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The Federal Tax Treatment of Disclaimers of Future Interests: A Call for Reform

*Trent S. Kiziah**

Federal tax laws essentially preclude individuals with a future interest from disclaiming because the time in which a qualified disclaimer can be executed may pass before the person becomes aware of the interest and long before the interest becomes possessory and fixed as to quality and quantity. This article examines the state of the law prior to enactment of these limiting tax provisions, examines the call for reform by commentators, and examines the legislative history resulting in the current law. The author asserts Congress made an informed decision albeit a poor one. The author recommends Congress revisit the issue and enact legislation to permit an individual to disclaim within a reasonable period of time after the later of occur of (1) becoming aware of the future interest or (2) the future interest becoming indefeasibly fixed.

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* All Rights Reserved, 2014. The author wishes to express special thanks to Jonathan Blattmachr for proposing that consideration be given to this topic. The views expressed herein are those of the author and not that of any organization or business entity.

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Introduction[1]

For over two hundred years, the law has permitted individuals to disclaim a gift or devise.[2] As aptly stated by a court in 1819: "[t]he law

[1] This article focuses on a narrow issue involving disclaimers. For a general understanding of disclaimers see the following: (1) 6 William J. Bowe & Douglas H. Parker, Revised Treatise Page on the Law of Wills ch. 49 (1962); (2) William P. LaPiana, *Some Property Law Issues in the Law of Disclaimers*, 38 Real Prop. Prob. & Tr. J. 207 (2003); (3) Ronald A. Brand & William P. LaPiana, American Bar Ass'n, Disclaimers in Estate Planning: A Guide to Their Effective Use (1990); (4) C.P. Jhong, Annotation, *What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest*, 93 A.L.R.2d 8 (1964); (5) L.S. Groff, Annotation, *Beneficiary's Right to Disclaim or Renounce Spendthrift Trust Prior to Acceptance*, 14 A.L.R.3d 1437 (1967); and (6) R.E.H., Annotation, *Right to Accept One Devise or Bequest Under Will and Renounce Another*, 91 A.L.R. 607 (1934).

[2] *See* Townson v. Tickell, (1819) 106 Eng. Rep. 575 (K.B.); 3 B. & ALD. 31 (Abbot, C.J.). A disclaimer is also referred to as a "renunciation" in the literature. *See id.*

is certainly not so absurd as to force a man to take an estate against his will."[3] Unfortunately, while individuals may disclaim under governing state law, federal tax law requires an individual to accept or reject gifts and devises years, often decades, before the person receives the expected inheritance.[4] Unless the recipient is a minor, disclaimers must be made within nine months of a trust's creation even though the individual may have no current right to enjoy the income and principal of the trust, even though the individual may never receive any benefit from the trust and even though the person may be unaware of the existence of the inheritance.[5] This article examines the historical framework, which finally resulted in Congress enacting legislation, which economically precludes many taxpayers from disclaiming.[6] I conclude that Congress considered various alternatives and intentionally adopted the requirement that individuals must disclaim within nine months of the creation of the interest. While I believe Congress made an informed decision, I argue that the nine-month period should run from the time that the person is presented with a current possessory interest. I recommend that Congress revisit the issue and enact legislation to permit individuals nine months in which to disclaim after the interest becomes possessory before facing tax consequences.

I. Historical Development

A. Common and Statutory State Disclaimer Laws Pre – TRA '76

For over two hundred years, the law has clearly recognized the right of an individual to disclaim a gift or devise.[7] Disclaimers are based on the concept that a person cannot be forced to accept property he or she doesn't want.[8] Generally, a donee must accept a gift before it is complete.[9] Likewise, a devisee must accept or be deemed to have accepted

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3 *Id*. at 576-77.

4 *See* I.R.C. §2518(b)(2).

5 *Id.* §2518(b)(2)(B).

6 While the taxpayer may be able to disclaim under the governing state law, the disclaimer will not be recognized as a "qualified disclaimer" under I.R.C. §2518. The taxpayer will be deemed to have made a taxable gift even though under state law they have disclaimed the property. The taxpayer will thus have a tax cost without the inherited property to pay the gift tax. The tax cost makes it costly, and in many cases, prohibits the taxpayer from disclaiming.

7 John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 316 & nn. 1-2 (1979).

8 *Id.* at 318; *See also* Jewett v. Comm'r, 455 U.S. 305, 323 (1982) (Blackmun, J., dissenting); Joan B. Ellsworth, *On Disclaimers: Let's Renounce I.R.C. Section 2518*, 38 Vill. L. Rev. 693, 694 (1993).

9 Restatement (Second) of Prop.: Donative Transfers § 31.1 (1992); *see also Jewett*, 455 U.S. at 323; Ellsworth, *supra* note 8, at 694.

a devise in order for the devise to be effectuated.[10] This freedom to disclaim did not apply however if the property passed by intestacy.[11] Under the common law, in intestacy, title immediately vested in the heirs upon the decedent's death.[12] The heirs could not disclaim.[13] To overcome this common law provision, many of the states enacted legislation specifically granting intestate heirs the right to disclaim.[14]

Under the common law and the disclaimer statutes in place in many states before 1976, a donee, devisee and intestate taker had to disclaim within a reasonable period of time.[15] Generally, as to outright devises and inheritances, the time period ran from the time in which the person became aware of the devise or inheritance.[16] A person who failed to disclaim within a reasonable period of time was deemed under the law to have accepted.[17] What constituted a reasonable time depended on the governing state law and the nature of the devise or gift.[18] In certain states, the individual had as short as four months in order to disclaim an outright devise, while in one state the person had fourteen years.[19]

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10 *See* People v. Flanagin, 162 N.E. 848, 849-50 (Ill. 1928) ("The law is clear that a legatee or devisee is under no obligation to accept a testamentary gift. It seems clear that the law does not compel a man to accept an estate, either beneficial or in trust, against his will, while it may reasonably presume, in the absence of evidence, that an estate has been accepted, especially where it is beneficial in its character. . ..It is hardly necessary to add that no one can make another the owner of an estate against his consent by devising it to him. . ..") (quoting Burritt v. Silliman, 13 N.Y. 93, 96 (1855) (internal quotation marks omitted); 3 Washburn on Real Prop. § 2478 at 506 (6th ed. 1902)); *see also* Dare v. New Brunswick Trust Co., 194 A. 61, 62-63 (N.J. Ch. 1937).

11 Bowe & Parker, *supra* note 1, § 49.1; *see also* K.A. Drechsler, Annotation, *Renunciation of Benefit Under Statute of Descent and Distribution*, 170 A.L.R. 435, 436 (1947). For a lengthy analysis of the English and American historical development of the law, see Christian Marius Lauritzen, II, *Only God Can Make An Heir*, 48 Nw. U. L. Rev. 568, 569-82 (1954).

12 Bowe & Parker, *supra* note 1, § 49.1.

13 Lauritzen, *supra* note 11, at 572-73; *see also* Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act,* 29 Fla. St. U. L. Rev. 109, 112 (2001).

14 Bowe & Parker, *supra* note 1, § 49.1. For a list of the states that had statutes in place in 1978, see Martin, *supra* note 7, at 319 n.12.

15 Bowe & Parker, *supra* note 1, § 49.8; *see also* Helene S. Shapo, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 170 (Thomson Reuters/West ed., 3d ed. 2012).

16 *See* Bowe & Parker, *supra* note 1, § 49.8; *see also* Shapo, Bogert, & Bogert, *supra* note 15, § 170 & n.2.

17 *See* Bowe & Parker, *supra* note 1, § 49.8.

18 Martin, *supra* note 7, at 321.

19 Note, *Taxation: Disclaimers Under Federal and Minnesota Law*, 51 Minn. L. Rev. 907, 920 (1967).

Common and statutory law was uniform on when a future interest had to be disclaimed.[20] To illustrate, assume grantor's will establishes a trust which directs all the net income be distributed to a surviving spouse, W, for W's life and upon W's demise, the trust is to be distributed outright to the grantor's son, A, if he survives W, and if not, then the trust is to be distributed to A's then living issue. W has a vested interest in the trust; W is entitled to current enjoyment of the trust income. Grantor's son, A, either has a vested interest subject to divestment contingent on surviving W, or a contingent interest.[21] A's issue have a contingent interest. Neither A nor A's issue have the right to current possession or enjoyment of the trust. Prior to 1976, every state statute permitted A and A's issue a reasonable period of time to disclaim after being presented with enjoyment of the trust.[22] The time to disclaim did not run from the time of the creation of the interest. Nor did the time run from the time of knowledge of the interest. Rather, the beneficiary had a reasonable time to disclaim after being presented with a current possessory interest.[23]

B. Federal Tax Law Pre - TRA '76

Before the changes brought by the Tax Reform Act of 1976, several sections of the Internal Revenue Code ("IRC") set forth the federal tax treatment of disclaimers.[24] IRC § 2056(d)(2) provided that a disclaimer executed within a reasonable period of time and valid under state law which resulted in property passing to a surviving spouse was deemed to be a transfer by the decedent with a resulting marital deduction.[25] Section 2055(a) contained a similar provision for property passing to charity as a result of a disclaimer executed within a reasonable period of time and valid under state law. Sections 2041(a)(2) and 2514(a) provided a disclaimer or renunciation of a general power of appointment was not deemed a taxable event. If the disclaimer was not valid under state law, it was not treated as a disclaimer for federal tax purposes.[26] State law primarily determined the effect of a disclaimer for federal tax purposes.[27]

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[20] Shapo, Bogert, & Bogert, *supra* note 15, § 171 at 246. *See also infra* text accompanying note 60.

[21] *See* Jewett v. Comm'r, 455 U.S. 305, 322 (1982) (Blackmun, J., dissenting).

[22] Martin, *supra* note 7, at 321.

[23] *Id.* at 321 n.22.

[24] *Id.* at 321 n.18.

[25] H.R. 438, 80 Stat. 872, Pub. L. 89-621 (Oct. 4 1966) (codified as amended in I.R.C. § 2056(d)(2).

[26] Ellsworth, *supra* note 8, at 695-96.

[27] Doris D. Blazek & Philip L. O'Donoghue, *Use of Disclaimers in Post-Mortem Planning*, *in* 1 N.Y.U. Proc. Fortieth Inst. on Fed. Tax'n, § 7.02[1], at 7-4 (Nicolas

Treasury Regulations § 25.2511-1(c) provided that a disclaimer had to be valid under state law and had to be executed within a reasonable period of time after knowledge of the existence of the transfer.[28] As to a future interest, the issue arose as to when the pertinent "transfer" occurred. The Regulations did not define whether the creation of the trust constituted the relevant "transfer" or whether the relevant "transfer" occurred when the remainder beneficiary was entitled to a distribution from the trust. In fact, Justice Stevens, writing the opinion of the majority in the U.S. Supreme Court decision of *Jewett v. Commissioner*, noted "[b]oth positions find support in the language of the Regulation."[29] In the earlier decision of *Keinath v. Commissioner*, the Eight Circuit Court of Appeals held that the Treasury Regulations deferred to state law to determine whether the disclaimer was executed within a reasonable time period.[30] In *Jewett,* the U.S. Supreme Court held the Treasury Regulations required a federal test of reasonableness.[31]

Liakas ed., 1982); Brand & LaPiana, *supra* note 1, at 48; Ellsworth, *supra* note 8, at 696.

[28] Former Treas. Reg. §25.2511-1(c) (1958) provided:

> The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further §25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. . .. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. 23 Fed. Reg. 8,904, 8,909-10 (Nov. 15 1958).

[29] Jewett v. Comm'r, 455 U.S. 305, 311 (1982). See *infra* Part III.C. for an analysis of this case.

[30] Keinath v. Comm'r, 480 F.2d 57, 61 (8th Cir. 1973), *overruled by* Jewett v. Comm'r, 455 U.S. 305 (1982). See *infra* Part I.C.9. for an analysis of this case.

[31] *Jewett*, 455 U.S. at 310-11, 316. See *infra* Part III.C. for an analysis of this case.

C. Call for Legislative Reform

1. *H.R. 11450 (October 6, 1965)*

Beginning in the 1960s, individuals began to call for legislative reform of the federal tax treatment of disclaimers.[32] H.R. 11450, introduced on October 6, 1965, at the request of the American Bar Association, proposed adding a new section 2518 to the Internal Revenue Code.[33] The following explanation was given:

> Certain cases have held that renunciation or disclaimers of property received by inheritance are transfers subject to estate and gift tax . . . . The differences in result are considered undesirable from the standpoint that similar transactions are not now treated uniformly for estate and gift tax purposes. Uniformity seems desirable regardless of whether the property interest in question passes from the estate of a decedent dying testate or intestate, and regardless of the State law applicable to the passage of title at death.[34]

The proposed law was directed at providing uniform federal tax treatment for property passing either testate or intestate. The proposed statute did not speak to future interests.

