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Mary Lynne James

*University of Nebraska College of Law*

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## Taxation: Disclaimer or Renunciation Under Nebraska Statutes

*Persons have a right to and should consider the tax consequences of many of their acts, as taxes take an increasingly larger bite of the income or corpus of individual assets. There appears to be nothing morally reprehensible or legally wrong for a person who has never received the benefit or income from a bequest, to disclaim that bequest. . . .*<sup>1</sup>

### I. INTRODUCTION

Estate planning should not cease at someone's death, for post-mortem estate planning can be as effective in altering tax consequences as planning done before death. Indeed, in those instances where the decedent has died intestate, it is the only planning that is done. The chief tool facilitating such post-mortem planning is the disclaimer,<sup>2</sup> which traditionally is the refusal or rejection of an estate or right offered to a person.<sup>3</sup> For gift and estate tax purposes the pertinent definition is "complete and unqualified refusal to accept rights to which one is entitled."<sup>4</sup> By following this definition and properly disclaiming, unwanted property can be kept out of the disclaimant's gross estate without gift tax consequences being incurred. In such cases, the property will be considered as having passed directly from the original transferor to the ultimate recipient by virtue of the disclaimer, with the disclaimant being bypassed altogether.

The utility of this tool is demonstrated by its effect on the double taxation which is imposed on inherited but unwanted property. Once property is inherited, it cannot be disposed of by the recipient without an additional tax being imposed. If the recipient keeps

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1. *Keinath v. Commissioner*, 480 F.2d 57, 66 (8th Cir. 1973).

2. The terms disclaimer and renunciation as used in this area are synonymous. To avoid confusion this article will use the term disclaimer almost exclusively.

3. BLACK'S LAW DICTIONARY 550 (rev. 4th ed. 1968).

4. Treas. Reg. §§ 20.2041-3(d) (6) (1958), 20.2055-2(c) (2) (1958), 20.2056(d)-1 (1958), and 25.2514-3(c) (5) (1958).

the property until his death, it is taxed in his estate,<sup>5</sup> while giving the property away during his lifetime subjects it to the gift tax.<sup>6</sup> In effect, the recipient's tax consequences have been dictated by the decedent. Post-mortem use of disclaimer in such a situation eliminates this tax duplication. In addition, disclaimer can also be used to increase or decrease the marital estate tax deduction,<sup>7</sup> increase the charitable estate tax deduction,<sup>8</sup> alter adverse income tax consequences,<sup>9</sup> and change the disposition of property passing after death.<sup>10</sup>

## II. FEDERAL DISCLAIMER LAW

### A. Statutory Basis

The federal law of disclaimer is purely a tax law. While federal tax laws designate what interests or rights will be taxed, state laws create those legal interests and rights.<sup>11</sup> The federal law of dis-

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5. INT. REV. CODE OF 1954 [hereinafter cited as CODE] § 2033.
  6. CODE §§ 2501, 2511.
  7. CODE § 2056(d) allows a surviving spouse or other beneficiary to disclaim. Prior to 1966 property disclaimed by another beneficiary was considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made. *Id.* § 2056(d)(2), 68A Stat. 395 (1954). As amended in 1966, the section now allows a disclaimed interest to be viewed as passing directly from the decedent to the surviving spouse and so to qualify for the marital deduction. CODE § 2056(d)(2). The corresponding regulation has not yet been amended to reflect this change. Treas. Reg. 20.2056(d)-1 (1958). If the spouse disclaims, that property no longer is eligible for the marital deduction. See *Estate of Olive R. Swenson*, 65 T.C. 21 (1975).
  8. CODE § 2055. Irrevocable disclaimers of interests qualify for the charitable deduction from the gross estate.
  9. One beneficial income tax use of disclaimer is to shift the income from a trust to another beneficiary in a lower tax bracket. Another is specifically allowed by CODE § 678. Under this section, a grantor who holds the sole power to vest corpus or income in himself is required to report the trust income as his own. By disclaiming within a reasonable time after becoming aware of this power, the grantor can avoid this requirement. *Id.* § 678(d).
  10. It is not within the scope of this article to detail the explicit tax benefits of disclaimers. For details of the beneficial uses which can be made of disclaimers, see Finnell, *Disclaimer and Marital Deductions*, 21 U. FLA. L. REV. 1 (1968); Newman & Kalter, *The Need for Disclaimer Legislation—An Analysis of the Background and Current Law*, 28 TAX L. 571 (1975); Smith, *Property and Tax Consequences of Renunciations and Disclaimers*, 96 TRUSTS AND ESTATES 744 (1957); Ward, *Practical Aspects of Disclaimers of Donees, Heirs and Legatees*, N.Y.U. 16TH INST. ON FED. TAX. 1037 (1958).
  11. *Morgan v. Commissioner*, 309 U.S. 78, 80 (1939).

claimer gives no right to disclaim, but only sets out when such disclaimers will or will not be taxable. It creates no property rights, but governs how rights created by the states will be taxed. The question of federal disclaimer is whether a disclaimer which is valid under the local law will be respected for estate tax purposes.

The law of federal disclaimer is outlined in section 25.2511-1(c) of the gift tax regulations.<sup>12</sup> The section speaks in terms of "the right to refuse to accept ownership" rather than of disclaimer, but the intent is clearly the same. This section, which deals with the application of the gift tax to "indirect" transfers, specifically exempts disclaimer transactions from taxation if they meet the following four criteria: (1) the refusal must be effective under local law; (2) it must be unequivocal; (3) there must be no acceptance of the property prior to refusal; and (4) the refusal must be made within a reasonable time after knowledge of the existence of the transfer.<sup>13</sup> If these four criteria are met, there is no transfer and, therefore, there is no gift tax.

The key to the applicability of disclaimer to other sections of the gift and estate tax provisions is found in the section 25.2511-1(c) definition of "transfer," for the gift and estate taxes are predicated on there being a "transfer" of interest. If there is no transfer, there is no tax. Since the gift tax was passed to supplement the estate tax, the two are *in pari materia* and must be construed together.<sup>14</sup> Therefore, if there is no transfer for gift tax purposes, then there is no transfer for estate tax purposes. Since properly disclaimed property cannot be pulled into the gross estate by section 2033 as property in which the decedent had an interest at death, and since a proper disclaimer is not a transfer so as to allow the property to be pulled into the gross estate by sections 2035 to 2038, disclaimers can alter estate taxes as well as gift taxes. Indeed, disclaiming to alter estate tax consequences is probably the more common use of this tool.

Although section 25.2511-1(c) speaks of "right to refuse" rather than disclaimer, other sections of the Internal Revenue Code of 1954 ("Code") and its accompanying Treasury Regulations ("regulations") do specifically use the term "disclaimer." Code sections 2041 on inherited powers of appointment,<sup>15</sup> 2514 on donated powers of appointment,<sup>16</sup> 2056 on estate tax marital deductions,<sup>17</sup> and 2055

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12. Treas. Reg. § 25.2511-1(c) (1958).

13. *Id.*

14. *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939).

15. Code § 2041(a) (2).

16. *Id.* § 2514(b).

17. *Id.* § 2056(d).

on estate tax charitable deductions<sup>18</sup> all expressly provide for tax exemptions for disclaimed property. These sections establish essentially the same criteria for a valid disclaimer as are set out in section 25.2511-1(c). Sections 20.2041-3(d)(6) and 25.2514-3(c) which establish the disclaimer criteria for their corresponding Code sections use exactly the same four criteria found in section 25.2511-1(c). The marital and charitable deduction sections differ from these others in some respects, but they still have language requiring that the refusal be unequivocal and that there must have been no acceptance of the property prior to refusal.<sup>19</sup> Furthermore, none of the differences found in these sections is of major import. Both the marital and charitable deduction sections require a more specific time standard for disclaiming than the "reasonable time after knowledge of the transfer" used by the other sections. A disclaimer affecting the marital or charitable estate tax deduction must be made within the time for filing the estate tax return, which is either nine months or such longer time as is granted pursuant to the extension provision of section 6081.<sup>20</sup> The reason for this different standard is the need to close out the estate within a reasonable time. The nine month limitation is simply a factual determination of what constitutes a reasonable time in this type of situation.

