DISCLAIMERS

Illinois State Bar Association
Trusts & Estates Section
Annual Law Ed Program

October 7, 2010

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DISCLAIMERS[1]

I. THE CONCEPT

A disclaimer is the absolute and irrevocable refusal to accept an interest in property, or power over property, to which the disclaimant is entitled, irrespective of whether that entitlement results from a gift, descent, bequest, contract, survivorship, or otherwise. A valid disclaimer causes the interest to pass to those who would have taken had the disclaimant predeceased the date of the entitlement. A disclaimed interest does not vest in the disclaimant, and a disclaimer is *not* a transfer of the property interest or a release of the power.

* The right to disclaim flows from the principle that a gift is not completed without acceptance, that acceptance is a discretionary act, and that no one can be required to accept a gift or devise against his or her will. *People v. Flanagin*, 331 Ill. 203, 162 N.E. 848 (1928).

* Most gifts are accepted, of course, and there is a rebuttable presumption of acceptance that causes title to vest in the taker immediately. To rebut the presumption of acceptance requires an affirmative act of refusal — a written disclaimer — which usually must comply with state law statutory requirements (*e.g.*, Illinois Probate Act §2-7; 755 ILCS 5/2-7; Colorado Uniform Probate Code; C.R.S. §15-11-801.) These laws usually detail the means for disclaimer and its effect on the property interests involved.

* If a valid property law disclaimer also satisfies (usually) somewhat stricter Internal Revenue Code requirements as a "qualified disclaimer," the refusal to accept will also allow the property to pass beyond the disclaimant to the next taker without treatment as a separate transaction for estate and gift tax purposes. In effect, a qualified disclaimer collapses the transfer into a single gift from the original owner to the ultimate recipient, bypassing the disclaimant, so that, as between the disclaimant and the next taker, the passing is not a taxable transfer. The rules governing a qualified disclaimer are provided in Internal Revenue Code §2518 and its detailed supporting regulations, Treas.Reg. §§25.2518-1, 25.2518-2, and 25.2518-3.

* It bears repeating, now and often, that by traditional common law construction a disclaimer *is not itself a transfer*; one does not "disclaim to" another. Rather, a disclaimer is best considered as the *avoidance* of a completed transfer from the donor to the original designated donee, whereby the purported gift either passes to the next entitled successor in interest, if any, or reverts to the donor or the donor's estate. As discussed later in this treatment, the legislature and courts do not always adhere to this construction when such might obstruct sovereign prerogatives in the course of taxation, bankruptcy, or other creditor-related topics.

* The power to disclaim a gift is the power to recharacterize the transfer and redefine its consequences. With judicious use disclaimers can create opportunity to rewrite estate plans substantially after death; flaws or omissions can be cured, tax savings seized, family assets (sometimes) protected from (some) creditors, future interests accelerated to defeat trusts or other ultimate takers, and property redistributed according to the survivors' preferences. Given the uncertainty of current federal transfer tax law, and the public's reluctance to revisit existing estate

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[1] **© 2010 William A. Peithmann.** This monograph represents an updated rewrite of a generalist's discussion of the property and tax treatment of disclaimers that was first prepared for the Illinois State Bar Association's Trusts and Estates Section LawEd program in 1990, has since been regularly updated and revised for several programs and publications (including the 1993 and 1999 editions of IICLE's two volume "ILLINOIS ESTATE ADMINISTRATION") and was last presented to the 21st Annual National CLE Conference, Snowmass Village at Aspen, Colorado, in January, 2004, and as an appendix to the presentation "Planning and Drafting for the Non-Professional Family Fiduciary" included with IICLE's 51st annual estate planning course in May, 2008. Those who compare this treatment with prior versions will quickly see that while some portions have been only lightly touched up, other sections have again been revised extensively to reflect evolutions in the law and practice. Special thanks are again extended to ACTEC Fellow E. Diane Thompson, of Norfolk, Virginia, and to Professor William P. LaPiana, of the New York Law School, whose light always shines brightest on this topic.

plans, disclaimers may yet prove to be of even greater importance now, and over the next ten years, than over the last twenty years, during which there has been immense evolution in the notional art and practice of the subject.

* Disclaimers probably should be considered in every death situation. A little time spent putting pencil on paper to run down the family tree, the amounts and types of assets in play, and the various dispositive provisions will often reveal some opportunity, some advantage, that may not have been first apparent. This approach will demonstrate the practitioner's skill and imagination and occasionally produce the surviving clients' manifest appreciation.

II. PROBATE AND PROPERTY LAW MATTERS

A. State Law Rules, In Summary

All states and the District of Columbia recognize disclaimers. Most (and believed, all) states have specific disclaimer statutes. (See, ACTEC Study 25, "Disclaimers", November, 2002.) Most state statutes will find common root in one or more of:

* The Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act;
* The Uniform Disclaimer of Property Interest Act;
* The Uniform Disclaimer of Transfers under Nontestamentary Interests Act; and/or,
* The Uniform Probate Act.

Many states revised the uniform acts upon adoption, and several provisions have been interpreted differently by different state judiciaries. The National Conference of Commissioners on Uniform State Laws approved and recommended a new "Uniform Disclaimer of Property Interests Act" in 1999, which was revised again in 2002 ["UDOPIA "]. Widely discussed if not widely adopted, this updated uniform approach may yet evolve to influence national standards.

B. Illinois Rules, In Summary

The current Illinois disclaimer statute (§2-7 of the Probate Act; 755 ILCS 5/2-7) was adopted in 1983 as a revised version of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (Uniform Act), 8A U.L.A. 93 (1994). Non-testamentary property interests are tied to this law by express reference under the Disclaimer Under Nontestamentary Instrument Act, 760 ILCS 25/0.01, *et seq.* The Illinois statute is comprehensive, specific, and flexible. It does not conflict with the tax rules, but neither is it quite as rigid. Almost all "qualified" disclaimers will be valid for Illinois property law purposes.

1. Who May Disclaim

Any person to whom a property interest passes may disclaim, including the representative of a decedent or a ward under Articles XI or XIa of the Probate Act. Disclaimer by a representative requires leave of court unless the nominating instrument specifically authorizes disclaimer. The power to disclaim is not limited by any spendthrift provision or similar restriction in the instrument.

The court is given liberal authority to approve a disclaimer by a representative of an estate, even if it alters the distribution of the property, or on behalf of a ward as long as the disclaimer benefits those interested in the estate generally and is not "materially detrimental to the interests of the ward." Probate Act §2-7(a). (This latitude appears to have been inserted in the statute as a direct response to the holding in *In re Estate of Morgan*, 74 Ill.App.3d 853, 393 N.E.2d 692, 30 Ill.Dec. 656 (1st Dist. 1979), *aff'd*, 82 Ill.2d 26 (1980), in which an important tax-saving strategy was denied because it skewed the distributive scheme of the testator.)

2. What May Be Disclaimed

Virtually any property or interest passing by whatever means, including specifically fractional

shares, limited interests, future interests, contract rights, rights by survivorship, fiduciary powers, and powers of appointment, may be disclaimed, in whole or in part.

3. Form

No precise form is specified, only broad requirements. The disclaimer must be a signed writing, must describe the property (or part) disclaimed, and must affirmatively declare the disclaimer and its extent. (Some representative forms are included in Part IV below.)

4. Delivery

The disclaimer must be delivered to either

a. the transferor, donor, or representative;

b. the trustee or other person holding legal title to the property disclaimed; or

c. if neither "a." nor "b." above can be determined, then to the person having actual possession of the property.

Probate Act §2-7(c) also provides that the disclaimer "may be filed with the [circuit] clerk" where probate is or could be administered or with "the recorder in the county in which the real" property interest passes. The effect of filing as adequate delivery is not specified as to the disclaimant, but filing can be relied on by third parties. As a practical matter, filing or recording is a highly recommended means for preserving the record.

5. Timing

Illinois is among the few states which, like UDOPIA '99, have eliminated all time limits for property right disclaimers (although there is a strict nine-month rule for qualified [tax] disclaimers). Since a long period may pass from the time a contingent interest is created until that interest indefeasibly vests, the power to disclaim for property purposes can be an extended one, and is sometimes characterized as a *de facto* general power of appointment. (See, Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell Law Review 587 [1989] for an influential if controversial discussion of this powers of appointment analogy).

6. Effect

Unless otherwise expressly provided in the creating instrument, Probate Act §2-7(d) provides that the disclaimed interest shall pass or descend:

a. in the case of a present interest, "as if the disclaimant had predeceased the decedent" or the date of the transfer;

b. as to a future interest, "as if the disclaimant had predeceased the event" indefeasibly fixing both the "quality and quantity" of the interest; and

c. "in each case the disclaimer shall relate back to such date for all purposes."

Successive future interests that are dependent upon termination of the prior estate "accelerate and take effect in possession or enjoyment to the same extent as if the disclaimant had died before the date to which the disclaimer relates back." *Id.*

These provisions are intended to treat the devolution of the interest in the same fashion as a lapsed gift. See Comment, Uniform Act §3, 8A U.L.A. 103 (1994).

Probate Act §2-7(d) also provides that the disclaimant may receive an interest in the same property disclaimed in a different capacity. For example, a surviving spouse may disclaim a portion of an outright bequest but retain the right to income from the credit-shield trust to which the property passes as a result of the disclaimer.

7. Waiver and Bar

Probate Act §2-7(e) provides that the right to disclaim may be permanently waived by a writing, which can be filed or recorded in the same manner as the disclaimer. Obtaining a written waiver is not a bad idea if the administrator has some doubt as to the beneficiary's intentions and wants to distribute or otherwise dispose of property early.

Disclaimer is barred by acceptance, transfer, encumbrance of the interest, or other actions inconsistent with the unequivocal refusal of the gift. Receiving consideration for the disclaimer is equivalent to acceptance, which includes a family settlement agreement that provides for a disclaimer as part of the settlement. *In re Fuerstenberg's Estate*, 116 Ill.App.3d 11, 452 N.E.2d 15, 72 Ill.Dec. 83 (1st Dist. 1983). A special provision that acceptance must be affirmatively proved to constitute a bar seems directed to protecting the right to disclaim from accidental inferences of acceptance. The mere lapse of time or creation of a property interest, without knowledge, will not constitute acceptance.

C. Problems and Focus

1. Lapse and Distribution

Once disclaimed, an interest created at the death of the grantor is treated like a lapsed legacy, causing it to pass to the next taker. This next taker should be specified in the instrument, but all too often is not.

* For post-mortem transfers, examine the will or trust closely for instructions on alternative takers in the event the named beneficiary disclaims or predeceases the decedent. The document may, for example, direct disposition to one or more named individuals or to one or more trusts and in each case may create present or future interests. The lapsed gift may be joined to another, passed specifically to the residue, or left with no disposition at all. Absent a comprehensive residuary provision, the property may pass by intestacy under the rules of descent and distribution provided in Probate Act §2-1. These rules create spousal preferences and per stirpal distribution schemes that reveal unexpected resulting takers.

* Even if successor takers are designated, attention must be given to the family protection construction rules provided by Probate Act §4-11 (often referred to as the "anti-lapse" law). This statute, which applies to all testamentary gifts unless there is "express" instruction to the contrary contained in the will, contains three key provisions:

    a. Specific legacies of a present or future interest to a descendant of the testator shall pass to the disclaimant's descendants per stirpes living when the interest is to take effect in possession.

    b. If the gift is to a class, the surviving class members take to the exclusion of the disclaimant's descendants *unless* the disclaiming class member is a descendant of the testator. If the disclaimant is a descendant of the testator, this class rule does *not* apply: the disclaiming class member's descendants then living will share, per stirpes, in the disclaimant's share. (This result is often overlooked by those who rely on the so-called "class gift" rule. For a good current discussion of this problem, see *In re Estate of Bulger*, 224 Ill.App.3d 456, 586 N.E.2d 673, 166 Ill.Dec. 715 [1st Dist. 1991]).

    c. If neither a nor b above applies, then the lapsed gift shall pass as part of the residue under the will, to be taken by the residuary legatees according to their stated proportions.

* So, if Mother's will provides a life estate to Father, with remainder to Son, Son's disclaimer will cause his interest to descend to Son's own children then living and, if he has none, then to Mother's residuary estate beneficiaries; Son's disclaimed interest will *not* automatically pass to Father. If that is the goal (in order to enhance the marital deduction), then disclaimers from both Son's children *and* any other residuary takers will also be required.

* Carefully draw the family tree to assure that all statutory takers are accounted for and that the gift truly lapses if the point is to pass and/or merge titles in another family member, especially going against the stream to an *ascendant* heir. See, *Hunt v. United States*, 566 F.Supp. 356 (E.D.Ark. 1983), in which an attempt to consolidate an intestate estate into the surviving spouse for marital deduction purposes failed to account for all descendent takers. Although all surviving children and the children of a predeceased child timely disclaimed, none of the children of the surviving children disclaimed, apparently on the belief that their parents' disclaimers were sufficient to discharge their interests by representation. The Service challenged the marital deduction, and the district court agreed, finding that the effect of the several disclaimers was merely to pass the decedent's intestate shares on to the non-disclaiming grandchildren and great-grandchildren. This result could have been avoided if guardians for the minors had been appointed who then gained leave to disclaim the descending interests. See Probate Act §§11-1 through 11-18 and 2-7(a)(second paragraph).

* If the interest flows from a joint tenancy and more than one joint tenant is involved, then the third joint tenant will of course take by survivorship and to the exclusion of the disclaimant's descendants. Similarly, the alternative named beneficiary to life insurance proceeds, annuities, or pension plans will take to the exclusion of others as a matter of contract rights. Only if there are no other joint tenants or contract right holders will the interest then pass to the decedent's estate and come within range of the statutory construction rules.

* As non-testamentary instruments — specifically, revocable "living" trusts — become more and more popular as the primary estate planning vehicle, it is important to remember that Probate Act § 4-11 is limited by its terms to legacies under a *will*, and there is no authority to apply its provisions to a lapsed (or disclaimed) gift under a non-testamentary instrument. Unless the instrument is clear to provide alternative takers for lapsed gifts, such as a comprehensive residuary clause, there is a real danger that a disclaimed gift under a trust may revert to the settlor or to the settlor's estate. What happens then depends on whether the settlor died testate or intestate. If testate, the settlor's will may "pour over" to the trust, begging the question and probably resulting in partial intestacy. Perhaps worse, the will may predate the trust by several years and have wholly different dispositive terms, a situation that invites a fight. In the event of intestacy — partial or whole — the property will pass by descent and distribution under Probate Act §2-1. If the disclaimant under the trust is also an intestate beneficiary, then the disclaimer must address the passing of the intestate interest as well.

2. Acceleration and Future Interests

The Illinois disclaimer law is intended to embrace the property law principle that when a present or prior interest in property terminates or fails by death or lapse, the successor estate shall fall in promptly. To this end, Probate Act §2-7(d) specifies:

a. that the disclaimer shall relate back before the event "which determines that the taker of the property or interest has become finally ascertained and his [or her] interest has become indefeasibly fixed";

b. that any future interest limited to take effect after the disclaimed interest "shall accelerate and take effect in possession and enjoyment . . . as if the disclaimant had died before the date to which the disclaimer relates back"; and

c. that the disclaimer is binding "upon the disclaimant and all persons claiming by, through or under the disclaimant."

An example provided in the comments to the old Uniform Act helps put these rules in perspective:

> **[U]nless the decedent or donor of the power has otherwise provided, if T leaves his estate in trust to pay the income to his son S for life, remainder to his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive**

possession and enjoyment, even though the son may subsequently have other children or one or more of the living children may die during their father's lifetime. Comment, Uniform Act §3, 8A U.L.A. 103 – 104 (1994).

* While this example is helpful, it is limited by the presumption that it is the prior possessory estate that terminates. The effect of a present disclaimer of one of the successive estates when the prior possessory estate does not fail or when there are other contingencies is less evident. In those cases, the passing may still depend on rules of construction based on the law of future interests.

* For example, suppose Husband gives a life estate to Wife, remainder to their Children, but if any Child predeceases Wife, his or her share shall pass to Grandchildren. In property parlance, each child takes a vested remainder that is subject to defeasance in the event he or she does not survive Mother. Suppose further that the family members wish to accelerate and destroy the remainder in order to pass the fee to Mother without disrupting her life interest. Can this be done if all the living descendants simultaneously disclaim? Or did the gift create an interest in a class of unknown beneficiaries — the possible but as yet unborn grandchildren who may be living at Wife's death — who have independent rights that cannot be presently cut off?

* The lead Illinois case on acceleration is *In re Estate of Aylsworth*, 74 Ill.App.2d 375, 219 N.E.2d 779 (3d Dist. 1966), which goes to great length to distinguish a vested remainder subject to defeasance from a contingent remainder, which is an interest that does not vest at all until the prior estate lapses. By applying common law property principles, the *Aylsworth* court concluded that a defeasible vested remainder is destroyed by acceleration but a contingent remainder is not because acceleration before the fulfillment of the condition to the contingent remainder is presumed to defeat the express intent of the testator.

  Suppose the devise had been reworded to give a life estate to Wife, remainder to Wife's descendants living at her death, thus creating a pure contingent remainder in descendants who are unascertainable until Wife's actual death. Certainly the children can disclaim to keep the remainders from their estates, but can anything be done to destroy the remainder entirely and vest the fee in Wife?