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[32] In fact, one of the earliest calls for reform dates to 1950. Note, *Disclaimers in Federal Taxation*, 63 HARV. L. REV. 1047, 1051 (1950) ("Explicit Code definition of what constitutes a disclaimer sufficient to prevent the property from being treated for estate and gift tax purposes as owned by the disclaimant would minimize the use of disclaimers for tax evasion and eliminate the present possibility of discrimination based on local property law. The Code should at least require that a disclaimer be made within a specified short period, in a writing delivered to all persons thereby affected."); Note, *supra* note 19, at 921 ("Disclaimers should be taxed in some uniform manner."); *see also* Lawrence Newman & Albert Kalter, *Disclaimers of Future Interests: Continuing Problems and Suggested Solutions*, 49 NOTRE DAME LAW. 827, 837, 840 (1973-1974) (calling for a federal disclaimer statute and suggesting that the reasonable period of time to disclaim for a future interest begin at the time the future interest becomes possessory by the individual).

[33] *See* STAFF OF H. COMM. ON WAYS AND MEANS, 89TH CONG., EXPLANATION OF H.R. 11450, A BILL INTRODUCED AT THE REQUEST OF THE AMERICAN BAR ASSOCIATION AND CONTAINING ITS RECOMMENDATIONS FOR CHANGES IN THE INTERNAL REVENUE CODE § 72 (Comm. Print 1965).

[34] *Id.*; *see also* AM. BAR ASS'N, REVISED EXPLANATION OF H.R. 11450, A BILL INTRODUCED AT THE REQUEST OF THE AMERICAN BAR ASSOCIATION CONTAINING ITS RECOMMENDATIONS FOR CHANGES IN THE INTERNAL REVENUE CODE AND SUBSEQUENT RECOMMENDATIONS ADOPTED BY THE AMERICAN BAR ASSOCIATION IN 1965 AND 1966 § 72 (1967).

2. *ALI Project*

At its annual meeting in 1968, the American Law Institute formally adopted a report by A. James Casner, titled "Reporter's Study of Dual Tax System and Unified Tax"[35] (hereinafter the "ALI Project"). Section K of the report publication is entitled "The Disclaimer Problem." The report recommends that the Internal Revenue Code define what constitutes a disclaimer so that the federal transfer tax consequences can be clearly determinable:

> The Internal Revenue Code, under either a dual tax system or a unified tax, should define what constitutes a disclaimer. Timely redirection of the destination of a property interest should be regarded as a disclaimer for the purpose of determining the transfer tax consequences of the original transfer, under either a dual tax system or a unified [transfer] tax.[36]

The report did not address the time period in which an individual with a future interest must disclaim. Notably, the Report recommended a disclaimant be permitted to direct to whom the property would pass.[37]

3. *ABA Model Act*

In 1968, a Special Committee on Disclaimer Legislation of the Real Property, Probate and Trust Law Section of the American Bar Association issued a report containing a Model Disclaimer Act (hereinafter the "ABA Model Act") to be submitted to the National Conference of Commissioners on Uniform State Laws.[38] The committee noted that it is "generally agreed that a state statute is the best way to achieve a workable, effective law governing disclaimers."[39] The committee noted that

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[35] A. James Casner, *Reporter's Study of Dual Tax System and Unified Tax*, *in* FED. EST. AND GIFT TAX'N: RECOMMENDATIONS OF THE A.L.I. AND REP. STUD. 58 (1968).

[36] A.L.I., *Recommendations of the American Law Institute with Respect to Federal Estate and Gift Taxation*, *in* FED. EST. AND GIFT TAX'N: RECOMMENDATIONS OF THE A.L.I. AND REP. STUD. 40-41 (1968).

[37] *Id.* at 40.

[38] Special Comm. on Disclaimer Legis., *Disclaimer of Testamentary and Nontestamentary Dispositions – Suggestions for a Model Act*, 3 REAL PROP. PROB. & TR. J. 131, 132 (1968) [hereinafter 1968 *Suggestions for a Model Act*]. In 1969, the Special Committee on Disclaimer Legislation of the Real Property, Probate and Trust Law Section of the American Bar Association issued a final report containing Model Disclaimer Act to be submitted to the National Conference of Commissioners on Uniform State Laws. Special Comm. on Disclaimer Legislation, *Disclaimer of Testamentary and Nontestamentary Dispositions – Suggestions for Model Acts*, 4 REAL PROP. PROB. & TR. J. 658, 659 (1969) [hereinafter 1969 *Suggestions for a Model Act*]. The pertinent sections concerning when an individual with a future interest could disclaim were left unchanged. *Compare id.* at 663-64; *with* 3 REAL PROP. PROB. & TR. J., *supra*, at 133-34.

[39] 1968 *Suggestions for a Model Act*, *supra* note 38, at 131.

some of the reasons for a model act are to authorize the disclaimer of future interests and to specify a time in which an individual must disclaim.[40]

Section 2 of the ABA Model Act provided:

> Section 2. TIME AND PLACE OF FILING. The instrument specified in section 1 shall be filed within [10] months after the death of the decedent or the donee of the power, as the case may be, or if the taker of the property or interest is not then finally ascertained or his interest has not become indefeasibly fixed both in quality and in quantity, then not later than [10] months after the event when the taker has become finally ascertained and his interest has become indefeasibly fixed both in quality and in quantity.[41]

The ABA Model Act did not require that the individual have knowledge of the property interest. However, since the time period did not begin to run until the interest was indefeasibly fixed, it is more likely that the person would be notified of the interest. The ABA Model Act did not contain an exception for individuals suffering a disability, such as minority. The comments indicate that an exception is not given in such circumstances because a disclaimer can be accomplished by court petition on behalf of those suffering disabilities.[42]

4. *1969 Committee Hearings*

On February 5, 1969, the Committee on Ways and Means of the U.S. House of Representatives and the Committee of Finance of the U.S. Senate jointly published a report titled "Tax Reform Studies and Proposals U.S. Treasury Department"[43] (hereinafter the "1969 Treasury Proposals"). The report attached studies and proposals regarding tax reform. The Report included a report prepared by a committee chaired by the former Secretary of the Treasury, Henry H. Fowler, which contained the following comment on disclaimers:

> [R]ules governing disclaimers of transferred interests will be more specifically detailed than in [existing] law. A transferee will be entitled to disclaim all or part of an interest within 15 months after the transfer, or within 6 months after he learns of the transfer, [whichever] period ends later, if he has not know-

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40 *Id.* at 131-32.
41 *Id.* at 134.
42 *Id.* at 137.
43 STAFF OF H. COMM. ON WAYS AND MEANS & S. COMM. ON FIN., 91ST CONG., TAX REFORM STUDIES AND PROPOSALS U.S. TREASURY DEPARTMENT (Comm. Print 1969).

> ingly accepted any benefits from or exercised control over the property.[44]

Unfortunately, the written comments did not have attached proposed statutory language. The key question is when a "transfer" occurs for purposes of a future interest, when the trust was created or when the life income beneficiary dies. The Treasury's Proposal did not provide any insight into this question. Importantly, the Proposal permits an individual six months to disclaim after knowledge of the transfer.[45]

5. *Uniform Probate Code (1969)*

In 1969, the National Commissioners on Uniform State Laws accepted the recommendations of the ABA Model Act but narrowed the time in which to disclaim to six months after the interest was finally ascertained rather than the ten months set forth in the ABA Model Act.[46]

6. *American Bankers Proposal*

In 1973, the American Bankers Association weighed into transfer tax reform by issuing a report titled: "American Bankers Association, Discussion Draft of Transfer Tax Statute and Explanatory Comments"[47] (hereinafter the "American Bankers Proposal"). Most of its report is dedicated to proposals to enact a generation-skipping transfer tax, unify the gift and estate tax, and modify the marital deduction statutes. Section 16 of the report contains the following statutory proposal concerning disclaimers:

> Section 16. Disclaimers. (a) General Rule. – If an individual makes a disclaimer, as defined in subsection (b), in whole or in part with respect to an interest in property, he shall not thereby be deemed to have made a transfer under this chapter or to have possessed the interest for the purposes of this chapter. (b) Definition. – The term "disclaimer" means the irrevocable and unqualified refusal in accordance with local law to

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[44] *Id.* at 365.

[45] *Id.*

[46] *See* Unif. Probate Code § 2-801(b) (1969) ("The writing specified in (a) must be filed within [6] months after the death of the decedent or the donee of the power, or if the taker of the property is not then finally ascertained not later than [6] months after the event by which the taker or the interest is finally ascertained.") (amended 1998). See *supra* Part I.C.3. for a discussion of the ABA Model Act.

[47] *General Tax Reform (Testimony From Administration and Public Witnesses): Public Hearings on the Subject of General Tax Reform Before the H. Comm. on Ways and Means*, 93d Cong. 3747-958 (1973) (American Bankers Association Discussion Draft of Transfer Tax Statute and Explanatory Comments).

> accept, in whole or in part, an interest in property, but only if (i) the refusal is by a written statement, made within 9 months of the interest becoming indefeasibly fixed and filed with the transferor, his legal representative, or the person who holds the legal title to the property to which it relates; and (ii) prior to the refusal, such individual has not waived his right to disclaim, or accepted the interest or its benefits.[48]

The Comments contain the following explanation concerning the statutory proposal:

> The disclaimer must be made within 9 months of the individual's interest becoming indefeasibly fixed . . . . The words of the subsection "indefeasibly fixed" are drawn from a Model Disclaimer Act drafted by a Special Committee on Disclaimer Legislation of the Real Property, Probate and Trust Law Section of the American Bar Association . . . . In describing the meaning of these words the Special Committee states: "The phrase . . . is intended to gear the commencement of the . . . period [within which a disclaimer may be made] to a time when the existence and extent of the disclaimant's interest are fully established and defined. The verb 'fixed' is employed rather than 'vested' to avoid the lack of precision in meaning which the term 'vested' involves." Under this provision an individual who holds a remainder or similar interest in property may, without, adverse transfer tax consequences, postpone renouncing his interest until it becomes fully possessory.[49]

The American Bankers Proposal permitted an individual nine months to disclaim after becoming indefeasibly fixed.

7. *1973 Committee Hearings*

On February 27, 1973, a panel discussion took place before the U.S. House Committee on Ways and Means.[50] James B. Lewis, a New York lawyer and member of the American Law Institute's Federal Estate and

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[48] *Id*. at 3781-82.

[49] *Id.* at 3921-22 (internal citation omitted). See *supra* Part I.C.3. for further analysis of the ABA Model Act.

[50] *See* Staff of H. Comm. on Ways and Means, 93d. Cong., Prepared Statements Submitted by Witnesses Invited to Appear Before the Committee on Ways and Means to Participate in Panel Discussions on Tax Reform: Panel No. 10 – Estate and Gift Tax Revision (Comm. Print 1973); *see also* Staff of H. Comm. on Ways and Means, 94th Cong., Background Materials on Federal Estate and Gift Taxation 80-86 (Comm. Print 1976) (containing oral and written statements from James B. Lewis of the House Committee on Ways and Means, 93d Congress).

Gift Tax Project, spoke and delivered written comments. His written comments note:

> The American Law Institute also recommends a uniform Federal disclaimer statute. Any beneficiary of a gift, bequest, devise or inheritance of property would have a limited period within which to renounce the bequest without having the renunciation treated as a taxable transfer. The vagaries of state law in this area, which have been a breeding ground for litigation, would be replaced by a uniform and understandable Federal rule applicable to all situations.[51]

The comment seems to suggest a single uniform time period. It should be borne in mind that the ALI Project would have permitted the disclaimant to direct to whom the property passed and did not specify a time period at all.[52] The ALI Proposal was submitted by the President of the American Bankers Association, Stetson B. Harman, as part of his presentation to the Committee on Ways and Means on March 29, 1973.[53]

8. *Uniform Disclaimer Acts (1973)*

In 1973, the Commissioners on Uniform State Laws promulgated The Uniform Disclaimer Acts (1973). The treatment of disclaimers was divided into two separate acts, to wit: (1) The Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and (2) The Uniform Disclaimer of Transfers Under Non-testamentary Instruments Act. For the most part, the two acts are identical. Section 2(b) of the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, provided:

> (b) An instrument disclaiming a future interest shall be filed not later than [6] months after the event that determines that the taker of the property or interest is finally ascertained and his interest indefeasibly vested.

The Comments provide:

> At common law, no specific time evolved within which disclaimer had to be made. The only requirement was that it be within a "reasonable" time . . . In the case of future interests the disclaimer period should run form the time that takers of

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51 STAFF OF H. COMM. ON WAYS AND MEANS, 94TH CONG., BACKGROUND MATERIALS ON FEDERAL ESTATE AND GIFT TAXATION 86 (Comm. Print 1976).

52 *See supra* Part I.C.2.

53 *General Tax Reform*, *supra* note 47, at 3733 (statement of Stetson B. Harman, President, American Bankers Association). Professor A. James Casner, Harvard Law School, also has spoke and presented the ALI Proposal as part of his written submissions. Professor Casner's written comments did not address disclaimers. Casner, *supra* note 35.

> the interest are finally ascertained and their interests indefeasibly fixed.

