in the case was that the renounced interest would have passed to the beneficiary by intestacy. The court said: "Under the rule sought here all such trust restrictions could be wiped out by the simple sleight-of-hand of renunciation followed by a retrieval according to the laws of intestate succession."[175]

If the testator creates successive interests, as in the typical testamentary trust, it is essential to provide for alternative disposition in the event of a disclaimer. Otherwise, serious construction questions may arise.[176] The following provision should obviate most problems when a prior interest is disclaimed: "In the event that a beneficiary hereunder disclaims or renounces the interest limited in his favor, succeeding interests shall take effect as though such beneficiary had died on the date of the disclaimer or renunciation."[177]

If no alternative provision is made, a court must attempt to ascertain the intention of the testator. Since the intent is usually not clear, it will probably

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Estate Planning and the Widow's Election, 71 HARV. L. REV. 1269 (1958); Wren, *The Widow's Election*, 100 TRUSTS & ESTATES 13, 108 (1961).

170. *See generally* 1 CASNER at 58; STEPHENS & MAXFIELD at 200, 219-20.

171. *See* Altman, *Florida Dower—Does It Qualify for the Marital Deduction?*, 22 U. MIAMI L. REV. 686 (1968), where the author concludes that Florida dower does not qualify for the estate tax marital deduction, based primarily upon the rationale of Jackson v. United States, 376 U.S. 503 (1964); *cf.* FLA. STAT. §731.34 (1967).

172. *See* 1 SCOTT §36.1.

173. RESTATEMENT (SECOND) OF TRUSTS §36 (1959). *Accord*, Commerce Trust Co. v. Fast, 396 S.W.2d 683 (Mo. 1965). *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS §524, at 603 (2d ed. 1947).

174. 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 (Dist. Ct. App. 1965).

175. *Id.* 181, 44 Cal. Rptr. 810 (Dist. Ct. App. 1965). The Commissioner of Internal Revenue has also utilized the spendthrift argument. Before Pennsylvania amended its law expressly to permit the beneficiary of a spendthrift trust to disclaim in favor of a remainderman, the Commissioner contended in Estate of James M. Schoonmaker, Jr., 6 T.C. 404 (1946) that a wife's purported disclaimer of the *principal* of a "spendthrift trust," of which she was also life tenant, was "void and ineffective . . . under the laws of the Commonwealth. . . ." and therefore the charitable deduction should be denied. The court, however, rejected the argument since the wife by her disclaimer did not undertake to assign or dispose of the income of the trust, but merely gave up her right to any payments out of the principal.

176. *See generally* 1 CASNER at 555.

177. 1 CASNER at 566.

be necessary to resort to constructional rules such as the doctrine of acceleration of remainders.[178] The doctrine has been stated in *Wilmington Trust Co. v. Carpenter*[179] as follows: "[U]pon the premature termination of a prior life right to the income from a trust fund, the rights of the succeeding beneficiaries will be accelerated unless contrary to the intent of the settlor of the trust. . . . [The] rule usually applies if the possession and enjoyment of the fund by other beneficiaries is merely postponed for the benefit of a life taker of the income."[180]

The doctrine was recently applied by the Missouri supreme court in *Commerce Trust Co. v. Fast*:[181] *H*'s will established a trust, the income of which was payable to three of his children and to a daughter,*D*, but only if she was unmarried. At death of *W* (which occurred about ten months after *H*'s death), three-fourths of the trust was distributable to the three children, the remaining one-fourth to be held in trust with income to *D* so long as she remained "single and unmarried." Upon *D*'s death, the trust was to be distributed equally to the other three children. *D* brought suit on grounds of lack of testamentary capacity, but, in consideration of a "Family Settlement Agreement," withdrew the action and renounced all her interests under the will. The court held that *D*'s renunciation accelerated the succeeding interests. The following contentions of the guardian ad litem for the minor grandchildren were rejected: (1) that the renunciation was invalid because it was made in consideration of a plan for *D* to receive substantial property; (2) that the contingent remainders were defeated contrary to express provisions of the will; (3) that the adult beneficiaries had no power to agree to terminate and thereby destroy appellants' contingent remainders; and (4) that, being a spendthrift trust, it could not be terminated by agreement. Acceleration seems properly applied if there was actually a valid renunciation. In view of the convincing evidence that *D* received valuable consideration for her actions, however, it is difficult to conclude that the renunciation was valid. It appears, instead, that there was an agreement between the life tenant and remaindermen to terminate the spendthrift trust—an action that clearly is not permissible.

In re Borsch's Estate[182] exemplifies the usual attitude of the court when

178. *See*, for a discussion of the doctrine of acceleration of remainders, 5 AMERICAN LAW OF PROPERTY §§21.41-.46 (A.J. Casner ed. 1952); 2 RESTATEMENT OF PROPERTY §§231-35 (1936); 2 SIMES & SMITH §§791-804; Simes, *Acceleration of Future Interests*, 41 YALE L.J. 659 (1932); Note, *Future Interests—Acceleration of Remainders upon Election of Surviving Spouse To Take Intestate Share*, 25 N.Y.U.L. REV. 130 (1950). Of course, the doctrine will not always be applied. A major determinant is whether the remainder is indefeasibly vested, vested subject to divestment, vested subject to open, or contingent. If vested, the remainder is almost always accelerated but, if contingent, it is much more infrequently accelerated. *See, e.g.*, 5 AMERICAN LAW OF PROPERTY §21.43 (A.J. Casner ed. 1952). Furthermore, there is always the possibility that the life estate will be sequestered to compensate a "disappointed legatee," one who has suffered loss by a disclaiming widow's claim of a statutory share. *See, e.g.*, Sellick v. Sellick, 207 Mich. 194, 173 N.W. 609 (1919).

179. 31 Del. Ch. 411, 75 A.2d at 815 (1950).

180. *Id.* at 421, 75 A.2d at 820.

181. 396 S.W.2d 683 (Mo. 1965).

182. 362 Pa. 581, 67 A.2d 119 (1949).

an income beneficiary of a spendthrift trust attempts, after acceptance, to renounce in order to terminate the trust and vest title in the remainderman. The court said:[183]

> Spendthrift trusts are sustained not because of the law's concern for the donee, but because the testator or donor possessed an individual right of property in the execution of the trust. *To permit a termination by agreement or release would be an invasion of the donor's property right.* . . . It is a subterfuge, thinly veiled, to permit a life tenant under a spendthrift clause to release and disclaim her interest, thus accelerating the remainder, and then to permit the remainderman to terminate the trust. This is allowing, by indirection, that which this Court has consistently forbidden to be done directly.