  Aylsworth suggests not, but that holding predates the current disclaimer law and its provision for acceleration, and no other Illinois decision since has tackled the question head-on. However, the Kansas Supreme Court has construed its comparable statute — including specifically the provision that all those "claiming by, through or under" the disclaimant are bound by the disclaimer — to find that, in certain instances, present disclaimers by the living are insufficient to cut off the contingent remainders of the unborn. In *Estate of Burmeister*, 225 Kan. 807, 594 P.2d 226, 229 (1979), a life income interest in a trust was given to the spouse. On her death, the trust was to continue until the occurrence of a specified event, at which time it was to be distributed to the testator's then-living descendants. Two of the four descendants living at the testator's death, who had no offspring of their own, made timely disclaimers, seeking to enhance the remainder interests of the others. However, a guardian ad litem appointed for the disclaimants' unborn issue objected to the acceleration, and the court upheld the objection. The interests of the unborn are created by the terms of the devise itself, not by any subsequent act like a disclaimer, and thus are dependent on the occurrence of certain events (in this case, survivorship.) These interests, therefore, are not derivative of the disclaimants' status but are "independent rights" that cannot be destroyed by the "representative" acts of the living potential takers.

* Illinois law has a comparable provision for the appointment of a guardian ad litem to represent the property interests of unborn children in §2-501 of the Code of Civil Procedure, 735 ILCS 5/2-501. (This is the current version of the Chancery Act proceedings previously found in *Ill.Rev.Stat.,* c. 110, ¶356, *et seq.*). This law makes it clear that the court has jurisdiction to terminate the interests of the unborn; however, it is not at all clear that the broad discretion given the court to approve disclaimers by guardians of a living ward under Probate Act §2-7(a) extends to guiding the discretion of a chancery guardian ad litem. Some attorneys in this position, charged with protecting the interest of the unborn, might feel compelled to object in favor of preserving the future interests that would ultimately vest. On

the contrary, when the point of the plan is to preserve family wealth *in toto*, by limiting or eliminating significant transfer tax, perhaps the broader interpretation of the best interests of those unborn takers should prevail and guide the GAL's advocacy. (SEE, *Estate of Lassiter v. Comm'r*, 80 T.C.M. [CCH] 541 [2000]), where the unborns' guardians' role was essential to avoiding $14,000,000 of current transfer tax.)

* Whether the remainder can be accelerated and destroyed during the pendency of a prior estate remains problematic. In the final analysis, it is a question of ascertaining the intent of the creator of the interest: Did the testator intend distribution to the remaindermen upon termination of the prior estate, regardless of time, or at the actual end of the predecessor's life? (For a broader discussion of this riddle, see Ronald A. Brand and William P. LaPiana, DISCLAIMERS IN ESTATE PLANNING: A GUIDE TO THEIR EFFECTIVE USE, pp. 19 – 22 [1990] and *Annot.,* 7 A.L.R. 4th 1084 [1981].)

* Some states have virtual representation rules, intended to facilitate intergenerational agreements resolving ambiguities in the terms of gifts and/or the fiduciary's duties and powers over a trust's res. Illinois has been a leader in this area, both in terms of the common law (See, *e.g., Hale v. Hale*, 146 Ill. 227, 33 N.E. 858 [1893]; *Hopkins v. Patton*, 257 Ill. 346, 100 N.E. 992 [1913], and *Cary v. Cary*, 309 Ill. 330, 141 N.E. 156 [1923]), and by statute. Illinois enacted its first virtual representation statute in 1993, by adding new Section 16.1 to the Trusts and Trustees Act (755 ILCS 5/16.1) The law was intended to facilitate intergenerational agreements resolving ambiguities in the terms of gifts and/or the fiduciary's duties and powers over a trust's res. Such agreements could be "*binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest, if all other persons who have a contingent, future, or other interest in the trust would become primary beneficiaries only by reason of surviving a primary beneficiary."* 760 ILCS 5/16.1(a). However, and perhaps in light of the conundrum over whether a remainder can be accelerated or destroyed during the pendency of a prior estate, the first virtual representation law purposely avoided the debate: "*This Section* [16.1] *shall not apply to an agreement that accelerates the termination of a trust, in whole or in part.* 760 ILCS 5/16.1(c).

  Effective January 1, 2010, Illinois adopted a new, far broader and more flexible virtual representation scheme which, while still limiting the conditions and manner by which trusts can be terminated, nevertheless contemplates the eventuality in strict theory. How this broader scheme will affect acceleration as a consequence of disclaimer remains to be seen.

* Finally, it bears reminding that while a tax-driven "qualified disclaimer" must be made within nine months after the interest is created, without regard to when the property may indefeasibly vest, in many states, including Illinois, a valid property disclaimer can be made at any time reasonably related to the event that determines the final taker. Thus, the holder of a contingent or a defeasible vested remainder can carry what amounts to a power of appointment through the term of the prior possessory estate before electing whether to accept the interest or to let it pass. This power may sometimes offer important nontax opportunities.

3. Creditors' Rights

Protecting family assets from creditors has long been the chief nontax purpose of disclaimers and, for this purpose, they have historically been quite effective. Traditionally the law has recognized an absolute right in every citizen to refuse a transfer of any kind, thereby causing the subject property to relate-back to the moment of the donor's attempted transfer: That which is never accepted is never owned; that which is never owned can never be attached, nor can it be transferred, fraudulently or otherwise.

New federal legislation, and a handful of state and federal court decisions, are beginning to break this protection down. What is or is not an attachable property right, and which of those rights may or may not be disclaimed to defeat the recoverable claims of others, is now in flux. The result is a new analytical scheme by which:

* the identity of the debtor and creditor,

* the nature of the debt and the creditor's claim,
* the timing of the disclaimer,
* the progressive status of the collection process, and
* the technical sufficiency of the disclaimer

may all influence the effectiveness by which the debtor's renunciation will–or will *not*--discharge the subject asset from recourse, and a growing sense that creditor avoidance will prove harder to accomplish as this new dialectic takes deeper root in the body of the law of collections and creditors' rights.

a.. Illinois State Property Law: Full Relation-Back

As first suggested the right to disclaim a gift stands upon the common law principle that acceptance is a discretionary act, and that the affirmative act of rejecting a gift avoids the disclaimant's entitlement *ab initio*. The lead Illinois case adopting the principle is *Flanagin*, 331 Ill. 203, 162 N.E. 848 (1928), which recites a lengthy historical basis for the general rule that the disclaimer avoids the vesting of title in the disclaimant altogether, and creditors' claims cannot attach to that which the disclaimant never owned. Or, as Professor Hirsch observed, the disclaimant's "'inchoate' title vanished retroactively." (74 Cornell L. Rev. 587, 592)

This position was sustained by our Supreme Court in *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 537 N.E.2d 274, 130 Ill.Dec. 207 (1989), a case that involved compelling facts in favor of the bank creditor. There, the son bought a farm on contract from his mother. The contract prohibited assignment without the seller's consent. Five years later, the son assigned his contract rights as an equitable mortgage to the bank. The mother successfully terminated the contract for breach of the nonassignment clause, and all titles reverted to her. When the mother died, she left everything to the son if he survived and in trust for his wife and children if not. The son disclaimed, and the bank foreclosed, arguing: (a) the doctrine of after-acquired title; (b) bar, under Probate Act §2-7(e), by virtue of the prior assignment; and (c) that the son's actions constituted a fraudulent conveyance under the then-existing Illinois statute of frauds, *Ill.Rev.Stat.* (1985), c. 59, ¶4. The Illinois Supreme Court denied all of the bank's arguments and reconfirmed *Flanagin* in all respects. The bank's equitable mortgage lapsed when the contract interest was forfeited, and it could not reattach to property that the debtor timely disclaimed. The prior acts of ownership during the tenure of the land contract could not be tacked to the interest that would have passed for purposes of §2-7(e). And, since a disclaimer is not a "voluntary conveyance," it cannot be a breach of the fraudulent conveyance rules regardless of the disclaimant's intent.

b. Federal Income Tax Liens: Federal Law Preemption

In 1999 the United States Supreme Court resolved a split in the federal circuits on whether disclaimed property could pass untouched by the disclaimant's existing federal income tax liens. *Drye v. United States*, 528 U.S. 49, 145 L.Ed.2d 466, 120 S.Ct. 474 (1999).

* The Fifth and Ninth Circuits had followed the traditional state/common law interpretation that disclaimers relate back for all purposes, meaning that the disclaimant could have no interest to which his or her existing tax liens might attach.

* The Second and Eighth Circuits had looked to the broader language of Internal Revenue Code §§ 6321 and 6334 to hold that the "right to receive property" -- the mere *right* to receive, irrespective of whether that right was renounced -- created a sufficient host for the income tax liens even if that property never vested in the taxpayer but indeed passed, as a result of the disclaimer, to another, largely innocent party.

* The *Drye* facts were simple enough: Irma Drye died intestate, leaving a sole insolvent heir who was subject to a series of valid IRC § 6321 income tax liens. (IRC § 6321 provides for "a lien in favor of the United States upon all property *and rights to property*, whether real or personal, belonging to such person." [Emphasis added.]) A few months after his mother's death her son validly disclaimed and Irma's $233,000 estate descended to the disclaimant's daughter/decedent's granddaughter.

* In sustaining the IRS in its collection against granddaughter's living trust, a unanimous

Supreme Court adopted the broadest possible application for the §6321 liens, and endorsed Congress' legitimate intention to reach "every species of right or interest protected by law" (528 U.S. 49 at 56). In the process the Court disregarded the very state law property rules that (presumably) defined whether the disclaimant ever had an identifiable interest, at any time, to which any claim of any kind could relate.

* Justice Ginzburg wrote that the Court was fully "satisfied that the Code and the interpretive case law place under federal, not state, control the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy for unpaid federal taxes." 528 U.S. 49 at 58. To this Court, the critical issue was not the niceties of property law theory but rather the practical control the taxpayer could actually exercise over the disposition of the putative gift. In this instance, the decedent's son may have had an absolute right to disclaim his inheritance, but he also had an absolute right to accept the inheritance as well.

* It was that practical control -- the power to choose whether to accept or to reject the gift -- that to this Court's view represented more than a mere personal right. Instead, it reasoned, these state-law-created choices crystalized to form the equivalent of Professor Hirsch's notional general power of appointment: as a result of his mother's death Rohn Drye could, in fact, choose to accept the inheritance in his own name and right or, through his refusal, choose for the property to pass to a close family member who, like the default taker under a general power of appointment, was not selected by the disclaimant but was fully known to him before the election was made.

> **Thus the heir inevitably exercises dominion over the property. He determines who will receive the property -- himself if he does not disclaim, a known other if he does. See Hirsch, The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587, 607-608 (1989). This power to channel the estate's assets warrants the conclusion that Drye held "property" or a "right to property" subject to the Government's liens.** 528 U.S. 49 at 61.

* Yet, in ignoring state property law rules for what are presumably federal preemptive purposes, the Supreme Court in its majesty comes perilously close to revoking the substance of those property law rules at their conceptual source. As Professor LaPiana observes:

> **Justice Ginsburg's sweeping language calls into question the entire relation back doctrine. Indeed, the [*Drye*] opinion expressly rejects the argument that by disclaiming the disclaimant is not directing the passing of the property. The rejection of a death time gift cannot restore the status quo ante because, unlike the donor of a lifetime gift, the decedent cannot make a decision about the rejected property. This even though the disclaimed property passes according to a statute that references , the deceased donor's arrangements . . . the disclaimant "inevitably exercises dominion over the property' [*Drye* citation omitted]. Exercising dominion, of course, means acceptance, and if one followed the reasoning of *Drye* to its bitter end, it is impossible to disclaim so long as disclaimer is barred by acceptance.** LaPiana, William P., *Some Property Law Issues in the Law of Disclaimers,* 38 ABA Real Property, Probate and Trust Journal 207 at 237 [2003].

c. Federal Bankruptcy

The degree of protection afforded by disclaimers in bankruptcy is also in transition. The cases suggest that the consequences of a disclaimer on a disclaimant's bankruptcy estate may well depend on whether the disclaimer is made before or after the bankruptcy petition is filed.

* The cases are split on whether a *pre-petition* disclaimer constitutes a fraudulent transfer or prohibited preference. See, e.g., *In re Atchison*, 101 B.R. 556 (Bankr. S.D.Ill. 1989), *aff'd*, 925 F.2d 209 (7th Cir. 1991; pre-petition disclaimer of an inheritance created before filing was allowed based on Illinois property law construction); a*ccord: Hoecker v. United Bank of Boulder*, 476 F.2d 838 (10th. Cir., 1973)(Colo. law); *Grassmueck, Inc. v. Nistler*, 259 B.R. 723 (Bankr. D. Or. 2000) (Oregon law, rejecting *Drye*); *In re Simpson*, 36 F.3d 450 (5th.

Cir. 1994)(Tex. law). *Contra: In re Brajkovic*, 151 B.R. 402 (Bankr. W.D. Tex. 1993); *In re Kloubec*, 247 B.R. 246 (Bankr. N.D. Iowa. 2000) (Iowa law, adopting *Drye*).

* The rules seem more clear with respect to *post-petition* disclaimers, where the after-acquired property provisions of Bankruptcy Code §541(a)(5) now include "[a]ny interest in property . . . that the debtor acquires *or becomes entitled to acquire* within 180 days" after filing, thus making disclaimer an unauthorized post-petition transfer that can be avoided under §549 of the Bankruptcy Code. These provisions override applicable state disclaimer law. *In re Chenoweth*, 132 B.R. 161 (Bankr. S.D.Ill. 1991), *aff'd,* 143 B.R. 527 (S.D.Ill. 1992), *aff'd,* 3 F.3d 1111 (7th Cir. 1993)).

* According to the *Chenoweth* interpretation, a foreshadowing of the *Drye* analysis, Congress has reversed the fundamental property law principle that acceptance of a gift or transfer is discretionary and has substituted a presumption — at least for post-petition bankruptcy matters — that all purported gifts the debtor "becomes entitled to acquire" are available for the interests of creditors *without regard* to the donee's state law right to disclaim and avoid the transfer.

d. Elder Law and Medicaid Planning

Adjusting to the costs of providing long-term health care for aging family members, when those costs rapidly prove to be beyond the family's reasonable capacity to pay, has become a burning subject among estate planning and elder law practitioners nationwide. Protecting inheritances while preserving public aid eligibility has been the focus of much disclaimer analysis.

* As part of the massive rewrite of medicaid policies contained in the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), new rules were imposed that severely restrict eligibility for assistance if the "individual or the spouse of such an individual . . . disposes of *assets*" for less than fair market value at any time while receiving assistance or less than 36 months before applying for assistance. [Emphasis added.] 42 U.S.C. §1396p(c)(1)(A). (Note that the look back is *60* months if the transfer is into trust.)

* The rub, of course, is the word "assets," which for these purposes means something far more than any state property law definition would imply. Instead, and apparently for the intended purpose of disarming disclaimers or as an effective means of thwarting recovery efforts, a new definition was added as part of 42 U.S.C. §1396p(e):

  " **(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse,** *including any income or resources which the individual or such individual's spouse is entitled to but does not receive* **because of action —**

  " (A) by the individual or such individual's spouse,

  "(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

  "(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse. **[**Emphasis added.**]**

* While it may seem to some practitioners that very little is crystal clear about public aid eligibility, about what works and what does not, it *is* clear from this language that a disclaimer during the pre-eligibility period or while receiving assistance could jeopardize prospective or continuing eligibility. In many cases the value of keeping the disclaimed property in the family will be outweighed by the importance of protecting eligibility for the disclaimant in the long term. The greatest caution should be observed before counseling a disclaimer by one whose present and continuing care depends on public assistance.

* One point is especially striking about the effect of this revision on the Department of Public Aid's recovery efforts. While the Department is directed to pursue assets in which the aid

recipient had an interest, the collection process is still governed by state law. While there is no reported Illinois case on this issue, it is hard to imagine a court wholly ignoring the *People v. Flanagin*, 331 Ill. 203, 162 N.E. 848 (1928), and *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 537 N.E.2d 274, 130 Ill.Dec. 207 (1989), holdings in order to recognize a recoverable interest in property in which the debtor never acquired title. Faced with a similar problem the Iowa Supreme Court sustained similar property law features in upholding a disclaimer by a decedent's executor in *In re Estate of Kirk*, 591 N.W.2d 630 (Iowa 1999). Mrs. Kirk died in February 1996 while receiving public assistance for her nursing home care. Her husband had continued to live in the marital home but predeceased her by three months. Mr. Kirk left property under his will to his wife, together with joint tenancy interests in some savings accounts. Mrs. Kirk's executor timely disclaimed all her interests in her husband's property, and the state agency sought reimbursement for funds advanced for her care from her estate, claiming that the disclaimers violated public policy in thwarting the agency's federally mandated right to reimbursement. The trial court upheld the disclaimers as effective to pass Mr. Kirk's property to the couple's children, and the Iowa Supreme Court agreed. However compelling the state's interest in recovering the cost of care where assets are available, this state interest did not override Iowa's state property law treatment — similar to Illinois' — that treats the disclaimer as an avoidance of the transfer, not a scheme to circumvent medicaid eligibility provisions, and therefore sufficient to defeat the claim for reimbursement.

* Nevertheless, the Illinois Department of Public Aid has begun taking its mandate to pursue reimbursement for assistance far more aggressively, an attitude evident in the facts and opinion reported in *In re Estate of Heater*, 266 Ill.App.3d 452, 640 N.E.2d 654, 203 Ill.Dec. 734 (4th Dist. 1994). Mrs. Heater died intestate and insolvent, except shortly before her death her sister also died, leaving her an inheritance of about $40,000. The Department filed a claim for reimbursement of assistance, and the administrator of her estate attempted to avoid the claim by petitioning for leave to disclaim the inheritance pursuant to Probate Act §2-7(a). The circuit court granted the administrator's petition, but the Fourth District Court of Appeals reversed the circuit court's order.