Section 2(a) of the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act contained an similar provision concerning the disclaiming of future interests.

9. *Keinath v. Commissioner*

The landmark case cited by Congress as illustrating the need for legislative reform is the U.S. Eighth Circuit Court of Appeals decision of *Keinath v. Commissioner*.[54] In *Keinath*, the trust provided the grantor's wife all of the net income for her life and directed that the trust property pass to the grantor's son if he survived his mother (grantor's wife), and if not, the property would pass to the son's issue who survived grantor's wife. Grantor's son served as co-trustee of the trust after its establishment following grantor's death. Nineteen years after the grantor's demise, grantor's wife died. Grantor's son executed a disclaimer within two months of his mother's demise. The Treasury argued that (1) a disclaimer made nineteen years after the disclaimant had become aware of the existence of the trust was not executed within a "reasonable time; " (2) its regulations required that the time period should be based on what is reasonable under a federally determined standard; and (3) the reasonable time period ran from the time the trust was established.[55] The court disagreed, noting since there was not a federal statute or regulation defining a reasonable time, one should look to state law to determine whether the disclaimer was executed within a reasonable time period.[56] The court concluded that under the governing state law, Minnesota, the time period in which to disclaim ran from the time of the mother's demise, not from the time of the trust's creation.[57] Since the son executed a disclaimer within two months of his mother's (the income beneficiary's) demise, the disclaimer was valid under state law and thus was valid under federal law since federal law deferred to the state. The court stated,

> [t]he appellants [taxpayers] maintain, without any refutation by the Commissioner, that all of the authorities who have considered this question have concluded that the time in which a remainder interest subject to divesture must be disclaimed commences upon the death of the life beneficiary, which in

[54] Keinath v. Comm'r, 480 F.2d 57 (8th Cir. 1973), *overruled by* Jewett v. Comm'r, 455 U.S. 305 (1982); See *infra* Part II for Congressional references to the case.

[55] *Keinath*, 480 F.2d at 60-61.

[56] *See Id*. at 61.

[57] *Id*. at 62.

> turn allows the remainder interest to be irrevocably fixed not subject to divestment. We have found no contrary authority and think that this is the prevailing common law rule, which also is sound in principle and reason. A remainder subject to divestment does not convey or transfer any actual control or current beneficial interest in property to the remainderm[e]n.[58]

The Court noted that the taxpayer

> had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary. When that event occurred he was in a position to accept or reject the gratuitous devise and would ordinarily be presumed to have accepted, absent an affirmative disclaimer executed in accordance with local law and in conformity with Treas. Reg. § 25.2511-1(c) respecting disclaimers.[59]

The Court noted the law uniformly ran the time period in which to disclaim a future interest from the time of the income beneficiary's demise.[60]

10. *America Bar Association Revised Proposal (1974)*

In 1974, the Committee on Estate and Gift Taxes of the American Bar Association recommended adoption of amendments to the Internal Revenue Code to address disclaimers.[61] The Recommendation proposed a new section 2518, which required delivery of a written disclaimer within nine months of the decedent's death for a present interest. With respect to a future interest, the disclaimer had to be executed "not later than nine months after the event when the taker of the interest is finally ascertained and his interest has become indefeasible."[62] The Committee notes,

> [t]he Recommendation would eliminate the undesirable situation illustrated in the *Keinath* case by providing a uniform federal standard for determining the time within which a disclaimer must be made. In the case of a future interest it

58 *Id*. at 64.

59 *Id.* See *infra* Part III.C. for a discussion of *Keinath* getting overturned by *Jewett v. Comm'r*, 455 U.S. 305 (1982). See James C. Crain, Note, *Federal Gift Tax—Section 2511—Holder of Vested Remainder Subject to Divestiture has Reasonable Time to Disclaim Interest After Death of Life Beneficiary.* Keinath v. Commissioner, *480 F.2d 57 (8th Cir. 1973)*, 51 Tex. L. Rev. 1430, 1433-36 (1973), for a criticism of *Keinath*.

60 *See supra* text accompanying note 58.

61 Comm. on Estate and Gift Taxes, *To Amend the Internal Revenue Code of 1953 to Provide for Estate and Gift Tax Treatment of Disclaimers,* 27 Tax Law. 811, 818 (1974).

62 *Id.* at 822-23.

would be within nine months after the event when the taker of the interest is finally ascertained and his interest has become wholly indefeasible. The result under that test would be the same as the one reached in *Keinath*.[63]

II. The Tax Reform act of 1976 (TRA '76)

In March 1976, the Committee on Ways and Means of the U.S. House of Representatives conducted public hearings on estate and gift tax reform. The Committee members were presented with background materials consisting of the following, among other items: (1) Statement of James B. Lewis before the Committee on Ways and Means on February 27, 1973;[64] (2) Tax Reform Studies and Proposals, U.S. Treasury Department, February 5, 1969;[65] (3) 1968 ALI Proposal;[66] and (4) American Bankers Association Discussion Draft of Transfer Tax Statute and Explanatory Comments.[67] Members of both the American Bankers Association and the American Law Institute spoke at the hearings and presented reports.[68] The American Bankers Association Discussion Draft proposed a statute which would permit an individual nine months after a future interest becoming indefeasibly fixed to disclaim.[69] The

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[63] *Id.* at 819.

[64] Staff of H. Comm. on Ways and Means, 94th Cong., Background Materials on Federal Estate and Gift Taxation 80-86 (Comm. Print 1976).

[65] Staff of H. Comm. on Ways and Means & S. Comm. on Fin., 91st Cong., Tax Reform Studies and Proposals, U.S. Treasury Department 183-85 (Comm. Print 1969).

[66] *Id*. at 311 *et. seq*; *See supra* Part I(C)(2) and note 35.

[67] *Id*. at 429 *et. seq; see supra* Part I(C)(6) and note 47.

[68] Thomas A. Melfe, Chairman of the Taxation Committee of the American Bankers Association, spoke on March 15, 1976 to the Committee, submitting the American Bankers Association Discussion Draft of Transfer Tax Statute. *See Pub. Hearings and Panel Discussions on the General Subject of Federal Estate and Gift Taxes Before the H. Comm. On Ways and Means*, 94th Cong. 48 (1976) (statement of Thomas A. Melfe, American Banker's Association). His oral and written comments did not address disclaimers. Harvard Law Professor A. James Casner, on behalf of the American Law Institute, spoke on March 23, 1976, delivering a copy of the ALI Proposal. *See supra* Part I(C)(2). *See also Pub. Hearings and Panel Discussions on the General Subject of Federal Estate and Gift Taxes Before the H. Comm. On Ways and Means*, 94th Cong. 1333 (1976) (statement of Prof. A. James Casner). Professor Casner's oral and written comments did not address disclaimers. While their oral and written comments did not reference disclaimers, the referenced supplemental submissions did address disclaimers. *See supra* Parts I(C)(2) and I(C)(6) for an analysis of both supplemental submissions.

[69] See *supra* Part I.C.6. for a discussion of the proposed statutory language of Section 16 of the American Bankers Association Discussion Draft of Transfer Statute and Explanatory Comments.

American Law Institute's proposal would allow a disclaimant to direct to whom the property passed.[70]

Section 10(b) of H.R. 14844, Estate and Gift Tax Reform Act, contained proposed disclaimer legislation.[71] The bill was referred to the Ways and Means Committee on July 26, 1976 and referred back to the House on August 2, 1976. The Report of the Committee of Ways and Means accompanying H.R. 14844 contains a lengthy discussion on disclaimers, with the following comments directed at the timing issue:

> For many of the estate and gift tax provisions described above, no specific time period is prescribed within which a disclaimer must be made in order to be recognized for Federal transfer tax purposes. Except in the case of the treatment of disclaimers affecting the estate tax marital or charitable deductions (which must be made before the due date), the disclaimer is required to be made within a "reasonable" time after the person disclaiming learns of the existence of his interest in a property transfer. In one case, a remainderman, who was aware of his interest, was considered to have made a disclaimer of his remainder interest within a "reasonable" time for gift tax purposes when he disclaimed shortly after the expiration of a life tenancy which had continued for 19 years after the grantor's death [footnote citation to *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973)]. The decision in this case might not apply in other cases involving the same facts depending upon the applicable local law . . . .Your committee believes that definitive rules concerning disclaimers should be provided for estate and

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[70] *See supra* Part I.C.2.

[71] The American College of Probate Counsel, now known as the American College of Trust & Estate Counsel, took the following position with respect to H.R. 14844:

> Disclaimer. Although no provisions dealing with disclaimers and renunciations appear in the Senate version, the House version contains a set of amendments to the Internal Revenue Code on this subject. The College believes that in light of the widespread adoption of the Uniform Disclaimer Act, proposed by the Commissioners on Uniform State Laws, the continued action of state legislatures in this area, and the fact that disclaimer is a postmortem planning devise used frequently for completely non-tax reasons, it is inappropriate to have these disclaimer provisions in the Internal Revenue Code. In any case, the proposed amendments in the House version will create a number of problems because they are inadequate, technically insufficient, and fail to take into consideration some of the more complex problems in this field. If they are to be retained in the final Bill they require considerable revision.

Am. C. Of Prob. Couns., *Position of the American College of Probate Counsel with Respect to the Estate and Gift Tax Amendments in Title XXII of HR 10612 and Also in HR 14844 Known as the "Estate and Gift Tax Reform Act of 1976"*, 3 PROBATE NOTES, Fall 1976, at 1, 12, 15 (message from the President)

> gift tax purposes to achieve uniform treatment. In addition, your committee believes that a uniform standard should be provided for determining the time within which a disclaimer must be made . . . . Under the bill, a "qualified disclaimer" means an irrevocable and unqualified refusal to accept an interest in property that satisfies four conditions. First, the refusal must be in writing. Second, the written refusal must be received by the transferor of the interest, his legal representative, or the holder of the legal title to the property not later than 9 months after the day on which the transfer creating the interest is made. However, if later, the period for making the disclaimer is not to expire in any case until 9 months after the day on which the person making the disclaimer has attained age 21.[72]

H.R. 10612, Tax Reform Act, which originally did not contain a provision concerning disclaimers, had passed the House on December 4, 1975. The U.S. Senate passed a tax reform bill on August 6, 1976.[73] In a joint Conference Committee, H.R. 14844 was rolled into H.R. 10612. A Conference Comparison on H.R. 10612 simply noted that the House Bill "[p]rovides a single set of definitive rules for disclaimers for purposes of estate, gift, and generation-skipping transfer taxes."[74]

H.R. 10612, incorporating the provisions of H.R. 14844, was signed by President Gerald Ford on October 4, 1976 and became Public Law 94-455. Section 2009 of Public Law 94-455 amended the Internal Revenue Code to add section 2518.[75] Under section 2518, if a person makes a

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[72] H.R. REP. NO. 94-1380 at 66-67 (1976) *reprinted in* 1976 U.S.C.C.A.N. 3356, 3420-21.

[73] S. REP. NO. 94-938, at 643 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4029, 2897.

[74] STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., CONFERENCE COMPARISON ON H.R. 10612: TAX REFORM ACT OF 1976, at 114 (Comm. Print 1976).

[75] Section 2518 as set forth in The Tax Reform Act of 1976, Pub. L. No. 94-455, §2009(b)(1), 90 Stat. 1893 (Codified as amended at I.R.C. § 2518), read as follows:

SEC. 2518. DISCLAIMERS

> (a) GENERAL RULE. For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
>
> (b) QUALIFIED DISCLAIMER DEFINED. For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if –
>
> (1) such refusal is in writing,
>
> (2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property, to which the interest relates not later than the date which is 9 months after the later of –

qualified disclaimer with respect to an interest in property, the person is not deemed to have made a gift. In order to constitute a qualified disclaimer, the disclaimer must be in writing and the writing must be "received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of – (A) the day on which the transfer creating the interest in such person is made, or (B) the day on which such person attains age 21."[76]

The Joint Committee on Taxation's General Explanation of the Tax Reform Act of 1976 is nearly identical to the Ways and Means Report accompanying H.R. 14844 with the following addition:

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes to a person other than the person making the disclaimer (without any direction on the part of the person making the disclaimer).

(c) OTHER RULES. For purposes of subsection (a) –

(1) DISCLAIMER OF UNDIVIDED PORTION OF INTEREST. A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) POWERS. A power with respect to property shall be treated as an interest in such property.

Section 2518(b)(4) was amended by section 702(m)(1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 to read as follows:

(b)(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer either –

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §426(a), 95 Stat. 171, 318 amended Section 2518 by inserting at the end thereof a new subsection (c)(3) to read as follows:

(c) CERTAIN TRANSFERS TREATED AS DISCLAIMERS. – A written transfer of the transferor's entire interest in the property –

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

PL 97–448, § 104, 96 Stat 2365 further amended the statute as follows:

(e) Amendment Related to Section 426.—, // 95 Stat. 318. // Paragraph (3) of section 2518(c) // 26 USC 2518. // (relating to disclaimers) is amended by striking out "For purposes of subsection (a), a" and inserting in lieu thereof "A".

