

EFFECTIVE USE OF DISCLAIMERS

FRUSTRATING THE PLANNER AND FEDERAL TAX POLICY

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I. INTRODUCTION

A disclaimer has been defined as "a refusal to accept the ownership of property or rights with respect to property."¹ Although it operates after a transfer has been made and thus is not useful as a pre-transfer estate planning device, the disclaimer may play an important estate planning role. The disclaimer can be useful as a technique for adjusting an estate plan to account for circumstances which were unforeseen at the time of the formulation of the plan. In addition, to the extent that the disclaimer results in post-transfer-date changes being treated for transfer tax purposes as though they were incorporated in the original plan, the premium on skillful advance planning is lessened.²

Despite the utility of the disclaimer, its use was severely restricted prior to the enactment of the Tax Reform Act of 1976. Until that time, the tax laws did not provide either definitive rules as to what constitutes a "disclaimer" or rules of general application concerning the tax consequences of a disclaimer.³ Prior to the 1976 Act, the tax consequences resulting from certain disclaimers were prescribed, on an ad hoc basis, only under several, individual code sections. Under the provisions relating to the estate tax charitable⁴ and marital⁵ deductions, property was deemed to pass from the decedent to the person who receives it by reason of the disclaimer. Under the section dealing with powers of appointment, a disclaimer of a general power was not treated as a release of the power and, therefore, was not a taxable event.⁶ Under the gift tax regulations, a disclaimer had to be effective under local law in order to avoid the imposition of gift tax liability on the disclaimant.⁷

Because of the lack of federal rules of general applicability, the federal tax consequences of a disclaimer generally depended upon its treatment under local law.⁸ The resolution of the issue of whether the disclaimer was a taxable transfer hinged, in many instances, upon whether the disclaimant was considered to have held title to the property under local law prior to his disclaimer.⁹ If he was deemed to have been vested with ti-

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¹ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3419.

² ALL, FEDERAL ESTATE AND GIFT TAX PROJECT, MAJOR PROBLEMS IN FEDERAL ESTATE AND GIFT TAXATION AND RECOMMENDATION IN REFERENCE THERETO 39 (1969).

³ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 65, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3420.

⁴ I.R.C. § 2055(a) (1976) (prior to amendment by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 [hereinafter the 1976 Act]).

⁵ I.R.C. § 2056(d) (1976) (prior to amendment by the 1976 Act).

⁶ I.R.C. §§ 2041(a)(2), 2514(b) (1976) (prior to amendment by the 1976 Act).

⁷ Treas. Reg. § 2511-1(c) (1958).

⁸ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421. See Treas. Reg. § 25.2511(c) (1958).

⁹ See, e.g., *Hardenberg v. Commission*, 198 F.2d 63, 66 (8th Cir.), cert. denied, 344 U.S. 836 (1952); *Brown v. Routzahn*, 63 F.2d 914, 916 (6th Cir. 1933).

In *Hardenberg*, for example, a disclaimer of intestate property was subjected to gift and

tle, the disclaimer would be a taxable event. However, state laws were not and are not uniform. As a consequence, identical refusals to accept property by disclaimants in different states were treated differently for federal estate and gift tax purposes.¹⁰ These local technicalities were irrelevant to the federal tax policy questions involved.¹¹

The problems emanating from this federal tax deference to local law were compounded, in some instances, by the lack of specificity in this area of the law. The status of the common law of disclaimers has been characterized as "spotty." Unfortunately, not all states have enacted disclaimer legislation which fills in the gaps in the law.¹²

In addition, for many of the estate and gift tax provisions, no specific time period was prescribed within which a disclaimer had to be made. While disclaimers affecting the charitable¹³ and marital¹⁴ deductions had to be made before the due date for filing the estate tax return, for other tax purposes the existing state and federal law concerning the time within which a disclaimer had to be made was unclear. In one case, a remainderman, who was aware of his interest, was deemed to have effectively disclaimed his remainder interest for gift tax purposes when he disclaimed shortly after the expiration of a life tenancy which had continued for nineteen years after the grantor's death.¹⁵ This result was reached in the face of a federal regulation which required that a disclaimer be made within a reasonable time after the beneficiary has knowledge of the existence of the transfer,¹⁶ since under local law, the court held, the reasonable time was measured from the time of vesting rather than the time of creation of the interest. This decision dramatizes the significance of local law and the resulting possible unevenness of tax treatment for residents of different states.

In response to this situation, Congress enacted section 2518 into the Internal Revenue Code as part of the Tax Reform Act of 1976. Congress' objective was expressed as follows in the House Report:

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

The bill provides definitive rules relating to disclaimers for purposes of the estate, gift and generation-skipping transfer taxes. If the requirements of the provisions are satisfied, a refusal to accept property is to be given effect for federal estate

estate taxes since title vested in the heir at the decedent's death. On the other hand, a contrary result was reached in *Brown* with respect to property passing by will. State law is not uniform on these subjects.

¹⁰ See H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421.

¹¹ See American Bar Association, *Reports and Recommendations of the Committees*, 27 TAX LAW. 818, 819 (1974).

¹² See *id.* at 818.

¹³ See I.R.C. § 2055(a) (1976) (prior to amendment by the 1976 Act).

¹⁴ See I.R.C. § 2056(d)(2) (1976) (prior to amendment by the 1976 Act).

¹⁵ *Keinath v. Commissioner*, 480 F.2d 57, 62-63 (8th Cir. 1973), *rev'g* 58 T.C. 352 (1972).

¹⁶ Treas. Reg. § 25.2511-1(c) (1958). The court in *Keinath* did not clearly delineate the relevant weight to be attached to federal and local law. 480 F.2d at 63.

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and gift tax purposes even if the applicable local law does not technically characterize the refusal as a 'disclaimer' if the person refusing the property was considered to have been the owner of the legal title to the property before refusing acceptance of the property. If a qualified disclaimer is made, the federal estate, gift, and generation-skipping transfer tax provisions are to apply with respect to the property interest disclaimed as if the interest had never been transferred to the person making the disclaimer.¹⁷

At the same time as Congress enacted section 2518, it abrogated the specific estate and gift tax sections dealing with disclaimers, since section 2518 was intended as a rule of general applicability for purposes of estate, gift and generation-skipping taxation. The estate, gift and generation-skipping transfer tax provisions relating to disclaimers are now integrated in a single provision. Under section 2518, a "qualified disclaimer" is treated for tax purposes as if the disclaimed interest were never transferred to the disclaimant. Section 2518(b) defines a "qualified disclaimer" as an irrevocable and unqualified refusal by a person to accept an interest in property which meets the following four requirements:

- (1) The refusal must be in writing;
- (2) This writing must be received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates no later than nine months after the later of either:
 - (a) the day on which the transfer creating the interest in such person was made, or
 - (b) the day on which the disclaimant attains twenty-one;
- (3) The disclaimant must not have accepted the interest or any of its benefits;
- (4) As a result of the disclaimer, the interest must pass to someone other than the disclaimant (without any direction on the part of the disclaimant).

In addition, section 2518(c) permits disclaimers of an "undivided portion" of an interest and sanctions the disclaimer of powers.

The attempt to assure uniform tax treatment of tax disclaimers through section 2518 has not been entirely successful. Due to the verbiage of subsection (b)(4) and the lack of detailed specificity in the statute, deference to local law is a likelihood. Because of the continuing significance of local law, this article will be concerned with the problems arising from the interreaction of federal and state law. In the course of this discussion, we shall draw upon the provisions of the Massachusetts statute,¹⁸ and the various Uniform Acts, including the Uniform Probate Code and the Uniform Disclaimer of Property Interests Act. While other states have enacted disclaimer legislation,¹⁹

¹⁷ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421.

¹⁸ MASS. GEN. LAWS ANN. C. 191A (1975).

¹⁹ The author is acutely aware that disclaimer statutes in other states may differ considerably from the illustrative statutes discussed herein. Because of the potentially large number of such variations, the author has restricted himself to the illustrative statutes in the text.

the Massachusetts statute and the Uniform Acts have been selected for illustrative purposes only to demonstrate the resulting interplay of federal and local law and the lack of uniformity in the treatment of taxpayers from different states.

This article will also be concerned with the efficacy of section 2518 as a practical estate planning technique in the area of partial disclaimers, perhaps one of the most common practical uses of a disclaimer. The discussion will reveal that the federal statutory language is less than satisfactory and that the problems are accentuated by a brooding omnipresence of local law. While possible solutions will be offered to some of these problems, including planning and drafting suggestions, it is obvious that the "ball" is really in the congressional "court" and that additional clarifying legislation is needed. Since the disclaimer is a valuable post-transfer "planning" technique, such a congressional effort would clearly be worthwhile.

