

# “SOMETIMES WHAT OTHERS THINK WE WANT ISN'T!”

DISCLAIMERS AND USEFUL “REAL LIFE” SITUATIONS  
UNDER FLORIDA’S DISCLAIMER PROVISIONS

BY:

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# DISCLAIMERS AND USEFUL “REAL LIFE” SITUATIONS\* UNDER FLORIDA’S DISCLAIMER PROVISION

## I. The Former Florida Statutes

- A. Section 732.801 of the Florida Statutes (hereafter the Florida Statutes will be referred to by only the section and number) provided for disclaimers under wills, intestacy and powers of appointment.
  - 1. Same time period as tax qualified disclaimers or if the disclaimant was not finally ascertained at the time of the decedent’s death six months after the event that would cause the interest to be fixed both in quality and quantity
  - 2. Required recording
- B. Section 689.21 provided for disclaimers under nontestamentary instruments and certain powers of appointment.
  - 1. Must be filed within twelve months after effective date of nontestamentary instrument creating the interest or if the disclaimant was not finally ascertained as a beneficiary, or his interest is not fixed both in quality and quantity, then twelve months after the event that disclaimant is finally ascertained
  - 2. Required recording
- C. Florida Bar Real Property Probate Trust Law Section (RPPTL) and its Estate and Trust Tax Planning Committee (the “Committee”) began reviewing the disclaimer issue several years ago.
- D. In 2004 the Committee presented to the Section a white paper and a new Chapter 739 based upon the 1999 Uniform Disclaimer of Property Interests Act (“UDPIA”) as amended in 2001.
- E. Chapter 739 legislation was passed and was effective July 1, 2005. The new Florida disclaimer statute, attached as Exhibit “A” closely tracks the UDPIA with changes as noted in the white paper (italics) attached as Exhibit “B”.

\* *“To protect the innocent” and my attorney-client privilege, I have changed names and specific facts in certain “real life” situations*

- F. Why have a separate Florida statute from Section 2518 of the Internal Revenue Code (the "Code")?
1. More flexible
  2. Do not care about tax consequences
  3. Differences
    - a. Time Limit
    - b. Conditional
    - c. Fiduciary expressly permitted

## II Review of New Disclaimer Statute by Sections

### A. Section 739.101 Title

1. Uniformity
2. Combine all disclaimer provisions into one statute

### B. Section 739.102 - Definitions

1. One location for all definitions
2. Disclaimant can be any person, including personal representative, guardian or attorney -in-fact of the person to whom the interest would have passed
3. Disclaimer includes a renunciation which makes clear that this is an exclusive statute

### Real Life Situation (Renunciation)

***The beneficiaries of a will "disclaimed" all their interests in the will proposed to be revoked in the Petition to Revoke Will. The Petition was denied. Can the beneficiaries "take" under the unrevoked will? Yes, the "qualified renunciation" was only placed in the Petition for "the purposes of complying with the statute and that no further purpose was intended." Estate of Stein v. Jacobson, 301 So2d 120 (3<sup>rd</sup> DCA 1974)***

4. Insolvency definition is the same as in Chapter 726 - sum of individual's debts in excess of the fair market value of assets. A

presumption of insolvency arises if not paying debts as they become due.

☞ Query: When advising clients to do disclaimer are you sure clients are solvent? If not, then is disclaimer valid if valid under Section 2518 of the Internal Revenue Code of 1986 (the "Code") "The fact that a disclaimer is voidable by the disclaimant's creditors has no effect on the determination of whether such disclaimer constitutes a qualified disclaimer. However, a disclaimer that is wholly void or that is voided by the disclaimant's creditors cannot be a qualified disclaimer." Treas. Reg. § 25.2518-1(c)(2)

### C. Section 739.103 - Scope

1. Makes clear statute is exclusive method of disclaimer
2. Applies to any disclaimers whenever created
3. UDPIA does not abridge common law while Florida statute does abridge common law

☞ *Difference from former statute - old law provided statute did not abridge common law.*

### D. Section 739.104 - Power to Disclaim

1. Can be conditional or unconditional
2. Irrevocable when the conditions are satisfied
3. Conditioned on a desired tax or nontax reason
4. Unconditional unless specifically provided otherwise within the language of the disclaimer