No other amendments have been made to Section 2518 than those stated in this footnote.

[76] I.R.C. § 2518(b)(2). This subsection of §2518 has not been amended since its enactment in 1976. *See Id.*

> The Congress intended to make it clear that the 9-month period for making a disclaimer is to be determined in reference to each taxable transfer. For example, in the case of a general power of appointment, where the other requirements are satisfied, the person who would be the holder of the power will have a 9-month period after the creation of the power in which to disclaim and the person to whom the property would pass by reason of the exercise or lapse of the power would have a 9-month period after a taxable exercise, etc., by the holder of the power in which to disclaim. Further, in the case where the transfer is for the life of an income beneficiary with remainder to another person, both the life tenant and the remainderman would have to disclaim with the 9-month period after the transfer is made.[77]

Congress enacted disclaimer reform at the request of professional organizations.[78] The legislative history indicates that reform was sought to provide a level of uniformity as to federal disclaimer law. Congress sought to enact legislation to end the confusion caused by the "reasonable" time standard in Treas. Reg. §25.2511-1(c).[79] The *Keinath* case is mentioned in both the Congressional reports and the Joint Committee on Taxation's report as evidence of the degree of inconsistency in the law.[80] The legislative history provides no insight into why Congress required a disclaimer be executed within nine months of creation of the interest. The Congressional record contains no discussion of the equities of requiring a disclaimer be executed within a certain time period without regard to the possibility that the disclaimant may not be aware of the existence of the trust. Over a century of common law required that a disclaimant be given a reasonable time period after becoming aware of the inheritance before being forced to accept an inheritance.[81] The Tax Reform Act of 1976, without any written record discussing the issue, deemed an individual to have accepted an inheritance for tax purposes regardless of the fact that the person may not even be aware of the existence of the inheritance. In addition, the record contains no discussion as to the equities of requiring someone to disclaim an inheritance which they will not come into possession for years, and possible

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77 STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 591 (Comm. Print 1976).

78 Blazek & O'Donoghue, *supra* note 27, § 7.02[2], at 7-6.

79 *Id.* at 7-7. See *supra* note 28 for a reproduction of Treas. Reg. §25.2511-1(C).

80 H.R. REP. NO. 94-1380 at 66 & n.342 (1976) *reprinted in* 1976 U.S.C.C.A.N. 3356, 3420.

81 *See, e.g.*, Keinath v. Comm'r, 480 F.2d 57, 61-62 (8th Cir. 1973), *overruled by* Jewett v. Comm'r, 455 U.S. 305 (1982); Strom v. Wood, 164 P. 1100, 1102 (Kan. 1917); Perkins v. Isley, 32 S.E.2d 588, 591 (N.C. 1945).

decades, after the time period in which they are to disclaim. Since the gift tax treatment of a non-qualified disclaimer may be costly, TRA '76 essentially removed the common law right to disclaim for many taxpayers.

When considering changes to the federal treatment of disclaimers in 1976, Congress had before it numerous proposals from professional organizations. All of these proposals would have permitted a disclaimer to be executed within a period of time after the individual was presented with a current possessory interest.[82] Without any discussion or precedent of any nature, Congress enacted a statute, which ran the time period for all interests from the time of the interest's creation.[83]

III. Post TRA '76

A. Subsequent Modifications to IRC § 2518

Section 2518, as enacted in the 1976 Act, and as it remains today, requires that a disclaimer be executed within nine months of creation of the interest, unless an exception exists.[84] Section 2518 was amended by the Revenue Act of 1978 and the Economic Recovery Tax Act of 1981.[85] These amendments did not modify the timing requirement.

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82 See *supra* text accompanying notes 64-67.

83 I.R.C. § 2518(b)(2)(A); In Merle A. Wolfson, *Disclaimers–A Device Whose Time Has Come? Problems and Possibilities for the Elimination or Reduction of Estate and Gift Taxes by Post–Transfer Fine Tuning Under Section 2518*, 2 N.Y.U. 41st Ann. Inst. on Fed. Tax'n, § 43.03[3], at 43-8 (1983), the author notes:

> While the new statutory language clearly incorporates the requirement that the critical date for measuring the nine-month requirement be related to the date of the transfer creating the interest, the committee reports offer no explanation for adoption of such date. Congress was obviously disturbed by the assumed finding in the *Keinath* case that 19 years after knowledge of the transfer creating the interest did not constitute an unreasonable time. . .. Congress reversed *Keinath* with a vengeance. It made the date of the transfer creating the interest determinative, irrespective of whether or not the beneficiary was aware of its existence, thereby, exceeding even the restrictive language of the prior regulation. While Congress complained bitterly about the reasonableness issue, emphasizing it by twice identifying the term "reasonable" in quotes, it was totally silent with regard to the extraordinary policy change involved in adopting the date of the transfer creating the interest as the criteria and eliminating the knowledge requirement. Did Congress know what it was doing? It would appear unlikely.

84 I.R.C. § 2518(b)(2).

85 See *supra* note 75 for the changes made by § 2518 to these two acts.

B. Treasury Regulations § 25.2518-2

In 1986, the Treasury issued Final Regulations governing disclaimers to incorporate changes made by TRA '76.[86]

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[86] Qualified Disclaimers of Property, 51 Fed. Reg. 28365-1, 28371 (Aug. 7, 1986) (codified as amended in Treas. Reg. 25.2518-2) provides:

§ 25.2518-2 Requirements for a qualified disclaimer.

> (a) In general. For the purposes of section 2518(a), a disclaimer shall be a qualified disclaimer only if it satisfies the requirements of this section. In general, to be a qualified disclaimer—
> (1) The disclaimer must be irrevocable and unqualified;
> (2) The disclaimer must be in writing;
> (3) The writing must be delivered to the person specified in paragraph (b)(2) of this section within the time limitations specified in paragraph (c)(1) of this section;
> (4) The disclaimant must not have accepted the interest disclaimed or any of its benefits; and
> (5) The interest disclaimed must pass either to the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer.
>
> (b) Writing—(1) Requirements. A disclaimer is a qualified disclaimer only if it is in writing. The writing must identify the interest in property disclaimed and be signed either by the disclaimant or by the disclaimant's legal representative.
>
> (2) Delivery. The writing described in paragraph (b) (1) of this section must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession of such property.
>
> (c) Time limit—(1) In general. A disclaimer is a qualified disclaimer only if the writing described in paragraph (b) (1) of this section is delivered to the persons described in paragraph (b) (2) of this section no later than the date which is 9 months after the later of—
> (i) The date on which the transfer creating the interest in the disclaimant is made, or
> (ii) The day on which the disclaimant attains age 21.
>
> (2) A timely mailing of a disclaimer treated as a timely delivery. Although section 7502 and the regulations under that section apply only to documents to be filed with the Service, a timely mailing of a disclaimer to the person described in paragraph (b) (2) of this section is treated as a timely delivery if the mailing requirements under paragraphs (c) (1), (c) (2) and (d) of § 301.7502-1 are met. Further, if the last day of the period specified in paragraph (c) (1) of this section falls on Saturday, Sunday or a legal holiday (as defined in paragraph (b) of § 301.7503-1), then the delivery of the writing described in paragraph (b) (1) of this section shall be considered timely if delivery is made on the first succeeding day which is not Saturday, Sunday or a legal holiday. See paragraph (d) (3) of this section for rules applicable to the exception for individuals under 21 years of age.

(3) Transfer. For purposes of the time limitation described in paragraph (c)(1) (i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the taxable transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers for this purpose. With respect to transfers made by a decedent at death or transfers which become irrevocable at death, a taxable transfer occurs upon the date of the decedent's death. However, where there is a taxable transfer of an interest for Federal gift tax purposes and such interest is later included in the transferor's gross estate for Federal estate tax purposes, the 9-month period for making a qualified disclaimer is determined with reference to the earlier taxable transfer. In the case of a general power of appointment, the holder of the power has a 9-month period after the creation of the power in which to disclaim. A person to whom any interest in property passes by reason of the exercise or lapse of a general power may disclaim such interest within a 9-month period after the exercise or lapse. In the case of a nongeneral power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within a 9-month period after the original taxable transfer that created or authorized the creation of the power. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindermen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original taxable transfer. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remainderman must disclaim within 9 months of the transfer creating the interest, rather than 9 months from the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the taxable transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age.

(4) Joint property—(i) In general. Except as otherwise provided in paragraph (c)(4)(ii) of this section, a qualified disclaimer under section 2518(a) of an interest or any portion of an interest in a joint tenancy or a tenancy by the entirety must be made no later than 9 months after the transfer creating the tenancy. Thus, a surviving joint tenant cannot disclaim any part of the interest, including the survivorship interest, if more than 9 months have passed since the transfer creating the joint tenancy. In addition, a joint tenant cannot make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that tenant.

(ii) Tenancies in real property between spouses created before 1982. In the case of joint tenancies between spouses or a tenancy by the entirety in real

With one exception, a disclaimer must be executed within nine months of the creation of the interest.[87] The only exception to this nine-month requirement permits a minor nine months after turning twenty-one years of age to disclaim the interest.[88] The time period does not run until the transfer is complete for gift tax purposes.[89] If there is a trans-

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property created after 1976 and before 1982 where no election was made under section 2515, the surviving spouse must make a qualified disclaimer no later than 9 months after the date of death of the first spouse to die. Such a qualified disclaimer will be effective for—

(A) The entire joint interest (except any portion attributable to consideration furnished by the surviving spouse) if the date of death of the deceased spouse is before 1982; or

(B) One-half the value of the joint interest if the date of death of the deceased spouse is after 1981.

See examples (7) and (8) under paragraph (c)(5) of this section.

(5) Examples. The provisions of paragraphs (c)(1) through (c)(4) of this section may be illustrated by the following examples. For purposes of the following examples, assume that all beneficiaries are over 21 years of age.

Example (1). On May 13, 1978, in a transfer which constitutes a completed gift for Federal gift tax purposes, A creates a trust in which B is given a lifetime interest in the income from the trust. B is also given a nongeneral testamentary power of appointment over the corpus of the trust. The power of appointment may be exercised in favor of any of the issue of A and B. If there are no surviving issue at B's death or if the power is not exercised, the corpus is to pass to E. On May 13, 1978, A and B have two surviving children, C and D. If A, B, C or D wishes to make a qualified disclaimer, the disclaimer must be made no later than 9 months after May 13, 1978.

Example (2). Assume the same facts as in example (1) except that B is given a general power of appointment over the corpus of the trust. B exercises the general power of appointment in favor of C upon B's death on June 17, 1989. C may make a qualified disclaimer no later than 9 months after June 17, 1989. If B had died without exercising the general power of appointment, E could have made a qualified disclaimer no later than 9 months after June 17, 1989.

Example (3). F creates a trust on April 1, 1978, in which F's child G is to receive the income from the trust for life. Upon G's death, the corpus of the trust is to pass to G's child H. If either G or H wishes to make a qualified disclaimer, it must be made no later than 9 months after April 1, 1978.

Example (4). A creates a trust on February 15, 1978, in which B is named the income beneficiary for life. The trust further provides that upon B's death the proceeds of the trust are to pass to C, if then living. If C predeceases D, the proceeds shall pass to D or D's estate. To have timely disclaimers for purposes of section 2518, B, C, and D must disclaim their respective interests no later than 9 months after February 15, 1978.

[87] I.R.C. § 2518(b)(2)(A).

[88] *Id.* § 2518(b)(2)(B).

[89] Treas. Reg. § 25.2518-2(c)(3).

fer creating an interest in property during the grantor's life, which is complete for gift tax purposes and such interest is later included in the grantor's federal gross estate, the 9-month period runs from the date in which the gift was complete, rather than from estate tax inclusion.[90] As for future interests, the person must disclaim within nine months of the creation of the interest.[91] For example, assume a testamentary trust provides income to decedent's spouse for his remaining life with remainder to decedent's daughter, D, if D survives the decedent's spouse, and if not, then the remainder passes to D's then surviving issue, E and F. Under the Treasury Regulations, decedent's surviving spouse, D, E and F have nine months from the time of decedent's death to disclaim if they wish to disclaim.[92] The time period runs on vested interests, vested interest subject to divestment, and contingent interests in like manner. The remainder beneficiary of a testamentary qualified terminable interest property (QTIP) trust has within nine months of the creator's death to execute a qualified disclaimer.[93] The subsequent inclusion of the QTIP trust in the surviving spouse's estate does not begin a new time period for disclaiming.[94] The nine-month time period runs regardless of the individual's knowledge of the existence of the trust.

