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Dependent Disclaimers

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I. Introduction

Intent, delivery, and acceptance.[1] The first two can be pressed at a donor's choice; with the last one, the donee can brake. In this regard, inter vivos gift theory reflects symmetrical propositions: just as no one can be forced to make a gift, none can be forced to accept one.

The same holds true for estates. Under the twin theories of renunciation and disclaimer,[2] would-be takers may refuse to accept a devise or inheritance,[3] simultaneously rejecting a right to acquire and exercising a right to avoid. Such refusal again reflects evenness of form, for in the very act of disclaiming inheres the enrichment of someone else. It might initially seem odd that one would reject another's largesse or the status of being deemed heir. But ownership carries both value and cost, and acquisition is personal choice. Refusal will sometimes occur.

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[1] "The essentials of an enforceable gift have not changed in centuries." Eunice L. Ross & Thomas J. Reed, Will Contests § 9:21 (2d ed. 2013). While that may be true, a few particularities have. *See, e.g.*, Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 Wash. U. L. Rev. 797, 819 (2014) (noting, for example, how delivery has occasionally collapsed from an independent requirement into an evidentiary subset of intent).

[2] Technically, the term "renunciation" once described an heir's refusal to accept an intestate share rather than a beneficiary's rejection of a testate one. At common law, as the heir was thought to acquire title immediately upon the intestate's death, renunciation generated two taxable transfers: the first from the estate to the heir and the second from the heir to the next qualified taker. 1 Page on the Law of Wills § 49.1 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp., Jeffrey A. Schoenblum ed., 2013) [hereinafter Page]. Most modern statutes use the terms "disclaimer" and "renunciation" interchangeably, and the I.R.C. section 2518 treats them identically for tax purposes. Mark Reutlinger, Wills, Trusts, and Estates: Essential Terms and Concepts 78 (1993); *see also* C.P. Jhong, Annotation, *What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest*, 93 A.L.R.2d 8, 11 (1964).

[3] A "disclaimer" is the refusal to accept an interest in or power over property. Unif. Probate Code § 2-1102(3) (Unif. Law Comm'n 2010).

Where the rejecter is also the would-be owner, the disclaimer is both clean and direct, and is a relative commonplace within estates law to attain tax efficiency or avoid a creditor's claim. But less common and more questionable is the situation where one person disclaims on behalf of another. For while the fruit or folly of a choice about property is readily acceptable when the actor will bear all consequences, it seems less fair when costs are externalized,[4] even less so when the third party who bears them is a minor incapable of making legally binding decisions for herself, and less again yet when the resulting benefits of disclaiming seem to redound to the decisionmaker rather than the person whose "interest" was "lost."[5] One should be just before being generous. What is more, it is far easier to be generous with another's money than it is to so act with one's own.[6]

With all of that said, there are circumstances where attempts to disclaim on behalf of another are both understandable and appropriately to be encouraged, and yet have been denied. This is particularly so for what I term "dependent disclaimers," which in their purest form occur when parent A seeks to disclaim on behalf of minor child B, but where the very existence of B's property interest turns on a choice that A, as yet technically, has not made. More casually stated, they arise when the interest disclaimed remains but an expectancy, or less – and as when a parent conditions her own disclaimer of interest on her non-heir descendant's as well. Both the interest disclaimed and the person disclaiming are thus dependent on someone, or something, else.

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4 Life estates versus fees provide a ready example. With the former, the doctrine of waste curbs opportunistic behavior by charging the life tenant with depreciation or loss. On the thinking that lost value will present at lease or sale, no such doctrine limits the ability of the absolute fee owner to treat the property exactly as (legally) desired. "Property promotes autonomy, security, the ability to make long-term plans, the right to be different. If I temporarily transfer possession of some thing to someone else, through a lease or a life estate, I am entitled to receive the same thing back. This protects my subjective expectations about the thing—my plans for its use in the future—without regard to whether these expectations or plans make sense from anyone else's perspective." Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1059 (2011).

5 Technically, the disclaimant is the person whose interest is disclaimed, and is not necessarily the same as the "person making the disclaimer," who may be a guardian, conservator, or other fiduciary. *Id. See also* UNIF. PROBATE CODE § 2-1102(1) & cmt.

6 *Compare* RESTATEMENT (SECOND) OF TRUSTS § 227(a) (AM. LAW INST. 1959) *with* UNIF. PROBATE CODE § 7-302 (noting the shift from investment standards tracking what a prudent person would do with her own money to those acts undertaken by a person of prudence in dealing with the property of another). *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP. PROB. & TR. J. 407, 410 (1992) (explaining that individuals should make investments only "as a prudent man would make of his own property").

The issue, which exists somewhat fitfully, finds most recent expression in the New York state case of *In re Friedman*.[7] In rejecting the parent/guardian's understandable attempt to disclaim on behalf of her infant,[8] *Friedman* surfaces the tensions of wealth transfer tax assessment and avoidance through a stilted "best interests" policy lens as well as a flawed perception of property writ large. This is unfortunate on many levels, particularly as a more careful analysis of such foundational issues can be easily lost in a tax policy haze.

After reviewing extant disclaimer doctrine in Part II, Part III employs *Friedman* and similar cases to assert the paradoxical debility of joining a capacious view of "property interests" with a straitened one of "best interests" within the dependent disclaimer attempt. Stated differently, for reasons both ranging and slight, most such disclaimers should work. After suggesting possibilities for planning, litigation strategy, and reform in Part IV, Part V concludes.

II. A Brief Review of Disclaimers

A. What Is a Disclaimer?

A disclaimer is little more than refusal to accept proffered property, and is the preferred term when set against an attempted transfer of a testate or intestate share.[9] For example, were X to die intestate survived by children A, B and C as sole heirs, C could disclaim her interest, leaving A and B to take the entire estate. Critically, C is not treated as having transferred her 1/3 share to her siblings, as would have happened

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7 7 N.Y.S.3d 845, 846 (Sur. Ct. 2015). The *Friedman* case seems to have touched a slight nerve, appearing in assorted publications as a notable recent development. *See* Gerry W. Beyer, *Keeping Current-Probate*, 29 Prob. & Prop., July/Aug. 2015, at 21, 26; Jeffrey N. Pennell, *Notable State Law Developments* SY003 ALI-CLE 203 (ALI-CLE course materials, July 7-8, 2016) (Westlaw).

8 *Friedman*, 7 N.Y.S.3d at 846-47.

9 Of course, disclaimers are possible for other inchoate interests as well, such as the survivorship right in jointly held real estate or an interest in a joint bank account. *See, e.g.*, Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587, 646-47 (1989) (exploring the tensions inherent in creditors' rights against successors' rights to disclaim, elect against a will, or pursue a will contest). For a sustained analysis of all aspects of disclaimers in theory and operation, see *id.* at 591-92; Adam J. Hirsch, *Disclaimers and Federalism*, 67 Vand. L. Rev. 1871, 1873 (2014) (assessing the utility of a unified response, under federal law, to circumstances where disclaimers involve federal debts, plans or programs); Adam J. Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*, 36 Est. Plan. 34, 34 (2009) [hereinafter Hirsch, *Unintended Consequences*] (observing the mismatch between intended policy and drafted provision under the Uniform Disclaimer of Property Interests Act); Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 Fla. St. U. L. Rev. 109, 110-11 (2001).

had they agreed to this alternate plan *before* distribution had occurred,[10] or were C to have accepted her interest and then given it to the others *thereafter*.[11] Instead, C is seen as having predeceased the decedent with respect to the disclaimed interest,[12] thus functionally never having acquired it and leaving the chips to fall to the other estate successors where they may.[13]

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10 *See, e.g.*, UNIF. PROBATE CODE § 3-912 (UNIF. LAW COMM'N 2010) (recognizing private agreements among successors but noting that they are "[s]ubject to the rights of creditors and taxing authorities"); Estate of McNicholas v. State, 580 N.E.2d 978, 981 (Ind. App. 1991) (inheritance tax based upon will bequests, not family-designed redistribution of same); Ind. Dep't of State Revenue, Inheritance Tax Div. v. Estate of Pickerill, 855 N.E.2d 1082, 1085 (Ind. T.C. 2006) ("assets . . . distributed based on a family settlement agreement . . . [do not] constitute a transfer made by the decedent; rather a family settlement agreement is a contract to transfer property from one living person to another, subsequent to the transfer of property made by the decedent under his Will.").

11 Once accepted, the property becomes that of the donee and may no longer be disclaimed. *See, e.g.*, UNIF. PROBATE CODE § 2-1113. Of course, what constitutes an "acceptance" is a question of fact for the court to determine. *See* Jhong, *supra* note 2, at 15; PAGE, *supra* note 2, § 49.9. "[R]efusal to accept would leave it part of the testator's residuary estate. But the refusal must be absolute and unqualified, not merely in word but in deed. However positive the terms of refusal, they may be made ineffective by conduct inconsistent with a refusal such as acts of dominion over the property. A gift to another is unquestionably such an act, since it is only by virtue of the bequest that it can be thus disposed of." *In re* Zindel's Estate, 23 Pa. D. & C.3d 282, 291 (1982) (quoting Wonsetler v. Wonsetler, 23 Pa. Super. 321, 322 (1903)).

12 *See, e.g.*, UNIF. PROBATE CODE § 2-1106(b)(3) (stating that a disclaimed interest passes as if the disclaimant had died immediately before the time for distribution of the interest); JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING § 12.32 (2009) ("A disclaimed interest in property generally passes as if the disclaimant had predeceased the attempt to transfer the property to him or her.").

13 Where the decedent dies intestate, either the decedent's entire estate or the disclaimed interest alone will then pass to the other heirs, with representation. For example, in *Webb v. Webb*, 301 S.E.2d 570 (W. Va. 1983), the decedent's son (the disclaimant) disclaimed his intestate interest under the understanding that it would thereby pass to his mother (decedent's spouse) and enjoy marital deduction protection. The disclaimed interest instead descended to his minor daughter via representation, just as if disclaimant had actually (rather than virtually) predeceased. The disclaimant was left with no recourse other than to sue his attorney for malpractice for failing to discern the effect that disclaimer would have.

By contrast, where the decedent dies testate or leaves property through a different donative form, the disclaimed interest will generally pass according to the terms of the governing instrument (which may or may not expressly state the effect of disclaimer on the distributive plan). For example, a residuary clause might cover "the rest and residue of the decedent's estate, including any failed, lapsed, or disclaimed interests," in which case the answer is arguably clear. For a will that is silent on point, a disclaimer could either pass to the residuary, fall through intestacy, or trigger the state's anti-lapse provision and shift to the disclaimant's surviving descendants. *See, e.g.*, PAGE, *supra* note 2, § 49.12. For an interesting example of a case where the devolution to be made of the disclaimed interest is unclear, see *In re Peyrot,* No. 205265CV, 2006 WL 1919130, at *5-6 (Tex. Ct. App. July 13, 2006).

B. Why Disclaim?

Disclaimers are most often used to effect positive tax outcomes.[14] For example, assume that the decedent's intestate estate descends equally to surviving spouse S and adult child A. S might choose to accept her portion of the inheritance and later spend none, some, or all of it in favor of A, herself, or anyone else, and bearing any associated tax consequences involved.

Alternatively, S could be financially positioned so as to immediately disclaim her interest, whereby A would inherit the whole. The resultant tax efficiencies could include S's preservation of her unified credit, effectively permitting up to twice as much to eventually pass to the son free of a gift or estate tax burden.[15] Moreover, her disclaimer could shift assets to one in a lower income tax bracket to the extent that use or investment of the property generated income or capital gains.[16]

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14 *See, e.g.*, WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID ENGLISH, WILLS, TRUSTS, AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 390 (3d ed. 2004) [hereinafter MCGOVERN, KURTZ & ENGLISH 3D] ("[M]ost disclaimers are driven by federal tax considerations . . . ."); WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID ENGLISH, WILLS, TRUSTS, AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 88-89 (4th ed. 2010) [hereinafter MCGOVERN, KURTZ & ENGLISH 4TH] ("Disclaimers are typically motivated by two reasons [tax advantage and creditor avoidance]. Empirically the first probably explains most disclaimers.").

15 The Tax Reform Act of 1976 combined the previously separate gift and estate tax exemptions into a single "unified credit" applicable across the individual's lifetime and at her death. I.R.C. § 2010. Its adoption eliminated the estate tax on about 2/3 of the estates that would otherwise have been required to file estate tax returns or pay any federal transfer tax. PRICE & DONALDSON, *supra* note 12, § 2.3. As applied to the estates of persons dying in calendar year 2016, the basic exclusion amount is $5,450,000, or $10,900,000 per married couple. Rev. Proc. 2015-22, 2015-44 I.R.B. 610, https://www.irs.gov/irb/2015-44_IRB/ar10.html (last visited Mar. 20, 2016). In 2017, the amount increased to $5,490,000. *See* I.R.S., *What's New – Estate and Gift Tax*, https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax (last updated Jan. 18, 2017). The same result can be achieved under the portability features of the deceased spousal unused exclusion amount ("DSUE amount"), which permits the surviving spouse to capture any outstanding, unused balance of the last predeceased spouse's unified credit.

As projected, approximately .2% of all estates of decedents dying in 2016 will owe an estate tax.

J. COMM. ON TAX'N, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, NO. JCX-52-15 (Mar. 16, 2015), https://www.jct.gov/publications.html?func=startdown&id=4744.

16 Income splitting can reduce the total income tax burden within a given family, particularly if it shifts property to one in a much lower income tax bracket or if the 3.8% surtax on "net investment income" would otherwise come into play. PRICE & DONALDSON, *supra* note 12, § 7.9. These benefits might not be captured, however, if the transfer is to a minor child or full time student under age 24, in which case the tax on unearned income might be assessed at the parent's level. I.R.C. section 1(g).

A quite different choice might be attractive were the parties' financial circumstances flipped. A could disclaim, whereby the estate tax would be computed as though the disclaimed interest had never been transferred to him. Otherwise stated, the estate would pass directly from the decedent spouse to the surviving one, thereby triggering the unlimited marital deduction and, depending on the amount disclaimed, minimizing (if not negating) transfer tax liability under the Internal Revenue Code.[17]

For desired ends to be achieved, the disclaimer must work under the applicable law, the specifics of which may differ. A disclaimer can be qualified under both federal law[18] and state law,[19] one but not the other,[20] or neither.[21] This potential for slippage is eased in jurisdictions having adopted the Uniform Disclaimer of Property Interests Act, where any disclaimer that qualifies under federal law is deemed to meet the requirements for a valid state law disclaimer, whatever the local re-

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17 When a legatee makes a qualified disclaimer that causes the surviving spouse to be entitled to the disclaimed interest, the interest is treated as though it passed directly from the decedent spouse to the surviving one. I.R.C. § 2518. The estate may take a marital deduction for same. *See* I.R.C. § 2056(a); Treas. Reg. 20.2056(d)-1(b); *see also* DePaoli v. Comm'r, 62 F.3d 1259, 1261 (10th Cir. 1995). Although I.R.C. section 2518 is a gift tax section, I.R.C. section 2046 makes it equally applicable to a disclaimed legacy or inheritance.

18 A "qualified disclaimer" under the Internal Revenue Code is one that will be recognized as effective under federal gift and estate tax law. More specifically, the disclaimer must be 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—
  (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 without any direction on the part of the person making the disclaimer and passes either—
  (A) to the spouse of the decedent; or
  (B) to a person other than the person making the disclaimer.

I.R.C. § 2518(b)(1)-(4).

19 For statutory example, New York law provides that "A renunciation made in compliance with the provisions of this section shall not necessarily constitute a qualified disclaimer within the meaning of section 2518 of the Internal Revenue Code of 1986, as amended, or for the purposes of the taxes imposed by article twenty-six of the tax law." N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(a) (McKinney 2017).

20 *See, e.g.,* Estate of Monroe v. Comm'r, 124 F.3d 699, 709 (5th Cir. 1997) (discussing disclaimers valid under state law but challenged under federal).

21 As generally would happen, e.g., if the attempted disclaimer took place after acceptance of the interest had already occurred. *Id.*

quirements imposed.[22] As should be obvious under federalism principles, however, the reverse is not equally true.[23]

C. Direct v. Dependent Disclaimers

Legal theory counsels that choices over how to interact with property, including whether to exercise the right to reject, accept, transfer, or abandon it, is largely up to the individual owner. For example, donative freedom (including in testamentary form) permits choices to be made that are largely untrammeled by restriction.[24] Freedom of contract, or more modernly, transactional autonomy,[25] reminds that parties contem-

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[22] The UDPIA has been adopted in eighteen jurisdictions, the District of Columbia, and the United States Virgin Islands. *But see* UNIF. PROBATE CODE § 2-1114 (UNIF. LAW COMM'N 2010). ("Notwithstanding any other provision of this [part], if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this [part].").

[23] MCGOVERN, KURTZ & ENGLISH 3D, *supra* note 14, § 83. For example, because state law might permit a disclaimer at any time up until acceptance, the testate beneficiary of a future interest might have a fairly long time indeed within which to effectively disclaim. By contrast, federal law would bar the attempt if being made by one over the age of 21 if nine months had elapsed from the date of the decedent's death. I.R.C. § 2158(b); Treas. Reg. § 25.2518-2(c)(3).

[24] *See* Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 214-15 (1997) (quoting Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942); *see also* Minary v. Citizens Fid. Bank & Tr. Co., 419 S.W.2d 340, 343-44 (Ky. 1967) (stating "[N]othing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. [Nevertheless,] [e]xercise of the coordinate power to limit classes of beneficiaries is infrequent and courts usually enforce testamentary dispositions unless they are contrary to public policy or positive law."). More starkly (and clearly too broadly) stated, "[I]t is of paramount importance that a man be permitted to pass on his property at his death to those who represent the natural objects of his bounty. This is an ancient and precious right running from the dawn of civilization in an unbroken line down to the present day.").

Although formal limits on testamentary freedom may be unusual, informal ones might exist through such judicial mechanisms as will invalidation on formalities, influence, or capacity grounds. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 272-73 (1996) (discussing effects of assessing will legitimacy through prevailing social norms).

[25] *See* E. ALLEN FARNSWORTH, CONTRACTS 313 (4th ed. 2004) (discussing the mid-19th century turn from the height of such autonomy to a modern view where contracts often must yield to legislative and judicial oversight – on the "unruly horse" of policy – over what constitutes an acceptable bargain). He perceives it as still true, however, that "[i]n general . . . parties are free to make such agreements as they wish, and courts will enforce them without passing on their substance."

plating one can generally decide how to structure their deals.[26] Restraints on alienation are disfavored, which furthers the notion that owners can self-determine whether they need or want to convey their interests,[27] save them, or lay them to waste. While broad, decisions about property are not legally unbounded, and that actors internalize most decisional costs and benefits will generally further rational acts. Either way, competent adults, whether or not they are also rational, may make such binding choices for themselves, and either celebrate good outcomes or learn from their own mistakes.

Nevertheless, there are numerous instances in which (at times overlapping) categories of individuals presumptively need special property protection, either because they have not yet gained, were never given, have given up, or have already lost, that control.[28] One legal response is to remove donative or contractual capacity from the person or class until (if ever) the disability is removed and action, ratification, or rejection can occur.[29] Another is to appoint or permit a second person to act on behalf of the first.

These issues pose unique concerns for dependent disclaimers, which while technically falling within neither contract nor conveyance categories, operate similarly. Irrespective of whether they want or

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[26] Basic contract principles reinforce that absent procedural rules (such as the Statute of Frauds) or substantive ones (such as incapacity, misrepresentation, mutual mistake, or unconscionability), courts will generally enforce bargains as per their agreed terms. "The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give." Melvin Aaron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742, 745 (1982) (quoting THOMAS HOBBES, LEVIATHAN 75 (1651)).

[27] *See, e.g.,* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 532 (2007) ("The law has long favored transferability of property. Nowhere is this more clearly seen than in the common-law rule against restraints on alienation."); Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1410 (2013) (discussing the simultaneous predictability but contextual flexibility of reasonableness as restraint-limiting principle).

For an older, fascinating treatment of restraints on alienation, including their genesis in feudal land theory and their broad early embrace, see ELISHA GREENHOOD, THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS 604-27 (1886). Mr. Greenhood recounts that "the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off." *Id.* at 608 (citing 3 KENT's COMMENTARY 506). Of course, this regard for restraints no longer exists, falling early victim to the Statute Quia Emptores in the mid-13th century.

[28] These instances include infants, minors, wards, incapacitated adults, principals under a power of attorney, trust beneficiaries, and heirs or beneficiaries to a still-open estate.

