ESTATE PLANNING WITH
“DISCLAIMERS”

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Understanding Estate, Gift & Fiduciary Income Tax
Returns 2005: Strategies for Maximum Advantage
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Professional Memberships:  
New York State Bar Association  
Trust & Estates Section  
Member of Legislation and Estate Planning Committees  

American Bar Association  
Member of Real Property, Probate and Trust Law Section  

American Bar Foundation (Member as of 2005).
1. Introduction –

a. The use of qualified disclaimers in estate planning, though in existence for decades, has enjoyed renewed popularity in the last several years as a result of the Economic Growth and Tax Relief Reconciliation Act of 2001 (the “2001 Tax Act”). A unique and powerful estate planning tool that can either correct an estate plan with the benefit of hindsight or be intentionally incorporated into a client’s will prospectively to accommodate unpredictable circumstances after the client’s death, the disclaimer provides clients with the basis for a versatile and flexible estate plan in the face of a possible estate tax repeal and shifting estate tax rates.

b. The concept of the disclaimer: A disclaimer\(^1\) for estate planning purposes, which is formally defined in § 2518 of the Internal Revenue Code and the Treasury Regulations thereunder, is the irrevocable refusal to accept ownership of property passing gratuitously by gift, testamentary transfer, or by operation of law. For transfer tax purposes, if a person (a transferor) makes a transfer of property to another person who in turn makes a qualified disclaimer of the property, it is as though the disclaimant (the “would be transferee”) never received the property at all. For purposes of the gift, estate, and generation-skipping transfer tax laws, this is significant because the transaction is treated as though the disclaiming party had predeceased the transferor and the property passes to the next transferee in line at no transfer tax cost. Therefore, the vital point about the disclaimer is that, provided it meets certain specifications as a “qualified disclaimer,” it avoids a taxable transfer.

c. Traditional uses: Traditionally, estate planners have used the disclaimer to address both tax and non-tax circumstances in two separate modes: (1) Post-mortem “remedial” planning and (2) pre-mortem “defensive” planning.

(i) Post-mortem remedial disclaimers: The most common examples of the use of the disclaimer in the post-mortem planning mode involve situations where wealthy beneficiaries, con-

\(^1\) The term “disclaimer” is often used interchangeably with the term “renunciation” for state law purposes. Estate planning attorneys must be familiar with local law requirements for making valid “renunciations” or “disclaimers” in order to comply with federal law.
tent to waive their legacy under a will or trust, allow property to pass to the contingent beneficiaries (ordinarily the beneficiary’s children or next-of-kin) named by the decedent in the will or trust. Additionally, the disclaimer has been used repeatedly to improve imperfectly drawn estate plans: i.e, to cure a technically defective marital trust so that it qualifies for the marital deduction, or to enable property to pass by intestacy to a surviving spouse in order to afford the estate the marital deduction (PLRs 9247002, 9228004, 9148018); to reduce the amount of property passing to a spouse in order to make full use of the decedent’s applicable exclusion amount (PLR 9513011); to transform a non-qualifying charitable remainder trust into a “reformable interest” under the Internal Revenue Code such that it qualifies for the estate tax charitable deduction (PLR 9347013); to eliminate tax-sensitive powers held by a beneficiary/trustee so that the beneficiary/trustee avoids adverse tax consequences to himself personally (PLRs 9521032, 9203037); to eliminate an individual’s life interest in a testamentary charitable remainder unitrust in order to accelerate the charitable remainder interest and produce a current charitable deduction for the estate; to allow a child who inherits property under his parent’s will to cause the property to pass directly to the decedent’s grandchildren in order make use of the decedent’s exemption from the generation-skipping transfer tax (PLR 9822014).