An individual, who is granted a power of appointment, whether general or specific, whether inter vivos or testamentary, must disclaim within nine months of the creation of the interest, unless the individual is a minor.[95] The person to whom property has been appointed as a result of the exercise of a general power of appointment and the default takers of a general power of appointment have a nine month period after the exercise, release, or lapse of general power of appointment to disclaim, regardless of whether the exercise, release, or lapse is subject to estate or gift tax.[96]

The person to whom property has been appointed as a result of the exercise of a non-general, also known as a "limited power of appointment," and the default takers of a limited power of appointment, must disclaim within the nine-month period that created or authorized the creation of the limited power of appointment.[97] This rule applies regardless of how broad or narrow the limited power is, provided the

[90] *Id.*
[91] *Id.*
[92] *See id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* Thus, for example, it is immaterial that the holder of the general power of appointment does not pay gift tax due to protection by the holder's applicable exclusion amount. *See id.*
[97] *Id.*

power is not considered a general power of appointment. Thus, the appointees of a power which may be exercised in favor of anyone other than the power holder, the power holder's estate or the creditors of the power holder's estate, have nine months in which to disclaim, even though the class of appointees would include every occupant of the globe, except those to whom the power holder has outstanding debt.[98]

C. *Jewett v. Commissioner*[99]

In *Jewett*, the Supreme Court was faced with facts extremely similar to those in *Keinath v. Commissioner*.[100] In *Jewett*, taxpayer's grandmother's will established a trust, which directed that all of the trust income be distributed to her husband, taxpayer's grandfather, during his life. Upon grandfather's death, the trust income was to be distributed to taxpayer's parents for their lives. Upon the death of the surviving parent, the trust was to be distributed equally to taxpayer and his brother if then living and if not, then to each of their issue. Grandmother died in 1939. Grandfather and taxpayer's father died prior to 1972. In 1972, when taxpayer was 45 years old, and 33 years after the trust was created, he attempted to disclaim his future interest in the trust. Taxpayer's mother was alive when the taxpayer executed the disclaimers so at the time that taxpayer executed the disclaimers he had not become indefeasibly vested in the trust.[101] Taxpayer never received any benefit from the trust and was not entitled to income or principal until his mother's death. His interest was vested subject to divestment or contingent at the time he executed the disclaimers. It was undisputed that the taxpayer had been aware of the existence of the trust for many years and that his disclaimers were valid under the governing state law.[102] Note, IRC § 2518 did not apply because the disclaimers were executed prior to its enactment.[103] Thus, before the Supreme Court issued its opinion, the new law had been in place for over six years.

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[98] Paul N. Frimmer, *Proposed Regs Under Section 2518 Explain and Expand the Federal Disclaimer Statute*, 53 J. TAX'N 266, 268 ("However, if the class of permissible appointees is so broad as to render it impossible to determine whether a potential individual will become an appointee, the rule is extremely harsh.").

[99] Jewett v. Comm'r, 455 U.S. 305 (1982).

[100] Keinath v. Comm'r, 480 F.2d 57 (8th Cir. 1973) *overruled by* Jewett v. Comm'r, 455 U.S. 305 (1982). See *supra* Part I.C.9. for a detailed analysis of *Keinath v. Comm'r*.

[101] *See Jewett*, 455 U.S. at 306. The taxpayer executed two disclaimers. Initially, he disclaimed 95% of his interest in the trust and subsequently executed a disclaimer of the balance of his interest in the trust. *Id.* at 306-07. Both *disclaimers* were executed before his mother died. *Id.*

[102] *Id.* at 310-11.

[103] The disclaimers were executed in 1972 while the statute was first enacted in 1976. *See id.* at 306; I.R.C. § 2518.

In my opinion, the case illustrates the court's extreme deference given to the Treasury's interpretation of its own regulations.[104] The Treasury argued its regulations required that a disclaimer be made within a reasonable time after the disclaimant became aware of the interest and that the term "reasonableness" should be determined under a federal standard.[105] The taxpayer argued that the same regulations required one to look to the applicable state law to determine what a reasonable period of time was. To give effect to the reasonableness requirement, Justice Stevens argued that it was necessary that the reasonableness time requirement be determined under federal law.[106] Justice Stevens stated "[t]he narrow question presented is whether the 'transfer' referred to in the Regulation occurs when the interest is created, as the Government contends, or at a later time when the interest either vests or becomes possessory, as argued by [the taxpayer]."[107] The court held the time ran from the time of trust creation.[108] Having reached that conclusion, the court went on to hold that a disclaimer executed 24 years after the beneficiary turned age 21 was not executed within a reasonable period of time.[109]

Interestingly the court applied the same test as set forth in IRC § 2518 as enacted in TRA '76. By deferring to the Commissioner's interpretation of its own ambiguous regulation, the court applied a time standard, which ran from the time of creation. The majority opinion did not examine whether it would be reasonable to apply such a standard.

Justice Blackmun, writing the dissenting opinion in which Justices Rehnquist and O'Connor joined, noted the ambiguity in the Regulations, and stated:

> The beneficiary of a contingent remainder or, as the Court seems to suggest here, *ante*, at [308], n. 5, of 'a vested remainder subject to divestiture,' however, may never realize anything by way of actual enjoyment of income or corpus. The contingencies upon which enjoyment depends may never ripen. In particular, the contingent beneficiary may die while

[104] In *Jewett,* 455 U.S. at 318, Justice Stevens writing the majority opinion states: "The Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect. This canon of construction, which generally applies to the Commissioner's interpretation of the Internal Revenue Code. . . is even more forceful when applied to Commissioner's interpretation of his own Regulation." Treas. Reg. §25.2511-1(c) was the Regulation at issue. *See supra* note 28 in which the Regulation is reproduced.

[105] *See Jewett,* 455 U.S. at 307.

[106] *See id*. at 316.

[107] *Id*. at 306.

[108] *See id*. at 311-12, 319.

[109] *See id.* at 318-19.

> the life beneficiary still lives. . . .[110] Petitioner has realized no benefit from the trust and never will have any benefit if he predeceases his mother. It is the contingency event that is important and makes sense in the consideration of any disclaimer. . . .[111] The law of disclaimer is founded on the basic property-law concepts that a transfer is not complete until its acceptance by the recipient, and that no person can be forced to accept property against his will. A transferor chooses the recipients of the transferred property; a disclaimant makes no such selection, for that selection has been made by the trustor. Petitioner's disclaimers merely renounced any future right to receive corpus of the trust; they did not direct or even purport to direct the future distribution of that corpus. . . .[112] The remainderman 'had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary'. . . .[113] There is nothing unfair or improper in allowing the remainderman to wait until the life beneficiary's death and then decide whether to accept the bequest. . . .[114] The Commissioner stresses repeatedly the number of years that elapsed between the death of the testatrix and the execution of the disclaimers. . . .But to require the disclaimer long before the interest could ripen into enjoyment means that the decision must be made at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest.[115]

The minority opinion is the better-reasoned opinion.

D. Legislative Proposals to Amend IRC § 2518

The harshness of Section 2518 has resulted in several proposed amendments to revise the effective date provisions. A Joint Committee on Taxation Report dated February 14, 1990 outlined a tax proposal which would permit an individual to disclaim within a specified period after the disclaimant's interest vests if the property interest was created prior to 1942.[116] Similar proposals were made in 1993 and 1995 with respect to interests created prior to November 15, 1958 if the disclaimer

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110 *Id.* at 322 (Blackmun, J., dissenting).
111 *Id.* at 323.
112 *Id.*
113 *Id.* at 325 (quoting Keinath v. Comm'r, 480 F.2d 57, 64 (8th Cir. 1973)).
114 *Id.*
115 *Id.* at 328.
116 Staff of Joint Comm. on Taxation, 101st Cong., Explanation of Miscellaneous Tax Proposals 28-30 (Joint Comm. Print 1990).

was made before May 22, 1972 and no later than a reasonable time after the interest vested or became possessory.[117] The Joint Committee comments to both bills note the May 22, 1972 date is the date of the U.S. Tax Court's decision in *Keinath v. Commissioner*.[118] These tax relief proposals were never enacted.

E. Uniform Laws Post -TRA '76

1. *Uniform Probate Code (1982)*

The 1982 revised Uniform Probate Code continued the same concept concerning the time in which to disclaim a future interest as its predecessor the Uniform Probate Code (1969).[119] It provided, in Subsection 2-801(b), the following:

> (2) An instrument renouncing a future interest may be filed not later than [9] months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested.[120]

The Comments provided,

> At common law, no specific time evolved within which disclaimer had to be made. The only requirement was that it be within a "reasonable" time . . . . As a result, divergent holdings were reached by the courts . . . . Subsection (b) fixes a definite time for filing of disclaimers. This approach follows the pattern of the Federal estate tax law which prescribed the time for filing estate tax returns in terms of the decedent's death. The time allowed should overlast the time for filing claims and contesting the will and enable the executor or administrator to know with certainty who the takers of the estate will be. On the other hand, it should not be so long as to work against an early determination of the acceptance or rejection of succession to an estate, or increase the risk of inadvertent acceptance of the benefits of the property, creating an estoppel. In the case of future interests the disclaimer period should run from the time the takers of the interest are finally ascertained and their interest indefeasibly fixed . . . . In the case of future inter-

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117 Staff of Joint Comm. on Taxation, 103d Cong., Description of Miscellaneous Tax Proposals 86 (Joint Comm. Print 1993); Joint Comm. on Taxation, 104th Cong., Description of Miscellaneous Tax Proposals 77 (Joint Comm. Print 1995).

118 Joint Comm. on Taxation, 1993, *supra* note 117, at 86 n.36; Joint Comm. on Taxation, 1995, *supra* note 117, at 77 n.42. See *supra* Part I.C.9. for an analysis of *Keinath v. Commissioner*.

119 *See supra* Part I.C.5.

120 Unif. Probate Code § 2-801(b) (1982).

> ests it should be noted that the person need not wait until the occurrence of the determinative event before filing a disclaimer, but may do so at any time after the death of the decedent or donee, so long as it is made "not later than" the prescribed period . . . . A "reasonable time" for gift tax purposes is not defined in the Code or regulations. It has been held that the courts will look to the law of the states in determining the question . . .[121]

The 1990 revision to the Uniform Probate Code continued the provision of the 1982 Act that a disclaimer of a future interest had to be disclaimed within nine months "after the event determining that the taker of the property or interest is finally ascertained and his [or her] interest is indefeasibly vested."[122]

2. *Uniform Disclaimer of Property Interests Acts (1978)*

The Uniform Disclaimer of Property Interests Act (1978) (hereinafter the "UDPIA (1978)") divided the disclaimer provisions into three acts, to wit: (1) The Uniform Disclaimer of Property Interests Act (1978), (2) Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) and (3) The Uniform Disclaimer of Transfers Under Non-Testamentary Instruments Act (1978). For the most part, the provisions of each act are identical.

The Prefatory Note to the UDPIA (1978) provides,

> As respects the time for making disclaimer, the common law imposed only a requirement of reasonableness. The Conference concluded that a specific period had merit and suggests 9 months. The longer the time allowed, the greater the risk of conduct inconsistent with rejection of the gift and indicative of implied acceptance; the shorter the time allowed, the greater the risk of not having full information for intelligent action.

Section 2(b) of the Uniform Disclaimer of Transfers Under Non-Testamentary Instruments Act provides that a future interest arising under a non-testamentary instrument may be disclaimed

> not later than [9] months after the event determining that the taker of the property or interest has become finally ascertained and his interest indefeasibly vested. If the person entitled to disclaim does not have actual knowledge of the existence of the interest, the disclaimer shall be delivered not later than [9]

[121] *Id.* § 2-801(b) cmt. Background (citing Keinath v. Comm'r, 480 F.2d 57, 61 (8th Cir. 1973).

[122] Unif. Probate Code § 2-801(b)(2) (1990).

> months after he has actual knowledge of the existence of the interest.

Section 2(c) of the Uniform Disclaimer of Transfers Under Non-Testamentary Instruments Act provided that a disclaimer made after December 31, 1976 and subject to the federal transfer tax had to be made within nine months of the later of the date the transfer is made or the day on which the person disclaiming attains age 21. The Prefatory Note indicates:

> As to the time for making disclaimer, the Acts incorporate the time requirements of Section 2518 only for disclaimers which are subject to that Section and which specifically state that they are intended to qualify thereunder; the preexisting (and generally more liberal) time requirements have been retained for disclaimers not subject to that Section or not intended to qualify thereunder.

Both the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978) and the Uniform Disclaimer of Transfers Under Non-Testamentary Instruments Act (1978) tract the language of sections 2(b) and 2(c) of the Uniform Disclaimer of Transfers Under Non-Testamentary Instruments Act.[123]

3. *Uniform Disclaimer of Property Interests Acts (1999)*

In 1999, the Commissioners on Uniform State Laws adopted the Uniform Disclaimer Property Interests Acts (1999). Section 13 of the Uniform Disclaimer of Property Interests Act establishes the only bar to a disclaimer by providing,

> (b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:
>
> (1) the disclaimant accepts the interest sought to be disclaimed;
>
> (2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or
>
> (3) a judicial sale of the interest sought to be disclaimed occurs.

[123] *See* Unif. Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978); Unif. Disclaimer of Transfers Under Non-Testamentary Instruments Act (1978); Unif. Disclaimer of Transfers Under Non-Testamentary Instruments Act § 2(b)-(c) (1978).

