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Some Property Law Issues in the Law of Disclaimers

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SOME PROPERTY LAW ISSUES 
IN THE LAW OF DISCLAIMERS

William P. LaPiana*

Editors' Synopsis: This Article discusses important property law questions that arise when trying to design a disclaimer statute such as what property may be disclaimed, what happens to disclaimed property, and when are disclaimers barred. The Article uses the relevant provisions of the Uniform Disclaimer of Property Interests Act as illustrations, in the belief that it exemplifies the latest consideration of the subject.

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I. INTRODUCTION

During the last twenty-five years the disclaimer has evolved. Although its antecedents are venerable and its common law lineage well established, it entered into a new phase of life with the enactment of Internal Revenue Code ("Code") section 2518 as part of the Tax Reform Act of 1976 (the "1976 Act").

The 1976 Act transformed the transfer tax system by

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unifying the estate and gift taxes and creating the first version of the generation skipping transfer tax. The disclaimer provision was occasioned by the decision of the Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner.* In *Keinath* the court interpreted the relevant tax regulations to make effective for tax purposes a disclaimer made within a reasonable time after a future interest vested in possession. The Eighth Circuit resolved the question by looking to state law to understand the meaning of “reasonable time.” The *Keinath* court applied the “indefeasibly vested” test from state property law only after failing to find a definition of reasonable time in federal law. In so doing, the court acknowledged that “the Commissioner has the right in the Treasury Regulations to set forth the conditions under which disclaimers will be recognized,” and they need not be based on state property law standards. Code section 2518 was designed to provide a uniform federal rule of timeliness for a disclaimer that would be effective for tax purposes, and, thus, would not result in a taxable transfer by the disclaimant. The House Ways and Means Committee Report specifically cited *Keinath* as an example of the lack of uniformity created by the application of state law standards to the reasonable time requirement under then existing laws.

Code section 2518 requires that a “qualified disclaimer” be made within nine months of the transfer creating the interest being disclaimed. However, the new statute did not stop there. Instead, it created several additional requirements, including that the disclaimer be in writing, that the disclaimant not have accepted any of the benefits of the disclaimed interest, and that the interest pass “without any direction on the part of the person making the disclaimer” to someone other than the disclaimant or to the

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2 480 F.2d 57 (8th Cir. 1973).
3 See id. See also former Treas. Reg. § 25.2511-1(c) (as amended in 1997) (requiring that a disclaimer be (1) recognized and “effective under the local law,” (2) “made within a reasonable time after knowledge of the existence of the transfer,” (3) “unequivocal,” and (4) made prior to any acceptance of the disclaimed property by the disclaimant).
4 See *Keinath*, 480 F.2d at 61-62.
5 Id. at 61.
6 See id. at 61-62.
spouse of the decedent.¹¹ Code section 2518 also includes rules for disclaimers of less than an entire interest and of powers.¹² Even so, these rules do not provide the last word.

Like so many aspects of our federal tax system, the qualified disclaimer is a hybrid of state and federal law. While the common law of disclaimers was not unknown, as the Keinath case shows, the requirements of Code section 2518 led the states to codify their law of disclaimers in order to provide some certainty for their residents who sought to make tax qualified disclaimers.¹³ After all, state law governs to whom disclaimed interests pass, and state law provides the mechanisms for making sure the written refusal to accept property is properly noted by the legal system. In short, once the federal tax law dictated specific rules for disclaimers that the tax law would recognize, the states began to codify their laws with the federal law in mind.

The movement to codify state laws has been greatly influenced by the various uniform acts on the topic promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). The latest expression of NCCUSL's views is the Uniform Disclaimer of Property Interests Act ("UDOPIA") promulgated in 1999 and amended in 2002 to reflect changes in the law of electronic documents.¹⁴ In 2002 UDOPIA was incorporated into the Uniform Probate Code ("UPC") as Article 2, Part 11, replacing former UPC section 2-801. UDOPIA exemplifies the bipolar nature of the disclaimer.¹⁶ On one hand, disclaimers are tools of transfer tax planning, and even if the sunset provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA")¹⁷ are repealed and the estate and generation skipping transfer taxes cease to exist at midnight December 31, 2009, the gift tax and, therefore, section 2518 will continue in force. UDOPIA, therefore, was drafted to allow the full range of disclaimers recognized under Code section 2518.¹⁸ On the other hand, disclaimers are important aspects of property law in general. The concept of disclaimer is often used to clarify the effect of other provisions

