

Problems with the Texas Disclaimer Statutes and How to Deal with Them

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Like many states, Texas enacted a disclaimer statute in the 1970s as tax-motivated disclaimers became more prevalent. Over the years, the disclaimer statute has grown and spawned a trust-related offspring. Because of this piecemeal development, the current Texas disclaimer statutes (Chapter 122 of the Estates Code and Section 112.010 of the Trust Code) are quirky and difficult to follow. They create traps for the user. There are disclaimers which are possible under federal tax law that are not expressly allowed by Texas law.

This paper discusses the background of disclaimers (only very briefly), the history of Texas's disclaimer statutes, some of the problems they cause, and some practice tips for addressing these problems. It also previews possible legislative changes, including a Texas version of the Uniform Disclaimer of Property Interests Act.

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1) Background

What if your Uncle Benny leaves you his toxic waste dump in his will? You don't want a toxic waste dump, but a probated will in Texas immediately vests title to you just as effectively as a

deed.¹ Fortunately, you do not have to accept a gift or devise you do not wish to receive. You can disclaim the property – say “I don’t want it” – and it will pass as if you predeceased the decedent.²

Disclaimers can be useful in several situations:

1. They provide a means to avoid receiving unwanted property like toxic waste dumps.
2. They provide a means to fix an estate plan (or create an estate plan) after someone dies. For example, a widow may disclaim her interest in community property of an intestate decedent, causing it to pass to the decedent’s children.
3. They often provide an opportunity for tax savings. For example, if a married couple has a taxable estate but did not do tax planning, the husband may disclaim a portion of the estate when the wife dies, causing the property (and the appreciation on the property) to pass to the children without being taxed on the husband’s death.³
4. They provide a means to protect property from creditors. If the parent of a deadbeat leaves property to a deadbeat which would be taken by his creditors, the deadbeat may disclaim the property, causing it to pass to his children rather than his creditors.

While useful, disclaimers also can lead to unexpected (and terrible) results:

1. There are specific rules which must be followed in order to make a disclaimer effective. Much of this paper discusses the problems these rules create and ways to eliminate them or reduce their effects. If the rules are not followed, the disclaimant is treated as having made an assignment of property, which has adverse gift tax and creditor-protection consequences.⁴
2. The disclaimant cannot direct the disclaimed property to a particular person. A disclaimer is a blunt instrument, not a scalpel. One merely disclaims or does not disclaim. The intestacy laws or the decedent’s will determine where the disclaimed property goes.⁵ Every statutory probate judge can (and will, given a chance) burn your

¹ Tex. Est. Code § 101.001(a).

² Tex. Est. Code § 122.101.

³ Portability has greatly reduced the need to use disclaimers in this way, but: (a) portability does not remove estate taxation on the appreciation in value of property which could be disclaimed; (b) it is necessary to file an estate tax return on the death of the first spouse to die to get portability; (c) there is no portability of the generation-skipping transfer tax exemption of the first spouse to die, while disclaiming property to skip persons permits the use of GST exemption; (d) the creditors of the surviving spouse may be able to reach the property, while they cannot if the property is disclaimed; and (e) portability could be lost to the family of the first spouse to die in some cases if the surviving spouse remarries. *See, generally*, Brian D. Cororve, “Portability in the New Age of Estate Planning,” State Bar of Texas 38th Annual Advanced Estate Planning and Probate Course (2014).

⁴ Tex. Est. Code § 122.102(b).

⁵ Tex. Est. Code § 122.101.

ears off with stories of people who come before the court saying things like “I wanted it to go to my mother, not my brother’s kids.”

3. The disclaimant may not achieve the creditor protection he or she desires. Disclaimers are not effective to qualify someone for Medicaid.⁶ Also, as discussed in more detail later in this paper, a disclaimer may work to protect assets from a creditor if the disclaimer occurs before the disclaimant files for bankruptcy, but it probably will not work if the disclaimer is made after the disclaimant files for bankruptcy.

This paper is not about how (and how not) to disclaim. It is about problems with the current disclaimer statutes in Texas and ways to avoid or address the problems.

2) History of Texas Disclaimer Statutes

Enacted in 1971 and amended by nine legislatures, Texas Probate Code Section 37A (“Section 37A”) has been modified in a piecemeal manner for over three decades. The result currently is codified in Texas Estates Code Chapter 122, subchapters A - D (“Chapter 122”).⁷ As discussed below, Chapter 122 can be difficult to administer for several reasons, including the fact that the effectiveness of a disclaimer depends on compliance with technicalities and that some of the provisions are inconsistent with federal law concerning qualified disclaimers for tax purposes.

a) History of Section 37A

Many of the idiosyncrasies of Chapter 122 can be explained through a review of the legislative history of Section 37A. Additionally, the legislative history provides insight about the administrative challenges that arose under different configurations of the disclaimer statute.

i) Enactment – 1971

Section 37A was enacted in 1971 as H.B. 728. The stated purpose of H.B. 728 was “to clarify the disclaimer law in Texas” because existing disclaimer law was “vague and unclear.”⁸ As originally enacted, Section 37A consisted of subsections (a) through (f). Fiduciary disclaimers were not addressed under the original statute.

The introductory language in the original statute included the following statement: “Failure to comply with the provisions hereof shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting

⁶ See Deborah Green & Stephen Jody Helman, *It Seemed Like a Good Idea at the Time: How Some Traditional Estate Planning Techniques Can Adversely Affect Qualifying for Government Benefits* at 30, 34th Annual Advanced Estate Planning & Probate Course (June 2010).

⁷ Section 112.010 of the Texas Trust Code governs the disclaimer of trust interests and also has been amended multiple times.

⁸ Bill Analysis, Committee on Judiciary, H.B. 728, 62nd Leg., R.S.

the disclaimer died prior to the decedent.”⁹ Accordingly, to be effective, a disclaimer had to adhere to the technical requirements of each of the six existing subsections, as applicable.

ii) Amendments

(1) 1977 Amendment: Coordination with Federal Tax Law

Section 37A was significantly revised in 1977 in response to the Tax Reform Act of 1976.¹⁰ The previous version of Section 37A permitted disclaimers only within six months after a transfer, but the 1977 amendment extended the deadline to nine months to conform with federal tax law.¹¹ Also, under the original language, a disclaimer could be revoked with judicial approval within nine months after the date of the transfer.¹² The 1977 amendment eliminated the judicial revocation procedure to be consistent with the requirement under the Internal Revenue Code that a qualified disclaimer must be irrevocable.¹³

The 1977 amendment also addressed the timing for disclaimers of future interests for the first time. Specifically, the following language was added to Section 37A(a): “a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property of interest is finally ascertained and his interest is indefeasibly vested.”¹⁴ This language has not changed significantly since 1977.¹⁵ The relevant provision of the Texas Trust Code concerning disclaimers of property from an inter vivos trust is almost identical.¹⁶

The definition of a qualified disclaimer for federal tax purposes uses the following language to define the permissible timing with respect to a disclaimer of a future interest: “not later than the date which is 9 months after . . . the day on which the transfer creating the interest in such person is made”¹⁷ The Treasury Regulations provide that “[w]ith respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death”¹⁸ Because of the discrepancy between Section 37A and federal law, a disclaimer of a future interest could be effective under Texas law while not constituting a qualified disclaimer for federal tax purposes.

⁹ Tex. Prob. Code § 37A (1971) (third sentence).

¹⁰ Bill Analysis, Committee on Judiciary, S.B. 791, 75th Leg., R.S.

¹¹ Texas Probate Code § 37A(a) (1977).

¹² Texas Probate Code § 37A(d) (1971).

¹³ See I.R.C. § 2518(b).

¹⁴ Texas Probate Code § 37A(a) (1977).

¹⁵ See Texas Estates Code § 122.055(b).

¹⁶ Texas Property Code § 112.010(c-2)(2) (memorandum of disclaimer must be delivered to the trustee “not later than the date that is nine months after the . . . date of the event that causes the taker of the interest to be finally ascertained and the interest to be indefeasibly vested.”).

¹⁷ I.R.C. § 2518(b)(2). See also *Jewett v. Comm’r*, 455 U.S. 305, 315-16 (1982).