☞ *Difference from former statute - old law did not provide for conditional disclaimers:*

**!!** ***IMPORTANT:*** *Just because a disclaimer qualifies under Florida law a conditional disclaimer may not be valid under Section 2518 of the Code because the disclaimer must be irrevocable and an unqualified refusal. By its terms a "conditional disclaimer" is not irrevocable or an unqualified refusal; therefore, there is no disclaimer. However, as long as the refusal is irrevocable and unconditional upon the satisfaction of the condition the disclaimer should be a qualified disclaimer (assuming all other requirements are met).*

Real Life Situation (Conditional Disclaimer)

**Albert puts his swamp (his “Homestead”) and money into a revocable trust. His Attorney Bull Gator advises Albert that his Homestead can stay in his trust for his girlfriend, Alberta, until she reaches the age of 70, at which time she receives the Homestead outright. Prior to the date Alberta reaches age 70, she has right to income and principal as she needs for health, maintenance and support. Apparently Alberta has an ex-spouse Bobby Nole, who Albert is afraid will persuade her with his “silver tongue” and steal her money or the Homestead if she receives any assets outright. Attorney Bull Gator advises Albert about homestead and the rights of creditors if devised to a “non” heir. Albert understands the exposure. Albert’s trust is responsible for maintaining the Homestead. Albert has one adult daughter, Princess.**

**Albert and Alberta marry one month before Albert dies. Prior to Albert’s death and after their marriage Albert and Alberta visit Attorney Bull Gator to make sure nothing has to be corrected or changed. Attorney Bull Gator says “No problem, all is well.” Lo and behold at Albert’s death Alberta’s attorney, Urban A. Tour advises Alberta that the devise of Albert’s Homestead is invalid and Alberta owns a life estate in the Homestead, with the remainder being held by the “not so lovely” Princess. Alberta and Princess have never once spoken. Alberta is extremely upset.**

💡 **Can Alberta disclaim so Homestead passes into trust and Princess becomes a bad dream?**

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**Janien v. Janien, 916 So.2d 806 (4<sup>th</sup> DCA 11/30/2005); In Re: Estate of Harry Sudakoff, 654 So.2d 927 (2<sup>nd</sup> DCA 3/10/95) Walker v. Ryerson, 642 So.2d 763 (4<sup>th</sup> DCA 9/8/1994); See also P. Craig Harrison, “Homestead” - The Post - Death Spousal Disclaimant: A Cure For A Constitutionally Prohibited Devise?”. Fla Bar. J., April 1996).**

💡 **If Alberta disclaims, then can Princess come back to haunt her?**

💡 **Can Alberta prepare a conditional disclaimer contingent on this whole matter being resolved in court in Alberta’s favor?**

💡 **Does Alberta have a grievance against Bull Gator?**

💡 **Does Alberta have a malpractice action against Bull Gator?**

2. With court approval a fiduciary can disclaim any interest in or power

- over property
3. Under UDPIA a fiduciary can disclaim powers and interests in property subject only to limitations imposed by fiduciary duties. Florida chose not to elect this position
  4. Intentionally does not incorporate a standard for a fiduciary to disclaim

☞ *Difference from former statute: Trustees could not disclaim on behalf of beneficiary (example - environmental property, tax or tainted assets); fiduciary could not disclaim powers.*

5. Without court approval fiduciary can disclaim if instrument specifically allows it

### **SAMPLE FORM LANGUAGE \***

#### **POWER OF TRUSTEE**

*“The power to make partial or full disclaimers under Section 2518 of the Code and Chapter 739 of the Florida Statutes.”*

#### **DISPOSITION IF BENEFICIARY DISCLAIMS**


*“Upon the Grantor’s death, the Grantor authorizes any beneficiary, the guardian or fiduciary of the beneficiary or the personal representative of the estate of a beneficiary under this Agreement, to renounce and disclaim, in whole or in part, any interest in property for the beneficiary’s benefit hereunder. If a beneficiary, other than the Grantor’s spouse, the guardian of the Grantor’s spouse or the personal representative of the estate of the Grantor’s spouse, makes a disclaimer then the property interest (or portion thereof) so renounced and disclaimed will be disposed of in accordance with the terms of this Agreement as if the beneficiary had predeceased the Grantor. If the Grantor’s spouse, a guardian of the spouse or the personal representative of the estate of the Grantor’s spouse, disclaims, in whole or in part, any interest in property for the spouse’s benefit hereunder, then the disclaimed portion shall be distributed as provided by the \_\_\_\_\_ and any estate taxes becoming due because of such disclaimer shall be paid from the \_\_\_\_\_, if any, and then from the \_\_\_\_\_, if any, and if none, then the \_\_\_\_\_.”*

\* The author merely suggests such language. Obviously edit and review all language for your particular client.