[29] Thus, for example, minors generally cannot make wills, nor can those who lack testamentary capacity, until either becoming of age, regaining capacity, or acting within a lucid interval.

ought to, minors may not disclaim.[30] Depending on one's view, the difficulty thus posed is either eased or exacerbated by a common difference between federal and state disclaimer law, which tracks the two protection options noted above. Qualification under federal law demands that disclaimers be filed within 9 months of the decedent's death.[31] Nevertheless, under the theory that a minor beneficiary is not yet old enough to decide to reject the subject share, federal law tolls the 9-month window for minors until the minor reaches age 21.[32] By contrast, many states that have not adopted the UDPIA retain the fixed 9-month requirement, but provide that a guardian may disclaim on a minor's behalf.[33]

D. The Example of Friedman

The deceptively short case of *In re Friedman*[34] illustrates both the issues presented and the complexity of a reasoned response. The decedent died intestate survived by her spouse, two adult children, and one infant grandchild (the child of one of the decedent's children) and leaving an estate valued at over $6,000,000. Under applicable law, decedent's estate was to be distributed among three heirs, with her spouse taking the first $50,000 plus one half of the remainder and each of the children splitting the balance.[35] The parties quickly discerned that were all descendant heirs to disclaim, the entire estate would pass to their father (decedent's surviving spouse), capture the marital deduction, and nullify the $200,000 New York estate tax bill that would otherwise be levied against it.[36]

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30 I.R.C. § 2518(b)(2)(B).

31 I.R.C. § 2518(b)(2).

32 I.R.C. § 2518(b)(2)(B).

33 In a break from prior law, the UDPIA and the Uniform Probate Code reject any particular time bar (such as that set by I.R.C. section 2518) to instead provide that disclaimer is barred if, *inter alia*, the disclaimant has accepted the interest. Hirsch, *Unintended Consequences*, *supra* note 9, at 34-35. *See also* UNIF. PROBATE CODE § 2-1113(b) (UNIF. LAW COMM'N 2010). As the General Commentary to the Uniform Probate Code's disclaimer provisions reflects, the older uniform acts promulgated in 1978 (i.e. the Uniform Disclaimer of Property Interests Act, the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and the Uniform Disclaimer of Transfers under Nontestamentary Instruments Act), the prior Uniform Probate Code provision of section 2-801, and virtually all of the state statutes that the UDPIA was designed to replace had largely (but not completely) mirrored the time limit then newly set by I.R.C. section 2518 in the Tax Reform Act of 1976, i.e. had to be made within nine months of the decedent's death.

34 7 N.Y.S.3d 845 (Sur. Ct. 2015).

35 N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 2017).

36 *Friedman*, 7 N.Y.S.3d at 845.

The objective sought would easily have been accomplished had the two adult children, acting in concert, been the decedent's sole descendants.[37] But they were not, with the initial impediment to their plan being representation. Because there was a third descendant of the decedent – her infant granddaughter[38] – the effect of such dual disclaimer may have been that infant's inheritance of the entire "descendant's portion," ostensibly carrying the same $200,000 tax hit as would have been borne by her mother and uncle.[39] As such, the disclaimers would have left decedent's children with no share of her estate, caused zero to little increase in the amount passing to the surviving spouse, generated zero to little tax benefit under the marital deduction, and arguably increased net costs given the potential need thereafter to appoint a guardian for the infant vis-a-vis the roughly 1.5 - 3 million dollars with which she would have ended up.[40]

Undeterred, the child's mother petitioned for, and was granted, a limited guardianship of the infant's property.[41] Representing that her and her brother's disclaimers were conditioned on the effectiveness of that of the infant,[42] she sought authorization to renounce the infant's intestate share of the decedent's estate. Petitioner's rationale was concise. She maintained that it was in the "best interests" of decedent's distributees to renounce both directly and derivatively to avoid estate taxes, and further postulated that disclaiming on behalf of the infant

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37 Note that both of them would have had to disclaim to achieve this objective. Had simply son disclaimed, half of his disclaimed interest would have gone to his father and the other half, to his sister, with the opposite also being true. *See* N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c).

38 Indeed, the granddaughter seems to have been born *after* the death of the decedent. In discussing the effect of representation upon the disclaimed interest, the court cites section 4-1.1(c) of the Estates, Powers and Trusts Law, which provides that takers from the decedent's estate "conceived before . . . death but born alive thereafter, take as if they were born in his or her lifetime." *Friedman*, 7 N.Y.S.3d at 845. If so, this is all the more reason to permit the petitioner to disclaim on behalf of her daughter, whom the decedent had never met, and may have not known was *in utero* or otherwise in esse.

39 This supposition is informed by two factors. First, if the entire "decedent's estate" would be redistributed as though both adult disclaimants predeceased decedent, then infant would have been entitled to the entire amount to which her mother and uncle would have otherwise succeeded. The wording of section 2-1.11(c) of the Estates, Powers and Trusts Law, however, seems to limit the effect of the disclaimer to the "disclaimed interest" rather than the decedent's entire estate. Second, one would have to see whether the state estate tax on property passing to any descendant (rather than a child) was pitched at an equal rate.

40 UNIF. TRANSFERS TO MINORS ACT § 6 (UNIF. LAW COMM'N 1986).

41 *In re* Friedman, 7 N.Y.S.3d 845, 845 (Sur. Ct. 2015). "A renunciation may be made by . . . [t]he guardian of the property of an infant, when so authorized by the court having jurisdiction of the estate of the infant." N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d)(1).

42 *Friedman*, 7 N.Y.S.3d at 845.

"has no pecuniary effect on [that infant, as she] only possesses a contingent interest in decedent's estate."[43] Effectively shrugging, the court said "no."

> The fact that if petitioner does not disclaim the infant would receive nothing from the estate does not denote that it is in the infant's best interests to allow the renunciation, which is the standard to be applied . . . . While it may be in the "best interest" of decedent's *distributees* to renounce to avoid the imposition of estate taxes, the court does not find allowing petitioner to disclaim on behalf of the infant to be in the best interests of *the infant*, and finds that it is in fact against the infant's best interests to allow the renunciation.[44]

Although there is much to be said for directness, the court's decision was flawed.

III. Justifying Dependent Disclaimers

A. Best Interests in Context

1. *Doctrinal Context*

Through guardianship proceedings, states protect the interests of minors and others deemed legally incapable of managing their personal or financial affairs by transferring that power to another (the "guardian") on behalf of the protected person or ward.[45] Generally, guardians of the property must manage the ward's finances, including collecting assets and overseeing their investment, disbursement, and sale.[46]

Minors are often heirs or beneficiaries. Particularly where the will does not provide otherwise, the careful personal representative will distribute a more substantial share to a guardian or conservator rather than

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43 *Id.* at 846.

44 *Id.* (emphasis added).

45 Contrast the looser invocation of the term to refer to the non-court appointed "natural guardians" or "legal or physical custodians" of a minor child over whom they have custodial rights, or the narrower appointment of a "guardian ad litem," literally appointed for the particular litigation or court proceeding. McGovern, Kurtz & English 4th, *supra* note 14, at 660-61.

46 *Id.* at 660. The petition in *Friedman* reflects that there is a fair amount of flexibility in limiting guardianship parameters by scope or duration. Guardianship is a creature of the state: state courts conduct the hearing and do the appointing; state law controls. Unsurprisingly, there is broad jurisdictional variation, even over terminology. *Id.* There is a limited degree of standardization, however, in that roughly one-third of the states have adopted the Uniform Guardianship and Protective Proceedings Act, incorporated into the Uniform Probate Code at Article V.

to the minor or his parents.[47] Moreover, she will reject a disclaimer made on behalf of a minor without ensuring that the person making the disclaimer holds proper authority to do so and has followed all governing rules.[48] Unfortunately, what little guidance exists about disclaiming for minors may end at that procedural level. It is almost as though the relative clarity of state statutes over the procedures demanded when disclaiming on behalf of another has seduced courts into focusing thereon at the expense of locating, and then discharging, a more searching substantive standard. Federal law is similarly unhelpful, with the validity of federal disclaimers and the determination of one's best interests remaining at the mercy of the state. Yet as the court in *Friedman* remarked,

> The procedure for authorizing renunciations cannot be regarded as pro forma or ministerial; it is a significant responsibility. . . . It can only be justified if the State, acting through the court, assures the ward's best interests are being protected. . . . The court may, and indeed should, consider any matter which may affect the ward's welfare, including the possible future legal consequences of a fiduciary's proposed course of action.[49]

Paradoxically, the *Friedman* court's remonstration is both enormously helpful yet not helpful at all.

Guardians owe all of the duties of care, diligence, loyalty, and prudence that any fiduciary owes to those whose interests it represents.[50] These standards essentially translate into the familiar obligation to act in

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[47] *Id.* at 557. State statutes might avoid the need for (and correlative costs of) appointing a legal guardian in instances where the value of the amount transferred is small. *See, e.g.*, UNIF. PROBATE CODE § 5-104 (UNIF. LAW COMM'N 2010) (property with value not exceeding $10,000 a year may be transferred to, *inter alia*, "the person with care and custody of the minor and with whom the minor resides" to be used for the minor's benefit but without transferor liability for its improper application); *see also* UNIF. TRUST CODE § 816(21) (UNIF. LAW COMM'N 2000) (a trustee may "pay an amount distributable to a beneficiary who is under a legal disability" to the beneficiary directly, apply it for the beneficiary's benefit, or pay to the beneficiary's conservator or guardian, or custodian, or custodial trustee).

[48] *See, e.g.*, N.J. STAT. ANN. 3B:9-4(B) (West 2016). A disclaimer on behalf of a decedent, minor, or mental incompetent may be made by the personal representative of the decedent or the guardian of the estate of the minor or mentally incompetent person. The disclaimer shall not be effective unless, prior thereto, the personal representative or guardian has been authorized to disclaim by the Court having jurisdiction of the estate of the decedent, minor or mentally incompetent person.

[49] *In re* Friedman, 7 N.Y.S.3d 845, 846 (Sur. Ct. 2015) (quoting *In re* Scrivani, 455 N.Y.S.2d 505 (Sup. Ct. 1982)).

[50] *See, e.g.*, UNIF. PROBATE CODE § 5-207(a) (discussing a guardian's duty to "act at all times in the ward's best interest and exercise reasonable care").

the ward's "best interests," as independently and objectively discerned. Except to the extent that they bring something to bear upon those interests, such factors as the relative stringency of the particular determination by contrast to alternatives, or the inclinations of the ward (or others) vis-a-vis the decision being made, are largely ignored.[51] Within the context of appropriate dependent disclaimers, the grand question – must, and if so, does, the requested disclaimer survive best interests review – is one that permits no easy answer.

As applied to children, the contours of "best interests" are usually tested within abuse, neglect, and custody contexts, which will often include objective, non-pecuniary features in deciding what they even are. As such, best interests determinations made within those confines can acquire a certain rhythm and flow, for although no two such situations are identical, generally agreed-upon principles can inform the guardian's recommendation in the particular case. Less so for disclaimers for minors, however, where mixed inter- and even intra-jurisdictional signals cloud outcome predictability for even a straightforward plan. That little guidance exists has led even the Tax Court, when confronting the propriety of a parent's disclaimer for a minor, to lament that "[t]here is nothing in [the applicable state] law which instructs the Probate Court as to what factors must be considered when deciding what is in the [minor's best interests]."[52]

Part of the difficulty may be that with disclaimers, the outcome presents with more subtlety given that the issue will by necessity arise within the powerfully triple-charged conflation of family, property, and death. Of the three, the one on which legal actors and institutions seem most boldly and authoritatively willing to speak is "property," tempting those wrestling with best interests toward a reductionist bottom line. This makes the answer easy, depending on the eye of the beholder.

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51 MCGOVERN, KURTZ & ENGLISH 4TH, *supra* note 14, at 662. Other models exist, but seem generally pitched – at least formally – toward incapacitated adults rather than minors. *Id*. Note, however, that Uniform Probate Code section 5-411(c) expressly notes that the court "shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained[,]" and shall also consider the protected person's financial needs, the possible reduction of estate, inheritance or other tax liabilities, eligibility for governmental assistance, the protected person's previous pattern of giving; the existing estate plan, the protected person's life expectancy vis-a-vis the extent of the conservatorship, and *any other factors* that the court considers relevant. UNIF. PROBATE CODE § 5-411(c)(1)-(7) (emphasis supplied).

52 Estate of Goree v. Comm'r, T.C. Memo. 1994-331, 68 T.C.M. (CCH) 123, 128 (1994), *nonacq.*, 1996-2 C.B. 1, *action on dec.*, 1996-01 (Mar. 4, 1996). Although the court may have been speaking broadly about best interests in general, the more narrow construction may be the more apt, given the particular issue before the court and the myriad places and ways in which "best interests" for such matters as custody have been explicated.

Those who want to deny the disclaimer will stress how it removes property, improvidently and irretrievably, from the estate of the ward. Those who want to uphold it will respond by underlining its tax-savings utility in preserving economic value for broader family use. Perhaps the question should turn more on matters of degree. Perhaps disclaiming is good for the minor independently, or better for the minor than not disclaiming, or best. Perhaps instead it is "not bad" for the minor in the short term, but optimal in the long. The problem, in other words, may partly rest with how the standard is currently framed, which seems to create a false binary between that single decision which is in the minor's "best interests" versus that which is not, when a more shaded standard might encourage a superior, creative response.

This construct might exacerbate the tendency, particularly of non-parental guardians, to mirror their trustee counterparts in acting with risk-aversity. Indeed, under the Uniform Guardianship and Protective Proceedings Act, "guardians" make personal care decisions for the ward's person, "conservators," for her property.[53] The terminology is evocative in suggesting that when dealing with assets, the primary role is literally "conservative asset conservation," which further suggests the almost per se impropriety of making any uncompensated "transfer" of the ward's funds (which, to the layperson, is what a disclaimer is). The guardian is forced between two fires: ignore any broader benefit that might inure to the child or family unit by refusing to recommend the disclaimer, or endorse it and be vulnerable to suit once the child is of age to bring one.[54]

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53 UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 5-101(1) (UNIF. LAW COMM'N 1997).

54 Unfortunately, and perhaps because of the existence of such remedies as voiding prior judgments or reopening existing decrees, "little attention has been paid to whether the person under disability can sue the guardian ad litem." Martin D. Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643, 744 (1984). Depending on the rights and the role of the person who acts on the other's behalf, barriers might exist. For example, although trustees, guardians, and conservators are fiduciaries, owing duties to their beneficiaries and vulnerable to suit for their breach, most jurisdictions grant the guardian ad litem, as an "arm of the court," quasi-judicial immunity from conduct arising within the scope of the appointment. Moreover, the guardian ad litem reports its recommendations to the court, which is free to accept or disregard them through its order, itself appealable. *See, e.g.*, Kimbrell v. Kimbrell, 331 P.3d 915, 921 (N.M. 2014) (suit by one parent "on behalf of the child" against other parent and GAL in custody context barred). Perhaps the critical difference lies in whether and to what extent the guardian is viewed more as an agent of the court charged with serving the child's best interests or an agent of, or lawyer for, the child herself, such as when assessing settlement issues. For discussion in a non-estate context, see chapter 12 of the 2013 edition of Linda D. Elrod's book, *Child Custody Practice & Procedure*, entitled, "Representation of Minor Child." *See generally* George S. Mahaffey Jr., *Role Duality and the Issue of Immunity for the Guardian Ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD.

There are several immediate options when considering the extent to which dependent disclaimers should be reviewed: never permit such disclaimers, always permit them, or permit them only after a "best interests" review. The first option is absurd for two reasons. First, it ignores one way (later discussed)[55] to view the subject "interest" being disclaimed, which is as no actual interest at all. If that is true, there is no necessity to review what happens to "it," including its disclaimer, much less under a "best interests" standard. Moreover, if the interest being disclaimed is indeed property, an absolute rule barring its disclaimer disregards the very fact- and human nature concerns driving the need for a guardianship. The second option is much more defensible depending on how the subject interest and the parties' relationship to it and each other is viewed. Again depending on how the disclaimed interest is perceived, the third option may be best. No decision that intimately affects the circumstances of minor children should be made lightly, with dependent disclaimers no exception.

Nevertheless, "best interests" itself, as applied, yields wide variation, from a *pro forma* look at the petition or guardian's report, whatever its substance, through a near- *per se* determination that uncompensated transfers will never comport,[56] to a searching inquiry in which all factors are carefully factored and weighed. Which version to push? One could analogize the entire enterprise to constitutional standards of review. The proposed conduct by a guardian on behalf of a minor ward might rationally further the child's legitimate interest, substantially advance an important one, or be narrowly tailored to meet a compelling one. In one sense, the entire "best" interests question roughly and categorically assumes the strictest scrutiny tier, working backwards from there in assessing the legitimacy of the proposed conduct. I propose a more flexible (if not forgiving) scrutiny, especially where a parent is disclaiming on behalf of a child, with the disclaimed interest ending up with either that parent or that parent's ancestor, and especially where, but for the parent's identical choice to disclaim, the child would have had no interest at all. Differently stated, if they are to be reviewed at all, perhaps dependent disclaimers should presumptively

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279 (2002) (observing, *inter alia*, a trend "disfavoring immunity" for guardians ad litem who play an advocacy role). Note that section 5-411 of the Uniform Guardianship and Protective Proceedings Act explicitly notes that a conservator may make certain gifts and "convey, release, or disclaim contingent and expectant interests in property[,]" but may only do so "after notice to interested persons and upon express authorization of the court[.]"

55 *See infra* note 185 and accompanying text.

56 The *Di Domenico* and *Horowitz* decisions treat this approach as a virtual sine qua non to conserve the minor's property. MCGOVERN, KURTZ & ENGLISH 3D, *supra* note 14, at 85.

meet a "best interests" test, under which the onus to disprove their providence shifts to some party with standing to object.

2. *Friedman, Horowitz, and Goree: Situating Application Through Facts*

The *Friedman* opinion was short; its best interests discussion far shorter. Unmoved and, seemingly, unimpressed by the "non-property" argument to be made, the court chided that while it may be in the bests interests of estate *distributees*[57] to gain the tax benefits of disclaiming, "[t]he fact that if Petitioner does not disclaim the infant would receive nothing from the estate does not denote that it is in the *infant's* bests interests to allow the renunciation."[58]

Indeed, the court took more than a neutral stance. It could have said that the disclaimer was in the infant's best interests, or that it was not. Technically, it said neither. Instead, the court pronounced that to permit the requested disclaimer was "in fact *against* the infant's best interests," which seems to strike particularly hard at its propriety.[59] In reaching this result, the court borrowed almost verbatim from the 1987 case of *In re Estate of Horowitz*[60] – a case even more disdainful of the proposed disclaimer attempted, and itself worth careful attention given that it supplied such a critical base for the *Friedman* court.

Testator's will named nephew as executor and residue taker; if he failed to survive her, the residue was to be placed into trust for his children, his wife to serve as trustee.[61] Testator was survived by nephew, his wife, and his minor son, as well as by her own mother.[62] Were either nephew or his son to take in their own right, their bequest would be taxed at a Class D rate (15%) and generate inheritance tax liability of roughly $26,000.[63] By contrast, if both he and his son disclaimed, Testator's mother (nephew's grandmother) would inherit at a Class A status, dropping the tax rate by 10% and generating a tax savings approaching $20,000.[64]

As the viability of the plan was contingent on his minor son's disclaimer, nephew refused to disclaim unless son could also. Applicants thus sought appointment of nephew's wife/trustee as guardian of the property of their child so that she could disclaim as per state law. Note

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57 *In re* Friedman, 7 N.Y.S.3d 845, 846 (Sur. Ct. 2015).
58 *Id.*
59 *Id.*
60 531 A.2d 1364 (N.J. Super. Ct. Law Div. 1987).
61 *Id.* at 1365.
62 *Id.* at 1366.
63 *Id.*
64 *Id.*

briefly the position that the minor was in: he owned nothing before his aunt died (as it was but an expectancy, and in a contingent interest at that), and moreover, nothing thereafter (since his contingent interest disappeared once the alternate one in his father had vested).