4. *Uniform Disclaimer of Property Interests Acts (2002)*[124]

The current revised Uniform Disclaimer of Property Interests Act (2002, last revised or amended 2010), notes: "[b]ecause a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer."[125]

Section 5(a) provides "[a] person may disclaim, in whole or part, 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." The Comment to section 5(a) notes,"[t]his provision follows from the principle behind all disclaimers – no one can be forced to accept property – and extends that principle to powers over property."

Section 6(a)(1) defines a "future interest" as "an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation." Section 6(a)(2) defines the "time of distribution" as "when a disclaimed interest would have taken effect in possession or enjoyment."[126]

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[124] See Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 Real Prop. Tr. & Est. L.J. 325 (2011), for a discussion of which states have enacted the statute and what modifications the adopting states have made to the Uniform Statute.

[125] Unif. Disclaimer of Prop. Interests Acts, prefatory note, at 1 (amended 2010).

[126] The Comment to Section 6 provides:

> The second defined term, "time of distribution," is used in determining to whom the disclaimed interest passes (*see* below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, if B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

Id. § 6 cmt. at 170-71

IV. Analysis

A. Individuals Should Be Able to Disclaim

For centuries the common law has recognized the right of a person to refuse to accept a gift or devise.[127] The law was premised on the concept that an individual could not be forced to take an asset he or she did not want.[128] The only exception to this fundamental right involved property passing by intestacy.[129] The common law forbade an intestate heir from disclaiming.[130] This exception to the general rule rested on principles developed centuries ago in England based on principles that had no real application in the United States.[131] Some commentators have asserted that the right to disclaim is a fundamental property right.[132] Individuals should not be forced to accept assets they do not want; instead, individuals should be able to disclaim.[133]

B. Beneficiaries Should Have a Reasonable Time to Disclaim

The common law granted donees and devisees a reasonable period of time to disclaim.[134] Individuals were permitted a reasonable time to disclaim after their interest became indefeasibly vested or possessory.[135] The UDPIA (1978) permits an individual, within nine months of becoming indefeasibly invested in a future interest, to disclaim.[136] The

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127 *See supra* note 2 and accompanying text.

128 *See supra* note 8 and accompanying text.

129 *See* Bowe & Parker, *supra* note 1, § 49.1; *see also* K.A. Drechsler, *supra* note 11.

130 *See* Bowe & Parker, *supra* note 1, § 49.1.

131 As noted by Christian Marius Lauritzen, II, landowners had a duty in feudal England to defend the crown. It was important for land to devolve quickly and clearly upon death so the defense obligation could pass immediately to the devisee. *See* Lauritzen, *supra* note 11, at 569-70.

132 *See* Edward T. Roehner & Sheila M. Roehner, *Renunciation as Taxable Gift – An Unconstitutional Federal Tax Decision*, 8 Tax L. Rev. 289, 294 (1952-53).

133 In Note, *Taxation*, *supra* note 19, at 908-09, the author notes:

> The traditional argument for allowing tax-insulated disclaimers is that a person should not be forced to accept property with the concomitant burdens and responsibilities inherent in ownership. Therefore, he should have the right of rejection without being subject to a gift tax liability. Since any tax on a disclaimer would have to be predicated on control over the property rather than enjoyment or possession, it is arguably unfair to predicate tax liability on control limited to the choice of accepting an interest or allowing it to pass to those entitled to take as a result of the disclaimer.

Id; See also S. Alan Medlin, *An Examination of Disclaimers Under UPS Section 2-801*, 55 alb. l. rev. 1233, 1234 (1992) ("The conceptual justification underlying the recognition of a disclaimer is manifestly simple: a person should be able to refuse a gift.").

134 *See supra* note 15 and accompanying text.

135 *See* Martin, *supra* note 7, at 323 n. 29.

136 *See supra* Part III.E.2.

UDPIA (1999) does not contain a time restriction on when a disclaimer must be executed.[137] Rather, an individual must disclaim before acceptance.[138] Numerous states have adopted the UDPIA (1999) or subsequent versions thereof.[139] Individuals should have a reasonable period of time in which to disclaim.

C. The Time in Which to Disclaim Should Not Begin Until the Recipient Is Aware of the Interest

Prior to TRA '76, Treas. Reg. § 25.2511-1(c) permitted an individual a reasonable time to disclaim after knowledge of the interest.[140] IRC § 2518 does not require knowledge. Under § 2518, the period of time in which to execute a qualified disclaimer expires nine months from the time of the creation of the interest with the sole exception being that a minor has an extended time period in which to disclaim.[141] There is no logical justification for running the time period in which to disclaim on an individual who is not even aware of the existence of the trust.[142] If the time to disclaim has run before an individual is aware of the property transfer, practically speaking they are precluded from disclaiming because of the gift tax ramifications of disclaiming. It seems unjust to

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137 *See supra* Part III.E.3.

138 *See supra* Part III.E.3.

139 *See* Unif. Disclaimer of Prop. Interests Act (2010), *available at* http://www.uniformlaws.org/Act.aspx?title=Disclaimer of Property Interests Act (last viewed Apr. 23, 2014).

140 See *supra* note 28, which reproduces the Regulations.

141 I.R.C. § 2518(b)(2)(A)-(B).

142 The following comments by George M. Schain, *The Effective Disclaimer*, 34 cath. u. l. rev. 19, 29 (1984) provide:

> Although the termination of the distinction between present and future interests may promote consistent treatment among taxpayers, this interpretation of section 2518 places an extremely harsh burden on the holder of a contingent remainder interest. The section forces the holder to make a decision to accept or refuse property he may never own. Furthermore, section 2518 requires that the holder of the future interest evaluate the potential appreciation or depreciation of a piece of property he may not receive until many years later when his financial status may be substantially different from his present situation. This is especially burdensome when one considers the fact that knowledge is not longer necessary to trigger the time period for disclaiming.
>
> Theoretically, a person would have to write a disclaimer to each of his relatives and friends every nine months to avoid being subject to ownership of those interests. Although an absurd example, this clearly illustrates the unfair position in which section 2518 places the holder of a future interest without knowledge. It seems that such a situation cannot be justified if the old common law principle upon which disclaimers were founded still stands.

See also John H. Martin, *supra* note 7, at 333 n.69 ("It is unreasonable to expect a refusal to be articulated if the intended recipient is unaware that he has been offered something.").

force an individual to accept an interest he or she does not want and of which interest he or she is not even aware.[143] The right to disclaim was an inherent right under the common law and under the statutes in most states, prohibiting a person from exercising that right by taxing them for doing so seems improper, and according to one commentator "clearly oppressive."[144] One commentator has asserted the "elimination of the knowledge requirement may well run afoul of the due process requirement of the Constitution."[145] The time in which to disclaim should not begin until the recipient is aware of the interest.

D. A Gift Tax Should Not Be Imposed Upon a Disclaimer Until the Interest Becomes A Possessory Interest

Under property law, a disclaimer is the refusal to accept a gift or devise.[146] A disclaimer is an act of non-acceptance.[147] The disclaimant's creditor could not reach the assets since they did not belong to the disclaimant.[148] The disclaimed property passed as if the disclaimant predeceased the decedent.[149] The disclaimant does not direct to whom the property passes; rather the disclaimant simply does not accept the inheritance.[150] The disclaimant is therefore not deemed to have transferred the assets, either directly or indirectly, for transfer tax purposes.[151] A non-general power of appointment, more commonly referred to as a "limited power of appointment," has similar parallels.[152] A limited power of appointment is not subject to estate taxes even if the power

143 *See* Schain, *supra* note 142 and accompanying quotation.

144 Roehner & Roehner, *supra* note 132 at 293-94, asserts the following:

> But even if a man renounces because he wants to aid the natural objects of his bounty, can the Government tell him that he must pay an excise tax for refusing to accept property, because if he had accepted it the Government would have extracted a gift tax from him when he made a gift. . . .
> We believe that the right to reject is an inalienable right which cannot be taxed by the Government consistently with the Fifth Amendment, and that as an English judge said in Thompson v. Leach "a man cannot have an estate put into him in spight of his teeth."

Id.; *see also* Wolfson, *supra* note 83 § 43.03[3], at 43-9 ("The imposition of the 'transfer date test,' without reference to knowledge, is clearly oppressive.").

145 Wolfson, *supra* note 83 § 43.03[3], at 43-9.

146 *See supra* Part I.A.

147 Ellsworth, *supra* note 8, at 695 ("A disclaimer is fundamentally different from a voluntary transfer of property because it is a refusal to accept property *ab initio.*").

148 LaPiana, *supra* note 1, at 232.

149 *Id.* at 214.

150 *Id.*

151 I.R.C. § 2518(a).

152 A position asserted by the taxpayer in Jewett v. Comm'r, 455 U.S. 305, 317-18 (1982). The Supreme Court however concluded that a disclaimer "more closely resembles a *general* power of appointment," *Id.* at 318.

holder can appoint to anyone in the world, other than to herself, her creditors or the creditors of her estate.[153] A disclaimer is an act of less control than the exercise of a limited power of appointment. It is similar to that of a non-exercise of a limited power of appointment.

In *Jewett*, the Treasury argued that a disclaimer is similar to a general power of appointment.[154] An individual holding a general power of appointment can appoint the property to herself, her creditors or the creditors of her estate.[155] The Treasury asserted a disclaimer is similar to one that holds the right to appoint the property to oneself.[156] The Treasury is correct in that the individual can choose to accept the interest and thus enrich herself.[157] Several commentators have argued that a disclaimer should be fully subject to gift taxes since it is an act of control similar to the control of one holding a general power of appointment.[158]

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[153] *See* I.R.C. § 2041(b)(1).

[154] *Jewett,* 455 U.S. at 318.

[155] I.R.C. § 2041(b)(1).

[156] *Jewett,* 455 U.S. at 318.

[157] See Martin, *supra* note 7, at 357, in which the author asserts "the treatment of general powers of appointment offers a most persuasive analogy for justifying taxation of disclaimers" and continues in the following pages of his article to recommend that all disclaimers be subject to gift tax.

[158] *Id.*; Additionally, in Note, *Disclaimers*, *supra* note 32, at 1047-48, the author notes:

> There is some theoretical justification for treating every disclaimer as either a taxable gift by the disclaimant or a transfer of property the value of which may be includible in the disclaimant's gross estate. Inherent in his choice of accepting or rejecting tendered property is at least some degree of control over the subject matter, whether or not he exercises that right in a manner which prevents the vesting of technical "title" in him. Furthermore, the result of a disclaimer . . . is that the property disclaimed goes to the same persons, and in the same way, that the disclaimant would wish it to go if it were his own property. For example, a son may disclaim interests in his father's estate, knowing that under his father's will they will pass to the grandchildren and hoping thus to avoid the imposition of a gift tax or a second estate tax.
>
> On the other hand, it seems unfair to predicate tax liability on control which the donee may have gotten without any volition of his own, where that control is limited to a choice of accepting the gift with its concomitant tax consequences or allowing it to follow a single alternative route provided by the donor. It seems particularly odd, in the context of the gift tax, that a donee by acting solely in order to defeat an attempted gift made *to* him can make himself liable to a tax as on a gift made *by* him.

Id. (emphasis in original). See also Note, *Taxation*, *supra* note 19, at 909-910, wherein the author notes:

> However, there are several justifications for treating a disclaimer as a taxable event. In most cases, the recipient of the interest in event of disclaimer can be easily determined, and the disclaimant knows to whom the interest will pass. Practically speaking, the recipient upon disclaimer usually will be an heir of the disclaimant, and a disclaimant who does not need the property for his personal

This argument has some merit. Arguably, it would be logically consistent for the Treasury to tax all disclaimers.[159] However, such an argument imposes a gift tax on non-acceptance and is inconsistent with a long-established property law doctrine.[160]

While an individual cannot control to whom the property passes if he or she wishes to disclaim, it is argued an individual disclaims only if the property passes to whom he or she wishes. In *Jewett*, the Treasury argued that the taxpayer controls to whom the property passes by deciding whether to disclaim or not.[161] The assertion may be correct since individuals often disclaim because they want to benefit the individuals to whom the property passes as a result of the disclaimer.[162] If the property will pass to someone that the disclaimant does not wish to benefit, the individual may elect not to disclaim. Of course, this is not always the case. An individual may wish to disclaim to avoid creditors even though the property may pass to individuals who are not the individual's preferred choice. But, in many cases the individual executes a disclaimer because the alternate takers are objects of the individual's bounty. Again, however, this position is making non-acceptance an act of control.[163] In a disclaimer, it is the grantor or decedent who has determined to whom the property passes, not the disclaimant. The disclaimant cannot control to whom the property passes. The "control" in a disclaimer is similar to the "control" in the non-exercise of a limited power of appointment.[164]

> sustenance can readily appreciate the tax advantages of disclaiming. Thus, the motive behind disclaimers is very likely to be tax avoidance, as a person is able to pass more property by disclaiming than by accepting and subsequently passing the property inter vivos or through his estate.