  In its brief, the Department argued that its claims were entitled to special consideration, that there is a public policy against artificial impoverishment for public aid purposes, and that since a disclaimer in her lifetime would have made Mrs. Heater ineligible for further assistance, her administrator "should not be allowed to do what she could not have done." 640 N.E.2d at 656. The court relied on *Flanagin* in rejecting this supposed preferential status and found, first, that the state is a creditor just like any other. But, just like any other creditor, the state was an "interested person" for purposes of the estate's administration, and its claim was entitled to the court's consideration before granting the administrator leave to disclaim.

  The opinion recites the court's own careful review of the existing law on when and how a person or representative may disclaim in accordance with Probate Act §2-7 and properly observes that "a testator may, in a will, authorize his or her executor to disclaim without court approval," with which power the state's claim could have been avoided. 640 N.E.2d at 656. But when not specifically authorized by the decedent in advance, a representative of an estate may disclaim only with court approval, and that approval may be granted only after the court has made its finding that the disclaimer would benefit the estate and those interested in the estate generally. The court found from the circuit court record that the creditor's interest was not considered, but rather only the benefit to Mrs. Heater's sole heir, and that was an abuse of discretion.

* The *Heater* opinion is well reasoned, consistent with existing law, and applicable to a comparatively narrow set of facts. It illustrates, however, and once again, that every will (and every durable power of attorney) should include specific authority in the representative to disclaim without leave of court. (See Part IV.A. below for one possible approach.)

e. The Eroding Trend

What was perhaps the chief non-tax reason to disclaim a transfer -- to prevent family assets from

falling to those predators who might wish to seize them -- is now thoroughly compromised by the thinking represented by §541(a) of the United States Bankruptcy Code, §1396p(e) of Title XIX of the Social Security Act, §6321 of the Internal Revenue Code, and the "right to acquire" holdings of *Drye*, *In re Chenoweth*, and *Heater.*

* Whether the tactical disclaimer will succeed, or not, may depend upon a mosaic of independent facts -- such as the identity of the parties (whether public or private), the nature of the debt (look out for intentional tort feasors and public aid miscreants), and the status of the collection when the disclaimable "interest" arises -- on all of which the attorney must be well-briefed before hazarding advice.

* Yet, if relation back is a legal fiction, as suggested by both Professor Hirsch and Justice Ginsburg in the *Drye* opinion, might it not be that that fiction was divined by wise jurists with full awareness of its social utility? And given that "rights to property" and "rights to acquire" property are now so easily defined, with the United States Supreme Court providing the dictionary, how long will it be before the several state legislatures begin re-defining the applicable provisions of their governing state collection and fraudulent conveyances laws? That creaking sound one hears in the distance sounds like a door slowly shutting on the effective creditor-avoidance disclaimer.

* There is one more consequence to this transition that should now be crystal clear to all practicing attorneys: advising clients on the suitability and effect of a disclaimer of interests is an increasingly risky procedure, one requiring the greatest of care and the most succinct communication with the clients. For thoughtful reading, see, *Linck v. Barokas & Martin*, 667 P.2d 171 (AL, 1983); *Leipham v.Adams*, 894 P. 2d 576 (WA, 1995); and *Kinney v. Shinholser*, 663 So.2d 643 (FL, 1995) -- malpractice actions all, and all involving allegations of failure to understand or properly advise on disclaimers.

III. FEDERAL ESTATE AND GIFT TAX FEATURES

The consequences of a valid property law disclaimer are brought into stark focus when compared with the broad advantages that a "qualified disclaimer" can create in avoiding federal transfer tax liabilities.

In principle, the Internal Revenue Code and Treasury Regulations are reasonably clear:

* A refusal to accept property through disclaimer is a taxable transaction to which the gift tax applies irrespective of the state law treatment of title. Treas.Reg. §25.2511-1(c)(1).; however,

* If the disclaimer is a "qualified disclaimer" under Code §2518, it will be excepted out and will not be treated as a taxable gift.

Of course, transfer tax still applies against the original grantor/donor, but a qualified disclaimer will collapse the transaction into a single gift from the original owner to the ultimate recipient and avoid a second gift tax on the (intervening) disclaimant.

Thus, while the property law rules define how and where the disclaimed property passes, the tax rules define whether the refusal will cause it to pass "as if the interest had never been transferred" to the disclaimant. Code §2518(a).

A. General Requirements

A "qualified disclaimer" is defined by Internal Revenue Code §2518(b) and Treas.Reg. §25.2518-2. Broken into its core elements, a qualified disclaimer is

1. an irrevocable and unqualified
2. refusal by a person to accept an interest in property,
3. in writing and signed,
4. received by
    a. the transferor of the interest,
    b. the transferor's legal representative, or
    c. the holder of the legal title to the property
5. not later than nine months after
    a. the date on which the transfer creating the interest in the disclaimant is made, or
    b. the day on which the disclaimant attains age 21; and
6. the disclaimant may not have accepted the interest or any of its benefits, and
7. as a result, the refused interest must pass
8. without any direction by the disclaimant either
    a. to the spouse of the decedent or
    b. to someone other than the disclaimant.

(Note the special provision for the spouse. All other disclaimants must lose the interest in property altogether, but a spousal disclaimer will not prohibit the interest from passing to the spouse in another capacity.)

* Code §2518(c) goes on to provide that a disclaimer may be of an undivided portion of an interest; that powers with respect to property are treated as property and can be disclaimed (even if the power is extinguished and does not pass to anyone); and, that under certain circumstances, a disclaimer that does not qualify under state law may nevertheless qualify for tax purposes.

* Code §2518 and its regulations apply to the disclaimer of all property interests created after its effective date of January 1, 1977. Pre-1977 interest disclaimers are governed by the somewhat looser rules of Treas.Reg. §25.2511-1(c)(2). Although it is still technically possible to qualify a disclaimer of a pre-1977 interest under Treas.Reg. §25.2511-1(c)(2), the principles of Code §2518 apply in broad effect to all disclaimers today.

B. Problems and Focus

1. Form

Like most state disclaimer laws, Treas.Reg. §§25.2518-2(b) and 25.2518-2(c) do not prescribe a

precise form. The disclaimer must be a signed writing, identifying specifically the property or interest disclaimed, and delivered within nine months after: (a) the day on which the transfer creating the interest is made; or, (b) the day on which the disclaimant attains age 21.

* There can be no conditions. A disclaimer made dependent on its final determination as a qualified disclaimer is fatally flawed.

* Great care is required to identify the actual interest in property or power being disclaimed, especially when the disclaimer applies to less than an entire interest (which in turn requires a very close reading of the text and examples under Treas.Reg. §25.2518-3). Sometimes the best approach will be identification by reference to specific clauses in the granting instrument.

* Capacity to disclaim is a requirement, so a fiduciary who has not been formally appointed, or who has been appointed but not authorized by the instrument or the court, cannot make a qualified disclaimer. But see, *Estate of Allen v. Commissioner*, 56 T.C.M. (CCH) 1494 (1989; attorney's disclaimer pursuant to express oral authority from absent executor upheld on general agency principles.)

* Delivery must be proved (an important reason for filing or recording) and delivery by mailing is specifically authorized under Treas.Reg. §25.2518-2(c)(2).

2. Timing and Future Interests

The most important changes Code §2518 brought to prior law were the fixing of a strict nine-month period during which the disclaimer may be made and the redefinition of the moment when that period begins to run: "The date on which the transfer creating the interest in the disclaimant is made." Treas.Reg. §25.2518-2(c)(1)(i). These changes, and the Supreme Court's interpretation of the meaning of Treas.Reg. §25.2511-1(c), have combined to eliminate the power of a contingent interest holder to defer making a qualified disclaimer of the interest until its final vesting.

a. Pre-1977 Interests and the Old Rule: Knowledge and Indefeasible Vesting

Under the "old rule" (Treas.Reg. §25.2511-1(c)(2)), the validity of the tax disclaimer depended more on its effect under relevant state law. To qualify, the refusal needed to be made only "within a reasonable time after knowledge of the existence of the transfer."

* If the interest was contingent or defeasible and state law deferred the remainderman's power to disclaim until the interest became indefeasibly fixed, then it was arguable that "knowledge" of the transfer was also deferred to the moment of vesting, and the power to disclaim for tax purposes was preserved co-terminously. A disclaimer timely made after the life tenant's death should be qualified since the "existence of the transfer" would not occur until the interest indefeasibly vested. Until then, the disclaimant's expectancy was speculative, and there was nothing concrete to renounce.

* Most state property law rules embrace this construction, and this argument was advanced for tax purposes to, and ultimately upheld and adopted by, the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973).

* Of course this property law construction -- allowing deferral of acceptance or disclaimer of a contingent future interest through the term of the predecessor estate -- created the power to defer tax planning until the remainderman's own wealth and needs were well defined. A suspended power of this type, equivalent in effect to a nontaxable general power of appointment, would have been of immense advantage to intergenerational planning and thus was aggressively pursued — and resisted — through several cases until it was quashed conclusively by the Supreme Court in *Jewett v. Commissioner*, 455 U.S. 305, 71 L.Ed.2d 170, 102 S.Ct. 1082 (1982). *Jewett* overruled *Keinath* specifically, interpreting this continuing power in the remainderman as a constructive form of control over the disposition of property comparable to the power of ownership. A future interest, even a contingent or defeasible one, is nevertheless an element of current wealth, actuarially measurable in value

and freely alienable. The power to disclaim this wealth exists from the moment of its creation irrespective of its vesting; accordingly, the reasonable time to disclaim must -- for the transfer tax purposes of old §2511-- run from the creation of the interest and not its finality under state property law rules.

* This is now the indisputable rule for interests created before 1977. Practitioners will continue to run into these pre-1977 interests for many years to come as life estates expire and future interests fall in, but under *Jewett* the present vesting no longer matters. Since Code §2518 has been the law since 1977, far more than a "reasonable time," it will be practically impossible to qualify a disclaimer of a pre-1977 interest by a disclaimant unless the disclaimant has just attained the age of 21 or unless it can be established that the taker was so remote from the creation of the interest and any subsequent proceedings as to in fact have had no knowledge of its existence.

* The *Jewett* rationale was reconsidered and unanimously sustained in *United States v. Irvine*, 511 U.S. 224, 128 L.Ed.2d 168, 114 S.Ct. 1473 (1994). *Irvine* stands for the proposition that state law must yield to federal tax authority: "Although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." 114 S.Ct. at 1481. State property transfer rules do not translate into federal taxation rules because the principles underlying the two look to different objects. State property law rules apply the legal fiction that an effective disclaimer of a future interest cancels the transfer to the disclaimant *ab initio* and substitutes a single transfer from the original donor to the disclaimant's successor in line. In contrast, Congress meant for the gift tax to supplement the federal estate tax and raise revenue, and Congress did not mean to limit this revenue function with state law controls. State law interests in disclaimers are less compelling than the federal government's interest in preserving a certainty that on tax issues state control or limitation will not be recognized absent clear language in the revenue laws that says so. This is true even in those instances, as in *Irvine* when the creation of the interest -- a trust with a distantly ripening remainder -- occurred before enactment of the gift tax. (This federal supremacy perspective on private property rights was reinforced and expanded in *Drye v. United States, supra*.)

b. Post-1976 Interests and the New Rule: Transfer Creating the Interest

Internal Revenue Code §2518 was adopted, at least in part, to prospectively eliminate the local law components that sustained *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973), by introducing two new defining criteria:

1. The "reasonable time after knowledge of the existence of the transfer" standard was replaced by a fixed nine-month limit, and

2. The reference point was changed from the moment the interest indefeasibly vested to "the day on which the transfer creating the interest" occurred.

* Thus, for interests in (or powers over) property created on or after January 1, 1977 — no matter how remotely the interests or powers may ripen — local law will be ignored for the purposes of timing a qualified disclaimer.

* These standards were detailed in Treas.Reg. §25.2518-2(c)(3), which recited several specific instances of interests that may or may not be disclaimed in reference to the moment when those interests (or powers) were first created or authorized by the donor's original action. (Unfortunately, the drafters of the regulation incorporated a reference from the House Committee report that led them to define these moments in relation to the donor's "taxable transfer" of the interests, and that has led to substantial confusion. As demonstrated by the underlying facts in *United States v. Irvine*, (1994), not all transfers creating a property interest are *taxable* transfers and the argument has been made that a disclaimer of an interest

resulting from a nontaxable transfer need not comply with Code §2518. *See Irvine, supra; Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990).

* Because the Service was compelled to revise the regulations in light of several adverse rulings pertaining to jointly owned property it took advantage of the opportunity to clarify the reference point for disclaimers by substituting the term "transfer creating the interest" for "the taxable transfer" throughout the revised regulations. "This change clarifies that the starting point for the 9-month period is not dependent on the actual imposition of a transfer tax at the time that the interest to be disclaimed is created." 62 Fed.Reg. 68,183, 68,184 (Dec. 31, 1997).

* What constitutes a "transfer creating an interest" under Treas.Reg.§25.2518-2(c)(3)(i) is first defined by two now-familiar general rules:

    1. For inter vivos transfers, "a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift" (specifically including gifts qualifying for the annual exclusion); and

    2. For transfers not created until death (wills, revocable trusts, and most beneficiary designations) "the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer" ("For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax.").

* The regulation then applies these two general rules to several specific instances of when the time for making a qualified disclaimer begins to run:

    1. For transfers of foreign-situs property by a non-resident alien, the day of the transfer "even if the transfer would not be subject to estate tax";

    2. For the holder of a general power of appointment, the date the power was created;

    3. For the taker of any interest passing upon the exercise, release, or lapse of a general power of appointment, the date of the exercise, release, or lapse "regardless of whether the exercise, release, or lapse is subject to estate or gift tax";

    4. For the holder, permissible appointees, *and* takers in default under a nongeneral power of appointment, the date the power was created;

    5. For life tenants and their remaindermen, without regard to whether the remainder is vested or contingent, the date of the transfer originally creating the interest;

    6. For remaindermen in the case of QTIP property elected under Code §2056(b)(7), the date of death of the first spouse to die even though a subsequent taxable event for the property occurs at the death of the survivor; and

    7. For interests passing as a result of a prior disclaimer, the date of the original transfer creating the interest in the prior disclaimant.

* All of these dates are subject, of course, to the minority safe harbor that preserves the disclaimant's rights until attaining age 21, as provided in Code §2518-2(b)(2)(B) and Treas.Reg. §25.2518-2(d)(3).

3. Joint Property and Survivorship

a. Background and Confusion

The estate plan of popular choice has long been joint tenancy or tenancy by the entirety, with the

automatic rights of survivorship that make postmortem administration seem so easy and painless. And while these joint ownership interests may offer some practical benefits in select situations involving smaller estates, the potential for tax wastage is always present for larger — or larger-than-expected — estates where the survivorship feature can cost the first decedent some or all of the benefit of the applicable exclusion amount (whatever it may be). It is not uncommon for more and more families to confront large savings or brokerage accounts, titled jointly with the surviving spouse, and insufficient assets in the decedent's own name to fund credit-shelter transfers. Frequently, a review of the facts will suggest that a disclaimer of the survivorship interest in some of these joint assets will save money and preserve a better estate planning posture for the survivor.

Until relatively recently the regulations and the courts have been at odds over what joint interests can be disclaimed and when. Fortunately, revised regulations were eventually issued that cleared up most of the confusion by making technical amendments to several related gift, power of appointment, and estate tax rules and by wholly rewriting Treas.Reg. §25.2518-2(c)(4). See 62 Fed.Reg. 68183 (Dec. 31, 1997).

b. Former Treas.Reg. §25.2518-2(c)(4)

Former Treas.Reg. §25.2518-2(c)(4) began with two general rules that were tied to the creation/reference point of the "taxable transfer" (now, "transfer creating the interest"):

1. The surviving joint tenant was barred from disclaiming any part of the property interest, including the survivorship interest, more than nine months after the transfer creating the joint tenancy. This presumed a completed gift to the noncontributing joint tenant immediately upon the creation of the joint tenancy, apparently on the theory that the noncontributing joint tenant was deemed to have obtained a power over the joint property that he or she did not have before the joint tenancy was created.

2. In addition, both joint tenants were barred from disclaiming "any portion of a joint interest attributable" to the disclaimant's own contribution, thereby continuing to apply the contribution rule to spousal joint tenancies even though the economic distinction between husband and wife has all but disappeared from current transfer tax policy.

Then, on the heels of these two bedrock rules, the old regulation created two important exceptions:

1. Former §25.2518-2(c)(4)(ii) afforded special treatment for spousal joint tenancies created in real property after 1976 and before 1982 when no election to treat the transfer as a completed gift was made under now-repealed Code §2515. In this limited area, the surviving spouse was specifically authorized to disclaim within nine months after the date of the first to die.

2. Example (9) under former §25.2518-2(c)(5) exempted most joint bank accounts (without reference to joint brokerage or other investment accounts) if *all* joint owners had power -- by account agreement, or state law -- to make withdrawals at any time *but* the surviving joint tenant never exercised the power nor received any proceeds from the account. The example depended on an assumption that the contributing owner's retained power to withdraw the funds prevented the deposit from being a completed gift to the survivor or, in essence, a revocable transfer.