(c). *Interests Passing by the Exercise or Nonexercise of a Testamentary Power of Appointment*

It seems undisputed that the appointee of property pursuant to an exercised power of appointment can disclaim the interest appointed.[184] Likewise, a taker in default of a valid exercise can disclaim if the property passes pursuant to a gift-over provision in the will.[185] Nevertheless, *Commissioner v. Cardeza's Estate*,[186] a case that considered the effect of a disclaimer of appointed property, suggests a possible problem that should not be overlooked. The court presented the issue as follows: "*T*, a testator . . . gives a life estate to *A* with a testamentary power of appointment in *A* . . . with a gift over in default of appointment. *T* dies. Then *A* dies leaving a will in which he exercises the power by appointing [to] *B*. *B*, however, renounces. What happens to the property which is the subject matter of the power?" The court held that the predominant view and the law in Pennsylvania is that "a legacy in default of appointment *vests* in the legatee on the testator's death, subject to be[ing] divested by the exercise of the power."[187]

Perhaps the court used *vested* in a nontechnical sense. *Cardeza's Estate* does predate *Hardenbergh*. In any event, state law that vests property in a taker-in-default, subject to a power in another to divest the property, might invite the kind of attack that has been feared in the case of state law that vests realty in the devisee at testator's death.[188]

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183. *Id.* at 586, 589, 67 A.2d at 121, 123. *See also* Matthews Estate, 28 Pa. D. & C.2d 416 (1963).

184. *E.g.*, Second Bank-State St. Trust Co. v. Yale Univ. Alumni Fund, 338 Mass. 520, 156 N.E.2d 57 (1959). Most of the cases have been primarily concerned with the incidence of federal and state death taxes. State inheritance tax cases, *e.g.*, are: Cook v. Dove, 32 Ill. 2d 109, 203 N.E.2d 892 (1965); *In re* Lansing's Estate, 182 N.Y. 238, 74 N.E. 882 (1905). Federal estate tax cases, *e.g.*, which have been concerned with whether a "pre-1942" power has been exercised are: Wilson v. Kraemer, 190 F.2d 341 (2d Cir. 1951); Estate of Sarah v. Moran, 16 T.C. 814 (1951).

185. *See* text accompanying *supra* note 155.

186. 173 F.2d 19 (3d Cir. 1949).

187. *Id.* at 27 (emphasis added).

188. *See supra* note 160 and accompanying text.

(d). Interests Passing by Succession to a Disclaimed Testamentary Interest

The Minnesota statute specifically provides for the right to disclaim an interest passing as a result of a disclaimer by will, intestate succession, through the exercise or nonexercise of a testamentary power of appointment, or by renunciation and election to take against a will.[189] Such a provision seems unnecessary in a comprehensive statute. But it does underscore the importance of tracing the ultimate effect of a disclaimer to see if another disclaimer will be necessitated thereby.

(e). Interests of Donee of a Power of Appointment Created by Testamentary Instrument

A prospective disclaimant of a power of appointment should rely only upon statutory authority;[190] a soundly-reasoned precedent supporting such a right to disclaim has not been found. Some courts and commentators have assumed — indeed, courts have held — that a donee of a power can disclaim. Nevertheless, the existence of statutory authority may be crucial, and there does not seem to be a satisfactory primary authority on which to rely.

Imprecise terminology has created much of the confusion. There is a tendency to use release and disclaimer interchangeably, to confuse the donee of a power with the appointee of appointed property, or to confuse the donee with the devisee or legatee under a will. Additional problems are raised because of the different kinds of powers, for example, general, special, special coupled with a trust.

The most persuasive authority for the proposition that "all powers of appointment may be renounced or disclaimed" is found in Professors Simes' and Smith's treatises:[191] "But, however we may classify a renunciation or disclaimer, it is clear that it can operate to extinguish or prevent the existence of a power of appointment."[192] As authority for this statement, the authors cite *In re Finucane's Will*,[193] a case that clearly holds that the donee of a

189. MINN. STAT. ANN. §525.532 (1) ((a)) (Supp. 1966).

190. Of the disclaimer statutes cited *supra* note 147, some authorize the donee of a power of appointment to disclaim, *e.g.*, MINN. STAT. ANN. §§501.211, 525.532 (Supp. 1966); PA. STAT. ANN. tit. 20, §301.3 (Purdon Supp. 1966). In addition, there are statutes that authorize disclaimers by the donee of a power, although not authorizing an heir to disclaim, *e.g.*, MASS. GEN. LAWS ANN. ch. 204, §§27-34 (1958); VA. CODE ANN. §55-278 (1959).

191. SIMES & SMITH §1061; L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 179 (2d ed. 1966). In fact, the "black-letter law" in the *Handbook* is the quoted material in the sentence footnoted.

192. SIMES & SMITH §1061.

193. 199 Misc. 1069, 100 N.Y.S.2d 1005 (Sur. Ct. 1950). The other authority cited in SIMES & SMITH is McLaughlin v. Industrial Trust, 28 Del. Ch. 275, 42 A.2d 12 (1945). Close consideration of *McLaughlin* reveals that the court found it unnecessary to determine the questions of whether an extinguishment of the power had occurred and whether such an extinguishment was analogous in principle to the right of a devisee to disclaim a gift. *See*, in particular, 28 Del. Ch. 280, 42 A.2d at 15. The bill was dismissed on other grounds, although the court recognized, as an apparent afterthought, that even if the power had been extinguished, the effect would be that the property would pass to the heirs at law of

special power of appointment can renounce. The case seems to be questionable precedent, however, because the authorities relied upon by the court[194] in that case do not support the decision; the cited cases were concerned with whether the *appointee* of an attempted exercise of a power could renounce.

