

**DISCLAIMERS CAN BE A LIFESAVER...IN ORANGE, CHERRY , LEMON AND LIME?**

**PRESENTED ON BEHALF OF THE FLORIDA REAL PROPERTY  
AND PROBATE LAW SECTION**

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**BY**

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**I. EFFECT OF A QUALIFIED DISCLAIMER**

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A. If a qualified disclaimer is made as to any interest in property, then for purposes of Subtitle B the estate, gift and generation-skipping transfer (“GST”) taxes apply as if the interest was never transferred to the person making the disclaimer. See §2518(a) of the Internal Revenue Code of 1986; as amended (the “Code”). Applicable to transfers made after December 31, 1976.

B. The governing instrument, such as the will or trust, will determine how the property will be distributed for estate, gift or GST purposes. If no governing instrument exists, then the state law will determine how the property is to be distributed. For GST purposes, however, an individual who makes a disclaimer is not treated as predeceased for the predeceased step-up in generation exception. Treas. Reg. §26.2612-1(a)(2)(i).

C. No corresponding provision for income tax consequences is in the income tax title of the Code.

1. PLR7933066. Disclaimant is not required to include taxable income from disclaimed property.

2. PLR9319029. Disclaimant is not taxed on income of qualified benefit accounts and individual retirement accounts.

3. Section 678 of the Code (person other than Grantor treated as substantial owner) specifically refers to disclaimers.

**II. DEFINITION (§2518(b) of the Code). Pages 4.25 through 4.41 for statute and regulations.**

A. Irrevocable and unqualified refusal by a person to accept an interest in property;

B. The refusal must be in writing;

C. The writing must be received by transferor of interest, the legal representative or holder of legal title;

D. Not later than 9 months after the later of;

1. Day on which transfer creating interest is made; or

2. Date on which disclaimant reaches age 21;

E. No acceptance of interest or any of its benefits; and

F. As a result of the refusal the interest passes without any direction of person disclaiming, and the interest passes either to spouse or person other than the person making disclaimer.

**III. IRREVOCABLE AND UNQUALIFIED REFUSAL (Treas. Reg. §25.2518)**

A. In Estate of Monroe, 80 AFTR 2d ¶97-6826, (10/9/97), the Fifth Circuit reversed the Tax Court and held that as to 28 disclaimers made by disclaimants the majority of the disclaimers were unqualified refusals even though the Tax Court determined the disclaimants expected that they would receive the renounced bequests from the decedent’s husband. The Fifth Circuit determined that the disclaimer would be “unqualified” only if the disclaimants received tangible benefits. See

Treas. Reg. §2518-2(d)(1). Because the disclaimants did not receive any consideration or tangible benefits the disclaimers were valid.

B. If a disclaimer creates an unintended result, then one may be able to argue that the disclaimer was not qualified because the disclaimer was not irrevocable. In Lange vs. US, 96-2 USTC ¶60,244, a GRAT was created in §2036(c) of the Code's anti-freeze rules. The GRAT donor disclaimed the reversion interest and power of appointment. Section 2036(c) of the Code was repealed retroactively and therefore no disclaimer was subsequently needed. A state court order determined that the disclaimer be disregarded. The court agreed with the Internal Revenue Service, however, in holding the disclaimer valid.

C. In Estate of Holden vs. Holden, 539 S.E.2d, 703 (So. Car. 2000), it did not matter what was intended. Decedent died intestate survived by a spouse, two sons and one grandchild. Another grandchild was born ten months after decedent's death. The sons filed a disclaimer with a letter signed by an attorney stating that the disclaimer was made in favor of spouse. Probate court said grandchildren inherited. Sons signed a "revocation and withdrawal" of disclaimer. The court found disclaimer effective and grandchildren inherited.

#### IV. WRITING (Treas. Reg. §25.2518-2(b))

A. Identification of property.

B. Must be signed by disclaimant or disclaimant's legal representative including agents acting under a durable power of attorney (executor of estate, trustee, conservator and guardian).

1. Best interest of minor.

2. Guardian ad litem or court approval required.

C. Section 2518(c)(3) of the Code provides that a written transfer of the transferor's entire interest will be qualified if the transfer is to the person or persons who would have received the property had the transferor made a qualified disclaimer (consider PLR9135043). Wife and husband owned property jointly with right of survivorship and money was contributed by husband. Wife died. Within 9 months of death husband deeded wife's ½ interest to daughter. In wife's will the disclaimer language indicated the property would go to daughter. Because husband contributed all the consideration no disclaimer because of Massachusetts law. IRS said yes to a valid disclaimer because of the deed.

D. PLR9228004. Agreement not to probate will and agreement to intestacy was valid disclaimer.

#### V. DELIVERY (Treas. Reg. §25.2518-2(b)(2))

A. Writing must be delivered to transferor of the interest.

B. Legal representative of transferor of interest.

C. Holder of legal title to property.

D. Person in possession.

E. Timely mailing is timely delivery. Treas. Reg. §§25.2518-2(c)(2) and 301.7502-1.

VI. NINE MONTHS (Treas. Reg. §25.2518-2(c))

A. Nine months is determined with reference to “transfer creating the interest.” (Prior to the final regulations the language was “taxable transfer”). However, see PLR199934011 whereby a trust was created for a son for life, then to son’s wife for life, and the remainder to son’s descendants. Son died and son’s wife learned of interest. Prior to that time she did not know she was a contingent beneficiary. The IRS ruled she could disclaim within nine months of date of her husband’s death. See also PLRs 200109041, 200105049, 200047027, 200040014 and 200029048.

B. Completed gift for gift tax purposes regardless of whether the transfer results in gift tax liability.

C. Date of decedent's death regardless of whether there is estate tax liability or when the will is offered for probate.

1. Pay on death U.S. savings bonds. See PLR9336011.
2. Life insurance policies.
3. Totten trust accounts.
4. Pay on death certificates of deposits.

D. Irrevocable Trust.

1. Qualified Terminable Interest Property (“QTIP”) - 9 months after creation of QTIP trust, not from surviving spouse’s death.
2. GRAT, GRIT, QPRT - 9 months from date trust is created.

E. *Example:* H dies in 1967 with will. W has right to income until death. Remainder to children upon W's death. W dies in 1982. Child wants to disclaim. I.R.C. §2518 is inapplicable. Transfer made in 1967. §2511 of Code applies. In Treas. Reg. 25.2511-1(c) disclaimer of interest created before 1976 is permissible if:

1. Local law permits.
2. Disclaimer made with reasonable time after knowledge of existence of transfer.
3. Unequivocal.
4. No acceptance of benefits.