Notwithstanding these two exceptions, former §25.2518-2(c)(4) would otherwise have prohibited virtually any disclaimer of a survivorship interest in a jointly held asset created more than nine months before the death of the first joint tenant. And, while the Internal Revenue Service and the Tax Courts clung to this position doggedly, the federal circuit courts of appeal repeatedly rejected the presumption that the taxable transfer (or the transfer creating the interest in the survivorship share) occurred upon creation of the joint tenancy ownership form. See, *Kennedy v. Commissioner,* 804 F.2d 1332 (7th Cir. 1986; sustaining timely 1979 disclaimer of a survivorship interest in an Illinois farm acquired jointly in 1953); *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *rev'g* 89 T.C. 293 (1987), *cert denied,* 109 S.Ct. 1639 (1989), and the Fourth Circuit in *Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th Cir. 1989), *rev'g* 89 T.C. 550 (1987). In the face of this

bludgeoning, the Service raised the white flag in the form of its Action on Decision 1990 – 06 (Feb. 7, 1990), which provided its acquiescence to the *McDonald* finding:

> **Where a joint tenant has the right to sever the joint tenancy or cause the property to be partitioned under state law, the Service will no longer litigate that the transfer relative to which the timeliness of the disclaimer of a survivorship interest is measured refers to the transfer creating the joint tenancy. The Service will also no longer contend that a joint tenant cannot make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that joint tenant. Treas. Reg. section 25.2518-2(c)(4)(1) will be revised accordingly.**

As a consequence of these developments it appeared that former Treas.Reg. §25.2518-2(c)(4) was effectively rewritten according to the following principles:

1. For assets placed in joint ownership whereby each owner had an unequivocal and unrestricted right to sever and partition the fractional ownership share, a taxable transfer occurred as to that fractional share upon the creation of the ownership interest, *e.g*., upon execution and delivery of a joint tenancy deed to real estate. The taxable transfer as to the survivorship interest, however, did not occur until the death of the other owner. *Kennedy* stated this principle for real property, and *McDonald* and *Dancy* extended it to personal property as well. State law rights to partition or sever seemed to be determinative. Upon the first joint tenant's death the survivor could disclaim only the survivorship portion, and not the whole of the property.

2. Assets held in joint accounts that by agreement or statute afforded all owners equal authority to withdraw any portion or all of the account without the consent of the other owners were treated as incomplete gifts, per Example (9) under former Treas.Reg. §25.2518-2(c)(3), and there was no exclusive ownership interest in either owner merely upon creation of the account. Since the transfer was considered incomplete until the death of all other owners, leaving one owner surviving, and assuming the surviving owner had not accepted any of the benefits of the account, the surviving owner appeared to be able to disclaim the entire balance in the account, not merely the survivorship interest.

3. The prohibition against disclaiming any portion of a joint interest attributable to the contributions furnished by the disclaimant, set forth in former Treas.Reg. §25.2518-2(c)(4)(i), was administratively revoked.

c. Revised Treas.Reg. §25.2518-2(c)(4) — The Treasury's Response

The stage was thus prepared for the Treasury's reconciliation of these conflicting principles, which emerged -- after extensive drafting, proposals, practitioner comments and revisions -- as new Treas.Reg. §25.2518-2(c)(4), and which provides the following final rules for disclaiming interests in jointly owned property with rights of survivorship:

1. With respect to property *other than* joint bank, brokerage, and other investment accounts, in the case of an interest in a joint tenancy with right of survivorship *or* a tenancy by the entirety:

    a. A qualified disclaimer of the interest to which the disclaimant succeeds *upon creation* of the tenancy must be made no later than nine months after the creation of the tenancy. Treas.Reg. §25.2518-2(c)(4)(i), first sentence.

    b. A qualified disclaimer of a survivorship interest — to which the disclaimant succeeds by operation of law only upon the death of the first joint tenant — must be made no later than nine months after the death of the first joint tenant and, except as otherwise provided in revised Treas.Reg. §25.2518-2(c)(4)(ii) (pertaining to certain non-U.S. citizen spousal joint interests), the survivorship interest is deemed to be a one-half interest in the property. Treas.Reg. §25.2518-2(c)(4)(i), second sentence. (Although the regulation is silent about instances in which there is more than one surviving joint tenant, logic suggests that the deemed fractional survivorship interest

should be adjusted to correspond to the number of survivors, *e.g.*, if there are two surviving joint tenants, the survivorship interest should be deemed to be one-third for each disclaiming joint tenant.)

c Both time frames are, of course, subject to the minority safe harbor, which preserves the disclaimant's rights until attaining age 21, as provided in Code §2518-2(b)(2)(B). Treas. Reg. §25.2518-2(c)(4)(i), third sentence.

d. The rules in subparagraphs a. and b. above apply *without regard to:*

(1) the portion of the property attributable to the disclaimant's own contribution or consideration;

(2) the portion of the property that is included in the decedent's gross estate under Code §2040;

(3) whether the interest can be unilaterally severed under local law; or

(4) whether the joint owners are married. Treas.Reg. §25.2518-2(c)(4)(i), fourth sentence; Treas.Reg. §25.2518-2(c)(5), Examples (7) – (8).

2. With respect to a joint tenancy between spouses, or a tenancy by the entirety in real property created on or after July 14, 1988, to which Code §2523(i)(3) applies (pertaining to the disallowance of the marital deduction for noncitizen spouses and when the spouse of the donor of the joint property is not a U.S. citizen) the surviving spouse may disclaim *any* portion of the joint interest that is includible in the first joint tenant's estate under Code §2040. Treas.Reg. §§25.2518-2(c)(4)(ii), 25.2518-2(c)(5), Example (9).

3. With respect to joint bank, brokerage, and other investment accounts, including mutual funds, the contribution rule is revised and restated as follows:

a. If one joint owner transfers personal funds to a joint account and under the terms of the account agreement retains the unilateral right to regain that contribution to the account without the consent of the other co-tenant, so that there is no completed gift under Treas.Reg. §25.2511-1(h)(4), the transfer creating the survivor's interest does not occur until the death of the contributing joint tenant. Treas.Reg. §25.2518-2(c)(4)(iii), first sentence. If the surviving joint tenant has made no contribution to the account, then the survivor may make a qualified disclaimer of the *entire* account within nine months after the contributing joint tenant's death. Treas.Reg. §25.2518-2(c)(4)(iii), second and third sentences. In that event, the disclaimed account balance will pass through the deceased co-tenant's probate estate, where it will be includible in the taxable estate under Code §2033 rather than as joint property under Code §2040. This result applies without regard to whether the co-tenants are married. Treas.Reg. §25.2518-2(c)(5), Example (12).

b. If, on the other hand, the noncontributing joint owner dies first, the contributing survivor may not disclaim any portion of the account attributable to the personal contribution. As the provider of all the funds, and having never relinquished dominion and control over the account, the surviving contributing co-tenant will be deemed to have owned the entire account from the outset. This result also applies without regard to whether the co-tenants are married. Treas.Reg. §25.2518-2(c)(5), Example (13).

c. If the contributing joint owner dies first and the noncontributing survivor disclaims only a portion of the account:

(1) the disclaimed portion will be included in the decedent's gross estate under Code §2033; and

(2) the non-disclaimed portion will be included in the decedent's gross estate as joint property under Code §2040.

Note that, under this scenario, the tax effect *is* influenced by whether the co-owners are married:

(a) If the co-owners are married, only half of the non-disclaimed portion of the account is includible in the decedent's estate under Code §2040(a), without regard to contribution; but

(b) If the co-owners are not married, all of the non-disclaimed portion of the account is includible in the decedent's estate under Code §2040(b) because the decedent provided all of the consideration for the account (see Treas.Reg. §25.2518-2(c)(5), Example (14)).

These revised rules -- applicable for disclaimers made on or after December 31, 1997; Treas.Reg. §25.2518-2(c)(4)(iv) -- track the common sense criteria developed by the federal courts of appeal during the 1980s.

4. Without Benefits from the Property

As would be expected, the tax rules embrace the state law disclaimer rule that if the interest or any of its benefits is accepted, the gift is completed and cannot later be disclaimed. Treas.Reg. §25.2518-2(d).

* Actual acceptance requires some act consistent with ownership of the interest. Merely taking delivery of an instrument of title, by itself, will not be enough, nor will the fact that a property interest notionally vests upon the death of the decedent.

* If consideration is received for the disclaimer, *e.g.,* a family settlement agreement involving a disclaimed interest, the disclaimer may not qualify. See Treas.Reg. §25.2518-2(d)(4), Example (2). But see, *Estate of Anderson v. Commissioner*, 56 T.C.M. [CCH] 78 [1988] and *Estate of Lute v. United States*, 19 F.Supp. 2d 1047 [D.C. Neb. 1998]). The implication of reciprocity of benefit will be difficult to overcome.

* A disclaimer is not qualified if it is induced or coerced *(Estate of Monroe*, 104 T.C. 352 (1995), *rev'd.*, 124 F.3d 669 [5th Cir. 1997]) but in the absence of consideration, a mere expectancy that corresponds with a disclaimer will not by itself defeat tax qualification. *Id.*

* Treas.Reg. §25.2518-2(d)(2) carves out a special exception to the no-acceptance rule for fiduciaries who are also beneficiaries. An executor-beneficiary may, as executor, accept and preserve the estate while retaining the power to disclaim the beneficial interest. However, the disclaimant may not, after the disclaimer,

> **retain a** *wholly* **discretionary power to direct the enjoyment of the disclaimed interest. For example, a fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class. [**Emphasis added.**]** Treas. Reg. §25.2518-2(d)(2)**.**

This prohibition ties the no-acceptance rule to the "passing without direction of the disclaimant" requirement described below.

* Note that acceptance of some benefits by a minor before obtaining the age of 21 will not be considered an acceptance barring the disclaimer of *remaining* benefits or interests at that later time. Treas.Reg. §§25.2518-2(d)(3), 25.2518-2(d)(4), Examples (9) – (11).

5. Passing Without Direction of the Disclaimant

Code Section 2518(b)(4) states that the interest disclaimed must pass "without any direction on the part of the person making the disclaimer."

* This appears to create a simple standard, similar to the principle that one may not receive consideration for a disclaimer, by prohibiting the exercise of the disclaimer in favor of a specific designee; remember, directing the passing would be the exercise of an ownership prerogative, and a qualified disclaimer depends upon the *avoidance* of ownership.

* However, the regulations expand this restriction to also prohibit the disclaimant's retention of the fiduciary power to direct the redistribution of the property (in trust or otherwise) unless "such power is limited by an ascertainable standard." Treas.Reg. §25.2518-2(e)(1).

* If the disclaimant beneficiary is also trustee of a trust that does not delimit powers of distribution by an ascertainable standard, the disclaimant must also disclaim the fiduciary power in order to make the property disclaimer effective. This is true without regard to whether the disclaimant is also a surviving spouse. (But see, *Estate of Lassiter v. Comm'r.*, *supra*)

* This prohibition on a retained fiduciary power is especially troublesome when a surviving spouse's disclaimer causes the disclaimed interest to fall into a credit-shield trust that provides non-ascertainable standard sprinkle authorities, or a limited power of appointment, in the spouse. Examples (4), (5), (6), and (7) of Treas.Reg. §25.2518-2(e)(5) each give some guidance on how to implement this common tactic. In effect, the disclaimer will qualify only if the surviving spouse simultaneously disclaims all discretionary authorities (and not merely those exercisable in the survivor's own behalf) that are not limited by an ascertainable standard. Of course, if the disclaimant is not the trustee or the holder of the power of appointment, there is no retained power and thus no problem. But in the usual case, either the credit-shield trust must be narrowly drafted or the disclaimant spouse will need to surrender some fiduciary prerogatives. (See, Wash. Rev. Code, § 11.86.041(6) for a statutory savings provision that includes a deemed disclaimer of any power of direction over trust property passing by virtue of disclaimer if the power is not limited by the ascertainable standard.)

* When a *non-spouse* disclaimant has the potential to receive the disclaimed property interest in another capacity (under the residuary clause, intestacy, or otherwise), *all* of the successive interests must also be disclaimed or none of the disclaimers will be qualified. Treas.Reg. §§25.2518-2(e)(3), 25.2518-2(e)(5), Examples (2) – (4). Only the surviving spouse may disclaim an interest in one capacity and still receive that interest or any part of the interest in another capacity.

6. Separate and Partial Interests

Since one of the primary practical purposes of disclaimers is to balance the assets between the credit shield and the marital deduction, the ability to disclaim only a portion of a gift creates important flexibility. That is the function of Treas.Reg. §25.2518-3. A qualified disclaimer may be made "of all or an undivided portion of any separate interest in property . . . even if the disclaimant has another interest in the same property." Treas.Reg. §25.2518-3(a)(1)(i). Note that having another, separate interest that is not disclaimed is different from receiving the same interest in the property as a result of the disclaimer.

* Any "separate interest" in a single property must have been created by the transferor. The beneficiary of a farm in fee, for example, may not disclaim the remainder and keep a life estate since doing so would result in the disclaimant defining the interests, not the grantor.

* Even if the grantor creates separate interests, the ability to disclaim one and keep the other will be lost if the interests merge in the same taker as a function of state property law, such as when a life estate and remainder vest in the same person simultaneously. In this case, "a qualified disclaimer will be allowed only if there is a disclaimer of the entire merged interest or an undivided portion of such merged interest." Treas.Reg. §§25.2518-3(a)(1)(i), 25.2518-3(d), Example (12).

* Treas.Reg. §25.2518-3(a)(1)(ii) distinguishes carving out separate interests in the same property from carving up the property itself when the property is severable. "Severable property" is defined as

> **property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.** *Id.*

Again, the legatee may not accept only the dividends from all or part of the stock and disclaim the stock itself. Neither the right to the dividends nor the mere equity ownership would be independent of the other. See Treas.Reg. §2518-3(d), Examples (1) – (5).

* If the grantor did not create separate interests in the same property and the property itself is not severable, the third means for disclaiming a part of the gift is to disclaim an undivided portion of any separate interest. Code §2518(c)(1). Such a fractional or percentage share disclaimer must consist of the same share in "each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest." Treas.Reg. §§25.2518-3(b), 25.2518-3(d), Example (4).

* As a final partial interest option, the disclaimer may be of a specific dollar amount or a pecuniary amount stated in a dollar value or in a pecuniary formula, "provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer." Treas.Reg. §25.2518-3(c). Therefore, as a result of the disclaimer, the amount disclaimed must be segregated from that portion of the gift that was not disclaimed to avoid a blurring of income features. If the assets have fluctuated in value, the segregation must be made on the basis of the fair market value of all of the assets on the date of the disclaimer.

  Interestingly, such a pecuniary disclaimer may be made despite a partial distribution made before the disclaimer. The distribution is considered to be a distribution of corpus, and a formula is provided to calculate the proportionate share of earned income that will be deemed accepted by the disclaimant.

  Pecuniary formula disclaimers are tricky. If they are employed to fine-tune tax savings with precision, it is best to do so as early as possible, keep all income earned beforehand segregated, avoid prior distributions, and separate the two portions immediately.

7. Powers over Property

A power with respect to property is treated as a separate interest in the property and may be disclaimed even though the power is extinguished as a result. There are two kinds of powers over property to be considered:

a. General and non-general powers of appointment, which are not necessarily fiduciary powers and are the subject of a separate complex tax scheme under Code §§2041 and 2514; and

b. Fiduciary powers, which are separately enforceable by beneficiaries under general equitable principles and are treated as general powers of appointment for gift and estate tax purposes if the fiduciary is also a beneficiary and the distribution power is not limited by an "ascertainable standard."

* Disclaiming accidental (or intentional but unwanted) powers over property is an important curative feature discussed in detail in Treas.Reg. §§25.2518-2(e)(1)(ii), 25.2518-2(e)(5), Examples (11) – (12), 25.2518-3(a)(iii), and 25.2518-3(d), Examples (9) and (21). From these provisions it is clear that a power over the property may be disclaimed as to all or a portion of the property, but only on condition that any power retained over that portion of the property is limited by an ascertainable standard.

* The ascertainable standard is not defined in these regulations but is treated under Code §§2041 and 2514 as relating to the "health, education, support, or maintenance" of the eligible distributee(s) (and *not* of the disclaiming fiduciary.)

  These standards are in fact more generous and less restrictive than may at first appear. The terms "support" and "maintenance" are not limited to the bare necessities of life, and it is immaterial whether the beneficiary is required to exhaust other income before the power can be exercised. Treas.Reg. §§25.2514-1(c), 20.2041-1(c)(2).

  The ascertainable standard exception offers substantial protection from unwanted tax burdens yet preserves tremendous opportunity for distribution, especially when the trustee has a current or potential beneficial interest in the trust property. Indeed, there is sound reason for including the restraint on every power held by an interested trustee unless it is intended that the property fall within the holder's tax orbit. The result places little practical limitation on the beneficiary-fiduciary's access and substantially enhances disclaimer opportunities.

* A recurring problem is a non-ascertainable standard sprinkle authority that the surviving spouse-trustee wishes to trim to an ascertainable standard without resigning as trustee or surrendering the sprinkle authority in full. An example would be a credit-shield trust affording the surviving spouse-trustee the power to distribute income or principal to self or children for their "health, maintenance, support, *and general happiness*." Can the surviving spouse-trustee partially disclaim the "and general happiness" portion of this directive and in effect convert the non-ascertainable standard into an ascertainable standard? The answer is not clear, but it seems doubtful. Treas.Reg. §20.2041-3(d)(6) alludes to disclaimer of a power of appointment as to only a portion of the property subject to the power, but not to a portion of the scope of the power. (Note that the December, 1997, revisions also amended the first two sentences of Treas.Reg. §20.2041-3(d)(6)(i) and the first two sentences of Treas.Reg. §25.2514-3(c)(5)(i) to directly tie the effect of disclaiming a post-October 21, 1942, power of appointment to Code §2518 and its regulations.)

* A pure property power of appointment is not a fiduciary power that the permissible appointees can enforce, and therefore its holder may timely disclaim the power with absolute discretion. But fiduciary powers, no matter how broadly drawn in their discretionary authority, pertain to beneficial interests created by the original grantor and are enforceable by the beneficiaries. An example of a clause granting the trustee the power to cut off these equitable rights is included in Part IV below.