¹⁸ Treas. Reg. § 25.2518-2(c)(3)(i).

For example, the disclaimer of a contingent remainder interest in a testamentary trust is subject to different deadlines for treatment as a qualified disclaimer under federal law or as an effective disclaimer under Texas law. In this situation, a qualified disclaimer of a contingent remainder interest that vests upon the death of the lifetime beneficiary must be made within nine months of the decedent's date of death (i.e. the "date on which the transfer creating the interest in [the disclaimant] is made").¹⁹ In contrast, a disclaimer pursuant to Texas law would be effective so long as it was made within nine months after the death of the lifetime beneficiary (i.e. the "event determining that the taker of the property is finally ascertained and his interest is indefeasibly vested").²⁰

Finally, the 1977 amendment included provisions permitting a personal representative to disclaim property on behalf of an estate or a ward with court approval and permitting an independent executor to disclaim property on behalf of an estate without court approval.²¹

(2) 1993 Amendment: Relation-Back Doctrine and Other Changes

The 1993 Legislature enacted several substantive changes to Section 37A. Prior to 1993, Section 37A provided that a valid disclaimer "shall be effective as of the death of decedent" but did not explicitly address the issue of whether a disclaimer might constitute a fraudulent transfer as to the disclaimant's creditors.²² In response to the court's holding in *Dyer v. Eckols*, the legislature added language to the initial part of Section 37A codifying the "relation-back" doctrine.

Specifically, the revised statute provided that "[a] disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant."²³ Further, the revised language specifically states that a disclaimer under Section 37A is not a "transfer" for the purposes of the Business & Commerce Code.

The relation-back doctrine significantly impacts the creditor protection of disclaimers not only under Texas law but also under federal bankruptcy law. Federal courts have held that, under Texas law, pre-petition disclaimers are effective in the bankruptcy context,²⁴ but post-petition disclaimers are not effective to remove property from the bankruptcy estate.²⁵

¹⁹ See *Id.*; *Jewett*, 455 U.S. at 305 (under former version of I.R.C. § 2518 requiring disclaimer "within a reasonable time after knowledge of the existence of the transfer", the Court held that "disclaimers of a contingent interest in a testamentary trust, though effective under local law, were not made until 33 years, and thus not 'within a reasonable time,' after the interest was created, the disclaimers were subject to a gift tax . . .").

²⁰ Note that the deadline would be the same in the case of a disclaimer of an interest in an irrevocable inter vivos trust pursuant to Tex. Prop. Code § 112.010.

²¹ Tex. Prob. Code § 37A (1977) (first sentence).

²² See *Dyer v. Eckols*, 808 S.W.2d 531, 533-34 (Tex. App.—Houston [14 Dist.] 1991, writ dismissed by agreement).

²³ Tex. Prob. Code § 37A (1993) (second sentence).

²⁴ *Matter of Simpson*, 36 F.3d 450, 453 (5th Cir. 1994).

²⁵ *In re Schmidt*, 362 B.R. 318, 326-27 (Bankruptcy W.D. Tex. 2007).

The 1993 amendment includes language that is applicable when the decedent's will directs the disposition of disclaimed property.²⁶ The 1993 amendment also clarified that a partial disclaimer by a decedent's surviving spouse does not constitute a disclaimer of any other transfer for the benefit of the surviving spouse.²⁷

(3) Other Amendments

Amendments in 1979, 1987, 1991, 1995, and 2011 revised provisions of Section 37A regarding the types of property that can be disclaimed, the disclaimer procedures applicable to charitable organizations or governmental agencies, and certain terminology. The 2007 amendment authorized court-approved disclaimers by an agent appointed under a durable power of attorney authorizing disclaimers.²⁸

Finally, the 2013 amendment added new Estates Code Section 122.107, which provided that a disclaimer by a delinquent child support obligor is ineffective.²⁹ The 2013 amendment also imposed an affirmative requirement that any memorandum of disclaimer include a statement regarding whether the disclaimant is a child support obligor.³⁰

(4) Estates Code Chapter 122

Starting on January 1, 2014, Estates Code Chapter 122 replaced Probate Code Section 37A. In the codification process, Section 37A, which consisted of 17 subsections, was reorganized into four subchapters under Chapter 122 of the Estates Code, with 21 total sections.

Despite the many technical additions and the sheer volume of the statute as amended, the current version of Chapter 122 retains one provision of the original statute nearly verbatim: "a disclaimer that does not comply with this chapter is ineffective . . . [except] as an assignment of the disclaimed property" As with the original six-subsection statute, Chapter 122 requires technical compliance with all formal requirements to qualify as an effective disclaimer.

3) Rescission of Disclaimer on Equitable Grounds

Section 122.004 of the Estates Code states that a disclaimer that is filed and served as provided in Chapter 122 is irrevocable.³¹ This provision is consistent with the requirement of irrevocability for a qualified disclaimer for federal tax purposes.³² Section 122.004 applies regardless of whether the disclaimant understands how the disclaimed property will be distributed.

²⁶ Tex. Prob. Code § 37A (1993) (third sentence).

²⁷ Tex. Prob. Code § 37A(f) (1993).

²⁸ Tex. Prob. Code § 37A(a) (2007).

²⁹ Tex. Est. Code § 122.107.

³⁰ Tex. Est. Code § 122.051(b).

³¹ Tex. Est. Code § 122.004.

³² See I.R.C. § 2518(b).

For example, in *Northwestern National Casualty Co. v. Doucette*,³³ the Fort Worth Court of Appeals held that an heir's disclaimer of her interest in her father's estate was effective and irrevocable despite the fact that she was mistaken about who the disclaimed property would pass to. The disclaimer recited the disclaimant's belief that the disclaimed property would pass to her mother, the decedent's surviving spouse. However, the disclaimant was unaware that the decedent had legally adopted another child, meaning that the adopted child would receive the disclaimed property. The *Doucette* court upheld the trial court's finding that the disclaimer was valid and irrevocable "in spite of the probable unintended results of the property distribution."³⁴

Similarly, in *Baker Botts v. Cailloux*,³⁵ the San Antonio Court of Appeals rejected a trial court's award of a constructive trust to compensate a disclaimant for an allegedly mistaken disclaimer. The disclaimant in *Cailloux* disclaimed her interest in her husband's residuary estate, causing significant assets to pass to designated charities. Several years later, after the disclaimant had been diagnosed with Alzheimer's disease, her agent under a durable power of attorney filed a lawsuit against the executor of the husband's estate and the attorneys who had represented the executor and the disclaimant for breach of fiduciary duty and other claims. The jury found that the executor and the law firm had breached their fiduciary duties to the disclaimant by failing to fully and fairly disclose all important information to her. In awarding damages of \$65 million against the defendants to be held in an "equitable trust" for the disclaimant's benefit, the trial court stated that it was exercising its equitable powers to "place [the disclaimant] in the position she would have held but for the breach of fiduciary duty . . . and had she not signed the disclaimer."³⁶

The *Cailloux* court determined that the trial court's decision was erroneous because there was no evidence that any breach of fiduciary duty had caused the disclaimant to disclaim her interest in property. Of greater relevance, the court stated that the trial court's imposition of an equitable trust would not have been appropriate even if causation had been proved at trial. This equitable remedy was not appropriate because the defendants did not hold legal title to the disclaimed property. Because the alleged wrongdoers were not the persons who received the property as a result of the disclaimer, the court stated that it was not within the court's equitable powers to order the defendants to return the disclaimant to her pre-disclaimer position.

In contrast to *Doucette and Cailloux*, in at least one case a Texas court has found that a disclaimer may be deemed ineffective if the disclaimant executed the disclaimer in reliance on a factual mistake. In *McCuen v. Huey*,³⁷ the potential disclaimant executed an affidavit filed with the Alabama court in which his brother's estate was being administered. The affidavit recited

³³ *Nw. Nat. Cas. Co. v. Doucette*, 817 S.W.2d 396 (Tex. App.—Fort Worth 1991, writ denied).

³⁴ *Id.* at 399.

³⁵ *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied).

³⁶ *Id.* at 733.

³⁷ *McCuen v. Huey*, 255 S.W.3d 716, 722 (Tex. App.—Waco 2008, no pet.).