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¹² See id. § 2518(c) (2000).
¹³ See Keinath, 480 F.2d 57.
¹⁴ See UDOPIA (amended 2002).
¹⁶ See UDOPIA (amended 2002).
¹⁸ See UDOPIA prefatory note (amended 2002).
of law. In the UPC, for example, the rules of disclaimers govern the effects of disinheritece\textsuperscript{19} and of statutory revocation by divorce.\textsuperscript{20} In some states, a spouse who exercises elective share rights is treated as disclaiming interests passing to the spouse by will. Finally, in many states, disclaimed interests will not be subject to the claims of the disclaimant's creditors.

This Article discusses three important property law questions that arise when trying to design a disclaimer statute and uses the relevant provisions of UDOPIA as illustrations in the belief that UDOPIA exemplifies the latest consideration of the subject. UDOPIA is the most recent attempt to create a modern disclaimer statute and was designed to be part of the Uniform Probate Code, which is widely regarded as embodying the most up-to-date thought on the law governing succession to property at death.\textsuperscript{21} These three questions are (1) what property may be disclaimed, as exemplified by jointly held property, (2) what happens to disclaimed property, and (3) when are disclaimers barred. The resolution or lack of resolution of these issues in UDOPIA illustrates the difficult task of creating a workable disclaimer statute and highlights the importance of planning for disclaimers in every estate plan.

II. ANALYSIS

A. What May be Disclaimed—Jointly Held Property

Federal tax law allows the qualified disclaimer of "an interest in property"\textsuperscript{22} and states that "[a] power with respect to property shall be treated as an interest in such property."\textsuperscript{23} State disclaimer statutes usually contain a laundry list of what may be disclaimed, giving rules which may or may not give sufficient guidance to potential disclaimers. The most important case in point is jointly held property, whether held as joint tenants with right of survivorship or as tenants by the entirety. The property law of these estates is complex and varies from state to state, but under a traditional understanding of property law, a surviving joint tenant or tenant by the entirety has nothing to disclaim. The theory of both forms of ownership is that each tenant holds an undivided proportional interest

\textsuperscript{20} See id. § 2-804.
\textsuperscript{21} The author was the reporter for the UDOPIA. The opinions expressed in this article are his alone and do not represent the views of NCCUSL or of any of the members of the UDOPIA drafting committee.
\textsuperscript{22} I.R.C. § 2518(b) (2000).
\textsuperscript{23} Id. § 2518(c)(2) (2000).
and when one tenant dies the survivors are simply freed of the participation of that person. Nothing passes, therefore the tenant has nothing to disclaim.

However, American law has come a long way from the days in which the courts reified common law concepts, especially common law property concepts, to such a degree that they stood in the way of sound policy judgments. The Iowa Supreme Court came to a sensible conclusion when faced with the argument by state taxation authorities that a surviving joint tenant could not disclaim on the death of the other joint tenant because no transfer occurred at that time. The court stated:

While the [revenue] department’s position fits neatly into the traditional concepts of common law joint tenancy, we do not believe these precepts bind us in our interpretation of the language of the statute. When the legislature amended the statute to allow a “transferee in joint tenancy” to disclaim a “transfer” of property, it was referring to the accrual of additional rights and interest to the surviving joint tenant which occurs upon the death of the other joint tenant.

However, such a reading of state law is not necessarily binding on the United States Treasury. The ability to disclaim jointly held property is an important issue because it seems that many, if not most, married couples hold extensive property jointly, especially the family home. It often is impossible to take advantage of the applicable exclusion amount at the death of the first spouse to die because the decedent spouse does not have sufficient probate property to fund a credit shelter vehicle. If the surviving spouse could make a qualified disclaimer of the one-half of the family home that does not pass but, in the words of the Iowa court, “accrues” to the surviving spouse, the disclaimed interest could pass through the decedent spouse’s estate where it would be available to fund the credit shelter vehicle. Litigation resulted and the courts uniformly held that a surviving joint tenant could make a qualified disclaimer of the portion the decedent would have received had the tenancy been severed during life.