Prior to §2518, Keinath vs. C.I.R., 480 F.2d 57(1973), and Cottrell vs. C.I.R., 628 F.2d, 1127 (1980) held that a disclaimer could be made within 9 months of time beneficiary's interest vested (i.e., 9 months of W's death in 1982). The United States Supreme Court in Jewitt vs. Commissioner, 455 U.S. 305 (1982), found that a disclaimer of a transfer created before 1976 must be made within reasonable time of knowledge of the original transfer. See PLR 200202036 and PLR 200150020. If the disclaimer is not effective, then is there a gift tax? See PLR200150020.

In 1994 the United States Supreme Court held in Irvine vs. U.S., 1145 S. Ct. 1473 (1994), that the answer is yes even if the original transfer took place before the enactment of the gift tax. In Irvine a disclaimer was made in 1979 of property in a trust initially created in 1917. The disclaimant knew of the trust in 1931. Minnesota law allowed a disclaimer within 9 months of vesting of interest (i.e., 1979). The Service said no disclaimer should be allowed based on Jewitt and a gift tax should be imposed under §2501 of the Code. The

Court of Appeals held no taxable transfer because in 1917, when the transfer took place, the gift tax was inapplicable; therefore the reasonable time period of §2511 of the Code was inapplicable; and therefore Minnesota law applied and the disclaimer was effective. The Supreme Court reversed the ruling and held that the transfer which related to the gift tax was the disclaimer in 1979 and therefore was subject to gift tax under §2501 and 2511. “The opportunity to disclaim, and thereby to avoid gift as well as estate taxation, should not be so long as to provide a virtually unlimited opportunity to consider estate planning consequences,” Id.

F. Interest passing as a result of an exercise, release or lapse of general power of appointment (“GPOA”), 9 months after exercise, release or lapse. See PLR9340052. Holder of GPOA must disclaim within 9 months after the transfer creating the power.

G. Interest passing as a result of an exercise of special power of appointment (“SPOA”), 9 months after original transfer that created or authorized the power. Holder of SPOA must disclaim within 9 months after the transfer creating the power.

H. Income interest with remainder (vested or contingent) within 9 months after transfer creating the interest.

I. Joint tenancy (“JT”) property - Treas. Reg. §25.2518-2(c)(4) (i) now states that:

“...in a joint tenancy with right of survivorship or a tenancy by the entirety, a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the tenancy must be made no later than 9 months after the creation of the tenancy regardless of whether such interest can be unilaterally severed under local law. A qualified disclaimer of the survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law and, except as provided in paragraph (c)(4)(ii) of this section (with respect to certain tenancies created on or after July 14, 1988), such interest is deemed to be a one-half interest in the property.”

Prior to the new regulations the regulation stated that a qualified disclaimer of any portion of any interest in a JT or a tenancy-by-the-entirety must be made no later than 9 months after the transfer creating the tenancy.

Taxpayers were successful in Estate of Dancy vs. Commissioner, 872 F.2d 84 (4<sup>th</sup> Cir. 1989); McDonald vs. Commissioner, 853 F.2d 1494 (8<sup>th</sup> Cir. 1988); and Kennedy vs. Commissioner, 804, F.2d 1332 (7<sup>th</sup> Cir. 1986) determining this regulation invalid and finding that a surviving spouse’s survivorship interest in the decedent’s one-half interest in the jointly held property was created on the date of death, and thus the beginning period of the 9 months, because the decedent could have unilaterally severed the interest and defeated the surviving spouses’ right in that interest.

1. 1990 IRS Action on Decision (AOD 1990-06) followed the Kennedy, Dancy and McDonald decisions. If the joint tenants have right to sever JT, or cause property to be

partitioned under state law, then 9 months begins to run on date of death of first to die and it does not matter if survivor furnished consideration. Treas. Reg. §25.2518-2(c)(4)(i) was revised in Prop. Reg. §25-2518-2. See PLR9106016 and PLR9208003.

2. Treas. Reg. §25.2518-2(c)(4)(iii) provides a special rule for joint bank and brokerage accounts.

“In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor’s own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under §25.2511-1(h)(4), the transfer creating the survivor’s interest in the decedent’s share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant’s death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant.”

Thus a disclaimer can be made within 9 months of co-tenant’s death as long as the accounts are severable property when A deposits funds with right of survivorship with B. B can disclaim within 9 months of A’s death because no completed gift until A’s death. See Treas Reg. §25.2518-2(c)(5) Ex. 9. A cannot make a qualified disclaimer upon B’s death if A contributes all the money.

3. Taken from examples in regulations. See Treas. Reg. §25.2518-2(c)(5).

*Example (7):*

- a. 2/1/90 A purchases real property worth \$100 with A funds.
- b. Title to A & B with right of survivorship (under state law severable).
- c. B dies 5/1/98 survived by A.
- d. A disclaims ½ survivorship interest on 1/1/99 belonging to B.
- e. Applies regardless of A’s consideration.
- f. Applies regardless as to how much is included in gross estate under Section 2040.

On B’s Form 706 the 50% disclaimed would be includable under Section 2033 of the Code.

*Example (8):*

- a. 2/1/90 A purchases real property with A funds.
- b. A & B married and real property held tenancy-by-the entirety (under state law cannot be unilaterally severed).
- c. B dies 5/1/98.
- d. A disclaims 1/1/99.
- e. Valid disclaimer regardless of A’s consideration and regardless of tenancy-by-the-entirety.

On B’s Form 706 the 50% disclaimed would be includable under Section 2033 of the Code and ½ of the remainder of the 50% would be includable on Schedule E. Thus a step-up

in basis of 75%.

*Example (12):*

- a. 7/1/90 A opens bank account. JT with B (spouse).
- b. A transfers \$50,000 to account.
- c. A can regain \$50,000 without B's consent.
- d. No completed gift under Treas. Reg. §25.2511-1(h)(4).
- e. A dies 8/15/98.
- f. B disclaims 100% on 10/15/98.
- g. Valid disclaimer.

On A's Form 706 if B disclaimed 100%, then 100% would be includable in A's estate under Section 2033 of the Code and, if A and B are married, then 50% of the balance (-0-) would be includable on Schedule E under Section 2040(b) of the Code. If the joint tenants are not married, then if B disclaims 100% all would be includable in A's estate under Sections 2033 and 2040(a) of the Code because A contributed 100%.