(ii) Pre-mortem defensive disclaimers: In addition, the use of the disclaimer has historically provided a mechanism to accommodate future contingencies and, at the same time, protect against undesirable tax results. Common examples of the use of the disclaimer in the pre-mortem planning mode have been: to specifically provide in the will that a beneficiary has the option to disclaim in favor of a charity named in the will as an alternate beneficiary so that the estate will receive an estate tax charitable deduction while the testator’s charitable goals are met (PLR 9635011, 9532027); to specifically provide that a surviving spouse otherwise entitled to receive the testator’s entire estate outright may disclaim assets in favor of the testator’s children in the manner and in the proportion that the testator sees fit and utilize the testator’s applicable exclusion amount; to expressly preserve the option for a non-U.S. citizen spouse
to disclaim an outright marital bequest under a will into a qualified domestic trust and obtain the marital deduction for the estate in case the non-U.S. citizen spouse chooses not to become a U.S. citizen before the testator’s death.

d. Why we especially care about disclaimers at present: Currently, the possible repeal of the estate tax under the 2001 Tax Act, the increases that will occur in the “applicable exclusion amount” over the next several years, and the decoupling of the state and federal estate tax systems place a premium on creating an estate plan for married clients in particular that properly coordinates the marital and non-marital shares of their estates. The following chart reflects the changes in the estate tax rates and the applicable exclusion amount over the next several years pursuant to the 2001 Tax Act.

<table>
<thead>
<tr>
<th>Year</th>
<th>Applicable Exclusion Amount</th>
<th>Tax Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>$1,000,000</td>
<td>50%</td>
</tr>
<tr>
<td>2003</td>
<td>$1,000,000</td>
<td>49%</td>
</tr>
<tr>
<td>2004</td>
<td>$1,500,000</td>
<td>48%</td>
</tr>
<tr>
<td>2005</td>
<td>$1,500,000</td>
<td>47%</td>
</tr>
<tr>
<td>2006</td>
<td>$2,000,000</td>
<td>46%</td>
</tr>
<tr>
<td>2007</td>
<td>$2,000,000</td>
<td>45%</td>
</tr>
<tr>
<td>2008</td>
<td>$2,000,000</td>
<td>45%</td>
</tr>
<tr>
<td>2009</td>
<td>$3,500,000</td>
<td>45%</td>
</tr>
<tr>
<td>2010</td>
<td>Tax Repealed</td>
<td>35%</td>
</tr>
</tbody>
</table>

e. Pre-2001 Tax Act wills may create unintended adverse results: As a result of the large increments in the applicable exclusion amount, many wills drawn prior to the 2001 Tax Act which incorporate a traditional “reduce to zero” formula clause to create a credit shelter (or “bypass”) trust in conjunction with a marital disposition (the so-called “A/B Trust structure”) may inadvertently allocate a disproportionate amount of the client’s assets to the credit shelter trust at the expense of the surviving
spouse. For example, suppose W individually owns assets valued at $2,000,000 while H individually owns assets valued at $200,000, and that both spouses intend to benefit each other to the greatest extent possible but in the most tax efficient manner possible. Suppose also that W and H each have identical wills prepared in 1998 that contain the typical formula clause directing that the credit shelter trust for the benefit of non-spousal beneficiaries receives an amount equal to “the largest amount that can pass free of estate tax under federal law”\textsuperscript{2} and a provision that the balance passes to their surviving spouse. Should W die in year 2006 (when the applicable exclusion amount is $2,000,000), an unintended disinheritance of H results because W’s entire estate will pass to the credit shelter trust for the non-spousal beneficiaries by virtue of the formula language in her will. No part of her estate will pass to H. Therefore, unless W can predict the year of her death with certainty, a better result would be achieved if W structures her will to leave her entire estate to H and provide that, in the event of H’s qualified disclaimer of his inheritance (or any portion of it), the disclaimed property passes to the credit shelter trust for the non-spousal beneficiaries.

