HOW FEDERAL TAX DISCLAIMERS CAN SAVE YOU!

PRESENTED TO PINELLAS COUNTY ESTATE PLANNING COUNCIL

OCTOBER 19, 2009

BY

LINDA SUZZANNE GRIFFIN, J.D., LL.M., C.P.A.
BOARD CERTIFIED IN WILLS, TRUSTS AND ESTATES
BOARD CERTIFIED IN TAXATION

1455 COURT STREET
CLEARWATER, FLORIDA 33756
727.449.9800
WWW.LAWYERGRIFFIN.COM
LINDA@LAWYERGRIFFIN.COM

HOW FEDERAL TAX DISCLAIMERS CAN SAVE YOU! *

I. EFFECT OF A QUALIFIED DISCLAIMER

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).

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

This outline addresses the Federal law on disclaimer. Chapter 739 of the Florida Statutes and its recent revisions (attached as "Exhibit A") govern Florida law as applicable to disclaimers.

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. <u>WRITING</u> (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). A guardian ad litem or court approval may be required. Section 739.104(2) of the Florida Statutes allows a natural guardian to disclaim on behalf of a minor child of the natural guardian when the minor child is to receive solely as a result of another disclaimer but only if the disclaimed interest does not pass to or for the benefit of the natural guardian as a result of the disclaimer.

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.
F. *Query?* Section 739.301(7) states that the disclaimer of jointly owned property must be delivered "to the person to whom the disclaimed interest passes." If the disclaimer has the effect of transferring property to the estate, does this mean only to the personal representative or to all beneficiaries of the estate?

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 (4th Cir. 1989); *McDonald vs. Commissioner*, 853 F.2d 1494 (8th Cir. 1988); and *Kennedy vs. Commissioner*, 804, F.2d 1332 (7th 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's 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 the new Chapter 739 of the Florida Statutes, Section 689.21(5) of the Florida statutes which controlled the disposition of joint property 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."

Now Sections 739.202 and 739.203 of the Florida Statutes govern the disposition of joint accounts and tenancy by the entireties property.

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 21st 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 discretion to direct enjoyment of disclaimed interest. This disclaimer is okay if limited by ascertainable standards. Otherwise, individual 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. Effective July 1, 2009 Section 739.201(4) of the Florida Statutes has been added to provide that if a disclaimer of property is made for which the disclaimant has a power to direct the beneficial enjoyment, then unless the disclaimer proves otherwise, such a power is disclaimed unless such a power is limited by an ascertainable standard.
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 l 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 martial 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. 5th 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 (8th 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 are separate interests 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. 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).

XIII. 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. See also PLR 2008 20005 for disclaimer which allowed surviving spouse to use her maximum GSTT exemption.

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. See also PLR 2009 38042 for a disclaimer used to save a rollover; PLR 2008 37046 for a disclaimer which allowed distributions to be made over the life expectancy of a younger child.

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.

V. *Use in Settlement Agreements.*

W. *Use to Avoid Assets in Bankruptcy Estate.* In *Gaughan vs. Edward Ditt of Revocable Trust*, No. 06-16520(2/6/09) the Bankruptcy Trustee did <u>not</u> have access to disclaimed assets.

XIV. <u>CHECKLIST</u>

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. <u>See</u> PLR9707026 and PLR9732034.

I. Formula disclaimer clause. Be sure to review the cases of *Estate of Helen Christiansen vs. Commissioner*, 130 T.C. No. 1 (2008), *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.

K. Always review Chapter 739 of the Florida Statutes to be sure disclaimer complies with Florida law.

XV. <u>BE CAREFUL</u>

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 which are now allowed in Florida) 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.

<u>CIRCULAR 230 DISCLOSURE</u>: ANY TAX ADVICE CONTAINED IN THESE MATERIALS IS NOT INTENDED OR WRITTEN BY THE AUTHOR TO BE USED AND IT CANNOT BE USED BY ANY TAXPAYER FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON THE TAXPAYER. ANY TAX ADVICE CONTAINED IN THESE MATERIALS WAS <u>NOT</u> WRITTEN TO SUPPORT, WITHIN THE MEANING OF TREASURY DEPARTMENT CIRCULAR 230, THE PROMOTION OR MARKETING OF THE TRANSACTIONS OR MATTERS ADDRESSED BY SUCH ADVICE BECAUSE THE AUTHOR HAS REASON TO BELIEVE THAT IT MAY BE USED OR REFERRED TO BY ANOTHER PERSON IN PROMOTING, MARKETING OR RECOMMENDING A PARTNERSHIP OR OTHER ENTITY, INVESTMENT PLAN OR ARRANGEMENT TO ONE OR MORE TAXPAYERS. BEFORE USING ANY TAX ADVICE CONTAINED IN THESE MATERIALS, A TAXPAYER SHOULD

SEEK ADVICE BASED ON THE TAXPAYER'S PARTICULAR CIRCUMSTANCES FROM AN INDEPENDENT TAX ADVISOR.