## DURABLE POWER OF ATTORNEY

*“To prepare, sign, and file joint or separate income tax returns or declarations of estimated tax for any year or years; to prepare, sign, and file tax and/or generation-skipping transfer tax (“GSTT”) returns with respect to gifts and/or generation-skipping transfers made by me for any year or years; to consent to any gift and to utilize any gift-splitting provision or other tax election, including disclaimers under Section 2518 of the Internal Revenue Code of 1986 (the “Code”) and Chapter 739 of the Florida Statutes; and allocation of GSTT exemption; to prepare, sign, and file any claims for refund of any tax, requests for extensions of time, ruling requests, petitions to the Tax Court or other courts regarding tax matters, and any and all other tax-related documents, including, without limitation, receipts, offers, waivers, consents (including, but not limited to, consents and agreements under Section 2032A of the Code) closing agreements and any Power of Attorney form (e.g., Form 2848) required by the Internal Revenue Service or other taxing authority with respect to any tax period; to pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authorities; to exercise any elections I may have under federal, state or local tax law; and generally to represent me in all tax matters and proceedings of all kinds and for all periods before all offices and officers of the Internal Revenue Service and any other taxing authority.”*

6. Without court approval - natural guardian can disclaim on behalf of minor child if minor child only receives property solely as a result of another disclaimer only if disclaimed interest does not benefit natural guardian.
7. Can disclaim a partial interest in property. A disclaimer by a donee of a remainder of a fee simple interest while retaining a life estate is not qualified for tax purposes. Treas. Reg. § 25.2518-3(b)
8. Disclaimer is irrevocable upon the satisfaction of any conditions, if any, and upon the later of delivery or the date it becomes effective under this statute.

 *Difference from former statute: old law only allows disclaimer for minor if it is in the best interests of : (1) those interested in estate of beneficiary for whom disclaimer is made; (2) those who take beneficiary’s interest by virtue of disclaimer; and (3) not detrimental to best interests of beneficiary.*

### Real Life Situation (Minor Beneficiaries)

***Yogie Bear and Boo Boo are happily married running the Honey Bear factory which makes honey for the State of Florida. Upon both their deaths the factory was distributed in equal shares to their children: Smokey Bear, Ted E. Bear and Pooh Bear, loving siblings but very different. Smokey and Ted E. love the honey business but Pooh Bear is happily pursuing the study of lizards. Pooh Bear has two minor***

**children, Goldie and Lottie. Pooh Bear agrees to disclaim because she legally wants nothing to do with the business.**

💡 **Can Pooh Bear disclaim under prior law?**

💡 **Can Pooh Bear disclaim under current law?**

9. Disclaimer must be in writing, must declare it to be a disclaimer, describe the interest or power disclaimed, signed, witnessed and acknowledge as provided for deeds of real estate. See Sample Form attached as Exhibit "C".

👉 *Difference from former statute- former statute required disclaimer to be recorded (what happens when there is a hurricane that closes the court house for weeks!) Except for constructive notice for disclaimers of real estate (see below) recording is not required.*

#### **E. Section 739.201 Disclaimer of Interest or Property**

1. Disposition of interest continues the relation back doctrine; the effective date is the date the instrument becomes irrevocable which is generally the benefactor's death.