\textbf{f. Background of § 2518 – the federal disclaimer statute:}
Section 2518 is an outgrowth of a common law rule, which continues to govern disclaimers of interests created by pre-1977 transfers. The governing law for pre-1977 transfers is contained in Treasury Regulation §25.2511-1(c)(2) and provides as follows: “Where the law governing the administration of the decedent’s estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent’s will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of the gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer (emphasis added). In the absence of the facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent’s property within a reasonable time (emphasis added) after learning of the

\begin{itemize}
\item[2.] Prior to the enactment of the 2001 Tax Act, traditional formula clauses such as these did not generally risk an inadvertent disinheritance of the surviving spouse since the applicable exclusion amount (then referred to as the “unified credit”) was within the range of $600,000 to $675,000 for many years.
\end{itemize}
existence of the transfer, he will be presumed to have accepted the property. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under local law.”

g. It is important to note that the above regulation, which was amended to reflect the effective date of §2518, remains the law applicable to taxable transfers creating an interest prior to January 1, 1977. Therefore, a trust beneficiary’s disclaimer of an interest in an irrevocable trust (not subsequently includible in the estate of the grantor or any other person) created prior to 1977 will be governed by this regulation.3 For example, several IRS Private Letter rulings issued in 1998 approved tax-free disclaimers by remaindermen of trusts created in 1958. In each case the disclaimant apparently had no knowledge of their interest until late 1997, and a disclaimer of the interest was qualified under applicable state law. Thus, even in the case of very old trust instruments, a disclaimer may be a viable option. Since many pre-1977 trusts will have enjoyed significant appreciation, identifying a genuine disclaimer opportunity in a pre-1977 trust which is not includible in a current estate may render significant tax benefits. (PLRs 9845013, 9840009, 9840007, 9839019, 9839015.)

h. Prior disclaimer law proves to be unworkable and results in codification: Determining the validity of a disclaimer of a pre-1977 interest was often difficult because the test was subjective.

3. Although the case of Jewett vs. Commissioner, 455 U.S. 305 (1982), which holds that the period within which a contingent remainder interest must be disclaimed begins to run upon the establishment of the trust rather than upon the later death of the life tenant (when the remainder vests), would bar most disclaimers as untimely, it is possible that a disclaimer of a pre-1977 disclaimer could be effective. Since the disclaimer must be made within a reasonable time after knowledge of the existence of the transfer, if there is no knowledge, the period does not begin to run. See U.S. v. Irvine, 511 U.S. 224, 234 (1994). Thus, under limited circumstances, disclaimers of pre-1977 interests may be successful.
Based on the facts and circumstances of each case, the court had to establish whether the disclaimant made the refusal within a “reasonable time” after his “having knowledge” of the transfer. Proving the existence of the disclaimant’s “knowledge” and whether the disclaimer occurred within a “reasonable” time was factually burdensome and subject to argument. In response to the need for a more objective test than that in the common law rule came the enactment of §2518 of the Internal Revenue Code for federal purposes and § 2-1.11 of the Estates, Powers & Trusts Law of New York (“EPTL”) for New York purposes. Thus, pursuant to the statutory codifications, a beneficiary can make a valid disclaimer of a post-1976 testamentary or inter vivos transfer if certain objective, mechanical requirements are met.

i. **Basic requirements of § 2518:** Under § 2518, the main requirements for making a qualified disclaimer for federal purposes are as follows:

(i) There must be a writing that identifies the property and is signed by the disclaimant.

(ii) The disclaimer must be an irrevocable and unqualified refusal to accept the property.4

(iii) The writing must be delivered to the appropriate party.

(iv) The disclaimer must occur within the nine-month time limit beginning from the time the interest was created.

(v) The disclaimant may not accept any of the benefits from the property.

(vi) As a result of the disclaimer, the property must pass without any direction by the disclaimant to either (1) a person other than disclaimant or (2) the spouse of the transferor.

(vii) For the disclaimer to be valid under federal law, it must be valid under local property law.