As though it were properly in question, the court began by grudgingly acceding that disclaimers may be driven by tax efficiencies, but then swiftly distinguished the cases it cited to get there by noting that in neither one had the court been asked to "*affirmatively assist or approve* a disclaimer for the sole purpose of avoiding the payment of taxes."[65] The *Horowitz* court continued by asserting that other courts "have implied" that such action would be improper. For example, the court invoked in *In re Zipperlein's Estate*,[66] in which the Pennsylvania Supreme Court refused to sanction the possibility of a beneficiary's disclaimer to reduce an inheritance tax burden. Critically, the beneficiary there had already accepted the interest, which would have barred her disclaimer in any event. But in marshaling dictum in *Zipperlein* in support of its ultimate decision, the *Horowitz* court tipped its hand over how it *really* felt about disclaimers:

> Justice Stern, in refusing to assist *such a scheme*, distinguished the facts before him from other cases of disclaimer by stating: "[that there,] the renunciation of the legacy was *bona fide* and *not part of any palpable evasive scheme* such as that here suggested . . . ."
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> While passive acceptance of a disclaimer scheme may be acceptable, there is no reported instance of a New Jersey court having actively involved itself in *aiding* the avoidance of taxes. Nor should a court *aid in such avoidance* except where there exist *most compelling reasons* for so doing which do not exist here. Although tax avoidance is lawful, there is no authority in New Jersey whereby its courts should *affirmatively intercede to aid a plan* when the *sole purpose is the evasion of taxes*.[67]

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65 *Id.* (emphasis supplied). The court's attempted differentiation seems like a distinction without a difference, for if a disclaimer is permitted and otherwise qualified, and the best interests (if any) standard met, it should arguably matter little whether the court approves the petition for making the disclaimer or approves the disclaimer itself.

66 80 A.2d 817 (Pa. 1951).

67 *In re* Estate of Horowitz, 531 A.2d 1364, 1366-67 (N.J. Super. Ct. Law Div. 1987) (emphasis supplied). Note that what the *Zipperlein* court suggested would have been an "evasive scheme" was precisely tried and completely endorsed by a later (admittedly lower) court, which found not "a scintilla of evidence" that the disclaimers would be inappropriate or illegal. *In re* Uhrich's Estate, 7 Pa. D. & C.2d 126, 127 (Orphans' Ct. 1957). Note also that *Horowitz* was effectively neutralized (even if not expressly overruled) in *In re Estate of Schock*, 543 A.2d 488, 490 (N.J. Super. Ct. Law Div. 1988) ("One must be just in paying taxes due under the law; one need not be generous. . . . I hold that

First, the court seems to have warped the appropriate standard from whether disclaimer would be in the disclaimant's "best interests" to one driven by the "most compelling of reasons."[68] That is a difficult barrier to scale, and without more information to suggest it, seems to arise from a misguided perception that there was some great mischief afoot.

More importantly, "scheming conduct,"[69] particularly of the non-bona fide, evasive variety, is normally equated with illicit behavior if not crime. The court seems as affronted by the concept of disclaimer itself – where tax avoidance is arguably its policy- and I.R.S.-approved raison d'etre – as with the guardian's request that the court facilitate it through a guardianship appointment. What a peculiar critique if so. Disclaimers are permitted under federal law, which indeed, revamped its policy in the 1970s so as to standardize their practice and catch fewer of its users unaware of potential avenues for its disqualification. While one might argue that its effects in *Horowitz* (passing property to Testator's parent instead of a spouse) militate against its favorable treatment given that no marital deduction was involved, closer inspection weakens that argument. First, it involved a four-generation family. Shifting property from a collateral descendant's line to a directly ascendant one would have still left the disclaimed interest within the family of Testator's nephew and his son, both of whom were descendants of Testator's mother with the potential to inherit from her.[70]

Both more specifically yet abstractly, tax policy is tax policy. Just as the I.R.S. implicitly prioritizes marital relationships through creating a

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just as disclaimers not requiring court approval are legitimate even if the sole purpose is tax avoidance, so are court approved disclaimers."). New Jersey recently repealed the state estate tax, effective January 1, 2018. Inheritance taxes, however, will remain for non-family recipients. John C. Mahon, *New Jersey Repeals Estate Tax*, 2016 WLNR 32351675 (Oct. 21, 2016), http://www.wealthmanagement.com/estate-planning/new-jersey-repeals-estate-tax.

68 *Horowitz*, 531 A.2d at 1367.

69 *See, e.g.*, United States v. Malone, 454 F. Appx. 711, 713 (11th Cir. 2011) ("[A]ll conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.").

70 Interestingly, the *Horowitz* court ignores how the majority opinion in *Zipperlein* actually bended property law to result in a lower inheritance tax burden. There, the bequest was to a stepson and his wife as tenants by the entirety. Under then-applicable standards, the tax rate would have been 2% for the interest passing to the stepson, and 10% for the interest passing to his wife. The court had three options: tax the entire transfer at 2%, tax the entire transfer at 10%, or tax ½ of the transfer at each. In selecting the last option to achieve what it, at least according to the dissent, viewed as a more equitable result, the court openly disregarded long-standing principles regarding tenancies by the entirety being seized by their holders "pur tout et non pur my," or in indivisible form. *Zipperlein*, 80 A.2d at 818.

marital deduction and by sanctioning disclaimers to gain it, similar relational ranking finds expression in variable state tax rates based on relational status to the decedent. Both differential rates reflect policy choices that disclaimers should be able to achieve. One wonders whether the *Horowitz* court would have ruled the same way had disclaimants been Testator's *children*, had they all been adults, and had her spouse survived. If the federal government allows taxpayers to deploy tax-driven disclaimers, where there is far more money at stake, it would seem that state governments would be willing to do so as well. There should be nothing nefarious about intent nor action for that which the law permits, if not encourages.[71]

The court finally reached the heart of the matter to claim (not without sanctimony) that all of the rest aside, disclaimer would not be in the best interests of the infant.

> If the entire residue were to go to the child's great-grandmother there is no guarantee that this child will receive any benefit . . . . The amount could be significantly reduced by the grandmother during her lifetime; the grandmother could possibly remarry and share her estate with her husband; family relations could become strained and her grandson's interest in her estate reduced or eliminated; or, any number of [other] events might [occur]. Moreover, if the child's father accepts his devise, despite the increased tax burden, the child unquestionably will receive some direct benefit from his father; it cannot be said with any degree of certainty that such would be the case if the estate devolved to the great-grandmother of the child. While taxes may be saved by approval of this *scheme*, any number of contingencies could reduce the amount devolved after receipt by the grandmother, thus affecting any benefit the child might eventually receive.[72]

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[71] *See, e.g.*, *In re* Guardianship of Kramer, 421 N.Y.S.2d 975, 977 (Sur. Ct. 1979) (recognizing the tax-driven nature of disclaimers).

The *Horowitz* court also discussed the dependent disclaimer itself, proclaiming the need for "strict construction and compliance" with the authorizing statutes. Technocratically, the court determined that while the will meant that nephew's predeceasing (or disclaimer) should shift the interest to the trust's trustee, the state disclaimer statute only permitted disclaimers by devisees, defined to *exclude* both trustees and trusts and thereby negating any judicial authority to authorize disclaimer by a non-devisee trustee. The court ignored that petitioner was attempting to disclaim not as trustee, but on behalf of her minor child who was indeed the devisee of an equitable contingent interest. *Horowitz*, 531 A.2d at 1367.

[72] *Id.* (emphasis supplied). Tellingly, the court shifted from referring to the taker on disclaimer as the "great-grandmother" to the "grandmother." This suggests that the court was thinking about the disclaimant as being Testator's nephew rather than his son. Of course, in that he was an adult, the nephew's decision to disclaim would have been his

The *Friedman* court agreed, constructing a suffocating little paradox through the claim that "the parent won't disclaim if child cannot, so it is even more probable that the money will be there and the child will get some direct benefit through the mother."[73] Echoing *Horowitz*: "[a]ny taxes saved by the [distributees or the] estate cannot serve to overcome the effect of making it more remote and improbable that this infant will ever receive a benefit by allowing Petitioner to renounce the infant's intestate share[.]"[74]

This thinking represents a cramped view of best interests. True, an interest held by an owner one step removed from a child is "closer" to that child than the property of one thrice so removed. But that is not really the relevant line to draw. Both are expectancies, both are non-property, and how odd to find disadvantage to B in A's choices about what he alone owns (which, in essence, is what the court has done). First, every single possibility that could happen to or through the interest while in a more generationally removed ancestor's hands could happen through a parent's as well: he could spend down or dilute the money; he could die leaving it all to a charity; he could bet the lot on "red" and lose. No parent is obligated to give property to children during life or at death.[75] Parental support obligations will remain whether parents disclaim or not. What is more, disclaimers are less likely sought anyway where finances are strapped, support costs loom,[76] or familial relationships are strained.

It is curious that the *Friedman* court chose to follow the discredited view of *Horowitz* over its own sister court's holding in *Kramer*,[77] which

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alone to make no matter the consequence, and again reveals what seems to be a bias against tax-driven disclaimers as much as some concern over how doing so would affect the rights of a minor.

73 *In re* Friedman, 7 N.Y.S.3d 845, 846-47 (Sur. Ct. 2015).

74 *Id.*

75 Except perhaps in Louisiana, and even there, only under certain circumstances. *See, e.g.*, *How Long Do Parents' Legal Obligations to Their Children Continue?*, FIND LAW, http://family.findlaw.com/emancipation-of-minors/how-long-do-parents-legal-obligations-to-their-children-continue.html (Last visited Mar. 7, 2017) (discussing parental duties and obligations); *How to Disinherit Loved Ones—And Which You Can't,* REUTERS (Feb. 1, 2013), http://www.cnbc.com/id/100424947 (last visited Apr. 4, 2017) (discussing legal barriers to disinheriting children); *Forced Heirs and Heirship Under Louisiana Law,* MY LOUISIANA SUCCESSION ATTORNEY, http://www.mylouisianasuccession.com/louisiana/forced-heirship/ (last visited Mar. 22, 2017) (discussing the restrictions on a person's ability to leave property to someone other than one's children under Louisiana's system of laws).

76 Indeed some states would prohibit the disclaimer by an insolvent or bankrupt heir. *See* E. Diane Thompson, *Can A Beneficiary Avoid a Federal Tax Lien By Using a Disclaimer?*, VA. STATE BAR NEWSLETTER (Vol. 16, No. 2 1999), http://www.vsb.org/site/sections/trustsandestates/summer1999b.

77 *In re* Guardianship of Kramer, 421 N.Y.S.2d 975, 978 (Sur. Ct. 1979).

sustained a petition to renounce on strikingly similar facts. There, decedent died intestate leaving a gross estate approaching $400,000.[78] As in *Friedman*, decedent was survived by a spouse, two adult children, and a minor grandchild through one of his living children. The children were prepared to renounce a percentage of their share, shifting a half million to their mother and triggering marital deduction savings. Again as in *Friedman*, because the daughter's disclaimed interest would have passed to her child, she sought limited letters of guardianship of the property of her daughter for the sole purpose of renunciation,[79] after which she and her brother would renounce a portion of their distributive share and thus maximize the marital deduction.[80] As she revealed, "[P]etitioner will not renounce a percentage of her interest in her father's estate unless a similar renunciation is permitted to be filed on behalf of the infant."[81]

The court granted the daughter's application for limited letters of guardianship and authorized her to disclaim on the infant's behalf.[82] The court essentially recognized that although it would be difficult to rule that the infant should forego a right to receive something of value without commensurate consideration, here, the infant would ultimately *not be foregoing the right* to receive something of value, so it mattered not that there was no benefit in return.[83] From that perspective, any money received would be pure windfall, as the infant had nothing to gain or lose.

None of these questions are resolved at the federal level, in part because the federal government defers to the state courts in determining a disclaimer's effectiveness. The closest that federal law comes is through *Estate of Goree v. Commissioner,*[84] which holds questionable reliance value given its procedural posture and the Service's subsequent nonacquiescence therein.

Decedent died intestate survived by four siblings, father, spouse, two minor children of a prior marriage (both of whom spouse had adopted), and a third minor child of decedent and spouse. The only heirs were his spouse and his children.[85] Decedent's estate was significant, with its principal asset close to $4,000,000.000 worth of shares in a

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78 *Id.* at 976.

79 *Id.*

80 *Id.*

81 *Id*. Note that the reverse need not be so qualified, for if the mother does not disclaim, there is no interest in the infant at all.

82 *Id.* at 978.

83 *Id.* at 977.

84 No. 21098–92, 1994 WL 379246 (T.C. 1994), *nonacq.* 1996-2 C.B. 1, *action on dec.*, 1996-001 (Mar. 4, 1996).

85 *Id.* at *1.

closely-held family corporation that decedent's great-grandfather had founded and which decedent's extended family continued to work at and control.[86]

Decedent's father was appointed estate administrator, and his spouse conservator of his children's property. The day after decedent's father disclaimed any interest he might have (or critically, be later entitled to receive) in decedent's estate, spouse as conservator petitioned the probate court for protective orders authorizing and directing that partial disclaimers of each child's intestate share be executed.[87] The probate court appointed a guardian ad litem for the children. After hearing (of which no record or transcript was maintained), the probate court judge entered the requested orders, which were duly filed and received by the estate administrator.[88] Respondent filed a notice of deficiency, determining that the disclaimers were invalid under state law and disallowing the marital deduction for any property passing to spouse in result.[89]

Although remonstrating that little guidance existed for the probate court in determining "best interests," the Tax Court offered its view over whether, when and why a guardian might choose (and be permitted) to disclaim on behalf of her children, even if ultimately to benefit herself:[90] accordance with procedural law; the desire to preserve capital

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86 *Id.* at *1-2.

87 *Id.* at *2.

88 *Id.*

89 *Id.* at *3.

90 *Id.* at *6. Although the petitioner's disclaimer on behalf of her children inured to her own benefit, I.R.C. section 2518(b)(4)(A) shields it from attack since she is also the decedent's spouse. Additionally, the court noted in an aside that there was no self-dealing here by wife in her role as conservator given (a) the appointment of the guardian ad litem and (b) the court's pre-approval of the disclaimer. *Id.* at *7 n.12.

Once held by the spouse, it is possible that the disclaimed interests would "directly benefit" the children/disclaimants, thus potentially disqualifying the disclaimers under section 2518(b)(3) (disclaimant must not have "accepted the interest or any of its benefits[.]") Although the court elided that argument, it should fail. First, any benefit would be indirectly mediated through the mother's fee simple absolute ownership of interests disclaimed, to spend as she would then decide. This fee title should break the benefit chain; otherwise, the court would be pushing a peculiar, if not perverse, concept of fee ownership. Loose analogy exists within slayer statutes, where the maxim that "one should not profit from her own wrong" has been invoked in attempts to affect the downstream disposition of the murdered decedent's estate. *See, e.g.*, *In re* Estate of Burkland, No. CIV.A. 11-5024, 2013 WL 327622, at *3 (E.D. Pa. Jan. 29, 2013) (where statute provided that "[n]o slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent[,]" distributing life insurance proceeds to contingent beneficiary, who planned to transfer them to primary beneficiary to fund her defense of the homicide charge, would violate the statute and the underlying principles of ERISA). Aside from the fact that disclaimer is not tantamount to murder, section 2518(b)(3) implies *ex ante* acceptance of the disclaimed interest rather than some derivative *post hoc*

assets for children and avoid depletion through taxation or forced sale to pay it; the connection between that capital, the multi-generation family company that it represents, and the other family members with economic interest in the company and familial interest in the well-being of the decedent's children; the unanimous support of all other parties to the proceeding (including an initially dubious guardian ad litem) and the suggestion that the decedent would have, too; and others' testimony over their intended bequests to the minors, indicating that disclaimer would not leave them in economic straits.[91] In short, to the Tax Court, the probate court's decision, while permissibly mindful of the tax consequences of disclaimer, did more than merely rubber stamp a tax-driven petition (as the Commission had claimed).[92]

All of that said, much of the opinion actually distills to dispute over the appropriate standard through which to review the trial court's decision. The I.R.S. urged that *Commissioner v. Estate of Bosch*[93] required the federal court to review probate court proceedings *de novo* (although by its nature, a "best interests" decision will entail mainly questions of fact),[94] which it claimed would have resulted in virtually per se reversal of the decision to permit the disclaimer given that the lone benefit generated was to the decedent's estate or his spouse, rather than to the disclaimants.[95] The Tax Court disagreed, explicating a taxonomy of *Bosch* under which state trial court decisions should be given "due re-

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gain. *See generally* Estate of Monroe v. Comm'r., 124 F.3d 699, 706 (5th Cir. 1997) (discussing that "one who disclaims an interest in property must do so without getting something in exchange").

91 Estate of Goree v. Comm'r, T.C. Memo. 1994-331, 68 T.C.M. (CCH) 123, 128 n.12 (1994).

92 *Id*. at 128.

93 387 U.S. 456, 459 (1967).

94 Some have argued that the legacy of Bosch is at times more stated than real, with federal appellate courts often disregarding the state court determination as but another "evidentiary factor" in determining its review. *See, e.g.*, S. Alan Medlin, Howard M. Zaritsky, F. Ladson Boyle, *Construing Wills and Trusts During the Estate Tax Hiatus in 2010*, 36 ACTEC L.J. 273, 314-15 (2010) ("*Bosch* has concluded that the highest court of New York, based on existing precedent would not have affirmed the friendly ruling of the trial court, but *Bosch* involved a question of law."); Paul L. Caron, *The Federal Courts of Appeals' Use of State Court Decisions in Tax Cases: "Proper Regard" Means "No Regard*," 49 OKLA. L. REV. 443, 486 (1993) ("Courts of appeals have merely paid lip service to the "proper regard" standard and instead have undertaken a reexamination of state law, thereby giving "no regard" to lower state court decisions."); and Paul L. Caron, *The Federal Tax Implications of* Bush v. Gore, 79 WASH. U. L.Q. 749, 762 (2001) ("Federal courts have cavalierly disregarded the state court's interest in being the final arbiter of laws within the state.").

95 *Goree*, 68 T.C.M. (CCH) at 128. Interestingly, however, in failing to appeal the decision, the Commission later suggests that the probate court's decision to authorize the disclaimer would have passed muster under even *de novo* review.

gard," appellate court decisions should be "considered,"[96] and supreme court decisions should be "followed" when adjudicating property rights.[97] As such, the Tax Court refracted *Bosch* from *de novo* review assessing "what the probate court should have said"[98] into the meta-question of "what the state supreme court would have said about what the probate court did say."[99] Applying this approach, the Tax Court determined that it must affirm the probate court unless its findings were "plainly and palpably erroneous,"[100] which would be a hard review standard to clear and one that, at least to the Tax Court, in no way described the probate court's determination.

As the Service is generally agnostic over how disclaimers turn out under state law, its position in *Goree* signals a surprisingly aggressive posture in challenging the propriety of the dependent disclaimers there made. In addition to the Commissioner's brave claim that proper review would have obviously revealed the disclaimer's debility, the Service suggested in pleadings that the only plausible scenarios for a minor's disclaimer of a valuable property interest would be for a "dying minor" who "wish[ed] to disclaim . . . so as not to add value to his own estate"[101] or where the burdens of ownership exceeded the property's value.[102] As the court drily understated in response, "[w]e think that respondent's examples are much too narrow."[103] Moreover, the Commissioner filed a Notice of Non-Acquiescence[104] and an Action on Decision[105] signaling its general posture to Service personnel dealing with similar facts. While the notice merely reflected the procedural issue with which the Service disagreed,[106] the accompanying Action on Deci-

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96 And presumably, followed "[u]nless the court is convinced that the highest court of the state would decide otherwise." *Id*. at 126 (citing *Bosch*, 387 U.S. at 465).

97 *Id.*

98 *Id.* at 127.

99 *Id.*

100 *Id.* (seemingly limited to Alabama law and review of arbitral awards involving labor unions). *See, e.g.*, Local Union 1785, United Mine Workers of Am. v. Quarto Min. Co., No. 87-3027, 1988 WL 41973, at *1 (6th Cir. May 4,1988) (discussing how an arbitration award must be applies unless it is "plainly and palpably erroneous").

101 Estate of Goree v. Comm'r, T.C. Memo. 1994-331, 68 T.C.M. (CCH) 123, 128 n.11 (1994).

102 As might happen where the property is subject to an environmental clean up action, or where real property is underwater on the note and mortgage.

103 *Id*.

104 I.R.S., *Bulletin 1996-10* 4 (Mar. 4, 1996), https://www.irs.gov/pub/irs-irbs/irb96-10.pdf.

105 I.R.S., *Action on Decision*, CC-1996-001 (Mar. 4, 1996).

106 "Nonacquiescence relating to whether under *Estate of Bosch v. Comm'r*, 387 U.S. 456 (1967), the Tax Court erred in applying an appellate standard of review to a lower state court factual determination instead of reviewing the question *de novo*." I.R.S., *Cumulative Bulletin 1996-2*, 1996-2 C.B. 1 n.10 (1996), https://www.gpo.gov/fdsys/pkg/GOV

sion went farther, and both questioned the precedent upon which *Goree* relied in rejecting *de novo* review[107] and intimated that "friendly" proceedings yielding scant factual development would draw I.R.S. scrutiny:

> [T]here was doubt as to the adversarial nature of the state court proceeding, and as to the extent of testimonial evidence available to the trier of fact. In addition, there was no factual record available for review; the Tax Court was required to make its own record, but then reviewed the state court conclusions of fact based upon this subsequently created record, using an appellate (palpably erroneous) standard. The utilization of the palpably erroneous standard for review of factual findings in a nonadversarial situation is inconsistent with the rationale for the palpably erroneous standard, which assumes a vigorously contested lower court hearing.[108]

B. Tilt Toward Best Interests Because of the Nature of the Interest Disclaimed

1. *Expectancies and Other "Non-Property"*

Disclaimers are all about property–more specifically, "the . . . refus[al of] a proffered interest in or power over property."[109] With no such interest in property, there is nothing to disclaim. There is no need, for example, for one to reject next month's lottery winnings, or the profits that may be earned in a later year of stock trading, because there is no existing right in either to be relinquished.[110] The "rejection" of such assets would either need to wait until they (if ever) materialized, or take some other, more attenuated and precursive form, such as a refusal to purchase a lottery ticket or invest in the stock market to begin with.