Neither the marital nor the charitable deduction sections include a requirement that the disclaimer be valid under local law, but effectiveness under local law is a requirement by implication, for it is still state law which creates the legal interests and rights, while federal revenue acts only designate what interests or rights, so created, will be taxed. When section 2056 was amended in 1966 to allow a disclaimed interest to qualify for the marital deduction,<sup>21</sup> the Senate report on the bill specifically recognized that "[a] disclaimer for the purposes of this bill. . . . [m]ust be a valid refusal under State law. . . ."<sup>22</sup>

In addition to the four specific criteria for federal disclaimer set out in section 25.2511-1(c), the section also covers partial disclaimers. Where a partial refusal is attempted, "the determination of

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18. *Id.* § 2055(a).

19. In addition to the general requirement that the refusal must be unequivocal, the Code and regulation sections on charitable deductions define the situation even further by adding the caveat that if consideration is received for the disclaimer, the rights to which the disclaimant was entitled were not completely and unqualifiedly refused. Treas. Reg. § 20.2055-2(c)(2) (1958). The disclaimer is thus invalid for federal estate tax purposes.

20. CODE § 6081 allows for time extensions for extenuating circumstances.

21. See note 7 *supra*.

22. S. REP. No. 1599, 89th Cong., 2d Sess. 9 (1966).

whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances of each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law."<sup>23</sup> Again, this same language is found in sections 20.2041-3(d) (6) and 25.2514-3(c) on inherited and donated powers of appointment. However, neither the marital nor the charitable deduction Code and regulation provisions make any mention of the effect of partial disclaimers. It is difficult to say what interpretation should be given to this, but if the estate and gift tax Code sections are to be read *in pari materia*, it is arguable that the provision for partial disclaimers in section 25.2511-1 (c) of the gift tax regulations should be read into these sections also.

In all these Code and regulation sections on disclaimer, only the time limits on disclaiming, the absence of prior acceptance, and the unequivocal nature of the disclaimer are distinct federal requirements. Local law, whether specifically or implicitly included, sets all other disclaimer specifications and thus plays an immense part in federal disclaimer law, especially in determining what kind of property can be disclaimed. Furthermore, these federal requirements might even be redundant since they include factors which would be considered in determining the validity of the disclaimer under local law.

For the most part the federal requirements have not been fleshed out by case law or Internal Revenue Service ("Service") interpretations. However, an indication of the position the Service will take on such matters is given in Revenue Ruling 76-156.<sup>24</sup> The question there was whether a beneficiary who renounces a bequest given under a decedent's will is deemed to have made a taxable gift if he exercises a special power of appointment created under the will over the disclaimed property. The decedent's adult child was left the residue of the estate with a provision that the residue could be renounced, and if it were, the child could appoint the renounced interest to any of the decedent's issue or spouses of such issue. Such provisions were authorized under the state law. The beneficiary proceeded to renounce the residue and appoint one-fourth of the residuary estate to the wife of the beneficiary's deceased son and the remaining three-fourths to this deceased son's two children.

The Service's position, as delineated in the revenue ruling, is that if a beneficiary renounces a bequest and yet is able to direct

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23. Treas. Reg. § 25.2511-1(c) (1958).

24. Rev. Rul. 76-156, 1976 INT. REV. BULL. No. 17, at 22.

that renounced bequest to the natural objects of his bounty by exercising a special power of appointment which allows the property to be disposed of in a way not specifically ascertainable from the terms of the will, then the beneficiary has had the opportunity to dispose of property which supposedly has been unequivocally renounced. The renunciation in such a situation no longer is a complete and unqualified refusal of ownership. The Service holds that the true import of this situation is that the beneficiary is making a transfer of his own property interest and thus should be taxed on that transfer.

If only the disclaimer were available, in this situation the property could pass to the same beneficiaries either by statute or by direct provision in the will, and the disclaimer would still be valid. If only the special power of appointment were authorized by the will, it would be exercisable without incurring tax consequences as long as the rules against appointing to one's self, one's estate or creditors were met. However, the Service relies on the fact that the two occur together as justification for ruling that the transaction is taxable and argues that:

Congress intended to tax gifts in the broadest and most comprehensive sense possible, which include all 'transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or devise employed' Section 25.2511-1(c) of the regulations.<sup>25</sup>

The Service ignores the fact that the quoted section goes on to exclude disclaimed property from the definition of such transactions by saying that a disclaimer is not a "transfer" for the purposes of the tax statutes.

As an additional argument, the Service says this particular disclaimer is not valid since it is not "unequivocal," as required by section 25.2511-1(c). It is difficult to see the justification for this finding, for it would appear that such a disclaimer is just as unequivocal a refusal to accept the property as a disclaimer which results in exactly the same disposition, but where the disposition of the property following the disclaimer is dictated by statute or rigid specifications in the will, rather than by a special power of appointment.

The Service's position on this is just a position and not a hard and fast rule of law, but the practitioner should be aware of its presence so that potential conflict with the Service may be avoided by proper drafting. If the same purpose can be accomplished without using a special power of appointment, that would be the safer course.

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25. *Id.* at 23.

## B. Case Law Interpretation

Although many courts have decided cases on the basis of what constitutes a valid disclaimer under local law so as to qualify for federal tax purposes,<sup>26</sup> there is a dearth of reported cases clarifying the purely federal disclaimer requirements.<sup>27</sup> Perhaps the most important of these few cases on the federal requirements is *Keinath v. Commissioner*,<sup>28</sup> wherein the Eighth Circuit recognized the separate federal requirements and yet interpreted them by reference to state law.

In *Keinath*, the taxpayer was the beneficiary of a trust established by his father's will in 1944, the income of which was to be paid to the testator's widow for life. Upon her death the principal was to be divided between the taxpayer and his brother. If either son predeceased the mother, that son's children would get a *per stirpes* share of their father's half. The taxpayer thus had a vested remainder interest in one-half of the trust subject to divestment only if he predeceased his mother.

The mother died in 1963, and within six months the son filed a disclaimer of his half interest with a reservation clause in favor of his children. Prior to the filing of the disclaimer, the Minnesota district court had been petitioned for an order construing the effect of the disclaimer. It held that the disclaimer was effective under Minnesota law. The Commissioner of Internal Revenue ("Commissioner") claimed that the disclaimer was not effective for the purposes of federal law and assessed a gift tax deficiency. The Tax Court upheld the assessment on the grounds that, according to the federal requirements, the disclaimer not only had to be effective under local law, but that it also had to be made within a reasonable time after the disclaimant learned of the transfer. The Tax Court

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26. *E.g.*, *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 334 U.S. 836 (1952) (intestate disclaimer invalid); *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933) (partial disclaimer valid); *Bishop v. United States*, 338 F. Supp. 1336 (N.D. Miss. 1970), *aff'd*, 468 F.2d 950 (1972) (disclaimer of jointly owned securities invalid).

27. *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (waiver of contingent interest 19 years after the grantor died, but only six months after interest vested was held valid for federal tax purposes); *Estate of C. Warren Caswell*, 62 T.C. 51 (1974) (disclaimer made after the date of filing the estate tax return was not valid for the purpose of altering the marital deduction); *Kathryn S. Fuller*, 37 T.C. 147 (1961) (disclaimer of life estate after receiving the income for 25 years invalidated disclaimer for federal tax purposes although it was held valid by the state court).