### **Real Life Situation (Retirement System)**

***Nancy Young died May 24, 1986, having participated in the Florida Retirement System for over 25 years. In 1974 she designated her husband Fred as primary beneficiary with contingent beneficiaries being Lucinda, Dirk and Dyes. Fred and Nancy divorced in 1980 and Nancy never changed beneficiary designation. Fred, Lucinda and Dirk all execute disclaimers. Dykes says, "Where's my money?!" Retirement System said Dykes was only entitled to what Fred would have received. Because Fred was a divorced spouse, he would only receive a refund of contributions made and that was what he disclaimed. There was no refund; therefore, Fred receives nothing and therefore, Dykes receives nothing. Court determines disclaimant is treated as if Fred died before Nancy. Therefore, contingent beneficiaries inherit. (Young v. Dept. of Admin., Div. Of Ret. (1<sup>st</sup> DCA 1988)***



## Real Life Situation (Trust)

***Mrs. Cox died on August 4, 1999 with no children. Her husband, Joseph Cox waived homestead under a premarital agreement. Mrs. Cox placed property in her trust on June 6, 1991, at which time she established a Mae Campbell Hamor Trust (the "Hamor Trust") and a Marital Trust. The Trust stated that "should the Grantor's husband survive the Grantor, then the Grantor directs the Trustee to set aside..." Marital Trust consisting of the Homestead and \$100,000. Mr. Cox also had a testamentary power to appoint assets left in the Marital Trust. In default of the appointment, the property was to be distributed to Mrs. Cox's four (4) nieces. The Hamor Trust was to be distributed to only three of the four nieces. Mr. Cox disclaimed Marital Trust. A petition was presented to determine the beneficiaries. All parties except one niece signed the settlement agreement. The beneficiaries of the Hamor Trust argued that because Mr. Cox executed the disclaimer, the disclaimed property never funded the Marital Trust. The one niece who would inherit under the Marital Trust argued Mr. Cox received only a life estate in the Marital Trust and could only disclaim the life estate. The court determined that because the disclaimer was properly executed, the effect was to treat the disclaimant, Mr. Cox, as having died immediately preceding Mrs. Cox's death. Thus, the Marital Trust never came into existence and the assets were distributed to the three nieces under the Hamor Trust. Richey v. Hurst, 798 So.2d 841 (5<sup>th</sup> DCA, 2nd)***



Query: How does this compare to the Janien case, supra, for homestead purposes?

2. If an intestate estate, then disclaimer effective at intestate's death
3. Disclaimed interest passes as provided in instrument
4. If no provision is provided in instrument then:
  - a. Will - if vested interest is not contingent on survival, then the interest passes as if disclaimant died immediately before interest created



***EXAMPLE: Lloyd's will devises \$10,000.00 to his brother Sam. Sam disclaims. The statute treats the disposition as if Sam died before Lloyd therefore at Lloyd's death Section 732.603 (antilapse statute) would distribute assets to Sam's children. Note: the new Florida Trust Code makes a conforming amendment to Section 732.605 to omit reference to testamentary trusts and includes interests created by the exercise of a testamentary power of***

***appointment and incorporates Florida case law on survivorship language in a devise or appointment***

★ *EXAMPLE:* Linda's will states "residuary estate to her descendants per stirpes." Linda is survived by a child, Della, who has two children and a child, Perry, who has one child. Della disclaims one-half. Assets are distributed as if Della predeceased Linda, therefore the one-half disclaimed would be distributed fifty percent to Della's children and one-half would be distributed to Perry. But the total of Della's share should go to her children. Section 739.201 (3)(a) states that the disclaimed interest passes only to the descendants of the disclaimant who survives the time of distribution, Thus, Della's children would receive 100% of the amount of Della's disclaimed share.

- c. For trust(s) created after June 12, 2003, Section 737.6035 (antilapse statute) applies in same manner as wills above **Note: the new Florida Trust Code enacts Section 736.1106 which replaces Section 737.6035 and is effective July 1, 2007. This statute applies when a beneficiary of a future interest in either a testamentary or intervivos trust dies before the point at which the beneficiary's interest becomes possessory and applies to all trusts other than those trusts irrevocable before the effective date of the Trust Code. Applies whether or not the trust settlor and predeceasing beneficiary are related, i.e. no relationship test.**
- d. Trusts created prior to June 12, 2003- Interests of a beneficiary in a revocable trust that is not conditioned on survival is a vested interest subject to divestment.