“disclaimant’s” belief that the specific gift from the decedent to the disclaimant under the will had been adeemed and that he consented to the distribution of all property of the decedent to the residuary beneficiary. Contrary to this belief, the decedent had owned the gifted property (Texas real property) at death.

The heirs of the residuary beneficiary argued that the affidavit should be treated as a disclaimer for purposes of determining title to the Texas real property. However, the court concluded that the affidavit was not an effective disclaimer because “to be effective, a disclaimer of an inheritance is enforceable against the maker only when it has been made with adequate knowledge of that which is being disclaimed.”³⁸

Note that although the *McCuen* decision was issued in 2008, the purported disclaimer was executed in the 1960s, prior to the enactment of Section 37A. Further, although the *McCuen* court referenced Section 37A in its discussion of the potential disclaimer, it reached its conclusion without considering whether the affidavit satisfied the technical requirements for a statutory disclaimer. Finally, the result in *McCuen* has not been cited in any case decided under Section 37A or Chapter 122. Accordingly, it seems unlikely to be followed in a case to determine if an effective disclaimer under Chapter 122 could be revoked or deemed ineffective based on a mistake of fact, but it raises the possibility that revocation could be available.

4) Problems with the Texas Disclaimer Statutes and Practice Tips for Dealing with Them.

a) ***Must meet all requirements to be effective.*** Section 122.102 of the Estates Code provides that “a disclaimer which does not comply with this chapter is ineffective” except as an assignment of property. There are 21 sections of Chapter 122 dealing with disclaimers and many impose requirements. In order for her disclaimer to be effective (a prerequisite to being a qualified disclaimer for federal tax law purposes), the disclaimant must comply with all of these requirements:

- (1) The disclaimer must be in writing and notarized.³⁹
- (2) It must include a statement regarding whether the disclaimant is a “child support obligor” whether the disclaimant has minor children or not.⁴⁰
- (3) It must be filed in the decedent’s probate proceeding,⁴¹ except in some cases it must be filed with the county clerk of the county of the decedent’s residence,⁴² filed with the county clerk of the county in which real property owned by a non-

³⁸ *Id.* at 731.

³⁹ Tex. Est. Code §122.051(a).

⁴⁰ Tex. Est. Code § 122.051(b).

⁴¹ Tex. Est. Code §122.052.

⁴² Tex. Est. Code § 122.053.

resident decedent is located,⁴³ within nine months of the decedent's death,⁴⁴ except in the case of a future interest⁴⁵ and except if the disclaimant is a charity.⁴⁶

- (4) In addition to the filing requirement, it must be delivered in person to or mailed by registered or certified mail to **and received by** the personal representative of the decedent's estate within nine months of the decedent's death,⁴⁷ except in the case of a future interest⁴⁸ and except if the disclaimant is a charity.⁴⁹
- (5) The disclaimant must not have "previously accepted the property by taking possession or exercising dominion and control of the property as a beneficiary".⁵⁰

There are similar, but slightly different, requirements for a beneficiary to disclaim an interest in a trust (delivered to the trustee,⁵¹ or, if there is no trustee, to the transferor of the interest of his legal representative⁵²).

These requirements are unnecessarily burdensome. For example:

- It should not be necessary to both **file** with the court **and deliver** to the executor in order to make the disclaimer effective.
- It should be possible to send the notice to the executor by courier or delivery service, but the statute requires delivery in person or registered or certified mail.
- It should be sufficient if the notice is **mailed** to the executor by the deadline – the disclaimant should not be required to assure that it is received by the executor by the deadline.
- Filing with the wrong clerk's office or in the real property records rather than the probate records could render the disclaimer ineffective.
- And, of course, it is ridiculous that a disclaimer may be ineffective simply because it omits a statement that the disclaimant is not a "child support obligor."⁵³

⁴³ Tex. Est. Code § 122.054.

⁴⁴ Tex. Est. Code § 122.055(a).

⁴⁵ Tex. Est. Code § 122.055 (b).

⁴⁶ Tex. Est. Code § 122.055(c).

⁴⁷ Tex. Est. Code § 122.056(a)(1).

⁴⁸ Tex. Est. Code § 122.056(a)(2).

⁴⁹ Tex. Est. Code § 122.056(b).

⁵⁰ Tex. Est. Code § 122.104.

⁵¹ Tex. Prop. Code § 112.010(c-2)(2).

⁵² Tex. Prop. Code § 112.010(c-2)(2).

Here are some practice tips to avoid these traps:

- ***Start early.*** Because of the arcane rules, the disclaimer should be ready and signed days or weeks before the deadline. If necessary, have the disclaimant sign the disclaimer and instruct her attorney to hold it in escrow until authorized to release it.
 - ***Line up the personal representative.*** Because receipt by the personal representative is required by the deadline, make sure the personal representative knows the disclaimer is coming.
 - ***Have the personal representative acknowledge receipt of the disclaimer on its face.*** The written memorandum of disclaimer should have a place for the personal representative to sign and date his or her receipt.
 - ***Don't rely on the mailbox rule to meet the filing deadline.*** Since Section 122.055 of the Estates Code says that the disclaimer must be “filed” by the deadline and does not say that it must be “received” by the deadline, the mailbox rule probably applies. This would mean that mailing it to the clerk (or e-filing) by the deadline would meet the deadline. However, this is not clear, and the stakes are too high. So, make sure the memorandum of disclaimer is received by the clerk by the deadline and get a file-stamped copy or e-filing acknowledgment to prove it.
 - ***Always mail it and track down the green card.*** Since mailing by certified or registered mail is an acceptable means of notice, be sure to use it even if the executor is personally signing the memorandum of disclaimer to acknowledge receipt.
 - ***Follow an established form, and make sure it has the “child support obligor” language in it.*** This is no place to do freestyle drafting.
 - ***Don't forget the notary.***
- b) ***The Texas deadlines don't match up perfectly with the tax deadlines.*** The deadlines in the Texas statutes clearly were based on the nine-month deadline for qualified disclaimers for tax purposes. However, as discussed above, the Texas deadlines do not match the tax deadlines perfectly.⁵⁴
- c) ***Disclaimer by a trustee.*** What happens if a trustee disclaims property which otherwise would pass into a trust? Will the property pass into the trust? In TAM 8549004, which appears to apply Texas law, the Internal Revenue Service concluded that state law did not

⁵³ This requirement was added in 2013 and is almost certain to be addressed in 2015. The requirement may be useful in a few child support cases, but failing to include the statement in the 95% of the cases where child support is not an issue should not make the disclaimer ineffective.

⁵⁴ See discussion at notes 15-18.

permit a trustee to disclaim property to avoid having the property pass into the trust. This was based on three factors:

- i) The trustee, as a fiduciary, had no authority to unilaterally renounce a portion of the trust property on behalf of beneficial interests.
- ii) The beneficiaries, holding equitable title to trust property, were entitled to have the properties distributed to the trust.
- iii) The state's disclaimer statute did not broaden a trustee's function so as to empower the trustee to unilaterally disclaim property. Rather, it could be used only by persons with beneficial interests.

Texas courts have not ruled on this issue, so it is not clear if a Texas court would agree with this analysis.⁵⁵

If the trustee's disclaimer was accompanied by the beneficiaries' disclaimer of the property, the disclaimers should be effective to keep the property out of the trust.⁵⁶ Further, if the trustee asks a court to approve the disclaimer, the per-se breach of fiduciary duty issue can be avoided. Section 115.001(a) of the Texas Trust Code permits a court to relieve a trustee from any duty imposed by the trust instrument or by law. Section 112.054(a) of the Texas Trust Code permits a court to direct or permit the trustee to do acts that are not authorized or are forbidden by the terms of the trust.

Still, this is a very long way around the problem. It seems likely that a different result would be reached under the reasoning in TAM 8549004 if state law expressly permitted a trustee to disclaim without court approval and if the law clearly provided that the result of the disclaimer would be that the disclaimed property does not pass into the trust.⁵⁷

- d) *Disclaimer of survivorship property.*** Federal law permits a disclaimer of survivorship property.⁵⁸ Texas law defines a "beneficiary" who is permitted to disclaim as including persons receiving property as a result of the death of another person by community property with right of survivorship, joint tenancy with right of survivorship or by survivorship agreement,⁵⁹ but Chapter 122 does not state what portion of the survivorship property is subject to the right to disclaim.