Chances of taking from another's estate fall into the same category. Such an interest, usually cast as a "mere expectancy," is an odd piece of elusiveness dancing on the brink between hope and high chance.[111]

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107 The Service argued that the Tax Court actually misapplied *Bosch*: "The cases it cited in support are all distinguishable in that they concern the extent to which lower state court legal determinations are binding on the Tax Court, not factual determinations." I.R.S., *Action on Decision*, *supra* note 105.

108 *Id*.

109 *See* UNIF. PROBATE CODE §§ 2-1101 to 2-1117 (UNIF LAW COMM'N 2010) The quoted language comes from the General Comment to Part 11 of the UNIFORM PROBATE CODE, comprising the UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT.

110 Without an enforceable contract, such "interests" are non-existent. They cannot, for example, supply the res demanded for a valid trust.

111 *See* Katheleen R. Guzman, *Releasing the Expectancy*, 34 ARIZ. ST. L.J. 775, 775 (2002).

Notwithstanding the diffuseness of its contours, however, one thing is quite clear: the expectancy has not been deemed "property."[112] If not, it cannot be disclaimed. True, the expectancy can be lost before vesting, as where the decedent to whose estate it is sourced first writes a will or revises an existing one, or where the person in whom it appears that the interest will ultimately vest releases it back to a still-living testator. But none of these occurrences amount to a disclaimer, which requires an *in esse* right before it can be employed.

The expectancy unquestionably qualifies as property or a right thereto once the relevant decedent has actually died. This is so whether the interest under, for example, the subject will was devised as a presently vested fee simple absolute, a defeasible estate where divestment could occur, or a contingent or otherwise speculative future interest which perhaps, ultimately, will never vest at all. The key, once more, is that with the decedent's death comes the transformation of that inchoate potential into a fully existing (whether or not yet vested) property interest.

These reminders, basic as they are, hold important consequences within the dependent disclaimer field, particularly when assessing whether and the extent to which "best interests" must even be engaged.

If a disclaimer is the rejection of an interest, and where the cost/benefit of doing so initially and squarely rests upon the disclaimant, the following basic disclaimers seem irreproachable:

1. *A* disclaims an intestate inheritance descending *to A* from X's estate.
2. *A* disclaims a testate bequest or devise made *to A* under T's will.

In each instance, A was to succeed to property directly from the decedent's estate, turning from beneficiary or heir apparent into actual taker immediately upon decedent's death. Correlatively, A's interest ripened from the non-property of mere expectancy into an already

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112 Or as the usual formulation goes, "nemo est haeres viventes." *See, e.g.*, PAGE, *supra* note 2, § 1.2, at 3-4 ("[T]he will is not meant to create rights in others or to pass any interest in the property covered by the will prior to maker's death. . . . [T]o revoke a will is not to recall or reclaim an interest in another."); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 86.1 (4th ed. 1989) (one is free to revise a will, and the interests created by the will are "mere expectancies"); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1083 (1996) ("[T]he interests [a will] creates are mere expectancies, in no wise encumbering the properties it bequeaths."). *See, e.g.*, Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 617 n.85 (2000) (discussing examples of acquisition rights vesting as property on death).

vested interest,[113] with the only thing standing between A and ripened acquisition being creditors and estate distribution.[114] For reasons perhaps known only to A (and generally irrelevant in any event), A has made a decision that will affect no one else, and will bear the advantageous, disadvantageous, or neutral consequences of so rejecting ownership.[115] Legally, it does not matter whether the disclaimer would be in A's best interests or not, thus no best interests review is necessary.

Altering the scenario makes this propriety conclusion more difficult.

3. *A* disclaims an intestate inheritance descending *to B* from X's estate, and the property will instead pass *to C*.
4. *A* disclaims a testate bequest or devise made *to B* under T's will, and the property will instead pass *to C*.

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5. *A* disclaims an intestate inheritance descending *to B* from X's estate, and the property will instead pass *to A*.
6. *A* disclaims a testate bequest or devise made *to B* under T's will, and the property will instead pass *to A*.

Here, the interests created in B are similar to those that the prior examples had created in A: they are interests to which B is immediately entitled upon decedent's death; having vested, they are no longer mere expectancies.[116] The differences, however, are important. In Examples 3-6, had B been a competent adult, decisions about disclaiming would have rested with her. But here, as with any instance where one person disclaims on behalf of another, the immediate costs of rejecting owner-

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113 A few technical points should be made. First, under the common law, title acquired through intestate succession vested immediately in the heir by operation of law upon the decedent's death, whereas title acquired through testate succession only vested in the beneficiary who had not prevented same through disclaimer. *See, e.g.*, PAGE, *supra* note 2, §§ 49.1, 49.2. Nevertheless, the distinction has been largely erased through modern statutory and case law such that the vesting generally occurs *eo instante* in either case, and remains in only academic form. *Id.* §§ 49.1, 49.2 & 49.4; *In re* Bevilacqua's Estate, 191 P.2d 752, 755 (Cal. 1948) (succession rights may be "changed, limited or abolished by the Legislature at any time prior to the death of the ancestor"). Nonetheless, there is always the possibility that through some other expressed condition, the testate interest remained non-vested notwithstanding the decedent's death. For example, A's interest might have been a contingent remainder following a prior vested life estate in another.

114 The value of the underlying interest is always subject to depletion (if not total loss) depending on the intestate's debt position. *See, e.g.*, UNIF. PROBATE CODE § 3-902 (providing for abatement scheme where estate is insufficient to pay all creditors and beneficiaries); MCGOVERN, KURTZ & ENGLISH 4TH, *supra* note 14, at 350 (discussing abatement and tax allocation approaches).

115 Unless, perhaps, one who disclaims has a cause of action in malpractice against an attorney who failed to apprise of the disclaimer's effect.

116 *See supra* note 38 and accompanying text.

ship are estranged from its benefits, which legitimately inspires concern over whether the disclaimer decision serves B's interests. This is particularly acute in Examples 5 and 6, where A's disclaimer of B's interest inures to A's own ownership benefit.[117] Clearly, a "best interests" review is warranted in all four situations. As later discussed, however, the concern for B in either coupled scenario is mitigated somewhat if A is B's parent or otherwise already responsible for B's care.

Contrast:

7. A, lone heir to X's intestate estate, *having not yet disclaimed her intestate interest*, disclaims on behalf of her minor child, B.
8. A, sole beneficiary under X's testate estate, *having not yet disclaimed her testate interest*, disclaims on behalf of her minor child, B.

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9. *A*, heir to X's intestate estate, disclaims *her intestate interest*, and then disclaims the interest that thereby passes by representation to her minor child, B.
10. *A*, beneficiary under X's testate estate, disclaims *her testate interest*, and then disclaims the interest that thereby passed through a disclaimer provision, anti-lapse principles, the residuary clause, or intestacy to her minor child, B.

Situations 7-10 are classic dependent disclaimers, locking the parties into a prisoner's dilemma of sorts, or at least a high stakes game of chicken. Technically, the only way that B will acquire anything to disclaim is if A does so first, a decision entirely within A's control just as is A's decision over whether to seek to disclaim on behalf of Minor B. But if the original disclaimer is tax advantage motivated, the only way A will disclaim for herself is upon the assurance that B can, effectively, as well; whomever goes "first" could lose to the other.

Jarringly, Examples 7 and 8 seem to reflect useless acts in that there is nothing in B to disclaim but the doubly contingent possibility of nonexpectant and conditional share. Before A disclaims, B's interest does not even warrant a name. It is neither a vested nor contingent property interest any more than one might capriciously claim to hold rights to some rich stranger's estate.[118] It is not even an inchoate expectancy, both because it was not expectant in B to begin with and because on the

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117 Creating self-dealing problems to the extent that A is a fiduciary.

118 Not that people haven't tried.

decedent's death, it has already vested in someone else.[119] If expectancies need not–indeed, cannot–be disclaimed, then what to make of the wisdom or utility of imposing legal impediments to an attempt to disclaim an even lesser "something," which borders on nothing? That B can even contemplate that "something," whatever its stripe, derives solely and completely from the future potential conduct of A, who should enjoy unabridged liberty to disclaim. For in these situations (which are essentially the facts of the *Friedman* case), B as yet has no intestate share or property interest, contingent or otherwise, at all.[120] Without something to disclaim, there can be no disclaimer or similar transfer, rendering overly fraught concern with its "best interests" motivation or result irrelevant if not somewhat absurd.

Although the chronology is flipped, the same effectively can be said of Examples 9 and 10. Admittedly, B ends up with an interest (however conditional or short-lived) by virtue of A's already having exercised the right to disclaim. Nevertheless, as with Examples 7-8 and unlike Examples 3-6, the singular reason that that interest in B even arises again owes to what A has done, rather than what and to whom the original decedent had hoped to effect. The careful parent or guardian should either make her disclaimer expressly conditional on the validity of her child's,[121] or make no disclaimer of her own interest at all without first securing the effectiveness of the subsequent and dependent one. That said, given the circumstances through which B arrived at her interest, A

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119 One might think of an expectancy as that which would result if the status quo remained: the heir apparent's interest if the erstwhile decedent never writes a will, or the presumptive beneficiary's interest if an existing will is not changed. This interest in B is even more fragile than either, because it can be viewed as that which would result if the status quo were actually changed, i.e. were A affirmatively to disclaim that to which A has become entitled.

120 Absent unique jurisdictional terminology, to the extent that the *Friedman* parties or court suggested otherwise, they would be wrong. *See, e.g.*, *In re* Friedman, 7 N.Y.S.3d 845, 846 (Sur. Ct. 2015) (characterizing petitioner/parent's assertion that renunciation would have "no pecuniary effect on the infant as the infant only possesses a *contingent interest* in Decedent's estate") (emphasis supplied).

121 That is the position that the parent took in *Friedman*, as well as the parent in *In re Guardianship of Kramer*, 421 N.Y.S.2d 975, 977 (Sur. Ct. 1979). The *Kramer* court explicitly noted the issue:

> It is true that as a general rule, a court will not issue a ruling relative to a hypothetical contingency which might never arise. Nevertheless, the law is not so harsh as to require a person to act at his own peril in each and every instance. . . . In the instant matter, petitioner is not requesting a determination upon an issue which might never arise. She is requesting authority to perform an act that is an intrinsic part of a plan that will become immediately operational if she receives this authority. . . . The issue presented is far from premature. A need for its determination is pragmatically immediate, if not legally present until after petitioner actually renounces.

– particularly if the ultimate effect of doubly disclaiming is the passage of property through to an ancestor of both – should have a virtually unbounded right to disclaim on behalf of B with no best interests review or at least but a minor one, under a standard easily passed. At some oddly circuitous level, it is actually but A's right, and not B's, that A gives up through either dependent disclaimer.

That *Friedman* effectively disagreed does not mean that all courts have done, or would do, the same. Indeed, recall that *Friedman* references but disregards the earlier decision of *In re Guardianship of Kramer*,[122] where the close parallels between the cases, both of which tracked Examples 7-10, ended with their strikingly similar facts. Concerned that the infant would be "foregoing the right to receive something of value without receiving commensurate consideration[,]"[123] the court nevertheless granted the parent/limited guardian's petition with admirable conciseness and logic:

> [A]t this time, the infant has nothing. Unless her mother renounces she will have nothing. Her mother will only renounce if this can achieve a tax benefit for the estate which will not be achieved if the renounced share passes to the infant. Accordingly, the authority which petitioner seeks does not involve the infant giving up anything which she would otherwise possess. All that is here involved is the infant playing a ministerial role in a program designed to minimize the estate's tax liability without any real sacrifice whatsoever on the part of the infant.[124]

The *Kramer* court hit the mark. It seems foolish to hand-wring over the prudence of a parent's dependent disclaimer of a child's interest that doesn't even exist, worse yet to brood when the children do not yet exist either.[125]

2. *Releases, Advancements, and Satisfaction Compared*

The second reason that dependent disclaimers should be permitted as of virtual right is that their features echo a series of cohort doctrines where a parent's decision over estate-related issues–some of them predeath, some of them post–can bind her descendants with zero oversight by a guardian, a standard, or a court.

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122 421 N.Y.S.2d 975 (Sur. Ct. 1979).

123 *Id.* at 977. *See infra* note 241 and accompanying text (discussing what constitutes a "qualified disclaimer" under federal law and reflecting that consideration received is disqualifying).

124 *Kramer*, 421 N.Y.S.2d at 977.

125 As where there is some sort of disclaimer on behalf of the unborn.

a) *Releases*

As earlier described, expectancies are non-vested, inceptive rights to a living person's estate, disappearing on a dime with a change of the law or the testator's mind. Expectancies are neither present nor future interests; they are not "legitimate" in the sense that their erasure can trigger a taking or support an action for waste; and at least so far, they are assuredly not property.[126]

It is recursively unsurprising that the expectancy may not legally be sold or involuntarily levied upon: "[such attempts] are not recognized at law because, the usual expression goes, the putative grantor has nothing to assign or transfer."[127] Few may realize, however, that such attempts *are* generally enforceable in equity, whether yielded to their putative source through "release" or conveyed to some third party through "assignment."[128] The most common requirement asks whether the transaction was fair and supported by adequate consideration paid to the transferor.[129]

Note at the outset the difference in timing between such transfers in equity and the disclaimer. By definition, the latter occurs only *after* the decedent has died and the right to the interest has vested, thus after affording the disclaimant an opportunity to discern both the value of the interest disclaimed and the likely identity of those it will ultimately enrich. Pre-death transfers are comparatively blind deals. Although the releasor may have held some sense of the value of the (in)/testate share relinquished, she will never quite be sure: for example, the source could

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126 Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1571 n.69 (1982).

127 *Id.* at 1573 (1982). *See generally* 1 JOHN A. BORRON, JR. & LEWIS M. SIMES, SIMES & SMITH: THE LAW OF FUTURE INTERESTS §395 (3d ed. 2002) (stating that expectancies are not assignable because "the grantor has nothing to assign"); Guzman, *supra* note 111, at 775-76 (explaining that expectancy hovers between "hope and high chance").

128 Guzman, *supra* note 111, at 778-79. I risk committing the very error that I elsewhere critique by presenting these transfer forms as virtually indistinguishable save for the identity of the transferee. That said, the simplification is useful when targeting some of the distinctions between the release and the assignment and between the both of them and the disclaimer. Although the term "release" was traditionally limited to a putative heir's relinquishment of an intestate share to the ancestor, it now encompasses similar action by a putative beneficiary of a testate estate. *See, e.g.*, Ware v. Crowell, 465 S.E.2d 809, 811 (Va. 1996) (noting, however, that Virginia permits the testate but not intestate release).

129 Guzman, *supra* note 111, at 778-79; *see also* RESTATEMENT OF PROP.: FUTURE INTERESTS § 316 (AM. LAW INST. 1940); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.6 cmt. j (AM. LAW INST. 1999); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 130 (2d ed. 1953); BORRON & SIMES, *supra* note 127, §§ 394, 395.

have suffered loss or enjoyed a windfall just after the transfer was accomplished, or decided to leave every penny, either way, to an unrelated charity of choice. No matter the circumstance, the releasor cedes all claim to the source's estate. Here is the critical part: in the process, she has also bound her descendants, whether they know of, consent to, or in the eyes of any person or court, are well (much less "best") served by that release or not. Admittedly, assignments do not affect the rights of the assignor's descendants if the assignor predeceases the source. However, in surrendering the expectancy to the source rather than to some third party, the release is much closer conceptual kin to the disclaimer than the assignment, and thus provides the superior comparison point.[130]

For example, assume that decedent dies intestate leaving a $30,000 net estate, no spouse, and four descendants: Son A, Son B, and B's two children. If both A and B survive without transferring their expectancies, they will split the estate at $15,000 apiece, B's two children taking nothing under the thinking that their interests are adequately protected, in mediated form, through their parent's inheritance. Had B predeceased decedent, his children would emerge unscathed, sharing his interest through representation and succeeding to $7,500 apiece. The same result would likely accrue were B to survive decedent but disclaim thereafter, without any dependent disclaimers on behalf of his children.[131] Indeed, the same would hold true were B to have assigned his expectancy to X at a discount, and then predeceased decedent, leaving B's children unbound by their father's action.

But had B instead *released* to decedent, Son A would inherit the entire estate, the grandchildren's "interest," attenuated as it is, completely extinguished by virtue of what B had decided to do with "his expectancy."[132] Although the disparate treatment of assignment and re-

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130 To be fair, the requirement that the source pay consideration to the releasor for an interest that as yet exists only in the realm of possibilities and nowhere in real space renders the entire concept of the release peculiar, and undercuts the utility of keying the dependent disclaimer to its effects. Nevertheless, very few jurisdictions have abolished the release, and its similarities with the disclaimer are significant enough to warrant the comparison. *See generally* Guzman, *supra* note 111, at 777-79 (discussing expectancy interests).

131 This would depend on the jurisdiction's disclaimer statute. Some would redistribute B's disclaimed interests as though B had predeceased the decedent, thus sending that $15,000 to A along with B's children. Others would redistribute B's interest to his own descendants alone. Still others might redistribute the decedent's entire estate, rather than simply the disclaimed interest, as though the disclaimant had predeceased the decedent. *See infra* notes 217, 219-21 and accompanying text for examples of state statutes.

132 *E.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.6 cmt. j ("If a releasor or assignor predeceases the decedent, the right of the descendants of a releasor but not of an assignor are cut off by the ancestor's action."). Some commen-

lease may be puzzling, the more immediate question is why a parent is held to a "best interests" standard when affecting the rights (or mere hopes, or non-entities) of his children through a disclaimer but not a release.[133] Tellingly, the binding effect of the release on the releasor's descendants in no way turns on the releasor's having shared the consideration received from the source in return for it with those descendants.

b) *Advancements and Satisfactions*

The effects of advancements and ademptions by satisfaction complement the analogy. In that they are early gifts of, respectively, a later testate or intestate share, they parallel release and assignment by occurring only before the relevant decedent has died, thus affecting expectancies rather than already-vested interests. An advance is only counted against an heir's intestate share if there is sufficient evidence that the decedent had so intended, which must usually be found in a writing.[134]

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tary limits this preclusive effect to circumstances where other children of the source survive, presumably theorizing that the source would prefer the otherwise estopped child or grandchild to take over more attenuated collateral relatives or share in the estate with other descendants of equal degree. *E.g.*, Pylant v. Burns, 112 S.E. 455, 458 (Ga. 1922) (discussing how the relinquishment dealt with the subject of an advancement to the child); ATKINSON, *supra* note 129, § 130, at 728; REUTLINGER, *supra* note 2, at 31; Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 251-52 & nn. 125-27 (1981) (explaining that the share of the estate should be extinguished as to all claimants). *Contra* RESTATEMENT OF PROP.: FUTURE INTERESTS § 316, cmt. f, illus. 6 (stating that the collateral relatives would take). For case law examples of the result in assignment, see *Schneider v. Dorr*, 210 N.E.2d 311, 317 (Ohio Prob. Ct. 1965). For case law examples of the result in release, see *Crum v. O'Rear*, 24 N.E. 956 (Ill. 1890). This distinction (release v. assignment) is commonly noted. *See e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.6 cmt. j, reporter's note 2 (discussing difference).

133 The distinction is routinely supported by invoking *Donough v. Garland*, 109 N.E. 1015, 1017 (Ill. 1915), where an adult child assigned her expectancy in her mother's estate to two siblings, then predeceased her mother. When the mother died, the assignor's seven children sued for partition, claiming that they were not precluded from a share in their grandmother's estate. The court agreed. After reciting a series of peripheral cases, the last paragraph of the opinion differentiates release from assignment by remarking that the former "extinguish[es] . . . the right of inheritance, cutting it off at its source, whereas the latter preserves the right of inheritance and specifically enforces the agreement once, if ever, the expectancy vests in the assignor. *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.6 reporter's note 2.