II. DISCLAIMERS AND POST-TRANSFER PLANNING

In several ways, disclaimers play an important role in post-transfer estate planning. They can rectify prior errors in planning the estate and improve the tax positions of an estate, its beneficiaries, and others. By permitting beneficiaries to adjust the size and content of particular gifts, the distribution of property can be made to conform to the realities faced by those beneficiaries. In some circumstances, property in excess of the needs of one beneficiary can be disclaimed so as to benefit another beneficiary. Gifts of property inappropriate or inconvenient in form can be avoided, and gifts which are too large or too small to achieve maximum tax advantages can be modified. In short, disclaimers make possible useful adjustments to an estate plan based on the facts and circumstances actually faced by the transferor's beneficiaries.

One of the most important circumstances in which disclaimers may prove useful is in connection with the marital deduction. Section 2056 permits a deduction of the greater of \$250,000 or half the adjusted gross estate²⁰ from an adjusted gross estate for qualified property transferred by a decedent to the surviving spouse.²¹ While use of certain formula clauses in wills and revocable trusts generally can assure that a marital deduction equal to the maximum permitted to the decedent's estate will be taken, a nonformula gift or an improperly formulated gift can be altered through a disclaimer to achieve a maximum deduction. Thus, in the event the surviving spouse has not been given enough qualified property to create a

While the details of the statutes may vary considerably, almost all raise the same problems when matched against § 2518.

²⁰ Section 2056 allows a deduction from the gross estate for qualified property passing to the surviving spouse, subject to a limit of the greater of \$250,000 or half the value of the adjusted gross estate. For a discussion of section 2056, see in this issue Piper & Fremont-Smith, *Principles for Effective Use of Marital Deductions*, at p. 403 *supra*.

²¹ I.R.C. § 2056(b); Treas. Reg. § 20.2056(b)-(1) (1958).

Qualification of property for the marital deduction is of course an enormously complex area. See I.R.C. § 2056 (and the regulation thereunder). The most common forms of qualified property are outright gifts to the surviving spouse and gifts in trust with annual income for life for the surviving spouse coupled with general power of appointment in the spouse. Possession of such incidents of ownership at the death of the survivor, of necessity, makes such property includible in the surviving spouse's estate at death under I.R.C. §§ 2033 and 2041.

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maximum marital deduction, the deduction may be increased to the maximum possible amount by a timely disclaimer in favor of the surviving spouse on the part of someone other than the surviving spouse.²²

Conversely, a surviving spouse may wish to disclaim part or all of marital deduction property received if it exceeds the maximum permissible marital deduction. If not disclaimed, the excess may be taxed both in the deceased spouse's estate and also in the surviving spouse's estate.²³ If the disclaimer causes the excess to pass into a trust taxable at the death of the first spouse but not includible in the second spouse's estate, the disclaimer prevents this double taxation. A disclaimer by the surviving spouse also may be desirable even where the amount of the property passing to the surviving spouse equals but does not exceed the maximum marital deduction. Such a situation arises, first, where the surviving spouse's assets are substantial enough so that the total taxes on both estates may be larger than if the marital deduction had been used to a lesser extent in the estate of the first decedent.²⁴ This may occur because of the augmentation of the survivor's estate by the marital deduction gift. Here, a disclaimer which subjects the property to taxation in the deceased spouse's estate may be preferable to deferring a tax on the marital deduction portion until the surviving spouse's death. The disclaimer may also be appropriate where a maximum marital deduction is unnecessary to eliminate the obligation to pay estate taxes on the first decedent's death. The unified credit available under section 2010 might eliminate any tax liability on the first decedent's estate without the maximum marital deduction, and therefore taking the maximum deduction would unnecessarily augment the size of the survivor's estate.

Another circumstance in which a disclaimer may be advisable is when a transfer to a surviving spouse is formally defective so that it does not qualify for the marital deduction under section 2056. For example, assume that a marital deduction trust is created under the terms of which the surviving spouse is to receive income for life and has a general testamentary power to appoint the remainder as she may see fit, but the trustee has the power to retain unproductive property for an unreasonable period of time. The current Treasury Regulations indicate that the trust will not qualify for a marital deduction because the retention of such property by the trustee may preserve the property at the expense of the spouse's enjoyment of the property and its income.²⁵ The trust therefore will be subject to estate taxation in the deceased spouse's estate. At the same time, the property also may be subject to estate taxation in the surviving spouse's estate unless the latter disclaims the general power of appointment. A disclaimer of that power of appointment would convert the defective gift to the spouse into

²² See I.R.C. § 2056(d)(2) (1976) (prior to amendment by the 1976 Act).

²³ That is, since qualified marital deduction property may be includible in the surviving spouse's estate, the amount of qualified property passed to the spouse in excess of the maximum permissible deduction may be taxed both when the first spouse dies, and, again, with the previously deductible marital property, when the surviving spouse dies.

Under I.R.C. § 2033, all property which the surviving spouse owns outright is includible in the survivor's estate and under § 2041 property subject to a general testamentary power of appointment is also includible in the survivor's estate.

²⁴ See W. SCHWARTZ, *FUTURE INTERESTS & ESTATE PLANNING*, § 14.14 (Supp. 1977).

²⁵ Treas. Reg. § 20.2056(b)-5(f)(4)-(5) (1958).

nonmarital property transferred to the trustee. This property, although taxable in the decedent's estate, bypasses the estate of the surviving spouse, who upon death will have no interest in the property, the life interest and power given her having terminated. Thus, double taxation of the property is avoided.

In addition to its use as a device to achieve estate tax savings, a disclaimer may be used to adjust the division of a residual estate to reflect economic circumstances not foreseen in planning the estate. For example, suppose that at the time he drafted a will, T had no spouse, but had three children, all with similar financial needs. T therefore divided his residual estate evenly among the three. At T's death, however, one of the children, A, has become wealthy in his own right, whereas another, C, has contracted a debilitating chronic disease. Even though the estate is to be divided evenly, A effectively can increase C's share without incurring gift tax liability by disclaiming his share, thus giving B and C half shares in the residue of the estate. Had A not disclaimed and later given C additional gifts to meet his needs, A might have had to pay taxes on the gifts. Thus, any time a bequest becomes unnecessary or excessive, a disclaimer may be used and, if the instrument creating the interests so permits, the disclaimed property may pass to someone with greater need of it.

The estate tax charitable deduction may also be affected by a disclaimer. A proper disclaimer of property by a noncharitable beneficiary in favor of a qualified charity results in the property qualifying for the charitable deduction.²⁶ A disclaimer can be especially helpful in the context of a gift to charity of a remainder interest. In order to qualify for the estate tax charitable deduction, a trust must satisfy the detailed and technical requirements of a charitable remainder trust.²⁷ If the trust fails to meet these requirements, a charitable deduction could be preserved if the noncharitable beneficiaries totally disclaim their interest and thus cause the charity to receive the property outright.

Problems which arise from the tax on "generation-skipping" transfers imposed by the 1976 Tax Reform Act also may be remedied by the timely use of a disclaimer. If, for example, a trust was created which provided that income was payable to the grantor's surviving spouse for life, then to the grantor's child for life, and then to the grantor's grandchildren, the trust would be a generation-skipping trust because beneficiaries of the trust are assigned to two or more generation levels younger than the grantor's generation.²⁸ Accordingly, a generation-skipping transfer tax might be imposed on the death of the grantor's child. This could be avoided if the grantor's child disclaims his interest. Such a disclaimer would prevent the trust from constituting a generation-skipping trust because there would no longer be two or more generations of beneficiaries whose generation levels are "younger" than that of the grantor. The grantor's widow is assigned to the same generation as the grantor and hence there would be only one level of younger generation beneficiaries, the grandchildren.²⁹ Thus, where one of the beneficiaries of a generation-skipping trust has no need of his

²⁶ I.R.C. § 2055(a) (1976) (prior to amendment by the 1976 Act).

²⁷ Treas. Reg. § 1.664 (1972).

²⁸ See I.R.C. § 2611(b).

²⁹ See I.R.C. § 2611(c)(2).

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income interest, the imposition of the tax on an otherwise taxable termination may be avoided by a timely disclaimer of the unnecessary interest.

Finally, the disclaimer may be helpful if a person holds a general power of appointment with respect to property. If the person dies holding the power, the property subject to the power is includible in his gross estate for federal estate tax purposes.³⁰ This result can be avoided by the donee during his lifetime by a disclaimer of the power, since section 2518 by its terms applies to a "power" with respect to property.³¹

In addition to being helpful post-transfer estate tax planning tools, disclaimers are a useful way for living taxpayers to avoid present income tax liability. For example, a disclaimant may not be required to include future income attributable to the disclaimed property in his taxable income.³² In addition, a person other than the grantor of a trust is treated for income tax purposes as the owner of a portion of a trust if, with respect to such portion, that person has an exclusive power to vest the corpus or the income of the trust in himself.³³ If the power referred to has been disclaimed within a reasonable time after the holder of the power first became aware of its existence, such a person is not treated as the owner of the portion of the trust.³⁴ Thus, timely disclaimer of income producing property or of certain trust powers can prevent unnecessary incidence of income taxation.