159 See Martin, *supra* note 7, at 357; *see also* Note, *Disclaimers in Federal Taxation, supra* note 32, at 1047-48.

160 Ellsworth, *supra* note 8, at 756.). *Cf.* quotation cited *supra* note 158, provides:

> Imposing a transfer tax on all disclaimers would be unfair and unwise. It would interfere with long-established property law doctrine by creating a corresponding but diametrically opposed tax law doctrine. While tax law can be, and sometimes is divorced from property law, this has never been favored in our country. The common-law rule of disclaimers has a long and venerable history; disclaimers do serve important and legitimate purposes. To permit the I.R.C. to hobble this ancient rule of law would be imprudent and unnecessary.

161 *See Jewett*, 455 U.S. at 318.

162 *See supra* note 158; *see also* Note, *Taxation*, *supra* note 19, at 910.

163 In Roehner & Roehner, *supra* note 132, at 293, the authors state:

> But even if a man renounces because he wants to aid the natural objects of his bounty, can the Government tell him that he must pay an excise tax for refusing to accept property, because if he had accepted it the Government would have extracted a gift tax from him when he made a gift?

164 The following comment in Note, *Taxation supra* note 19, at 908-09 asserts:

Since issuance of regulations in 1958, the Treasury has taken the position that a disclaimer executed within a reasonable period of time is not a transfer giving rise to gift tax.[165] The common law provides that acceptance bars a disclaimer.[166] Under the common law, if a person has not executed a disclaimer within a reasonable period of time, the person is deemed to have accepted the gift.[167] Thus, an unreasonable delay in acceptance constitutes an acceptance.[168]

As for present interests, for example an outright devise of $100,000, IRC § 2518 requires that that the disclaimer be executed within nine months of the decedent's death to be a "qualified disclaimer." In some cases this time period may work an injustice. For example, if there is a will contest and it is unclear to whom the estate passes, the time period may run on a disclaimer before it is clear to whom the estate passes. Arguably, if you don't want anything it should not matter to whom the estate passes. The fact that someone is concerned to whom the estate passes for property they wish to disclaim supports the "control" argument. However, a person wishing to make a partial disclaimer is precluded from effectively disclaiming in many instances if a will contest occurs. The National Commissioners on Uniform Laws in UDPIA (1999) have eliminated the time requirement altogether allowing acceptance to be the only bar to disclaiming.[169] An argument could be made that the time period should be eliminated altogether.

The Legislative History indicates the disclaimer provisions were enacted to provide uniform treatment for disclaimers.[170] Commentators and organizations were seeking uniformity of tax treatment when local law didn't provide uniformity in the definition of "reasonable time," whether partial disclaimers could be executed, and whether one could

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> The traditional argument for allowing tax-insulated disclaimers is that a person should not be forced to accept property with the concomitant burdens and responsibilities inherent in ownership. Therefore, he should have the right of rejection without being subject to a gift tax liability. Since any tax on a disclaimer would have to be predicated on control over the property rather than enjoyment or possession, it is arguably unfair to predicate tax liability on control limited to the choice of accepting an interest or allowing it to pass to those entitled to take as a result of the disclaimer.

165 *See* Keinath v. Comm'r, 480 F.2d 57, 61 (8th Cir. 1973), *overruled by* Jewett v. Comm'r, 455 U.S. 305 (1982); *see also* Cottrell v. Comm'r, 628 F.2d 1127, 1129 (8th Cir. 1980).

166 Bowe & Parker, *supra* note 1, §49.1 at 38.

167 *See supra* Part I.A.

168 *See supra* Part I.A.

169 *See supra* Part III.E.3.

170 H. Comm. on Ways and Means, Estate and Gift Reform act of 1976, H.R. Rep. No. 94-1380, at 66-67 (1976), *reprinted in* 1976 U.S.C.C.A.N. (90 Stat.) 3356, 3420-21. See *supra* Part II for a detailed analysis of the Committee Hearings and Reports.

disclaim intestate property.[171] Within the exception of two states, all of the states provided that a person could disclaim within a reasonable period of time after becoming entitled to current possession or interest of trust property.[172] Uniformity already existed as to when the time period began to run in a future interest.[173] Lack of uniformity only existed as to how long a period of time an individual could disclaim, not when the time period began to run with respect to a future interest.[174] In TRA '76, Congress enacted legislation which required a disclaimer of a future interest to be executed within nine months of creation.[175] This new requirement adopted a new time period in which to disclaim which didn't exist in any state, thereby abolishing the common and statutory law. It was made without a single explanation.[176] At least one commentator asserts Congress simply did not know what it was doing.[177]

Why do the common law and the statutes in nearly every state set the beginning time period in which to disclaim a future interest from the time the interest becomes indefeasibly vested or set no time period at all on when a disclaimer must be executed? The Treasury in its brief to the Supreme Court argued,

> To qualify as a nontaxable transfer for federal gift tax purposes, a disclaimer must also satisfy a federal timeliness requirement. The reasonable time requirement of the Regulation is separate and distinct from the timeliness standard under state law.

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[171] Blazek & O'Donoghue, *supra* note 27, § 7.02[2], at 7-6; Note*, supra* note 19, at 921 ("Disclaimers should be taxed in some uniform manner."). *See* also Doris D. Blazek, *Use of Disclaimers in Post-Mortem Planning*, *in* N.Y.U. PROCEEDINGS OF THE FORTIETH INST. ON FEDERAL TAXATION § 7.02[2], at 7-6 (Nicolas Liakas ed. 1982).

[172] In Wolfson, *supra* note 83 § 43.03[3], at 43-9 to 43-10, wherein the author states:

> Congress failed to observe that the Uniform Disclaimer Laws drafted by the Commissioners on Uniform Law as well as all but two state statutes agreed on one point: they all measure the time limitation in the case of future interests from the date the interest becomes indefeasibly vested, not from the date of the transfer creating the interest. Nevertheless, Congress proceeded to draft the federal tax law provision based upon a "transfer date" test. This seems to be a strange way to create uniformity. What Congress has done is make the Uniform Disclaimer Laws and the laws of the vast majority of the states uniformly wrong. Congress did not say that it did not like the Uniform Law approach, it simply referred to it and then did the opposite.

[173] *See id.*

[174] *See id.*

[175] Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009, 90 Stat. 1893 (codified as amended in I.R.C. § 2518(b)).

[176] Wolfson, *supra* note 83, § 43.03[3], at 43-8.

[177] *Id.*

> This difference between state and federal timeliness requirements arises as a consequence of the different concerns of state property law and the federal gift tax law. The federal gift tax is concerned with control over the disposition of property and with the exercise of a right to determine those who will possess, enjoy or own property or property rights. State law is primarily concerned with balancing conflicting claims to property, and protecting the rights of creditors and other third parties. To accomplish these purposes, state law may allow considerable time to pass after a person learns of a property interest before he must disclaim. On the other hand, the passage of time is crucial under the scheme of the federal gift tax, because time allows a potential recipient to engage in planning his estate by exercising control over the future interest and to wait to see whether he himself needs the property, or whether he should choose to have it pass to the next generation. Thus, even though petitioner's disclaimers were timely under state law, the passage of 33 years after the creation of his interest by means of the transfer in trust, and 24 years after attaining his majority, far exceeded a reasonable time for petitioner to wait before disclaiming his interest under Section 25.2511-1(c). The disclaimers were thus indirect transfers subject to the gift tax under Sections 2501 and 2511.[178]

The Treasury's argument is disingenuous. State law is concerned with who will possess, enjoy and own property and property rights. These concerns are just as important, and maybe more so, than protecting the rights of creditors and third parties. If the latter were the primary concern, then arguably, it would seem advisable for the states to require an individual to disclaim within a shorter period of time than possibly even the federal statute. With one or two exceptions, states permit an individual to disclaim within a reasonable time of becoming indefeasibly vested or at any time before acceptance, because there is no compelling reason to require someone to accept a gift before they are present with possession.[179] Only at that time is it important for the individual to make a

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[178] Brief for the Respondent at 7-8, Jewett v. Comm'r, 455 U.S. 305 (1982) (No. 80-1614), 1981 WL 390092.

[179] In Adam J. Hirsch, *Disclaimer Law and UPDIA's Unintended Consequences,* 36 Est. Pln. 34, 36 (2009), the author states:

> As a matter of public policy, no justification for setting a deadline on disclaimers is apparent. Obviously, once beneficiaries have accepted an inheritance, they should forfeit the right to disclaim; otherwise they might retain the opportunity to render themselves judgment proof retroactively. But so long as acceptance stands as an independent bar to disclaiming, which it universally does, no one is harmed by allowing beneficiaries to draw out their decision, which might prove

determination as to whether to accept or reject an inheritance. Arguably, the federal government does have a reason to require a disclaimer to be made within the estate tax filing period for outright gifts and certain transfers into trusts so that the executor can determine the amount of the estate tax and pay the tax. The same rationale does not apply to the disclaimer of a future interest.

In its brief, the Treasury also does not indicate how the passage of time "allows a potential recipient to engage in planning his estate by exercising control over the future interest."[180] The Treasury argues,

> the Regulations imposes a federal timeliness requirement that subjects to the gift tax those persons who maintain control over the disposition of property by postponing their decision to disclaim. It is precisely that type of estate planning by *inter vivos* transfer at which the gift tax is aimed. By requiring that disclaimers be made within a reasonable period after a person learns of his right to a property interest, the Regulations implements "the evident desire of Congress [in enacting the gift tax] to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech."[181]

The Treasury continues:

> If a person is to be permitted to refuse to accept an interest in property and have that interest pass to a successor without gift tax consequences, it is entirely appropriate that he should also be required to manifest that refusal promptly upon learning of his right to that property interest. Indeed, if the rule were otherwise, a person could consider at length whether a disclaimer would be the most advantageous course of action, *i.e.*, whether he would prefer to receive the assets himself or allow them to pass to his successor in interest. In appraising his options, he could belatedly measure the resources available in his own estate in order to ascertain whether he should take the property interest for his own personal needs. Thus, absent a timeliness requirement, the holder of the property interest could, perhaps up to the moment of his own death- if state law posed no bar-

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advantageous if probate is contested or delayed, or if contingencies remain to be resolved.

[180] Brief for the Respondent at 8, Jewett v. Comm'r, 455 U.S. 305 (1982) (No. 80-1614), 1981 WL 390092, at *6.

[181] *Id.* at 16 (citing Comm'r v. Wemyss, 324 U.S. 303, 306 (1945)).

rier- engage in the very type of estate planning by *inter vivos* transfers upon which the gift tax is imposed.[182]

The Treasury asserts that mere delay is an act of control.[183] By refusing to accept or reject the gift the recipient is involved in estate planning and thereby controlling to whom the property passes.[184] The Treasury is partially correct. If the individual were permitted to make a qualified disclaimer after the recipient was presented with possession, the recipient would at that time determine, based on the circumstances then existing, whether to accept or reject the gift. But, it is only at that time will the recipient be in a position to know the nature and the amount of the property at issue. At any time before possession, the interest is a future contingency. It is only at the time possession is presented can the recipient make an informed decision. At any time before such time the nature and the value of the interest in unknown. For example, assume a mother possess the legal life estate in her home with the title passing at her death to her then-living issue. Her issue do not know whether they will ever possess title since they may predecease their mother. In addition, they don't know the value they are disclaiming until their mother dies. The home could substantially increase or decrease in value, and in rare cases could become exceedingly valuable.

The Treasury takes the position that it is unfair to allow a person to disclaim a future interest many years after the interest is created. It argues that the person has enjoyed the benefits of the future interest.[185] In *Jewett*, the Treasury argued that it would be unfair to allow a person who has had the control associated with a future interest to be able to disclaim years after the interest's creation.[186] The Treasury does not explain what control a contingent interest has over the trust. It is hard to understand how the mere possession of a future interest is an act of control, especially if the person holding the contingent interest was not

[182] *Id.* at 17.

[183] *Id.* at 16. ("The validity of petitioner's disclaimers under state law is insufficient to bar the imposition of the gift tax because his 33-year delay in making the disclaimers enabled him to control the disposition of his interest in the trust.").

[184] *See* Hirsch, *supra* note 13, at 117 ("American courts almost universally have extended the right of disclaimer to cases in which the disclaiming party was motivated by tax considerations- with scarcely a word about public policy- on the theory that tax statutes have failed to preclude this legal stratagem.").

[185] *See* Note, *supra* note 19, at 917 n.61 ("Traditionally, the only benefits which are considered such for the purposes of determining whether acceptance has taken place are actual benefits, as distinguished from the benefit one derives from knowing, and thereby being able to plan accordingly, that he will receive an interest at some time in the future.").

[186] *See supra* text accompanying note 182.

aware of the existence of the interest, or was aware but never participated in any way in the trust administration.