8. Assets in Trust

If the property has passed into a trust, either inter vivos or testamentary, special rules apply that have the effect of limiting the power to disclaim all or part of specific assets. Treas.Reg. §25.2518-3(a)(2).

* There is no restriction on the power to disclaim all or an undivided portion of the income from all trust property or all or an undivided portion of all trust principal interests. But if the intent is to disclaim the income from or remainder in a specific property in trust, then the disclaimer must cause the property to be "removed from the trust and pass . . . without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent." *Id.*

* For example, assume a trust containing farm land and cash gives *A* and *B* the income for life, remainder to the survivor. *A* cannot disclaim the farm income, keeping the cash income, because the farm will not pass out of the trust. *A* may disclaim the remainder or the income, in whole or in part, but not a specific portion unless it passes out of the trust. Treas.Reg. §25.2518-3(d) Examples (5), (7), (8).

* Since many trusts have more than one interest holder, and often property will *not* pass as the result of the disclaimer of one, this rule can severely limit disclaimers of specific trust assets.

9. Generation-Skipping Transfer Tax

A disclaimer causing an interest to pass to a taker two or more generations below the grantor will be treated as a "direct skip" generation-skipping transfer (GST). Code §2613(a). The special protection provided by Code §2612(c)(2) to exempt gifts to "skip persons" whose parents have in fact predeceased the grantor (by treating them as a member of the parent's generation) does not apply to transfers resulting from disclaimers. Treas.Reg. §26.2612-1(a)(2) describes how this "pre-deceased parent" rule works, and specifically provides:

> [A] **living descendant is not treated as a predeceased [**person**] solely by reason of applicable local law;** *e.g.,* **an individual is not treated as a predeceased [**person**] solely because state law treats an individual executing a disclaimer as having predeceased the transferor of the disclaimed property.**

IV. PLANNING AND PRACTICE, FORMS AND COMMENTS

Although the advantages of a qualified disclaimer strategy are more often apparent after the fact, when matters are considered anew and opportunities begin to surface, an advance awareness of disclaiming at the planning stage is still valuable. A few simple steps incorporated into traditional drafting techniques can ease the way for future opportunity.

A. Fiduciary's Power To Disclaim Without Court Order

* Every will should empower its executor to disclaim without leave of court, which otherwise is required by Probate Act §2-7(a). (See the discussion of *In re Estate of Heater*, 266 Ill.App.3d 452, 640 N.E.2d 654, 203 Ill.Dec. 734 [4th Dist. 1994], in Part II.C.3.d. above.)Something similar to the following should be adopted in the executor's powers boilerplate language:

  > **My Executor and his or her successors are hereby empowered to disclaim in accordance with applicable federal or state law any interest in property passing to me or to my estate without leave of court.**

* Similar authority should also be in every durable general power of attorney. The power to disclaim is specifically incorporated by reference in the Illinois statutory short form power of attorney for property. *See* 755 ILCS 45/3-4(n).

* A comparable provision can also be included when providing for guardians of minor children or nominating a guardian in the event of a future disability of an adult:

  > **Upon the death of my spouse and me, I hereby nominate and ask the Court to appoint _____ as guardian of the person and estate of each minor child surviving me. Each such guardian shall have the power to disclaim any interest in property passing to any one or more of my said children without leave of court, which power may be exercised in the guardian's sole discretion and without regard to whether the disclaimer is or may be construed to be materially detrimental to the interest of the child, and without corresponding liability to any child affected thereby.**

* In nominating a future guardian in the event of adult disability proceedings some version of the following could be included:

  In the event I am adjudicated a disabled person and a guardian of my person

and estate is to be appointed, I nominate and ask the court to appoint _____ as such guardian, to serve without bond or security. Any guardian so acting shall have the power to disclaim any interest in property passing to me without leave of court.

B. General Disclaimer Instructions

A comprehensive disclaimer paragraph may be added to longer or more complex instruments in order to map out disclaimer possibilities and intended consequences. This provision will also soften the hesitation, often expressed by loyal family members, to "rewrite the will" by indicating the decedent's prior understanding and approval of the doctrine. The following clause is just one approach and can easily be improved or revised to fit individual situations:

ARTICLE _____: Disclaimers.

In making the dispositions set forth in this instrument, I am aware that the circumstances at my death may be significantly different than they are today, and that there may be advantage to my loved ones and designated beneficiaries in disclaiming one or another of the gifts and powers contained herein. It is my intention that all interested persons have maximum flexibility for this purpose. Any such person, whether a beneficiary or a fiduciary, may disclaim any gift, power, right, or authority hereunder, in whole or in part, in accordance with applicable state law; provided, that no person other than my spouse may disclaim any such gift, power, right, or authority if such disclaimer might defeat the marital estate tax deduction anticipated elsewhere in this instrument. The effect of the disclaimer shall be that the disclaimant shall be deemed to have predeceased me to the extent of the disclaimed interest or power only and shall be deemed to have survived me for all other gifts or powers accruing thereto. Successive interests in property or trusts shall accelerate into possession or enjoyment upon disclaimer without regard for the potential interest of any unborn contingent beneficiaries, and the disclaimers of all persons having an interest who are alive at the time of the disclaimer shall be sufficient to discharge all other potential unborn takers by representation. Powers over property shall pass to the next nominated holder of the power, if any; otherwise, that power shall lapse and terminate.

Except as may be otherwise required to preserve the marital estate tax deduction anticipated elsewhere in this instrument, any fiduciary acting under this instrument may release or disclaim any power or discretionary obligation created hereby, in accordance with applicable state law, in whole or in part, with or without the consent of any beneficiary or other interested person and without corresponding responsibility or liability to any beneficiary or interested person affected thereby even though such release or disclaimer may adversely affect or terminate the interests of one or more of the beneficiaries.

The second paragraph could, in the alternative, be integrated among the listed fiduciary's powers often detailed in a separate administration article.

C. Disclaimer Trusts

The tax rules afford special protection and flexibility for disclaimers by the surviving spouse. All others must disclaim the interest in every capacity and may not take the same interest by virtue of successor provisions in the instrument. But since the spouse can disclaim in one capacity and still enjoy benefits in another, there are a number of approaches that can preserve maximum flexibility at the death of the first to die.

A popular small estate drafting option is to make an outright gift to the surviving spouse with the direction that any property disclaimed shall pass to a trust in which the spouse is a primary or the exclusive beneficiary. The trust can be a credit-shelter trust, with benefits for the surviving spouse

and others, or a QTIP trust for the surviving spouse alone. Either way the survivor has multiple options to take and keep, or disclaim and defer, all or any portion of the gift -- and can take nine months to decide. An outright gift also offers the extra advantage of avoiding the "assets in trust" rules of Treas.Reg. §25.2518-3(a)(2) so the surviving spouse can pick and choose assets, individually, without being required to disclaim an equivalent interest in all bequeathed property. The spouse may, for example, keep outright gifts of prime farm land and cash while specifically disclaiming the Florida time share and BP stock in favor of the family trust. Remember, however, that even though the spouse may enjoy this second bite at benefits, two key control restrictions still apply:

1. The prohibition against retaining the power to direct the disposition of the property requires that if the surviving spouse is the trustee of the receiving trust, the powers to distribute trust property must be limited by an ascertainable standard applicable to all potential beneficiaries.

2. In addition, the surviving spouse may not be allowed the customary limited power of appointment over disclaimed property passing into the trust. Therefore, the trust's remaindermen must be certain in the document.

1. Outright Bequest with Credit-Shield Disclaimer Trust

An outright bequest/credit-shelter trust plan could be constructed as follows:

ARTICLE THREE:

A. Subject to the foregoing, I hereby give all of the rest, residue, and remainder of my estate to my beloved wife, Mother Farmer, if she survives me.

B. In the event my said wife should not survive me, or lawfully disclaims any portion or all of this gift, then all of said rest, residue, and remainder of my estate (or such portion thereof disclaimed) shall pass to the Trustee of the Father Farmer Family Trust pursuant to ARTICLE FOUR below.

ARTICLE FOUR:

A. In the event my said wife, Mother Farmer, survives me, the Trustee shall pay to or for the benefit of any one or more of my wife and/or descendants from time to time living as much of the net income of the Family Trust as may be required from time to time to provide for his, her, or their health, education, maintenance, and support in reasonable comfort only.

This sprinkle power over income must be limited by an ascertainable standard if the trustee is the surviving spouse. Conversely, if the trustee will not be the disclaiming surviving spouse, a more liberal standard such as "and overall happiness" can be added.

B. The Trustee may also pay to or for the benefit of any one or more of my spouse and/or descendants from time to time living such amounts of the principal of the Family Trust as may be required to provide for his, her, or their health, education, maintenance, and support in reasonable comfort only.

Of course, the power to distribute income and principal can be combined in a single paragraph, but separating them gives the beneficiaries some latitude under the "separate interest rule" to disclaim distinct rights to principal without necessarily sacrificing rights to income.

C. The Father Farmer Family Trust shall terminate upon the death of my said wife; or upon my death should she not survive me; or, as to any severable portion thereof,

upon her lawful disclaimer of any severable portion or all of her interest under Paragraphs A or B above. In such event, the Trust Estate or that disclaimed severable portion thereof shall be distributed to my descendants, per stirpes, then living.

In a typical case, Mother Farmer's disclaimer into the Family Trust will be used: (a) to maximize the applicable exclusion amount of the decedent, Father Farmer; (b) to protect Mother Farmer's access to the trust property as needed from time to time; and (c) to preserve the expectancy of inheritance in the next succeeding generation. However, it is possible that Mother Farmer will not need or want any of the income or principal and that there may be utility in letting the property pass through the trust and outright to descendants. These provisions would allow Mother Farmer to disclaim a second time, thereby passing specific assets out of the trust directly to the children, with full compliance with the requirements of Treas.Reg. §25.2518-3(a)(2). In turn, one or another or both of the children can timely disclaim all or any separate portion of the property — thus allowing it to pass straight on to the grandchildren — because the property has been removed from trust by virtue of their and Mother Farmer's disclaimers.

These layered options allow the family to reconsider needs, benefits, and utilities upon Father Farmer's death and, with disclaimers, allow a redirection of the property from Mother outright to a trust for Mother and the children, or to the children, or straight on to the grandchildren as a classic generation-skipping transfer.

Consider a twist on this example. What if Mother Farmer not only wished to disclaim into the trust, but for one reason or another also wished to qualify the trust for QTIP treatment? If the fiduciary powers include the clause mentioned in §15.36 above, and Mother Farmer as trustee can disclaim the power to distribute income or principal to Father Farmer's descendants with or without the descendant's consent, then the credit-shelter trust can indeed be reformed by her disclaimer into a QTIP trust eligible for the marital deduction.

2. Outright Bequest with QTIP Disclaimer Trust

The advantage of the credit-shelter sprinkle trust is the option to use family assets for family needs or to preserve and retain capital for future takers. This potential is severely limited by the QTIP requirements that the surviving spouse must receive all the income currently and that no benefit may pass to any other beneficiary during the surviving spouse's lifetime. On the other hand, the QTIP trust does offer the option of a partial election for the marital deduction, and some GST flexibility which in turn affords an opportunity to fine-tune estate and GST tax burdens in the event of sequential deaths.

An outright bequest-disclaimer QTIP trust plan could be constructed as follows:

ARTICLE THREE:

A. Subject to the foregoing, I hereby give all of the rest, residue, and remainder of my estate to my beloved wife, Mother Farmer, if she survives me.

B. In the event my said wife should not survive me, or lawfully disclaims any portion or all of this gift, then all of said rest, residue, and remainder of my estate (or such portion thereof disclaimed) shall pass to the Trustee of the Father Farmer Marital Trust pursuant to ARTICLE FOUR below.

ARTICLE FOUR:

A. In the event my said wife, Mother Farmer, survives me, then commencing upon my death the Trustee shall pay to or for her benefit all of the net income of the Marital Trust in regular monthly or other convenient installments, and at least quarterly.

B. The Trustee may also pay to or for her benefit such amounts of the principal of the Marital Trust Estate as may be required from time to time to provide for her health, education, maintenance, and support in reasonable comfort only.

C. The Trustee shall make no unsecured loans from the Marital Trust Estate without the written consent of my wife, and any unproductive property held in the Family Trust shall be sold by the Trustee upon being directed to do so by my wife.

D. Upon my wife's death that portion of the Trust Estate consisting of accrued and undistributed income shall be paid to my wife's estate.

E. The Father Farmer Marital Trust shall terminate upon the death of my said wife; or upon my death should she not survive me; or, as to any severable portion thereof, upon her lawful disclaimer of any severable portion or all of her interest under Paragraphs A and B above. In such event, the Trust Estate or that disclaimed severable portion thereof shall be distributed to my descendants, per stirpes, then living.

Even though this QTIP treatment obviates partial disclaimers by the children of any current income or principal interest, it retains all the flow-through options described in connection with the credit-shelter disclaimer trust immediately above.

D. Disclaimer Forms — In Abstract

There is no set form for a property or tax disclaimer that includes all of the broad requirements. The several versions discussed below are based on cautious experience, targeted to specific instances, and *cannot* be reduced to all-purpose utility forms. They are given merely as illustrations of what should be considered and to that end generally include a little more detail than is absolutely necessary. The additional "precatory language" (which is given its own safe harbor by Treas.Reg. §25.2518-2(e)(4)) and the provisions for recording and clause headings are suggested for thoroughness of thought and administrative convenience.

1. Disclaimer by Surviving Spouse — Farmland

Suppose that Father Farmer, deceased, left a will including the outright bequest/credit-shelter disclaimer trust discussed in part C.1. above and that at the date of his death a substantial amount of the family's wealth consisted of an interest in farmland held in Father's sole name. A disclaimer sufficient to partially fund the credit-shelter trust could be prepared as follows:

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY

IN THE MATTER OF THE ESTATE	**)**
of	**) IN PROBATE**
FATHER FARMER, DECEASED	**) NO: 20__ - P - X**

TO: Mother Farmer, Independent Executor of the Estate of Father Farmer, Deceased

Mother Farmer, Trustee of the Father Farmer Family Trust U/W Father Farmer, Deceased

DISCLAIMER

Now comes the undersigned, Mother Farmer, acting in her sole and individual capacity as legatee under the Will of Father Farmer, deceased, who for her disclaimer of interest states as follows:

1. That Father Farmer departed this life on the 27th day of February, 20__, leaving a Last Will and Testament dated January 16, 20__, which was admitted to probate in this cause on March 5, 20__.

2. That Article Three of said Last Will and Testament of Father Farmer provides as follows:

ARTICLE THREE:

A. Subject to the foregoing, I hereby give all of the rest, residue, and remainder of my estate, including any property passing to me or to my estate as a result of my death but not including any property over which I have power of appointment at my death and less any amounts disbursed by my Executor for debts, taxes, and expenses pursuant to the foregoing, to my beloved wife, Mother Farmer, if she survives me.

B. In the event my said wife should not survive me, or lawfully disclaims any portion or all of this gift, then all of said rest, residue, and remainder of my estate (or such portion thereof disclaimed) shall pass to the Trustee of the Father Farmer Family Trust, which Trust shall be held, administered, and distributed pursuant to ARTICLE FOUR below.

3. That at the time of his death, Father Farmer owned the following interest in real estate that is the subject of this disclaimer, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

4. That by virtue of the foregoing provisions of said Last Will and Testament of Father Farmer, deceased, and the application of Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7), the undersigned's disclaimer of all of her interest in the real property described in Paragraph 3 immediately above shall cause that real property to pass, without any direction on the part of the undersigned, to the Trustee of the Father Farmer Family Trust U/W Father Farmer, deceased.

5. That, accordingly, the undersigned intends by these presents to disclaim any and all rights, titles or interests, of every kind and nature, that she might, could or should receive individually and outright in said farm real estate as a result of the death of Father Farmer, including any such right, title or interest that might, could or should pass to her individually by virtue of ARTICLE THREE, Paragraph A. of said Last Will and Testament.

6. That notwithstanding the foregoing this Disclaimer is limited to the rights, titles, and interests in said farm real estate directed to pass to her in her own individual name, right and interest, and shall not be construed to extend to any other right, title, interest or powers over property to which the undersigned is, might or could be entitled as a result of the death of Father Farmer, including specifically all rights, titles, interests and powers the undersigned may have in, to, and over the Father Farmer Family Trust, as the same is created under ARTICLE THREE, Paragraph B. of said Last Will and Testament, which are hereby specifically reserved.

7. That no portion of or proceeds from the above-described farm real estate have been transferred to the undersigned or those acting in her behalf; that the undersigned has received no individual benefits from said property, directly or indirectly, at any time or in any way since the date of Father Farmer's death; that the undersigned has not accepted any interest in said property nor exercised any incident of ownership with respect thereto; that the undersigned has not assigned, conveyed, encumbered, pledged or otherwise attempted to dispose of or transfer any interest in said property at any time or in any way; that the undersigned is not insolvent; that this disclaimer is not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity; but rather, said property has come under the control of the Executor of the Estate for administrative convenience and safekeeping, only.

8. That this disclaimer is intended to comply with the provisions of Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) [or other state-specific statutory provision] and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R.

§§25.2518-1, 25.2518-2, and 25.2518-3), and all references herein that are inconsistent with this overriding intention shall be deemed amended or, if necessary, deleted, in order to conform with this overriding intention.