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4. Generally defined as a “relinquishment of a legal right that is incapable of being retracted or revoked by the disclaimant and is not modified by reservations or restrictions that limit its enforceability.” Estate of Monroe, 104 T.C. 352 (1995), rev’d, 124 F.3d 699 (5th Cir. 1997).
Adhering to federal law requires adherence to local law – a dual track: The following chart compares the federal statutory requirements with those under the New York statutory scheme. The requirements, which are substantially straightforward and parallel to each other for the most part, are relatively self-explanatory and do not invite different interpretations.\(^5\) Despite the seemingly simple concept of the disclaimer, however, the key to its success is that it constitute a “qualified disclaimer” that fully complies with each of the underlying statutory elements. Failure to pay due regard to the details required by the statutory elements, as clarified by the pertinent Treasury Regulations, could result in adverse tax consequences.

<table>
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<th>DISCLAIMER UNDER FEDERAL TAX LAW</th>
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<td>Section 2518 of the Internal Revenue Code</td>
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<td>1. A writing that identifies the property and is signed by the “disclaimant.”</td>
<td>1. A writing that is signed and acknowledged by the “renouncing party.”</td>
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<td>3. Delivered to the appropriate recipient (i.e., the transferor, the representative of the transferor's estate, the holder of legal title to the property or the person in possession).</td>
<td>3. Filed with the Court and notice served personally on the fiduciary holding the property; notice served by mail on persons whose interests are accelerated.</td>
</tr>
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<td>4. Delivered within nine months from the date on which the interest is created (or nine months from the disclaimant's turning age 21).</td>
<td>4. Filed with the Court within nine months from the “effective date of disposition.” For a future interest, the date of disposition is the date the interest becomes an “estate in possession.”</td>
</tr>
</tbody>
</table>

\(^5\) Under New York law, the act of refusing an interest in property is called a “renunciation” rather than a “disclaimer.” This is a carryover from common law and although a distinction without a substantive difference, the term “renunciation” appears throughout the New York statute.
2. Special points relevant to elements of the qualified disclaimer:

   a. Nine-month time limit: The most problematic of the requirements under both the federal and state statutes (and the most often litigated issue) is the requirement regarding the nine-month period within which a person must disclaim. The critical issue is in identifying the starting point for the nine-month period. As a general rule, the period begins to run when the “interest in the property is created.” The question then becomes: “When is the interest in property created?” As a starting point, the Treasury Regulations provide that an interest in property is created for purposes of a qualified disclaimer at the time there is a “taxable transfer.” In turn, finding the “taxable transfer” often depends on the nature of the property being transferred:

   (i) Outright inter vivos (lifetime) gifts and testamentary transfers: For lifetime gifts and outright testamentary transfers, the interest is created as of the date the transfer is complete for transfer tax purposes. In other words, for gifts the interest is created on the date of the gift. For testamentary transfers, the interest is created on the date of the decedent’s death.

   b. No acceptance by the disclaimant.

   c. As a result of the disclaimer, the property must pass to another person or the spouse of the transferor, without direction by the disclaimant.

   d. To be valid for federal tax purposes, the disclaimer must comply with state law.

   e. Prior to the repeal of the gift tax in New York, to be valid for New York tax purposes, the disclaimer had to be valid for federal tax purposes.

   f. An “affidavit of no consideration” must be filed with the Court.

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(ii) **Interests in trust:** Determining when a particular trust interest is created will depend on whether the trust is revocable or irrevocable and when a “taxable transfer” has occurred to mark the starting point. For example, if Father creates an *irrevocable* trust providing that income is payable to Daughter for life and that upon Daughter's death the principal is payable to Grandchild, Grandchild will have nine months from the date that the trust is created to disclaim his remainder interest. This is so even though Grandchild’s interest may not vest for many years after the trust's creation. Since the taxable event is the creation of the trust – i.e., the date on which the transfer of the trust property was complete — the nine-month period begins to run from that date. By contrast, if Father creates a *revocable* trust for himself providing that income is payable to himself for life and upon his death principal passes to Grandchild, Grandchild will have nine months from Father’s death (rather than the earlier date of the trust’s creation) to disclaim his remainder interest. In the case of the revocable trust, no taxable transfer occurs upon its creation and the transfer is not complete for gift tax purposes until Father's death, when the revocable trust becomes irrevocable and is included in his estate for estate tax purposes.