28. 480 F.2d 57 (8th Cir. 1973).



and the Commissioner reasoned that the taxpayer learned of the transfer 19 years previously upon his father's death and that 19 years was not a reasonable period of time to wait to disclaim.<sup>29</sup>

Although the Eighth Circuit agreed that a standard of validity based entirely on state law was not the correct one to apply,<sup>30</sup> it held that the taxpayer had not waited an unreasonable period of time to file his disclaimer under either state or federal regulations. The Eighth Circuit judges viewed the transfer in question as having been made not at the time the trust was established, but 19 years later when the remainderman came into control.

In coming to its decision, the *Keinath* court took the position that the Commissioner had the right to set forth in the Treasury Regulations the conditions under which disclaimers would be recognized, and that state law was relevant only to the extent recognized in the Code or regulations. Having taken this position, the court had to consider the scope of the vague federal requirements: (1) the disclaimer must be recognized and effective under local law; (2) it must be made within a reasonable time after knowledge of the existence of the transfer; (3) there can be no disclaimer after there has been acceptance of the transfer of the property; and (4) the disclaimer must be unequivocal.<sup>31</sup> Since there was no federal definition of "reasonable time" or of when that time period should commence to run, the court looked to state law for guidance, although it would not be binding on the federal court. A review of state cases led the court to decide that the time period did not commence until the life beneficiary died, and that disclaimer within six months after the life beneficiary's death was a reasonable time even by federal standards.

Finally, the circuit court also took exception to the following language in the Tax Court's opinion:

The exception from taxation for disclaimers was designed to permit a donee to avoid receiving an unwanted gift or bequest within a reasonable time after learning of the gift or bequest: it should not be used as an estate planning and tax avoidance tool.<sup>32</sup>

And in response said:

We think in giving full and fair effect to the law of disclaimer that a person's motives are immaterial, and if he has a right to

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29. *Id.* at 60.

30. "We are concerned here with the exercise of federal taxing power and state law participates only to the extent recognized in the federal statute or Treasury Regulation." *Id.* at 61.

31. *Id.* at 61.

32. *Pauline Keinath*, 58 T.C. 352 (1972).

disclaim he may do so for any reason. Persons have a right to and should consider the tax consequences of many of their acts, as taxes take an increasingly larger bite of the income or corpus of individual assets. There appears to be nothing morally reprehensible or legally wrong for a person who has never received the benefit or income from a bequest, to disclaim that bequest, provided of course, that the disclaimer is done in accordance with the applicable law and the Treasury Regulations implementing that law.<sup>33</sup>

The state of the law on federal disclaimers, at least in the Eighth Circuit, appears to be that effectiveness under local law is a condition precedent to effectiveness under federal law, but that the independent federal requirements listed in the Treasury Regulations must also be met. However, since no ascertainable standards are set out in these regulations, the courts are free to look at the law of the states to determine what the reasonable standards should be.

Since the federal law is so dependent upon state law, whether beneficial use of disclaimer is possible depends on how developed the disclaimer law of the particular state is. Where the local law on disclaimers is sketchy or nonexistent, making beneficial use of disclaimers is uncertain at best. Perhaps even worse is the situation where the local law on disclaimers is quite clear—and also quite restrictive. There are many common law restrictions on disclaimers which operate to limit their application. One such restriction still followed in many jurisdictions is the applicability of disclaimers only to testate property. In those jurisdictions property passing under a will may be disclaimed, but property passing under the intestacy laws is considered as passing automatically by operation of law and may not be disclaimed.<sup>34</sup> Other common law restric-

33. 480 F.2d at 66.

34. In intestate succession, for reasons dating back to feudal law where an heir was not allowed to avoid the gift tax by renouncing, title passes by operation of law and vests in the recipients immediately upon the death of the decedent. 6 BOWE-PARKER: PAGE ON WILLS § 49, at 36 (1962). Common law jurisdictions still follow this reasoning. In *Hardenbergh*, the court held that a Minnesota decedent's widow and daughter could not renounce in favor of the son without paying a gift tax because the decedent died intestate, making title vest in the mother and daughter immediately. 198 F.2d 63 (8th Cir. 1952).

There seems to be little reason for such a distinction today. Indeed, UNIFORM PROBATE CODE § 2-801, Comment states:

Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a distinction. . . .

The reason for the distinction between testate and intestate takers was given so little thought that after the *Hardenbergh* decision, the Minnesota legislature passed a very liberal disclaimer statute doing away

tions include limitations on partial disclaimers,<sup>35</sup> and prohibitions against disclaimers of jointly-held property<sup>36</sup> and spendthrift trusts.<sup>37</sup> Such restrictions severely hamper the use of disclaimers as a tax avoidance tool.

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with the distinction. MINN. STAT. ANN. §§ 501.211 (Supp. 1976), 525.532 (Reissue 1975).

The absurd results of a rule retaining the distinction can be seen in *William L. Maxwell*, 17 T.C. 1589 (1952). The surviving spouse renounced all interest as sole beneficiary under the will. This meant he would still succeed to the property under the statutory rules of intestacy, so he also disclaimed his intestate interest. The Tax Court recognized the disclaimer of the testate interest, but not that of the intestate interest, so the surviving spouse was held to have made a taxable gift. Had there been a residuary clause or another beneficiary under the will, the disclaimer would not have been a gift for no property would pass by intestacy.

35. State courts usually try to determine whether the gift is one single gift or whether it is severable. If it is severable it can be disclaimed in part. For example, in *Routzahn*, the court held the gift of one-third of the decedent's estate to be separate from a life estate in the residence left in the same will. 63 F.2d 914 (6th Cir. 1933). In finding that the bequests were separate, the court determined that there was no intent to make the acceptance or enjoyment of one depend upon acceptance of the other. The surviving spouse was thus allowed to accept the life estate and disclaim the one-third interest in the estate as a whole.
36. The reasoning behind not allowing a disclaimer of any part of jointly owned property is that such a disclaimer cannot apply to property which is already absolutely owned by the person attempting to disclaim. There is no devise of joint ownership property since the right of survivorship operates outside the normal probate or intestacy provisions. The survivor, by virtue of the nature of the tenancy, simply continues to own and possess that which was already owned. The property is viewed as vesting at the creation of the tenancy and not at the death of the first tenant. See *Bishop v. United States*, 338 F. Supp. 1336 (N.D. Miss. 1970). There the court held that under Mississippi law a surviving husband could not avoid gift tax by disclaiming the interest he had as a surviving registered joint owner of securities. The interest he had was in a joint estate and as such was a present possessory interest. He could not disclaim that which he already owned and possessed.
37. See GRISWOLD, SPENDTHRIFT TRUSTS § 524, at 603 (2d ed.). The reasoning behind not allowing this kind of disclaimer is that if a beneficiary can disclaim a spendthrift trust, he is able to accelerate his remainder interest and so thwart the donor's restrictions. However, the majority American position currently seems to be that such disclaimers should be allowed. RESTATEMENT (SECOND) OF TRUSTS § 36 (1959); *Commerce Trust Co. v. Flast*, 396 S.W.2d 683 (Mo. 1965). Those who would allow disclaimers of spendthrift trusts view the spendthrift provisions as no different than any other burden on which a gift is conditioned and thus capable of being disclaimed. See generally Annot., 14 A.L.R.3d 1437 (1967).

## III. NEBRASKA LAWS

## A. The Nebraska Disclaimer Act

Until 1971 there was little ascertainable law on disclaiming property in Nebraska. No reported cases or state statutes directly addressed the issue. In 1971 the Unicameral passed L.B. 535<sup>38</sup> which became the Nebraska Disclaimer Act ("Disclaimer Act"), codified as sections 30-129 to 30-135 of the Nebraska Revised Statutes.<sup>39</sup> Modeled after the Illinois<sup>40</sup> and Minnesota<sup>41</sup> statutes on disclaimers,<sup>42</sup> L.B. 535 had as its stated purpose to provide for disclaimers by persons succeeding to interests in property passing by will, intestate succession, deed, trust or otherwise.<sup>43</sup> Testimony before the Judiciary Committee indicated that because of the uncertainty of the law on the area and the common law restrictions on intestate disclaimer, disclaimers were not an effective tax tool in Nebraska.<sup>44</sup> This act was to relieve that uncertainty and lift the restrictions on disclaimer.