134 *See e.g.,* UNIF. PROBATE CODE § 2-109(a) (UNIF. LAW COMM'N 2010) (explaining that a gift is treated as an advancement "only if the decedent declared in a contemporaneous writing or the heir acknowledged in [any] writing that the gift is an advancement"). Differences do exist. In some states, oral testimony may provide the requisite intent. Other jurisdictions create presumptions for or against such intent, leaving the evidentiary burden to their disproof. *See, e.g.*, IOWA CODE § 633.224 (2016) (presume against); LA. CIV. CODE ANN. art. 1230 (2016) (presume for). At some level, any jurisdiction that

While there are admitted outliers,[135] the traditional rule for advancements is to take them into account when computing the representational intestate shares of descendants of an advancee who has predeceased the decedent.[136] This rule is defensible either through a variation of the conduit theory, under which the law assumes pass-through benefit of the advance from the advancee or her estate, or through the belief that the intestate would have desired to preserve distributional vertical equality among her descendants.[137]

Ademption by Satisfaction is the testamentary corollary to the advance, similarly requiring that the testator's intent be clearly expressed in writing. Here, the Uniform Probate Code joins the majority of the states to follow the traditional theory: ademption does presumptively

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requires a writing for the good enough intent is implicitly creating a presumption against the advance.

The advance might be perceived as being as much of an odd rarity as the release: first, those who feel strongly about the distributional equality that advances are thought to protect will presumably write a will rather than rely on intestate succession and its associated advance doctrine. Second, few advancers will have the presence of mind to write a contemporaneous statement of advance, and instead, would simply write a will. Third, rational self-interest assures that few advancees would have the incentive to cast the transfer as an advance in writing, whether contemporaneously with, or after, that transfer.

135 *See* UNIF. PROBATE CODE § 2-109(c) (advance not charged against children of predeceasing advancee "unless the decedent's contemporaneous writing provides otherwise"); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.6 cmt. h (AM. LAW INST. 1999). The theory implicitly opposes presuming that the advancee's descendants benefitted by receiving either part or all of the advanced share or its value from the advancee or his estate. Of course, the advance is charged against the donee's descendants if the decedent's contemporaneous writing so provided or if the descendant was the specific advancee herself.

136 *See, e.g.*, ATKINSON, *supra* note 129, § 129, at 722; BORRON & SIMES, *supra* note 127, § 394 at 423-24 (noting English and American common law). For legislative examples, see 755 ILL. COMP. STAT. § 5/2-5 (2016) ("[I]f [the advancee] die[s] before the decedent, [the advancement is applied] on the share of the descendants of the person to whom the advancement was made."); MD. CODE ANN. EST. & TRUSTS § 3-106(c) (LexisNexis 2017) ("If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the share of the issue of the recipient."); OKLA. STAT. tit. 84 § 227 (2017) ("If any [qualified advancee] dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.").

137 But oddly enough, the Uniform Probate Code does charge the value of a satisfaction, the testate analog to advance, against the descendants of a predeceasing donee who are substituted as recipients under anti-lapse. UNIF. PROBATE CODE § 2-109(c) (unless there is a contrary contemporaneous writing by the testator); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 5.4 cmt. h (unless testator's contemporaneous writing provides otherwise).

count against the shares of children of a predeceasing beneficiary.[138] Thus, for both advances and ademption by satisfaction, as well as for the release, the parent's action in either requesting or accepting an inter vivos gift to be charged against a later testate or intestate share will generally bind that parent's children, and quite possibly, down to nil.

Again assume that decedent dies intestate leaving a $30,000 net estate, no spouse, and four descendants: Son A, Son B, and B's two children. If both A and B survive without transferring their expectancies, and had no advances been made, they would split the estate at $15,000 apiece. But further assume that before he died, decedent had made a lifetime gift, qualifying as an advance, of $30,000 to B.

Under traditional advance theory, B would not be entitled to take from decedent's estate. Since B's advance equaled the amount to which he would have been entitled under advancement theory, B is no longer permitted any additional share.[139] But what if B had predeceased the decedent, leaving two children who might represent him in calculating an intestate share? Were B's advance no longer factored, they would split half of the decedent's estate to take $7,500 apiece, with the other half descending to A. But the majority rule does bind them to the consequences of their father's advance, leaving them with nothing and $30,000 to A. As with consideration received for a release, this would be true regardless of whether they had actually enjoyed any pass-through benefit from A having received the advance, or not.

There is independent value in easing (if not abandoning) a "best interests" interposition between a parent's decision to disclaim on behalf of a minor and the parent's accomplishment of the disclaimer on behalf of the minor. Moreover, "it is almost as important that property law be predictable as that it be right."[140] If cross-theoretical consistency itself holds virtue, then the disparity between the standardless but binding effect of a parent's pre-death release, advance, or assignment on her children, and the impediments to parental, post-death disclaimers, should trouble participants and observers alike. The distinction might be justified on the reminder that death changes everything–that what a parent does with an expectancy differs distinctly from how a parent acts with an interest that has already vested. That said, it is also worth re-

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138 UNIF. PROBATE CODE § 2-609.

139 Specifically, B's advance of $30,000 would be added to decedent's $30,000 to create a hotchpot of $60,000. The hotchpot would be split between A and B, the decedent's heirs, with each taking $30,000 apiece. However, B's advance would then be subtracted from B's share, cancelling it out and leaving B with nothing and A with the entire estate (which is all that exists to distribute in any event).

140 Estate of Propst v. Stillman, 788 P.2d 628, 639 (Cal. 1990) (Broussard, J., concurring and dissenting). Or as my colleague Bob Spector might say, a bad decision, if predictable, might still be a good decision.

membering that in dealing with a potential interest that owes its existence to the acts of the one with the initial right to claim it, the paradigmatic dependent disclaimer will involve a child's claim that from some perspectives is two times as ephemeral as that expectancy, and perhaps should be treated no differently.[141] Relatedly, it is anomalous that disclaimer theory (which requires that the disclaimant be treated as though she predeceased the decedent) does not bind the disclaimant's descendants, whereas advance, release and satisfaction theory, where the ancestor/actor actually does predecease, propels the subject interest that much closer to the descendants but nevertheless continues to bind them.

c) *Family Settlement Agreement*

The family settlement agreement is a long-favored arrangement whereby beneficiaries determine for themselves how to arrange estate distribution.[142] While it might seem unsettling that survivors are permitted to override either the state's objective intestacy scheme or the testator's subjective wishes, they were always free to obtain that ultimate result anyway by receiving, then conveying, their predetermined share.[143] Moreover, these private agreements better reduce probate and administration costs and promote family harmony than can pro-

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141 Another possible explanation for the distinctions inheres in the concept of notice. In either requiring evidence of the intent of, or implicating transfers (through consideration or gift) from the "source decedent" to the taker, releases, advances, and satisfactions will necessarily be known to that decedent, who will then have an opportunity to adjust her estate plan (including optional transfers directly to the relevant actors' descendants). Relatedly, if (as many do) the relevant jurisdiction limits potential advances to descendants of the decedent (rather than any heir), the source will know of the transaction. By contrast, the same cannot be said of assignments to strangers, of which the source might well be ignorant, or disclaimers, of which the source will always be ignorant, having already died. Perhaps that fact legally ties those two dispositions together, shielding the actor's descendants by limiting the externalized effects of the ancestor's conduct. Support for this possible explanation can be found in the doctrine of Ademption by Extinction, where a guardian or conservator's disposition of certain property owned by a ward might not effect its testate beneficiary's loss unless the ward was aware of the disposition and had an opportunity to react.

142 *See, e.g.*, *In re* Will of Pendergrass, 112 S.E.2d 562, 568 (N.C. 1960) (finding that [family settlements] are made in recognition of facts and circumstances known, often, only to those who have lived in the sacred family circle"). *See generally* M.L. Cross, Annotation, *Family Settlement of Testator's Estate*, 29 A.L.R.3D 8, 18 (1970) *and* M.L. Cross, Annotation, *Family Settlement of Intestate Estate*, 29 A.L.R.3D 174 (1970) (discussing how the law takes preference to family settlements of testate and intestate estates). That the practice has existed for some time yields substantial state-specific statutory and case law for the practitioner seeking to assist a client thus situated.

143 *See, e.g.*, *In re* Estate of Webb, 266 S.W.3d 544 (Tex. App. 2008) (discussing whether, as a party to the family settlement agreement, a trustee is a necessary party to any action to modify the trust).

tracted and acrimonious will contests.[144] Some jurisdictions statutorily impose a "good faith contest or controversy" prerequisite,[145] but the better view acknowledges dispute to be irrelevant to the parties' determination to reallocate rights, and is perhaps only demanded when a party asserts for some reason that no "transfer" actually took place.

A few observations are relevant when comparing the settlement agreement to the disclaimer. Like disclaimers, they occur after the decedent's death, thus after expectancies have already vested and correlatively, where more information about the extent and value of the subject interests (discounted by the risk exposure and expense of a potential will challenge or constructional proceeding) exists. But unlike disclaimers, agreements are generally treated as receipt and subsequent transfer of the subject interest, rather than merely "stepping out of its way" as per disclaimer conceptualization. This view thwarts their effectiveness as a tool through which to reallocate a decedent's estate for purposes of such tax efficiencies as the marital deduction.[146] Vested takers (or those who negotiate on behalf of them) face a Hobson's choice: refuse the subject interest through disclaimer and be treated as never having received it for taxation or debt purposes, or rearrange the subject interest (whether or not litigation is initiated or even contemplated) and accept any desired consideration (or none) in exchange for it, along with exposure to taxing authorities and the rights of intervening creditors.[147]

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144 *Id.* at 544-45; *see, e.g.*, Jernigan v. Jernigan, 138 P.3d 539, 547 (Okla. 2006) (explaining that the law favors family settlements).

145 *See, e.g.*, *In re* Estate of Ward, 23 P.3d 108, 109 (Ariz. App. 2001).

146 This is so for many reasons: first, disclaimers are barred once acceptance has occurred. *See* I.R.C. § 2518(b); 1 HARRIS N.Y. ESTATES: PROBATE ADMIN. & LITIGATION § 15:85 (6th ed. 2016). Second, disclaimers are not federally tax qualified if consideration has been received. *See* Treas. Reg. § 25.2518-2(d)(1) (acceptance of consideration for making the disclaimer is an acceptance of the benefits of the disclaimed property). Third, disclaiming parties cannot direct where the disclaimed interest is to go. *See* HARRIS N.Y. ESTATES: ESTATE PLANNING & TAXATION § 7:36 (6th ed. 2016). That task is the function of the local law, and not any party agreement.

147 For example, Indiana codifies the family settlement by providing that compromise of estate matters "shall [not] in any way impair the rights of creditors or of taxing authorities." IND. CODE § 29-1-9-1 (2016). There is a jurisdictional split in the states over whether state transfer taxes follow the will (which is the majority view) or the agreement. *See, e.g.*, *In re* Estate of Dunnick, 855 N.E.2d 1087, 1094 (Ind. T.C. 2006) (calling "well-established" the rule that family settlement agreements, while favored, cannot alter the manner in which state inheritance taxes would be imposed and observing that one motivation behind the statute was to prevent families from "creating more beneficial tax postures" at the expense of state revenue); Ind. Dep't of State Revenue, Inheritance Tax Div. v. Estate of Pickerill, 855 N.E.2d 1082, 1085 (Ind. T.C. 2006) (same). Jurisdictions taking the minority view seem emboldened in doing so when actual conflict or controversy motivated the settlement.

Family settlement agreements bind all parties to them, and at least directly, leaving unaffected the rights of those who have not agreed to their terms.[148] They may or may not include beneficiary or non-beneficiary children of parents who are parties to the agreement. For example, were decedent's estate set to transfer ½ to Son A and the rest to Son B, they could rearrange matters such that everything went to A, or perhaps A's minor child, irrespective of whether there were other descendants of either A or B or not. In other words, A and B's conduct would loosely "bind" their descendants to the agreement's terms in the same way that any contract or other transfer of interest binds or affects others who have no standing to object, even though they might suffer some downstream, attenuated consequence of it.[149] And just as any parent may do what she will with property that she owns without securing the advance approval of the conduct through her child's guardian or the court, all of this may be done with no independent assessment over whether the agreement was in any minor's best interests or not.[150]

Of course, minors who do have direct, actual interests in the decedent's estate that are affected by an agreement should be represented by a guardian (or protected through court approval) to safeguard their concerns.[151] Otherwise, they may disavow the agreement upon reaching the age of majority subject to such defenses as ratification and estoppel.[152] Again the parent faces a dilemma: accept or disclaim on her

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148 *Compare* Duncan v. Alewine, 255 S.E.2d 841, 845 (S.C. 1979) (stating that an agreement binds those who are party to it) *with In re* Estate of McCrea, 380 A.2d 773, 775 (Pa. 1977) (stating that to be effective, an agreement must be binding on all of the parties) *and In re* Estate of Outen, 336 S.E.2d 436, 437 (N.C. App. 1985) (stating that agreements are invalid unless all who receive under the will join in the agreement). More generally, family settlement agreements are normally upheld unless successfully challenged through such typical contract defenses as fraud or undue influence. Mary F. Radford, *An Introduction to the Uses of Meditation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 645 (2000).

149 Compare the rights of creditors under fraudulent transfer or conveyancing acts.

150 "[A] court need not find that a proposed settlement is in the best interests of minors and unborn and unknown heirs or beneficiaries under the will represented by a guardian ad litem if the court instead finds that those parties in fact have no valid claim to assert." 80 AM. JUR. 2D *Wills* § 964 (2017) (citing *Duncan*, 255 S.E.2d at 845).

151 "Where the rights of a minor are involved, the court has the power to approve a compromise negotiated by the guardian, guardian ad litem, next friend, or other legal representative of the minor if the court finds the settlement to be in the best interests of the minor." *Id.*; *see also* UNIF. PROBATE CODE § 3-1102(3) (UNIF. LAW COMM'N 2010); UNIF. TRUST CODE § 304 (UNIF. LAW COMM'N 2010) (virtual representation).

152 The court is on firm ground when refusing to approve a compromise giving the minor less than the minor would take as heir or under the will. *See In re* Beach's Estate, 57 So. 2d 659, 660 (Fla. 1952); Ham v. Marshall, 196 N.E.2d 377, 380 (Ill. App. Ct. 1964). *See generally* Cross, *Family Settlement of Intestate Estate, supr*a note 142, at 223-24, § 22 (discussing the court's holding in *In re Beach's Estate*), 218-20, § 20 (discussing minors).

own behalf, but now, also on her child's. The question again becomes whether it is possible to disclaim first, and then enter into a family settlement agreement on behalf of the minor child whose interest is solely attributable to the parent's initial disclaimer. But if it is a true agreement, rather than a subsequent dependent disclaimer, there would be no tax benefit to that conduct. Interestingly, the extent to which a parent may effectively bind a minor, non-heir child in this arena without oversight, but may not bind a minor to a dependent disclaimer without court supervision, suggests either that (a) the court views the derivative, contingent interest in the minor as more worthy of protection than the interest of any minor whose parent is considering acting so as to reduce property from the "family arena" or (b) the reluctance within the disclaimer arena might owe more to a desire to "punish" the parent for seeking tax saving than the court might otherwise want to admit.

Ultimately, the question appears to be whether dependent disclaimers should be treated more like the advance, satisfaction, and release, or the assignment or family settlement agreement. Admittedly, the answer is difficult in that the disclaimer shares some features with each depending on timing and the nature of the interest itself. From one view, the law seems more solicitous of the minor's (as well as others') rights when the event takes place post-death, which is also when the interests normally vest.[153] This would counsel treating the dependent disclaimer similarly to the rules affecting a parent's entry into a settlement agreement that was not in the child's best interests. But timing cannot be everything, and that cannot be the sole difference, because otherwise, assignments (which occur before death and do not bind the descendant) would be treated the same as releases, advances, and ademptions by satisfaction. Indeed, the very fact that there is jurisdictional inconsistency over the actual extent to which advances bind the advancer's descendants reveals that it could be one or the other, and that the pre-versus post timing feature is not entirely the salient one.

Under the other view, the law is not as concerned with the effect on a child's rights for "interests" that that child (and in fact, no one) yet has, which explains the ease with which parents' conduct can affect the rights of those children in the advance and release contexts. Parents may do what they like with their property without asking their children first. Parents may do what they like with their "non-property" (e.g. release it) without asking their children first. Which is the dependent disclaimer more like? Indeed, which "should" it be more like? It would seem that it should be treated more closely like the latter. If the interest would not exist but for the parent's conduct, then it is closer to non-

153 Drye v. United States, 528 U.S. 49, 60-61 (1999) (discussing creditors and channeling one's inheritance to close relatives through disclaimer).

property than to property, and should fall into the latter camp similarly to any parental decision over what is in her own best interests. And if it is subject to some sort of review, it should be very light indeed.

The difference could be found in what the common ancestor knows and when, such that only if she has had a chance to react and adjust will the child be bound by the parent's conduct. That should not be the determinant, however, because decedents should know that their successors may always reject testate gifts. Had the intestate decedent or testator been concerned about the effect of disclaiming on the disclaimant's child, the decedent could have written a will with a robust disclaimer provision in it to address the issue. Absent that fact, who should have the superior right? The parent is the better choice.

C. Tilt for Related Miscellaneous Reasons

For the true dependent disclaimer, no best interests review should even be necessary and the conduct should be permitted as of right. However, if it is, either because the jurisdiction thinks that there should be no blanket rule against that review, the jurisdiction is concerned that the interest disclaimed by the parent has now (or soon would) become the interest of the child, or the interest was held directly in the child to begin with, then the best interests review should be presumptively met whenever the parent is acting on behalf of that child. This would not technically be the same as a pro-forma determination, but should be tilted toward favoring the parent's chosen conduct. These factors stand apart and in addition to recognizing the contingency of the minor's resultant rights.

1. *Interest Alignment*

Dependent disclaimers will always involve at least two disclaimers of all or part of the same property: the parent's primary disclaimer of her own right to acquire the property, followed by the parent's secondary disclaimer of that same interest for the minor child in whom the right to the initial disclaimed interest results. In neither instance does the parent immediately, personally benefit,[154] instead ceding her direct rights right along with the child's wholly derivative ones. For even if true that "[c]onsiderations of kinship and familial affection should be accorded little weight,"[155] their cumulation with broader factors should

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154 As could happen, e.g., were B to be A's niece through a predeceased sibling who acquired her right through intestate representation, direct testate bequest, or lapse.

155 *See In re* Estate of Guterman, 432 N.Y.S.2d 511, 512 (App. Div. 1980).

counsel in favor of perceiving their interests to be similarly, sufficiently aligned.[156]

Obviously, one can act improvidently on one's own behalf the same way one can on another's, and two foolish disclaimers do not equal a single wise choice. Nevertheless, leading by example suggests equitable and considered decision-making. If it can be assumed that competent actors are both self-interested and rational when calculating disclaimer outcomes, and remembered that parents remain (presumably, consciously) legally responsible for their children's welfare no matter what they decide to do, then there is something undeniably compelling about a parent's willingness to do herself the very thing that she will press for her children.[157] Particularly after recalling that the child's interest would not even exist but for the parent's predicate conduct, the purity of motivation suggested by interest and relational alignment in turn suggests the efficiency and logic of presuming (if not conclusively accepting) that such disclaimers or petitions to disclaim have already appropriately factored all concerns and interests, including those of the child.

An entire theory is built around this basic premise in the litigation-based doctrine of virtual representation, where "[i]t is presumed that the representor in pursuing his own economic self-interest must necessarily protect the rights of the representees having the same interest."[158] Al-

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156 A similar assertion should be made where, for example, A is the sibling and guardian of incapacitated B, and disclaims on behalf of B and herself to get the property to their shared ancestor.

157 While they cannot prove much of anything, adages can reinforce either the truth of the underlying supposition or at least the perception of the truth of the underlying supposition. For example, here it may be that what is good for the goose is not only good for the gander, but perhaps for the gosling (and whole gaggle) as well.

158 Martin D. Begleiter, *Serve the Cheerleader-Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP. TR. & EST. L.J. 311, 319 (2008) (quoting *In re* Estate of Putignano, 368 N.Y.S.2d 420, 424 (Sur. Ct. 1975)).

Under virtual representation, an interested party's participation in a formal proceeding or settlement might sufficiently safeguard and bind the interests of non-party others. Its theoretical underpinnings include the tense dual recognition that while all necessary parties must be before the court to determine their rights, prompt, final, and binding issue resolution is valuable for the judicial process. In result, rather than delaying matters until the legal disabilities of interested minor, unborn, unascertained, or incapacitated persons resolve (if ever), their participation and protection may be secured through virtual (or obviously, actual) representation by parties with sufficient similarity of interest. *Id.* at 313-16.