⁵⁵ See E. Diane Thompson, Michael J. Cenatiempo, *Practical Look at Disclaimers: Does Phaseout of Exemptions and Rate Cuts in New Law Make Disclaimers the Technique of Choice for Most? Risks and Rewards (Including Conflicts and Avoiding Claims by Under-Represented Disclaimants)* at 57-61, 26th Annual Advanced Estate Planning & Probate Course (June 2002).

⁵⁶ See PLRs 8729008, 8804004 and 9745008.

⁵⁷ Section 8 of the Uniform Disclaimer of Property Interests Act so provides.

⁵⁸ Treas. Reg. § 25.2518-2(c)(4).

⁵⁹ Tex. Est. Code § 122.001.

5) Possible Legislative Changes

The Real Estate, Probate and Trust Law Section of the State Bar of Texas has included a Texas version of the Uniform Disclaimer of Property Interests Act in its 2015 legislative package. Many things could happen to keep this legislation from passing.

A copy of the current draft of the legislation is attached. The authors would appreciate feedback about this draft and suggestions for changes.

Here are some highlights of this legislation:

- a) ***History of the Uniform Act.*** The current version was originally drafted in 1999 and was last updated in 2010. Eighteen states have enacted versions of the 1999 act.
- b) ***Key features of the Uniform Act.***
 - i) ***There is no state-law time limit for disclaimers.*** Prior to 1977, federal tax law did not have a hard-and-fast nine-month deadline. Like most states, Texas reacted to the 1977 tax legislation by adopting a nine-month deadline in its statute. However, there is no reason why disclaimers under state law need to be tied to that deadline. As noted above, problems arise because the Texas nine-month deadline does not match perfectly with the tax-law deadline. Those problems are eliminated if the Texas statute has no deadline. This is even more relevant in light of the recent increase in the applicable exclusion amount for federal estate tax purposes. Fewer and fewer disclaimers will be tax-based, so there is less and less of a reason to tie Texas's statute to the tax law deadline.
 - ii) ***There are less restrictive technical requirements.*** For example, the Uniform Act permits delivery to the executor to suffice. It is not necessary also to file a disclaimer in the probate proceeding.
 - iii) ***Different types of property are specifically addressed.*** For example, there are specific provisions regarding survivorship property and beneficiary designation property which are missing in the Texas statutes.
 - iv) ***Expansive fiduciary disclaimers.*** The Uniform Act more clearly addresses the disclaimer of interests and powers by fiduciaries. It specifically permits a trustee to disclaim property, causing the property not to pass into the trust. The statute makes clear that, in deciding to disclaim, the fiduciary is subject to fiduciary duties.
 - v) ***There is just one statute.*** The uniform act addresses disclaimers of all types of property. There no longer would be separate Estates Code and Trust Code statutes.

6) Conclusion

Disclaimers can be effective tools in planning and administration. Texas's statutes cause confusion and create unnecessary obstacles, but the confusion and most of these obstacles can be overcome with careful attention to detail. Legislation on the horizon may make disclaimers easier to use in the future.

This act is based on the Uniform Disclaimer of Property Interests Acts. To assist in understanding, NCCUSL’s comments to the uniform act are included in *italics*.

By: _____

___ B. No. _____

A BILL TO BE ENTITLED

AN ACT

relating to disclaimers.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 122, Subchapters A, B, C, and D of the Estates Code are repealed.

SECTION 2. Chapter 122, Subchapter A is added to the Estates Code, to read as follows:

SUBCHAPTER A. DISCLAIMERS

Sec. 122.001 [UDPIA §1]. SHORT TITLE. This chapter may be cited as the “Texas Uniform Disclaimer of Property Interests Act.”

NCCUSL’S PREFATORY NOTE

The Uniform Disclaimer of Property Interests Acts (UDPIA) replaces three Uniform Acts promulgated in 1978 (Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and Uniform Disclaimer of Transfers under Nontestamentary Instruments Act) and will be incorporated into the Uniform Probate Code to replace current UPC § 2-801. The new Act is the most comprehensive disclaimer statute ever written. It is designed to allow every sort of disclaimer, including those that are useful for tax planning purposes. It does not, however, include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer. In addition, in almost all jurisdictions disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant’s creditors. In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property and the effect of that refusal on the power or interest while leaving the effect of the refusal itself to other law. Section 13(e) explicitly states that a disclaimer may be barred or limited by law other than the Act.

The decision not to include a specific time limit—to “decouple” the disclaimer statute from the time requirement applicable to a “qualified disclaimer” under IRC § 2518—is also designed to reduce confusion. The older Uniform Acts and almost all the current state statutes (many of which are based on those Acts) were drafted in the wake of the passage of IRC § 2518 in 1976. That provision replaced the “reasonable time” requirement of prior law with a requirement that a

disclaimer must be made within nine months of the creation of the interest disclaimed if the disclaimer is to be a “qualified disclaimer” which is not regarded as transfer by the disclaimant. The statutes that were written in response to this new provision of tax law reflected the nine month time limit. Under most of these statutes (including the older Uniform Acts and former Section 2-801) a disclaimer must be made within nine months of the creation of a present interest (for example, as disclaimer of an outright gift under a will must be made within nine months of the decedent’s death), which corresponds to the requirement of IRC § 2518. A future interest, however, may be disclaimed within nine months of the time the interest vests in possession or enjoyment (for example, a remainder whether or not contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary). The time limit for future interests does not correspond to IRC § 2518 which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest’s creation, no matter how contingent it may then be. The nine-month time limit of the existing statutes really is a trap. While it superficially conforms to IRC § 2518, its application to the disclaimer of future interests does not. The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law.

The elimination of the time limit is not the only change from current statutes. The Act abandons the concept of “relates back” as a proxy for when a disclaimer becomes effective.

Instead, by stating specifically when a disclaimer becomes effective and explicitly stating in Section 5(f) that a disclaimer “is not a transfer, assignment, or release,” the Act makes clear the results of refusing property or powers through a disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not been explicitly addressed in previous statutes. The Act provides detailed rules for the disclaimer of interests in jointly held property (Section 7). Such disclaimers have important uses especially in tax planning, but their status under current law is not clear. Furthermore, although current statutes mention the disclaimer of jointly held property, they provide no details. Recent developments in the law of qualified disclaimers of jointly held property make fuller treatment of such disclaimers necessary. Section 8 addresses the disclaimer by trustees of property that would otherwise become part of the trust. The disclaimer of powers of appointment and other powers not held in a fiduciary capacity is treated in Section 9 and disclaimers by appointees, objects, and takers in default of exercise of a power of appointment is the subject of Section 10. Finally, Section 11 provides rules for the disclaimer of powers held in a fiduciary capacity.

Sec. 122.002 [UDPIA §2]. DEFINITIONS. In this chapter:

(1) “Disclaimant” means:

(a) the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;

(b) the estate to which a disclaimed interest or power would have passed had the disclaimer not been made by the personal representative of the estate;

(c) the ward to whom a disclaimed interest or power would have passed had the disclaimer not been made by the guardian of the ward’s estate; or

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(d) the trust into which a disclaimed interest or power would have passed had the disclaimer not been made by the trustee of the trust.

(2) “Disclaimed interest” means the interest that would have passed to the disclaimant had the disclaimer not been made.

(3) “Disclaimed power” means the power that would have been possessed by the disclaimant had the disclaimer not been made.

(3) “Disclaimer” means the refusal to accept an interest in or power over property.

(4) “Fiduciary” means a personal representative, a trustee, an agent acting under a power of attorney, or any other person authorized to act as a fiduciary with respect to the property of another person.

(5) “Person” means an individual, corporation, business trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(6) “Personal representative” has the meaning given it in Sections 22.031 and 1002.028 of the Estates Code.

(7) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a State.