The disclaimer, when properly utilized, offers the estate planner not only a tool for post-transfer correction of planning errors or miscalculations but also facilitates a fine tuning of an estate plan to compensate for and adjust to changes in the financial conditions and circumstances of the beneficiaries which were not foreseeable at the time the estate plan was formulated. Unfortunately, the ability to take advantage of this useful estate planning device is impaired because its tax status remains clouded despite the enactment of section 2518.

III. CONTINUING FEDERAL—STATE DISCLAIMER CONFLICTS

A. *The Impact of Section 2518(b)(4)*

Section 2518 was enacted by Congress to achieve uniformity of result among the taxpayers of different states who disclaim property.³⁵ Congress sought to promote this goal by removing the Code's dependence on state law to determine the effectiveness of a disclaimer. Unfortunately, section 2518 does not explicitly address the issue of uniformity. Instead, it utilizes language which probably mandates a reference to state law to determine the effectiveness of a disclaimer.

³⁰ I.R.C. § 2041(a)(1).

³¹ I.R.C. § 2518(c)(2). Under earlier law, the same result was achieved, since § 2041(a)(2) specifically did not treat a disclaimer of a power as a taxable release or exercise of the power.

³² See Rev. Rul. 64-62, 1964-1 C. B. 221. However, the disclaimant may be required to include the income in his taxable income where he had a right to receive or control the income prior to the disclaimer. See *Grant v. Commissioner*, 174 F.2d 891, 892 (5th Cir. 1949); *Robert E. Cleary*, 34 T.C. 728, 736 (1960).

³³ See I.R.C. § 678.

³⁴ I.R.C. § 678(d).

³⁵ See H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE & CONG. & AD. NEWS 2897, 3421.

The American Bar Association had proposed the following verbiage for inclusion in the disclaimer legislation:

DISCLAIMERS INEFFECTIVE UNDER LOCAL LAW

—A disclaimer of property which is ineffective under governing law shall be given effect for the purpose of this section if the property is transferred, within the time herein prescribed for delivery of a disclaimer, to the person or persons who would have been entitled thereto had the disclaimant predeceased the prior holder of the property.³⁶

Similarly, the American Law Institute had recommended that a disclaimer be recognized for federal tax purposes if the beneficiary, in a timely fashion, redirects the destination of the interest to another recipient, even though local law would have deemed title to have vested in the disclaimant and to have been transferred by him. Such "timely redirection" would be permissible provided that the disclaimant did not derive any tangible beneficial enjoyment from the property.³⁷

These proposals would have satisfied congressional concern³⁸ that a refusal to accept property be given effect for federal estate and gift tax purposes even though local law does not technically characterize the refusal as a disclaimer or if the person refusing the property is considered under local law to have been the owner of the legal title to the property before refusing its acceptance. Instead of following such a legislative course, Congress inserted subsection (b)(4) into section 2518. That subsection provides that a disclaimer is effective for tax purposes if "as a result of such refusal, the interest passes to a person other than the person making the disclaimer (without any direction on the part of the person making the disclaimer)." Significantly, however, if the disclaimer is invalid or ineffective under local law, the interest vests in the disclaimant and does not pass to another person without further direction on the part of the disclaimant. Accordingly, if subsection (b)(4) is to be taken at face value, the effectiveness of a disclaimer for tax purposes is dependent upon its status under the local property law. Indeed, two leading commentators have concluded: "Consequently, new I.R.C. § 2518 may not have totally superseded state disclaimer statutes, but instead, provided an additional set of conditions which must be satisfied for purposes of the federal taxes. Consequently, a valid disclaimer must satisfy both the requirements of I.R.C. § 2518 and the applicable state disclaimer law."³⁹

Moreover, the federal statute is silent with respect to important aspects of disclaimers. Thus, for example, section 2518 does not define some of its key terms such as "person" and "irrevocable." In light of the congressional quest for uniformity, a federal lexicon may be created by the federal courts to define such terms. On the other hand, it is possible that the fed-

³⁶ See American Bar Association, *Reports and Recommendations of the Committees*, 27 TAX LAW. 818, 822-23 (1974).

³⁷ ALI, FEDERAL ESTATE AND GIFT TAX PROJECT, MAJOR PROBLEMS IN FEDERAL ESTATE AND GIFT TAXATION AND RECOMMENDATIONS IN REFERENCE THERETO 40-41 (1969).

³⁸ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 7897, 3421.

³⁹ A. CASNER & R. STEIN, ESTATE PLANNING UNDER THE TAX REFORM ACT OF 1976, at 179 (1978).

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eral courts will defer to or be influenced by local law interpretations in such areas where the federal statute provides no guidelines. Furthermore, to the extent that subsection (b)(4) mandates a reference to local law, a disclaimer invalid under such local law because of the local treatment of the issue will be invalid for federal tax purposes regardless of how section 2518 may otherwise view the problem. In such circumstances, variations in local law will produce a nonuniform federal tax result for disclaimants who reside in different states.

Thus it would appear that two regimes, federal and state, will continue to be operative in the disclaimer sphere. Congress' goal of uniformity will be frustrated since the federal and the various state laws differ one from another. Some of the areas of conflict between section 2518 and state laws will now be examined.

B. *Conflicts*

I. Timing Conflicts

Section 2518 and local laws impose different requirements as to the time for filing disclaimers. Section 2518(b)(2) prescribes that the disclaimer, to be effective, must be received no later than the date which is 9 months after the later of the day on which the transfer creating the interest in the disclaimant was made or the day on which such person attains age twenty-one. Local laws may have different time requirements. At common law, there was no specific time within which a disclaimer had to be made. The only requirement was that it be within a "reasonable" time.⁴⁰ The Uniform Probate Code provides that an instrument renouncing a present interest "shall be filed not later than [6] months after the death of the decedent" and that an instrument renouncing a future interest "may be filed not later than [9] months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested."⁴¹ The Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act contains a similar provision for nontestamentary instruments.⁴² The Massachusetts statute provides that a disclaimer must be filed not later than 9 months after the event determining that the beneficiary is finally ascertained and that such interest is indefeasibly vested.⁴³ Unlike these statutes, section 2518 does not, on its face, draw a distinction between present and defeasible or contingent future interests.

The statutes may regulate the time period differently in various other ways. Some statutes toll the time period if the person entitled to disclaim does not have actual knowledge of the existence of the interest.⁴⁴ Section

⁴⁰ See authorities collected in UNIFORM PROBATE CODE § 2-801(b), Comment (5th ed., Official 1977 Text).

⁴¹ UNIFORM PROBATE CODE § 2-801(b) (5th ed., Official 1977 Text).

⁴² UNIFORM DISCLAIMER OF TRANSFERS UNDER NONTTESTAMENTARY INSTRUMENTS ACT § 2 (1973). The Uniform Act, however, specifies (in brackets) a period of 6 months, rather than 9 months, to disclaim a future interest after the taker thereof is finally ascertained and his interest is indefeasibly vested.

⁴³ MASS. GEN. LAWS ANN. c. 91A, § 3 (1975).

⁴⁴ See UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT, § 2(a) (1973) (doing so with respect to nontestamentary interests).

2518, the Uniform Probate Code and the Massachusetts statute do not contain such an automatic tolling provision. However, while the Massachusetts statute does authorize the court, upon petition, to permit an extension of time to execute and file a disclaimer, section 2518 and the various Uniform Acts do not delegate such authority to the court.⁴⁵

In the case of beneficiaries under the age of 21, section 2518 sanctions disclaimers filed 9 months after such a person attains the age of 21 even though 9 months had previously elapsed since the creation of the interest.⁴⁶ The Uniform Acts and the Massachusetts statutes do not contain such a provision since they authorize disclaimers by guardians in behalf of minors.⁴⁷ Section 2518 does not explicitly sanction disclaimers by guardians. It merely speaks of a "person" refusing to accept an interest in property.⁴⁸ One may draw a negative inference, from the section's explicit postponement of the time period to 9 months after a person attains 21, that guardians may not disclaim. Thus as demonstrated by the foregoing variations, section 2518 and the states seem to establish different time requirements. In some instances, section 2518 may authorize a longer time period than local law, while in others, a disclaimer sanctioned by local law may be time-barred under section 2518.

For example, assume both that T devises land to "A for life, and then to B and his heirs, but if B fails to marry C, then to D and his heirs" and that B is over 21 years of age at T's death. To disclaim his interest effectively for federal tax purposes, B would have to disclaim within nine months after T's death. In states like Massachusetts or those having the Uniform Probate Code, B could disclaim his interest effectively for local purposes until the lapse of nine months after his interest became indefeasibly vested. Prior to B's marriage to C, B's interest is not indefeasibly vested; rather it is subject to total divestment in the event that B fails to marry C. Thus, during A's life, as long as B has not married C and has not otherwise accepted any benefits from the property, B could disclaim effectively even though more than nine months had elapsed since T's death.⁴⁹ This situation does not pose any problem of lack of uniformity of tax treatment if no state has a time period shorter than that expressed in section 2518. In such circumstances, section 2518 will control the federal estate and gift tax consequences and, unless the disclaimer is filed within the section 2518(b)(2) time period, it will be ineffective for tax purposes.