*Examples (12 and 13):*

- a. 7/1/90 A opens bank account. JT with B (spouse).
- b. A contributes all money.
- c. B dies 8/15/98.
- d. A cannot make disclaimer because A provided all consideration.

On B's Form 706 ½ would be includable on Schedule E as joint interest. If A died and B disclaimed 40% of the funds, then 40% would be includable in A's gross estate under Section 2033 of the Code. One-half of the balance of 60% (or 30%) would be includable on Schedule E in accordance with Section 2040(b) of the Code. If A and B were not married, then 40% includable in A's gross estate under Section 2033 of the Code, and 60% includable under Section 2040(a) of the Code. Thus, a step-up in basis.

4. Prior to a change in Section 689.21(5) of the Florida statutes, the statute did not track the federal statute re: disclaimers of tenancy-by-the-entirety or joint property. Section 689.21(5) of the Florida statutes was amended in 2002 to add the following language:

“Nevertheless, for purposes of this section, the survivorship interest in a joint tenancy with rights of survivorship, or the deceased tenant's interest in tenancy by the entireties property to which the survivor succeeds by operation of law upon death of the co-tenant, must be disclaimed within 9 months after the date of death of the deceased co-tenant.”

5. Joint brokerage, or securities in brokerage firm as nominee, either spouse can make withdrawals without other's consent; is like joint bank account; 9 months from date of death. Rev. Rul. 69-148, 1969-1 C.B. 226. See PLR200003023; PLR9427003 (surviving spouse 9 months after death); PLR9411014 (securities in name of mom and daughter); and PLR9336011 (CD's POD acts).

6. Treas. Reg. §25.2518-2(c)(4)(ii) indicates that for tenancies in real property between spouses, where the spouse is not an U.S. citizen, the surviving spouse can disclaim any portion includable in decedent's estate under Section 2040(a) of the Code.

7. Surviving JT can continue to live in JT residential property without being considered to have accepted interest. See Treas. Reg. §25.2518-2(d)(1). Can pay mortgage and real estate taxes.

J. Extension of time for filing estate tax return does not extend time for disclaimer.

K. *Examples Of Time Periods.* See Treas. Reg. §25.2518-2(c)(5).

1. A → Irrevocable Trust - 5/13/78. B → Income for life with SPOA over corpus to children of A and B. In default of appointment then to E. A and B had children = C and D.

a. B, C or D must disclaim 5/13/78, plus 9 months.

b. If B has GPOA, and exercises the GPOA for C on 6/17/89, the date of B's death, then C must disclaim 6/17/89, plus 9 months. If no exercise by B, then E could disclaim 6/17/89, plus 9 months.

2. F → Irrevocable Trust, 4/1/78. Income to G for life upon G's death to H (G's son). G or H must disclaim 4/1/78, plus 9 months.

3. A → Irrevocable Trust, 2/15/78. Income to B. Upon B's death to C, if surviving, and, if not, then to D. B, C or D must disclaim 2/15/78, plus 9 months.

4. A → Revocable Trust, 6/1/80, at which time B and C are given income interest for life. At the latter death of B and C then to D. Not irrevocable gift and therefore no completed gift. At the distribution date of income interest B and C starts the 9 months. A dies 9/1/82. B, C or D must disclaim 9/1/82, plus 9 months.

L. Disclaimant has 9 months from the day the disclaimant reaches age 21. Any actions taken by a beneficiary prior to his or her 21<sup>st</sup> birthday is not an acceptance by beneficiary. See PLR200333023. See also PLR200238039 and PLR200240015 (disclaimers by minors for trust created before 1977).

## VII. ACCEPTANCE OF BENEFITS (Treas. Reg. §2518-2(d))

A. An affirmative act consistent with ownership of the interest in the property.

B. Cannot accept interest or benefits. For example:

1. Use of property or pledging property as security for loan.

2. Accepting dividends, interest or rents.

3. Directing others to act.

4. No acceptance when merely taking title. See PLR199932042.

5. Residential property can be disclaimed if residing on property.

C. As a fiduciary, can preserve or maintain with no acceptance.

1. Executor fees on disclaimed property are not acceptance which would disqualify a disclaimer.

2. Individual cannot disclaim if individual, as a fiduciary, exercises a discretion to direct enjoyment of disclaimed interest. Would be okay if limited by ascertainable standards. Otherwise, must disclaim trustee powers. In PLR200030011, the decedent's estate was left to spouse. Spouse, who was also the executor, disclaimed and then the disclaimed interest was distributed to a credit shelter trust. The IRS determined there was no acceptance of property.



D. If a beneficiary is under the age of 21, then any actions taken with respect to property by the beneficiary, or the beneficiary's custodian prior to the age of 21, is not an acceptance by the beneficiary.

VIII. PASSING OF INTEREST WITHOUT DIRECTION OF DISCLAIMANT (Treas. Reg. §2518-2(e))

A. No express or implied agreement.

B. If property disclaimed is distributed to a charitable organization, then the disclaimant must not have the power to direct the enjoyment of the funds after the charity receives them. For example, if disclaimant is director or officer, then the bylaws can be amended to show those funds are managed by independent directors. See PLR9320008, PLR9317039 and PLR9635011. IRS approved charitable deduction for unitrust interest passing to charities after decedent's brother disclaimed. The brother, trustee of the unitrust, disclaimed power to give advice to charities regarding disclaimed funds).

C. A disclaimer can be made even if disclaimant has fiduciary power to distribute, but only if limited by ascertainable standards.

IX. DISCLAIMED PROPERTY MUST PASS TO SURVIVING SPOUSE OF DECEDENT OR PERSON OTHER THAN DISCLAIMANT (Treas. Reg. §2518-2(e))

A. Beneficiary (other than spouse) cannot disclaim property which will pass to a trust in which beneficiary holds an interest.

B. A spouse can disclaim and still receive beneficial enjoyment. For example, a marital portion can be disclaimed which then is distributed to a unified credit trust in which he or she has an income interest.

C. Treas. Reg. §2518-2(e), examples (4) and (5).

1. B dies 2/13/80. B's will has marital and nonmarital trust. A, B's surviving spouse, is income beneficiary of marital trust and has GPOA. A also has income interest in nonmarital trust with no GPOA or limited power of appointment ("LPOA"). The document states any part of marital trust disclaimed is to be added to nonmarital trust. Disclaimer of marital trust is valid as to no direction by A.

2. Same as 1 above but A also has LPOA in nonmarital trust, and not limited by ascertainable standard. A must also disclaim LPOA.