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24 *In re Estate of Lamoureux*, 412 N.W.2d 628, 631 (Iowa 1987).
25 *Id.*
26 See *id.* at 632.
27 See *Kennedy v. Comm’r*, 804 F.2d 1332, 1336 (7th Cir. 1986); *McDonald v. Comm’r*, 853 F.2d 1494, 1495 (9th Cir. 1988); *Dancy v. Comm’r*, 872 F.2d 84, 85 (4th Cir. 1989).
These holdings provided little solace to tenants by the entirety, especially if read to require the ability to sever unilaterally as the prerequisite to a qualified disclaimer. Fortunately for taxpayers, the Internal Revenue Service proposed new regulations to facilitate making qualified disclaimers of jointly held property interests that became final on December 30, 1997 (the "Regulations").

The Regulations allow a surviving joint tenant or tenant by the entirety to disclaim the "survivorship interest" to which the survivor succeeds by operation of law on the death of the first joint tenant to die (the examples identify this interest as one-half of the property when two joint tenants exist). The qualified disclaimer can be made regardless of whether the joint arrangement could be unilaterally severed under local law or the disclaimant furnished consideration for the property. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988, in which the spouse of the donor is not a United States citizen. The non-citizen surviving spouse may make a qualified disclaimer of any portion of the joint interest that is included in the decedent's estate under Code section 2040, which applies a contribution rule. Therefore, if the surviving spouse contributed none of the consideration for the tenancy's creation, he or she may make a qualified disclaimer of all the property. The Regulations also recognize the unique features of joint bank, brokerage, and other investment accounts by allowing the survivor to make a qualified disclaimer of that portion of the account contributed by the decedent so long as the decedent could have regained that property by unilateral action during life.

Section 7 of UDPIA accommodates state law to these rules by allowing the surviving joint tenant or tenant by the entirety to disclaim the decedent's proportional share of the property (referred to in the Regulations as the "survivorship interest"). In the usual spousal joint arrangement, the decedent spouse's proportional share is one-half. UDPIA section 7 also allows the disclaimer of all of the jointly held property not attributable to consideration furnished by the disclaimant, if that portion is greater than

30 See Treas. Reg. § 20.2040-1(a) (as amended in 1997) (valuing a decedent's gross estate under section 2040 at death as the value of the property held jointly by decedent and another person less the value attributed to consideration paid by other joint owners).
32 See id. § 25.2518-2(c)(4)(iii) (as amended in 1997).
the proportional share. Thus, the special rule for non-citizen spouses is accommodated. Finally, UDOPIA section 7(c) provides that the disclaimed interest passes as if the disclaimant predeceased the decedent, thus sending the property through the decedent’s probate estate, where it will be available to fund a credit shelter disposition.33

These rules for the disclaimer of jointly held interests give surviving joint holders of property great flexibility. However, like other property law rules governing disclaimers, these rules are not default rules. The creator or creators of a joint property arrangement cannot “draft around” these rules, although perhaps a binding agreement could be entered into bargaining away the right to disclaim.34 In addition, in some circumstances the disclaimer by the survivor may not be wise despite potential tax benefits. For example, in a jurisdiction that follows the lien theory of mortgage, the death of a joint tenant mortgagor will extinguish a mortgage.35 If the survivor disclaims, property that otherwise would be unencumbered will be subject to the mortgage debt. Similarly, in many jurisdictions, a lease entered into by one joint tenant-lessee will be extinguished at that lessor’s death.36 A disclaimer by the survivor might very well revive the lease. Finally, UDOPIA goes farther than the Regulations. Under UDOPIA section 7(a), any surviving joint tenant may disclaim the greater of the proportionate share or that part of the property not attributable to the disclaimant’s contribution.37 Under the Regulations, the contribution rule only governs disclaimers made by a non-citizen spouse with respect to certain joint tenancies and disclaimers of certain bank accounts or similar arrangements. Therefore, under UDOPIA, a surviving citizen spouse could disclaim all the family home if he or she did not contribute to its purchase, but could make a qualified disclaimer under Code section 2518 of only one-half of the property.