(iii) **Interests resulting from the exercise or default of the exercise of a power of appointment:** Determining when one’s interest is created as a result of the exercise or default of the exercise of a power of appointment depends on whether the power holder had (1) a special (or “limited”) power of appointment or (2) a general power of appointment. If the interest in property is created by the exercise or default of a *limited power of appointment*, the nine-month period within which the appointees or takers in default must disclaim begins at the creation of the trust, a taxable event. If the interest in property is created by the exercise or default of a *general power of appointment*, however, the nine-month period within which the appointees or takers in default must disclaim is deferred until the holder of the general power of appointment exercises that power (either during life or at death) or fails to exercise it. For example, suppose Father creates an irrevocable trust giving Daughter a *limited testamentary power to appoint* the trust property to Grandchild. Grandchild has nine months from the
date of the creation of the trust to disclaim his remainder interest in the trust. This is the result because Daughter’s power to appoint is limited. By contrast, if Father creates an irrevocable trust giving Daughter a *general testamentary power of appointment* which Daughter exercised in favor of Grandchild by the terms of her will, Grandchild would have nine months from Daughter’s date of death (the effective date of the exercise of her testamentary power – a taxable event) rather than the earlier date of the trust's creation. The distinction lies in the fact that the general power of appointment causes the trust to be included in the Daughter’s estate for estate tax purposes. Due to this estate tax inclusion, a taxable event occurs subsequent to the creation of the trust, the first taxable event, and the beginning of the nine-month period is postponed until the last taxable event occurs. No such estate tax inclusion would occur in the case of the limited power of appointment and so the nine-month period is not deferred.

(iv) **Under age 21 exception to nine month rule for New York purposes:** The major exception to the “nine-month from the date of creation of the interest” rule applies to a disclaimant who is younger than 21 on the date the taxable transfer is made. Under federal law, a disclaimant has nine months from his 21st birthday to disclaim, even though state law may treat him as a person of majority at a younger age. Under federal law, this is the only exception to the general rule and there is no tolling of the nine-month period for any other disability. Under New York law, there is no express exception for disclaiming beneficiaries under age 21, but New York courts have allowed extensions for under age beneficiaries to make their renunciation, even after the nine-month period has elapsed, in order to be consistent with the federal statute.6)

(v) **Other exceptions to the nine-month rule for New York purposes:** For purposes of New York law, there are two other exceptions to the nine-month rule: The “reasonable cause exception” and the “future interest exception.” Generally, the time for filing and serving a renunciation in New York may be extended, within the court's discretion, even after the nine-month period has expired upon a showing of “reasonable

cause.” An example of where the court found “reasonable cause” was where the beneficiary did not initially comprehend the extent and complexity of the liabilities attached to the property interest and was not in a position to administer the property. Another example of “reasonable cause” was where the beneficiary was not aware of the extent of the value of the bequest and accepting it would have had a negative impact on the beneficiary’s own estate plan. Under the “future interest exception,” if the property interest is a future estate, the renouncing party has nine months from the date on which the interest actually comes into possession, or vests in him, to make his renunciation and cause the property to pass to the next beneficiary in line. (It is important to note that these two exceptions are for New York purposes only, and do not serve as exceptions to the timing requirements for making a qualified disclaimer for purposes of the federal statute).

(vi) **Time period for successive interests:** A significant distinction between the New York and federal statutes relates to the nine-month period in connection with multiple, successive interests. Under federal tax law, if more than one disclaimer is necessary for the disclaimed property to fall into the hands of the desired beneficiary, all disclaimers must be made within the same original nine-month period. For example, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residuary estate, of which B was the sole beneficiary, then B would have to make a disclaimer of the property no later than nine months after the testator’s death. For New York law purposes, however, if the interest of the renouncing party is created as the result of a prior renunciation by another person, the nine-month period begins to run from the date of the prior renunciation rather than from the date of the original transfer.

(vii) **Time Limit Strictly Enforced:** Under federal law, no extensions of time to file disclaimers may be granted, and an extension to file a gift or estate tax return does not extend the time for making a qualified disclaimer.