3. Same as 1 above but A has income interest and power to invade principal for health, maintenance and support. A can disclaim marital portion without disclaiming any portion of nonmarital trust.

D. Be sure to insert language in document providing what happens if a beneficiary disclaims. In Richey vs. Hurst, 798 So.2d 841 (Fla. App. 5<sup>th</sup> Dist. 2001), a trust was created with a marital trust. Surviving spouse disclaimed. The trust did not address what would happen to the property if marital trust was disclaimed. The court found surviving spouse was deemed to predecease the decedent and, therefore, no marital trust was created. The property passed, pursuant to a residuary clause, to a separate trust for the benefit of beneficiaries who were different than the

beneficiaries of the marital trust.

X. PARTIAL INTERESTS (Treas. Reg. §25.2518-3)

A. Can disclaim undivided portion of disclaimant's interest in property even if disclaimant has another interest in the same property.

*Example:* A died 8/1/78. 100 shares of X to C; 200 shares of Y to C; 500 shares of Z to D; personal effects to B; 500 acre farm to B; 500 cattle to B. B disclaimed painting and jewelry. C disclaimed 50 shares of Y, and D disclaimed 100 shares of Z. D cannot disclaim income interest in Z stock while retaining remainder. See *Walshire vs. U.S.*, 288 F.3d 342 (8<sup>th</sup> Cir. 2002).

B. Each interest separately created by transferor is treated as separate interest.

*Example:* Income to A for life, then income to B for life, then remainder to A's estate. Can make disclaimer of either income interest, or remainder or undivided portion of either interest, because transferor created the separate interests.

C. If interests separately created are "merged," then all or a portion of entire interest must be disclaimed.

D. Can disclaim pecuniary amount (expressed as a specific dollar amount or by a formula), and any income from that amount must be segregated (FMV of assets on disclaimer date or on a basis that is fairly representative of value changes that may have occurred between date of transfer and date of disclaimer).

E. Powers of appointment is a separate interest in property.

1. 5 and 5 power.
2. General power of attorney.
3. Right to receive trust corpus.
4. Discretionary distributions of principal.

XI. DISCLAIMERS BY TRUSTEES

A. Disclaimers by trustees have been recognized. See *Cleveland vs. U.S.*, 88-1 USTC ¶13766 (1988); *McClintock vs. Scahill*, 530 NE 2d 164 (1988); Rev. Rul. 90-110, 1990-2 C.B. 209.

B. Disclaimers of fiduciary power binds disclaiming trustees but not successor trustees. See PLR8729002; PLR8605004 and PLR8127009.

C. Disclaimers should also be obtained from beneficiaries who could benefit.

D. If a fiduciary has a property interest as an individual, then the fiduciary can disclaim that property interest unless the fiduciary has a broad discretion to control the use and enjoyment of the property. See Treas. Reg. §25.2518-2(d)(2). Thus, if a fiduciary's powers are limited by an ascertainable standard, then that power does not have to be disclaimed. See PLR9203037.

E. A fiduciary cannot disclaim a power to eliminate the object of the fiduciary's power from being a beneficiary. In PLR8804004, PLR8605004 and PLR8409024 a trustee disclaimer of an invasion power is not sufficient to cure a defective QTIP trust because state law does not provide that the trustee could extinguish a beneficiary's right.

F. Include within trust document power in trustee to disclaim any power which results

in denial of charitable or marital deduction.

## XII. DISCLAIMER UNDER FLORIDA STATUTE (§689.21)

See attachment at page 4.26 for proposed new Florida disclaimer statute under a new Chapter 739. This has not been passed but is set for approval by the Florida Bar Real Probate and Trust law Section Executive Council at its November 6, 2003 meeting.

A. Unless otherwise provided in the instrument, as to the result of the disclaimer, the interest will be distributed as if disclaimant predeceased the Grantor.

B. Interest passing under nontestamentary instruments or certain power of appointment interests.

1. As donee.

2. Grantee.

3. Deed, assignment or nontestamentary instrument.

4. Inter vivos trust beneficiary.

5. Insurance beneficiary. See *Barker vs. Jackson Nat. Life Ins. Co.*, 888 F Supp. 1131 (1995). Disclaimer of life insurance proceeds does not bar husband from being beneficiary of intestate estate.

6. Power of appointment (“POA”) exercised by deed.

7. Nontestamentary exercise POA by deed or will. Disclaimer of life insurance proceeds does not bar husband from being beneficiary of intestate estate.

8. Donee of POA created by nontestamentary interest.

9. Any other manner not specifically enumerated under nontestamentary instrument (i.e., IRA, pension, etc).

C. In writing and the extent.

D. Describe interest.

E. Signed, witnessed and acknowledged as manner for real estate deeds.

F. Effective and irrevocable when instrument filed for recording in office of any circuit court.

G. Copy must be delivered by hand or certified mail to personal representative or trustee, or other person with legal title.

H. If interest in real estate is disclaimed, then certified copy where real estate is located.

I. Filed within 12 months after effective date of nontestamentary instrument creating the interest, or if disclaimant is not finally ascertained as a beneficiary, or his interest is not indefeasibly fixed both in quality and quantity, then 12 months after event disclaimant is finally ascertained, and the interest becomes fixed both in quality and quantity.

J. Right to disclaim barred if insolvent at the time of event giving rise to disclaimer.

K. Disclaimer can be made for minor, incompetent or deceased beneficiary if circuit court determines that it is in the best interest of those interested in estate, and not detrimental to the best interest of the beneficiary.