While these observations are commonplace, what they reveal about the nature of UDOPIA and, indeed, of most disclaimer statutes is worth emphasizing. Disclaimer statutes are permissive; they set forth what may

33 See UDOPIA § 7(c) (amended 2002).
34 Like most disclaimer statutes, UDOPIA § 5(a) (amended 2002) does not allow unilateral action by the creator of an interest to limit the right to disclaim the interest.
37 See UDOPIA § 7(a) (amended 2002).
be done and prescribe in greater or lesser detail the procedures for accomplishing those ends, but they do not provide guidance on deciding whether what they authorize should be done. Those decisions can only be made by the persons involved and almost always require the advice of a professional. While the regulations governing the disclaimer of jointly held property were a victory for taxpayers and of real benefit to married couples whose planning did not extend to the severance of joint tenancies, the increase in the applicable exclusion amount under EGTRRA makes such disclaimers less important as the concerns about overfunding the marital deduction diminish.

B. What Happens to Disclaimed Property

1. In General

The rules for a qualified disclaimer under Code section 2518 require that the disclaimed interest pass “without any direction on the part of the person making the disclaimer.” State disclaimer statutes make fulfilling this requirement easy by providing rules that govern how disclaimed interests pass, as well as rules that govern what might be called the collateral effects of a disclaimer. Most statutes, including UDOPIA, make these default rules, the significance of which is discussed at the end of this section.

What should happen to disclaimed property? If the core idea of the disclaimer is the requirement that a gift be accepted, then it might help to look at the paradigmatic situation—the inter vivos gift. If the donee refuses to accept the gift, the donor simply takes it back to do with it as she wishes. In the situation where an intended beneficiary disclaims an interest passing on the death of the donor, the equivalent would be to allow the donor’s arrangements to govern. The relevant arrangements are those that would take effect should the beneficiary not be alive to take at the time of the transfer. This would seem to be the origin of the almost universal statutory provision, continued in UDOPIA, that disclaimed interests pass as if the disclaimant had predeceased the creation of the interest (analogous to the inter vivos offer). This is often referred to as the “deemed death” rule.

2. Present Interests

The deemed death rule is straightforward and easy to understand when dealing with present interests—that is, interests which, but for the dis-
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A claimer, would pass to the disclaimant in outright immediate ownership. In the simplest case of an outright gift under a will, the deemed death of the disclaimant will implicate first the provisions of the will. As discussed below, UDOPIA like most, if not all, disclaimer statutes, gives effect to a provision of the document creating the interest that directs the passing of the interest should it be disclaimed.\(^\text{39}\) In the absence of such a provision, a testamentary gift will lapse. Under the common law, a gift in a will to a beneficiary who predeceases the testator lapses, and therefore fails. If it is a pre-residuary gift, it will pass to the residuary takers, and if a residuary gift lapses, it will pass in intestacy. Every jurisdiction, however, has some version of an antilapse statute. While these statutes vary in detail, they usually provide that a gift in a will to a beneficiary who is related to the testator and who predeceases the testator does not lapse but passes instead to the beneficiary's issue, if any, so long as the will does not provide otherwise. The degree of relationship to the testator required to invoke the statute varies from jurisdiction to jurisdiction, and the degree of specificity needed to "provide otherwise" often is not completely clear. The UPC antilapse statute applies to gifts to grandparents and descendants of grandparents of the testator, but it requires that the intent to override its provisions must be more than a requirement that the beneficiary survive the testator.\(^\text{40}\)

Once we move beyond the law of wills, the situation is even more uncertain. Although the UPC does contain antilapse provisions that apply to non-probate transfers, few, if any of the states that have not adopted the UPC provision have similar statutes.\(^\text{41}\) For example, if the designated beneficiary of an insurance policy on the life of the decedent disclaims the interest, there may be a contingent beneficiary, but if there is no contingent beneficiary, the death benefit is likely to pass to the decedent's estate. There probably is even less certainty about the effect of disclaimers of beneficiary designations under payable on death and transfer on death arrangements. In some instances, the documents governing these arrangements may not allow for the designation of alternate beneficiaries. In many

\(^{39}\) See UDOPIA § 6(b)(2) (amended 2002) ("The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.").