WHEREFORE, the undersigned Mother Farmer, acting pursuant to Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3), HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS any and all rights, titles or interests, of every kind and nature, that she might, could or should receive individually and outright in the property identified in Paragraph 3 above as a result of the death of Father Farmer, including any such right, title or interest that might or could pass to her individually by virtue of ARTICLE THREE, Paragraph A. of the Last Will and Testament of Father Farmer, deceased, but without prejudice to and reserving to herself all other rights, titles, interests, and powers over property to which she is, might or could be entitled as a result of the death of Father Farmer, including specifically but without limitation all rights, titles, interests and powers the undersigned may have in, to, and over the Father Farmer Family Trust, as the same is created under ARTICLE THREE, Paragraph B. of said Last Will and Testament.

Dated: _____, ____.

_____
MOTHER FARMER

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
NOTARY PUBLIC

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, ____.

_____
MOTHER FARMER, Independent Executor of the Estate of Father Farmer, Deceased

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, ____.

_____
MOTHER FARMER, Trustee of the Father Farmer Family Trust U/W Father Farmer

This instrument prepared
with the assistance of:
THE PEITHMANN LAW OFFICE
Attorneys and Counselors at Law
111 S. Main St., P.O. Box 228
Farmer City, IL 61842
Telephone: (309) 928-3390

Wordy? Unquestionably. But this draft touches upon all the issues to be considered. How much detail should be ultimately included is up to each attorney.

Note:

* The final disclaimer should be executed and receipted by Mother Farmer in her three separate capacities, and in multiple counterparts.

* Since an interest in real estate is affected, one copy should be recorded with the county recorder and another placed with the probate court file.

* The executed disclaimer is not attached to the Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return unless it influences the marital deduction (see Schedule M — "Bequests, etc., to Surviving Spouse"); otherwise, the actual disclaimer will not come under Service scrutiny until Mother Farmer's later death.

2. Disclaimer by Surviving Spouse — Joint Account

Suppose that Mother and Father Farmer also owned a stock brokerage account as joint tenants with full right of survivorship to which both contributed equally. The account agreement with the brokerage firm provides that either joint owner has unequivocal power to draw on the account at any time and with complete discharge to the brokerage firm from liability to the other owner.

The following written disclaimer form is even more detailed than that provided immediately above because of the realities of dealing with a joint property interest and a brokerage firm (the person in possession of the property) that might not fully understand what is going on:

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY

IN THE MATTER OF THE ESTATE	**)**
OF	**) IN PROBATE**
FATHER FARMER, DECEASED	**) NO: 20__ - P - X**

TO: Solid Investment Company
c/o Honest Broker, its authorized representative

Mother Farmer, Independent Executor of

the Estate of Father Farmer, Deceased

Mother Farmer, Trustee of the Father
Farmer Family Trust U/W Father Farmer, Deceased

DISCLAIMER

Now comes the undersigned, Mother Farmer, acting in her sole and individual capacity as surviving joint owner of certain personal property and as legatee under the Will of Father Farmer, deceased, who for her disclaimer of interest states as follows:

1. That Father Farmer departed this life on the 27th day of February, 20__. A certified copy of his certificate of death is attached hereto as Exhibit A.

2. That at his death Father Farmer left a Last Will and Testament dated January 16, 20__, which was admitted to probate in this cause on March 5, 20__. A copy of this Last Will and Testament showing the file mark of the DeWitt County Circuit Clerk is attached hereto as Exhibit B.

3. That ARTICLE THREE of said Last Will and Testament of Father Farmer provides as follows:

[quote provisions]

4. That at the time of his death said Father Farmer and the undersigned owned certain personal property in joint name and with right of survivorship pursuant to the Illinois Joint Tenancy Act (765 ILCS 1005/0.01, *et seq.*) **which property is identified on Exhibit C attached hereto and made part hereof.** [NOTE: Exhibit C might best be a recent account statement.]

5. That this Disclaimer is directed to the survivorship interest in most but not all of said securities and other property, as specifically detailed on Exhibit D attached hereto and made part hereof.

6. That by virtue of the foregoing provisions of said Last Will and Testament of Father Farmer, deceased, and the application of Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7), the undersigned's disclaimer of the survivorship interest in the securities and other property described on Exhibit D hereto, and of the specific bequest of property under ARTICLE THREE, Paragraph A of said Last Will and Testament, shall cause that property to pass, without any direction on the part of the undersigned, to the Trustee of the Father Farmer Family Trust U/W Father Farmer, deceased.

7. That, accordingly, the undersigned intends by these presents to disclaim any and all rights, titles or interests, of every kind and nature, that she might, could or should receive individually and outright in the securities and other property described on Exhibit D hereto as a result of the death of Father Farmer, including any and all interest, dividends, payments, or other benefits attributable to said property, and including any such right, title or interest therein that might or could pass to her individually:

a. as surviving joint tenant with right of survivorship pursuant to the terms of the Solid Investment Company account agreement governing said Account and/or the Illinois Joint Tenancy Act (765 ILCS 1005/0.01, *et seq.*)**;**

b. by any rule of construction that there was a completed gift to the undersigned upon the creation or funding of the joint account;

c. as surviving heir at law of Father Farmer, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1); and/or

d. by virtue of ARTICLE THREE, Paragraph A. of said Last Will and Testament,

8. That notwithstanding the foregoing this Disclaimer is limited to the rights, titles, and interests in said securities and other property that are directed to pass to her in her own individual name, right and interest, and shall not be construed to extend to any other right, title, interest or powers over property to which the undersigned is, might or could be entitled as a result of the death of Father Farmer, including specifically all rights, titles, interests and powers the undersigned may have in, to, and over the Father Farmer Family Trust, as the same is created under ARTICLE THREE, Paragraph B. of said Last Will and Testament, which are hereby specifically reserved.

9. That no portion of or proceeds from the property identified on Exhibits C and D hereto have been transferred to the undersigned or those acting in her behalf; that the undersigned has received no individual benefits from said property, directly or indirectly, at any time or in any way since the date of Father Farmer's death; that the undersigned has not accepted any interest in said property nor exercised any incident of ownership with respect thereto; that the undersigned has not assigned, conveyed, encumbered, pledged or otherwise attempted to dispose of or transfer any interest in said property at any time or in any way; that the undersigned is not insolvent; that this disclaimer is not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity; but rather, said property has been retained by Solid Investment Company on account, for safekeeping but without the exercise of any incident of ownership or acceptance by the undersigned, individually, since the date of Father Farmer's death.

10. That this disclaimer is intended to comply with the provisions of Section 1 of the Illinois Disclaimer Under Nontestamentary Instrument Act (760 ILCS 25/1), Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3), and all references herein that are inconsistent with this overriding intention shall be deemed amended or, if necessary, deleted, in order to conform with this overriding intention.

WHEREFORE, the undersigned Mother Farmer, acting individually as surviving joint tenant pursuant to Section 1 of the Illinois Disclaimer Under Nontestamentary Instrument Act (760 ILCS 25/1), and as legatee under ARTICLE THREE, Paragraph A. of Father Farmer's Last Will and Testament pursuant to Section 1 of the Illinois Disclaimer Under Nontestamentary Instrument Act (760 ILCS 25/1), Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7), and further pursuant to Section 2518 of the Internal Revenue Code (26 U.S.C.

§2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3), HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS all rights, titles or interests, of every kind and nature, that she might, could or should receive individually and outright in the securities and other property identified in Exhibit C hereto according to the specifications of Exhibit D hereto, including any and all interest, dividends, payments, or other benefits attributable to said property paid, payable, or accruing thereon since the date of the decedent's death, and including without limitation any such right, title or interest therein that might or could pass to her individually: (i) as surviving joint tenant with right of survivorship pursuant to the terms of the Solid Investment Company account agreement governing said Account and/or the Illinois Joint Tenancy Act; (ii) by any rule of construction that there was a completed gift to the undersigned upon the creation or funding of the joint account; (iii) as surviving heir at law of Father Farmer, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1); and/or (iv) by virtue of ARTICLE THREE, Paragraph A. of said Last Will and Testament, but without prejudice to and reserving to herself all other rights, titles, interests, and powers over property to which she is, might or could be entitled as a result of the death of Father Farmer, including specifically but without limitation all rights, titles, interests and powers the undersigned may have in, to, and over the Father Farmer Family Trust, as the same is created under ARTICLE THREE, Paragraph B. of said Last Will and Testament.

Dated: _____, 20___.

_____
MOTHER FARMER

Subscribed and sworn to before me
this _____ day of _____, 20__.

_____
NOTARY PUBLIC

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, 20__.

SOLID INVESTMENT COMPANY

By: _____
Honest Broker,
Its Authorized Representative

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, 20__.

_____
MOTHER FARMER, Independent Executor of the Estate of Father Farmer, Deceased

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, 20__.

_____
MOTHER FARMER, Trustee of the Father Farmer Family Trust U/W Father Farmer

Note that this disclaimer includes a certified copy of the death certificate and a copy of the will because the brokerage firm will almost certainly require them. Again, this instrument should be prepared in multiple counterparts for delivery and receipt. Since no real property is involved, there is no need for recording, but it would not hurt to place a duplicate original with the probate court file.

a. Letter of Explanation to Brokerage Firm

Having planned and calculated the disclaimer strategy in compliance with property laws and tax requirements still will not be enough. The disclaimer must be given effect by the holders of the joint property, and that often requires special persuasion. An account representative may be inclined not to honor the disclaimer and may simply re-register the joint property in the survivor unless educated in the process. While the following detailed letter was sent to a brokerage firm, a comparable "advance notice" to any holder of property (bank, mutual fund, insurance company, benefits plan administrator, etc.) may be helpful to clear the way to implement the plan.

August 1, ____

Mr. Honest Broker
Solid Investment Company

RE: Solid Investment Account No: 12345
Father Farmer & Mother Farmer JTWROS
Estate of Father Farmer, Dec'd
DeWitt County No: 20__ - P - X

Dear Mr. Broker:

We are now close to executing the disclaimer estate tax-avoidance strategy that we discussed by phone last month.

To let you know in advance what will happen, I am enclosing a draft of the disclaimer that Mrs. Farmer will tender shortly. Attached to it are copies of Father Farmer's death certificate and last will and testament and a schedule of the property being disclaimed and how it all is to pass.

The rules governing a valid property law and transfer tax "qualified" disclaimer are unusual and complex, and I mean no offense when I suggest that many finance professionals are not conversant with how they work and the results they produce. When it comes to joint tenancy or survivorship property — such as the Farmer account — it often comes as a surprise that the accretion to the surviving joint tenant is anything less than automatic and irreversible.

The legal effect of the disclaimer is to cause the disclaimed property interest to pass as if held as tenancy-in-common, without right of survivorship, and thus to the decedent's probate estate to be governed by his will. According to the instructions of Father Farmer's will, everything is to go to Mrs. Farmer outright; but if she in turn disclaims the property, it keeps going and passes to a testamentary trust that qualifies for the unified transfer tax credit (a "credit shield" trust). Mrs. Farmer's disclaimer pertains both to the survivorship interest identified on Exhibits C and D and to her right to take the property individually under Article Three, but does not pertain to her beneficial interest in the trust under Article Four of the will.

Applying these principles to this Solid Investment Company account, the disclaimed interest in the equities will pass to the estate of Father Farmer; then, by virtue of a letter of direction from Mrs. Farmer as executor (affirming and warranting that all of the claims against the decedent's estate have been satisfied, together with all of his lawful debts), the disclaimed portion will pass directly to the trustee under Article Four of the will, as follows:

Mother Farmer, Trustee
Father Farmer Family Trust
U/W Father Farmer, Deceased
EIN: 35-1234567

So, when you receive the executed disclaimer and the accompanying letter of direction, the jointly-held assets described in detail on Exhibit D should be transferred in kind — NOT SOLD — into a new account in the name of the trust and under the trust tax identification number. Please note that precision is important, especially with respect to the money market account.

I have responsibility for the consequences of this transaction to the Farmer family, as their attorney, but you may wish to refer this matter for review by your firm's attorneys for assurance; indeed, I urge you to do so now so that I may respond to any questions or concerns quickly. The tax rules afford only a strict nine-month period running from Father Farmer's death on February 27, ____. I would be grateful if after reviewing this letter and the enclosures you would give me a call so we may discuss how best to bring this approach to task.

Many thanks for your help in assisting us in our mission.

b. Letter of Direction from Mother Farmer as Independent Executor

The advisory letter from the attorney may then be supplemented by a letter of direction from the executor:

August 26, ____

Mr. Honest Broker
Solid Investment Company

RE: Solid Investment Account No.: 12345
Father Farmer and Mother Farmer JTWROS
Estate of Father Farmer, Dec'd
DeWitt County No.: 20__ - P - X
Father Farmer Family Trust U/W Father Farmer

Dear Mr. Broker:

My husband, Father Farmer, passed away on February 27, 20__. I am the Executor of his estate. A certified copy of my letters of office is enclosed.

At the date of his death my husband and I held joint interests in certain property. Acting in my individual capacity I have disclaimed my survivorship interest in most but not all of this property. By virtue of this disclaimer, the survivorship interest in the account passes pursuant to the provisions of his last will and testament, and therefore to my direction and control as executor.

Speaking as executor, I can confirm and warrant that all of the lawful debts and claims against my husband's estate have been paid and that there is no lien for federal or Illinois estate taxes. Therefore, this disclaimed survivorship interest in property may and should pass directly to the Father Farmer Family Trust pursuant to Article Four of his last will and testament, as follows:

Mother Farmer, Trustee
Father Farmer Family Trust
U/W Father Farmer
EIN: 35-1234567

I have retained the Peithmann Law Office to assist me with the administration of my husband's estate and the Father Farmer Family Trust. Please cooperate with its members in every respect.

Yours very truly,

_____

Mother Farmer, Independent Executor
of the Estate of Father Farmer, deceased

Signature guaranteed by

PRAIRIEVIEW STATE BANK:

_____

3. Notice of Appointment of Legal Counsel - by Executor

Given the increasing sensitivity to privacy rights, and the realities of the more and more financial service firms and other providers are reluctant to discuss a client's affairs with counsel. The following form has proven useful for this purpose. It can be modified for clients in other capacities, such as trustees or corporate officers, or for a client represented in his or her individual capacity:

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY

IN THE MATTER OF THE ESTATE	**)**
OF	**) IN PROBATE**
FATHER FARMER, DECEASED	**) NO: 20__ - P - X**

NOTICE OF APPOINTMENT OF LEGAL COUNSEL
and
DIRECTION TO RELEASE INFORMATION

MOTHER FARMER, upon her oath and pursuant to penalties of perjury affirms and states as follows:

1. That she is the duly appointed and still acting Independent Executor of this Estate. A true copy of her letters of office is attached hereto.

2. That as said Independent Executor she has retained and appointed The Peithmann Law Office to serve as her legal counsel to assist with the administration of this Estate. All persons with whom she has business are directed to cooperate with her legal counsel in all respects.

3. That all persons having possession of or access to information to which she is entitled are hereby directed to provide such information, or access to such information, to the representatives of The Peithmann Law Office for or upon the same force and effect as if she were so directing herself, individually and in person.

4. That except for these premises no person dealing with her said legal counsel shall inquire further into said Attorneys' authority to act for or in her behalf or in behalf of said Estate.

5. That a photocopy, facsimile transmission, or other true reproduction of this executed original instrument shall be deemed to be an original counterpart hereof, to be relied and acted upon by all affected thereby.

WITNESS MY HAND AND SEAL, this ____ day of _____, 20___.

_____
MOTHER FARMER

THE PEITHMANN LAW OFFICE
Attorneys and Counselors at Law
111 S. Main St., P. O. Box 228
Farmer City, IL 61842
Telephone: (309) 928-3390

Subscribed and sworn to before me this ___ day of _____, 20__.

_____
NOTARY PUBLIC

Sometimes your author has expanded this Notice to authorize the release of information "*or property*", by substituting paragraph 3 as follows:

> **3. That all persons having possession of or access to information or property to which she is entitled are hereby directed to provide such information, or deliver such property, to or upon the order of the representatives of The Peithmann Law Office, for or upon the same force and effect as if she were so directing herself, individually and in person.**

This provision effectively makes counsel the Executor's transactional agent. If this approach is selected, a separate understanding on the scope of this agency should be settled with the client - in writing, and in advance.

4. Disclaimer by a Personal Representative

Suppose Mother Farmer dies shortly after Father Farmer, having done nothing with respect to Father Farmer's estate, and daughter Donna Farmer is named in both wills as successor executor. Suppose further that applicable state law (*i.e.,* Illinois) allows a personal representative to disclaim only under express authority (that is not included in this will) or by leave of court. If Donna Farmer now wishes Father's half of the farmland property to pass directly to herself and her brother, Sam, bypassing Mother Farmer's gross/taxable estate, the process would flow as follows:

a. Motion For Leave of Court to Disclaim

To get leave of court you must ask for it, by motion, and offer enough detail for the judge to grasp what will probably be a rare request.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY

IN THE MATTER OF THE ESTATE	**)**
OF	**) IN PROBATE**
MOTHER FARMER, DECEASED	**) No. 20__ - P - Y**

MOTION FOR LEAVE TO DISCLAIM PROPERTY INTEREST

NOW COMES THE UNDERSIGNED, Donna Farmer, duly appointed and still acting Independent Executor of this Estate, who for her Motion for Leave to Disclaim Property Interest respectfully states as follows:

1. That the decedent's husband, Father Farmer, predeceased the decedent, having departed this life on the 27th day of February, 20__.

2. That at his death Father Farmer left a Last Will and Testament dated January 16th, 20__, which was admitted to probate before this Court on March 5, 20___, as Cause No. 20__ - P- X. A true copy of said Will is attached hereto as Exhibit A.

3. That said Will of Father Farmer nominated the decedent Mother Farmer as Executor, but she declined to so serve, and as first nominated successor under the Will your undersigned was appointed Independent Executor of the Estate of Father Farmer on March 5, 20___; meaning, that your undersigned serves as Independent Executor of the estates of both of her parents.