XIII. DISCLAIMER UNDER FLORIDA STATUTES (§732.801)

- A. What kind of interest?
1. Whole of any property, real or personal, real or equitable, present or future, fractional part share or portion.
  2. Power to appoint.
  3. Homestead.
  4. Exercise, non-exercise POA.
  5. Beneficiary of testamentary trust.
  6. Beneficiary of testamentary gift to a nontestamentary trust.
  7. Donee of POA created by will.
  8. Any manner not specifically enumerated under testamentary instrument.
- B. In writing and extent.
- C. Signed, witnessed and acknowledged in manner for real estate deeds.
- D. Effective and irrevocable when instrument is recorded by clerk where estate is or has been administered. If no administration, then record with clerk in county where venue is proper.
- E. Copy must be delivered or mailed to personal representative, trustee or other person having legal title.
- F. Recorded at any time after creation of interest but, in any event, within 9 months after the event giving rise to the right to disclaimer. “If disclaimant is not finally ascertained as a beneficiary or his interest has become indefeasibly fixed both in quality and quantity, such disclaimer shall be recorded no later than 6 months after the event when indefeasibly fixed both in quality and quantity.”
- G. Disclaimer, however, can be recorded at any time after creation of the interest upon written consent of all interested parties.
- H. Right to disclaim barred if beneficiary
1. is insolvent at time of event giving rise to disclaim;
  2. makes a voluntary assignment or transfer of an interest in real property;
  3. gives a written waiver of right to disclaim; or
  4. a sale or other disposition in interest, pursuant to judicial process, before recording disclaimer.
- Example:* Will states “I give, devise and bequeath all the rest, residue and remainder....absolutely in fee simple to my issue surviving me, on a per stirpes basis.”
- Beneficiary daughter, who has 4 children, one of which is a minor, disclaims. Beneficiary has 3 brothers and a sister and she wants her share to go to her brothers and sister. If she disclaims, then how is property distributed? Her children or her brothers and sister? What to do? Outside of 9 months can 3 grandchildren disclaim? What if a minor grandchild? Is it in the best interest of grandchild to disclaim? See Estate of Goree vs. Commissioner, T.C. Memo 1994-331.
- I. Is Florida disclaimer effective as to IRS tax lien? In Estate of Leggett vs. United States, 96-2 USTC ¶60,249 (SD Texas 1996), the court determined that under Texas law the IRS is not barred by a disclaimer. In Leggett the will devised property to Schuette who owed back taxes.

Schuette prepared and filed a timely disclaimer and argued that under Texas law a disclaiming beneficiary is treated as having predeceased the decedent and therefore Schuette had nothing on which a tax lien could attach. Compare Fla. Stat. §732.801(3)(a), “the interest disclaimed shall descend, be distributed...as if the disclaimant had died immediately preceding the death.... An interest in property disclaimed shall never vest in the disclaimant.”

In Texas the statute also states that when one dies with a will all of the estate “shall vest immediately in the devisees...of the estate.” The court determined that because Schuette’s title vested immediately the tax lien immediately attached. This case has been appealed to the Fifth Circuit. See also *Tinari vs. U.S.*, 96-2 USTC ¶50,460 (E.D.PA. 1996).

The United States Supreme Court settled the matter in *Drye vs. United States*, 528 U.S. 49 (1999), where the Court found that a disclaimer did not defeat a federal tax lien. See also *Choate vs. Tubbs*, 2003-1 U.S.T.C. ¶50,402 (E.D. Tenn. 2003).

#### XIV. HIGHLIGHTS OF NEW FLORIDA DISCLAIMER STATUTE , CHAPTER 739 OF THE FLORIDA STATUTES. See page 4.26.

Many thanks to Richard Gans, Esquire for his chairmanship of this committee, and for editing and drafting this statute, and providing this author with a draft based upon the Uniform Disclaimer of Property Interests Act.

- A. Combines the Florida statutes in Chapter 739.
- B. Definitional Section (8) includes a definition of insolvency (Fl. Stat. §739.102(8).
- C. Exclusive method of disclaimer ( Fl. Stat. §739.103).
- D. Includes “conditional” disclaimers (Fl. Stat. §739.104(1). See Exhibit “A” on page 4.56.
- E. Provides for a disclaimer for a minor (Fl. Stat. §739.104(2). See Exhibit “B” on page 4.58.
- F. Provisions how disclaimed interest is transferred (Fl. Stat. §739.201(3). See Exhibit “C” on page 4.60.
- G. Specific provisions on jointly held property (Fl. Stat. §739.202). See Appendix “D” on page 4.62.
- H. Specific provisions for tenancy-by-the entirety property (Fl. Stat. §739.203).

#### XV. MEDICAID

Assets for Medicaid planning include income and resources consisting of any asset recipient is entitled to but does not receive because of their own action. OBRA 93, 42 U.S.C. 1396p. An asset is considered transferred for purposes of the look back rule of 36 months, or 60 months if action is taken by the individual that “reduces or eliminates such individual’s ownership or control of such asset.” 42 U.S.C. §1396p(c)(3).

#### XVI. PLANNING POINTS

- A. *Accelerate Estate Tax.* Spouse disclaims to accelerate estate tax. Can use increased

unified credit growth. Spouse can have life interest as long as the interest results without spouse's direction. I.R.C. §2518(b)(4), Treas. Reg. §25.2518-2(e)(2). Others cannot have property pass to or for benefit of disclaimant. §25.2518(ii).

B. *Save Charitable Deduction.* Save an improper charitable remainder trust by beneficiary disclaiming income interest. See PLR9113004 and PLR9008011.

C. *Increase The Marital Deduction.* Testate or intestate.

D. *Increase Unified Credit Trust.* \$1,000,000 for spouse with LPOA.

E. *Save The Marital Deduction.*

1. Disqualifying interest held by individuals other than spouse.

a. Beneficiaries - son disclaims interest in residuary non-marital trust so trust qualifies as ("QTIP").

b. Trustees - children (or third party) as trustees waive their right to invade principal, except for spouse. Children can continue as trustees with all other powers, including invasion of principal for spouse.

2. Disqualifying interest held by spouse. Spouse can disclaim powers (such as appointment powers) to qualify trust as QTIP.

F. *Correct Underfunded GST Exemption.* Husband places \$600,000 in unified credit trust and gives \$900,000 outright to spouse. Spouse has her own \$800,000 estate. Grandchildren are sole beneficiaries. Spouse disclaims \$400,000 of marital devise. No tax on husband's death.

G. *Equalize Estates.* Spouse can disclaim a portion of marital deduction to trigger tax on first death. Also previously taxed property credit may be available at wife's death.

H. *Convert GPA Trust To QTIP Trust For GST Purposes.* Reverse QTIP election then available.

I. *Specific Disclaimer Trusts for*

1. GST and QTIP purposes.

2. estate equalization.

3. for unified credit purposes. Simple will with disclaimer trust. Trust cannot give spouse power to distribute trust property unless limited by an ascertainable standard.

J. *Reduce GST Taxes By Transforming A Taxable Termination To A Direct Skip.* Tax exclusive vs. tax inclusive.

K. *Qualified Plan And IRAs.* Trust designated as primary beneficiary and spouse is contingent beneficiary. Trust disclaims so spouse can rollover plan benefits. Trustee and beneficiaries disclaim rights. In GCM39858, issued on September 23, 1991, the Service ruled that a proper disclaimer under Section 2518 of the Code, the state law for a qualified retirement plan account and IRAs, was not a prohibited assignment or alienation under Section 401(a)(3) of the Code, nor an assignment of income.