\(^{40}\) See UNIF. PROBATE CODE § 2-603(b)(3) (amended 1993), 8 U.L.A. 190 (Supp. 2002). This particular provision is a change from prevailing law and has proved to be controversial. See Mark L. Ascher, The 1990 Uniform Probate Code: Older and Better or More Like the Internal Revenue Code?, 77 MINN. L. REV. 639 (1993).

others, creators of these arrangements will not have taken advantage of the opportunities for planning that these documents provide. The UPC provisions at least provide some certainty, and because UDOPIA was designed to operate as part of the UPC, it does not provide any guidance beyond the deemed death rule. Superficially then, UDOPIA does not address these questions and, in that regard, resembles almost all other disclaimer statutes. The difference is that UDOPIA does not need to address these issues. Jurisdictions adopting UDOPIA may be lulled into ignoring this shortcoming in their current statutes, but unless they have adopted the relevant UPC provision, the application of the deemed death rule to testamentary substitutes may not be at all clear.

3. Future Interests

Another uncertainty occurs when applying the deemed death rule to the disclaimer of a future interest. Assume that T’s will creates a testamentary trust for A, who is to receive all the income for life. At A’s death, the trust is to be distributed to T’s descendants by representation. A is survived by T’s son S and daughter D. S has two living children and D has one child. S decides that he would prefer his share of the trust to pass to his children and disclaims. Under many existing disclaimer statutes, including the former UPC provision section 2-801, the interest passes as if S had predeceased T. A problem can arise if children born after T’s death survive S. One possible argument is that, had S predeceased T, the afterborn children would not exist and that D and S’s two children living at the time of T’s death are entitled to all of the trust property.

There appears to be no judicial resolution of the problem, but UDOPIA avoids it by having the deemed death of the disclaimant occur not before the creation or transfer of the disclaimed interest, but immediately before the time of distribution of the interest. Time of distribution is defined as “the time when a disclaimed interest would have taken effect in possession or enjoyment.” “Possession” and “enjoyment,” are, of course, terms of art from the law of future interests describing the time at which it is certain to whom property belongs and the time at which that person will have the property in hand. The terms do not necessarily mean that the person actually has the property in hand. For example, the time of distribution of

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42 If the disclaimer is to be a qualified disclaimer for tax purposes it must be made within nine months of T’s death. See Treas. Reg. § 25.2518-2(c)(3) (as amended in 1997).
43 See UDOPIA § 6(b)(3)(A) (amended 2002).
44 UDOPIA § 6(a)(1) (amended 2002).
present interests created by will and all interests arising under the law of intestate succession is the date of the decedent’s death. At that moment, the heir or devisee is entitled to his or her devise or share. The fact that time will pass before the will is admitted to probate and actual receipt of the gift may not occur until the administration of the estate is complete is irrelevant. The time of distribution of present interests created by a nontestamentary instrument generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when all preceding interests have ended, and the future interest comes into possession or enjoyment as described above. In the example above, under UDOPIA, S would be deemed to have died immediately before A’s death, which is the time that the remainder will come into possession. Therefore, S’s children living at the time of distribution, whenever born, are entitled to the share of the trust property S would have received.

However a problem still arises when the disclaimed interest is vested in interest when created. For example, T creates a testamentary trust to pay the income to A for life, remainder in equal shares to T’s son S and daughter D. Because no explicit requirement exists which states that S must survive A to receive his share of the remainder, S’s interest is said to be vested in interest. If S dies during A’s lifetime, his share of the remainder is simply an asset of his estate. As in the example above, S has two living children and D has one living child. S would prefer that his share of the remainder pass to his children on A’s death. Under the statutes that apply the deemed death rule, S has predeceased T and therefore S cannot receive the remainder interest; however, if the relevant antilapse statute applies to future interests, S’s share of the remainder passes to his issue, which is the result he wants. Under UDOPIA, S is deemed to have died immediately before A, at which time S did own the remainder interest and his death before A did not divest him of that interest. Where should it go? Again, UDOPIA provides an answer through other provisions of the UPC. Section 2-707 creates an antilapse rule for interests in trusts that in essence requires all holders of future interests to survive to the time the interest is to come