★ *EXAMPLE:* At Adam's death, then property in Adam's trust to Aaron for life remainder to Liz. Liz disclaims. No antilapse statute applied to this interest in the trust but during Aaron's life, Liz's interest is a vested remainder interest which is subject to divestment therefore Liz could devise her interest. If so, then could not qualify as a tax disclaimer because Liz directs where the disclaimed interest is passing. Special rule for disclaimed interests under revocable trust - disclaimed interests deemed to be created at benefactor's death, or such earlier time, if any, that benefactor's transfer is a completed gift for gift tax purposes. However, under the new disclaimer statute the disclaimed interest passes as if in a will. Thus Liz's interest created only at Aaron's death under a will and the

*antilapse statute would apply.*

- e. Future Interests (interests that are conditioned upon survival) - upon disclaimer of preceding interest, the future interest held by person other than disclaimant takes effect as if disclaimant had died immediately before time of distribution but a future interest held by the disclaimant is not accelerated



*EXAMPLE: At Adam's death - To Linda all income for life, then to Bob if living at Linda's death, and, if not, then to Bob's living children. Bob disclaims. Time for distribution is Linda's death. At Linda's death then to Bob's children. What if Bob has a child born after Adam's death but before Linda's death? Only Bob's children living at Linda's death would inherit. Bob's future interest is not accelerated. If Linda disclaims life interest then time for distribution is Adam's death which accelerate Bob's remainder. (Bob is not the individual who made the disclaimer) Section 739.201(3)(a) treats Bob as if he died prior to time for distribution. This interest is conditioned upon surviving Linda's death.*



*EXAMPLE: Beaver's trust provides \$10,000 to Wally upon Beaver's death. Wally disclaims. Wally deemed to predecease Beaver because Beaver's death is when Wally's interest came into possession and enjoyment (Interest would pass through Wally's estate and his heirs) Section 737.6035 would make Wally's descendants take per stirpes.*



*EXAMPLE: Beaver's trust provides assets upon his death to be distributed to his three children June, Mabel and Cricket. June disclaims and is treated as predeceasing Beaver. Assuming no other language to the contrary, Section 737.6035 would make interest to June's descendants, per stirpes.*

- f. Future interest held by a disclaimant is not accelerated in possession or enjoyment as a result of the disclaimer.



*EXAMPLE: Apple creates a trust with income to son, Acorn, for his life, remainder to Apple's descendants, per stirpes. At Apple's death, Acorn disclaims and he is treated as if he died before Apple. Acorn's income interest came into possession*

and enjoyment at Apple's death and time of distribution is Apple's death.

- ★ *EXAMPLE: Mickey creates trust with income to daughter Minnime, until she reaches age of 35. At that date trust terminates and is distributed in equal shares to Minnime and her three siblings. Minnime disclaims her income interest. The three siblings receive their interest immediately but Minnime does not receive her interest until she reaches age 35. No acceleration of future interest.*

### Real Life Situation (Trust)

***In 1973 Mrs. Levis signed a trust agreement which provided that after her death the net income would be distributed to her nephew, David Mackey and niece, Shirley Mackey. Upon both David's and Shirley's death the trust principal would be distributed to Dr. Mackey's children, including children born after Mrs. Levis' death, per stirpes. Mrs. Levis died April 25, 1979 and Dr. Mackey had four children born from 1965 - 1976. Both Mackey's disclaimed in January 1980. Remainder interest accelerated and only went to four children - no afterborn children. Prior to disclaimer, Dr. Mackey's children have vested remainder subject to open (future born children). The disclaimer closes class at disclaimer effective date. Weinstein v Mackey, 408 So.2d 849 (3rd DCA 1982).***

#### F. Section 739.202 Disclaimer of Rights of Survivorship in Jointly Held Property

1. If the deceased holder can regain portion of property attributable to his contributions without consent of others, then the surviving holders can disclaim fractional share of the property attributable to deceased holder's contributions by dividing one (1) by joint holders alive after death of holder.
  - ★ *EXAMPLE: Bryan contributes 50, Adam contributes 50, Linda contributes 50; they can all regain their property; Bryan dies; Linda disclaims  $1 \div 2 = \frac{1}{2}$  of 50*
2. As to all other joint property a surviving holder can disclaim a fraction of the whole property, the numerator of which is 1 divided by the product of number of joint holders immediately before death and the number of joint holders after death