The discussion in the treatise continues: "This [that a disclaimer can operate to prevent the existence of a power of appointment] is true, even though the power be in trust. For, just as a trustee may disclaim the trust if he acts within a reasonable time,[195] so it would seem that the donee of a power in trust may disclaim the power."[196] It seems questionable whether the trustee analogy supports the conclusion. For "If the trustee disclaims, the effect of the disclaimer is to pass the title back to the transferor or his estate and retroactively to free the trustee of any liability as trustee to the benficiary or as holder of the title to the trust property to any one. The trust, however, does not fail."[197] The *Restatement* also states: "A trustee cannot accept a trust in part and disclaim in part."[198] In other words, although the *Restatement* is concerned that a trustee not be forced to serve against his wishes, it clearly recognizes that the trust will not fail. Another trustee will be appointed to carry out the wishes of the settlor of the trust. The proffered powers continue; the only alteration is that a different trustee will be appointed.

In the case of *Ewing v. Rountree*,[199] the main issue was whether the decedent-donee possessed, at her death, a power of appointment not limited by an ascertainable standard of support and maintenance. In order to avoid a constitutional question, the court tried to show that the decedent had the power to disclaim under section 2041 (a) (2) and added the following comment: "There is no serious doubt that the donee of a power can renounce it under the law of Tennessee."[200] An analysis of the cases cited by the court, however, reveals that the issue in each case was not the right of a donee of a power to disclaim, but was the right of a devisee or legatee.[201]

Probably the best discussion of the right to surrender, release, or renounce a power of appointment is found in *Merrill v. Lynch*.[202] The court recognized the "settled law that a person may renounce a bequest or devise and refuse to accept it" and continued by stating: "Likewise, in the case of general beneficial powers, no statute says that they must be exercised, and no statute

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testatrix (rather than the petitioning life tenant) since the will did not contain a provision for a gift-over in default of appointment.

194. The court cites Helvering v. Grinnell, 294 U.S. 153 (1935); Commissioner v. Cardeza's Estate, 173 F.2d 19 (3d Cir. 1949).

195. SIMES & SMITH §1061 *citing* RESTATEMENT OF TRUSTS §102 (1935).

196. SIMES & SMITH §1061.

197. RESTATEMENT (SECOND) OF TRUSTS §102, comment *g* (1959).

198. RESTATEMENT (SECOND) OF TRUSTS §102 (1959).

199. 228 F. Supp. 137 (M.D. Tenn. 1964), *aff'd*, 346 F.2d 471 (6th Cir. 1965), *cert. denied*, 382 U.S. 918 (1965).

200. 228 F. Supp. at 143.

201. The court cited McQuiddy Printing Co. v. Hirsig, 23 Tenn. App. 434, 134 S.W.2d 197 (1939); *In re* Hodge's Estate, 20 Tenn. App. 411, 99 S.W.2d 561 (1936); Annot., 93 A.L.R.2d 8 (1964).

202. 173 Misc. 39, 13 N.Y.S.2d 514 (Sup. Ct. 1939).

provides that they may not be released and extinguished by the donee. . . . Thus, it is settled law in all jurisdictions, including New York, that beneficial powers may be surrendered, released or renounced by the grantee and thereby extinguished."[203] Admittedly, the position taken by Professors Simes and Smith and the *dictum* in *Merrill* point strongly toward a right of a donee to disclaim a power notwithstanding the existence of a statute. Nevertheless, it would seem to be an undue risk to accept such a conclusion in absence of stronger primary authority. In *Merrill,* for example, the issue was the right to *release* the power — not the right to disclaim.

There is wide variation in the types of statutory authority for disclaimer by the donee of a power. Massachusetts, for example, has detailed provisions concerning releases of powers of appointment by a donee, followed by a provision that a donee of a power can disclaim in the same manner and to the same extent that he can release.[204] The statute contains broad language:[205]

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203. *Id.* at 49, 13 N.Y.S.2d at 526-27.

204. MASS. ANN. LAWS ch. 204, §§27-34 (1958).

205. *Id.* at §27. Absent authorization from the testator for the donee of a fiduciary power to disclaim, there are likely to be restrictions on such a disclaimer even in a state with a statute as broad as the one in Massachusetts. Sherry v. Little, 341 Mass. 224, 167 N.E.2d 872 (1960), though not specifically addressed to the release and disclaimer statutes, seems relevant. *H* died Jan. 11, 1956, leaving his residual estate in two trusts — a "Marital Deduction Trust" and a trust with lifetime benefits for *W* with remainders to his issue. *W* and *T* were named coexecutrices and cotrustees with "ordinary powers" and, in addition, a controlling power of decision ("veto power") in *W*. On Nov. 8, 1956, *W* executed a written renunciation of the "veto power." Subsequently *W* and the other beneficiaries petitioned for a determination of the validity of *W*'s attempted renunciation. The trial court entered a final decree that the purported waiver was null and void on grounds that *W* was not "fully informed as to the nature and effect of the instrument and [did not have] a proper knowledge and understanding of its significance, and that the said instrument was signed without notice to the beneficiaries and without approval of the court . . . ." *Id.* at 228, 167 N.E.2d at 874-75. The decree was affirmed by the Supreme Judicial Court of Massachusetts, with the additional observation: "The power . . . is an integral part of the testator's plan for the administration of his estate. . . . The executrices having accepted the trust are obligated to administer it according to the terms prescribed by the testator subject to the supervision of the Probate Court. . . . Neither can resign without its consent. . . . Nor can they depart from the directions of the testator except by leave of court and then only 'upon proof of the most pressing exigency.' . . . There is no evidence of present or impending necessity. . . . We think that the attempted relinquishment of the controlling power by [*W*] without notice to the other beneficiaries and without the approval of the court, was of no legal effect and that her agreement to confirm and effect the renunciation upon request by [*T*] amounted to an engagement to commit a breach of trust. It was a promise by a fiduciary to act in violation of her duties and was invalid. . . ." *Id.* at 229, 167 N.E.2d at 875.

One commentator writes: "The controlling power of decision given the widow was an administrative power and as such appears to be beyond the purview of [Mass.] G.L., c. 204, Sec. 27, permitting the complete or partial release of a power of appointment." 1960 ANNUAL SURVEY OF MASSACHUSETTS LAW §211, at 22-23. It may be inaccurate to assume that the court's decision turned on whether the power was within the purview of the statute; decision could have rested upon the finding that the "instrument was signed without notice to the beneficiaries and without approval of the court" since the statute requires such notice.