(8) “Survivorship property” means property held in the name of two or more persons under an arrangement in which, upon the death of one of the persons, the property shall pass to and be vested in the other person or persons and includes:

(a) Property held by agreement described in Section 111.001 of the Estates Code;

(b) Property held by community property survivorship agreement described in Section 112.001 of the Estates Code; and

(c) Property in a joint account held by agreement described in Section 113.151 of the Estates Code.

(9) “Trust” means a trust described in Section 111.003 of the Texas Property Code.

NCCUSL Comment

The definition of “disclaimant” (subsection (1)) limits the term to the person who would have received the disclaimed property or power if the disclaimer had not been made. The disclaimant is not necessarily the person making the disclaimer, who may be a guardian, custodian, or other fiduciary acting for the disclaimant or the personal representative of the disclaimant’s estate.

The term “disclaimed interest” (subsection (2)) refers to the subject matter of a disclaimer of an interest in property and provides a compact term the use of which simplifies the drafting of Section 6.

The definition of “disclaimer” (subsection (3)) expands previous definitions. Prior Uniform Acts provided for a disclaimer of “the right of succession to any property or interest therein” and former UPC Section 2-801 referred to “an interest in or with respect to property or an interest therein.” These previously authorized types of disclaimers are continued by the present language referring to “an interest in . . . property.” The language referring to “power over property” broadens the permissible scope of disclaimers to include any power over property that gives the power-holder a right to control property, whether it be cast in the form of a power of appointment or a fiduciary’s management power over property or discretionary power of distribution over income or corpus.

Under the Act, a “fiduciary” (defined in subsection (4)) is given the power to disclaim except where specifically prohibited by state law or by the document creating the fiduciary relationship. See Section 5(b).

The term “jointly held property” (subsection (5)) includes not only a traditional joint tenancy but also other property that is “held,” but may not be “owned,” by two or more persons with a right of survivorship. One form of such property is a joint bank account between parties who are not married to each other which, under the laws of many States, is owned by the parties in proportion to their deposits. (See UPC § 6-211(b).) This “holding” concept, as opposed to “owning,” may also be true with joint brokerage accounts under the law of some States. See Treas. Regs. § 25.2518-2(c)(4).

*The term “trust” (subsection (8)) means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of “trust” is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust is created. Commercial trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165*

(1997).

Sec. 122.003 [UDPIA §3]. SCOPE. This chapter applies to disclaimers of any interest in or power over property, whenever created.

Sec. 122.004 [UDPIA §4]. CHAPTER SUPPLEMENTED BY OTHER LAW. (a) Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.

(b) This chapter does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this chapter.

NCCUSL Comment

The supplementation of the provisions of the Act by the principles of law and equity in Section 2-1104(a) is important because the Act is not a complete statement of the law relating to disclaimers. For example, Section 2-1105(b) permits a trustee to disclaim, yet the disclaiming trustee must still adhere to all applicable fiduciary duties. See Restatement (Third) of Trusts §86 Reporter's Notes to cmt. f. Similarly, the provisions of Section 2-1113 on bars to disclaiming are subject to supplementation by equitable principles. See Badouh v. Hale, 22 S.W.3d 392 (Tex. 2000) (invalidating a disclaimer of an expectancy as contrary to equity, on the ground that the putative disclaimant had earlier pledged it to a third party).

Not only are the provisions of the Act supplemented by the principles of law and equity, but under Section 2-1104(b) the provisions of the Act do not preempt other law that creates the right to reject an interest in or power over property. The growth of the law would be unduly restricted were the provisions of the Act completely to displace other law.

Historical Note. This Comment was added in 2010.

Sec. 122.005 [UDPIA §5(a)]. POWER TO DISCLAIM BY PERSON OTHER THAN A FIDUCIARY. A person other than a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person other than a fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

Sec.122.006 [UDPIA §5(b)]. POWER TO DISCLAIM BY A PERSON DESIGNATED TO SERVE AS OR SERVING AS FIDUCIARY. Except to the extent the right to disclaim of a person designated to serve or serving as a fiduciary is expressly restricted or limited by another

statute of this State or by the instrument creating the fiduciary relationship, the person may disclaim, in whole or part, any interest in or power over property, including a power of appointment, acting in a representative capacity. A person designated to serve or serving as a fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

Sec. 122.007 [UDPIA §5(b)]. POWER TO DISCLAIM BY FIDUCIARY ACTING IN A FIDUCIARY CAPACITY. (a) Subject to the limitations of subsection (b):

(1) Except to the extent the fiduciary's right to disclaim is expressly restricted or limited by another statute of this State or by the instrument creating the fiduciary relationship, a fiduciary acting in a fiduciary capacity may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, which would have passed to the ward, estate, trust, or principal with respect to which the fiduciary was acting had the disclaimer not been made.

(2) A fiduciary acting in a fiduciary capacity may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(3) Except for a disclaimer by a personal representative subject to court supervision or a disclaimer by the trustee of a guardianship management trust described in Chapter 1301 of the Estates Code, a disclaimer by a fiduciary acting in a fiduciary capacity does not require court approval to be effective unless the instrument that created the fiduciary relationship requires court approval.

(4) In the absence of a court-appointed guardian, without court approval, a natural guardian as defined in Section 1104.051 of the Estates Code may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power

of appointment, which the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer.

(b) A disclaimer by a fiduciary acting in a fiduciary capacity must be compatible with the fiduciary's fiduciary obligations, unless a court of proper jurisdiction otherwise orders.

Sec. 122.008 [UDPIA §5(c), (d), (e) and (f)]. GENERAL REQUIREMENTS; WHEN IRREVOCABLE. (a) To be effective, a disclaimer must be in writing, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 122.015.

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

(c) A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 122.015 or when it becomes effective as provided in Sections 122.009 through 122.014, whichever occurs later.

(d) A disclaimer made under this chapter is not a transfer, assignment, or release.

NCCUSL Comment

Subsections (a) and (b) give both persons (as defined in Section 2(6)) and fiduciaries (as defined in Section 2(4)) a broad power to disclaim both interests in and powers over property. In both instances, the ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. (In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (a) continues the provisions of current law by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on

a person. This provision follows from the principle behind all disclaimers – no one can be forced to accept property – and extends that principle to powers over property.

This Act also gives fiduciaries broad powers to disclaim both interests and powers. A fiduciary who may also be a beneficiary of the fiduciary arrangement may disclaim in either capacity. For example, a trustee who is also one of several beneficiaries of a trust may have the power to invade trust principal for the beneficiaries. The trustee may disclaim the power as trustee under Section 11 or may disclaim as a holder of a power of appointment under Section 9. Subsection (b) also gives fiduciaries the right to disclaim in spite of spendthrift or similar restrictions given, but subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the creator of a trust or other arrangement creating a fiduciary relationship should be able to prevent a fiduciary accepting office under the arrangement from altering the parameters of the relationship. This reasoning also applies to fiduciary relationships created by statute such as those governing conservatorships and guardianships. Subsection (b) therefore does not override express restrictions on disclaimers contained in the instrument creating the fiduciary relationship or in other statutes of the State.

Subsection (c) sets forth the formal requirements for a disclaimer. The definitions of “record” and “signed” in this subsection are derived from the Uniform Electronic Transactions Act § 102. The definitions recognize that a disclaimer may be prepared in forms other than typewritten pages with a signature in pen. Because of the novelty of a disclaimer executed in electronic form and the ease with which the term “record” can be confused with recording of documents, the Act does not use the term “record” in isolation but refers to “writing or other record.” The delivery requirement is set forth in Section 12.

Subsection (d) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. (It must be noted, however, that a disclaimer by a devisee or donee which seeks to “carve out” a remainder or life estate is not a “qualified disclaimer” for tax purposes, Treas. Reg. § 25.2518-3(b).)

Subsection (e) makes the disclaimer irrevocable on the later to occur of (i) delivery or filing or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest. A disclaimer must be “irrevocable” in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time significant for tax purposes, a disclaimer under this Act will always meet the irrevocability requirement for tax qualification. The interaction of the Act and the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. *G creates a revocable lifetime trust which will terminate on G’s death and distribute the trust property to G’s surviving descendants by representation. G’s son, S, determines that he would prefer his share of G’s estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G (see Section 12(e)(3)). The disclaimer is not irrevocable at that time, however, because it will not become effective until G’s death when the trust becomes irrevocable (see Section*

6(b)(1)). Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

Sec. 122.009 [UDPIA §6]. DISCLAIMER OF INTEREST IN PROPERTY. (a) In this section:

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

(2) "Time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(b) Except for a disclaimer governed by Section 122.010 or 122.011, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

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

(3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in

subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

NCCUSL Comment

Subsection (a) defines two terms that are used only in Section 6. The first, "future interest," is used in Section 6(b)(4) in connection with the acceleration rule.