Although the past twenty years have seen the expansion of virtual representation beyond its common law parameters–most notably through the its codification within Article 7, Part III of the Uniform Trust Code (judicial and non-judicial settlements; extends)–its proper application remains questionable enough that many courts will simply appoint a

though virtual representation does not appear to have ever been applied, directly, to disclaimers (dependent or otherwise),[159] appreciable similarity exists between that which is held by a child in whom the right to a parent's as-yet undisclaimed interest will result and that which is held by either a permissible appointee or a taker in default under a power of appointment.[160] Each one of these "interests" owe their entire

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guardian ad litem anyway to ensure that sufficient jurisdiction exists and that all parties are bound. *Id*. at 327, 337-38; *see also In re* Estate of Silver, 340 N.Y.S.2d 335, 339 (Sur. Ct. 1973) (noting, *inter alia*, that "virtual representation never assures the same finality of decree [or freedom from potential conflicts of interest] as does representation by a guardian ad litem"); David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. LAW REV. 143, 161 (2002) (observing that practitioners should consider requesting GAL appointment where the potential for conflict exists. LORING & ROUNDS, A TRUSTEE'S HANDBOOK 1123 (2016) (revealing the authors' "suspicion" that the doctrine "will not live up to the expectation of its codifiers[,]" and urging that the doctrine "not be oversold").

The analogy of virtual representation to disclaimer is imperfect in ways that both support and undermine the comparison. For example, its application may be limited to a "formal proceeding" or a settlement. UNIF. PROBATE CODE § 1-403 (UNIF. LAW COMM'N 2010) (which, *inter alia*, permits a parent to represent a minor child if no conservator or guardian has been appointed). That a disclaimer is neither might make heightened rules over permissible virtual representation irrelevant, except to the extent that, for example, a petition for a limited guardianship so as to disclaim on behalf of a child were considered a formal judicial proceeding. Alternatively, perhaps the lack of the judicial "check" provided when issues are brought before the court, coupled with the reduced need for dispatch for most voluntary, transactional undertakings, intimate that dependent disclaimers are precisely the sort of matters to warrant the appointment of a guardian ad litem rather than the less targeted representation offered by the doctrine. Of course, none of this is necessary if the interest dependently disclaimed is deemed non-existent for the subject purpose.

For an extraordinarily comprehensive treatment of the issue, see Susan T. Bart & Lyman W. Welch, *State Statutes on Virtual Representation–A New State Survey*, 35 ACTEC L.J. 368, 368 (2010) (noting the continued expansion of virtual representation and "development into ever new uses and applications").

159 Although the Uniform Probate Code adopts virtual representation principles in section 1-403, neither those provisions nor the Uniform Disclaimer of Property Interests Act (subsumed into Part 11 of the Uniform Probate Code, and which grants broad disclaiming authority to actual fiduciaries) explicitly speak to the interplay between the two. *See* UNIF. PROBATE CODE §§ 1-403; 2-1105 (UNIF. LAW COMM'N 2010). The same is true for non-uniform statutory law, and case law. The only clear reference to treating the issues together appears in a dated but prescient article suggesting that this particular sort of "disclaimer by proxy" might be met with judicial disfavor. S. Alan Medlin, *An Examination of Disclaimers Under UP[C] Section 2-801*, 55 ALB. L. REV. 1233, 1243 (1992).

160 A power of appointment is effectively nothing more than a donor's grant of a power to a donee to choose who should take the property subject to the power's terms. The power is "general" if it can be exercised by the donee/ "power holder" in favor of that donee or her creditors, or that donee's estate or its creditors; "non-general" (or "special") if these potential appointees are excluded from the permissible class. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.4 (AM. LAW INST. 1984); *see also* I.R.C. §§ 2041(b), 2514(c). Again depending on its terms, a power may be exercisa-

existence not to the decedent attached to the estate or the donor of the appointment power, but rather to the made up mind, considered or capricious, of the party choosing whether to disclaim or appoint. The Restatement of Property allows the donee of a power of appointment to represent permissible appointees, theorizing that the very possibility of their acquisition is "so completely within" the donee's "exercise of volition" that it is "reasonable to expect that any such object will receive all the protection which his interest merits[.]"[161] The Uniform Probate Code and the Uniform Trust Code carry similar yet expanded provisions.[162]

A quarter century ago, Professor Sheldon Kurtz urged a wider operational sphere for power holder representation through observations acutely applicable to dependent disclaimers.[163] After noting that the interests of both objects of appointment and takers in default "can be defeated [thus are subject to whether] the donee exercises a power,"[164] and the "obvious justification . . . that the donee of a presently exercisable [general] power has an interest that is essentially equivalent to ownership,"[165] he marshaled a description set of the power of appointment to reveal the level of dominion and control wielded by its holder that far exceeds a mere "agency," no matter its general versus nongeneral or present versus testamentary character:

1. Guidelines for the donee's exercise of the power are broad;
2. The donee is not a fiduciary of the donor;

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ble by the donee presently or only at death. Technically, the objects of appointment hold but an expectancy in the subject property, as they will only take if an actual appointment to them is made by the donee. By contrast, any takers in default of that appointment hold a vested property interest, albeit one subject to divestment depending on the donee's conduct. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.2.

161 RESTATEMENT OF PROP.: FUTURE INTERESTS, §§ 181(c), 184(dd) (AM. LAW INST. 1936 & Supp. 1948).

162 UNIF. TRUST CODE § 302 (UNIF. LAW COMM'N 2010); UNIF. PROBATE CODE §§ 1-108, 1-403 (expanding the representation by power donees from objects of appointment to include takers in default under a general testamentary power, at least where there is no conflict of interest). *See generally* Ira Mark Bloom, *Powers of Appointment Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 755, 757-58 (2007) (explaining how the draft by the American Law Institute for publication in the Restatement of Property affected estate planners and identifying aspect that needed clarification).

163 Sheldon F. Kurtz, *Powers of Appointment Under the 1990 Uniform Probate Code: What Was Done—What Remains to Be Done*, 55 ALB. L. REV. 1151, 1153-60 & nn.10-45 (1992) (urging the extension of representation to include non-conflicted holders of nongeneral and testamentary powers on the theory that the donee effectively controls the outcome for both takers in default (whose interests may be divested) as well as for the expectancies held by objects of appointment).

164 *Id*. at 1155.

165 *Id.*

3. The donee holds dispositive discretion over whether or not to exercise the power;
4. The power is generally irrevocable unless its donor reserved that right;
5. The donee might be able to impel certain conduct by the object of appointment or taker in default;
6. The donor generally lacks a continuing interest in the appointive property;
7. The donee's power does not terminate on the donor's death; and
8. Efficiency principles support permitting the donee to represent objects and takers in default, "particularly . . . when the donee, as is most likely, is an adult relative of the objects and takers in default who are minors or unborn persons for whom a guardian ad litem would otherwise have to be appointed."[166]

The upshot for Professor Kurtz was that just as for the presently exercisable general power of appointment, decisions by the non-conflicted holder of either a non-general or a testamentary power should also bind takers and objects thereunder.

Every one of Professor Kurtz's observations holds equally (if not more) true when tested against the economic and relational interest between a parent with a disclaimable interest and a minor child to whom it would thereby devolve. For example, the parent's disclaimable interest is not a "mere power," however significant or robust. Its source has died therefore may no longer revoke; its contours are driven by the objective law of, e.g., disclaimers, rather than channeled through that decedent's ongoing wishes. It is an already vested property right that does not depend on "general versus special" characterization or a decision to appoint to self. There will be no conflict of interest as might exist, for example, between a donee of a power of appointment who retains a distinct, lifetime interest under a trust but who acts so as to affect the potential remainder. The crux of the matter is that in no way is a legitimate heir to or beneficiary of an estate a mere "agent" of the decedent who left it.

If a donee of a power – even, as Professor Kurtz urges, one who may not appoint to herself or in any way benefit from the interest during life – should be able to bind, say, a taker in default of appointment who owns a vested (though divestible) interest in the appointive property, surely a parent should be able to do the same for the interest that but for her own disclaimer will never even fall to the child's hands. For as Professor Kurtz notes,

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166 *Id.* at 1156-58.

> in many cases where the donee is an ancestor of either the objects or the takers in default, the donee would have a strong desire to protect their financial interests. This interest also warrants concluding that a donee should represent objects, takers in default, and others whose interests are subject to the power, but only if the person represented is a descendant of the donee.[167]

2. *Saved Costs*

Guardians do not always come cheaply, nor should they. Fairness and functionality at individual and systemic levels often demand no less.[168] That should not suggest, however, that the appointment of a guardian ad litem, a guardian "proper," or a conservator is always optimal given the potential economic, temporal, and human costs associated with their appointment[169] and ongoing administration.[170] It is truistic

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[167] *Id*. at 1158-59. It is a commonplace that without more, a close family relationship is insufficient to bind a nonparty to a judgment. *See* Begleiter, *supra* note 158, at 362-67 (citing, *inter alia*, *In re* Dowsett Trust, 791 P.2 398, 402-03 (Haw. 1990) and 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4459 (2002)). Professor Begleiter explains the distinction between this reality and the common law's willingness to allow parents to bring lawsuits on behalf of their minor children by reminding of the economic investment, thus the "skin in the game," that the parent will have demonstrated by paying litigation and other costs in even filing the action, as well as the insulation from tort exposure for breach of a duty to that child unless the parent is also the child's fiduciary. However, again this unique context allays some of those concerns in that the parent's economic investment has already been clearly established in the "giving up" of the disclaimed interest to begin with.
All of that being said, Uniform Trust Code section 303(6) indeed allows a parent "to represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed." UNIF. TRUST CODE § 303(6) (UNIF. LAW COMM'N 2010) (a principle that also finds expression in the Uniform Probate Code). UNIF. PROBATE CODE § 1-403(3) (UNIF. LAW COMM'N 2010). Whether that provision is novel, uncontroversial, or active, its very existence suggests some belief in the mere family connectedness to support a child-binding role for a parent. *See* Begleiter, *supra* note 158 at 365-67 (citing English, *supra* note 158, at 160).

[168] *See* Jean A. Mortland, *Source of Trustee's Fees; Guardian Ad Litem's Fees*, 12 EST. PLAN. 312, 313 (1985); Begleiter, *supra* note 54, at 672-73.

[169] The estate may be charged with the court costs of guardianship appointment, which might be particularly burdensome if significant effort was necessary to obtain it. *See* Begleiter, *supra* note 54, at 678-80.

[170] Guardians and guardians ad litem are entitled to reasonable compensation for services rendered as well as fees incurred. In *Friedman*, for example, the court closed by fixing the compensation for the GAL at roughly $2,000 after considering such traditional factors as the nature, extent, necessity for, and actual time spent on the services, the nature of the issue, the professional standing of the guardian, and the results achieved. *In re* Friedman, 7 N.Y.S.3d 845, 847 (Sur. Ct. 2015) (citing *In re* Morris, 868 N.Y.S.2d 766 (Sup. Ct. 2008)). If the guardian is not a lawyer, fees associated with consulting one (or other professionals such as accountants or tax specialists) may add up, especially if litiga-

that lawyers often try to avoid guardianships in favor of some less expensive alternative.[171] Indeed, it has been determined reversible error to appoint a guardian although the testator's will waived the need for one, as to do so would "thwart the intention of the testatrix and result in additional expense which the testatrix sought to avoid."[172] In a similar vein, "the judge of probate should take into consideration, in determining whether to appoint a guardian ad litem, both the need for such appointment and the resulting expense."[173]

Consider a minor whose parent petitions, either directly or through a limited guardianship, to disclaim on his behalf. The more difficult and involved the process, the greater the expense, particularly if cumbersome requirements control such decisions, numerous requests for approval are made, guardians are appointed, best interests analysis is demanded, professional services are required, or litigation proceeds through appellate levels. Although some costs will arise whether the petition is granted or denied, that the former process would assuredly be more streamlined and less costly than the latter militates toward granting it for this context and without unnecessary appointments or steps.[174] Doing so would preserve the estate for heirs and beneficiaries rather than divert it toward quasi-administrative personnel or judicial decision-making. Perhaps that explains why legislatures or courts tend to prefer

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tion ensues. Additional compensation factors may include the amount of the ward's estate and applicable statutory rates, but compensation that unduly burdens the estate may be reduced. *See generally* Mortland, *supra* note 168, at 312-13 (discussing how the guardian's compensation should be determined).

Although the amount of and payment source for fees is generally discretionary with the appointing court, they are customarily charged against the estate rather than, e.g., the interest of the ward or a litigating party. Begleiter, *supra* note 54, at 678-80.

171 As a past chair of the Taxation, Probate & Trust Section of the Idaho State Bar has noted, "[t]he biggest complaint I hear in cases involving a GAL is the fees and expenses charged by the GAL . . . [t]he second reason for complaints about GAL fees and costs is the amount charged." Robert L. Aldridge, *Practical Ethics and Professionalism of the Guardian Ad Litem*, 53 ADVOCATE 16, 17 (2010).

172 MCGOVERN, KURTZ & ENGLISH 4TH, *supra* note 14, at 558 n. 84 (quoting *In re* Estate of Tate, 543 S.W.2d 588, 590 (Tenn. 1976)).

173 Gale B. Wilhelm, David R. Hermenze & Patricia L.R. Fowler, *The Role of the Guardian Ad Litem and Probate Proceedings*, 65 CONN. B.J. 462, 463-64 (1991).

174 Courts are empowered to appoint a guardian ad litem to represent the minor or other necessary but unjoined party under state statute or court rules. Begleiter, *supra* note 54, at 647. The power is commonly characterized as discretionary, perhaps in recognition that appointment would serve little purpose where a party either needs no protection, is actually represented (as through a guardian or a conservator), or is virtually represented through a party's identity of interest. *Id.* at 653-54. Moreover, at least according to one set of authors, "[t]he probate judge . . . could and often does reach the same practical result [as would be effected by virtual representation] by appointing the adult children as guardians ad litem to represent their own issue." Wilhelm, Hermenze & Fowler, *supra* note 173, at 465-66.

the appearance and encourage the appointment of the parent, other natural guardian, or the person nominated.[175] Nevertheless, the guardian ad litem cannot have an adverse interest, which precludes relatives and even parents as so acting if their interests conflict with that of the minor.[176] Depending on how they are structurally viewed, this may complicate things for dependent disclaimers, particularly given the common (although sometimes porous) prohibition on a guardian's waiver of any benefit to his ward or entry into any agreement that prejudices her.[177]

From the guardian's perspective, the bird in the minor's hand is clearly better than any more speculative alternative, particularly given that absent a 100% transfer tax rate, the money saved to the estate via tax-driven disclaimers will always be lesser than the amount that the disclaiming heir or beneficiary foregoes.[178] Moreover, it may be perceived by the guardian as better for a child to effectively block the parent's disclaimer in this way, if monies owned by a parent have a greater chance of being given to or spent on the particular child than monies owned by a grandparent who may have other expenses, other desires, or ten other children or grandchildren to spend it on.

The difficulty could have been addressed *ex ante*. "Knowledgeable estate planners prefer trusts to guardianship or conservatorship for minors or incapacitated adults,"[179] and trustees may disclaim on behalf of

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175 Begleiter, *supra* note 54, at 657 n. 80 (citing *In re* Holmyard's Trust, 442 N.Y.S.2d 7 (App. Div. 1981)). As others have stated, "the parent of a minor child should be appointed as the child's guardian, unless it is not in the best interests of the minor to do so. Most probate judges apply a rule of practicality in these situations and tend to appoint the parent to represent the child unless the amounts involved are large or the parent is inexperienced in handling business and financial matters." Wilhelm, Hermenze & Fowler, *supra* note 173, at 465-66.

176 Begleiter, *supra* note 54, at 656-57.

177 *Id.* at 685.

178 For example, *In re Estate of Azie*, 694 N.Y.S.2d 912, 912 (Sur. Ct. 1999), reflects a guardian's attempt to disclaim 1/10 each of two $500,000 bequests left directly to the decedent's minor children, which would have saved taxes of $40,000. The court denied the disclaimers, noting that they would have resulted in a "net loss" to the minors and reminding that the benefit must accrue to the disclaimants, not to their parents or the estate itself.

179 McGovern, Kurtz & English 4th, *supra* note 14, at 389 (noting that most of the benefits remain, with far fewer of the burdens). For example, protections exist for both wards and beneficiaries through such elementary fiduciary standards as loyalty, prudence, and care. Trustees, however, have more flexibility to act free of judicial control, and restrictions on guardians (e.g. to post bond) cannot generally be waived as easily as may those on trustees.

Minors' property may also be managed more effectively and efficiently than guardianship through the Uniform Transfers to Minors Act, which can apply to both lifetime and deathtime transfers. *Id. See also* William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 Real Prop. Prob. & Tr. J. 1, 17 (1992) (examining and comparing assorted representational methods).

the trust. For present purposes, however, that is a bit like saying that there is no problem when there is no problem. Disclaimers generally arise within post-mortem planning precisely because its pre-mortem counterpart never took place.

None of this is to say, however, that decisions about the propriety, identity or type of the guardian to be appointed should be made on economics alone, or even that they are confined to the disclaimer context, as "[p]rotection of the best interests of the ward is not equivalent to obtaining the best financial result."[180] Some instances might be even stronger. For example, in *In re Snide*,[181] spouses simultaneously executed mirror image wills bequeathing everything to the other on survival. With the husband's death, however, came the realization that they'd each signed the wrong document, leaving wills formalities unmet and the spouse facing far less than the whole through an intestate share. While two adult children waived their rights to the estate, a minor child represented by a guardian ad litem refused to make the concession.

> The reason for the guardian's objection is apparent. Because the will of [the husband] would pass the entire estate to [the wife], the operation of the intestacy statute . . . [by denying probate to the flawed instrument] is the only way in which the minor child will receive a present share of the estate.[182]

Although the will was ultimately upheld through a narrow *ad hoc* exception,[183] perhaps the associated costs of litigating the issue up through the New York State Court of Appeals (the highest court in New York), including the family tension and stress that it may have caused on family members and their relationships, could have been better spent, directly or indirectly, on the minor child herself. For as a Florida court has wistfully expressed,

> [w]e are not privy to the factors that the guardian ad litem considered in deciding not to consent to [the ward's] classification as a pretermitted child, a decision that deprived [her] of a share in the estate and ultimately led to costly litigation. We hope, however, that a guardian evaluating the facts of this case would not focus strictly on the financial consequences for the

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180 Begleiter, *supra* note 54, at 746 (supporting limits on GAL execution of settlement agreements, even though the result may be the ward's inferior economic position, in part by reminding that the conservatorship option exists and in part by asserting that if the GAL is reprocessed as the child's attorney, efficacy and advocacy are subject to testing through malpractice suit).

181 418 N.E.2d 656 (N.Y. 1981).

182 *Id.* at 657.

183 *Id.* at 658.

> child, but would also consider such important factors as family harmony and stability.[184]

Such benefits to the child, her sibling, the parents, and the entire family are beyond cavil, particularly when coupled with, rather than reflexively cast against, the economic benefits that must necessarily exist for any tax-driven disclaimer. Simplistically assuming a 10% transfer tax rate, $1,000,000.00 held directly by the child is less, by one hundred thousand dollars, than the $1,100,000.00 that could be sheltered for the family were the disclaimer to occur. True, the child would no longer own it directly, it instead likely being held by some other ancestor or relative with no guarantee of direct or diffuse benefit flowing back to the child's hands. Nevertheless, disclaiming, for example, to get property into the hands of a grandparent spouse so as to ensure a marital deduction suggests at least three things: first, the parent must have sufficient assets already or the primary disclaimer would probably not have been made; second, the grandparent probably has or has just acquired significant wealth as well or no tax effect by disclaiming would have been possible; and third, given the natural (if overly simplified) order of things, the grandparent is more likely to die sooner than the parent anyway, thus having less opportunity to spend down the assets and perhaps with a long enough memory to enrich those who had earlier disclaimed for her benefit.

Moreover, consider the alternative results where the dependent disclaimer is not permitted: (a) the parent never disclaims either; (b) therefore the child holds $0.00 directly anyway; (c) thus still has only indirect rights, but now, in a lesser amount; (d) which may be as (if not more) likely to be spent by the parent without ever reaching the child.[185] Useful comparison might be made to rules purging "interested witnesses" of their shares under a decedent's will. If defined as those who take some "beneficial interest" therein, one view might find interested witnesses whenever the bequest exceeds the "nothing" that the testator could otherwise have chosen to bestow. But an equal (if not superior) view would recognize that no testate share is beneficial when it falls below that to which the taker would have been entitled had the will never been made.[186] In short, like most things, it is all a matter of perspective.