More troublesome, of course, is the case where a local law may prescribe a shorter time period than section 2518. Assume that T devises property to A in fee simple absolute and that A disclaims his interest seven months after T's death. A statute may provide that a disclaimer of such a present interest shall be filed not later than six months after T's death.⁵⁰

⁴⁵ See MASS. GEN. LAWS ANN. c. 191A, § 3 (1975); UNIFORM PROBATE CODE § 2-801(a), Comment (5th ed., Official 1977 Text).

⁴⁶ I.R.C. § 2518(b)(2).

⁴⁷ See UNIFORM PROBATE CODE § 2-801 (5th ed., Official 1977 Text); MASS. GEN. LAWS ANN. c. 191A, § 2 (1975).

⁴⁸ I.R.C. § 2518(c).

⁴⁹ Once A's estate terminates and B takes possession of the premises, B's ability to disclaim would be barred even though he has not as yet married C and his interest is defeasible, because at that point B has accepted an interest in the property. See discussion of "acceptance," at notes 65-67 *infra*.

⁵⁰ See, e.g., UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT § 2 (1973).

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On the other hand, section 2518 would allow the disclaimer to be filed up until nine months after T's death. Likewise, Massachusetts, which provides that a disclaimer may be filed until the lapse of nine months after the event determining that the beneficiary is finally ascertained and that such interest is indefeasibly vested,⁵¹ would also authorize a disclaimer of such a present interest to be filed up until nine months after T's death. To the extent that section 2518(b)(4) necessitates a reference to local law, the disclaimer would be ineffective for tax purposes in the first state but effective, for tax purposes, in Massachusetts. Thus, there is a resulting lack of uniformity of tax treatment for residents of different states.

Timing difficulties also arise with respect to inter-vivos transfers which are included in the gross estate for federal estate tax purposes. For example, assume that O by inter-vivos transfer gives property in trust "for O for life, and then to A and his heirs." Since O has retained a life estate, the property is includible in O's gross estate for federal estate tax purposes.⁵² When do we start counting the time period under section 2518 for disclaiming A's interest? The basic reference point mentioned in section 2518(b) is the date of the creation of the interest. When is A's interest deemed to be created? On the one hand, the House Report defines "creation" as follows: "For purposes of this requirement, a transfer is considered to be made when it is treated as a completed transfer for gift tax purposes with respect to inter-vivos gifts or upon the date of the decedent's death with respect to testamentary transfers."⁵³

While this explanation may be helpful in the instances where a transfer can be characterized as being either exclusively an inter-vivos gift or a testamentary transfer, it does not provide much guidance with respect to inter-vivos transfers which are deemed to be completed gifts for gift tax purposes but which are also includible in the transferor's gross estate. In the example presented, for gift tax purposes, O has made a gift of the remainder interest to A. Yet, the property will still be includible in O's gross estate for federal estate tax purposes.⁵⁴ Thus, A's interest may appropriately be referred to as being both the subject of an inter-vivos gift and a testamentary transfer.

Further confusion emanates from the Conference Report, which provides:

The conferees intend to make it clear that the nine month period for making a disclaimer is to be determined in reference to each taxable transfer. For example, in the case of a general power of appointment where the other requirements are satisfied, the person who would be the holder of the power will have a nine-month period after the creation of the power in which to disclaim and the person to whom the property would pass by reason of the exercise or lapse of the power would have a nine-month period after a taxable exercise, etc., by the holder of the power in which to disclaim. Similarly, in the case where a

⁵¹ MASS. GEN. LAWS ANN. c. 91A, § 3 (1975).

⁵² See I.R.C. § 2036.

⁵³ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 67, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421.

⁵⁴ See W. SCHWARTZ, *FUTURE INTERESTS & ESTATE PLANNING*, § 8.18 (Supp. 1977).

lifetime transfer is included in the transferor's gross estate because he had retained an interest in the property (e.g. sec. 2038), the person who would receive an interest in the property during the lifetime of the grantor will have a nine-month period after the original transfer in which to disclaim and a person who would receive an interest in the property on or after the grantor's death would have a nine-month period after the grantor's death in which to disclaim⁵⁵

This language strongly suggests that section 2518 would treat the date of O's death as the date of the creation of A's interest and that A would have nine months thereafter in which to disclaim. However, under the Uniform Disclaimer of Property Interests Act,⁵⁶ and the Massachusetts statute,⁵⁷ the disclaimer would have to be filed by A within a time period following the creation of the trust. Thus, the disclaimer may be time-barred by the application of a shorter time period under the local law of some states and there would, once again, be a lack of uniformity of tax treatment.

As a final timing problem, the Conference Report also suggests an internal inconsistency, within section 2518, with respect to defeasibly vested interests. Pursuant to the foregoing quoted statement from the Conference Report,⁵⁸ a taker in default could disclaim up until nine months after the lapse of the power of the appointment. A taker in default of appointment may have a vested interest, subject to total divestment by an exercise of the power, even prior to the power's lapse.⁵⁹ In the example where T devised land "to A for life, and then to B and his heirs, but if B fails to marry C, then to D and his heirs," we indicated previously that to disclaim his interest effectively for federal tax purposes under section 2518, B would have to disclaim within nine months after T's death. It is difficult to reconcile one result where the vested interest is defeasible by exercise of a power and another where the interest is defeasible by some other act or event. It does not suffice to suggest that the time period for disclaiming should run from the lapse of the power because the lapse is a taxable event as far as the donee of the power is concerned.⁶⁰ The creation of the power by T's will is also a taxable event with respect to T, the donor of the power. Thus, it could be plausibly contended that the interest of the taker in default should be governed by the same rules applicable to other interests created by will.

2. Procedural Conflicts

Section 2518 and local laws also may differ with respect to different procedural matters. Section 2518(b)(1) merely requires that the refusal to accept a property interest be in writing.⁶¹ It does not indicate that it is to be

⁵⁵ H. CONF. REP. NO. 94-1515, 94th Cong., 2d Sess. 623-624, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2897, 4261-62.

⁵⁶ See UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT § 2 (1973) (within 6 months).

⁵⁷ MASS. GEN. LAWS ANN. c. 191A, § 3 (1975) (within 9 months).

⁵⁸ See text at n.55 *supra*.

⁵⁹ W. SCHWARTZ, FUTURE INTERESTS & ESTATE PLANNING, § 9.3 (1977 Supp.).

⁶⁰ I.R.C. §§ 2514(b)(e), 2041(a)(2), (b)(2).

⁶¹ I.R.C. § 2518(b)(1).

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signed, although that is probably assumed to be the case, and, if it is to be signed, who the signatory should be. On the other hand, the Massachusetts statute requires that the disclaimer shall be in writing, shall describe the interest being disclaimed, shall declare the extent of the disclaimer, and shall be signed by the beneficiary or the guardian of a disabled beneficiary or the legal representative of a deceased beneficiary's estate.⁶² If real property is being disclaimed, the disclaimer must be acknowledged in the manner provided for deeds.⁶³ Moreover, the Uniform Probate Code and the Uniform Disclaimer of Property Interests Act do not specify, in any detail at all, the form of a disclaimer. The failure, in a given state, to satisfy that jurisdiction's requisites as to form, could render the disclaimer ineffective.⁶⁴ To the extent that the formal requisites for a disclaimer may vary from state to state, section 2518(b)(4) may cause disclaiming residents of different states to be treated differently for tax purposes.

Section 2518(b) provides that a disclaimer must be "irrevocable" to be effective for tax purposes. It does not, however, define the term. Here again, section 2518(b)(4) would appear to require the incorporation by reference of local law on the revocability of disclaimers. There could be some divergence of views at the local level. The Massachusetts statute specifically provides that a disclaimer is irrevocable only when executed in accordance with the formal requirements of the statute and filed in the Probate Court.⁶⁵ Although other statutes, such as the Uniform Probate Code, require a filing in the court, they do not address themselves to the issue of the revocability of the disclaimer prior to such filing.⁶⁶ It should be noted that section 2518 does not, itself, specifically require a filing of the disclaimer in court. Such a requirement may be read into it, however, by the incorporation of a state filing requisite pursuant to section 2518(b)(4).