The second defined term, "time of distribution," is used in determining to whom the disclaimed interest passes (see below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment

the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, if B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

Section 6(b)(1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts on this subject, but with different wording. Previous Acts have stated that the disclaimer "relates back" to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer "relates back," the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit. This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. Sections 2(3) and 5(f) taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (b)(1) of this section makes the disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the statute, however, prevents the legislatures or the courts from limiting the effect of the disclaimer as refusal doctrine in specific situations or generally. See the Comments to Section 13 below.

Section 6(b)(2) allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars (\$10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to...." is such a provision.

Sections 6(b)(3)(B), (C), and (D) apply if Section 6(b)(2) does not and if the disclaimant is an individual. Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made (Section 2(1)), these paragraphs would apply to disclaimers by fiduciaries on behalf of individuals. The general rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 6(a)(2). The application of this general rule to present interests given to named individuals is illustrated by the following examples:

Example 1(a). *T's will devised "ten thousand dollars (\$10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has*

lapsed. If the State’s antilapse statute applies, it will direct the passing of the disclaimed interest. Under UPC § 2-603(b)(1), for example, B’s descendants who survive T by 120 hours will take the devise by representation.

Example 1(b). *T’s will devised “ten thousand dollars (\$10,000) to my friend, F.” F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members. Under UPC § 2-603(b), which saves from lapse only gifts made to certain relatives, the devise would lapse and pass through the residuary clause of the will.*

Example 1(c). *T’s will devised “ten thousand dollars (\$10,000) to my brother, B, but if B does not survive me, to my children.” If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T’s children will dispose of the devise.*

Present interests are also given to the surviving members of a class or group of persons. Perhaps the most common example of this gift is a devise of the testator’s residuary estate “to my descendants who survive me by representation.” Under the system of distribution among multi-generational classes used in the Uniform Probate Code § 2-709 and similar statutes, division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). *T’s will devised “the residue of my estate to my descendants who survive me by representation.” T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed. Section 6(b)(3)(B) provides that the disclaimed interest passes as if S had predeceased T. If Section 6(b)(3) stopped there, S’s children would take one-half of the disclaimed interest and D would take the other half under every system of “representation” that commonly exists. S’s disclaimer should not have that effect, however, but should pass what he would have taken to his children. Section 6(b)(3)(C) solves the problem. It provides that the entire disclaimed interest passes only to S’s descendants because they would share in the interest had S truly predeceased T.*

The provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). *Assume the same facts as Example 2(a), but D has predeceased T. T is survived, therefore, by S, S’s two children, and D’s child. S disclaims. Again, the disclaimed interest is one-half of the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of S would have shared equally in T’s residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed interest, S’s two children would each receive one-third of the one-half while D’s child would receive one-third of the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. Section 6(b)(3)(C) again applies to insure that S’s children receive one-half of the residue, exactly the interest S would have received but for the disclaimer.*

The disclaimer of future interests created by will leads to a different problem. The effective

date of the disclaimer of the future interest, the testator's death, is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. *Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts and former UPC § 2-801, the interest would have passed as if Son had predeceased Father. A problem could arise if, at Mother's death, one or more of S's children living at that time were born after Father's death. It would be possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.*

The problem illustrated in Example 3 is solved by Section 6(b)(3)(B). The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half of the trust property, at Mother's death. Under paragraph (3)(B) Son is deemed to have died immediately before Mother's death even though under Section 6(b)(1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property S would have received and, as Examples 2(a) and 2(b) show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

Future interests may or may not be conditioned on survivorship. The following examples illustrate disclaimers of future interests not expressly conditioned on survival.

Example 4(a). *G's revocable trust directs the trustee to pay "ten thousand dollars (\$10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. B is deemed to have predeceased G because it is at G's death that the interest given B will come into possession and enjoyment. Had B not disclaimed he would have received \$10,000 at that time. The recipient of the disclaimed interest will be determined by the law that applies to gifts of future interests to persons who die before the interest comes into possession and enjoyment. Traditional analysis would regard the gift to B as a vested interest subject to divestment by G's power to revoke the trust. So long as G has not revoked the gift, the interest would pass through B's estate to B's successors in interest. Yet If B's successors in interest are selected by B's will, the disclaimer cannot be a qualified disclaimer for tax purposes. This problem does not arise in a jurisdiction with UPC § 2-707(b), because the interest passes not through B's estate but rather to B's descendants who survive G by 120 hours by representation. Because the antilapse mechanism of UPC § 2-707 is not limited to gifts to relatives, a disclaimer by a friend rather than a brother would have the same result. For jurisdictions without UPC § 2-707, however, Section 6(b)(3)(D) provides an equivalent solution: a disclaimed interest that would otherwise pass through B's estate instead passes to B's descendants who survive G by representation.*

Example 4(b). *G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease the distribution date, which is G's death. The traditional analysis applies exactly as it does in Example 4(a). The only condition on A's gift would be G's not revoking the trust. A is not explicitly required to survive G. (See First National Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989).) The interest would pass to A's successors in interest. If those successors are selected by A's will, the disclaimer cannot be a qualified disclaimer for tax purposes. UPC § 2-707(b) provides that A's interest passes by representation to A's descendants who survive G by 120 hours. For jurisdictions without UPC § 2-707, Section 6(b)(3)(D) reaches the same result.*

Example 4(c). *G conveys land "to A for life, remainder to B." B disclaims immediately after the conveyance. Traditional analysis regards B's remainder as vested; it is not contingent on surviving A. This classification is unaffected by whether or not the jurisdiction has adopted UPC § 2-707, because that section only applies to future interests in trust; it does not apply to future interests not in trust, such as the one in this example created directly in land. To the extent that B's remainder is transmissible through B's estate, B's disclaimer cannot be a qualified disclaimer for tax purposes. Section 6(b)(3)(D) resolves the problem: a disclaimed interest that would otherwise pass through B's estate instead passes as if it were controlled by UPC §§ 2-707 and 2-711. Because UPC § 2-707 only applies to future interests in trust, jurisdictions enacting Section 6 should enact Section 6(b)(3)(D) whether or not they have enacted UPC § 2-707.*

Section 6(b)(3)(A) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because Section 8 applies to disclaimers by trustees of property that would otherwise pass to the trust, Section 6(b)(3)(A) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 2(6). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Section 6(b)(4) continues the provision of prior Uniform Acts and UPC § 2-801 on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Section 6(b)(4) are illustrated by the following examples.

Example 5(a). *Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (see Examples 1(a), (b), and (c)), and, therefore, the time of distribution is Father's death. If at the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.*

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaims her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

2006 Technical Amendment. By technical amendment, subsection (b)(3)(D) was added to resolve the problem of future interests transmissible through the disclaimant's estate. The Comment was correspondingly amended. For the prior version, see 8A U.L.A. 170-174 (2003).

Legislative Note. Because UPC § 2-707 only applies to future interests in trust, and does not apply to legal future interests, states that have enacted Section 6 should enact the 2006 technical amendments whether or not they have enacted UPC § 2-707.

Sec. 122.010 [UDPIA §7]. DISCLAIMER OF RIGHTS IN SURVIVORSHIP PROPERTY.

(a) Upon the death of a holder of survivorship property, a surviving holder may disclaim, in whole or part:

(1) If the survivorship property is held by community property survivorship agreement described in Section 112.001 of the Estates Code, one-half of the survivorship property;

(2) If the survivorship property is held in a joint account held by agreement described in Section 113.151 of the Estates Code, the greater of:

(i) a fractional share of the property determined by dividing the number one by the number of holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(ii) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

(3) A disclaimer under subsection (a) takes effect as of the death of the holder of survivorship property to whose death the disclaimer relates.