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184 Espinosa v. Sparber, 612 So. 2d 1378, 1379 n.1 (Fla. 1993).

185 $10.00 can be spent more quickly than $11.00; either amount is more likely to be spent down to zero by one with an extra generation or so to spend it.

186 *See In re* Estate of Morea, 645 N.Y.S.2d 1022, 1022 (Sur. Ct. 1996). At the risk of extending the analogy beyond its usefulness, one might even compare the relativity of that that which is "beneficial" to a party versus that which is "best." The former, while a far more forgiving standard than the latter, was deemed not met in *Morea* by interpreting the term in a functional rather than strict way.

Like their more formal and lasting fiduciary counterparts, guardians ad litem can be overly conservative and inflexible,[187] even where such benefit as family harmony and stability are clear to the ward and her siblings alike. But nothing prevents the guardian from engaging an even more far-ranging inquiry, beyond immediate economic effect: "In making recommendations, the guardian ad litem may consider the general benefit accruing to living members of the individual's family."[188]

3. *Decedent's Wishes*

Parties justifying a dependent disclaimer sometimes pitch its accordance with the decedent's likely wishes, a difficult enterprise where the decedent died intestate, and one not necessarily made easier where a will exists.[189] One response is indifference. The time for concern for the decedent's wants has passed; with death, those rights and controls have been spent. On the heels of indifference come frustration and cynicism, the first with the decedent's failure to plan and the second from the opportunism found in post hoc self-interest.[190] A court might perceive that petitioners are merely dressing their own desires in the clothes of the dead. But a third, particularly where the "best interests" question is close, might be regard–not, per se, for what the decedent may have wanted or successors now hope to achieve, but rather in the acknowledgment that a shared filial and familial perspective about one's last wishes–particularly if strong enough to actuate conduct–might strengthen the bonds of survivors.

While the decedent's intent (much less the shared or professed belief of interested parties over it) might seem irrelevant to the minor's best interests, subtle values exist. Mortals mere as they are, barring the child's disclaimer could prompt misplaced resentment in others who unconsciously or openly blame her. Depending on the child's age, the child might feel guilty or responsible for letting the others down. Conversely, a child permitted to disclaim could feel instrumental in strengthening family relations around a common goal, as where the subject property held expressive or collective value that disclaimer would shield

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187 *See* Robert H. Sitkoff, *An Agency Costs Theory of Trusts Law*, 89 CORNELL L. REV. 621, 668 & n.243 (2004).

188 John B. Payne, *Guardian Ad Litem*, MICH. PROB. § 1:11.

189 For example, the family may aver that disclaiming would "carry out what they believe would be Decedent's wishes that her entire estate pass to her husband," *In re* Friedman, 7 N.Y.S.3d 845, 847 (Sur. Ct. 2015), or that the decedent "would have approved of the disclaimers because they were necessary to prevent the sale of [economically and personally valuable assets] by decedent's estate." Estate of Goree v. Comm'r, T.C. Memo. 1994-331, 68 T.C.M. (CCH) 123, 127 (1994).

190 The *Friedman* court appears to have experienced all three. *See infra* Part IV.A.

from loss.[191] Moreover, whether the property was technically "hers" to disclaim or not, permitting disclaimer would reinforce to both the minor and all involved the potential value in giving up that which, for whatever reason, perhaps another should have, or in assessing immediate gains against longer or broader views. Pure altruism is probably rare. But even where motives are mixed, it is worthwhile to inculcate consideration for others with no expectation or entitlement in return, as well as the value in greater good for the whole.

It might be ironic to rationalize dependent disclaimers as an anti-self-interest principle, given that they are likely engineered as a tax dodge. Moreover, the values described would be better instilled by either the parent or the minor accepting the property then simply handing it over, subject to the possibility of consecutive taxation but thus arguably inuring to the public good. That might be asking a little much, however, especially if prudent asset management is an equally valid goal, and the tax-free disclaimer is at least a first step.

Finally, the claim that "this is what the decedent would have wanted" might even be true, which should count for something.

IV. Dependent Disclaimer Strategy and Reform

Again, whether the disclaimer must work under state or federal law depends on the goal sought. If the objective is to capture federal tax benefits, the disclaimer must qualify under I.R.C. section 2518; otherwise, local law must be met.[192]

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191 For example, in *Goree*, it appears that the "unique relationship" between the decedent's extended family and estate assets, "including the families' long-held philosophy of retaining [stock in the family corporation] for the benefit of their descendants which would inure to the benefit of decedent's children," was deemed relevant by both the probate and appellate court. *Goree*, 68 T.C.M. (CCH) at 128.

192 Indeed, the enactment of I.R.C. section 2518 as part of the Tax Reform Act of 1976, which to some, "represent[ed] a quest for the holy grail of uniformity[,]" was in part prompted by the predecessor provision which recognized the validity of a disclaimer under federal law only if it had been valid under state law. *See* John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. Chi. L. Rev. 316, 322-23 (1979). The pre-enactment problem had been twofold given differences between federal law and state law (where conflicting provisions were common, if not usual) and across states. That said, the issue was not cured even under section 2518. Although it appears that unification was the goal, bifurcation continues, most acutely seen through section 2518(b)(4) (relying upon state law to determine where the disclaimed interest will pass, thus implicitly requiring that the disclaimer be effective under state law as well). As such, there continue to be situations produced in which "a refusal satisfies one but not both laws." *Id*. at 323-34.

A. Pre-Mortem

The *Friedman* court disallowed the dependent disclaimer. Toward the close of the case, in a slightly caustic aside, the court shunted responsibility for the outcome:

> It bears noting that this estate valued at $6,250,000.00 was not the result of a wrongful death action of which the Decedent would have had no knowledge or control over. Clearly Decedent who had the financial sophistication to amass over six million dollars in assets, had she wished to, could have executed a will leaving everything to her husband.[193]

The court continued by observing that were decedent's wishes as her adult children averred, i.e. that everything pass to her surviving spouse, her execution of a will would have made them clear, "obviat[ing] the need for [the dependent disclaimer] application"[194] (and correlatively, all of its costs). The court closed: "Decedent having not executed a will, the statutory distribution contained in [the applicable intestacy statute] applies, with the concomitant tax consequences the distributees are now seeking to avoid by engaging in what in effect is post death estate tax planning."[195]

However one feels about *Friedman* in result or rationale, its reminder is timeworn but true: there is no better corrective than prevention.

1. *When to Be Concerned*

Lawyers with clients who have amassed wealth sufficient to raise taxation concerns should encourage careful estate planning, perhaps raising cases like *Friedman* where a single will sentence could have saved roughly $200,000.[196] Additional factors, particularly where cumulative, generate additional caution, the most notable being the likelihood of one of the following: a state estate or relationally variable inheritance tax;[197] the decedent or any descendants, heirs, or benefi-

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193 *In re* Friedman, 7 N.Y.S.3d 845, 846 (Sur. Ct. 2015).

194 *Id.* at 847.

195 *Id.* It almost sounds as though the *Friedman* court views post-death estate planning as suspect, to be rooted out and cut off at the pass. Yet that is exactly what disclaimers usually are – post-death planning tools – as the Service will readily admit.

196 *Id.* For example, the dependent disclaimers attempted in another relatively recent New York case, where the minors on whose behalf they were sought were born after the decedent's intestate death, alleged that they would generate tax savings exceeding $3,000,000. *In re* Guardianships of S.B.E., D.E., 824 N.Y.S.2d 758, 758 (Sur. Ct. 2006). The guardian supported the disclaimers, and the court authorized them. *Id.*

197 Only Connecticut retains a state gift tax. CONN. GEN. STAT. § 12-642(a) (2017). Very few states retain a state inheritance or estate tax. *See e.g.*, N.Y. EST. POWERS &

ciaries leaving minor descendants of their own (whether currently heirs apparent or not);[198] weakened or complex relationships between decedent and other family members;[199] an applicable intestacy scheme that divides estate assets between the spouse and some other;[200] assets that hold particular "special" value; and non-existent (worse, an unhelpful position within) case law or statute.[201] Aside from the truism that a well-planned estate might obviate the need for any disclaimer, dependent or otherwise, some component of each factor listed either heightens the import or utility of that plan or the difficulty of using disclaimer as a later fix.

Although clearly more necessary when no planning took place, post-mortem strategies may be equally useful when it was undertaken, but poor. From the perspective of the marital deduction, the most basic cure – "all to the spouse" – is insufficient, especially when the subject will is susceptible to challenge on formalities, capacity, or other grounds.[202] Along with more general pre- and post- mortem planning itself,[203] particular care should be taken to consider expressly drafted disclaimer provisions in even a validly executed will when the likelihood of leaving either a minor beneficiary, a minor descendant of any benefi-

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TRUSTS LAW § 2-1.8(a) (McKinney 2017) (discussing apportionment for the payment of state and federal estate taxes).

198 This is an admittedly sweeping factor, capturing most every estate in its ambit. Any human beneficiary might predecease the decedent, leaving minor descendants of her own, no matter the age of the beneficiary when will is written or the question is posed.

199 Scenarios that do or may include potential descendants whose inheritance status is unclear or factually complicated include non-marital children, posthumously conceived and/or born children, adoption in or adoption out, or any arena where the possibility of a will contest would be heightened were the decedent to validly execute it.

200 *Compare* UNIF. PROBATE CODE § 2-102(1) (UNIF. LAW COMM'N 2010) *with* OKLA. STAT. tit. 84, § 213(B)(1) (2017). Under the former, a decedent's surviving spouse will take the entire estate if there are not also parents or sole descendants of the decedent. In other words, where all of the decedent's descendants are also those of the surviving spouse, who has no other descendants of her or his own, the spouse will take everything. Under Oklahoma law, spouse might share the decedent's estate with the decedents children, parents, and even siblings, depending on how estate assets are characterized.

201 While it appears that the only identified jurisdictions with negative case law are New York and New Jersey, *Friedman*'s recency could be persuasive in others.

202 Ironically, equal planning care should be taken, although perhaps for different reasons, whether the jurisdiction is strict with formalities or forgiving. In the former, more attempted wills will fail, sending the property through intestacy absent a prior valid plan. In the latter, more attempted wills will survive, resulting in a greater number of documents where their drafters failed to appreciate or address sound tax (or other aspect) planning.

203 Which, given that I claim no tax expertise, exceeds the scope of this paper.

ciary,[204] or a minor heir[205] is high. Again, these triggers are especially critical where complex or strained family relations exist.

The suggestion to "plan carefully" reads somewhat like a legal version of "run faster": especially when malpractice looms, all of us would if we could. But if the observer effect has merit, the reminder cannot hurt. Moreover, the decedent's very attempt to make her wishes known, such as through an attempted transfer to a spouse, a testamentary request for a tax-sensitive read, or an overt request that the rights of a child should yield to a parent's concerns, might sway a court on the fence over whether to agree.

2. *What to Do About It*

a) *Planning (Subjective)*

Numerous sources suggest tax-sensitive pre- and post-mortem estate planning strategies, and with far more sophistication than this article can attempt.[206] But while many will focus on whether and how to deploy a disclaimer,[207] fewer discuss how to draft one.[208] This is unfortunate, for a precise provision might anticipate and neutralize the dependent disclaimer conundrum. Aside from providing that disclaimed interests should not follow anti-lapse analysis and instead shift to some other such as a trust or the spouse, perhaps the provision could key particular outcomes to disclaimer types, e.g. of what sorts of interests, by whom and for whom, made for what purpose, and with what types of results.[209] A few examples follow:

> Upon the parent's election, where the effect of any disclaimer would be to vest the disclaimed interest in the disclaimant's

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[204] Beneficiaries may always predecease the decedent leaving minor descendants to take through lapse or anti-lapse. It is also possible that the same will happen to a disclaimed interest, increasing the number of instances where minors could take. Much depends on the care with which disclaimer provisions are drafted and the jurisdiction's perspective on the anti-lapse statute.

[205] Although well-drafted wills should include both detailed disclaimer provisions and a detailed, perhaps integrated residuary clause, some property could end up passing to minors nevertheless, as where the will fails to distribute 100% of the decedent's estate; the jurisdiction fails to recognize negative will provisions; there is either no residuary clause, or a total lapse therein; there is a partial lapse in the residue, but the jurisdiction follows the minority rule for its devolution; jurisdictional sympathy for wills challenges or pretermitted heirs; jurisdictional stringency over in terrorem clauses.

[206] *See, e.g.*, JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING (2016).

[207] *See, e.g.*, *id.* §§ 12.32-.36.

[208] None, it would seem, specifically target how one might be drafted within the dependent disclaimer context.

[209] *See supra* Part III.B.1.

> minor descendants, the interest shall instead pass to my spouse, or if predeceased, to my next closest adult beneficiary [with priority given to the person (a) whose state inheritance tax is set at the lowest percentage or (b) who will consult with the parent who initially disclaimed over whether that individual should also disclaim];
>
> Where a minor child's disclaimable interest arises solely as a result of the parent's decision to disclaim, I hereby empower that parent to decide whether to disclaim that interest on behalf of the child without the need for approval by any other person or court.[210]
>
> I hereby direct that if any guardian be appointed by the court to represent either the best interests or the property interest of any minor beneficiary, such guardian shall strongly factor broader familial interests, particularly the parents' perspective, rather than limit such focus to the individual on whose behalf the disclaimer is sought. In making recommendations to the court, this directive is particularly relevant when the minor's interest is dependent on the parent choosing to disclaim.

Such provisions might fly a little too close to the sun. Obviously, they would not fix results for intestacy, and could be superfluous (if not harmful) if the estate plan already maximizes tax efficiencies through other means, such as through trusts reflecting broad and discretionary trustee powers.[211] But if most testators would rather maximize the control held by their actual beneficiaries than non-beneficiary relatives or

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210 An even more aggressive attempt is found in a will clause that specifically permits any parent to disclaim on behalf of any minor child, regardless of the direct versus dependent source of the minor's interest. Although such breadth might undermine the view that the minor's interests are best protected through the court's view of "best interests," perhaps the clause would be upheld: first, the law interposes few boundaries to testamentary freedom, and the testator may cut any person out completely anyway, minor or otherwise; second, similar discretion is upheld where, e.g., the parent is given a power of attorney or named trustee for the minors or others; third, principles of virtual representation might be strengthened in both scope and force where there is a clear statement of such intent; fourth, the disclaimant is still not technically directing the disclaimed property itself, but merely channeling it through the words of the will; and last, the context in which "best interests" are normally assessed might be distinguishable as focusing more on custody, care and abuse issues than economic ones. Even in that arena, the guardian named in the parent or parents' will, while not determinative, is given a fair amount of deference.

211 One method to do so would have been to avoid individual bequests, instead leaving the interest to a trust over which the trustee would hold broad distributive and disclaiming authority, and where decisions would need to be made in light of the trust's and all beneficiaries' broader interests, rather than with focus on an individual beneficiary's concerns.

courts, and if most courts are willing to pay more than lip service to testator intent, then just maybe such clauses could work.

Testamentary freedom holds the main key. Property law permits all manner of conditional or qualified gifts, a category that may loosely be said to include defeasible, divestible, contingent, and springing interests, equitable elections, and forfeitable estates. Moreover, outright disinheritance of anyone (including one's minor children) is already permissible. There would seem to be little policy bar to a clause under which takers, especially those whose very interest rests wholly on another's predicate decision, would be preemptively barred at the parent's (or other's) election. As these matters would be pre-arranged by that testator, neither the decision to disclaim nor the outcome of disclaiming would be inappropriately determined, *per se*, by either the disclaimant or the person making the disclaimer. From this angle, the court would be effecting such postmortem interest shifting as nothing more than the legitimate consequence of an earlier testamentary plan.[212]

Compare the unlikely scenario under which all expectancy holders but the spouse were to release their interests moments before the decedent's death. Assuming that they could time things just so, release would bind all descendants and the property would pass to the surviving spouse without the need for expensive "best interests" questions or potentially adverse answers.[213] It seems curious to countenance this result one second before the decedent's death but summarily reject it one second after.

Escheat, or the "falling back" to the state of a decedent's estate upon failure of beneficiaries or heirs,[214] offers a similarly supportive conception. Escheat is a modern complement to the feudal tax, and is something, like modern estate taxes, that estates seek to avoid. Although escheat is universally recognized, and although easily sidestepped through the simple expedient of a valid will, some jurisdictions have softened other rules to sidestep its application.[215] Similarly, a

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212 *See* Martin, *supra* note 192, at 343.

213 Obviously, the releasors would need to be certain that the jurisdiction recognized the release and that all jurisdictional requirements (such as consideration) had been met, that the outcome could be predicted, and of course, that the testator predeceased them (or at least, the other spouse).

214 *See generally In re* O'Connor's Estate, 252 N.W. 826, 827 (Neb. 1934) (defining the term "escheat"); Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 621 (2000) (explaining that if the term "escheat" is used correctly, it cannot be forced).

215 For example, some jurisdictions that might otherwise effect a negative will clause might refuse to do so where escheat would result, as might courts faced with a close call over the validity of a will or the applicability of the doctrine of equitable adoption.

clause that seeks broadened dependent disclaimers might be seen as related enough to secure a forgiving judicial stance on its exercise.

b) *Legislation (Objective)*

All of that said, policy premiums should not rest on expensive anticipatory planning but on their own grounds, particularly when intestate death remains common. Rather, default rules are egalitarian, serving everyone irrespective of estate planning access. Unless the design has always been to capture an estate tax whenever possible–which could not be the case given ongoing exceptions and exemptions, credits and shields–perhaps the better answer rests with disclaimer legislation than with private ordering. It is less surprising that a few such statutes exist than that more jurisdictions have not followed suit.

The legislation should be clear. For example, a statute providing that effective disclaimers bind the beneficiary, *and all persons claiming by, through or under him,* was read not to bar the shift of the disclaimed interest to the disclaimant's descendants through representation,[216] an interpretation that effectively meant that the descendants could not disavow that the disclaimer had happened rather than that it also removed the property from their hands. Somewhat more directly, a Minnesota law states that a fiduciary (such as a personal representative, trustee, or conservator) may disclaim without court approval if the instrument creating the relationship explicitly granted that right.[217] Although the same provision requires court approval before a custodial parent may disclaim on behalf of a minor for whom no conservator has been appointed, it could be successfully employed to achieve a similar end.[218]

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216 MCGOVERN, KURTZ & ENGLISH 4TH, *supra* note 14, at 94 n.58 (citing, *inter alia*, Estate of Bryant v. Bryant, 196 Cal. Rptr. 856, 858 (Ct. App. 1983)). For three additional examples using virtually identical language, see IDAHO CODE § 15-2-801(6) (2010) ("The renunciation or the written waiver of the right to renounce is binding upon the person renouncing or person waiving and all persons claiming through or under him."); ME. STAT. tit. 18-a, § 2-801(f)(3) (2017) ("The renunciation or the written waiver of the right to disclaim is binding upon the person renouncing or waiving and upon all persons claiming through or under him."); N.J. STAT. ANN. § 3A:25-47 (West 2017) ("The disclaimer or the written waiver of the right to disclaim shall be binding upon the disclaimant or person waiving and all persons claiming by, through or under him.").

217 MINN. STAT. § 524.2-1107(b) (2017).

218 First, a savvy testator could take care to name the likely affected parent as the fiduciary (such as executor) as well, and therefore gain the benefit of the more forgiving standard. Second, the court, while perhaps not accepting the determination wholesale, might be inclined to permit the parent's disclaimer on behalf of the minor with only slight review were the will to attempt to provide this right explicitly. *See, e.g., In re* DuPont, 194 A.2d 309, 317 (Del. Ch. 1963) (recognizing that an authorized guardian of an incapacitated person might be permitted to make gifts of the ward's property under the thinking

Six identified state statutes explicitly address the issue and seem to dispense with any "best interests" demands. All of them are limited to situations where no court-appointed guardian exists, thus presumably where no concerning prior or contemporaneous facts have occasioned the need to appoint one. Limited differences appear in terms of who may then do the disclaiming, with additional differences as described below.

Statutory Version A

> In the absence of a court-appointed guardian . . . without court approval, a natural guardian . . . may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, which the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer.[219]

Statutory Version B

> A custodial parent of a minor for whom no guardian of the property has been appointed may disclaim, in whole or in part, an interest in or power over property, including a power of appointment, that, but for the custodial parent's disclaimer, would have passed to the minor as the result of another disclaimer.[220]

Statutory Version C

> A parent of a minor for whom no general guardian or guardian of the estate has been appointed may renounce, in whole or in part, an interest in or power over property (including a power of appointment) that would have passed to the minor as the result of that parent's renunciation.[221]

Version A enhances the natural guardian's power to effect a dependent disclaimer when (a) the interest thereby disclaimed was generated by any other disclaimer made by any person (presumably including the natural guardian) and (b) would not inure to or for the benefit of that natu-

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that such gifts may be beneficial to the ward. Although a disclaimer is not a gift, the analogy exists.).