ESTATE OF _____

DISCLAIMER AND TRANSFER OF INTERESTS

The undersigned, **NAME**, the surviving spouse of **NAME** (the "Decedent"), who died on **DATE**, does hereby declare this document to be a disclaimer, to the extent described herein, of all of his rights to the Decedent's interest in _____, devised to _____, under the Last Will and Testament of **NAME** dated _____.

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 _____ Percent (__%) of the said _____ devised under **NAME**'s Last Will and Testament dated **DATE** to **NAME**.

The undersigned acknowledges, represents and certifies that he (1) is not now insolvent and was not insolvent at the date the disclaimer became irrevocable; (2) has not accepted property or an interest in property sought to be disclaimed or any of its benefits; (3) has not voluntarily assigned, conveyed, encumbered, pledged or transferred (or contracted to do any of the foregoing) any of the interest sought to be disclaimed; (4) has not waived the right to disclaim; and (5) has not made any sale or other disposition of any interest sought to be disclaimed pursuant to judicial process or otherwise.

The undersigned's interest in such property arises out of the Will of **NAME** dated _____, and filed for probate on _____, in the _____ County Probate Court of _____ County, Florida.

This disclaimer is executed in conformity with the laws of the State of Florida and particularly with the provisions of Chapter 739 of the Florida Statutes, and in conformity with Section 2518 of the Internal Revenue Code of 1986, as amended.

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.

THIS IS A <u>DRAFT</u> FORM. EACH DISCLAIMER MUST BE EDITED TO FIT A CLIENT'S PARTICULAR CIRCUMSTANCES. YOU MUST REVIEW SECTION 2518 OF THE CODE AND CHAPTER 739 TO ASCERTAIN WHETHER THE DISCLAIMER IS VALID.

DATED this ____ day of _____, 2009.

Signed and Sealed in the
Presence of:

_____ _____
Witness Signature **NAME**, as beneficiary
of the Estate of **NAME**

_____
Witness Signature

STATE OF FLORIDA
COUNTY OF _____

Before me, the undersigned authority, personally appeared **NAME**, who is personally known to me or who has produced Florida Driver's License as identification, who acknowledged the execution of the above and foregoing Disclaimer to be his free and voluntary act and for the uses and purposes therein expressed.

WITNESS my hand and official seal at Pinellas County, Florida, this ____ day of _____, 2009.

Notary Public:
Signature_____
Print Name_____
My Commission Expires:

The undersigned acknowledges receipt of the above Disclaimer this ____ day of _____, 2009.

_____
NAME, as Personal
Representative of the Estate of
NAME

CHAPTER 739

FLORIDA UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

739.101 Short title.--This chapter may be cited as the "Florida Uniform Disclaimer of Property Interests Act."

History.--s. 1, ch. 2005-108.

739.102 Definitions.--As used in this chapter, the term:

(1) "Benefactor" means the creator of the interest that is subject to a disclaimer.

(2) "Beneficiary designation" means an instrument, other than an instrument creating or amending a trust, naming the beneficiary of:

(a) An annuity or insurance policy;

(b) An account with a designation for payment on death;

(c) A security registered in beneficiary form;

(d) A pension, profit-sharing, retirement, or other employment-related benefit plan; or

(e) Any other nonprobate transfer at death.

(3) "Disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(4) "Disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made.

(5) "Disclaimer" means the refusal to accept an interest in or power over property. The term includes a renunciation.

(6) "Fiduciary" means a personal representative, trustee, agent acting under a power of attorney, guardian, or other person authorized to act as a fiduciary with respect to the property of another person.

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

(8) "Insolvent" means, solely for purposes of this chapter, that the sum of a person's debts is greater than all of the person's assets at fair valuation and that the person is generally not paying his or her debts as they become due. For purposes of this subsection, the term "assets" has the same meaning as that provided in s. 726.102.

(9) "Jointly held property" means property held in the names of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property. Jointly held property does not include property held as tenants by the entirety.

(10) "Person" includes individuals, ascertained and unascertained, living or not living, whether entitled to an interest by right of intestacy or otherwise; a government, governmental subdivision, agency, or instrumentality; and a public corporation.

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

(12) "Trust" means:

(a) An express trust (including an honorary trust or a trust under s. 736.0408), charitable or noncharitable, with additions thereto, whenever and however created; and

(b) A trust created pursuant to a statute, judgment, or decree which requires the trust be administered in the manner of an express trust.

As used in this chapter, the term "trust" does not include a constructive trust or a resulting trust.