Basically, the Disclaimer Act provides for a written disclaimer which must describe the interest to be disclaimed, and must be signed and acknowledged by the disclaimant,<sup>45</sup> and filed with the probate court (and also with the registrar of deeds if the property to be disclaimed is real estate)<sup>46</sup> within ten months of the death

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38. L.B. 535, 82d Neb. Leg., 1st Sess. (1971).

39. NEB. REV. STAT. §§ 30-129-135 (Cum. Supp. 1974).

40. ILL. ANN. STAT. ch. 3, § 15(b), (c), (d) (Cum. Supp. 1975).

41. MINN. STAT. ANN. § 501.211 (Supp. 1976), § 525.532 (Reissue 1975). These statutes were passed in the aftermath of the *Hardenbergh* decision. See note 34 *supra*.

42. *Hearings on L.B. 535 Before the Judiciary Committee*, 82d Leg., 1st Sess. 29 (March 2, 1971) (remarks of Mr. Lundstrom).

43. *Id.* (statement of purpose).

44. *Id.* at 25-29 (remarks of Mr. Aitken and Mr. Lundstrom).

45. **Disclaimer; contents; execution.** The disclaimer shall (1) describe the interest, part thereof or shares or assets thereof disclaimed, (2) be signed and acknowledged by the disclaimant in the manner provided for the execution of deeds of real estate, and (3) declare the disclaimer and the extent.

NEB. REV. STAT. § 30-132 (Cum. Supp. 1974).

46. **Disclaimer; place of filing.** The place of filing the disclaimer shall be the court in which the estate of the decedent or the donee of the power is administered or if there is no administration within ten months after the death of the decedent or donee, then in the court of any county provided by law as the place of probate or administration of the estate of the decedent or donee. If an interest in real estate is disclaimed, a copy of the disclaimer also shall be recorded in the office of the register of deeds in the county in which the real estate lies. In addition, a copy of the disclaimer shall be delivered or mailed to the personal representative of the estate, the trustee of any trust in which the interest disclaimed exists or

of the decedent, or within ten months of the time when the taker is finally ascertained and the interest has become indefeasibly fixed.<sup>47</sup> Notice of the disclaimer must be sent to certain interested parties.<sup>48</sup> The property then passes as if the disclaimant had predeceased the decedent.<sup>49</sup> Acts which can be viewed as an acceptance of the property, such as conveyance, assignment, written waiver or transfer, bar any later attempt to disclaim.<sup>50</sup> (One should be wary in complying with the requirements of this section,

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to such other person as has legal title to, or possession of, the property in which the interest disclaimed exists, and no such executor, personal representative, trustee or person shall be liable for any other proper distribution or other disposition made without actual notice of the disclaimer.

*Id.* § 30-134.

47. Disclaimer; time for filing. The disclaimer shall be filed within ten months after the death of the decedent or the donee of the power, as the case may be, or if the taker of the property or interest is not then finally ascertained or his interest has not become indefeasibly fixed both in quality and in quantity, then not later than ten months after the event when the taker has become finally ascertained and his interest has become indefeasibly fixed both in quality and quantity, or, with respect to interests indefeasibly fixed both in quality and in quantity on August 27, 1971, within ten months after August 27, 1971.

*Id.* § 30-133.

48. *Id.* § 30-134. See note 46 *supra*.

49. Disclaimer; filing; effect. (1) Unless the decedent or donee of the power has otherwise provided by will, the property or interest therein or part thereof disclaimed as provided in sections 30-131 to 30-134 shall descend or be distributed as if the disclaimant had predeceased the decedent, or if the disclaimant be one designated to take pursuant to a power of appointment exercised by a testamentary instrument, then as if the disclaimant had predeceased the donee of the power. Unless otherwise provided in the instrument of disclaimer as described in section 30-132, the disclaimer shall relate back for all purposes to the date of death of the decedent or of the donee, as the case may be.

*Id.* § 30-135(1).

50. Any conveyance of or contract to convey real property or any interest therein, or assignment or transfer of or contract to assign or transfer personal property, or written waiver of the right to disclaim the succession to real or personal property, by a beneficiary, or any sale or other disposition of real or personal property pursuant to judicial process, made before the expiration of the period in which he may disclaim as provided in sections 30-129 to 30-135, bars the right to disclaim as to the property or interest.

*Id.* § 30-135(2).

This specific provision for written waiver during the period for disclaimer solves the problem of the executor or trustee who finds it advisable to sell property in the estate before the expiration of the disclaimer period, but cannot do so because the possibility of disclaimer is a deterrent to potential buyers.

for if the decision to disclaim is not made soon after the interest has vested, the recipient/disclaimant may have destroyed the opportunity to disclaim by acting towards the property in a manner which can be viewed as an acceptance.) Finally, the disclaimer of spendthrift trusts is specifically provided for.<sup>51</sup>

A disclaimer may be made by anyone succeeding to an interest in property which has passed by will, intestacy, deed, trust, insurance contract or otherwise,<sup>52</sup> and the property can be disclaimed in whole or in part.<sup>53</sup> Guardians, executors, administrators and other personal representatives of minors, incompetents, or deceased beneficiaries can disclaim on behalf of the beneficiary upon an order of the probate court.<sup>54</sup>

51. *Id.* § 30-135(3).

52. **Terms, defined.** As used in sections 30-129 to 30-135, unless the context otherwise requires:

(1) Beneficiary shall mean and include any person entitled, but for his disclaimer, to take an interest, by intestate succession, by devise, by legacy or bequest, by succession to a disclaimed interest, by virtue of a renunciation and election to take against a will, as beneficiary of a trust, pursuant to the exercise or nonexercise of a power of appointment, as donee of a power of appointment, as grantee, as donee, under any assignment or instrument of conveyance or transfer, as beneficiary of an insurance contract, or otherwise under a testamentary or nontestamentary instrument;

*Id.* § 30-130(1).

53. Interest shall mean and include the whole of any property, real or personal, legal or equitable, or any fractional part, share or particular portion or specific assets thereof or any estate in any such property or power to appoint, consume, apply or expend property or any other right, power, privilege or immunity relating thereto; and

*Id.* § 30-130(2).

**Disclaimer filing.** A beneficiary may disclaim any interest est in whole or in part, or with reference to specific parts, shares or assets thereof, by filing a disclaimer in the manner provided in sections 30-129 to 30-135. . . .

*Id.* § 30-131.

54. . . . A guardian, executor, administrator or other personal representative of the estate of a minor, incompetent or deceased beneficiary, if he deems it in the best interest of those interested in the estate of such beneficiary and of those who take the beneficiary's interest by virtue of the disclaimer and not detrimental to the best interest of the beneficiary, upon an order of the probate court, may execute and file a disclaimer on behalf of the beneficiary within the time and in the manner in which the beneficiary himself could disclaim if he were living, of legal age and competent. A beneficiary likewise may execute and file a disclaimer by agent or attorneys so empowered.

*Id.* § 30-131.

Although the power to disclaim is expressly given to guardians of incompetents, it is questionable under current Nebraska law whether

Disclaimers, when filed and recorded, are binding.<sup>55</sup> They do not impair other statutory rights such as renunciation and termination of powers of appointment,<sup>56</sup> and the law is applicable to interests outstanding on the date of enactment.<sup>57</sup>

## B. The New Nebraska Probate Code: Renunciation

The Disclaimer Act was in effect for only a short time before it was again considered by the Unicameral, this time as a part of

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such a disclaimer could ever be authorized by the court, for it might not be in the "best interests" of the incompetent under the current definition of that term. In *Clarkson v. First Nat'l Bank of Omaha*, 193 Neb. 201, 226 N.W.2d 334 (1975), the Nebraska Supreme Court, in a four to three decision, held that the best interests of a surviving incompetent spouse in deciding whether to take under the will or elect the statutory share require: (1) making the election which results in the larger pecuniary value; (2) ignoring the interests of possible heirs to the incompetent; and (3) ignoring whether the incompetent is provided for otherwise. If these same criteria are applied to the disclaimer power, that power could never be exercised, since the disclaimer would always result in a smaller pecuniary value vesting in the incompetent.