The states and the UDPIA permit an individual to disclaim upon being presented with possession because it is at that time the individual can fully appreciate the property to be received, understand the value of the property and its nature, and evaluate his or her need for the property.[187] Commentators have noted that it is harsh to run the disclaimer period on the appointee of a broad limited power of appointment since it is possible that the individual was unaware of the existence of the trust.[188] Others have said it is harsh to require an individual to disclaim property he or she may never own.[189] Some argue that it is unreasonable to require a disclaimer before an individual is aware of the quality and quantity of the amount they are disclaiming.[190] One commentator

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187 *See* quotation cited *supra* note 179.

188 *In* Frimmer, *supra* note 198, at 267-68, the author notes:

> The Proposed Regulations [which later became final –*see supra* footnote 86 in which the Final Regulations are reproduced] also make it clear that in the case of a limited power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within nine months after the creation of the power. With respect to limited powers where the permissible appointees are ascertainable, this rule does not seem unreasonable. However, if the class of permissible appointees is so broad as to render it impossible to determine whether a potential individual will become an appointee, the rule is extremely harsh.

189 *See* Schain, *supra* note 142, at 29; Medlin, *supra* note 137, at 1286; Jewett v Comm'r, 455 U.S. 305, 325 (1982) (Blackmun, J., dissenting) ("[A] remainderman [has] really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeed[s] in outliving the life beneficiary." (quoting Keinath v. Comm'r, 480 F.2d 57, 64 (8th Cir. 1973)).

190 "There is nothing unfair or improper in allowing the remainderman to wait until the life beneficiary's death and then decide whether to accept the bequest." *Jewett*, 455 U.S. at 325 (Blackmun, J., dissenting).

> The Commissioner stresses repeatedly the number of years that elapsed between the death of the testatrix and the execution of the disclaimer. . . . But to require the disclaimer long before the interest could ripen into enjoyment means that the decision must be made at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest.

Id. at 328; *see also* Martin, *supra* note 7, at 333 n.69 ("It is unreasonable to expect a refusal to be articulated if the intended recipient is unaware that he has been offered something. Moreover, a meaningful decision can be made only when the exact nature and extent of the gift are known."); Wolfson, *supra* note 83 § 43.03[4], at 43-11 ("[Asking] what policy consideration justifies the requirement that immediate affirmative written action be taken with respect to property which is not then or may never be the property of the disclaimant, the value of which interest can only be determined by vague actuarial speculations[.]"); Note, *supra* note 32, at 1050 ("If the gift is of a future interest, it might from the standpoint of property law be unreasonable to expect the donee to manifest his acceptance or rejection prior to the time the interest vests in possession, but this should

has noted that the current law is discriminatory because only the currently wealthy can entertain executing a disclaimer of a future interest, while the poor and middle class cannot afford to anticipate that they may need the future interest.[191] As stated by one commentator, "[a] strong equitable argument can certainly be made for the proposition that the period should not run until the interest becomes indefeasibly vested."[192]

E. Obligatory Devises

The 9-month from creation requirement of existing disclaimer tax law works an injustice with respect to gifts that obligate the devisee to transfer funds to another as a condition of receiving the gift. The inequities are displayed in *Estate of Balson*,[193] wherein the decedent died in 1978 survived by his wife and four children. His will devised a life estate in the decedent's homestead to his wife with the remainder to his son, on the condition that on the wife's demise that his son pay two of decedent's daughters (the son's siblings) a sum of $50,000 each. Decedent's wife died in 1992, fourteen years after decedent's death. At that time,

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not necessarily determine the tax issue."); However, a contrary position is taken in Note, *supra* note 19, at 917-918:

> In the property law context, there seems little necessity for forcing the beneficiary of a future interest to make a choice of accepting or rejecting such interest until he becomes entitled to possession. Thus, it is arguable that, under state law, the mere lapse of time would not be considered acceptance of a future interest. If this is the case, the policy underlying state property concepts, in this context, would be inconsistent with the motive behind the federal gift tax statute. The gift tax is aimed at taxing inter vivos gifts which allow the donor to avoid the imposition of an estate tax on property he has had the beneficial enjoyment of during his lifetime. When a gift is made, the donor's estate avoids the imposition of an estate tax on such property on the theory that the gift was complete at its creation. To disclaim after an extended period of time on the theory that the gift is not yet complete would seem to be inconsistent with the theory under which the interest escaped imposition of an estate tax. It would also seem to subvert the basic policy behind these taxing statutes, particularly when the disclaimant, during this time, had the economic security of the right to receive the interest. Thus, in contrast with local law, it appears that federal criteria are likely to provide a more stringent limitation upon the ability of a beneficiary to effectively disclaim a future interest.

191 *See* Wolfson, *supra* note 83 § 43.03[4], at 43-11; In Martin, *supra* note 7, at 362, the author argues that all disclaimers should be subject to transfer tax on the theory that:

> Persons with modest means cannot afford even to entertain the idea [of a disclaimer]. They accept, possess, and use their property, and they suffer the consequences of transfer taxation when the residue passes to the next family member. Disclaimers, then, present opportunities to keep wealth intact. In this respect, they work contrary to the basic purpose of wealth taxation.

192 Wolfson, *supra* note 83 § 43.03[4], at 43-10.

193 *In re* Estate of Balson, 515 N.W.2d 474, 475-76 (Wis. Ct. App. 1994).

the homestead was appraised for less than $100,000. The son executed a disclaimer. The daughters argued that the disclaimer was not valid and therefore their brother owed each of them $50,000. The applicable state statute provided, "[a]n instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property or interest is finally ascertained and his or her interest indefeasibly fixed[.]"[194] The state court held the disclaimer was valid. The disclaimer would not constitute a qualified disclaimer under IRC § 2518 however unless the son was less than 21 years and 9 months of age upon his mother's demise. The son's disclaimer would give rise to a gift. Under the facts of *Balson*, however, the value of the gift would be zero since the obligated payments exceeded the value of the residence. Problems will exist if the property at issue is difficult to value.

F. The GST Tax Impact of Disclaiming Future Interest

The General Explanation of the Tax Reform Act of 1976, prepared by the Staff of the Joint Committee on Taxation, contains the following comment in reference to the generation-skipping transfer tax:

> *Disclaimers.* – A beneficiary under a generation-skipping trust is permitted to disclaim his interest in that trust within the same time period and in the same manner as would any beneficiary of an outright gift or bequest. . . . The Congress also wished to clarify that for purposes of the new disclaimer rules (sec. 2518), the event which triggers the 9-month period allowed for an effective disclaimer is the generation-skipping transfer (either a taxable termination or a taxable distribution).[195]

This comment finds no support in the statutory language and was not followed in the Regulations.[196] Under the Treasury Regulations, the time period in which to disclaim runs from the time of the gift for property later included in the transferor's federal gross estate, not from the time of later estate tax inclusion.[197] Likewise, a future interest in a qualified terminable interest property ("QTIP") trust must be disclaimed within nine months of initial creation.[198] Later, estate tax inclusion of the QTIP trust in the surviving spouse's estate does not begin a new

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194 Wis. Stat. Ann. § 853.40(4)(b) (West 1991) (repealed 1992).

195 Staff of the Joint Comm. On Taxation, 94th Cong., General Explanation of the Tax Reform Act of 1976, H.R. Doc. No. 94-10612, at 580-81 (Comm. Print 1976).

196 *See* Frimmer, *supra* note 98, at 268.

197 *See* Treas. Reg. §25.2518-2(c)(3).

198 *See id.*

time period.[199] If a beneficiary has a general power of appointment, the individuals who receive the interest in the trust due to an exercise or lapse of the power have until 9 months after the exercise of lapse to disclaim.[200] Individuals who receive an interest as a result of the exercise of a lapse of a limited power of appointment must disclaim within 9 months of the creation of the interest.[201] Arguably, these four examples are inconsistent. In the first two cases later estate tax inclusion does not result in a new disclaimer period even though estate tax inclusion results.[202] However, in the case of a general power of appointment, later estate tax inclusion does result in the beginning of a new disclaimer period. The individual to whom property passes as a result of the non-exercise of a general power of appointment is in a similar position as the individual to whom property passes as a result of the non-exercise of a limited power of appointment. In both cases, the default taker in the event of non-exercise of the power has a contingent interest created by the original grantor. It would seem immaterial that the property is subject to later estate tax inclusion in the estate of the holder of the general power of appointment. The distinction between a limited power and general power is drawn on the limited universe of appointees in a limited power of appointment. Of course, if the power holder can appoint to anyone other than herself, her creditor and the creditors of her estate, the distinction seems quite artificial. To argue that due respect must be given to the property law concept that the exercise of a limited power is deemed the action of the grantor rather than the power holder, which is not the case with a general power of appointment, seems inconsistent with the position that due deference is not given to the common law which permitted a disclaimer within a reasonable time of vesting of a future interest. On this framework, we need to examine a taxable termination.

In a taxable termination, a portion, or all, of the trust is subject to generation-skipping transfer (hereinafter "GST") tax. Since a taxable termination does not alter to whom the property passes, it appears more consistent with the Treasury's tax treatment of QTIP property to consider that a new time period should not begin to run. The grantor determined to whom the trust assets would eventually pass, similar to the grantor of a QTIP, and transfer tax inclusion does not alter that result. This approach leads to internal consistency in the Regulations but is in-

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199 *See id*.

200 *Id*; *see also id.* § 25.2518-2(c)(5) ex. 2.

201 *Id.* § 25.2518-2(c)(3).

202 *See* Brand & LaPiana, *supra* note 1, at 64 (noting that the disclaimer period must run from the time of the completed transfer for gift tax purposes in the case of later estate tax inclusion in the grantor's estate, since it is possible that the grantor may relinquish the retained power during the grantor's lifetime).

consistent with the Joint Committee comments noted *supra*. The author's recommendation that Congress amend the Code to permit the disclaimer time period to run from the time that the future interest becomes indefeasibly vested would permit disclaimers when a taxable termination occurs in some, but not all instances.[203]

One commentator has asserted that the enactment of the GST tax in the Tax Reform Act of 1986 has made it possible to repeal Section 2518 and return to a state-dominated system of disclaimer law.[204] The commentator fails to explain why the passage of the GST tax in the Tax Reform Act of 1986 would permit repeal of § 2518 when a GST tax was also enacted in the Tax Reform Act of 1976 that gave us § 2518. In fact Example 3 of Proposed Treas. Reg. § 25.2518-2(c)(5) provided the following:

> F [established a generation skipping] trust [(section 2611(b))] on April 1, 1978, in which F's child G is to receive the income from the trust for life. Upon G's death, the corpus of the trust is to pass to G's child H[, who was 22 years of age on April 1, 1978]. If either G or H wishes to make a qualified disclaimer, it must be made not later than 9 months after April 1, 1978.[205]

The replacement of the old GST tax with a new GST tax doesn't seem to justify different treatment of the disclaimer period.

V. Some Practical Impacts of Proposal

Under the federal tax provisions under pre-TRA '76 law, the disclaimer period began to run from the time that an individual gained knowledge of the existence of the transfer. Presumably, factual disputes arose as to when the individual became aware of the existence of the transfer. Current IRC § 2518 avoids factual disputes. The disclaimer period runs from the later of the creation of the interest or the individual turning age 21.[206] Factual disputes over when the individual became

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203 In some instances a skip person may be entitled to income and principal distributions from a trust during the non-skip beneficiary's lifetime. Thus, the skip person may be precluded from disclaiming the remainder interest.

204 Ellsworth, *supra* note 8, at 697.

205 Prop. Treas. Reg. § 25.2518-2(c)(5), ex. (3). Example 3 of Final Treas. Reg. §25.2518-2(c)(5) has been modified as follows: (1) the introductory phrase "F established a generation-skipping trust (section 2611(b)) on April 1, 1978" has been replaced with "F creates a trust on April 1, 1978;" and (2) the phrase "who was 22 years of age on April 1, 1978" has been removed. No explanation is given for these changes. The Tax Reform Act of 1986 which repealed the GST tax laws enacted in 1976 and replaced it with a new GST tax was not enacted until October 22, 1986, several months after the issuance of the final regulation on August 7, 1986.

206 I.R.C. § 2518(b)(2).

aware of the interest are avoided, saving the taxpayer, the Treasury and the courts time and money. Unfortunately, this savings comes at the expense of those individuals who are unable to disclaim because the time period to disclaim has expired before they become aware of the existence of the trust. Justice tilts in favor of protecting the rights of the uninformed. Admittedly, this justice will come with the associated expense of determining when the individual became aware of the existence of the interest.

VI. Conclusion

Unless there is a legitimate governmental purpose, the law should not penalize an individual by imposing a gift tax on exercising a fundamental property right, provided the disclaimer is executed before the property is accepted. If the time to disclaim has run before an individual is aware of the property transfer, practically speaking he or she is precluded from disclaiming because of gift tax ramifications. It is unreasonable to impose a gift tax on an individual when the individual refuse a gift or devise if he or she has not unreasonably delayed his or her refusal. Congress should amend IRC § 2518 to permit an individual to disclaim within a reasonable period of time after the later to occur of (1) becoming aware of the interest or (2) the interest becoming indefeasibly fixed.