L. *Flexibility Planning For Retirement Benefits.* Consider naming spouse as primary beneficiary, and unified credit trust as alternate beneficiary under designation forms. Nine month window after death to analyze alternatives. See PLR9037048.

M. *Shift Retirement Benefits To Lower Tax Bracket Taxpayers.*

N. *Qualification For Estate Tax Charitable Deduction (Combined With Marital).* Disclaimer by noncharitable beneficiary to save a nonqualified split interest trust. See PLR200052006.

O. *Qualification For Special Use Valuation.* Disclaimers filed by "nonqualified" heirs

to allow Code §2032A (special use valuation).

P. *Tax Apportionment.* Beneficiary can disclaim right of non-apportionment of estate tax.

Q. *Near Simultaneous Death.* Consider use of disclaimer to equalize estate taxes. Use in conjunction with previously taxed property credit.

R. *Maintain Or Obtain QSST Election.* Excess beneficiaries waive rights to allow QSST treatment. Also can disclaim rights (i.e., trustee sprinkle powers in a unified credit trust).

S. *Avoid Gift Trap Regarding Insurance Beneficiary Designation.* Occurs when owner of policy is different than insured and beneficiary. Disclaim to avoid gift from owner to beneficiary on insured's death.

T. *Spouse Can Disclaim Elective Share Election.* Election does not alone constitute acceptance of benefits.

U. *Create a Pseudo Self-Settled Trust.* See Gopman & Schwartz, "The Florida Pseudo Self-Settled Trust," XXI Fla. Bar Journal, March, 2003.

## XVII. CHECKLIST

A. If a beneficiary makes a disclaimer, then will the beneficiary have enough income and resources to live comfortably?

B. Effect on decedent's estate if no disclaimer.

C. Increased marital or charitable deduction.

D. Can marital deduction decrease without estate tax impact?

E. What is effect on estate tax on recipient's estate income tax?

F. Time period.

G. Partial.

H. Effect on GST grandfathering rules and constructive additions if disclaimer is made.

See PLR9707026 and PLR9732034.

I. Formula disclaimer clause. Be sure to review the recent case of McCord, 293 F.3d 279 (CA-5 2002) re: definitional value clauses. See L. Paul Hood, "McCord and TAM 200245053: A Setback for Defined Value Transactions," Estate Planning, September, 2003.

J. Be sure you determine who will receive property before disclaimer signed.

## XVIII. BE CAREFUL

A. *Untimely Disclaimer.*

1. Nine months ran from date of death and not date of probating will.

2. A contingent life estate beneficiary disclaimed his interest more than 9 months after decedent's death. Estate lost marital deduction in a \$9.7 million charitable remainder unitrust.

B. *Disclaimer After Acceptance Of Benefits.*

1. Beneficiary of insurance policy forwarded claim form and proof of death to insurance company. Company set up checking account in beneficiary's name and sent her checkbooks. IRS ruled benefits accepted even though no checks written out of checking

account.

2. Disclaimer failed because beneficiary became general partner of partnership before disclaiming.

C. *Use Multiple Level Disclaimers (Or Conditional Disclaimers) When Necessary.* For example, a waiver of rights as a testate beneficiary and as an intestate heir.

D. *Disclaimer May Be Disqualified If Disclaimed Property Drops Into A Trust In Which The Nonspousal Disclaimant Has An Interest.*

E. *Use Of Multi-Tiered Disclaimers.* Childrens' disclaimed shares moved downstream to grandchildren rather than upstream to parents. Also waiver of homestead right terminated spouse's interest in homestead rather than transforming homestead to an intestate asset.

F. *Proper Party To Disclaim.*

1. Estate's interest in another estate. Personal representative was correct party to disclaim, not beneficiary.

2. When waiving powers in a trust insure that proper party disclaims (i.e., trustee vs. beneficiary). Often more prudent route is to have trustee and beneficiaries disclaim.

3. When disclaimant serves in a fiduciary role often more prudent for fiduciary to resign rather than attempt to disclaim all problematic powers.

G. *Valid Disclaimer Under Florida Law Not Necessarily Valid Under Code.* Significant problems if disclaimer valid under Florida law but not federal law. Disclaimant could have adverse tax consequences and no property.



## SOURCES

1. Sections 2518 and 2511 of the Internal Revenue Code and corresponding regulations.
2. BNA Portfolio 848.
3. L. Paul Hood, “McCord and TAM 200245053: A Setback for Defined Value Transactions,” Estate Planning, September, 2003.
4. Santley M. Johanson, “Recent Estate Planning Developments,” Southern Federal Tax Institute (“SFTI”), 2003, pages 235-236; 2002, pages 245-246; 2001, pages BB50-BB51; (2000), pages AA37-AA38; and 1994, pages AA100-AA104.
5. Edward Koren, Estate and Personal Financial Planning, Chapter 37, 1997.
6. Lynn Hart, 28 University of Miami Philip Heckerling Institute on Estate Planning, 1994.
7. Gary A. H. Laursen, “Federal Gift Taxation,” Florida CPA TODAY at page 30, July 1994.
8. Sun Bank, “Disclaimer: Looking Beyond the Code,” Estate Planning Studies, April, 1994.
9. Isaacs and Edwards, “Estate Plan Should Anticipate the Use of Disclaimers,” Estate Planning at page 89, March/April 1994.
10. Roy Adams, “Questions and Answers,” “Can Wife Disclaim Interest in Estate,” Trusts and Estates at page 53, September, 1993.
11. Diana Hastings, “Service Provides Ad Hoc Guidance on New Disclaimers”, Trusts and Estates at page 42, January, 1993.
12. Jerome Manning, “Disclaimers,” Twenty Third Annual Southern Federal Tax Institute, Outline T, October, 1988.

## **APPENDIX**

### **FORMS AND SAMPLE LANGUAGE**

**THESE FORMS ARE FOR INFORMATIONAL PURPOSES ONLY. THEY DO NOT REPRESENT LEGAL ADVICE OR CREATE AN ATTORNEY-CLIENT RELATIONSHIP**

Prepared by and return to:  
Linda S. Griffin  
Linda Suzzanne Griffin, P.A.  
1455 Court Street  
Clearwater, FL 33756  
727.449.9800

**IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

IN RE: Estate of

File No.:

Division:

Deceased

**DISCLAIMER AND TRANSFER OF INTERESTS**

The undersigned, \_\_\_\_\_, the surviving spouse of decedent, \_\_\_\_\_, does hereby declare this document to be a disclaimer, to the extent described herein, of his/her rights under and to an undivided portion of \_\_\_\_\_ devised under \_\_\_\_\_ Last Will and Testament to \_\_\_\_\_ dated \_\_\_\_\_, 19\_\_, and distributed to the Family Trust created under said Revocable Trust.