By analogy such restrictions might also be applied to disclaimers made by guardians for minors and maybe even to those by trustees and conservators, for the *Clarkson* "best interests" terminology of NEB. REV. STAT. § 30-108 (Reissue 1964) is also contained in the new Probate Code section on spousal election, NEB. REV. STAT. § 30-2315 (Reissue 1975), the present Disclaimer Act, NEB. REV. STAT. § 30-129 (Cum. Supp. 1974) and the new Probate Code section on conservators, NEB. REV. STAT. § 30-2362 (Reissue 1975). The "best interests" language is not contained in the new Probate Code general section on renunciation, NEB. REV. STAT. § 30-2352 (Reissue 1975).

However, applying *Clarkson's* narrow pecuniary measure of "best interests" to the disclaimer statutes would clearly go against the intent of these statutes. Under such a definition no disclaimer could ever be made if it meant foregoing some pecuniary value, and since most disclaimers do involve letting something of value pass to another, the use of disclaimer would be severely limited. It would be more consistent with the intent of the disclaimer statutes if the definition of best interests included considerations besides pecuniary value.

The rules of *Clarkson* may not be as restrictive as they have just been made to seem since the court also held that it would not entirely ignore what the surviving spouse might have done had that spouse been able to make the election. Also, the rule that the larger pecuniary value should be chosen was not an absolute rule, but only one which should be applied in most instances. Disclaimer would seem to be one of those instances where the "pecuniary value" rule should not apply. For a more detailed discussion of the problems raised by the *Clarkson* case, see Note, 9 CREIGHTON L. REV. 205 (1975).

55. NEB. REV. STAT. § 30-135(4) (Cum. Supp. 1974).

56. *Id.* § 30-135(5).

57. *Id.* § 30-135(6).

the proposed Nebraska Uniform Probate Code,<sup>58</sup> which was adopted, as modified, with an effective date of January 1, 1977.<sup>59</sup> Until then the Disclaimer Act is the operative law on disclaimers, but after that date, section 30-2352 on renunciation of succession will govern.<sup>60</sup>

Differences between the present and future law on disclaimer, or renunciation as it is denominated in the new section, are purposefully slight since the Uniform Probate Code, as originally proposed, was specifically rewritten to retain the features of the Disclaimer Act.<sup>61</sup> The language of section 2-801 of the Uniform Probate Code which applies only to intestate succession and testamentary interests was expressly expanded to include the Disclaimer Act and its provisions for nontestamentary instruments.<sup>62</sup>

Though similar, the two laws do differ in a few areas. While the present law makes no provision for disclaimers by trustees or conservators,<sup>63</sup> section 30-2352 of the new Probate Code specifically allows a court to authorize a trustee to renounce certain powers if such renunciation furthers the purposes of the trust,<sup>64</sup> and section

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58. UNIFORM PROBATE CODE § 2-801.

59. See the introductory remarks to the new Nebraska Probate Code before Article 22, NEB. REV. STAT. § 30 (Reissue 1975). The Nebraska Comments to the new Probate Code can be found in the 1974 Cumulative Supplement and the 1975 Reissue of Volume IIA. Since these Comments can be a valuable interpretive tool, copies of the 1974 supplement and 1975 Volume IIA should be retained even after later editions without the Comments are published.

60. NEB. REV. STAT. § 30-2352 (Reissue 1975).

61. Nebraska Legislature Judiciary Committee, *Preliminary Interim Study Report on a Revised Nebraska Probate Code* 115 (Sept. 1973) [hereinafter cited as *Preliminary Study*].

62. *Id.*

63. All conservators are not covered by the provisions in the present statute. Although conservators can represent minors and so can disclaim for them under the provisions of NEB. REV. STAT. § 30-131 (Cum. Supp. 1974), they do not represent incompetents or deceased beneficiaries, but only those with an age or a physical disability. *Id.* § 38-901 (Reissue 1974). A conservator representing a physically disabled person could not disclaim under NEB. REV. STAT. § 30-131 or any of the other current provisions.

64. The appropriate court may direct or permit a trustee under a testamentary or nontestamentary instrument to renounce or deviate from any power of administration, management or allocation of benefit upon finding that exercise of such power may defeat or impair the accomplishment of the purposes of the trust whether by the imposition of tax or the allocation of beneficial interest inconsistent with such purposes. Such authority shall be exercised after hearing and upon notice to all known persons beneficially interested in such trust, in the manner directed by said court.

*Id.* § 30-2352(a) (3) (Reissue 1975).



30-2637 provides for judicially authorized or directed renunciation by a conservator.<sup>65</sup> Under section 30-2637 a conservator has the explicit authority to renounce gifts as well as powers, while the trustee's renunciation abilities are limited to the renunciation of powers alone. The Preliminary Interim Study Report on the new Probate Code indicates that a trustee should also have the authority to renounce gifts.<sup>66</sup> Section 30-2352 also includes surviving joint owners or joint tenants among those permitted to renounce a power only implicitly present in the broad language of the current Disclaimer Act.<sup>67</sup> The purpose of this amendment was to make explicit that joint owners could disclaim a survivorship interest.<sup>68</sup>

Another difference between the two acts involves the time period in which one may disclaim. The present Disclaimer Act calls for filing the disclaimer within ten months after death, or if the taker is not ascertained or the interest has not become indefeasibly fixed both in quality and quantity, then not until ten months after the event which determines these factors.<sup>69</sup> The new section calls for filing within nine months after death (which coincides with the time limit for filing the estate tax return), or within nine months after the taker of the interest is finally ascertained.<sup>70</sup> The language of the Disclaimer Act which refers to the interest being indefeasibly fixed in quality and quantity has been dropped.

The breadth of these provisions demonstrates that the Disclaimer Act and the new Probate Code were both designed to apply to almost any situation. Unlike the common law disclaimer rule, both intestate and testate takers may disclaim. Nor are disclaimers limited to the estate situation. Any "succession" to property may be disclaimed, whether it comes through a will or by intestacy, power of appointment, disclaimer or otherwise. Even future interests may be disclaimed, as shown by the "beneficiary of a trust" and "pursuant to the exercise . . . of a power of appointment" language of section 30-130(1).<sup>71</sup>

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65. *Id.* § 30-2637.

66. *Preliminary Study supra* note 61, at 115.

67. Technical Memorandum on Amendments Proposed by the Judiciary Committee to L.B. 354, § 74, 83d Leg., 1st Sess. (Dec. 21, 1973) [hereinafter cited as Technical Memorandum].

68. *Id.*

69. *See* note 47 *supra*.

70. The writing specified in (a) must be filed within nine months after the death of the decedent, settlor of the trust or donee of the power, or if the taker of the property is not then finally ascertained not later than nine months after the event by which the taker or the interest is finally ascertained.

NEB. REV. STAT. § 30-2352(b) (Reissue 1975).

71. *See* Report, *Disclaimer of Testamentary and Nontestamentary Dis-*

Other advantages of the Disclaimer Act and the new Probate Code sections are the abolition of the common law rules against partial disclaimers and disclaimers of spendthrift trusts,<sup>72</sup> the inclusion of nonprobate life insurance proceeds as property that can be disclaimed,<sup>73</sup> and the establishment of definite procedures for disclaiming.