History.--s. 1, ch. 2005-108; s. 43, ch. 2006-217; s. 13, ch. 2009-115.

739.103 Scope.--This chapter applies to disclaimers of any interest in or power over property, whenever created. Except as provided in s. 739.701, this chapter is the exclusive means by which a disclaimer may be made under Florida law.

History.--s. 1, ch. 2005-108.

739.104 Power to disclaim; general requirements; when irrevocable.--

(1) A person may disclaim, in whole or in part, conditionally or unconditionally, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim. A disclaimer shall be unconditional unless the disclaimant explicitly provides otherwise in the disclaimer.

(2) With court approval, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, except that a disclaimer of a power arising under s. 739.201(4) does not require court approval. Without court approval, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, if and to the extent that the instrument creating the fiduciary relationship explicitly grants the fiduciary the right to disclaim. In the absence of a court-appointed guardian, notwithstanding anything in chapter 744 to the contrary, without court approval, a natural guardian under s. 744.301 may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, which the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer.

(3) To be effective, a disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, and be signed by the person making the disclaimer and witnessed and acknowledged in the manner provided for deeds of real estate to be recorded in this state. In addition, for a disclaimer to be effective, an original of the disclaimer must be delivered or filed in the manner provided in s. 739.301.

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

(5) A disclaimer becomes irrevocable when any conditions to which the disclaimant has made the disclaimer subject are satisfied and when the disclaimer is delivered or filed pursuant to s. 739.301 or it becomes effective as provided in ss. 739.201-739.207, whichever occurs later.

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

History.--s. 1, ch. 2005-108; s. 103, ch. 2006-1; s. 14, ch. 2009-115.

739.201 Disclaimer of interest in property.--Except for a disclaimer governed by s. 739.202, s. 739.203, or s. 739.204, the following rules apply to a disclaimer of an interest in property:

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

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

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

(a) If the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had died immediately before the interest was created, unless under the governing instrument or other applicable law the disclaimed interest is contingent on surviving to the time of distribution, in which case the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. However, if, by law or under the governing instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution. For purposes of this subsection, a disclaimed interest is created at the death of the benefactor or such earlier time, if any, that the benefactor's transfer of the interest is a completed gift for federal gift tax purposes. Also for purposes of this subsection, a disclaimed interest in a trust described in s. 733.707(3) shall pass as if the interest had been created under a will.

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

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

(4) In the case of a disclaimer of property over which the disclaimant has a power, in a fiduciary or nonfiduciary capacity, to direct the beneficial enjoyment of the disclaimed property, unless the disclaimer specifically provides to the contrary with reference to this subsection, the disclaimant shall also be deemed to have disclaimed that power unless the power is limited by an ascertainable standard, as defined in s. 736.0103, as in effect when the disclaimer becomes irrevocable.

History.--s. 1, ch. 2005-108; s. 15, ch. 2009-115.

739.202 Disclaimer of rights of survivorship in jointly held property.--

(1) Upon the death of a holder of jointly held property:

(a) If, during the deceased holder's lifetime, the deceased holder could have unilaterally regained a portion of the property attributable to the deceased holder's contributions without the consent of any other holder, another holder may disclaim, in whole or in part, a fractional share of that portion of the property attributable to the deceased holder's contributions determined by dividing the number one by the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates.

(b) For all other jointly held property, another holder may disclaim, in whole or in part, a fraction of the whole of the property the numerator of which is one and the denominator of which is the product of the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates multiplied by the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates.

(2) A disclaimer under subsection (1) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

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

History.--s. 1, ch. 2005-108.

739.203 Disclaimer of property held as tenancy by the entirety.--

(1) The survivorship interest in property held as a tenancy by the entirety to which the survivor succeeds by operation of law upon the death of the cotenant may be disclaimed as provided in this chapter. For purposes of this chapter only, the deceased tenant's interest in property held as a tenancy by the entirety shall be deemed to be an undivided one-half interest.

(2) A disclaimer under subsection (1) takes effect as of the death of the deceased tenant to whose death the disclaimer relates.

(3) The survivorship interest in property held as a tenancy by the entirety disclaimed by the surviving tenant passes as if the disclaimant had predeceased the tenant to whose death the disclaimer relates.

(4) A disclaimer of an interest in real property held as tenants by the entirety does not cause the disclaimed interest to be homestead property for purposes of descent and distribution under ss. 732.401 and 732.4015.

History.--s. 1, ch. 2005-108.

739.204 Disclaimer of interest by trustee.--If a trustee having the power to disclaim under the instrument creating the fiduciary relationship or pursuant to court order disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

History.--s. 1, ch. 2005-108.