4. That all of Father Farmer's heirs and legatees have filed their unlimited appearances, waivers of notice, and consents approving the validity and probate of his Will, and all of his known or reasonably ascertainable creditors have been paid in full.

5. That ARTICLE THREE of Father Farmer's Will provides as follows:

[quote provisions]

6. That ARTICLE FOUR of Father Farmer's Will provides as follows:

[quote provisions]

7. That at the time of his death, Father Farmer owned the following interest in real estate, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

8. That the provisions of ARTICLE THREE of Father Farmer's Will, and the fact that Mother Farmer survived him, are sufficient to vest title to said real estate in Mother Farmer unless she or her legal representative timely disclaims this property interest in the manner provided by Illinois Probate Act Section 2-7.

9. That in the event of such individual disclaimer the provisions of ARTICLE FOUR of Father Farmer's Will, and the fact that Mother Farmer survived him, are sufficient to vest title to said real estate in the Trustee of the Father Farmer Family Trust unless Mother Farmer or her legal representative timely disclaims her interests under Paragraphs A and B of said ARTICLE FOUR in the manner provided by Illinois Probate Act Section 2-7.

10. That this court's leave and approval is required before your undersigned, as Independent Executor, may disclaim said interests.

11. That such disclaimer will benefit the estate of Mother Farmer as a whole and those interested in the estate generally because it will result in substantial savings in federal and state transfer tax.

12. That no portion of or proceeds from the above-described property were transferred to Mother Farmer or those acting in her behalf during her lifetime, nor to the undersigned as the Independent Executor of her estate, nor to the Trustee of the Father Farmer Family Trust since the date of Father Farmer's death, nor has any of the income or other benefits attributable to said property been received by Mother Farmer or her estate at any time or in any way. The Estate of Mother Farmer is not insolvent, and this Motion and the disclaimers contemplated hereby are not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity.

13. That all of Mother Farmer's heirs and legatees have filed their unlimited appearances, waivers of notice, and consents approving the validity and probate of her Will in this cause; that all of her known or reasonably ascertainable creditors have been paid in full; and, that all of the

legatees under Mother Farmer's Will affected by this Motion have entered their appearances in writing consenting to the relief herein requested.

WHEREFORE, your Petitioner prays that this Honorable Court will set this Motion for hearing and direct the type of notice and the persons to whom such notice should be given, and that upon such hearing the Court will:

A. Find that it has jurisdiction over the parties hereto and the subject matter presented by the Motion, and that all parties necessary to the determination of this Motion have been duly joined and are properly before the Court.

B. Find that the disclaimer of the property interests described in Paragraphs 5, 6, and 7 above, together with all income or benefits attributable thereto, would benefit this estate as a whole and those interested in the estate generally.

C. Grant her leave, as Independent Executor of this estate, to disclaim such interests and benefits in the manner required by Illinois statute.

D. Grant such other, further, or different relief as this Court in these circumstances deems proper.

_____

DONNA FARMER, Independent Executor of the Estate of Mother Farmer, Deceased

Subscribed and sworn to before me this 1st day of May, 20___.

_____

NOTARY PUBLIC

b. Order Granting Leave To Disclaim

Modern orders seem to be shrinking more and more, and the following version can be edited correspondingly.

[Cause Heading]

ORDER GRANTING LEAVE TO DISCLAIM

This matter having come on to be heard this 1st day of June, 20__, upon the Motion of Donna Farmer, the duly appointed and still acting Independent Executor of this Estate, the Court having considered the evidence and being in all ways fully advised,

HEREBY FINDS AS FOLLOWS:

1. That this Court has jurisdiction over the parties hereto and the subject matter presented by the Motion. All parties necessary to the determination of the Motion have been duly joined and are properly before the Court.

2. That the decedent's husband, Father Farmer, predeceased the decedent, having departed this life on the 27th day of February, 20 ___.

3. That at his death Father Farmer left a Last Will and Testament dated January 16, 20__, which was admitted to probate before this Court on March 5, 20 ____, as Cause No. 20__ - P - X, and Donna Farmer was appointed Independent Executor of his estate.

4. That all persons having a right to contest the validity of said Will have entered their appearances approving its probate, and said Will may be relied on as dispositive of Father Farmer's individual property.

5. That at the time of his death, Father Farmer owned the following interest in farm real estate, to wit:

> **An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.**
>
> **P.I.N.: 12-36-20-10-001**

6. That the provisions of ARTICLE THREE of Father Farmer's Will, and the fact that Mother Farmer survived him, are sufficient to vest title to said real estate in Mother Farmer unless she or her legal representative timely disclaims this property interest in the manner provided by Illinois Probate Act Section 2-7.

7. That in the event of such individual disclaimer the provisions of ARTICLE FOUR of Father Farmer's Will, and the fact that Mother Farmer survived him, are sufficient to vest title to said real estate in the Trustee of the Father Farmer Family Trust unless Mother Farmer or her legal representative timely disclaims her interests under Paragraphs A and B of said ARTICLE FOUR in the manner provided by Illinois Probate Act Section 2-7.

8. That it will benefit the estate of Mother Farmer as a whole and those interested in the estate generally if the Independent Executor is granted leave to disclaim said property interest.

9. That for the purposes of Supreme Court Rule 304 there is no just reason for delaying enforcement or appeal of this Order.

IT IS THEREFORE ORDERED:

A. That the Independent Executor, Donna Farmer, is granted leave to disclaim all of the rights, titles, and interests directed to pass to Mother Farmer pursuant to ARTICLE THREE of Father Farmer's Will in and to the following described real estate, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

together with all income, rents, profits, payments or benefits attributable to said property interest since the date of Father Farmer's death.

B. That the Independent Executor, Donna Farmer, is granted leave to disclaim all of the rights, titles, and interests directed to pass to Mother Farmer pursuant to Paragraphs A and B of ARTICLE FOUR of Father Farmer's Will pertaining to the following described real estate, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

together with all income, rents, profits, payments or benefits attributable to said interests since the date of Father Farmer's death.

Dated: _____, 20___. **ENTER:**

_____

Circuit Judge

c. Disclaimer by Leave of Court

Having gained leave of the court in Mother's estate, Donna then submits the disclaimer to Father's fiduciaries, records one original with the county recorder, and enters another into the court file:

Document No._____.
This instrument was recorded this
_____ day of _____, 20_

_____, Recorder

[Cause Heading]

TO: Donna Farmer, Independent Executor of the Estate of Father Farmer, Deceased;

Donna Farmer, Trustee of the Father Farmer Family Trust U/W Father Farmer

DISCLAIMER

Now comes the undersigned, Donna Farmer, acting in her capacity as Independent Executor of the Estate of Mother Farmer, Deceased, who for her disclaimer of interest on behalf of said Mother Farmer states as follows:

1. That Father Farmer departed this life on the 27th day of February, 20__, leaving a Last Will and Testament dated January 16, 20__, which was admitted to probate in this cause on March 5, 20____.

2. That all of Father Farmer's heirs and legatees have filed their unlimited appearances, waivers of notice, and consents approving the validity and probate of said Will, and all of his known or reasonably ascertainable creditors have been paid in full.

3. That Mother Farmer departed this life on the 15th day of March, 20__, leaving a Last Will and Testament dated January 16, 20__, which was admitted to probate on March 30, 20__, in case No. 20__ - P - Y in the Circuit Court of the Sixth Judicial Circuit, DeWitt County, Illinois; and that Letters Testamentary were duly issued to Donna Farmer as Independent Executor on that date.

4. That Articles Three and Four of Father Farmer's Will created interests in property in Mother Farmer or for her benefit.

5. That Article Four of Father Farmer's Will provides in pertinent part as follows:

ARTICLE FOUR:

*** * ***

C. The Father Farmer Family Trust shall terminate upon the death of my said wife; or upon my death should she not survive me; or, as to any severable portion thereof, upon her lawful disclaimer of any severable portion or all of her interest under

Paragraphs A or B above. In such event, the Trust Estate or that disclaimed severable portion thereof shall be distributed (subject to the Contingent Minor's Trust provisions of ARTICLE FIVE below) as follows:

1. One half thereof to my son, Sam Farmer, if then living; and if not then living, or should he lawfully disclaim any severable portion or all of this gift, to his descendants, per stirpes, then living; and

2. One half thereof to my daughter, Donna Farmer, if then living; and if not then living, or should she lawfully disclaim all or any severable portion of this gift, then to her descendants, per stirpes, then living.

6. That upon the Motion of the undersigned an Order was entered by the Circuit Court of the Sixth Judicial District, DeWitt County, on June 1, 20__, granting the undersigned leave:

A. to disclaim on behalf of Mother Farmer, Deceased, the following interest in property directed to pass to Mother Farmer under said ARTICLE THREE, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

together with all income, rents, profits, or benefits attributable thereto since the date of Father Farmer's death; and,

B. to disclaim on behalf of Mother Farmer, Deceased, all of the rights, titles, and interests directed to pass to or for the benefit of Mother Farmer pursuant to Paragraphs A and B of ARTICLE FOUR of Father Farmer's Will pertaining to the following described real estate, to wit:

An undivided one-half interest in Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois.

P.I.N.: 12-36-20-10-001

together with all income, rents, profits, payments or benefits attributable thereto to said interests since the date of Father Farmer's death.

A true copy of said Order is attached hereto as Exhibit A and made part hereof.

7. That no portion of or proceeds from the above-described property were transferred to Mother Farmer or those acting in her behalf during her lifetime, nor to the undersigned as the Executor of her estate, nor to the Trustee of the Father Farmer Family Trust since the date of Father Farmer's death, nor has any of the income or other benefits attributable to said property been received by Mother Farmer or her estate at any time or in any way. The Estate of Mother Farmer is not insolvent, and Motion and the disclaimers contemplated hereby are not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity.

8. That this Disclaimer is limited to the interests in property hereinabove described and shall not be construed to extend to any other property interest to which the Estate of Mother Farmer is entitled by virtue of said Last Will and Testament of Father Farmer, or by right of survivorship, contract, or otherwise.

WHEREFORE, the undersigned Donna Farmer, as Independent Executor of the Estate of Mother Farmer, Deceased, acting pursuant to Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3) and acting further pursuant to leave granted by this Court's Order of June 1, 20__, HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS all of the rights, titles and interests in property identified in Paragraph 6 above that is directed to pass to or for the benefit of Mother Farmer pursuant to:(i) ARTICLE THREE; and (ii) ARTICLE FOUR, Paragraphs A and B of Father Farmer's Will, including any and all income, rents, profits, payments or benefits attributable to said property interests since the date of Father Farmer's death, but without prejudice to and reserving on behalf of Mother Farmer and her estate all other rights, titles, and interests otherwise accruing to Mother Farmer not specifically disclaimed hereby.

_____

DONNA FARMER, Independent Executor of the Estate of Mother Farmer, Deceased

Subscribed and sworn to before me this 1st day of June, 20 ___.

_____

NOTARY PUBLIC

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, ____.

DONNA FARMER, Independent Executor of the Estate of FatherFarmer, Deceased

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, ____.

DONNA FARMER, Trustee of the Father Farmer Family Trust U/W Father Farmer, Deceased

This instrument prepared
with the assistance of:
THE PEITHMANN LAW OFFICE
Attorneys and Counselors at Law
111 S. Main St., P.O. Box 228
Farmer City, IL 61842
Telephone: (309) 928-3390

Had the will granted the executor power to disclaim, this extra procedure could have been avoided and a lot of time and money could have been saved. Note well that it must be the executor, as legal representative of Mother Farmer, and not the trustee of the trust or Sam and Donna as her beneficiaries, who must disclaim on behalf of Mother Farmer's estate. The trustee's and children's disclaimers, alone, would not avoid the property vesting in Mother, making it subject to administration — and taxation — in her estate.

5. Disclaimer of Presently Vesting Remainder — By Attorney in Fact

The problems inherent with disclaiming presently vesting future interests are discussed in detail in Part III above. It is now accepted law that a tax "qualified disclaimer" must occur within a period directly related to the original transfer creating the interest, irrespective of the date of vesting. But since Probate Act §2-7(d)(2) still permits an effective property law disclaimer to occur within a reasonable time after the moment when the "taker of the property or interest has become finally ascertained and his interest has become indefeasibly fixed both in quality and quantity," there may be compelling non-tax reasons for doing so.

The following example is aimed at avoiding a property interest's vesting in a daughter after her mother's life estate terminates and in this case is made by the disclaimant daughter's agent pursuant to specific authority set forth in a durable general power of attorney:

DISCLAIMER

NOW COMES FAITHFUL LEE FARMING (who was known at birth and until her marriage as Faithful Lee Toiling), acting by and through Donna Farming, her duly constituted and still acting Attorney-in-Fact (or Agent) pursuant to a Durable General Power of Attorney dated January 10, 2003, and recorded in the office of the DeWitt County, Illinois, Recorder on January 12, 2003, as Document No. 03 R 00123, which Durable General Power of Attorney is warranted not to have been revoked as of the date hereof, who for her disclaimer of interest states as follows:

1. That the father of Faithful Lee (Toiling) Farming, HONEST LEE TOILING, departed this life on the 13th day of May, 1976, leaving a Last Will and Testament dated December 2, 1974, which was admitted to Probate by the Circuit Court of the Sixth Judicial Circuit, DeWitt County, Illinois, as Cause No. 76-P-X on July 28, 20 .

2. That Article Two of said Last Will and Testament of Honest Lee Toiling provides in pertinent part as follows:

> **ARTICLE TWO: I hereby give and devise all my interest in the following described real estate, to wit:**
>
> > **Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois,**
>
> **to my wife, CONSTANT LEE TOILING, for and during her natural life only.**
>
> **Upon the death of my said wife or at my death if she should predecease me, I do give and devise all my interest in the above-described real estate to my daughter, FAITHFUL LEE TOILING, if then living, and if not then living then to her descendants *per stirpes* then living.**

3. That at the date of his death, said Honest Lee Toiling owned an undivided one-half interest in the farm real estate described above.

4. That the permanent property tax identification number for said farm real estate is 12-36-20-10-000.

5. That Constant Lee Toiling departed this life on the 28th day of June, 20 .

6. That the death of Constant Lee Toiling, and the provisions of said ARTICLE TWO of Honest Lee Toiling's Last Will and Testament, are sufficient to vest title to said interest in farm real estate in the undersigned, as the taker of the remainder interest finally ascertained and indefeasibly fixed in both quality and quantity, unless she timely disclaims this property interest in the manner provided by Illinois Probate Act §2-7.

7. That in the event of such individual disclaimer the provisions of said ARTICLE TWO are also sufficient to cause title to said interest in farm real estate to descend to the undersigned's descendants per stirpes living as of June 28, 2002.

8. That in her lifetime the undersigned Faithful Lee Farming bore two children, both of whom are alive as of the date of this instrument, whose names and places of residence are as follows :

NAME	ADDRESS
Donna Farming	901 S. Main Street Farmer City, IL 61842
Frank Lee Farming	903 S. Main Street Farmer City, IL 61842

There are now living no other children of Faithful Lee Farming, natural or adopted, nor descendants of any other deceased child or children of Faithful Lee Farming, natural or adopted.

9. That, accordingly, the undersigned intends by these presents to disclaim all right, title or interest, of every kind and nature, that she might, could or should receive, directly or indirectly, in any interest in farm real estate owned by Honest Lee Toiling at the time of his death, specifically including the interest in farm real estate described in Paragraph 2 above, and further including any and all income, rents, profits, payments, or other benefits attributable to said property interest since the date of Constant Lee Toiling's death, and further including without limitation any such right, title or interest that might, could, or should pass to or for the benefit of the undersigned:

a. as surviving heir at law of Honest Lee Toiling and/or Constant Lee Toiling, deceased, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1);

b. by virtue of the terms and conditions of the Last Will and Testament of Honest Lee Toiling as aforesaid; and/or

c. by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned has any prior, present or future interest in said property.

10. That no portion of or proceeds from said farm real estate have been transferred to the undersigned or those acting in her behalf; that the undersigned has received no individual

benefits from said property, directly or indirectly, at any time or in any way since the date of Constant Lee Toiling's death; that the undersigned has not accepted any interest in said property nor exercised any incident of ownership with respect thereto; that the undersigned has not assigned, conveyed, encumbered, pledged or otherwise attempted to dispose of or transfer any interest in said property at any time or in any way; that the undersigned is not insolvent; and, that this disclaimer is not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity.

11. That Paragraph 1.I. of the above-described Durable General Power of Attorney issued by the undersigned Faithful Lee Farming to her said daughter Donna Farming as Agent provides in pertinent part:

> **1. It is my intention that my Agent shall have plenary powers including but not limited to the following, to wit:**
>
> *** * ***
>
> **I. To receive on my behalf, *or to disclaim and renounce* and to give full and complete receipts and acquittances for any and all legacies, bequests, devises, inheritances, or other distributions of whatsoever character to which I may at any time become entitled.**

12 That this disclaimer is intended to comply with the provisions of Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and all references herein that are inconsistent with this overriding intention shall be deemed amended or, if necessary, deleted, in order to conform with this overriding intention.

WHEREFORE, the undersigned Faithful Lee Farming, acting pursuant to Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS all of her right, title and interest, of every kind and nature, that she might, could, or should receive, directly or indirectly, in any interest in farm real estate owned by Honest Lee Toiling at the time of his death, specifically including the interest in farm real estate described in Paragraph 2 above, and further including any and all income, rents, profits, payments, or other benefits attributable to said property interest since the date of Constant Lee Toiling's death, and further including any such right, title or interest that might, could, or should pass to or for the benefit of the undersigned: (i) as surviving heir at law of Honest Lee Toiling and/or Constant Lee Toiling, deceased, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1); (ii) by virtue of the terms and conditions of the Last Will and Testament of Honest Lee Toiling as aforesaid; and/or (iii) by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned has any prior, present or future interest in said property.