Both statutes clarify who is entitled to take after property has been disclaimed. The disposition after disclaimer is as if the disclaimant had "predeceased" the decedent and the time "relates back," bringing the state rules on lapse into effect.<sup>74</sup> Unless otherwise directed by the decedent in the will, the interest goes to the disclaimant's then living relatives if he is a relative of the testator; under current law (but not under the new Probate Code lapse statute<sup>75</sup>), it passes to the members of the class if it is a class gift; or if neither of these applies, the interest becomes part of the residue. Since the disclaimant cannot designate who will take the property unless he has been given a special power of appointment in the will, but can only allow the property to pass according to the statute, the effect of such disclaimer should be determined before the decision to disclaim is made. The disclaimant should also be careful to renounce both his testate and intestate share if disclaiming under the will would still leave him as the heir at law. Similar precautions should be taken if he is both a legatee and a residuary beneficiary, for if this is not done, he could end up receiving property in spite of the disclaimer. However, there may be instances where it is beneficial to disclaim only one of these interests and still take under the other. In any case, the dispositive

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*positions—Suggestions for a Model Act, 3 REAL PROP., PROBATE & TRUST J. 131, 133 (1968).*

72. See notes 35 and 37 *supra*.

73. No cases are reported which allow a common law disclaimer of insurance proceeds, but it would appear that federal law specifically recognizes the disclaimer of life insurance proceeds if that disclaimer is effective under local law. Treas. Reg. § 20.2056(d)-1 (1958).

74. NEB. REV. STAT. § 30-288.03 (Reissue 1975) is the current anti-lapse statute. It prevents the common law lapse of a devise which would occur if the devisee died before the testator, but only if that devisee is a relative of the testator. Instead of lapsing and passing by intestacy, the devise passes to the relatives of the devisee; however, the devise does lapse if the deceased devisee has no living relatives. *Niemann v. Zacharias*, 185 Neb. 450, 176 N.W.2d 671 (1970). The new Nebraska Probate Code provides for essentially the same result with some refinements. NEB. REV. STAT. § 30-2343 (Reissue 1975).

75. Section 30-2343 of the new Probate Code makes the anti-lapse section apply to class gifts as well and thus passes the devise to the living relatives of the deceased devisee instead of to the other class members.

consequences of disclaimer should be considered just as carefully as the tax consequences.

These two acts cover those interests outstanding on the date of their enactment so long as the interests of third parties arising prior to that time are not affected. Although these are new laws applied to old trusts and wills, they both are procedural in nature, neither impairs the vested rights of third parties, and both extend a new remedy rather than operate as a limitation. Because of these qualities, both statutes are probably constitutional as applied to existing as well as to future estates and trusts.<sup>76</sup>

Finally, both statutes are probably exclusive. There is no longer a common law of disclaimer in Nebraska—if there ever was one. As pointed out in the testimony before the Judiciary Committee, these acts were to be the codification of the common law which did not exist in Nebraska.<sup>77</sup> That fact, together with the section protecting from abridgement only those rights arising under statute and not those arising under the common law, indicate that these statutes are to be the only law on disclaimer in Nebraska. Since there was no prior law, only the potentially restrictive common law from other jurisdictions, Nebraskans would seem to be better off under the statutes even in cases where the time limit might be restrictive.<sup>78</sup> What previously was an uncharted wilderness where few dared to venture is now a carefully mapped area of the law; therefore, even the most timid should not refuse to use disclaimers.

#### IV. REMAINING UNCERTAINTIES

Although both Nebraska disclaimer provisions were evidently designed to be broad grants of power to facilitate the use of disclaimers as a post-mortem tax tool,<sup>79</sup> there are still a few areas of uncertainty. However, these should not deter the use of disclaimer, for there is usually nothing to lose and only something to gain since disclaimers are really after-the-fact attempts to remedy an already disadvantageous situation.

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76. New laws have been held to be constitutional as applied to prior existing trusts and estates. See *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961), where the court allowed the Uniform Principal and Income Act to apply to a trust previously in existence.

77. *Hearings on L.B. 535*, *supra* note 42.

78. The state time limit could be more restrictive than the federal law in a case where a marital or charitable deduction could be made later than nine or ten months after decedent's death because of a grant of an extension on the time for filing under CODE § 6081.

79. See *Hearings on L.B. 535*, *supra* note 42, and the Uniform Probate Code Comment to NEB. REV. STAT. § 30-2352 (Supp. 1974).

### A. Joint Tenants

One major uncertainty is the scope of the provision on disclaiming jointly-held property. First, although the new provision does specifically include joint tenants and joint owners among those empowered to disclaim, it is not clear what part of the joint property may be disclaimed—all of it, that part representing the contribution of the decedent,<sup>80</sup> or the part that could have been severed had the decedent chosen to end the joint tenancy. Second, there is no specific reference to joint tenants or joint owners in the current Disclaimer Act. Under common law there is some doubt that joint tenants can disclaim.<sup>81</sup> Therefore, it is questionable whether this power exists in the absence of a specific statutory grant.

Both problems appear to have a solution in the Technical Memorandum of the Judiciary Committee on L.B. 354 which states:

This amendment makes explicit that a surviving joint owner or surviving joint tenant can disclaim a survivorship interest, a rule that is implied in both the present disclaimer statutes and section 74 as originally written.<sup>82</sup>

If this Technical Memorandum is determinative of the law, the first problem dealing with what portion of the joint property may be disclaimed disappears, for it is now clear that the property to be disclaimed is the survivorship interest. Under Nebraska joint tenancy law that would be the interest indefeasibly vested in the deceased joint tenant from the creation of the tenancy. Since by definition the interests of joint tenants are equal, in a two-party tenancy the survivorship interest would be one-half of the property. The second problem, i.e., whether the current law applies to joint property at all, also appears to be solved since it is asserted that the Disclaimer Act carries an implication that joint tenants and joint owners are to be included. Although a technical memorandum is not conclusive of legislative intent when the statute as passed is not clear on its face, it is strong evidence of how the statute is to be interpreted and would be difficult for a court to ignore.

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80. If the part corresponding with the contributions of the decedent were disclaimable, the treatment would correspond to the Service's approach to joint ownership under the estate tax laws. CODE § 2040. This very specific statutory approach to the treatment of joint property was added to the Code because of the inequities between the tax burden on joint owners in community property states and in noncommunity property states. This is perhaps the best example of the federal rejection of the local law of property for the purposes of the federal tax and application of its own property standards.

81. See note 36 *supra*.

82. Technical Memorandum, § 74.

Even if it is clear that it is the survivorship interest that can be disclaimed, the effect of disclaimer on multiple joint tenancies is troublesome. The impact on a two-party joint tenancy is fairly simple. While alive, each party has a one-half interest in the property. When the joint tenancy ends at the death of one of the tenants and the survivor disclaims, a new tenancy between the survivor and the person(s) taking under the disclaimer is formed, but it is a tenancy-in-common rather than a joint tenancy. The survivor retains a one-half interest in the whole, but has no right of survivorship in the remaining half.

If there are multiple tenants, the situation becomes more complicated. If A, B and C are joint tenants, each has a one-third interest in the property. If A dies, B and C each receive one-half of A's share and so remain equal joint tenants. If A dies and B disclaims his survivorship interest in A's share, there are various possibilities. Does C get all of A's third (one-sixth for his survivorship share and one-sixth for B's disclaimed share), or does C only get his own survivorship share with the other sixth passing to A's heirs? C probably should get all of A's interest since the disposition is supposed to be as if B predeceased A; however, it can be argued that B's disclaimer severs the joint tenancy for all three tenants and thus destroys all right of survivorship in A's share. If the situation arises where A's heirs and the joint tenants are different people, the point will surely be litigated.

Assuming that C gets all of A's share, a second consideration is whether B's disclaimer severs the remaining joint tenancy between B and C, or whether B still has a survivorship interest in C's share. The answer may be that B and C still have a joint tenancy in B and C's original two-thirds plus C's half of A's portion but that they have a tenancy-in-common in the remaining half of A's share which B disclaimed,<sup>83</sup> or the tenancy-in-common may apply to all of A's disclaimed share now belonging to C.