Section 2518 and local laws may differ with respect to the service of the disclaimer. Section 2518(b)(2) mandates that to be effective the disclaimer must be received by the transferor, his legal representative, or the holder of the legal title to the property to which the interest relates. In contrast, the Massachusetts statute prescribes that service of the disclaimer be made upon the person or entity having custody of the property, but the failure to comply with the service requirement does not affect the validity of the disclaimer.⁶⁷ Other statutes may mandate service of the disclaimer but establish a class of recipients which is less broad than section 2518. Thus, in the case of a revocable inter-vivos trust, section 2518 may sanction service upon the settlor's executors (i.e. his legal representative), while other statutes may require service upon the trustee of the trust.⁶⁸

To the extent that these procedural requirements affect the validity of a disclaimer, it would appear that a favorable tax result is available under section 2518 only if the most stringent applicable standard is complied with. Moreover, the several procedural conflicts between section 2518 and state laws further undermine the congressional goal of uniformity of tax treatment of disclaimers.

⁶² MASS. GEN. LAWS ANN. c. 191A, § 4 (1975).

⁶³ *Id.* at § 5.

⁶⁴ *Id.* at § 7.

⁶⁵ *Id.*

⁶⁶ See UNIFORM PROBATE CODE § 2-801(b)(3) (5th ed., Official 1977 Text).

⁶⁷ See MASS. GEN. LAWS ANN. c. 191A, § 5 (1975).

⁶⁸ See UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT § 2(b) (1973).

3. Bars to Disclaimer

Section 2518 explicitly deals with the only one bar to disclaimer. Section 2518(b)(3) provides that a disclaimer is precluded if the disclaimant has "accepted the interest or any of its benefits." This, of course, raises the issue of the so-called partial disclaimer, whether a person may accept some of the benefits of an interest, and disclaim other benefits thereof. This topic will be the focus of attention in Part IV of this article. Here we are concerned only with defining the scope of acceptance in the context of a whole, rather than a partial, disclaimer.

Section 2518 and some statutes, such as the Uniform Probate Code,⁶⁹ do not define the term "acceptance" with any degree of precision. On the other hand, the Massachusetts statute provides that an acceptance occurs if the beneficiary, having knowledge of the existence of an interest, receives without objection a benefit from such interest.⁷⁰ Section 2518 does not explicitly include knowledge of the existence of the interest as a predicate for an acceptance of the interest. The Regulations existent before the Tax Reform Act of 1976 provided: "In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property."⁷¹ It is unclear, as of this date, whether this concept will be perpetuated in new regulations. In any event, to the extent that local law defines "acceptance" as including knowledge of the interest, such a local law interpretation may be given effect under section 2518(b)(4).

Even more troublesome is the issue of whether a disclaimer will be barred for federal tax purposes if the disclaimant has disposed of the interest, waived the right to disclaim, or is insolvent. The federal statute is silent with respect to these matters. While arguably a disposition in at least certain circumstances could also be construed as an "acceptance," insolvency certainly cannot be dealt with under that rubric. The Massachusetts statute specifically includes insolvency as a bar to a disclaimer.⁷² Other statutes, such as the Uniform Probate Code and the Uniform Disclaimer of Property Interests Act, do not list insolvency as a bar. By virtue of section 2518(b)(4), insolvent disclaimants from different states may be treated nonuniformly for tax purposes.

It is also not totally clear whether a transferor may limit the capacity of a beneficiary to disclaim. Section 2518 is again silent on this issue. Although statutes, such as the Massachusetts statute⁷³ and the Uniform Probate Code,⁷⁴ provide that the right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction, these provisos may have the effect of invalidating the total prohibition of a disclaimer by the creator of the interest.⁷⁵

⁶⁹ See UNIFORM PROBATE CODE § 2-801(d)(1) (5th ed., Official 1977 Text).

⁷⁰ See MASS. GEN. LAWS ANN. c. 191A, § 8 (1975).

⁷¹ Treas. Reg. § 25.2511-1(c) (1958).

⁷² MASS. GEN. LAWS ANN. c. 191A, § 8 (1975).

⁷³ *Id.* § 9.

⁷⁴ UNIFORM PROBATE CODE § 2-801(d)(2) (5th ed., Official 1977 Text).

⁷⁵ Total prohibition on disclaimers is clearly void under the Massachusetts statute since MASS. GEN. LAWS ANN. c. 191A, § 2 (1975) states that a beneficiary may disclaim any interest "unless barred" by § 8.

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They may not necessarily preclude the imposition by the transferor of additional procedures for disclaiming. For example, could a testator require that the disclaimer be delivered to the testator's issue or that it be made within three months after his death? If state law tolerates such additional requirements and such a state-sanctioned requirement is read into federal disclaimer law by virtue of section 2518(b)(4), the net result is that the whim of an individual transferor may limit the availability of section 2518. Yet, if such restrictions are authorized, greater unevenness of result can be expected. Thus, the estate planner faces not only a question of the extent to which state disclaimer laws may impose barriers to effective disclaimers not raised by section 2518, but also whether an individual transferor, with state law approval, may do the same thing.

Section 2518 will, by its own terms, place some strictures on the individual whims of disclaimants. It is true that some disclaimer statutes may not preclude conditional disclaimers and may provide that a disclaimer "shall be effective according to its terms."⁷⁶ It would thus appear to be possible under such a statute to execute a disclaimer which contains conditional terms. For example, assume that T devises land to "A for life, and then to B and his heirs if B marries C," that B is over 21 years of age at T's death, and that B has not as yet married C. If B files a disclaimer after T's death,⁷⁷ pursuant to which he disclaims his interest only in the event his gross income is more than \$100,000 per year at the time his interest becomes possessory, this disclaimer may be effective according to its terms under local law. For that purpose, B will be deemed to have disclaimed if, but only if, his gross income is more than \$100,000 per annum. On the other hand, this disclaimer will not be effective for federal tax purposes. Section 2518(b) defines an effective disclaimer as meaning "an irrevocable and unqualified refusal by a person to accept an interest." B's disclaimer is ineffective for tax purposes since it does not constitute an unqualified refusal to accept the interest. Thus, while section 2518 may conceivably grant some limited autonomy to transferors, it confers no such flexibility upon disclaimants.

4. Who May Disclaim?

Section 2518 merely addresses itself to a "person" refusing to accept an interest in property. It does not define the term "person."

May a guardian of a minor or incompetent person disclaim in behalf of his ward? While some statutes, such as the Uniform Probate Code⁷⁸ and the Massachusetts statute⁷⁹ authorize disclaimers by guardians, the federal statute may be construed as precluding disclaimers by guardians for minors. This conclusion is based upon the negative inference drawn from the proviso in section 2518(b)(2) authorizing disclaimers up until nine months after a beneficiary attains the age of 21.⁸⁰ If, indeed, the subsection

⁷⁶ See, e.g., MASS. GEN. LAWS ANN. c. 91A, § 7 (1975).

⁷⁷ Although the time limit for B's disclaiming is 9 months after his interest becomes indefeasibly vested (which occurs when B marries C), a disclaimer may nevertheless be filed earlier than then. See MASS. GEN. LAWS ANN. c. 91A, § 3 (1975).

⁷⁸ UNIFORM PROBATE CODE § 2-801 (5th ed., Official 1977 Text).

⁷⁹ MASS. GEN. LAWS ANN. c. 91A, § 2 (1975).

⁸⁰ It should be noted that § 2518 uses the age of 21 rather than age 18 or some other age for attainment of majority under local law.

is so construed, the guardian and the minor are confronted with a dilemma. If the guardian cannot disclaim, and he applies the property for the benefit of the minor as he may be required to do under local law, this may constitute an "acceptance" which may preclude the minor from disclaiming after he attains the age of 21. Furthermore, in some instances, overall family tax savings could be achieved by a disclaimer in behalf of a minor prior to his attainment of the age of 21. Assume that a minor is terminally ill and will, with certainty, die in the very near future. A disclaimer would be desirable since it would insulate the property from estate taxation upon the minor's death. Yet, the negative inference to be drawn from section 2518(b)(2) would preclude such a disclaimer.⁸¹

If section 2518(b)(2) is construed as precluding disclaimers by guardians of minors, a further incongruity could result. Section 2518 is silent, in all respects, with respect to disclaimers in behalf of incompetents. Under local law,⁸² a disclaimer may possibly be executed by the representative of an incapacitated person. If section 2518 is construed as authorizing disclaimers in such jurisdictions, but only in those states, the assets of minors will be treated differently for federal tax disclaimer purposes than the property of other disabled persons. Furthermore, to the extent that local laws differ from each other, there may be nonuniformity of tax results for residents of different states. This consequence may be inevitable regardless of how section 2518 is itself otherwise construed, to the extent that subsection (b)(4) mandates a reference to local law.