The undersigned, having received no benefits from the interests disclaimed herein, hereby irrevocably, and without qualification, disclaims and renounces all interest (including, but not limited to, the intestate share, the testate share, the right to income and discretionary invasions of principal, and any power of appointment) in and to One Hundred Percent (100%) of the said \_\_\_\_\_ devised under \_\_\_\_\_ Last Will and Testament dated 2003 to the \_\_\_\_\_ dated \_\_\_\_\_, 2003.

The undersigned acknowledges, represents and certifies that he/she is not now insolvent and was not insolvent at the date of death of the deceased; that he/she has not made any voluntary assignment or transfer of; contract to assign or transfer or encumbrance of; given a written waiver of the right to disclaim the succession to and interest in, and has not made any sale or other disposition of any interest in the property being disclaimed pursuant to judicial process or otherwise.

The undersigned further acknowledges, represents and certifies that he/she has not accepted property or an interest in property described above or any of its benefits.

The undersigned's interest in such property arises out of the Will of \_\_\_\_\_ dated \_\_\_\_\_, 2003, and filed for probate on \_\_\_\_\_, 2003 in the Pinellas County Probate Court of Pinellas County, Florida.

This disclaimer is executed in conformity with the laws of the State of Florida and particularly with the provisions of Section 732.801 Florida Statutes, and in conformity with Section 2518 of the Internal Revenue Code.

Under penalties of perjury I declare that I have read the foregoing and the facts alleged are true to the best of my knowledge and belief.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2003.

Signed and Sealed in the Presence of:

\_\_\_\_\_  
Witness  
Print Name:  
Address:

\_\_\_\_\_  
Name  
Address:

\_\_\_\_\_  
Witness  
Print Name:  
Address:

STATE OF FLORIDA  
COUNTY OF

Before me, the undersigned authority, personally appeared \_\_\_\_\_, who is personally known to me or who has produced FL.D.L.# \_\_\_\_\_ as identification, who acknowledged the execution of the above and foregoing Disclaimer to be his/her free and voluntary act and for the uses and purposes therein expressed.

**WITNESS** my hand and official seal at \_\_\_\_\_ County, Florida, this \_\_\_\_ day of \_\_\_\_\_, 2003.

Notary Public:  
Signature \_\_\_\_\_  
Print Name \_\_\_\_\_  
My Commission Expires:

The undersigned acknowledges receipt of the above Disclaimer this \_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_

**THE FOLLOWING CLAUSES ARE EDITED FROM OLD  
PRENTICE HALL, INC. WILLS, FORMS ¶169,936-¶169,739-L  
AND BNA PORTFOLIO 848 WORKING PAPER**

WILL PROVISION FOR DISCLAIMER WITH GIFT OVER TO CHARITY

If any devisee named in this Will should renounce and disclaim in whole or in part, any property I have herein devised and/or bequeathed to him or to her, then I give, devise and bequeath the property so renounced and disclaimed to \_\_\_\_\_.

(FOR A CHARITABLE BENEFICIARY IT MIGHT BE ADVISABLE TO ADD THE PHRASE “AN ORGANIZATION EXEMPT FROM FEDERAL INCOME TAXATION UNDER SECTIONS 501(c)(3) AND 2055(a) AND OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED)

WILL PROVISION PROVIDING FOR DISCLAIMER WITH GIFT OVER TO SURVIVING SPOUSE BUT ONLY TO THE EXTENT OF THE “OPTIMUM” MARITAL DEDUCTION

If any devisee named in this Will should renounce and disclaim in whole or in part, any property I have herein devised and/or bequeathed to him or to her, then I give, devise and bequeath the property so renounced and disclaimed to \_\_\_\_\_ my husband/wife, as long as the assets passing to said spouse do not, in the judgment of my personal representative, exceed the “optimum” marital deduction or that marital deduction required to achieve the optimum estate tax benefit for both my own and my surviving spouse’s estates. If it is not deemed prudent that all the disclaimed assets pass to my surviving spouse then the remainder of the disclaimed assets shall pass to \_\_\_\_\_.

WILL PROVISION FOR DISCLAIMER OF A MARITAL INTEREST WITH GIFT OVER TO SPRAY TRUST

My husband/wife may disclaim either in whole or in part his/her interest in property passing under this article. If my husband/wife makes such disclaimer then I direct that the disclaimed property be set apart in a separate trust for the benefit of my wife/husband and my children. The trustee of this trust, \_\_\_\_\_ shall in his/her discretion distribute the income to my wife/husband and/or my children as often and in whatever proportions as he/she deems appropriate to meet their needs or he/she may accumulate the income. At the death of my husband/wife he/she shall distribute the principal and any accumulated income to my children, per stirpes.

WILL PROVISION FOR TRUST AND QUALIFIED DISCLAIMER IN WHOLE OR IN PART

If my husband/wife survives me then I give to my trustee, \_\_\_\_\_, my entire residuary estate to be held in trust and distributed as follows: (1) If my husband/wife, within a period of nine months after my death, executes and delivers a qualified disclaimer within the meaning of Section 2518 of the Internal Revenue Code or its counterpart in effect at the date of my death, of

the whole or part of his/her interest in this trust, I direct that all of the disclaimed interest be distributed to my issue then surviving, absolutely and per stirpes and (2) I direct that my trustee retain any portion of the trust as to which there was no qualified disclaimer and distribute it to my husband/wife as follows:

FORMULA DISCLAIMER REFERRING TO BOTH STATE AND FEDERAL TAXES

I disclaim a sum equal to the largest amount that can pass free of federal estate tax by reason of the unified credit and the state death tax credit (provided use of this credit does not require an increase in the state death taxes paid) allowable to my husband's/wife's estate but no other credit. For the purposes of establishing the sum disposed of by this disclaimer the values finally fixed in the federal estate tax proceeding relating to my husband's/wife's estate shall be used.