Since the answers are uncertain, B should also be sure to disclaim the survivorship interest with C if he does not ever wish to receive that property. If B and C wish to maintain the survivorship right, then perhaps a new conveyance to that effect should be made, even though it is possible that such a transaction might involve gift tax consequences. A declaratory judgment action to determine the rights of the various parties would be useful in this situation.

The joint bank account presents another aspect of the joint property problem because of the nature of the ownership involved.

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83. See C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 221 (1962).

In a typical joint bank account any person named as joint owner has the legal right to remove or add funds without the permission of any other owner.<sup>84</sup> Each joint owner thus has a present and completed interest in the property, independent of the death of any other owner. Under the common law this present interest would be enough to defeat any attempted disclaimer since nothing would be considered as passing at death.<sup>85</sup> This is the same type of reasoning behind the common law restriction on disclaiming any jointly held property,<sup>86</sup> but in this situation there is added justification in that the property in a joint bank account could be withdrawn and used by just one of the owners without any action being taken by the other. However, where the person attempting to disclaim the account never contributed to it and never truly had any control over it despite the dual names on the account, it would seem reasonable to allow the disclaimer. This would be consistent with the purposes of the Disclaimer Act, for if the disclaimant did not in fact have possession of the property, he should not be forced to accept it at the time of the true owner's death. Other situations exist where the true ownership rights are different than the account title; for example, a partnership account with unequal contri-

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84. When a deposit in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of such persons or to the survivor or survivors in the due course of business.

NEB. REV. STAT. § 8-136 (Reissue 1974).

The predecessor of this statute, NEB. REV. STAT. § 8-167 (1943), has been held to provide for the same disposition of the property. *Rose v. Hooper*, 175 Neb. 645, 122 N.W.2d 753 (1963). That predecessor statute was also held to fix the property rights as between the parties named on the account. *Tobas v. Mutual Bldg. & Loan Ass'n*, 147 Neb. 676, 24 N.W.2d 870 (1946).

85. The law in the area is illustrated by the case of *Krakoff v. United States*, 439 F.2d 1023 (1971), in which the decedent's widow attempted to renounce her rights as the surviving joint tenant in several joint savings accounts. The funds, which were previously nonprobate property because they were held jointly with rights of survivorship, passed through the probate estate and to the four surviving children. The Service claimed that this was a taxable gift from the widow to her four children. The federal district court agreed with the Service in spite of an earlier ruling by the state probate court on the validity of the disclaimer in favor of the widow. Disregarding the probate court's ruling as not determinative of the state law, the federal court held that under other cases which were determinative of the local law, the widow had acquired full title by virtue of the contracts creating the tenancies and, therefore, could not disclaim. She had full withdrawal and deposit rights and so had full title.

86. See note 36 *supra*.

butions from the partners. If in the partnership agreement each partner could only withdraw amounts up to his contribution, each partner should be able to disclaim funds not traceable to his contribution.

Whether joint bank account funds may be disclaimed under the present Disclaimer Act has not been decided by the court. The current law makes provision for disclaiming that which passes by succession, not that which is already owned; therefore, if the reasoning of other jurisdictions is applied,<sup>87</sup> funds from an account with unlimited withdrawal and deposit rights would not pass from the decedent at death, but would belong to the survivor from the creation of the account and could not be disclaimed. If it can be shown that the true rights to the account were limited in some way, disclaimer should be allowed.

Under the new Probate Code the result would be more certain because Article 27 on nonprobate transfers redefines the legal interests of multiple party account holders.<sup>88</sup> No longer may a joint account be treated as the entire property of each party during his lifetime, but it must be considered each party's property only in proportion to his net contribution.<sup>89</sup> These new sections will thus make it possible to renounce that portion of joint accounts which can be traced to the decedent, since that part now passes by survivorship and not on the creation of the account.

## B. Time to Disclaim

A second area of uncertainty under the Nebraska disclaimer provisions is the time period within which the disclaimer must be made. The present Disclaimer Act provides that a remainder interest need not be disclaimed until *both* its taker and its quality and quantity are indefeasibly fixed.<sup>90</sup> This broad provision would allow a remainderman to wait for the death of the life tenant before deciding whether to disclaim. The new Probate Code provision shortens the time period within which to disclaim and has somewhat different language governing when the period begins to run.<sup>91</sup> It provides that if the taker is not finally ascertained within nine months after the death of the decedent, the time period for disclaiming is nine months after the event by which the taker or the interest is finally ascertained. One possible interpretation of this

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87. See note 80 *supra*.

88. NEB. REV. STAT. § 30-2701 *et seq.* (Reissue 1975).

89. *Id.* §§ 30-2703, 30-2704.

90. *Id.* § 30-133 (Cum. Supp. 1974). See note 47 *supra*.

91. *Id.* § 30-2352(b) (Reissue 1975). See note 70 *supra*.

language is that the extra time period is available only in those instances where the intended beneficiaries are unborn or otherwise unascertainable. If such is the case, known but contingent beneficiaries would have to disclaim long before they were certain of receiving any property. A child left a remainder in his grandfather's will subject to a life estate in his parents would have only nine months to disclaim property he might not get for 50 years, if ever.

A broader interpretation of this language is that the taker is not ascertained until he is certain of his right to take and thus disclaimer of any kind of conditional interest can always be postponed. The grandchild in the example above would have until the statutory time after his parents' death to disclaim the grandfather's property.

There is no legislative history indicating why the wording of the new statute was changed from that of the present Disclaimer Act,<sup>92</sup> but when examined in view of the broad scope of the statute as a whole, it would seem inconsistent with the general intent of the Unicameral or Uniform Probate Code drafters if this section were given a restrictive interpretation. Even the federal rule on disclaimer seems to be that a disclaimer can be made until a reasonable time after the remainder interest is no longer subject to divestment.<sup>93</sup>

### C. Partial Disclaimer

Partial disclaimer is yet another area left uncertain by both the present and future Nebraska statutes on disclaimer. The present Disclaimer Act allows a partial disclaimer by saying simply that a beneficiary may disclaim "in whole or in part, or with reference to specific parts, shares or assets thereof."<sup>94</sup> The new Probate Code adds the word "fractional" before "shares."<sup>95</sup> This language could be interpreted as applying the same kind of "severable part" restriction employed by the common law courts in allowing or disallowing disclaimers.<sup>96</sup> If this is the case, the Disclaimer Act and the new Probate Code have added nothing to the law and disclaimants would still be restricted to disclaiming only what a court deems

92. The old wording reflected the Minnesota and Illinois statutes on which the Nebraska Disclaimer Act was modeled. See notes 40 and 41 *supra*. The new wording is that of the Uniform Probate Code. There is no legislative history indicating any significance in this change.

93. 480 F.2d 57 (8th Cir. 1973).

94. NEB. REV. STAT. § 30-131 (Cum. Supp. 1974). See note 53 *supra*.

95. *Id.* § 30-2352(a) (1) (Reissue 1975).

96. See note 35 *supra*.



severable. Conversely, if the language is interpreted in its broadest sense, any portion of a successor interest may be disclaimed whether or not it is severable in the common law sense. In view of the broad purpose of the Disclaimer Act and section 2-801 of the Uniform Probate Code, which is to make disclaimer a more useful tool,<sup>97</sup> this latter interpretation would seem correct. As stated in the testimony before the Judiciary Committee, a disclaimer "has long been recognized as a necessary tool of estate planning . . . by the use of disclaimer it permits an estate planner to take a second look . . . to determine whether the initial estate plan which was drafted is correct or whether it needs revision."<sup>98</sup>

As an extreme example under this broad interpretation, it would be possible to create a life estate out of a fee by disclaiming the remainder. In most cases this remainder would then pass to the disclaimant's descendants. The effect of such a disclaimer would be to avoid the estate tax on the property at the disclaimant's death while still allowing the disclaimant to keep the benefit of the property during his lifetime and permit his heirs take at his death.