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b. **Acts that constitute “acceptance:”** The second most problematic of the statutory requirements under § 2518 is that there be no acceptance by the disclaimant. The Treasury Regulations provide that acceptance is manifested by “any affirmative act that would be consistent with ownership of the property.” Examples of acceptance include the use or control of the property, the receipt of dividends or income from it, directing investment decisions, filing claims for retirement and insurance benefits, pledging the property as security or agreeing to encumber it in exchange for other assets, or directing others to act with respect to it (such as in the case of caretakers of real estate). In addition, the receipt of any consideration, whether at the time of the disclaimer or in the future, in exchange for making the disclaimer constitutes acceptance of the entire interest. The exercise of a power of appointment to any extent by the donee of the power is acceptance of the underlying property subject to the power.\(^\text{11}\) In addition, acceptance may be inadvertent and implied from the circumstances. For example, in an IRS Technical Advice Memorandum,\(^\text{12}\) W died shortly before H. W’s will included a marital deduction general power of appointment trust for H, and the H’s will exercised his power of appointment to the extent necessary to pay death taxes attributable to the property held in the marital trust. After H’s will was probated, the fiduciaries of his estate sought to disclaim his entire interest in the marital trust. The IRS held that his will effectively exercised the power before his disclaimer was accomplished so that there was acceptance by H of his pre-deceased wife’s estate and no valid disclaimer could be made by H’s fiduciaries. The facts of this Memorandum became incorporated as an example in the Treasury Regulations, which added the exception that if H had properly disclaimed the property before his death, H’s disclaimer would have been valid even though his will purported to exercise his power over the marital trust created by W’s will.

**General actions that do not constitute “acceptance:”** The mere re-titling of assets into the name of the beneficiary is not treated as an acceptance of the benefits by the beneficiary. The Treasury Regulations provide that “merely taking delivery of an instrument

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10. PLR 9223051.
of title, without more,” does not constitute acceptance. Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of the decedent. For example, a disclaimant’s living in a disclaimed residence that the disclaimant held as a joint tenant or as a tenant in common will not constitute acceptance. In addition, actions by a person who is a beneficiary and is also the fiduciary of the estate containing the property do not constitute acceptance if the actions are “in the exercise of fiduciary powers to preserve and maintain the disclaimed property.” The election of a statutory share by the surviving spouse is not deemed an acceptance of benefits, and some or a portion of the elective share may be disclaimed (before actual receipt of the benefits) within the nine-month period of the decedent’s death. A beneficiary who is under the age of 21 when the interest in property is created will not be viewed as having accepted even if he uses or enjoy the property. This is due to the technical element of the federal statute that tolls the nine-month period within which persons under age 21 must disclaim. In this case, the beneficiary can still make a qualified disclaimer upon his attaining age 21.

3. **Property interests that can be disclaimed:**

   a. **Entire interest or undivided portion of a separate interest:** In general, if the requirements of § 2518 are met, a beneficiary can make a qualified disclaimer of all or an undivided portion of any separate interest in the property, even if the beneficiary has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated a separate interest. For example, if an income interest in securities is bequeathed to A for life, then to B for life, with the remainder interest in such securities bequeathed to A’s estate, and if the remaining requirements of § 2518 are met, A could make a qualified disclaimer of either the income interest or the remainder, or an undivided portion of either interest. A could not, however,

14. Treas. Reg. § 25.2518-2(d)(2). Caveat: It is not clear whether other important fiduciary actions, such as selling property or allocating assets among beneficiaries’ shares, constitutes acceptance.
make a qualified disclaimer of either interest for a certain number of years.\textsuperscript{17}

\textbf{b. Severable property:} A disclaimer may be made of severable property (property which can be divided into separate parts, each of which, after severance maintains a complete and independent existence). For example, a legatee of shares of corporate stock may accept some shares and disclaim others.