In any event, the trust theory declared, though perhaps by dictum, is sound: "Once a

> A power of appointment, whether or not coupled with an interest, and whether or not existing at the time [the] section takes effect, and whether the power is held by the donee in an individual or in a fiduciary capacity may be released wholly or partially, by the donee thereof, unless otherwise expressly provided in the instrument creating the power. . . . [T]he term power of appointment includes all powers whether they are: (a) general, special, or otherwise; (b) in gross, appendant, simply collateral, in trust, or otherwise; (c) exercisable by will, deed, deed or will, or instrument amending a trust, or otherwise; (d) exercisable presently or in the future.

A possible criticism of the Massachusetts type of legislation is the failure to separate clearly the concepts of disclaimer and release. It is apparent that Congress considers disclaimers and releases to be different legal concepts producing substantially different tax results.[206] For example, property subject to a general power of appointment created after October 21, 1942, will be included in decedent's gross estate under section 2041 (a) (2) if decedent possesses the power at the time of his death or has at any time exercised or released it. Additional language provides that a disclaimer shall not be deemed a release. Thus, if the power is *released,* the property that is subject to it is includible in the donee's gross estate; if the power is *disclaimed,* the property is not includible.

Minnesota has included the following language in its statutory definitions of "interest": "[P]ower to appoint, consume, apply or expend property or any other right, power, privilege or immunity relating thereto."[207]

This language should overcome a possible problem in construing the meaning of *interest* as used in section 2056 (d) (2). It is arguable that the legislature did not intend that the word *power* be included within the meaning of the words *interest in property.* The basis for such an argument is that section 2055 (a) refers to the "disclaimer of a bequest, legacy, devise, transfer, or power." The legislative history of section 2055 (a), however, reveals that the disclaimer language was added for two specific purposes: (1) to clarify the law that a charitable deduction for a residuary bequest or devise includes an amount that falls into the residuary estate as a result of

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trustee has accepted a trust, he should be bound by the terms of the instrument, and should be permitted to deviate from the terms of a granted power only upon proof of present or impending necessity." *Id.*

206. *See generally* W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 565-68 (1961); 1 W. NOSSAMAN & J. WYATT, TRUST ADMINISTRATION AND TAXATION §3614 rev. 2d ed. 1967). The NOSSAMAN & WYATT treatise states in §36.14, at 714: "There is a technical difference in that the release of a power is to a certain extent an affirmative act exercising dominion over it, whereas renunciation or disclaimer is a negative act, a refusal to accept." The authors then cite Botzum v. Havana Nat'l Bank, 367 Ill. 539, 12 N.E.2d 203 (1937), a case that is primarily concerned with whether all the beneficiaries of a trust have consented to the termination of a trust, but which implies that a donee of a general power of appointment may refuse to accept the power: "[N]o title or interest in the thing vests in a donee of a power by the creation of that power alone. It amounts to a virtual offer to him of the estate or fund, and he may accept or reject it at will, and no title can vest thereby until he accepts the offer. [Citations omitted.]" *Id.* at 543; 12 N.E.2d at 205.

207. MINN. STAT. ANN. §§501.211, 525-532 (1) (b) (Supp. 1966).

a disclaimer; and (2) to permit the donee of a power to disclaim the power in order to save an otherwise qualifying gift to charity.[208] The purpose of the disclaimer provision under section 2056 (d) (2) is not so restricted.[209] Therefore, it seems fair to conclude that the additional words in section 2055 (a), that is, "bequest, legacy, devise, transfer, or power," are restrictive, and that the absence of such restrictive words in section 2056 (d) (2) calls for the broadest possible interpretation.[210]

Even if it were shown that the legislature did not intend that the words *interest in property* include *power*, an argument could still be made that disclaimer of a power to cure the marital deduction would be effective. Section 2056 (d) (2), before the amendment, prohibited increasing the marital deduction by disclaimer by providing that "such interest shall . . . be considered as passing . . . not to the surviving spouse, but to the person who made the disclaimer."[211] To prove that *power* was not included within *interest in property* is to concede that the former section 2056 (d) (2) was not applicable to disclaimers of powers.[212]

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208. The disclaimer language of CODE §2055 (a) was added to the CODE by The Revenue Bill of 1942. The purpose of the bill is explained in H.R. 2333, 77th Cong., 2d Sess. 166-67 (1942).

The purpose of the amendment to §812 (d) of the Int. Rev. Code of 1939 was considered at length in Commissioner v. Macaulay's Estate, 150 F.2d 847 (2d Cir. 1945). Pertinent facts were: Decedent specifically bequeathed $1 million to *H* and gave 46% of her residuary estate to charity. Before the effective date of the amendment to §812 (d), *H* disclaimed $428,750 of the bequest, causing it to fall into the residuary estate. The executor took a charitable deduction for 46% of the disclaimed interest. The issue was whether the 1942 amendment was passed to clarify or declare existing law, or whether it was passed to change the existing law. It was the opinion of the court that the amendment was intended to be applicable to two different situations: (1) the specific charitable bequest which, pursuant to a power, could be diverted to other purposes, and (2) the disclaimed legacy which would fall into the residuary estate bequeathed to charity (and in both cases the setting of a definite limit within which a disclaimer must be made to render a legacy deductible). The court held that as to the latter, *i.e.*, disclaiming a legacy, the effect of the amendment was only to clarify and give "persuasive and weighty interpretation of the scope of a preexisting exemption" (aside from setting a time limit). It was noted that as to the former, *i.e.*, certain powers, the amendment allowed a greater exemption after Feb. 10, 1939, but was not intended to alter the status of renounced legacies. *Id.* at 851.

209. *See supra* notes 136, 137 and accompanying text; *infra* note 210 and accompanying text.

210. Professor Casner included the following in his 1967 Supplement: "It is submitted that the new provisions should be construed liberally to carry out the underlying intent to enable persons, after the death of a deceased spouse, to refuse to accept something and thereby improve the marital deduction picture. The refusal to accept a power should be construed as a disclaimer of an 'interest' and the freedom from having her interest diverted by the exercise of the power disclaimed should be construed as entitling the surviving spouse 'to receive such interest.'" 1 CASNER at 828 n.92.

211. CODE §2056 (a) permits a deduction only for "an interest in property which passes or has passed from the decedent to his surviving spouse . . . ." *See generally* 1 CASNER at 827-31.