45 See, e.g., CAL. PROB. CODE § 282(a) (West 2002); N.Y. Est. Powers & Trust Law § 2-1.11(d) (McKinney 1998) (containing similar provisions that result in a similar outcome).
into possession. In other words, all interests become contingent on survival to the time of possession. Thus, in the example in this paragraph, the disposition of S's remainder is dictated by the statute and in this case would pass to his living descendants. Absent UPC section 2-707 or a provision like it, any state adopting UDOPIA must provide for the passing of disclaimed vested interests.

A gap remains in the UDOPIA provision, even taking into account UPC section 2-707. The UPC provision applies only to interests in trusts. The rationale is stated in the Comment to the section:

The rationale for restricting this section to future interests under the terms of a trust is that legal life estates in land, followed by indefeasibly vested remainder interests, are still created in some localities, often with respect to farmland. In such cases, the legal life tenant and the person holding the remainder interest can, together, give good title in the sale of the land. If the antilapse idea were injected into this type of situation, the ability of the parties to sell the land would be impaired if not destroyed because the antilapse idea would, in effect, create a contingent substitute remainder interest in the present and future descendants of the person holding the remainder interest.

The reasoning of this comment is persuasive, but the result is a gap in UDOPIA. In order to provide properly for the passing of disclaimed vested interests, any state adopting the uniform statute should provide the following in the first sentence of section 6(b)(3)(A): the disclaimed interest "passes as if the disclaimant had died intestate immediately before the time of distribution." The addition of the word "intestate" will have no effect on the passing of contingent interests because the holder of the contingent future interests loses all claim to the interest when he or she fails to fulfill the contingency (here, surviving to the time of distribution), but will provide a certain disposition for vested interests. In the example above, if S makes the disclaimer, the trust remainder will pass to his children (and if he makes a qualified disclaimer there will be no gift tax on the transaction). The simple addition of the word intestate to the statute will in most states

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47 See id.
48 Id. § 2-707(b)(1) cmt. at 197.
pass part of the remainder to $S$'s spouse because a surviving spouse is almost always an heir. Indeed, in most modern intestacy statutes, a surviving spouse takes a fixed amount of the intestate estate before other heirs have any claim. Under such statutes, the spouse's share might completely absorb the disclaimed interest. Adding "intestate and unmarried" to the statute would prevent the spouse from taking any part of the remainder, which might very well comport with the intent of most disclaimants. If the disclaimant wishes the spouse to receive part of the remainder, a partial disclaimer could be made passing the disclaimed portion to the heirs other than the spouse and the gift tax marital deduction could be used to make a tax-free gift to the spouse.

In the absence of a modification of the statute, what will become of a disclaimed vested interest? Helpful precedent is difficult to imagine. The traditional law of future interests is unanimous: the holder of a vested interest who dies before the interest has vested in possession (before the "distribution date" in the language of UDOPIA)\(^5\) has an asset that passes through the holder's estate. A tenuous argument exists concerning a resulting trust that states where a trust fails to dispose of an interest, that interest should pass back to the creator of the trust. The argument is weak because when the trust itself does not dispose of a disclaimed interest, the statute dictates that the interest pass as if the disclaimant died immediately before the time of distribution. The only way to make sense of that requirement is to pass the interest through the disclaimant's estate, and the only possible source for the terms of distribution of the estate is intestacy law. It arguably would be possible to rely on an executed will, but how could a will be given any effect without being admitted to probate, which presumably cannot be done if the disclaimant is only "pretend dead?" Perhaps in one of the few states that allow ante mortem probate one could actually admit the will to probate and use the will's residuary clause to dispose of the disclaimed interest. The difficulty with that solution, assuming availability, is that using the disclaimant's will to dispose of the disclaimed interest probably would make it impossible to make a qualified disclaimer because the interest would not pass "without any direction on the part of the person making the disclaimer."\(^5\) The only difficulty in the intestacy solution is the possible passing of a portion or even all of the disclaimed interest to the disclaimant's spouse, as noted above.