(4) An interest in survivorship property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

NCCUSL Comment

The various forms of ownership in which “joint property,” as defined in Section 1(5), can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable during the life of the joint tenants (Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir 1986), McDonald v. Commissioner, 853 F.2d 1494 (9th Cir 1988), Dancy v. Commissioner, 872 F.2d 84 (4th Cir 1989).) On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC § 2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, § 25.2518-2(c)(4)(i) allow a surviving joint tenant or tenant by the entirety to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (1/2 where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988 where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse’s gross estate under IRC § 2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy’s creation.

The amended final Regulations, § 25.2518-2(c)(4)(iii) also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor’s contributions, and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

These developments in the tax law of disclaimers are reflected in subsection (a). The subsection allows a surviving holder of jointly held property to disclaim the greater of the accretive share, the part of the jointly held property which augments the survivor’s interest in the property, and all of the property that is not attributable to the disclaimant’s contribution to the jointly held property. In the usual joint tenancy or tenancy by the entirety between husband and wife, the survivor will always be able to disclaim one-half of the property. If the disclaimer conforms to the

requirements of IRC § 2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. (Note that under subsection (a)(1) A can disclaim up to 50% of the account on B's death because there are two joint account holders, but the disclaimer would not be fully tax qualified. As previously noted, a tax qualified disclaimer is limited to 40% of the account.) If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC § 2518 are met.

Subsection (b) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (c) provides that the disclaimed interest passes as if the disclaimant had predeceased the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed. If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (a)(1) results in one-half of the home passing through the decedent's estate. The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount.

In a multiple holder joint property arrangement, the disclaimed interest will belong to the other joint holder or holders.

Example 1. *A, B, and C make equal contributions to the purchase of Blackacre, to which they take title as joint tenants with right of survivorship. On partition each would receive 1/3 of Blackacre and any of them could convert his or her interest to a 1/3 tenancy in common interest by unilateral severance (which, of course, would have to be accomplished in accordance with state law). On A's death, B and C may each, if they wish, disclaim up to 1/3 of the property under 2-1107(a)(1). Should one of them disclaim the full 1/3, the disclaimant will be deemed to predecease A.*

Assume that B so disclaims. With respect to the 1/3 undivided interest that now no longer belongs to A the only surviving joint holder is C. C therefore owns that 1/3 interest as tenant in common with the joint tenancy. Should C predecease B, the 1/3 tenancy in common interest will pass through C's estate and B will be the sole owner of an undivided 2/3 interest in Blackacre as the survivor of the joint tenancy. Should B predecease C, C will be the sole owner of Blackacre in fee simple absolute.

Alternatively, assume that both B and C make valid disclaimers after A's death. They are both deemed to have predeceased A, A is the sole survivor of the joint tenancy and Blackacre passes through A's estate.

Finally, assume that A provided all the consideration for the purchase of Blackacre. On A's death, B and C can each disclaim the entire property under 21107(a)(2). If they both do so, Blackacre will pass through A's estate. If only one of B or C disclaims the entire property, the one who does not will be the sole owner of Blackacre as the only surviving joint tenant. Such a disclaimer would not be completely tax qualified, however. The Regulations limit a tax qualified disclaimer to no more than 1/3 of the property. If, however, B or C were the first to die, A could still disclaim the 1/3 interest that no longer belongs to the decedent under 7(a)(1) [UPC 2-1107(a)(1)], the disclaimer would be a qualified disclaimer for tax purposes under the Regulations, and the result is that the other surviving joint tenant owns 1/3 of Blackacre as tenant in common with the joint tenancy.

2004 Amendment. *This Comment was amended in 2004 to correct an error in the joint bank account example and to provide a more complete explanation for the result in Example 1.*

Sec. 122.011 [UDPIA §8]. **DISCLAIMER OF INTEREST BY TRUSTEE.** If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

NCCUSL Comment

Section 8 deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's fiduciary obligations.

Sec. 122.012 [UDPIA §9]. **DISCLAIMER OF POWER OF APPOINTMENT OR OTHER POWER NOT HELD IN FIDUCIARY CAPACITY.** If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If the holder has exercised the power and the disclaimer is of a power other than a

presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

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

NCCUSL Comment

Section 5(a) authorizes a person to disclaim an interest in or power over property. Section 9 provides rules for disclaimers of powers which are not held in a fiduciary capacity. The most common non-fiduciary power is a power of appointment. Section 4(a) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 9 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer affects only the holder of the power and will not affect other aspects of the power.

Example 1. *T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.*

Sec. 122.013 [UDPIA §10]. DISCLAIMER BY APPOINTEE, OBJECT, OR TAKER IN DEFAULT OF EXERCISE OF POWER OF APPOINTMENT. (a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

NCCUSL Comment

Section 10 governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment. At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

Section 10 provides rules for disclaimers by all of these persons: subsection (a) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (b) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (a), therefore, makes the disclaimer effective as of the time the instrument exercising the power—giving the interest to the disclaimant—becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 6. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 9.

Example 1. *Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (a) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 6(b). If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 6(b)(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. See Restatement, Second, Property (Donative Transfers) § 18.5. The Restatement, Second, Property (Donative Transfers), § 18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. (See also Restatement, Third, Property (Wills and Other Donative Transfers) § 5.5, Comment l.) That is the position taken by UPC § 2-603. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.*

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. See Restatement, Second, Property (Donative Transfers) § 11.2, Comments c and d. The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (b) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 6. The effect of these rules is illustrated by the following examples.

Example 2(a). *The facts are the same as Example 1, except A disclaims before D's death and D's will does not exercise the power. Under subsection (b) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power,*

*Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 6(b). If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 6(b)(2)), the interest passes under Section 6(b)(3) as if the disclaimant had died immediately before the time of distribution. Thus, A is deemed to have died immediately before D's death, which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in **Example 1**. If A does predecease D he would have received nothing and there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.*

Example 2(b). *The facts are the same as in **Example 2(a)** except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if he predeceased D and the result is the same as in **Example 1**.*

In addition, if all the objects and takers in default disclaim before the power is exercised the power of appointment is destroyed. See Restatement, Second, Property (Donative Transfers) § 12.1, Comment g.

Sec. 122.014 [UDPIA §11]. **DISCLAIMER OF POWER HELD IN FIDUCIARY CAPACITY.** (a) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a person designated to serve or serving as a fiduciary disclaims a power held or to be held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another person designated to serve or serving as a fiduciary if the disclaimer so provides and the person disclaiming has the authority to bind the estate, trust, or other person for whom the person is acting.

NCCUSL Comment

Section 11 governs disclaimers by fiduciaries of powers held in their fiduciary capacity. Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction.

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(The use of a disclaimer in just that situation was approved in Cleaveland v. U.S., 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶ 13,766 (C.D.Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each State relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power but yet preserve the possibility of another trustee exercising the power would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

As with any action by a fiduciary, a disclaimer of fiduciary powers must be compatible with the fiduciary's duties.

Sec. 122.015 [UDPIA §12]. DELIVERY OR FILING. (a) In this section, “beneficiary designation” means an instrument, other than an instrument creating a trust, naming the beneficiary of:

- (1) an annuity or insurance policy;
- (2) an account with a designation for payment on death;
- (3) a security registered in beneficiary form;
- (4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or
- (5) any other nonprobate transfer at death.

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail, facsimile, electronic mail, or any other method likely to result in its receipt. If a disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in its receipt, delivery or filing shall be deemed to have occurred on the date of mailing regardless of receipt.

(c) In the case of an interest created under the law of intestate succession or an interest

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created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, a disclaimer must be filed in the official public records of the county in which the decedent was domiciled or of a county in which the decedent owned real property.

(d) In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, a disclaimer must be filed in the official public records of the county in which the decedent was domiciled or of a county in which the decedent owned real property.

(e) In the case of an interest in an inter vivos trust:

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, a disclaimer must be filed with a court having jurisdiction to enforce the trust or in the official public records of the county which is the situs of administration of the trust or of the county in which the settlor is domiciled or was domiciled at the date of the settlor's death; or

(3) if a disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

(f) In the case of an interest created by a beneficiary designation which is disclaimed before the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation.