212. However, it would seem that this reasoning is somewhat circuitous, since the purposes of CODE §2055 (a) specifically included permitting the donee of a power to disclaim in addition to clarifying the existing law as to disclaimers of bequests or devises. *See supra* notes 208, 209 and accompanying text.

It is important to determine whether a disclaimer of a power is authorized, for it is this type of disclaimer that can be of greatest use in saving the marital deduction. Numerous fact situations can be presented where an interest passing to *W*, which is a nonqualifying terminable interest, could be qualified if an outstanding power in a third-party donee could be extinguished or shifted to *W*.

Suppose, for example, that *H*'s will leaves the residue in a trust, of which *W* and her estate are the sole beneficiaries except for a power in *T* to pay funds to *D*, a minor, in an emergency. The trust is a qualifying "Estate Trust" but for the power.[213]

Or suppose that the residue is left in a trust that would qualify under section 2056 (b) (5) as a "Marital Deduction Trust" but for a power in the trustee to allocate receipts and disbursements between income and corpus (and it is known that the local courts do not impose reasonable limitations on the exercise of such a power).[214]

In both examples, an effective disclaimer of the power would save the marital deduction. In the first example, it would seem that *T* could not disclaim his power because of his fiduciary duty to *D*.[215] The second example does not pose such a clearly defined duty, however, and a disclaimer of the power would probably be consistent with the testator's presumed intent.[216]

Interests Passing by Nontestamentary Transfers

In addition to the testamentary transfers discussed above, decedent's gross estate may include property transferred during his lifetime.[217] The general principles pertaining to the disclaimer of testamentary transfers also apply to interests received by deed, assignment, or inter vivos trust agreement.[218] There are some additional problems, however, that deserve separate consideration.

(a). Interests Passing by Insurance Contracts, Joint Bank Accounts, Tenancies by the Entirety, and Joint Tenancies with Right of Survivorship

Proceeds of insurance are specifically recognized as an interest in property that may "pass" from decedent to the surviving spouse and thereby qualify

213. *See* 1 CASNER at 840.

214. Treas. Reg. §20.2056 (b)-5 (1958) provides that such an "administrative power" will not disqualify the interest in trust "if the entire terms of the instrument are such that the local courts will impose reasonable limitations upon the exercise of the powers."

215. *Cf. supra* note 205.

216. The instrument should contain a clause indicating intent and providing for disclaimer of the power. *See* 2 CASNER at 1255.

217. Lifetime transfers that may be includible in decedent's gross estate include transactions in contemplation of death, CODE §2035; transfers with retained life estate, CODE §2036; transfers taking effect at death, CODE §2037; revocable transfers, CODE §2038; joint interests, CODE §2040; transfers for insufficient consideration, CODE §2043.

218. *Cf., e.g.*, A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 695 (1st ed. 1951, Supp. 1959 & 1964) (requirement of acceptance of deed).

for the estate tax marital deduction.[219] Furthermore, it is generally assumed that, as a matter of state law, insurance proceeds can be disclaimed — the theory being that such proceeds are more analogous to a testamentary gift than to the interest of an intestate taker.[220] Such a conclusion seems correct, but the paucity of direct authority suggests a need for closer analysis.

The beneficiary of a life insurance policy is a donee beneficiary of a third-party beneficiary contract.[221] The *Restatement of Contracts*, takes the position that: "[A] donee beneficiary . . . who has not previously assented to the promise for his benefit, may in a reasonable time after learning of its existence and terms, render the duty to himself inoperative from the beginning by disclaimer, unless such action is a fraud on creditors."[222]

Although there are few cases on point,[223] the question of a third-party beneficiary's right to disclaim was recently considered in *Hershey v. Bowers*[224] in the context of a joint and survivorship bank deposit account. The issue was this: If *A* deposits his own funds in a joint and survivorship deposit account in the name of *A* and *B*, without *B*'s knowledge or consent, can *B*, upon discovering such fact after *A*'s death, validly disclaim the interest?

The court held that *B* could disclaim, upon the theory of a third-party beneficiary contract. As a result, the funds did not pass to *B* and were not taxed to *B* as a taxable succession. The court recognized that the succession tax statute[225] treated survivorship property as a succession of the same status as property bequeathed by will; therefore, it turned its decision on the analogous right of a legatee to disclaim and thereby avoid levy of the succession tax.

An earlier Ohio case deciding that an interest in a joint and survivorship bank account could be disclaimed is *In re Estate of Krakoff*.[226] The probate court considered the *beneficiary-heir* dichotomy and analogized the contractual arrangement to a succession created by will: "In the case of property

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219. CODE §2056 (e) (7).

220. *See, e.g.*, Lentz at 316; Sayles at 539; *cf.* Treas. Reg. 2056 (d)-1 (b), last sentence (the regulation under prior law which impliedly recognizes the possibility of disclaiming insurance proceeds). An authority often cited for the right to disclaim insurance proceeds is Estate of Mabel E. Morton, 12 T.C. 380 (1949). *But see* text accompanying *supra* notes 26, 27 where it is shown that the question in *Morton* was whether election of an optional mode of settlement constitutes *acceptance*. *See also* Estate of John Joseph Tuohy, Jr., 14 T.C. 245 (1950); Rundle v. Welch, 5 Am. Fed. Tax R.2d 1916 (S.D. Ohio 1960) (cases that, like *Morton*, deal with election of settlement options rather than disclaimer of the right to the proceeds).

221. 4 A. CORBIN, CONTRACTS §782, at 81 (1951, Supp 1964) [hereinafter cited as CORBIN].

222. RESTATEMENT OF CONTRACTS §137 (1932).

223. *See* 4 CORBIN §811, at 236-37.

224. 7 Ohio St. 2d 4, 218 N.E.2d 455 (1966). The lower courts had rendered conflicting decisions in *In re* Bauer's Estate, 91 Ohio L. Abs. 162, 191 N.E.2d 859 (P. Ct., Fulton Co. 1962), *aff'd*, Ct. App., Fulton Co., Ohio; *In re* Hershey's Estate, 1 Ohio App. 2d 511, 205 N.E.2d 590 (1965), *aff'd*, 7 Ohio St. 2d 4, 218 N.E.2d 455 (1966).