\textbf{c. Power of appointment is treated as a separate interest:} A power of appointment with respect to property is treated as a separate interest in such property and such power with respect to all or an undivided portion of the underlying property may be disclaimed separately from any other interests separately created by the transferor of the property.\textsuperscript{18} For example, a beneficiary can disclaim a power of appointment over trust principal yet retain his interest as a beneficiary of trust principal.

\textbf{d. Disclaimer of undivided portion:} A disclaimer may be made of an undivided portion of a separate interest in property provided it consists of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and the disclaimer extends over the entire term of the disclaimant’s interest in such property as well as other property into which such property is converted.\textsuperscript{19}

\textbf{e. Specific pecuniary amount of property:} A disclaimer may be made of a pecuniary amount provided that, following the disclaimer, the amount disclaimed and any income attributable to it is segregated from the portion of the property that was not disclaimed. Such segregation must be made on the basis of the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes between the date of the transfer and the date of the disclaimer.\textsuperscript{20}

\textbf{f. Joint property:} Pursuant to the Treasury Regulations effective for transfers made after December 31, 1997, determining whether a disclaimer of jointly held property is a “qualified disclaimer” depends on the nature of the property interest:

\begin{footnotesize}
\begin{enumerate}
\item[17.] Treas. Reg. § 25.2518-3(a).
\item[18.] Treas. Reg. § 25.2518-3(a)(1)(iii).
\item[19.] Treas. Reg. § 25.2518-3(b).
\item[20.] Treas. Reg. § 25.2518-3(c).
\end{enumerate}
\end{footnotesize}
(i) If the joint property interest is in a bank, brokerage or other investment account and if the transferor could make an unlimited, unilateral withdrawal during life such that under local law the creation of the joint tenancy does not create a completed gift, then, at the transferor’s death, the surviving joint tenant may disclaim his survivorship interest. The surviving joint tenant may not disclaim amounts contributed by himself as he is viewed as having retained dominion and control over those amounts. The surviving joint tenant must disclaim his survivorship interest within nine months of the death of the deceased joint tenant – the date on which the gift of the survivorship interest is deemed complete.

(ii) If the joint property interest is in property other than a bank, brokerage or other investment account, such as real estate, and it is held in joint tenancy with rights of survivorship, then the surviving joint tenant may disclaim his ½ survivorship interest upon the death of the deceased joint tenant. The surviving joint tenant may only disclaim his ½ vested interest which he received upon the creation of the joint tenancy by doing so within nine months of the creation of the joint tenancy. Between spouses, the survivorship interest is deemed to be ½ of the interest in the property, regardless of the amount that each joint tenant contributed and regardless of the portion of the property included in the deceased joint tenant’s estate for estate tax purposes.

(iii) Example: Under an example in the Treasury Regulations, if W contributes $1 million (and H nothing) to the purchase of Blackacre and they take title to Blackacre as joint tenants, H succeeds to a 50 percent joint interest in the property. If H wants to disclaim his 50 percent interest in Blackacre, he must do so within nine months of its purchase. But with respect to W’s interest in Blackacre, H has nine months after W’s death within which to disclaim. This is the case regardless of whether the interest can be unilaterally severed under local law and regardless of the levels of contribution of each spouse.

21. It is important to note that for New York purposes, such a contribution to a joint bank account would be considered a completed gift to the other joint tenant upon the creation of the joint tenancy.
g. **Non-probate property:** One may disclaim an interest in an asset that passes by beneficiary designation (such as life insurance and retirement benefits) or an asset that passes by operation of law (such as jointly held property subject to the rules set explained above).