219 FLA. STAT. § 739.104(2) (2017); *see also* ALASKA STAT. § 13.70.030(b)(2) (2016) (virtually identical provision, substituting "individual having legal custody" for "natural guardian"); S.C. CODE ANN. § 62-2-801(e)(4) (2016) (virtually identical provision, substituting "parent" for natural guardian and adding "or unborn issue" to minor child); TEX. PROP. CODE ANN. § 240.008(e) (West 2015) (virtually identical provision).

220 VA. CODE ANN. § 64.2-2603 (2016).

221 N.C. GEN. STAT. § 31B-1(d) (2017).

ral guardian. By slight contrast, Version B permits custodial parents to effect dependent disclaimers whenever the interest thereby disclaimed was generated by any other disclaimer, without expressly limiting the right of the custodial parent to benefit thereby. Version C, perhaps the most limiting, permits the minor's parent to dependently disclaim only if the subject interest had arisen solely because of that particular parent's initial disclaimer. By necessity, the interest will not redound to the parent's benefit given that the parent has already disclaimed it.

Assessing these statutes against Examples 1-10 from Part III.B.1, *supra*, illuminates that these distinctions would probably be fairly minor in application.[222]

1. *A* disclaims an intestate inheritance descending *to A* from X's estate.
2. *A* disclaims a testate bequest or devise made *to A* under T's will.

None of the versions apply because A is disclaiming for self an interest to which A directly succeeded.

3. *A* disclaims an intestate inheritance descending *to B* from X's estate, and the property will instead pass *to C*.
4. *A* disclaims a testate bequest or devise made *to B* under T's will, and the property will instead pass *to C*.

None of the versions apply because A is disclaiming for B an interest to which B directly succeeded. B's interest was not solely due to "any other disclaimer."

5. *A* disclaims an intestate inheritance descending *to B* from X's estate, and the property will instead pass *to A*.
6. *A* disclaims a testate bequest or devise made *to B* under T's will, and the property will instead pass *to A*.

None of the versions apply because A is disclaiming for B an interest to which B directly succeeded. B's interest was not solely due to "any other disclaimer." Additionally, Version A also does not apply because A will thereafter benefit from the disclaimer.

7. A, lone heir to X's intestate estate, *having not yet disclaimed her intestate interest*, disclaims on behalf of her minor child, B.

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222 Note that I have not, however, assessed whether enacting jurisdictions have retained the older distinction between renunciations of intestate interests and disclaimers of testate ones. Moreover, the examples do not reflect the extent to which the parent may disclaim an interest to which the child would have been entitled through some other, non-parental disclaimer (such as that of a sibling, uncle, or cousin).

8. A, sole beneficiary under X's testate estate, *having not yet disclaimed her testate interest*, disclaims on behalf of her minor child, B.

All three versions apply because B's interest would be entirely dependent on "another disclaimer" (which would satisfy Versions A and B) and that disclaimer would have been made by one of B's parent, A (which would satisfy Version C).

It is unclear whether the timing of the disclaimers, i.e. the fact that A is anticipatorily disclaiming for her child without first having done so herself, is important. Version A speaks in future terms by covering the interest "which the minor child *is to* receive" solely because of the other disclaimer, whereas Version B intimates the past tense by referring to the other disclaimer as having already been made.

9. *A*, heir to X's intestate estate, disclaims *her intestate interest*, and then disclaims the interest that thereby passes by representation to her minor child, B.
10. *A*, beneficiary under X's testate estate, disclaims *her testate interest*, and then disclaims the interest that thereby passed through a disclaimer provision, anti-lapse principles, the residuary clause, or intestacy to her minor child, B.

All three versions apply because B's interest would be entirely dependent on "another disclaimer" (which would satisfy Versions A and B) and that disclaimer would have been one of B's parent, A (which would satisfy Version C). As with Examples 7 and 8, it is unclear whether the ordering of the disclaimers matters.

Differently applied, reconsider the essential facts of *Friedman,* where decedent's adult daughter attempted to condition the validity of her own disclaimer on that of her infant child's as well. The dependent disclaimer would have been valid under all statutory schemes. The *Goree* analysis would have differed, however: there, the interests that the mother disclaimed on behalf of her minor children had passed to them directly through intestacy, rather than as the result of any person's disclaimer. Moreover, those disclaimers resulted in the mother actually taking the property herself under the applicable intestacy scheme, which would have violated the proscription in Version A.

Somewhat by necessity, default statutes can only do so much. But as with any arena where subjective intent can be rather cheaply and easily expressed, perhaps more finely tuned statutory precision would ask too much of legislation with insufficient value in return.

B. Post-Mortem

That a decedent has died does not mean that estate planning must end. Post mortem planning, or "the opportunity to reorder the distribution of property free of tax [, as through disclaimer,] is one of the most important tools available to the estate planner."[223] Part III explored the potential push back for dependent disclaimers and highlighted the sorts of arguments one might make to support them: the "disclaimed interest" does not really exist; analogs support its effectiveness; "best interests," if necessary, can still be met. Aside from their use to further pre-death success at either the macro legislative level or an individualized estate basis, most of those arguments would be made in the post-mortem period when trying to convince guardians and courts to approve the dependent disclaimer.

That said, holistic estate planning and probate might optimize the chance that a dependent disclaimer will work, perhaps even earlier and with less expense. For example, the parent seeking to disclaim on behalf of the minor could request that those with an interest in the decedent's estate – whether existing or potential – meet to discuss matters directly before any petitions or disclaimers were sought. The impetus to attend would presumably increase exponentially were an estate plan that attempted to mandate participation or precondition distribution already in place. But whether or not there were, the opportunities that such informal discussions hold for enhancing the outcome quality at individual and systemic levels – benefits that include efficiency, privacy, reduced costs, and improved family relationships – are too great to discount prematurely, particularly if the likelihood of contest is high or where unique requests, such as dependent disclaimers, exist:[224]

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223 PRICE & DONALDSON, *supra* note 12, § 12.32.

224 The existing scholarship covers this issue with pragmatism and theoretical nuance. Although I am certain that other equally useful treatment exists, the following sources are invaluable for understanding the utility of alternative resolution models within planning and probate contexts: MEDIATION FOR ESTATE PLANNERS: MANAGING FAMILY CONFLICT (Susan N. Gary, ed., 2016); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547 (2010); Ronald Chester, *Less Law but More Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests*, 37 DUQ. L. REV. 173 (1999);
Roselyn L. Friedman & Erica E. Lord, *Using Facilitative Mediation in a Changing Estate Planning Practice*, 32 EST. PLAN. 15 (2005); Susan N. Gary, *Mediating Probate Disputes*, 13 PROB. & PROP., July/Aug. 1999, at 11; Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997); Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539 (2008); Ray D. Madoff, *Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697 (2004); Radford, *supra* note 148; Robert N. Sacks, *Mediation: An Effective Method to Resolve Estate and Trust Disputes*, 27 EST. PLAN. 210 (2000).

> [I]f a family dispute actually reaches litigation, irreparable harm to the family relationship may be unavoidable. In recognition of this sad possibility, the utilization of mediation, or "process consultation," as a "preemptive strike against potential litigation" has begun to take root in the community of lawyers and other estate planners."[225]

ADR methods could be profitably employed in ranging ways, including within the planning process itself. Specific to the present postmortem issue, discussions could be useful, *inter alia*, in identifying appropriate guardians or fiduciaries for minors or assessing assorted possibilities for and potential results of single, numerous, or conditional disclaimers.[226] A critical component of the discussion would target the wisdom of proposed disclaimers vis-a-vis the estate, the family, successors, and potential disclaimants. While the determination of whether a proposed disclaimer served a particular minor's best interests may well be one for the court to make, the support of the rest of the family would seem, at the least, to be relevant.[227]

The impediment to disclaiming on behalf of a minor was traditionally all about money. As Professor John McCord cautioned soon after section 2518 was enacted, guardians attempting to do so faced a "practical dilemma," as he anticipated that state courts would but rarely approve such an act "run[ning] counter to" the duty to conserve, and protect, the property of the ward, particularly if the motivation was tax planning.[228] He thus found a certain elegance in the decision to toll disclaimer time limits until minors reached age twenty-one. But as he implicitly recognized, avoiding one difficulty created others.

One potential solution rests with the ability to set aside some sum for the minor's benefit, perhaps tied to the amount disclaimed, the taxes saved, or the present interest generated by either.[229] The most obvious impediment to such a plan would be that consideration generally disqualifies the attempted disclaimer for taxation and perhaps other pur-

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225 Radford, *supra* note 148, at 646 (citations omitted).

226 Nothing suggests that these meetings could not take place after the appointment of a guardian, ad litem or otherwise, given the guardian's obligation to investigate and become informed over all relevant matters. *See* Begleiter, *supra* note 54, at 663-64 (discussing the duty to investigate).

227 *See, e.g., supra* note 184 and accompanying text.

228 JOHN H. MCCORD, 1976 ESTATE AND GIFT TAX REFORM: ANALYSIS, EXPLANATION AND COMMENTARY § 5.28(3) (1977).

229 Optimally, the funds would be placed in trust, with terms that would best suit the needs of the parties, perhaps including mandatory termination and principal distribution payout to the minor upon reaching a certain age.

poses.[230] Such a *quid pro quo* could be viewed as akin to interest receipt and later transfer, the antithesis of what valid disclaimers achieve, or the judicially favored, but tax-consequence-agnostic, family settlement. Nevertheless, it is unclear (although likely) whether all state laws would proscribe such a condition.[231] Moreover, it may be possible legally to maneuver the concern at the federal level as well.

The court spoke to this issue in *In re Estate of De Domenico.*[232] There, the petitioner/surviving spouse sought an order authorizing disclaimers on behalf of her minor children. After noting that she would not be permitted to do so unless such action directly advantaged those children, the court continued:

> [E]ven should petitioner agree to use the renounced funds solely for her children's benefit, and the court were to permit such an agreement, such a commitment would invalidate the renunciation for Federal and New York estate tax purposes, since the respective tax laws require that a renouncing party may not serve his own interests or receive any benefits by virtue of the disclaimer.[233]

Effectively, the mother was put to a choice: establish "best interests" through consideration but eviscerate tax qualification, or back off the disclaimer and pay the tax debt. Whether a third way was possible, neither offered choice seemed palatable.

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230 *See* Treas. Reg. 25.2518-2(d)(1) (1986); Estate of Allen v. Comm'r, T.C. Memo. 1990-514, 60 T.C.M. (CCH) 904 (1990); Estate of Thompson v. Comm'r, 89 T.C. 619, 626-27 (1987); *In re* Estate of Carucci, 769 N.Y.S.2d 866, 868 (Sur. Ct. 2003). In *Carucci*, the dependent disclaimer was challenged, in part on the theory that petitioner's plan to create a trust funded at a higher amount than his children would otherwise take were they not to disclaim would disqualify it. Although noting the "paucity of reported decisions where the courts have authorized the payment of consideration on behalf of an infant or an adult in exchange for a renunciation," the court denied the petition. *Id*. at 869. The case is distinguishable, however, on the theory that the children's interests had been bequeathed to them directly and thus the petitioner's plan would seriously alter the decedent's testamentary disposition.

231 Like federal law, "[s]tate laws generally require a disclaimer to be made without consideration." PRICE & DONALDSON, *supra* note 12, § 12.32. *But see, e.g.,* NY EST. POWERS & TRUST LAW § 2-1.11 (McKinney 2014) (explaining that a party may receive consideration for a renunciation if payment of such consideration has been authorized by the court). Of course, that might simply be demanded so that the court may perform informed best interests analysis or assess whether the disclaimer is actually a contract for which no tax advantage may be secured (which is irrelevant anyway, depending on the amount of the estate for federal tax purposes and jurisdiction's retention of a state estate tax).

232 418 N.Y.S.2d 1012 (Sur. Ct. 1979).

233 *Id.* at 1013 (citations omitted).

A critical distinction exists. In *De Domenico*, the interest sought to be disclaimed was directly held by the minors, not turning on the mother's disclaimer at all. The most obvious sidestep for dependent disclaimers is simply to remind that the minor would be getting something for nothing. In other words, if the minor's interest would not exist but for the parent's disclaimer, then it is closer to non-property than property. Therefore, its "disclaimer" need not be justified by best interests at all, and any "consideration" paid to make it would actually just be a pure gift from the others to the minor for whom the disclaimer was made.[234] Realistically, adults could have simply talked it out none the wiser.

Lest that sound too strategic and inviting of fraud, consider how *Estate of Monroe v. Commissioner*[235] informs the analysis. Decedent left a multimillion dollar estate and numerous cash bequests to assorted family members and others. Her surviving spouse determined the potency of disclaimers (under which the property would pass to him) to reducing the federal tax liability generated by the estate.[236] He procured almost $1,000,000 worth of disclaimers from the legatees approached, allegedly careful "not to promise anything in return" and clarifying the absolute voluntariness of disclaimants' action.[237] Within weeks, Spouse gave each disclaimant a gift approximating the gross amount of each interest disclaimed.[238]

The Commissioner asserted, and the Tax Court agreed, that the disclaimers were not qualified for federal tax purposes on a blurred and blended theory of I.R.C. section 2518: that they were not "irrevocable and unqualified" and that there had been an acceptance of the interest or its benefits. To the Tax Court, although "explicit negotiation or bargained-for exchange of consideration" may not have existed, implied promise could be found in disclaimants' alleged expectation of recouping value in some form from Spouse[239] and concern over the economic consequence of refusing his request.[240]

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234 By analogy, consider the takings treatment of assorted future interests. Beyond the most vested, and "evaluable," as with a reversion following a short term of years, most courts will say that the interest is simply too speculative to warrant any compensation beyond nominal for its acquisition. *Cf.* Leeco Gas & Oil Co. v. Nueces Cty, 736 S.W.2d 629 (Tex. 1987) (permitting greater compensation for a possibility of reverter which looked to be imminent to occur). If such actual (although speculative) existing interests warrant such little protection, what protection, if any, should be afforded the non-property interest at issue here?

235 124 F.3d 699 (5th Cir. 1997).

236 *Id.* at 702.

237 *Id.* at 705.

238 *Id.* at 703.

239 *Id.* at 703-04.

240 *Id.* at 705.

The Tax Court was reversed on appeal. To the *Monroe* court, section 2518(b), as refined by the relevant treasury regulations,[241] reflected two avenues for disqualifying the disclaimer: acceptance of its benefits before disclaiming, or receiving consideration afterward. On the first route, there was neither allegation nor suggestion that disclaimants had accepted their legacies before they disclaimed them. As for the second, the court remonstrated that one's belief that she might be a beneficiary is "not consideration absent an actual promise or agreement" to provide it. The court's observation makes perfect sense. Consideration is property, or value in goods or services. If a mere expectancy–even one created under a known will or as apparent heir–is not property, then a more diffuse belief in the potential to be a donee, not under an existing instrument, will, or statute, should certainly not be either. To hold to the contrary would flirt with a dangerous date.

If refusing to equate hopes with interests creates too much concern over back-room deals and fraud on the Service, a more direct response would abolish disclaimers, abolish the tax deductions that inspire them, or sever the linkage between the two.[242] Aside from how any of that might fare in the capitol or the courts, it is unlikely (at least for now) that the political willingness exists to do so, and far more likely that instead it all becomes moot with repeal of the estate tax. Alternatively, Congress could provide that like spouses,[243] minors should enjoy an exception under section 2518 through which protective benefits generated

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241 Treas. Reg. 25.2518-2(d)(1) (1986) ("A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. . . . In addition, the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed."). The examples seem to support this argument - they are all about acts of acceptance, etc., and none of them reflect the type of fact pattern here presented.

242 If wealth transfer tax is meant to disaggregate wealth and raise revenue, perhaps achieving deduction benefits should at least be more difficult to accomplish than it currently is. While this approach could tighten the arenas in which any disclaimer (dependent or otherwise) could achieve tax efficiencies, the true dependent disclaimer should remain immune given the expectancy status of the subject interest. On the role of tax policy, deduction, and reform, see Joseph M. Dodge, *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*, 57 B.C. L. REV. 999, 999 (2016).

243 *See, e.g.*, Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 783 (2004) (acknowledging that a surviving spouse's disclaimer survives section 2518 scrutiny notwithstanding that spouses may benefit from that disclaimer).

by otherwise valid disclaimers would not disqualify matters for taxation purposes.[244]

Candor enhances trust, enhanced trust improves information, improved information enhances outcomes and reduces the likelihood of family discord. If, as the *Monroe* court stated, the "primary purpose of law regarding qualified disclaimers is to facilitate post-mortem estate tax planning and increase family wealth on the 'expectation' that there will thus remain more wealth to pass on to disclaimants in the future,"[245] then one might question what real harm exists in safeguarding those disclaimers even more tied to that expectation and the admitted hopes that inform them.

V. Conclusion

Considering the context within which the dependent disclaimer will fall makes it seem like a "rich person's problem," rare in actual sighting and curable with a modicum of insight and planning available to anyone of means.

Few states retain estate taxes.[246] For a federally driven disclaimer to occur, the estate will need to contain more than roughly five and one-half million dollars. Even then, other forms of tax planning might already have reduced the resultant tax hit. One would think that most families that have accumulated the level of wealth to even fret over the issue would have long ago handled things on the front end. After all, least cost avoiders begging judicial rescue from an economic effect of their own making risk the sort of blasé reaction that the *Friedman* court showed: "too bad, plan better." Moreover, factoring ever-increasing exemption amounts and portability with the continued demise of state wealth transfer taxes and the continuing threat to federal ones suggests that for practical purposes, the issue may soon become moot.

All of that said, such situations exist. And as long as people continue to die intestate or with wills that falter in form or effect, post-mortem estate planning will continue with the central role of the disclaimer intact.

But dependent disclaimers raise more critical issues about far more critical things. They invite foundational questions over the nature and scope of property – including the point at which mere potential solidifies

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244 Millie Baumbusch, *Thanks, but No Thanks: Making Qualified Disclaimers on Behalf of Minors*, 23 Ga. St. U. L. Rev. 937, 960-61 (2007) (constructing a compelling argument for why this should be the case).

245 Estate of Monroe v. Comm'r, 124 F.3d 699, 709 (5th Cir. 1997).

246 *See* Scott Drenkard & Richard Borean, *Does Your State Have an Estate or Inheritance Tax?*, Tax Found. (May 5, 2015), https://taxfoundation.org/does-your-state-have-estate-or-inheritance-tax.

into right, becoming an interest for which transfer demands direct compensation before minors' best interests are served. They correlatively prompt consideration over best interests, where assessors too often retreat from messy questions raised to the more sterile court game of costs versus benefits. Asking what is in the best interests of minors and the families that shelter and house them is one of the most important tasks that the law can undertake. But to press dependent disclaimers into service in reaching an answer disserves both the answer and the question itself.

All of these factors circle back to core issues. At least where the dependent disclaimer is tax-driven, a parent will not disclaim if the child cannot, and the child cannot disclaim if the parent does not. Thus, whenever a court thwarts the minor's dependent disclaimer, it is actually the parent's right to disclaim that is functionally barred,[247] the parent's interests that are being affected, and the parent who is forced to accept property no matter how "absurd" that suggestion may be.[248]

Traditional principles are threatened when the law starts demanding best interests analysis before a child can "give up" that to which she is not even entitled.[249] What, then, of a parent's decision to convert an entailed fee into an absolute one,[250] or sever a joint tenancy held with a child,[251] or fail to pursue an elective share against the estate of a spouse who disinherited her,[252] or write, change, or revoke a will in a manner reducing her take?[253] Indeed, what of a parent's decision to seek a degree, buy risky stock, donate to charity, or spend money at all other than on the child? For as the child's "rights" in such arenas expand, the parents' by necessity shrink, leaving law in the difficult position of explaining just how the indefinable turned into some form of property, and money became a proxy for care.

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247 I admit that the "functional" modifier is telling. The parent can still legally disclaim. It is simply that for practical purposes, she will not, because she has lost the whole motivation for doing so.

248 And "the law is certainly not so absurd as to force a man to take an estate against his will." Martin, *supra* note 192, at 316 (quoting Townson v. Tickell, 106 Eng. Rep. 575, 576-77 (K.B. 1819) (Abbot, C.J.)).

249 As odd as requiring a parent to pay the child for the child's release of an expectancy to the parent.

250 Which would destroy the tail to the detriment of descendants.

251 Which would destroy the right of survivorship, or potential to survive to the whole.

252 Which would destroy any hope of the child to gain from the interest thereby waived.

253 Which could disinherit the child completely at the absolute wish of the parent.