★ *EXAMPLE: Linda, Aaron, Courtney and Amanda all own a piece of real estate. Aaron dies. Linda, Courtney and Amanda can disclaim 1 divided by 4 X 3 or 1/12. Aaron's share is 1/4 which is equal to 3/12. Linda, Courtney and Amanda can each disclaim 1/12 times 3 = 3/12.*

**G. Section 739.203 Disclaimer of Property Held by Tenancy By the Entirety**

1. Survivorship interest can be disclaimed
2. Deemed a one-half interest
3. Passes as if disclaimant predeceased joint tenant
4. Disclaimer does not cause the disclaimed portion of tenants by the entireties property to be treated as homestead for purpose of descent and devise

➡ *QUERY: Is the disclaimed property considered homestead for creditor purposes under the Florida constitution; is this statute constitutional?*

**SAMPLE FORM LANGUAGE**

**SIMPLE WILL**

*"I devise my homestead, currently located at \_\_\_\_\_ (or any future homestead) (the "Homestead") to my spouse, \_\_\_\_\_, if he or she survives me, and, if not, then in equal shares to my children, who survive me, provided, however, that if a child dies before me, but leaves one or more lineal descendants, who survive me, then the share which would have gone to the child, had the child survived me, shall go to such lineal descendants, per stirpes, if any, and if none, then to my surviving children, per stirpes. It is my specific intent that if all or any part of the Homestead is to be transferred to my minor child, then that child's share of the Homestead shall be administered as provided in Article IV.*

*If, at the time of my death, my spouse and I hold title to the Homestead as tenants by the entirety, then, if my spouse survives me and if he or she disclaims my one-half (1/2) undivided tenancy by the entirety interest in accordance with Chapter 739 of the Florida Statutes and Section 2518 of the Internal Revenue Code of 1986, (the "Code"), such interest shall pass to the then serving trustee of the Disclaimer Trust as created under Article V. My spouse is the sole lifetime beneficiary of such Trust."*

**H. Section 739.204 - Disclaimer of Interest By Trustee**


1. If disclaimer by trustee, then property is not trust property
  2. Remember can disclaim by court order or by instrument
  3. Internal Revenue Service issue
  4. Trustee's fiduciary duties
- I. **Section 739.205 - Disclaimer of Power of Appointment or Other Power not Held in a Fiduciary Capacity**
1. Powers of appointment
  2. Can disclaim partial portion of power, i.e. disclaim the right to appoint to oneself while retaining right to appoint to others
- J. **Section 739.206 - Disclaimer by Appointee, Object or Taker in Default of Exercise of Power of Appointment.**
1. Appointee - one who actually receives property as a result of exercise of power of appointment
  2. Taker in default - before power is exercised
  3. If holder creates interest in appointed properly, then Section 739.201 applies
  4. If holder created another power in appointee then Section 739.205 applies.
- K. **Section 739.207 - Disclaimer of Power Held in Fiduciary Capacity**
1. Either by court approval or authorization in instrument
  2. Suggest court approval
  3. Examples are right to remove and replace a trustee, power to make distributions of income or principal
- L. **Section 739.301 - Delivery or Filing**
1. How delivered
    - a. Personal delivery, first class mail, priority or other method that results in its receipt
    - b. Specifically rejected UDPIA electronic transmission
    - c. Mail delivery - delivered on date it is postmarked
    - d. Other delivery - effective on receipt
  2. To Whom Delivered

- a. Intestate or Will
  - I. Personal representative
  - II. If no personal representative clerk of court in any county where venue is proper
- b. Testamentary trust
  - I. Trustee
  - II. If no trustee, then personal representative
  - III. If no personal representative clerk of court in any county where venue is proper
- c. Intervivos trust
  - I. Trustee, if no trustee, then clerk of court in any county where venue is proper
  - II. If made before trust becomes irrevocable, then to grantor
- d. Beneficiary designation
  - I. Person making beneficiary designation
  - II. Legal representative
  - III. After irrevocable, to person making distribution
- e. Joint property - To person to whom disclaimed interest passes
- f. Object taker - taker in default of exercise of power of appointment
  - I. Holder of power
  - II. Court
- g. Appointee of non fiduciary power of appointment
  - I. Holder, personal representative or fiduciary