4. **Who may disclaim:** Generally, any beneficiary of an interest in property may disclaim the interest in the property. In determining whether another can make a disclaimer on behalf of a beneficiary, it is necessary to review local law. For example, in New York, the fiduciary of the estate of the beneficiary, the guardian of an infant, the committee of an incompetent, or the conservator of a conservatee may make a disclaimer on the beneficiary’s behalf. Additionally, a person acting pursuant to a power of attorney may disclaim on behalf of the disclaimant provided the power of attorney expressly authorizes a disclaimer. If the beneficiary is disabled, however, a disclaimer made by an agent acting on the disabled beneficiary’s behalf requires court authorization even if the power of attorney expressly authorizes the disclaimer. In the case of an infant disclaimant where an authorized guardian is making a disclaimer on the infant’s behalf, the court will generally look to where the ultimate benefit flows as a result of the disclaimer and determine whether there is a conflict of interest before allowing the guardian to disclaim on the infant’s behalf. For example, in one case where a mother, as the guardian of two minor beneficiaries (her children), sought to disclaim the minors' interests in their father's estate in order to create a larger marital deduction and therefore create a tax savings for the estate, the court found that the ultimate economic benefit inured to the mother rather than the minors and disallowed her renunciation in her capacity as guardian on their behalf.24

5. **Disclaimer opportunities involving the surviving spouse:**

a. **Disclaim outright disposition into a credit shelter trust:** The spouse may consider disclaiming all or a portion of an outright bequest of the pre-deceased spouse’s estate into a credit shelter trust in order to utilize the decedent’s applicable exclusion amount. Because the disclaimer statute allows the property to pass to “a person other than the disclaimant or the spouse of the transferor,” the spouse can make a disclaimer of an outright

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residuary bequest into a credit shelter trust and receive distributions from the trust as a beneficiary.

b. **Disclaim outright disposition into a QTIP Trust to buy time:** The spouse may consider disclaiming an outright bequest into a marital or “QTIP” trust in order to allow the fiduciary of the pre-deceased spouse’s estate more time for determining whether and to what extent a marital deduction should be claimed at the first spouse’s death. The fiduciary could obtain the automatic six-month extension of time to file the decedent’s estate tax return and delay making the QTIP election decision to assess the circumstances. If the spouse becomes terminally ill during that timeframe, failure to make a full or partial QTIP election may result in substantial overall estate tax savings through splitting of the estates and the use of the tax on prior transfers credit under §2013.

c. **Consider partial disclaimer to a QTIP trust:** The surviving spouse may consider a partial disclaimer to a QTIP trust. The spouse could retain some assets for lifetime gifts or other estate planning alternatives.

d. **Disclaimers to allow QTIP treatment:** If a bequest is made to a trust providing for mandatory income payments to a surviving spouse, but permitting children to be discretionary principal beneficiaries, having the children disclaim their rights to receive principal distributions would allow the trust to qualify for QTIP treatment in case it is necessary to avoid estate tax at the first spouse’s death.

e. **Disclaimer of insurance on a surviving spouse’s life:** The surviving spouse may consider disclaiming insurance on his or her life, so that the decedent’s interest in the insurance could pass to a credit shelter trust.

6. **Disclaimer for generation-skipping transfer tax purposes:**

a. **Disclaim to utilize first spouse’s million dollar exemption:** If the first spouse to die does not fully utilize their GST exemption amount, consider having the surviving spouse disclaim a spousal bequest into a credit shelter trust of which grandchildren are expressly named in the will as permissible beneficiaries.
b. **Disclaim to create direct skips:** If a will leaves assets to a GST trust for both children and grandchildren, consider having the children disclaim as to that portion of the trust that exceeds the decedent’s GST exemption amount. This would have the effect of converting that portion of the trust property into skip trust and avoid the possibly higher transfer taxes associated with a taxable termination or taxable distribution.

c. **Disclaimer by children to utilize decedent’s exemption amount:** Consider having children disclaim an interest received from their parents estate to create a direct skip to grandchildren and to utilize some or all of the decedent’s GST exemption amount.

d. **Disclaim to limit generation-skipping transfer to exemption amount:** If property passing to a skip person exceeds the decedent’s available GST exemption, consider having the skip person disclaim their interest so that it passes to a non-skip person and avoids the imposition of the GST tax. (Unless the will expressly provides that the disclaimed property must pass to a non-skip person, it may be necessary to consult local law to determine whether such property would automatically pass “upstream” to a higher generation).