Dated: December 20, 20 .

_____

FAITHFUL LEE FARMING

_____

BY: DONNA FARMING
Her Attorney-In-Fact

State of Illinois)
) ss.
County of DeWitt)

I, the undersigned, a Notary Public in and for said County, in the state aforesaid, DO HEREBY CERTIFY that DONNA FARMING, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that she signed, sealed, and delivered said instrument as the free and voluntary act of FAITHFUL LEE FARMING, as her duly constituted and still acting Attorney-in-Fact, or Agent, for the uses and purposes therein set forth.

Given under my hand and official seal this 20th day of December, 20 .

_____

Notary Public

Delivery of this disclaimer will depend on the state-specific rules spelled out in governing statute. In this case: (a) the original transferor has been dead more than 25 years; (b) his estate has been closed almost as long, meaning the transferor has no representative; and (c) as a simple life estate there is no trustee or other person having legal title to the property. Since all those predecessors in interest are not "readily determinable" and since an interest in real property is involved, recording in the office of the recorder in the county in which the real estate lies. may be the only practical alternative.

This disclaimer will be a taxable gift by Faithful Lee Farming and should be reported on Internal Revenue Service Form 709 on or before April 15 of the year following the disclaimer, with valuation determined at the fair market value as of the date of the disclaimer, not as of the death of the measuring life.

6. Disclaimer of Inheritance — By Attorney in Fact

The disclaimant of that future interest discussed in immediately above may also have an interest in the estate of the person whose death caused that future interest to vest, such as the daughter of the

mother who received the life estate in father's half of the farm. The same non-tax reasons for disclaiming the vested remainder may encourage disclaiming the inheritance at the same time but with the added advantage of qualifying as a non-taxed gift under Code §2518. No gift tax return will be required (although some cautious practitioners may refer to this qualified disclaimer on the same Form 709 gift tax return used to report the taxable disclaimer of the vesting future interest).

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DEWITT COUNTY

IN THE MATTER OF THE ESTATE	**)**
OF	**) IN PROBATE**
CONSTANT LEE TOILING, DECEASED	**) NO.20__ - P - Z**

DISCLAIMER

TO: Donna Farming, Independent Executor of the Estate of Constant Lee Toiling, Deceased

NOW COMES FAITHFUL LEE FARMING (who was known at birth and until her marriage as Faithful Lee Toiling), acting by and through Donna Farming, her duly constituted and still acting Attorney-in-Fact (or Agent) pursuant to a Durable General Power of Attorney dated January 10, 2003, and recorded in the office of the DeWitt County, Illinois, Recorder on January 12, 2003, as Document No. 03 R 00123, which Durable General Power of Attorney is warranted not to have been revoked as of the date hereof, who for her disclaimer of interest states as follows:

1. That the mother of Faithful Lee (Toiling) Farming, Constant Lee Toiling, departed this life on the 28th day of June, 20 , leaving a Last Will and Testament dated December 2, 1974, which was admitted to Probate in this Cause on December 28, 2002.

2. That Articles Two and Three of said Last Will and Testament of Constant Lee Toiling provide as follows:

ARTICLE TWO: I hereby give and devise all my interest in the following described real estate, to wit:

Section 36, Township 20 North, Range 10 East of the Third Principal Meridian, situated in DeWitt County, Illinois,

to my husband, HONEST LEE TOILING, for and during his natural life only.

Upon the death of my said husband or at my death if he should predecease me, I do give and devise all my interest in the above-described real estate to my daughter, FAITHFUL LEE TOILING, if then living, and if not then living then to her descendants *per stirpes* then living.

ARTICLE THREE: All the rest, residue, and remainder of my estate, real, personal, or mixed, in possession or in expectancy at the time of my death, I give, devise, and bequeath unto my beloved husband, Honest Lee Toiling, if he shall survive me. In the event my husband, Honest Lee Toiling, does not survive me, or in the event he and I die under such circumstances as to make it impossible to determine which of us died first, I do hereby give, devise, and bequeath the aforementioned rest, residue, and remainder of my estate to my daughter, Faithful Lee Toiling, if then living, and if not then living then to her descendants *per stirpes* then living.

3. That at the date of her death, said Constant Lee Toiling owned an undivided one-half interest in the farm real estate described above.

4. That the permanent property tax identification number for said farm real estate is 12-36-20-10-000.

5. That said Honest Lee Toiling predeceased Constant Lee Toiling, having departed this life on the 13th day of May, 1976, a resident of DeWitt County, Illinois.

6. That the prior death of Honest Lee Toiling, and the provisions of ARTICLES TWO and THREE of the Last Will and Testament of said Constant Lee Toiling, are sufficient to vest title to said interest in farm real estate, and in the residue of said estate, in the undersigned unless she timely disclaims this property interest in the manner provided by Illinois Probate Act §2-7.

7. That in the event of such individual disclaimer the provisions of said ARTICLES TWO and THREE are also sufficient to cause title to said interests in property to descend to the undersigned's descendants per stirpes living as of June 28, 20 .

8. That in her lifetime the undersigned Faithful Lee Farming bore two children, both of whom are alive as of the date of this instrument, whose names and places of residence are as follows :

NAME	ADDRESS
Donna Farming	901 S. Main Street Farmer City, IL 61842

Frank Lee Farming **903 S. Main Street**
Farmer City, IL 61842

There are now living no other children of Faithful Lee Farming, natural or adopted, nor descendants of any other deceased child or children of Faithful Lee Farming, natural or adopted.

9. That, accordingly, the undersigned intends by these presents to disclaim all right, title or interest in property, of every kind and nature, that she might, could or should receive, directly or indirectly, as a result of the death of Constant Lee Toiling, including any and all income, rents, profits, payments, or other benefits attributable to any such interests in property, and further including without limitation any such right, title or interest that might, could or should pass to or for the benefit of the undersigned:

a. as surviving heir at law of Constant Lee Toiling, deceased, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1);

b. by virtue of the terms and conditions of the Last Will and Testament of Constant Lee Toiling as aforesaid; and/or

c. by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned has any prior, present or future interest in said property,

it being the undersigned's intention that she shall take or receive no right, title, interest or benefit of any kind as a result of the death of Constant Lee Toiling, directly or indirectly.

10. That no portion of or proceeds from the property of said Constant Lee Toiling have been transferred to the undersigned or those acting in her behalf; that the undersigned has received no individual benefits from said property, directly or indirectly, at any time or in any way since the date of Constant Lee Toiling's death; that the undersigned has not accepted any interest in said property nor exercised any incident of ownership with respect thereto; that the undersigned has not assigned, conveyed, encumbered, pledged or otherwise attempted to dispose of or transfer any interest in said property at any time or in any way; that the undersigned is not insolvent; and, that this disclaimer is not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity.

11. That Paragraph 1.I. of the above-described Durable General Power of Attorney issued by the undersigned Faithful Lee Farming to her said daughter Donna Farming as Agent provides in pertinent part:

1. It is my intention that my Agent shall have plenary powers including but not limited to the following, to wit:

*** * ***

I. To receive on my behalf, *or to disclaim and renounce* and to give full and complete receipts and acquittances for any and all legacies, bequests, devises, inheritances, or other distributions of whatsoever character to which I may at any time become entitled.

12. That this disclaimer is intended to comply with the provisions of Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3), and all references herein that are inconsistent with this overriding intention shall be deemed amended or, if necessary, deleted, in order to conform with this overriding intention.

WHEREFORE, the undersigned Faithful Lee Farming, acting pursuant to Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7), and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§ 25.2518-1, 25.2518-2, and 25.2518-3), HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS any and all rights, titles or interests, of every kind and nature, that she might, could or should receive, directly or indirectly, by virtue of the death of Constant Lee Toiling, including any and all income, rents, profits, payments, or other benefits attributable to any such interest in property, and further including without limitation any such right, title or interest that might, could or should pass to or for the benefit of the undersigned: (i) as surviving heir at law of Constant Lee Toiling, deceased, pursuant to the Illinois rules of descent and distribution; (ii) by virtue of the terms and conditions of the Last Will and Testament of Constant Lee Toiling as aforesaid; and/or (iii) by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned shall take or receive no right, title, interest or benefit of any kind by virtue of the death of Constant Lee Toiling whatsoever, directly or indirectly.

Dated: _____, 20 .

_____

FAITHFUL LEE FARMING

_____

BY: DONNA FARMING
Her Attorney-In-Fact

State of Illinois)
) ss.
County of DeWitt)

I, the undersigned, a Notary Public in and for said County, in the state aforesaid, DO HEREBY CERTIFY that DONNA FARMING, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that she signed, sealed, and delivered said instrument as the free and voluntary act of FAITHFUL LEE FARMING, as her duly constituted and still acting Attorney-in-Fact, or Agent, for the uses and purposes therein set forth.

Given under my hand and official seal this ___ day of _____, ____.

_____

Notary Public

RECEIPT

I hereby acknowledge receipt of a fully executed copy of the foregoing Disclaimer.

Dated: _____, ____.

BY: _____
Donna Farming, Independent
Executor of the Estate of
Constant Lee Toiling, deceased

7. Disclaimer of Death Benefit Under Group Life Insurance Policy

Life insurance, IRAs, payable-on-death accounts and other non-testamentary beneficial plans will always represent an important field for considering disclaimer options. In this example, the court proceedings are relevant only to the degree that the disclaimed proceeds will eventually become an estate asset. The disclaimer is initiated by the named policy beneficiary, and must be delivered to the insurance company as part of the redemption process.

DISCLAIMER

TO: Best Life Insurance Co.
BestLife Recordkeeping Center
P.O. Box 1234
Utica, NY 98765-1234

Re: Diligent Lee Trying
Soc. Sec. No.: 123-45-6777
Date of Death: January 10, 20__
Forever Phone Company Group Life Claim; BestLife Report No. 56789
Wilma Jones, designated beneficiary

NOW COMES ALLISON SMITH, who for her disclaimer of interest states as follows:

1. That said Diligent Lee Trying departed this life on January 10, 20___, a resident of DeWitt County, Illinois. A certified copy of her certificate of death is attached hereto as Exhibit A.

2. That said Diligent Lee Trying died intestate; however, the decedent's niece, Hard Lee Trying, was appointed Independent Administrator of the Estate of Diligent Lee Trying as administered in probate before the Circuit Court of the Sixth Judicial Circuit, DeWitt County, Illinois, as Cause No. 20__ - P - X on January 20, 20__. A true copy of said Hard Lee Trying's Letters of Office as Independent Administrator is attached hereto as Exhibit B.

3. That at the time of her death said Diligent Lee Trying had designated the undersigned as the beneficiary of her Forever Phone Company group term life insurance policy.

4. That the undersigned intends by these presents to disclaim any and all right, title or interest that she might, could or should receive, directly or indirectly, in said Forever Phone Company group term life insurance policy by virtue of the death of Diligent Lee Trying, including any and all interest, dividends, income, payments or other benefits attributable thereto, and further including without limitation any such right, title or interest that might, could or should pass to or for the benefit of the undersigned:

a. as the named/designated beneficiary on any beneficiary designation form pertaining to and governing the beneficial interests in such life insurance benefit;

b. by any rule of construction that there was a completed gift to the undersigned upon the creation of the beneficiary designation;

c. as surviving heir at law of Diligent Lee Trying, deceased, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1); and/or

d. by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned has any prior, present or future interest in said life insurance benefit,

it being the undersigned's intention that, for the purposes of said Forever Phone Company group term life insurance, she shall take or receive no right, title, interest or benefit of any kind in any way whatsoever, directly or indirectly.

5. That no portion or proceeds from said life insurance benefit have been paid or otherwise transferred to the undersigned or those acting in her behalf; that the undersigned has received no benefits from said property, directly or indirectly, at any time or in any way since the death of Diligent Lee Trying; that the undersigned has not accepted any interest in said property nor exercised any incident of ownership with respect thereto; that the undersigned has not assigned, conveyed, encumbered, pledged or otherwise attempted to dispose of or transfer any interest in said property at any time or in any way; that the undersigned is not insolvent; and, that this disclaimer is not in any way supported by consideration or by any reciprocal agreement for benefit with any other person or entity.

6. That this disclaimer is intended to comply with the provisions of Section 1 of the Illinois Disclaimer Under Nontestamentary Instrument Act (760 ILCS 25/1), Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. §2518) and its supporting regulations (26 C.F.R. §§25.2518-1, 25.2518-2, and 25.2518-3), and all references herein that are inconsistent with this overriding intention shall be deemed amended or, if necessary, deleted, in order to conform with this overriding intention.

WHEREFORE, the undersigned, ALLISON SMITH , acting pursuant to Section 1 of the Illinois Disclaimer Under Nontestamentary Instrument Act (760 ILCS 25/1), Section 2-7 of the Illinois Probate Act (755 ILCS 5/2-7) and Section 2518 of the Internal Revenue Code (26 U.S.C. § 2518) and its supporting regulations (26 C.F.R. §§25.2518.1, 25.2518-2, and 25.2518-3), HEREBY IRREVOCABLY, ABSOLUTELY, UNEQUIVOCALLY, AND WITHOUT QUALIFICATION REFUSES TO ACCEPT AND DISCLAIMS any and all right, title and beneficial interest in, to, or under the governing terms of any and all life insurance benefits payable upon the death of Diligent Lee Trying by virtue of her prior employment with Forever Phone Company and/or its predecessors in interest, including any and all interest, dividends, income, payments or other benefits attributable to said life insurance benefit since the date of death of Diligent Lee Trying, and further including without limitation any such right, title or interest that might or could pass to or for the benefit of the undersigned: (i) as the named/designated beneficiary on any beneficiary designation form pertaining to and governing the beneficial interests in such life insurance benefit; (ii) by any rule of construction that there was a completed gift to the undersigned upon the creation of the beneficiary designation; (iii) as surviving heir at law of Diligent Lee Trying, deceased, pursuant to the Illinois rules of descent and distribution (755 ILCS 5/2-1); and/or (iv) by any other rule or construction whatsoever that might or could apply in these circumstances to the effect that the undersigned has any prior, present or future interest in said life insurance benefit

Dated: January ____, 20___.

_____

ALLISON SMITH

Subscribed and sworn to before me this _____ day of _____, 20__.

_____

NOTARY PUBLIC

RECEIPT

The undersigned hereby acknowledges receipt of a fully executed copy of the foregoing Disclaimer.

DATED:_____ , 20___

BestLife and/or The Best Life Insurance Company

By: _____
Name: _____
Title: _____

This instrument prepared with the assistance of:
THE PEITHMANN LAW OFFICE
Attorneys and Counselors at Law
111 S. Main St., P.O. Box 228
Farmer City, IL 61842
Telephone: 309/928-3390

Note that no receipt is required for the Independent Administrator in this instance, since only the insurance company has control of the policy proceeds at this point. Getting those proceeds from the company to the Estate will take separate instructions:

8. Supplemental Letter of Direction From Estate Administrator to Life Insurance Company

Allison Smith's disclaimer of her beneficiary's interest in the life insurance benefits creates an entitlement in the next named alternate beneficiary, if any; and if none, then in the owner's probate estate. A letter of direction from the estate's executor could be composed along the following lines:

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
DE WITT COUNTY

IN THE MATTER OF THE ESTATE	)	
	)	
OF	)	**No. 20__ - P - X**
	)	
DILIGENT LEE TRYING, DECEASED	)	

LETTER OF DIRECTION

TO: **Best Life Insurance Co.**
BestLife Recordkeeping Center
P.O. Box 1234
Utica, NY 98765-1234

From: **Hard Lee Trying**
Independent Administrator of the
Estate of Diligent Lee Trying, deceased
51 Prairieview
Farmer City, IL 61842

Re: **Diligent Lee Trying, deceased**
Soc. Sec. No. 123-45-6777
Date of Death: January __, 20__
Forever Phone Company Group Life Claim; BestLife Report No. 56789

By virtue of the death of Diligent Lee Trying on January __, 20__, and the subsequent disclaimer of interest by ALLISON SMITH, the referenced group life insurance benefit is now payable to me as the Administrator of this Estate.

I hereby ask and direct that you redeem this interest and disburse the net proceeds to me as follows:

Hard Lee Trying
Independent Administrator of the
Estate of Diligent Lee Trying, deceased
51 Prairieview
Farmer City, IL 61842
EIN: 35-1234567

A completed Form W-9 is enclosed.

_____

HARD LEE TRYING

Subscribed and sworn to before me
this ____ day of _____, 20__

_____

NOTARY PUBLIC

This instrument prepared
with the assistance of:
THE PEITHMANN LAW OFFICE
Attorneys and Counselors at Law
111 S. Main St., P.O. Box 228
Farmer City, IL 61842
Telephone: (309) 928-3390

E. A Final Word on Forms and Procedures

The cardinal rule for the disclaimant's forms is *to keep the sentences declaratory, not imperative*; the disclaimant should merely state what he is doing and *not* direct the consequences by describing where property is to pass as a result. Directions of that type should be given, if at all, by the attorney in the cover letters, or by someone acting as a fiduciary, not individually.

A thorough statement of the disclaimant's standing and interest, the property involved, and the reservations of rights and interests not disclaimed is suggested both to keep the disclaimant and the attorney thinking about all the technical requirements and to be as precise as possible. Once the thinking is clear, then more simple forms can certainly be prepared. But simple or extravagant, the instrument must be precisely crafted and reviewed repeatedly to be sure that nothing necessary has been left out and nothing inappropriate has been included.