Section 2518 is also silent with respect to the impact of the death of a beneficiary. Is the executor or administrator of the deceased beneficiary the "person" who may disclaim under section 2518? The problem is further compounded by the variations in local law. In some states,⁸³ the executor or administrator of a deceased beneficiary may disclaim provided that the Probate Court determines that the disclaimer is in the best interests of those interested in the estate of the deceased beneficiary and not detrimental to the best interests of the estate. On the other hand, other statutes provide that the right to disclaim "does not survive the death of the person having it."⁸⁴ It has been stated that, absent a statute, the latter view represents the general rule.⁸⁵ If the silence of section 2518 with respect to disclaimers by executors or administrators is construed as authorizing such disclaimers to the extent it is sanctioned by local law, the net result, again, is the nonuniform tax treatment of disclaiming executors and adminis-

⁸¹ The authorization of a disclaimer by a guardian in behalf of a minor would not unduly prejudice the interests of the minor. In some states, *see, e.g.*, MASS. GEN. LAWS ANN. c. 191A, § 2 (1975), the disclaimer would be subject to the prior approval of the Probate Court, which would have to be satisfied that the disclaimer is not detrimental to the best interests of the minor. Under the Uniform Probate Code, *see, e.g.*, UNIFORM PROBATE CODE, § 5-209 (5th ed., Official 1977 Text), the guardian is under an obligation to apply the minor's property for the benefit of the minor and thus would be foolhardy to execute a disclaimer without advance approval by the court.

⁸² *See, e.g.*, UNIFORM PROBATE CODE § 2-801(a); MASS. GEN. LAWS ANN. c. 191A, § 2 (1973).

⁸³ *See, e.g.*, MASS. GEN. LAWS ANN. c. 191A, § 2 (1975).

⁸⁴ *See, e.g.*, UNIFORM PROBATE CODE § 2-801(a) (5th ed., Official 1977 Text).

⁸⁵ *See* UNIFORM PROBATE CODE § 2-801(a), Comment (5th ed., Official 1977 Text). *See* also text at note 46 *supra*.

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trators in different states. Even if section 2518's silence is not construed to require reference to state law on this point, such a result may nevertheless be reached since subsection (b)(4) may mandate a reference to local law.

IV. "ACCEPTANCE" AND PARTIAL DISCLAIMERS

Partial disclaimers constitute one of the most important potential uses of the disclaimer device. As discussed in Part II, a surviving spouse may wish to receive a portion of the marital deduction bequest but renounce the balance of it. Likewise, the beneficiary who has been given a life interest and a general power of appointment may find it desirable to "accept" the life interest but disclaim the general power of appointment. Although these examples involve some of the most propitious uses of disclaimers, there is some doubt and uncertainty as to the effectiveness of a partial disclaimer. The barriers to the effective use of a partial disclaimer stem from the language of section 2518 and the possible variations in local law on the subject.

Section 2518(b)(3) bars disclaimers if the beneficiary has "accepted the interest or any of its benefits." Unfortunately, the House Report explains the concept with the use of a broad brush. It states:

For purposes of this requirement, the exercise of a power of appointment to any extent by the donee of the power is to be treated as an acceptance of its benefits. In addition, the acceptance of any consideration in return for making the disclaimer is to be treated as an acceptance of its benefits.⁸⁶

The breadth of this language, and the verbiage in section 2518(b)(3) referring to acceptance of any of the benefits of the interest, could be construed together to preclude partial disclaimers even in those circumstances where its use is most desirable.

Section 2518(c)(1) is also relevant to the partial disclaimer issue. It authorizes a disclaimer with respect to "an undivided portion of an interest."⁸⁷ This subsection could be construed as sanctioning one type of partial disclaimer—the disclaimer of an undivided portion. Thus, a person who is given the entire interest in property could effectively disclaim an undivided one half interest therein and accept the other one half interest as a tenant in common.⁸⁸ Although there has been an acceptance of some of the benefits of the interest, it could be plausibly contended that the subsection overrides the bar to disclaimer posed by subsection (b)(3), the "acceptance" subsection. On the other hand, subsection (c)(1) could be construed literally as authorizing the disclaimer of an "undivided portion" only where the "undivided portion" is the only interest being transferred to the disclaimant. Thus, the reach of subsection (c)(1) could be limited to the following type of case: Assume that T owns an undivided one half interest in realty as tenant in common with X, who owns the other half. T devises his undivided one half to A. Since A has been given the undivided portion and

⁸⁶ H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 67, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421.

⁸⁷ I.R.C. § 2518(c).

⁸⁸ See J. McCORD, 1976 ESTATE AND GIFT TAX REFORM: ANALYSIS, EXPLANATION AND COMMENTARY 255 (1977).

nothing else, A may disclaim the entire one half interest. Such a literal interpretation does have the effect of reconciling subsection (c)(1) with subsection (b)(3), the "acceptance" proviso. The recognition of the disclaimer would not do violence to the "acceptance" concept since, as a result of the total disclaimer of the undivided interest, the disclaimant does not receive any benefits from the property.

However, such a narrow construction would frustrate post-transfer planning, which as indicated above, may entail the use of partial disclaimers of more extensive interests. In addition, it is inconsistent with the position of the regulations existent immediately prior to the Tax Reform Act of 1976. The regulations provided:

In any case where a power is purported to be disclaimed or renounced as to only a portion of the property subject to the power, the determination as to whether or not there has been a complete and unqualified refusal to accept the rights to which one is entitled will depend on all the facts and circumstances of the particular case, taking into account the recognition and effectiveness of such disclaimer under local law. Such rights refer to the incidents of the power and not to other interests of the possessor of the power in the property. If effective under local law, the power may be disclaimed or renounced without disclaiming or renouncing such other interests⁸⁹

These regulations thus appear to sanction the disclaimer of a general power even though the donee of the power, for example, retains a life estate in the appointive property. It is difficult to fit such a partial disclaimer within the confines of a narrow construction of the term "undivided portion." Yet, if such a disclaimer is not sanctioned by section 2518, the Tax Reform Act of 1976 will have regressed from that more liberal position.

It is encouraging to note that the Revenue Service, in a Letter Ruling,⁹⁰ has sanctioned a partial disclaimer. In the case postulated in that ruling, the taxpayer sought to renounce all interests inherited from a testator, including a special power of appointment over corpus and intestate interests but specifically reserved the right to receive discretionary distributions of income and corpus from the trustees of a realty trust and also the interests received outright in certain realty. The Service deferred to Texas law which recognized partial disclaimers, and sanctioned the disclaimer since the disclaimed interests passed under Texas law to someone other than the disclaimant. The Service pointed out that under Texas law, "acceptance of a portion of the outright legacy and part of the trust interest does not function as an acceptance of the interests subject to the disclaimer."⁹¹

In addition to the foregoing hurdles to be overcome because of the language of section 2518, subsection (b)(4) could be construed as mandating a reference to local law. Thus, even if section 2518 is interpreted as authorizing partial disclaimers, the fate of such disclaimers could be dependent upon their status under local law. The status of partial disclaimers is

⁸⁹ Treas. Regs. §§ 20.2041-3(d)(6), 25.2514-3(c)(5) (1958).

⁹⁰ I.R.C. Letter Rul. 7803065 (Oct. 21, 1977).

⁹¹ *Id.*

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uncertain in many states, with the result often turning on whether the gift is "severable" or constitutes a "single, aggregate" gift.⁹² In contrast, the Uniform Probate Code clearly sanctions partial as well as total disclaimers.⁹³ The Massachusetts statute contains language similar to section 2518(c)(1),⁹⁴ but partial disclaimers seem to be sanctioned since another section of that act provides that the assignment, waiver or acceptance "of a part of an interest in property shall not bar the right to disclaim any other part of such interest."⁹⁵ These variations in local law could lead to a diversity of tax results for partial disclaimants who reside in different states.

Partial disclaimers, in the context of joint tenancies, present particularly troublesome problems. Assuming that section 2518(c)(1) is construed as authorizing the joint tenant to disclaim the undivided interest accruing to him by right of survivorship, such a disclaimer could still be barred if subsection (b)(4) is construed as mandating a reference to local law and local law does not sanction such a disclaimer.⁹⁶ In the absence of a statute, it is doubtful that a surviving joint tenant can disclaim after the death of the deceased tenant.⁹⁷ In some jurisdictions, this uncertainty stems from the fact that the survivor receives his interest by operation of law, rather than from the decedent, and the survivor was deemed to be the owner of the entire property even during the lifetime of the decedent, subject to a similar property interest or right of participation in the decedent. Under this theory, the death of the decedent does not result in the survivor gaining any new rights—which he could disclaim—upon the decedent's death. However, some statutes⁹⁸ authorize a disclaimer of the accretive portion derived through survivorship. The Massachusetts statute sanctions a disclaimer except that the survivor may not disclaim that portion of the jointly owned property "which is allocable to amounts contributed by him or her to the interest in such property."⁹⁹

The Massachusetts statute represents an attempt to correlate disclaimers with the federal estate taxation of joint tenancies under section 2040 of the Internal Revenue Code. As a general rule, section 2040 utilizes a "consideration furnished" test for determining includibility of an interest in the decedent's gross estate. For example, if A and B are joint tenants and A dies first, the amount includible in A's gross estate hinges generally upon the percentage of the purchase price which A furnished for the acquisition of the property.¹⁰⁰ If A furnished the entire consideration, 100% of the

⁹² See UNIFORM PROBATE CODE § 2-801(a), Comment (5th ed., Official 1977 Text).