739.205 Disclaimer of power of appointment or other power not held in a fiduciary capacity.--If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

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

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

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

History.--s. 1, ch. 2005-108.

739.206 Disclaimer by appointee, object, or taker in default of exercise of power of appointment.--

(1) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

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

History.--s. 1, ch. 2005-108.

739.207 Disclaimer of power held in fiduciary capacity.--

(1) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(3) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary

is acting, except that a disclaimer of a fiduciary power arising under s. 739.201(4) shall bind only the disclaiming fiduciary.

History.--s. 1, ch. 2005-108; s. 16, ch. 2009-115.

739.301 Delivery or filing.--

(1) Subject to subsections (2) through (12), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method that results in its receipt. A disclaimer sent by first-class mail shall be deemed to have been delivered on the date it is postmarked. Delivery by any other method shall be effective upon receipt by the person to whom the disclaimer is to be delivered under this section.

(2) In the case of a disclaimer of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

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

(b) If no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration would be proper.

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

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

(b) If no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration of the decedent's estate would be proper.

(4) In the case of a disclaimer of an interest in an inter vivos trust:

(a) The disclaimer must be delivered to the trustee serving when the disclaimer is delivered;

(b) If no trustee is then serving, it must be filed with the clerk of the court in any county where the filing of a notice of trust would be proper; or

(c) If the disclaimer is made before the time the instrument creating the trust becomes irrevocable, the disclaimer must be delivered to the grantor of the revocable trust or the transferor of the interest or to such person's legal representative.

(5) In the case of a disclaimer of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation or to such person's legal representative.

(6) In the case of a disclaimer of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, the disclaimer must be delivered to the person obligated to distribute the interest.

(7) In the case of a disclaimer by a surviving holder of jointly held property, or by the surviving tenant in property held as a tenancy by the entirety, the disclaimer must be delivered to the person to whom the disclaimed interest passes or, if such person cannot reasonably be located by the disclaimant, the disclaimer must be delivered as provided in subsection (2).

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

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

(b) If no fiduciary is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with a court having authority to appoint the fiduciary.

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

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

(b) If no fiduciary is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with a court having authority to appoint the fiduciary.

(10) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (2), subsection (3), or subsection (4) as if the power disclaimed were an interest in property.

(11) In the case of a disclaimer of a power exercisable by an agent, other than a power exercisable by a fiduciary over a trust or estate, the disclaimer must be delivered to the principal or the principal's representative.

(12) Notwithstanding subsection (1), delivery of a disclaimer of an interest in or relating to real estate shall be presumed upon the recording of the disclaimer in the office of the clerk of the court of the county or counties where the real estate is located.

(13) A fiduciary or other person having custody of the disclaimed interest is not liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer or, if the disclaimer is barred under s. 739.402, for any otherwise proper distribution or other disposition made in reliance on the disclaimer, if the distribution or disposition is made without actual knowledge of the facts constituting the bar of the right to disclaim.

History.--s. 1, ch. 2005-108.

739.401 When disclaimer is permitted.--A disclaimer may be made at any time unless barred under s. 739.402.

History.--s. 1, ch. 2005-108.

739.402 When disclaimer is barred or limited.--

(1) A disclaimer is barred by a written waiver of the right to disclaim.

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

(a) The disclaimant accepts the interest sought to be disclaimed;

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

(c) The interest sought to be disclaimed is sold pursuant to a judicial sale; or

(d) The disclaimant is insolvent when the disclaimer becomes irrevocable.

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

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

(5) A disclaimer of an interest in, or a power over, property which is barred by this section is ineffective.

History.--s. 1, ch. 2005-108; s. 17, ch. 2009-115.

739.501 Tax-qualified disclaimer.--Notwithstanding any provision of this chapter other than s. 739.402, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of s. 2518 of the Internal Revenue Code of 1986 as never having been transferred to the disclaimant, the disclaimer or transfer is effective as a disclaimer under this chapter.

History.--s. 1, ch. 2005-108; s. 18, ch. 2009-115.

739.601 Recording of disclaimer relating to real estate.--

(1) A disclaimer of an interest in or relating to real estate does not provide constructive notice to all persons unless the disclaimer contains a legal description of the real estate to which the disclaimer relates and unless the disclaimer is filed for recording in the office of the clerk of the court in the county or counties where the real estate is located.

(2) An effective disclaimer meeting the requirements of subsection (1) constitutes constructive notice to all persons from the time of filing. Failure to record the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

History.--s. 1, ch. 2005-108.

739.701 Application to existing relationships.--Except as otherwise provided in s. 739.402, an interest in or power over property existing on July 1, 2005, as to which the time for delivering or filing a disclaimer under laws superseded by this chapter has not expired, may be disclaimed after July 1, 2005.

History.--s. 1, ch. 2005-108.