- II. Court
  - h. Fiduciary
    - i. Agent
      - I. Principal
      - II. Principal's representative
    - j. Real estate
      - I. Delivery is presumed upon recording
      - II. See below
    - k. Fiduciary is not liable for otherwise proper distribution made in reliance of disclaimer if the distribution is made without actual knowledge of facts constitutes the bar to disclaimer


**M. Section 739.401 - When Disclaimer is Permitted**

1. Anytime unless barred
2. This permits the disclaimer pursuant to Section 2518(b)(2)(B) of the Code for disclaimants attaining age 21; although see Section 739.501

 *Difference from former statute- No time limit and the time limit under the Code will be available under Florida law*

**N. Section 739.402 - When disclaimer is barred or limited**

1. Written waiver
2. Acceptance of interest

 *QUERY: If spouse is living in a house can she disclaim? Section 2518 of the Code and Treasury regulation § 25.2518-2(d)(1) states a surviving joint tenant can continue to live in joint tenant residential property without being considered to accept interest.*

3. Voluntary assignment, conveyance, encumbrance of the interest, pledge or transfer
4. Sold pursuant to judicial sale



5. Insolvent when disclaimer becomes irrevocable
6. Consequence if ineffective disclaimer is that there is no gift and disclaimant owns the property
7. Under UDPIA - ineffective disclaimer is treated as if property is transferred and the person attempting disclaimer bears the tax consequences

**O. Section 793.501 - Tax qualified disclaimer**

1. If effective under Section 2518 of the Code then effective under Florida law
2. Applies notwithstanding any other language in statute

**P. Section 739.601 - Recording of Disclaimer Relating to Real Estate**

1. No constructive notice unless disclaimer is recorded
2. If not recorded, then the disclaimer is valid between the parties

**Q. Section 739.701 - Application to Existing Relationships**

**Real Life Situation (IRA)**

***Donald and Daisy were married in 2000. Daisy has \$5M in assets all of which are in an IRA payable to Donald, if living and if not, then, in equal shares to their children, Peking, Sweet and Sour Duck. Daisy dies in May 2006 and Donald has been advised to disclaim \$2M of the IRA held by Disney Financial. Donald's attorney, Jiminy Cricket, sends the executed disclaimer to Disney Financial in November 2006, after Donald, (unbeknownst to Jiminy) moved \$2M of the total IRA to Fantasy Land Bank. Minimum distribution for 2006 was paid by Disney Financial to Donald by year end 2006.***

- 💡 ***What are questions to ask when Donald disclaims (ignore the tax consequences.)? Can Donald disclaim?***
- 💡 ***How does the movement of the \$2M to Vanguard affect the disclaimer?***
- 💡 ***Can Donald disclaim if received required minimum distribution?***

***Rev. Rule: 2005-36, 2005-26 IRB***

## Real Life Situation (Ethical)

**Sam D. Butcher prepares a will for Mike. At Mike's death the assets are distributed in trust, income to his wife, Carol and principal to Carol, as the Trustee, Marcia, determines. Carole also has a testamentary general power of appointment over trust assets; and in default the assets are to be distributed to Marcia. At Mike's death Sam is retired and the Trustee, Marcia, hires Attorney Alice Maid to handle the probate of Mike's estate. Alice advises Marcia to retain Brady, CPA to file the federal estate tax return. Brady advises Marcia about the tax consequences of the testamentary general power of appointment and because Carol has a testamentary general power of appointment, then Marcia could not use Mike's unified credit and thus save estate taxes at Carol's subsequent death. NO PROBLEM Brady, CPA prepares a federal estate tax return as if the GPOA did not exist. (That is one way to get rid of it!) The return was rejected by the Internal Revenue Service and Mike's unified credit was not used. At Carol's death Marcia discovers the estate owes over \$300,000 in taxes, interest and penalties!!!**

- 💡 **Do the children have a cause of action against Butcher when there is not intent to minimize taxes expressed in the will?**
  
- 💡 **Do the children have a cause of action against Alice Maid or Brady, CPA regarding the advice on the GPOA?**
  
- 💡 **Is this an ethical violation by Alice Maid?**

**Kinney v. Shinholster, 663 So.2d 643 (5<sup>th</sup> Dist. 1995)**