⁹³ *Id.*

⁹⁴ MASS. GEN. LAWS ANN. c. 191A, § 1 (1975) (authorizing a disclaimer of "any fractional part, share or portion" of an interest).

⁹⁵ *Id.* § 8.

⁹⁶ Even if local law does sanction such disclaimers, the surviving joint tenant may have difficulty in disclaiming the other undivided one half if he accepted an interest therein and if such acceptance bars the disclaimer under state law. For example, if the survivor had possession of the property prior to the death of the first decedent, the survivor's possession should be deemed an acceptance and bar a disclaimer of his undivided one half interest, which he owned prior to the death of the first decedent.

⁹⁷ See *Krakoff v. United States*, 313 F. Supp. 1089 (S.D. Ohio 1970), *motion denied*, 431 F.2d 847 (6th Cir. 1971).

⁹⁸ See e.g., UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT, § 2(c) (1973).

⁹⁹ MASS. GEN. LAWS ANN. c. 191A, § 2 (1975).

¹⁰⁰ The major exception is that if it is "a qualified joint interest" 50% of the property may be excluded from A's gross estate. See I.R.C. § 2040(b). Even though A paid the entire consideration, if A created the joint tenancy with his spouse and the creation of the joint ten-

value of the property would be included in A's gross estate. Unless the survivor could disclaim the accretive portion derived through survivorship, the survivor's subsequent efforts to transfer may result in such transfers being subjected to gift or estate taxation, and a form of double taxation would ensue. This consequence is avoided by permitting the survivor to disclaim.

On the other hand, the same justification for disclaimer does not exist where the first decedent contributed nothing to the acquisition of the property, and the survivor furnished the entire consideration. In that situation, generally speaking,¹⁰¹ nothing will be includible in the first decedent's gross estate and thus there will be no double taxation upon a subsequent transfer—inter-vivos at death—by the survivor. Hence, the Massachusetts statute concludes that the survivor may not disclaim to the extent that the survivor furnished the consideration.¹⁰² However, under a statute authorizing a disclaimer by a survivor who did furnish the entire consideration, the survivor could disclaim the accretive portion passing by survivorship even though nothing was includible in the first decedent's gross estate. While subsection (b)(4) may mandate a reference to local law on other matters, it is questionable as to whether deference should be paid to state law if the net effect thereof is to disrupt the pattern of estate taxation which the federal government has established for joint tenancies.

It should be noted that the Massachusetts statute does not clarify how the "allocation" of contributions to the purchase price is to be made. In particular, the statute fails to specify whether the contribution test is to be applied upon the basis of contributions in fact or upon contributions from a tax perspective. For example, assume that the survivor's contribution to the acquisition price was given to him by the decedent in an earlier and separate donative transaction. In such a case, the decedent is deemed to have contributed the entire consideration and the survivor's contribution is treated as zero for purposes of section 2040.¹⁰³ In that event, the entire value of the property is generally includible in the first decedent's gross estate for federal estate tax purposes. It is not totally clear whether the Massachusetts statute would also be construed in such a case as classifying the survivor as a non-contributor and thus entitling him to disclaim.

V. DRAFTING AND PLANNING CONSIDERATIONS

The promulgation of section 2518, with the attendant ambiguities described in Parts III and IV of this article, should cause the prudent estate planner to bear the following points in mind:

1. Choice of Law

The evolving rules of conflict of laws may enable the draftsman, by a declaration of intent in the instrument, to select the law governing the dis-

ancy was a gift for gift tax purposes (in the case of personal property) or A elected to treat it as a gift (in the case of realty under I.R.C. § 2515), and A and his spouse are the only joint tenants, 50% will be excluded from A's estate if he is the first decedent.

¹⁰¹ In the case of a "qualified joint interest," 50% would be includible in the first decedent's gross estate. See I.R.C. § 2040(b). See note 100 *supra*.

¹⁰² This result is consistent with the recommendation of the American Bar Association. See American Bar Association, *Reports and Recommendations of the Committees*, 27 TAX. LAW. 818, 820, 823 (1974).

¹⁰³ Treas. Reg. § 20.2040-1(c)(4) (1958).

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position.¹⁰⁴ We have observed that the effectiveness of a disclaimer may depend upon its status under local law and that jurisdictions may vary in their treatment of disclaimers. In making a choice of a governing jurisdiction in the instrument, the drafters should give some weight to the treatment given the disclaimers by the various involved states in light of the importance, if any, to be attached to the disclaimer in comparison to other relevant legal issues. This, of course, assumes that deference will be paid to the transferor's selection of the governing law even though the disclaimant resides in another jurisdiction.

2. Alternate Takers and the Marital Deduction

Subsection (b)(4) requires that the disclaimed interest must pass to someone other than the disclaimant without any direction on the part of the disclaimant. Thus, assume that T specifically bequeaths property to X who is also the sole residuary legatee. Assume that X disclaims the specific legacy and that under local law, the disclaimed legacy falls into the residue. The disclaimer of the specific legacy would not be effective under subsection (b)(4) since the legacy does not pass to someone other than the disclaimant. To guard against this possibility, the testator's estate planner should explicitly provide for an alternative taker in the event of a disclaimer.¹⁰⁵

This problem is particularly acute with respect to the disclaimer of a residuary marital deduction trust, or a portion thereof. In such circumstances, the disclaimed portion may pass to the residuary nonmarital deduction trust and the surviving spouse may also be a beneficiary of the nonmarital trust. If the wife has a life estate and a special power of appointment in the nonmarital deduction trust, it can be plausibly contended that the disclaimed interest does not pass to someone other than the disclaimant and hence the disclaimer is ineffective. The same result would probably obtain if the wife is a member of a group of beneficiaries to whom the income of the nonmarital trust may be distributed and each member of the group must receive an equal share of the income and the wife also has a special power.¹⁰⁶

The problem is more complex where the surviving spouse will not necessarily receive any interest under the nonmarital trust. Assume, for example, that the surviving spouse is not given a mandatory interest or power in the nonmarital trust nor appointed as a trustee of the trust, but that the spouse is a member of a group to whom the trustees may, in their uncontrolled discretion, make unequal distributions of income and corpus, and the trustees are authorized, in their uncontrolled discretion, to make no distributions at all to any particular group member, including the spouse. Since the spouse is only a possible appointee, it may be contended that unless amounts are actually distributed to her the spouse has no property

¹⁰⁴ See W. SCHWARTZ, *FUTURE INTERESTS & ESTATE PLANNING* §§ 4.7, 6.25 (1977 Supp.).

¹⁰⁵ The testator's designation of an alternative taker will govern and be given effect. See, e.g., *UNIFORM PROBATE CODE* § 2-801(c) (5th ed., Official 1977 Text); *MASS. GEN. LAWS ANN. c. 191A*, § 7 (1975).

¹⁰⁶ Quare, however, as to whether there could not be, at a minimum, a partial disclaimer consisting of a reduction of the general power which existed under the marital deduction trust to the special power under the nonmarital trust. The language of the House Report could be construed as precluding such a partial disclaimer. H.R. REP. NO. 94-1380, 94th Cong., 2d Sess. 67, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3421.

interest in the nonmarital trust, but merely an expectancy.¹⁰⁷ However, in such circumstances, it may be vigorously contended that the disclaimer is ineffective on the grounds that the requirement of subsection (b)(4) that the interest pass to someone other than the disclaimant as a result of the disclaimer has not been satisfied. Until such time as a distribution is made to some member of the group, a parity of reasoning leads to the conclusion that the property does not pass to another person, just as it did not, under this rationale pass to the surviving spouse. Since the trustees do not acquire a beneficial interest, the relevant beneficial "interest" does not pass to them either. For the same reason, it is even possible that the same problem—failure of the property to pass to some other person—may occur even if the spouse is not a permissible appointee of the totally discretionary nonmarital deduction trust. However, this conclusion is less likely since the beneficial interest will *ultimately* pass to someone other than the spouse.