FORMULA DISCLAIMER GEARED TO EQUALIZATION OF ESTATES

I hereby disclaim all of my right, title and interest in and powers over the principal and income of the Family Trust created under Article SIXTH...; and

All of my right, title and interest in and powers over an undivided portion of the pecuniary marital deduction bequest under Article FIFTH..., said undivided portion to be expressed as an undivided percentage interest in the pecuniary marital deduction bequest which, when taken together with all other interest and property qualifying for the marital deduction and passing, or which have passed, to me from my husband/wife shall obtain for the estate of my husband/wife a marital deduction which will result in an equalization of the "taxable estate" of my husband/wife, deceased, and my "taxable estate"... based upon the assumption that I died after, but on the same date of death as my husband/wife. In calculating the undivided percentage interest disclaimed herein, (i) the value of the estate of my husband/wife as finally determined for federal estate tax purposes shall be controlling, and (ii) my estate shall be valued as of the date on (and the manner in) which the estate of my husband/wife is valued for federal estate tax purposes.

FORMULA DISCLAIMER CONTINGENT UPON A QTIP ELECTION

I hereby disclaim the largest fractional share of the Children's Remainder Trust that may be disclaimed without causing any federal estate tax to be imposed upon the estate of \_\_\_\_\_ if a qualified terminable interest election is made under Internal Revenue Code Section 2056(b)(7) as to 100% of the Children's Remainder Trust (after giving effect to the disclaimer) and 100% of the Grandchildren's Remainder Trust... This fractional share shall be determined as of the federal estate tax valuation date by using the amounts and values as finally determined for federal estate tax purposes and after taking into consideration all items allowed as deductions on the federal estate tax return and all applicable credits.

## **FORMULA DISCLAIMER OF DOMICILIARY AND ANCILLARY INTESTATE ESTATE**

I hereby irrevocably refuse to accept, and I hereby disclaim, an undivided portion of any property or interests in property to which I may be entitled under the laws of intestacy relating to my father's/mother's domiciliary and ancillary intestate estates, namely that fractional share of my intestate interest in my father's/mother's estate described by the following fraction: a fraction, the numerator which shall be the value of my intestate interest in my father's/mother's estate, reduced by \$600,000, and increased by all administration expenses claimed or to be claimed as income tax deduction rather than as estate tax deduction, and further increased by the value of any property or interests in property includable in my father's/mother's gross estate for federal estate tax purposes which passed to my father/mother, in a manner which does not qualify for the federal estate tax marital deduction and by the value of any other property or interests in property includable in my father's/mother's gross estate for federal estate tax purposes (other than the property or interests in property described in paragraph (b) hereof) which passes to someone other than my mother/father, and increased further by the amount of any adjusted taxable gifts made by my father/mother; and the denominator of which shall be the value of my intestate interest in my father's/mother's estate. For purposes of establishing the numerator and denominator of the aforesaid fraction the values as finally determined in the federal estate tax proceedings relating to my said father's/mother's estate shall control. This disclaimer of an undivided portion of my interest in my father's/mother's intestate estate shall be construed as a disclaimer of each and every interest or right that I would have had in other property into which such disclaimed property is converted.

For purposes of establishing the numerator and denominator of the fraction set forth in paragraph (a) hereof and for purposes of establishing the denominator for the fraction set forth in paragraph (b) hereof, any reference to "the value of my intestate interest in my father's/mother's estate" shall be deemed to mean the value of my intestate interest in both my father's/mother's domiciliary as well as his/her ancillary intestate estates prior to the exercise of this Disclaimer. Additionally, for purposes of paragraph (a) and paragraph (b) hereof, the only deductions to be taken into account in valuing the interests to which I may be entitled under the laws of intestacy relating to my father's/mother's estate (prior to this Disclaimer) shall be those deductions payable from my father's/mother's intestate estate which are finally allowed on Schedule J, K and L of Form 706 in the federal estate tax proceedings relating to my father's/mother's estate.

## AUTHORIZATION FOR FIDUCIARY DISCLAIMERS

\_\_\_\_\_ : I authorize my Personal Representatives or Trustees to disclaim (whether or not such disclaimer is a “qualified disclaimer” as defined in the Internal Revenue Code) any property or interest in property which would otherwise pass to my estate or a trust under this Will; provided that if my husband/wife survives me such disclaimer may be made only with his/her written consent (or of his/her legal representative, if my husband/wife is incapable or has died).

\_\_\_\_\_ : I authorize my Personal Representatives and Trustees to disclaim any fiduciary power given hereunder or under applicable law.

## TAX APPORTIONMENT CLAUSE

- g.** This exhibit is reprinted by permission from the October, 1984 issue of the New York State Bar Journal, page 43.

I direct that all estate, inheritance, transfer, succession and other death taxes, domestic or foreign, together with any interest and penalties thereon, which may be payable by reason of my death, whether or not such property passes under this will and whether such taxes be payable by my estate or by any recipient of any such property, shall be paid as follows:

- (a) If my husband/wife \_\_\_\_\_ survives me all such taxes shall be paid (i) out of the property, if any, disclaimed by my husband/wife, or (ii) out of the property which generates the tax if my husband/wife does not disclaim my property.
- (b) If my husband/wife \_\_\_\_\_ does not survive me all such taxes shall be paid out of my residuary estate.



## STANDBY OR FALL BACK DISCLAIMER TRUST

Editor's Note: The following type of clause may be used to ensure that the decedent's unified credit is not wasted. In addition, the disclaimer would remove the disclaimed property from the surviving spouse's gross estate.

Note, that if the spouse is to serve as sole trustee the trustee's discretionary powers should be limited to an ascertainable standard to prevent inclusion of the trust property in the spouse's estate. See the discussion of the surviving spouse as disclaimant at IV, G in the Detailed Analysis

\_\_\_\_\_ : If my husband/wife survives me then I give to him/her the residue of my estate, both real and personal, of whatever kind ,however held, and wherever situated.

\_\_\_\_\_ : If my husband/wife survives me then I direct that he/she or a conservator, guardian or attorney-in-fact, under a Durable Power of Attorney, or executor or administrator of my husband' s/wife's estate, or other fiduciary acting on behalf of my husband/wife or his/her estate, may disclaim in whole or in part any or all property or interests required to be included in my estate under the provisions of any tax law, whether or not passing under this Will. I give any property or interest so disclaimed which, because of the disclaimer, passes under this Will, to my Trustees to hold IN TRUST as follows:

- A. During the life of my husband/wife, my Trustees:
  - (1) Shall pay or apply the income to or for the benefit of my husband/wife; and
  - (2) May from time to time pay or apply such part or all of the principal to or for the benefit of my husband/wife in such amounts or proportions as my Trustees, in their sole and absolute discretion, shall determine.
- B. Upon the death of my husband/wife my Trustee shall pay or apply the remaining principal, together with all accrued or collected but undistributed income, to my then surviving issue, in equal shares, per stripes.