\(^5\) See UDOPIA § 6(a) (amended 2002).
4. Acceleration of Remaining Interests

Consider a testamentary trust under which the decedent's child receives income for life and on the child's death the trust terminates and is distributed to the child's descendants by representation. The child makes a tax qualified disclaimer within nine months of the decedent's death. If the deemed death rule is applied literally, the child is deemed to have predeceased the parent, and the trust will terminate at the parent's death with the remainder coming into possession of the child's descendants who survive the parent. However, without the disclaimer, the remainder could certainly come into possession in persons who are not yet born at the time the disclaimer is made. Cases that state that the remainder interests come directly from the testator in this example and are unaffected by the disclaimer provide an argument that the trust should not terminate, but rather it should continue until the disclaimant actually dies. The question is further clouded by cases dealing with the treatment of the remainder when the life beneficiary relinquishes the income interest. These cases generally hold that the intent of the testator should decide whether the remainders accelerate, resulting in the termination of the trust. In New York the question was complicated by the well-established doctrine of the indestructibility of spendthrift trusts with the result that litigation on the question was not unusual.

In 1971 the New York legislature settled the matter by enacting Estate Powers & Trust Law § 2-1.11(d), which provides that unless the creator of the disclaimed interest provides otherwise, the disclaimer has the effect of accelerating the possession and enjoyment of subsequent interests. Today, many state statutes as well as UDOPIA have similar language, although unlike many of the state statutes, UDOPIA, like former UPC section 2-801, does not condition the application of the acceleration provision on the creator of the disclaimed interest not having provided otherwise.

The application of an acceleration provision is well illustrated by In re

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54 See N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney 1998).
55 See UDOPIA § 6(b)(4) (amended 2002).
Estate of Gilbert. Gilbert’s will created a discretionary trust for his son and his son’s issue. The remainder of the trust was payable to the son’s issue. At the time of the testator’s death, the son had no issue. The son disclaimed all his interest in the trust out of religious convictions about the evils of material wealth. The executors of Mr. Gilbert’s will argued that, while there was no explicit provision in the will providing for anything other than acceleration, one should be implied. The Surrogate refused to do so, holding that the legislature had definitively rejected a search for intent in each document. As a result, the remainders were accelerated, and because the disclaimant had no issue, the trust passed to the alternative remainders, which were similar trusts for the testator’s other children. The son’s future children were forever cut off from their grandfather’s bounty. As harsh as that result is, it is not unusual. Courts generally apply the concept of acceleration rigorously as the default rule, whether it is stated in the disclaimer statute or as a matter of common law, and even where the disclaimant may be motivated by the opportunity for manipulation presented by the acceleration rule.

A desire to manipulate the distribution of trust property may have motivated the disclaimer involved in Pate v. Ford. Mrs. Pate’s will created a trust for each of her two sons as life beneficiaries, with the remainder to go to all of her grandchildren. At the time of her death, one son, Wallace, had five children, and the other, Billy, had none. Wallace disclaimed his interest in his trust. If the remainders accelerated, his children would be guaranteed the corpus of their father’s trust and would not have to share it with any future children of Billy. The relevant statute stated that the disclaimed interest devolved according to the deemed death

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57 See id. at 225.
58 See id.
59 See id.
60 See id.
61 See id. at 227-28.
62 See id. at 228.
63 See id. at 225, 228.
64 See id. at 227.
67 See id. at 776.
68 See id.
69 See id.
70 See id. at 777.
rule unless the instrument creating the disclaimed interest contained another disposition in event of disclaimer.\textsuperscript{71} The South Carolina Supreme Court overturned the lower court’s ruling that the provision in the will terminating the trust on Wallace’s death was “another disposition.”\textsuperscript{72}

Because the court found that Mrs. Pate’s will did not contain an alternative disposition in the event of Wallace’s disclaiming, the court held that Wallace’s disclaimer accelerated his remaindermen’s interest and the property rights vested in them accordingly.\textsuperscript{73}