This may appear to be a drastic extension of disclaimer, yet it is well within the broad purpose of the disclaimer statutes and allows no more than is permitted under the Code and regulation sections governing the taxing of life estates with remainders over when they are created by trusts or wills. A decedent may leave a life estate with a remainder over and have that property taxed only in his estate and that of the remaindermen, skipping the tax on the life tenant.<sup>99</sup> If the disclaimer is truly to provide the estate planner with a second look, this tax advantage should also be available by using a disclaimer. To allow beneficial tax treatment in the case where the decedent gave a life estate but to disallow it where he simply gave a fee or died intestate is similar to the old common law distinction between allowing the disclaimer of testate property and disallowing it for intestate property.<sup>100</sup> There is little reasonable basis for such discrimination in either example.

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97. See note 79 *supra*.

98. *Hearings on L.B. 535, supra* note 42, at 28.

99. The COME does not allow a decedent to retain a life estate in himself and then pass it at death without a tax, but this is not the analogous situation to the disclaimer hypothetical. Under a disclaimer, property passes from the decedent to the remainderman without first vesting in the life tenant. The life tenant never accepts the property (in this case, the remainder) and thus has nothing upon which a tax can be levied under current law.

100. See note 34 *supra*.

### D. Insolvency

The present and future Nebraska statutes on disclaimer do not determine whether insolvency has any effect on the ability to disclaim. Some states have provided for the protection of creditors,<sup>101</sup> while others allow disclaimers in spite of creditors.<sup>102</sup> At least two courts in jurisdictions with statutes similar to ours have allowed disclaimers by insolvent recipients.<sup>103</sup> In both cases the statutes governing disclaimer made the disclaimer retroactive to the decedent's death and passed the property as if the disclaimant had predeceased the decedent. The property, therefore, was never considered as belonging to the disclaimant and so could not be claimed by the creditors. This approach, whether or not it is wise, is consistent with the theory underlying disclaimer. However, even under it, a disclaimer could be denied where the disclaimant has caused creditors to rely to their detriment on an apparent acceptance of the property or where there was collusion by the disclaimant and some other party to the detriment of the creditors. Courts can interpret the facts in such situations to imply an acceptance of the property before the disclaimer was attempted, and thus invalidate the disclaimer.

### E. United States Savings Bonds

United States Savings Bonds are properties which pass at death, but they are unique in some respects. The Secretary of the Treasury has the power to issue bonds "in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."<sup>104</sup> Pursuant to this authorization, the Secretary has issued Regulations on United States Savings Bonds,<sup>105</sup> which control all rights and interests in the bonds,<sup>106</sup> and supercede any state property law. Some

101. FLA. STAT. ANN. §§ 689.21(6), 731.37(6) (1969); BURNS IND. STAT. ANN. § 29-1-6-4 (1972); LA. CIV. CODE ANN. art. 1021 (1952); MINN. STAT. ANN. §§ 501.211(6) (Supp. 1976), 525.532(6) (Reissue 1975); VERNON'S ANN. MO. STAT. § 474.490 (1956); REV. CODE WASH. ANN. § 11.86.060 (1974 Supp.).

102. LAWS OF MD. ch. 11, § 9-101 (1974); ORE. REV. STAT. § 112.675 (1973).

103. Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973); *In re Estate of Hansen*, 109 Ill. App. 2d 283, 248 N.E.2d 709 (1969).

104. 31 U.S.C. § 757c(a).

105. Regulations Governing United States Savings Bonds, 31 C.F.R. § 315 (1973).

106. See *United States v. Chandler*, 410 U.S. 257 (1973) (per curiam), *Free v. Bland*, 369 U.S. 663 (1962). *In re Estate of Krieter*, 196 Neb. 482, 243 N.W.2d 773 (1976); *Nelson v. Rasmussen*, 164 Neb. 274, 82 N.W.2d 418 (1957).

of these regulations place direct restrictions on the transfer of the bonds: the form of the registration must express the actual ownership of and interest in the bonds;<sup>107</sup> the bonds are not transferable and are payable only to the owners named thereon;<sup>108</sup> a surviving co-owner will be recognized as the sole and absolute owner of the bonds,<sup>109</sup> as will a surviving beneficiary,<sup>110</sup> and no judicial determination will be recognized which would give effect to an attempted voluntary inter vivos transfer of a bond.<sup>111</sup> These regulations make no provision for recognizing a disclaimer. The position of the Treasury Department is that they would accept the surrender of the surviving owner's interest and would issue new bonds, but that such a surrender would constitute a taxable event for the purposes of reporting accrued interest for income tax and might also raise a gift tax question.<sup>112</sup>

Lower courts have found exceptions to the all-encompassing Treasury Department control of bond transfer rights in litigation which has arisen between private parties or which has been remotely related to the purpose of the regulations.<sup>113</sup> Whether this approach could be stretched to cover a disclaimer is doubtful, especially in light of the Supreme Court decision which did not recognize a gift between bond co-owners as being valid for purposes of excluding the bond from the decedent's taxable estate when the bond was not reregistered in the recipient's name as required by the regulations.<sup>114</sup> Even if one were successful in persuading a court to ignore the transfer regulations, the regulation providing that a co-owner bond will be paid to either co-owner upon his separate request<sup>115</sup> is an added hurdle, for this makes the rights in the bond analogous to the rights in joint bank accounts under the common law.<sup>116</sup>

Though a co-owner probably is precluded from disclaiming by the Treasury Department bond regulations, a beneficiary may not

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107. 31 C.F.R. § 315.5 (1973).

108. *Id.* § 315.15.

109. *Id.* § 315.62.

110. *Id.* § 315.67.

111. *Id.* § 315.20(a).

112. Letter from C. Gardner, Director, Division of Transactions and Rulings, Fiscal Service, Department of the Treasury to Herbert L. Jackman, Attorney, October 18, 1975, on file in the Nebraska Law Review Office.

113. For a general discussion of the cases in this area, see the district court opinion in *Chandler v. United States*, 312 F. Supp. 1263 (N.D. Cal. 1970), *rev'd* 410 U.S. 257 (1973).

114. 31 C.F.R. § 315.5 (1973).

115. *Id.* § 315.60.

116. See section IV (A) *supra*.

be so limited even though section 315.67 says that a surviving beneficiary will be recognized as the sole and absolute owner. If the disclaimer is properly made under state law, it can be argued that the intended beneficiary is not truly the beneficiary at all, because in an effective disclaimer the disclaimant is considered as never having had any interest in the property.

As of yet there have been no cases on co-owner or beneficiary disclaimer, but this may be an area which justifies a calculated risk, even though the Treasury Department's position is squarely against disclaimer in the co-owner situation. The consequence of losing is that the disclaimer is taxed as a gift. Not only the amount of the bonds, but also the amount of the gift tax which must be paid are then both out of the disclaimant's estate at the more advantageous gift tax rates. Win or lose, the taxpayer comes out ahead.

## VI. CONCLUSION

A disclaimer or renunciation can be a most valuable tool in post-mortem estate planning. Because of the necessary federal reliance on the local law of disclaimer, the Nebraskan with a problem which is correctible by a disclaimer is in an excellent position, for under Nebraska law it is currently possible to take advantage of most of the benefits available under disclaimer. The present and future Nebraska laws do away with common law restrictions on disclaimer and grant broad powers to disclaim a survivorship interest in any kind of property, in whole or in part. After the new Probate Code comes into operation in 1977, even greater use of disclaimer may be possible because of the change in the law governing survivorship interests in joint bank accounts and the inclusion of trustees and conservators among those empowered to disclaim. Absent new federal legislation removing the influence of local law and establishing purely federal disclaimer standards for tax purposes, Nebraskans are in a most enviable position.

*Mary Lynne James '76*