To guard against the possible invalidation of a disclaimer of a marital deduction trust then, it may be desirable for the estate planner to draft the residuary trust in a manner so as to exclude the surviving spouse as a beneficiary of the nonmarital trust if the planner concludes that the advantages of an effective disclaimer outweigh the loss of benefits to the spouse under the nonmarital trust.¹⁰⁸

Finally, it should be noted that the problem discussed herein will be obviated by the enactment of the Technical Corrections Bill. It contains a proviso which validates a disclaimer even though the property passes to the surviving spouse as a result of the disclaimer.¹⁰⁹

3. Controlling the Disposition of Property

The estate planner should anticipate the possibility of a disclaimer from the perspective of the devolution of the property in the event of a disclaimer. Although statutes commonly designate the alternate recipient of the disclaimed property,¹¹⁰ the statutory selection of the alternate taker may not be consistent with the transferor's wishes. Thus, it is desirable to anticipate the disclaimer and to provide expressly for an alternative disposition in the event of a disclaimer. An express manifestation of intent as to an alternate taker will be given effect and will override the statutory scheme which is operative usually only in the absence of such intent.¹¹¹

4. Powers

Section 2518(c)(2) clearly authorizes the disclaimer of powers. It has been suggested that the congressional intent to sanction the disclaimer of powers is so clear that the disclaimer will be effective even though the ef-

¹⁰⁷ See W. SCHWARTZ, *FUTURE INTERESTS & ESTATE PLANNING*, § 13.2 (1977 Supp.).

¹⁰⁸ For a suggested form, see A. CASNER & R. STEIN, *ESTATE PLANNING UNDER THE TAX REFORM ACT OF 1976*, at 181-182 (1978).

¹⁰⁹ Technical Corrections Bill of 1977, H.R. 6715, 95th Cong., 1st Sess. (§ 3(m)).

¹¹⁰ See, e.g., *UNIFORM PROBATE CODE* § 2-801(c) (5th ed., Official 1977 Text); *MASS. GEN. LAWS ANN. C. 191A*, § 7 (1975).

¹¹¹ *MASS. GEN. LAWS ANN. C. 191A*, § 7 (1975). Such an approach may not be available, of course, with respect to some interests which pass by operation of law to a survivor such as joint tenancy property.

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fect of the disclaimer may be to extinguish the power, without the power passing to a person other than the disclaimant.¹¹² The apparent inconsistency between subsection (c)(2) and the requirement of subsection (b)(4) that the interest pass to a person other than the disclaimant may be reconciled on the basis of two rationales.

First, it can be claimed that subsection (b)(4) is satisfied because even though the power is not transferred, the property which is the subject of the power does pass to some other person. Thus, assume that X is the trustee of a trust "for the benefit of Y for life, remainder to Z and his heirs" and that X has the power to invade corpus and pay all of it to Y. X's disclaimer results in the corpus vesting indefeasibly in Z, who is a person other than X within the meaning of subsection (b)(4). Prior to the disclaimer, Z's interest was subject to total divestiture by an exercise of the power of appointment.

Second, it has been suggested that subsection (c)(2) may override subsection (b)(4).¹¹³ Under this view, the disclaimer of powers may be effective for tax purposes even though such a disclaimer may not be valid under state law and even though the power does not pass to another person but is merely eliminated by the disclaimer.

Aside from these conceptual problems, there is, in many instances, a solid estate planning reason for an estate planner to provide for an alternative donee of the power in the event of a disclaimer. Under some statutes,¹¹⁴ a disclaimer of a power does not result in the power passing to another person but rather it causes an elimination of the power. This is undesirable if the transferor's objectives included a flexible and discretionary management of the property and/or its beneficial enjoyment and he hoped to attain that end by a prudent exercise of the power. If an alternative donee is available, the estate planner may wish to designate an alternate holder of the power in the event of a disclaimer. In addition to satisfying the transferor's desire for flexibility, the designation of an alternative donee will result in the power passing to someone other than the disclaimant and thus obviate the conceptual problem posed by the requirement of subsection (b)(4) that the interest pass to a person other than the disclaimant.

5. Partial Disclaimers

As indicated in Part IV, a partial disclaimer may be valid if it represents an "undivided portion of an interest." This raises the question whether a partial disclaimer could be expressed in the form of a dollar amount rather than a fraction or percentage of the property. Until the matter is clarified, if it is possible to do so, it may be prudent to phrase the disclaimer in the form of a fraction or percentage.¹¹⁵

¹¹² See A. CASNER & R. STEIN, ESTATE PLANNING UNDER THE TAX REFORM ACT OF 1976, at 183 (1978).

¹¹³ See J. MCCORD, 1976 ESTATE & GIFT TAX REFORM, ANALYSIS, EXPLANATION & COMMENTARY 255 (1977).

¹¹⁴ See, e.g., MASS. GEN. LAWS ANN. C. 91A, § 7 (1975).

¹¹⁵ See *Northeastern Nat'l Bank & Trust Co. v. United States*, 387 U.S. 213 (1967) rejecting the position of Treas. Reg. § 20.2056(b)-5(c) (1958), which states that for purposes of the marital deduction a surviving spouse's right to receive all of the income from a "specific

6. Acceleration of Future Interests

Some statutes¹¹⁶ may provide for an alternative disposition of the disclaimed interest but may not explicitly deal with the impact of a disclaimer of one interest upon other interests in the property, such as future interests.¹¹⁷ Other statutes purport to come directly to grips with the problem. Thus, the Uniform Probate Code provides that "[a] future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as though the person renouncing had predeceased the decedent or the donee of the power. A renunciation relates back for all purposes to the date of the death of the decedent or the donee of the power."¹¹⁸ The Official Comment to the Uniform Probate Code states that this verbiage has the effect of accelerating remainders.¹¹⁹

In states having no definitive rule as to whether an acceleration occurs, it would certainly be prudent for the estate planner to spell out explicitly the effect of a disclaimer upon future interests. The same diligence is called for even in states having an acceleration rule since the statutory result may not coincide with the transferor's wishes. For example, assume that T leaves his estate in trust to pay the income to his son for life, remainder to his son's children who survive him, and that S disclaims with two children then living. The Uniform Probate Code is construed so that the remainder in the children accelerates; the trust terminates and the two children receive possession and enjoyment, even though the son may subsequently have other children or one or more of the two living children may die during the son's lifetime.¹²⁰ Did T actually intend such a result? Did T desire to give it to the son's children even if they don't survive their father? Did T wish to exclude afterborn children of the son? Unless these matters are dealt with explicitly in the dispositive instrument, the transferor's actual intent may be a matter of pure conjecture. In addition, the statutory scheme may totally frustrate the effectuation of the transferor's planning objectives.¹²¹

CONCLUSION

The disclaimer is a useful estate planning vehicle. Its use lessens the premium on skillful advance planning and enables taxpayers to adjust transfers in light of emerging circumstances which could not have been foreseen prior to the transfer. Congress should facilitate the use of the dis-

portion" must be expressed in terms of all the income from a fraction or percentage and that the gift of a fixed amount of income would not suffice.

¹¹⁶ See, e.g., MASS. GEN. LAWS ANN. C. 191A, § 7 (1975).

¹¹⁷ The Massachusetts statute provides that the disclaimed interest shall pass in the same manner as if the disclaimant had died immediately preceding the event determining that he is the beneficiary and that such interest is indefeasibly vested. It also provides that the "interest in property being disclaimed shall never vest in the beneficiary." It does not explicitly treat the issue of the impact of the disclaimer upon other interests in the property, such as future interests. *Id.*

¹¹⁸ See UNIFORM PROBATE CODE § 2-801(c) (5th ed., Official 1977 Text).

¹¹⁹ *Id.* at Comment.

¹²⁰ *Id.*

¹²¹ For a discussion of acceleration, see W. SCHWARTZ, FUTURE INTERESTS & ESTATE PLANNING §§ 11.5-11.9 (1977 Supp.).

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claimer by enacting legislation which corrects the deficiencies, gaps, and ambiguities in section 2518. In particular, section 2518 should be revised to meet the problems discussed in this article relating to partial disclaimers, partial disclaimers and the marital deduction, powers, and the procedural rules governing disclaimers.

The ameliorative legislation should preempt local law on the subject of disclaimers. A federal tax result should not be dependent upon the vagaries and technicalities of local law. Such a federally oriented approach would promote uniformity. Taxpayers who reside in different states should not be treated differently under the federal tax law.

Although the attainment of these goals may require more detailed, comprehensive legislation, this should not prove to be an insuperable barrier to change. As the present form of section 2518 indicates, brevity is no virtue in this field. It is true that the resulting federal law may differ considerably from a state's disclaimer rules and that the taxpayer will be confronted with the obligation to satisfy the requisites of two different regimes—the federal rules of disclaimer relating to federal tax law and the state law of disclaimer pertaining to the transmission of property and local taxation. This problem can be rectified, however, more readily and expeditiously by the states falling into line and adopting the federal disclaimer model. This course of action would not unduly interfere with or disrupt the development of local law consistent with local needs. The federal disclaimer statute, in essence, only affects one small segment of local property law. It permits a person, who never derived any beneficial enjoyment from property, to redirect promptly the title to another. It is consistent with the basic philosophy that a person shouldn't be required to accept title to property he does not want.

Finally, a potential loss of revenues is not a solid reason for erecting barriers to disclaimers. The size of the governmental treasury should not be dependent upon 20-20 foresight or the gift of prophecy.

BOSTON COLLEGE LAW REVIEW

VOLUME XIX

MARCH 1978

NUMBER 3

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