225. OHIO REV. CODE ANN. §5731.02 (Page 1954, Supp. 1966).

226. 87 Ohio L. Abs. 387, 180 Ohio Op. 2d 116, 179 N.E.2d 566 (P. Ct., Franklin Co. 1961).

passing under a will, the testator directs his personal representative to distribute to his legatee; in this case, the owner directs the bank to pay money after death to a designated survivor."[227]

The theory of a third-party beneficiary contract would not be applicable to the traditional concurrent tenancies with survivorship – the tenancy by the entirety and the joint tenancy.[228] Nevertheless, in some circumstances the survivor would probably have the right to disclaim upon the theory that acceptance is required before a deed of property is effective.[229]

Assume, for example, that *H* paid the total consideration for the jointly held property and that the coowner did not learn of the coownership until *H*'s death.[230] Subject to the usual limitations of disclaimer within a reasonable time and before acceptance, the surviving tenant would have the right to disclaim the initial transfer into *H*'s and his names jointly.[231] Note, however, that the right to disclaim must be judged from the point of the initial conveyance; the survivor does not take from the deceased coowner.[232] Of course, all such property is includible in *H*'s gross estate under section 2040 and is treated as "passing" from *H* to the surviving tenant under section 2056 (e). Nevertheless, in determining the state-law effect of a disclaimer of an interest received in joint tenancy or tenancy by the entirety, or the interest received as survivor of one of these tenancies, it must be remembered that acceptance or disclaimer must be judged from the date of the initial conveyance.

Now to consider the effects of disclaiming interests received by nontestamentary transfers: Life insurance proceeds offer an ideal vehicle for either increasing the estate tax marital deduction by means of a disclaimer under section 2056 (d) (2) or decreasing the deduction by a disclaimer under 2056 (d) (1). Assume, for example, that *H* owned three policies of life insurance on his life,[233] one payable to each of *W*, *S*, and *D*. If the disclaimer is valid under controlling state law, and if *W* is the secondary beneficiary of the policies payable to *S* and *D*, a disclaimer of the proceeds by *S* or *D* would pass additional qualifying property to *W*. Conversely, if the goal were to decrease the marital deduction, and if the secondary beneficiaries were suitable objects, *W* could simply disclaim the proceeds payable to her.

Special questions may arise, though, in disclaiming insurance proceeds because of the different settlement options that are available.[234] For example,

227. *Id.* at 392, 180 Ohio Op. 2d at 118, 179 N.E.2d at 569.

228. *See generally* for discussion of characteristics of joint tenancies and tenancies by the entirely 2 AMERICAN LAW OF PROPERTY §§6.2, .3, .6 (A.J. Casner ed. 1952); 1 CASNER at 400-01.

229. *See supra* note 218.

230. Under CODE §2040, the value of concurrently owned property with right of survivorship is includible in *H*'s estate to the extent of the consideration paid by *H*. If the coowner knows of the transfer, questions of disclaiming within a reasonable time are raised. *Cf.* text following *supra* subheading *Timely Disclaimer*.

231. *In re* Bute's Estate, 355 Pa. 170, 49 A.2d 339 (1946) (permitted renunciation of interest as tenant by entirety).

232. *E.g.*, *In re* Gerling's Estate, 303 S.W.2d 915 (Mo. 1957).

233. These policies are includible in *H*'s gross estate under CODE §2042 (2).

234. *See generally* 1 CASNER at 284-302; Scott, *Life Insurance Options,* 56 HARV. L. REV.

S's or *D*'s disclaimer might increase the marital deduction if the contingent beneficiary is the trustee of a qualified "Estate Trust" or "Marital Deduction Trust" for benefit of *W*. Likewise, the deduction could be increased if the option gives *S*, or the contingent beneficiary, *W*, a life annuity with no refund feature so that the interest when disclaimed by *S* will pass directly to *W* and upon her death no benefits will pass to another.[235]

On the other hand, if there is any interest that will continue beyond *W*'s life (for example, a contingent beneficiary to take the commuted value of any unpaid installments upon the death of *W*), then the interest is a non-qualifying terminable interest.[236]

An additional word of caution: The *vesting* language of *Hardenbergh*[237] might present a problem in connection with disclaiming life insurance proceeds because of the question of whether a life insurance beneficiary's interest is vested subject to divestment or is an expectancy.[238] A reasonable answer to such an assertion should be that "ideas behind such terms as 'expectancy' and 'vested rights' are altogether too variable and uncertain to justify their use as a basis for decision. They are often used to describe a result that has been reached for reasons of policy that are in some degree made manifest."[239] Nevertheless, this recurring *Hardenbergh* threat will be alleviated only by comprehensive state legislation that provides, *inter alia*, that a beneficiary of an insurance contract can disclaim.[240]

If the donee of a third-party beneficiary contract disclaims his right under the contract, the property so disclaimed will revert to *H*'s estate,[241] thereby passing as part of his probate estate.[242] A similar result will obtain if the cotenant disclaims the conveyance.[243] Thus, the disclaimed interest will probably pass under the residuary clause of *H*'s will, or, if there is no will, by intestacy.[244]

(*b*). *Special Problems in Disclaiming Interests Passing Under Nontestamentary Transfers*

A major problem in disclaiming an interest passing from *H* during *H*'s lifetime is avoiding the claim that the interest has already been accepted,[245] or that it has not been disclaimed within a reasonable time.[246]

1147 (1943).

235. *Cf.* 1 CASNER at 867.

236. *See* Rev. Rul. 55-733, 1955-2 CUM. BULL. 388; *cf.* 1 CASNER at 867.

237. *See* text accompanying *supra* notes 141-60.

238. *Cf.* 3A CORBIN §742.

239. 4 CORBIN §887, at 566.

240. *See, e.g.*, MINN. STAT. ANN. §501.211 (1) (a) (Supp. 1966).

241. *Cf. id.*

242. The failure of the transfer to the third-party donee will result in inclusion under CODE §2033 rather than §2040.

243. *Id.*

244. *See* text accompanying *supra* notes 164, 167.

245. *See* text following *supra* subheading *Refusal To Accept.*

246. *See* text following *supra* subheading *Timely Disclaimer.*

The acceptance problem is illustrated by *Estate of Ida F. Doane*,[247] in which the interest in question was the corpus of an inter vivos trust. Decedent, during her lifetime, retained all rights to the income, the corpus to be distributed as she directed in her will. Decedent's sister served as cotrustee with decedent. Decedent's will directed that the property be distributed to the sister, but "trusting that she will carry out my wishes and intentions." It was apparent that decedent wanted the property distributed to charity, so the sister filed a timely disclaimer. The Commissioner argued on the authority of *Cerf v. Commissioner*[248] that the sister accepted the interest during decedent's lifetime by serving as cotrustee. The court observed, however, that the trustee's interest was not a beneficial interest during decedent's lifetime as it was in *Cerf*. Thus, the disclaimer was held to be effective.