(g) In the case of an interest created by a beneficiary designation which is disclaimed after

the designation becomes irrevocable:

(1) a disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and

(2) a disclaimer of an interest in real property must be recorded in the official public records of the county where the real property that is the subject of the disclaimer is located.

(h) In the case of a disclaimer by a surviving holder of survivorship property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

(i) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, the disclaimer must be filed with a court having authority to appoint the fiduciary or in the official public records of the county in which the creator of the power is domiciled or was domiciled at the date of the creator's death.

(j) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate, or to the fiduciary under the instrument that created the power; or

(2) if no fiduciary is then serving, the disclaimer must be filed with a court having authority to appoint the fiduciary or in the official public records of the county in which the creator of the power is domiciled or was domiciled at the date of the creator's death.

(k) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.

(l) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

NCCUSL Comment

The rules set forth in Section 12 are designed to provide notice of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only in very limited circumstances.

Historical Note: This Comment was revised in 2010 to account for the amendment of subsections (f) and (g)(1) and the addition of subsection (g)(2), amendments that were necessitated by the approval of the Uniform Real Property Transfer on Death Act (2009) as part of the Uniform Probate Code at Article VI, Part 4.

Sec. 122.016 [UDPIA §13]. WHEN DISCLAIMER BARRED OR LIMITED. (a) A disclaimer is barred by a written waiver of the right to disclaim.

(b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

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

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or

(3) the interest sought to be disclaimed is sold pursuant to a judicial sale.

(c) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(d) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(e) A disclaimer is barred or limited if so provided by law other than this chapter.

(f) A disclaimer of a power over property which is barred by this section is ineffective. A disclaimer of an interest in property which is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this subchapter had the disclaimer not been barred.

(g) A disclaimer by a child support obligor is barred as to disclaimed property that could be applied to satisfy the disclaimant’s child support obligations if those obligations have been:

(1) administratively determined by the Title IV-D agency as defined by Section 101.033, Family Code, in a Title IV-D case as defined by Section 101.034, Family Code; or

(2) confirmed and reduced to judgment as provided by Section 157.263, Family Code.

The child support obligee to whom child support arrearages are owed may enforce the child support obligation against the disclaimant as to disclaimed property by a lien or by any other remedy provided by law.

NCCUSL Comment

The 1978 Act required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a “reasonable” time.

This Act specifically rejects a time requirement for making a disclaimer. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts and former UPC § 2-801. Subsection (a) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

*Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (b)(1) will necessarily be determined by the courts based upon the particular facts. (See *Leipham v. Adams*, 77 Wash.App. 827, 894 P.2d 576 (1995); *Matter of Will of Hall*, 318 S.C. 188, 456 S.E.2d 439 (Ct.App. 1995); *Jordan v. Trower*, 208 Ga.App. 552, 431 S.E.2d 160 (1993); *Matter of Gates*, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); “What Constitutes or Establishes Beneficiary’s Acceptance or Renunciation of Devise or Bequest,” 93 ALR2d 8).*

The addition in this Act of the word “voluntary” to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the

disclaimant taken after the right to disclaim has arisen will act as a bar. (See Troy v. Hart, 116 Md.App. 468, 697 A.2d 113 (1997), Estate of Opatz, 554 N.W.2d 813 (N.D. 1996), Frances Slocum Bank v. Martin, 666 N.E.2d 411 (Ind.App. 1996), Brown v. Momar, Inc., 201 Ga.App. 542, 411 S.E.2d 718 (1991), Tompkins State Bank v. Niles, 127 Ill.2d 209, 130 Ill.Dec. 207, 537 N.E.2d 274 (1989).) An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may work an estoppel. See Hale v. Bardouh, 975 S.W.2d 419 (Tex.Ct.App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (b)(3) continues a provision from the earlier Acts and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (c) rephrases the rules of Section 11 governing the effect of disclaimers of powers.

Subsection (d) is applicable to powers which can be disclaimed under Section 9. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (e), unlike the 1978 Act, specifies that "other law" may bar the right to disclaim. Some States, including Minnesota (M.S.A. § 525.532 (c)(6)), Massachusetts (Mass. Gen. Law c. 191A, § 8), and Florida (Fla. Stat. § 732.801(6)), bar a disclaimer by an insolvent disclaimant. In others a disclaimer by an insolvent debtor is treated as a fraudulent "transfer". See Stein v. Brown, 18 Ohio St.3d 305 (1985); Pennington v. Bigham, 512 So.2d 1344 (Ala. 1987). A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of "transfer" in the federal Medical Assistance Handbook which includes a "waiver" of the right to receive an inheritance (see 42 U.S.C.A. § 1396p(e)(1)). See Hirschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md.App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999)(valid disclaimer by executor of surviving spouse who was Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the Asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the States. On the federal level, the United States Supreme Court has held that a valid disclaimer does not defeat a federal tax lien levied under IRC § 6321, Dyre, Jr. v.

United States, 528 U.S. 49, 120 S.Ct. 474 (1999).

Subsection (f) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. A disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. This provision removes the ambiguity that would otherwise be caused by an ineffective refusal to accept property. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

Sec. 122.017 [UDPIA §14]. TAX QUALIFIED DISCLAIMER. Notwithstanding any other provision of this chapter, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this chapter.

Legislative Note: *States with constitutions that prohibit a dynamic reference to federal law (“as now or hereafter amended, or any successor statute thereto”) may wish to refer instead to Title 26 of the United States Code as it exists on a specified date. See, e.g., Ariz. Rev. Stat. Sec. 1410014; Or. Rev. Stat. Sec. 105.645.*

NCCUSL Comment

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC § 2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if it does not otherwise meet the Act’s more specific requirements.

Sec. 122.018 [UDPIA §15]. RECORDING OF DISCLAIMER. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Except as otherwise provided in Section 122.015(g)(2), failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

NCCUSL Comment

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which only referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice. The reference to Section 12(g)(2) concerns the disclaimer of an interest in real property created by a “beneficiary designation” as that term is defined in § 12(a). Such a disclaimer must be recorded.

2010 Technical Amendment: *The cross-reference to Section 12 was added in 2010. This addition was necessitated by the approval of the Uniform Real Property Transfer on Death Act (2009) as part of the Uniform Probate Code at Article VI, Part 4.*

Sec. 122.019 [UDPIA §16]. APPLICATION TO EXISTING RELATIONSHIPS. Except as otherwise provided in Section 122.016, an interest in or power over property existing on the effective date of this chapter as to which the time for delivering or filing a disclaimer under law superseded by this chapter has not expired may be disclaimed after the effective date of this chapter.

NCCUSL Comment

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Acts and former UPC § 2-801, allows the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. Under T’s will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T’s estate ten months after T’s death. X cannot disclaim the general devise, irrespective of the application of Section 13 of the Act, because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 13 without regard to the nine month period of prior law.

Sec. 122.020 [UDPIA §18] . UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

Sec. 122.021 [UDPIA §19]. SEVERABILITY CLAUSE. If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other

provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

SECTION 3. Section 112.010, Property Code, is amended to read as follows:

Sec. 112.010. PRESUMED ACCEPTANCE OR DISCLAIMER BY OR ON BEHALF OF BENEFICIARY; DISCLAIMER. (a) Acceptance by a beneficiary of an interest in a trust is presumed.

(b) Disclaimers of interests or powers in trusts are governed by Chapter 122 of the Estates Code.

(c) A disclaimer by a trustee of an interest which otherwise would pass into the trust must be compatible with the trustee's fiduciary obligations. [Delete former subsections (b), (c), (c-1), (c-2), (c-3), (d) and (e).]

SECTION 5. Chapter 122, Subchapter E of the Estates Code is renumbered as Chapter 122, Subchapter B.

SECTION 6. Section 24.002(12), Business and Commerce Code, is amended to read as follows:

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance. The term does not include a transfer under a disclaimer pursuant to Chapter 122, Estates Code. ~~filed under Section 37A, Texas Probate Code, or Section 112.010, Property Code.~~

SECTION 7. This act is effective September 1, 2015.

NCCUSL Comment

Existing acts dealing with disclaimers are superseded by this Act and should be repealed. Among such acts are the previous Uniform Acts on this subject (see Prefatory Note).