On the other hand, there are many lifetime transfers that will set forth the beneficial disposition at transferor's death. A typical predeath arrangement[249] is for *H* to transfer property to *T* in trust to pay the income and principal as *H* may direct during his lifetime (and to *H* and *W* during *H*'s life within discretion of *T* in the event of *H*'s incapacity); *H* retains the right to revoke and amend the trust during his lifetime, and at his death, the trust is to be divided into a "Marital Deduction Trust" and the balance is to be divided into separate trusts for the primary benefit of each of *H*'s children. During *H*'s lifetime the trust may or may not be funded. In any event it is likely that the majority of the corpus of the trust will be received at *H*'s death, that is, when life insurance proceeds are paid and assets are received in "pour-over" under the terms of *H*'s will.

It would seem unreasonable to require *W* or the children either to accept or disclaim during *H*'s lifetime even if they had knowledge of the trust. Arguably, however, their interests, though defeasible and uncertain in amount, are offered at date of execution of the trust, thus requiring disclaimer within a "reasonable time" thereafter.

In considering a disclaimer of any nonprobate property, one must always consider the effect of a "formula marital deduction gift"[250] in *H*'s will. The result of a disclaimer of nonprobate assets may simply be to substitute the disclaimed interest for benefits under the will since, once the maximum deduction is reached, additional qualifying gifts of nonprobate property result in a corresponding decrease in the amount of the testamentary property produced by the formula.[251] Presumably, the new disclaimer technique will normally be utilized when the marital deduction is underqualified. The technique may be utilized to shift interests to *W* even though the marital deduction is fully qualified, since the disclaimed interest would avoid imposition of gift tax liability.[252]

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247. 10 T.C. 1258 (1948).
248. 141 F.2d 564 (3d Cir. 1944).
249. *See, e.g.*, 2 CASNER at 1235.
250. *See generally* 1 CASNER 791-97.
251. *Cf.* Lentz at 326 n.42.
252. *See supra* note 58.

PART III. CONCLUSION

The new disclaimer provision, though passed to alleviate existing inequities and hardships, is attended by an inordinate number of risks. Hopefully, the amendment will be broadly construed in keeping with the legislative purpose. Nevertheless, the well-advised taxpayer will disclaim an interest only after a thorough investigation of the probable consequences.

These basic questions should always be considered:

(1) Is augmentation of the marital deduction worth the price of an irrevocable refusal to accept the property?
(2) Is it a certainty that the disclaimed interest will pass to the surviving spouse?
(3) Will the interest pass in a form that qualifies for the marital deduction?
(4) Will the disclaimer comply with the specific requirements of section 2056 (d) (2)?
(5) What risk is there that a disclaimer, though effective for augmenting the marital deduction, might still be held to be a taxable transfer?[253]
(6) Will the disclaimer be effective under the controlling state law?

Answering the last question should not be difficult in a state such as Minnesota. But in a state that has inadequate or no statutory disclaimer laws, the disclaimer may be ineffective or the effects thereof may be so uncertain as to make it an undue risk. In either case, the taxpayer's planning efforts may be thwarted unnecessarily.

The most urgent state legislative needs are specific authorization to disclaim for an intestate taker and the donee of a power. Absent statutory authority, it is doubtful whether these interests can be disclaimed. Another need is recognition of the right to accept part of an interest and disclaim the remainder, with clear statement of the ways in which an interest can be divided.

Stopgap legislation is no longer adequate. Not only is there threat of gift tax liability; now there is also potential loss of an increased estate tax marital deduction.

Therefore, it is imperative that each state enact comprehensive legislation stating clearly who can disclaim, the interests that can be disclaimed, the method of disclaiming, the circumstances that constitute a disclaimer, and the effects of the disclaimer.

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253. Of course there is a constant danger that a supposed "disclaimer" will be held to be a taxable transfer. *See* text accompanying *supra* notes 33, 35, 58, 141, 148. A seemingly untenable result would be to hold that an attempted disclaimer met all the requirements under the marital deduction section, yet still was a taxable transfer for gift tax purposes. The cautious taxpayer should be aware, however, that such an anomalous result has been suggested. *See supra* note 34 and accompanying text.

APPENDIX

MINNESOTA DISCLAIMER STATUTES

The Minnesota disclaimer provisions, MINN. STAT. ANN. §§501.211, 525.532 (Supp. 1966), were approved May 21, 1965. Section 525.532 is set forth verbatim. Section 501.211 is similar to §525.532; accordingly, only the essential differences in §501.211 are set forth.

525.532 *Disclaimer of interests passing by will, intestate succession or under certain powers of appointment*

Subdivision 1. As used in this section, unless otherwise clearly required by the context:

(a) "Beneficiary" means and includes any person entitled, but for his disclaimer, to take an interest: by intestate succession; by devise; by legacy or bequest; by succession to a disclaimed interest by will, intestate succession or through the exercise or nonexercise of a testamentary power of appointment; by virtue of a renunciation and election to take against a will; as beneficiary of a testamentary trust; pursuant to the exercise or non-exercise of a testamentary power of appointment; as donee of a power of appointment created by testamentary instrument; or otherwise under a testamentary instrument;

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

(c) "Disclaimer" means a written instrument which declines, refuses, releases, renounces or disclaims an interest which would otherwise be succeeded to by a beneficiary, which instrument defines the nature and extent of the interest disclaimed thereby and which must be signed, witnessed and acknowledged by the disclaimant in the manner provided for deeds of real estate.

Subdivision 2. A beneficiary may disclaim any interest in whole or in part, or with reference to specific parts, shares or assets thereof, by filing a disclaimer in court in the manner hereinafter provided. A guardian, executor, administrator or other personal representative of the estate of a minor, incompetent or deceased beneficiary, if he deems it in the best interests of those interested in the estate of such beneficiary and of those who take the beneficiary's interest by virtue of the disclaimer and not detrimental to the best interests of the beneficiary, with or without an order of the probate court, may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary himself could disclaim if he were living, of legal age and competent. A beneficiary likewise may execute and file a disclaimer by agent or attorney so empowered.

Subdivision 3. Such disclaimer shall be filed at any time after the creation of the interest but in all events within six months after the death of the person by whom the interest was created or from whom it would have been received, or, if the disclaimant is not finally ascertained as a beneficiary or his interest has not become indefeasibly fixed both in quality and quantity as of the death of such person, then such disclaimer shall be filed not later than six months after the event which would cause him so to become finally ascertained and his interest to become indefeasibly fixed both in quality and quantity.

Subdivision 4. Such disclaimer shall be effective upon being filed in probate court in which the estate of the person by whom the interest was created or from whom it would have been received is, or has been, administered or, if no probate administration has been commenced, then in the probate court of any county provided in Minnesota Statutes, Section 525.82, as the place for probate administration of the estate of such person. A copy of the disclaimer shall be delivered or mailed to the representative, trustee or other person having legal title to or possession of, the property in which the interest disclaimed exists, and no such representative, trustee or person shall be liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer. If an interest in or relating to real estate is disclaimed, the original of the disclaimer, or a copy of the disclaimer certified as true and complete by the clerk of the probate court wherein the same has been filed, shall be filed in the office of the register of deeds or

the registrar of titles, as hereinafter provided, in the county or counties where the real estate is situated and shall constitute notice to all persons only from and after the time of such filing. If title to such real estate has not been registered under the provisions of Minnesota Statutes, Chapter 508, such disclaimer or certified copy shall be filed with the register of deeds. If title to such real estate has been registered under the provisions of Minnesota Statutes, Chapter 508, such disclaimer or certified copy shall be filed with the registrar of titles.

Subdivision 5. Unless the person by whom the interest was created or from whom it would have been received has otherwise provided by will or other appropriate instrument with reference to the possibility of a disclaimer by the beneficiary, the interest disclaimed shall descend, be distributed or otherwise be disposed of in the same manner as if the disclaimant had died immediately preceding the death or other event which causes him to become finally ascertained as a beneficiary and his interest to become indefeasibly fixed both in quality and quantity, and, in any case, the disclaimer shall relate for all purposes to such date, whether filed before or after such death or other event. However, one disclaiming an interest in a non-residuary gift, devise or bequest shall not be excluded, unless his disclaimer so provides, from sharing in a gift, devise or bequest of the residue even though, through lapse, such residue includes the assets disclaimed. An interest of any nature in or to the estate of an intestate may be declined, refused or disclaimed as herein provided without ever vesting in the disclaimant.

Subdivision 6. The right to disclaim otherwise conferred by this section shall be barred if the beneficiary is insolvent at the time of the event giving rise to the right to disclaim. Any voluntary assignment or transfer of, or contract to assign or transfer, an interest in real or personal property, or written waiver of the right to disclaim the succession to an interest in real or person property, by any beneficiary, or any sale or other disposition of an interest in real or personal property pursuant to judicial process, made before he has filed a disclaimer, as herein provided, bars the right otherwise hereby conferred on such beneficiary to disclaim as to such interest.

Subdivision 7. The right to disclaim granted by this section shall exist irrespective of any limitation imposed on the interest of the disclaimant in the nature of an express or implied spendthrift provision or similar restriction. A disclaimer, when filed as provided in this section, or a written waiver of the right to disclaim, shall be binding upon the disclaimant or beneficiary so waiving and all parties thereafter claiming by, through or under him, except that a beneficiary so waiving may thereafter transfer, assign or release his interest if such is not prohibited by an express or implied spendthrift provision. If an interest in real estate is disclaimed and the disclaimer is duly filed in accordance with the provisions of subdivision 4 of this section, the spouse of the disclaimant, if such spouse has consented to the disclaimer in writing, shall thereupon be automatically debarred from any spouse's statutory or common law right estate by curtesy or in dower or otherwise in such real estate to which such spouse, except for such disclaimer, would have been entitled.

Subdivision 8. This section shall not abridge the right of any person, apart from this section, under any existing or future statute or rule of law, to disclaim any interest or to assign, convey, release, renounce or otherwise dispose of any interest.

Subdivision 9. Any interest which exists on May 22, 1965 but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be disclaimed after May 22, 1965 in the manner provided herein. Added Laws 1967, c. 552, section 1.

501.211 *Disclaimer of interests passing by deed, assignment, under certain non-testamentary instruments or under certain powers of appointment*

Subdivision 1. As used in this section, unless otherwise clearly required by context:

(a) "Beneficiary" means and includes any person entitled, but for his disclaimer, to take an interest: as grantee; as donee; under any assignment or instrument of conveyance or transfer; by succession to a disclaimed interest, other than by will, intestate succession or through the exercise or nonexercise of a testamentary power of appointment; as beneficiary of an inter vivos trust or insurance contract; pursuant to the exercise or nonexercise of a nontestamentary power of appointment; as donee of a power of appointment created by a nontestamentary instrument; or otherwise under any nontestamentary instrument.

(b) ....

(c) ....

Subdivision 2. ....

Subdivision 3. Such disclaimer shall be filed at any time after the creation of the interest, but in all events within six months after the effective date of the nontestamentary instrument creating the interest ....

Subdivision 4. Such disclaimer shall be effective upon being filed in any district court of the State of Minnesota. ...

Subdivision 5. Unless otherwise provided in the nontestamentary instrument creating the interest with reference to the possibility of a disclaimer by the beneficiary, the interest disclaimed shall be distributed or otherwise be disposed of in the same manner as if the disclaimant had died immediately preceding the death or other event which causes him to become finally ascertained as a beneficiary and his interest to become indefeasibly fixed both in quality and quantity and, in any case, the disclaimer shall relate for all purposes to that date, whether filed before or after such death or other event. However, one disclaiming an interest in a non-residuary gift under a trust instrument or otherwise shall not be excluded, unless his disclaimer so provides, from sharing in a gift of the residue even though, through lapse, such residue includes the assets disclaimed.

Subdivision 6. The right to disclaim otherwise conferred by this section shall be barred if the beneficiary is insolvent ....

Subdivision 7. ....

Subdivision 8. ....

Subdivision 9. ....

TABLE OF HEADINGS AND SUBHEADINGS