The result in \textit{Pate} is the usual one.\textsuperscript{74} However, a few courts have strained to find some language that shows the creator of the disclaimed interest provided otherwise and therefore prevented acceleration. Two decisions of the Georgia Supreme Court have all but read the acceleration rule out of existence. \textit{Wetherbee v. First State Bank & Trust Co.}\textsuperscript{75} and \textit{Linkous v. Candler}\textsuperscript{76} both state that the intent to prevent acceleration can be implied from the document creating the interest and both find that the fact that the remainders are contingent on surviving the disclaiming life income beneficiary indicates the requisite intent.\textsuperscript{77} As the opinion in \textit{Gilbert} makes clear, the acceleration rule was intended to allow the acceleration of contingent remainders.\textsuperscript{78} Thus, the very fact of contingency should not prevent acceleration. The \textit{Wetherbee} case simply is an example of a tortured route to an appealing result. That case involved a testamentary trust for the testator’s widow, which, on her death, was to divide into subtrusts for their two sons.\textsuperscript{79} If a son predeceased his mother, his interest was to pass to his unmarried widow and his surviving descendants.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{71} See id.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} See id. See also Patricia J. Roberts, \textit{The Acceleration of Remainders: Manipulating the Identity of the Remaindermen}, 42 S.C. L. REV. 295 (1991). Prof. Roberts suggests that a distinction be drawn between acceleration and indefeasibility, and that the proper solution to a case such as \textit{Pate v. Ford} is to give the income to the remaindermen living from time to time, but to vest the remainder indefeasibly and terminate the trust only at the time provided for by the creator of the trust. \textit{Id.} at 318-22; see also supra text accompanying note 84.
\item \textsuperscript{74} See Roberts, supra note 73, at 304-05.
\item \textsuperscript{75} 466 S.E.2d 835, 836 (Ga. 1996).
\item \textsuperscript{76} 508 S.E.2d 657, 658 (Ga. 1998).
\item \textsuperscript{77} See \textit{Wetherbee}, 466 S.E.2d at 836; \textit{Linkous}, 508 S.E.2d at 658-59.
\item \textsuperscript{78} See 592 N.Y.S.2d at 227.
\item \textsuperscript{79} See \textit{Wetherbee}, 466 S.E.2d at 836.
\item \textsuperscript{80} See id.
\end{itemize}
sons disclaimed their interests shortly after their father's death. By the time of their mother's death they both had divorced. Their ex-wives claimed they were entitled to an interest in the trusts because the sons were deemed to have predeceased their father under the disclaimer statute and, therefore, both women were surviving unmarried wives. Under UDOPIA section 6(b)(4), the problem would not arise. The sons would be deemed to have predeceased their mother, at which time, of course, their ex-wives were not their surviving unmarried widows.

The acceleration rule has been criticized principally because, when applied to a situation like that in Pate, it allows the disclaimant to manipulate the identity of the remainder beneficiaries.

Legislatures can enact statutes providing that in the case of a disclaimer, release, conveyance, or other event that has the effect of ending the life estate while the life tenant is alive, when the identity of the remaindermen is to be ascertained at the death of the life tenant, the property should be held in trust for the benefit of the remaindermen. The statute also should specify that the income is to be paid out from time to time to those who fit the identity of the remaindermen at the time. This would apply to a remainder that is contingent (to A for life, then to A's surviving children), vested subject to open (to A for life, then to A's children), or vested subject to divestment (to A for life, then to A's children, the issue of any deceased child to take the parent's share). Additionally, disclaimer statutes should be amended to make it clear that acceleration will not occur without indefeasibility.

The practical difficulties with this solution are many. First, it does not address the situation in which no presumptive remaindermen are living, like the situation in In re Estate of Gilbert. If the trust provides income to A for life, then to A's issue and A disclaims without issue, the income presumably will be accumulated until such issue are born. Second, what if

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81 See id.
82 See id.
83 See id.
84 See Adam J. Hirsch, Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act, 29 FLA. ST. U. L. REV. 109, 170-75 (2001); see also Roberts, supra note 73, at 300.
85 Roberts, supra note 73, at 321-22.
86 592 N.Y.S.2d 224.
A's interest is a mandatory interest in income and a discretionary one in principal? The disclaimer turns the present beneficial interest into one in income only. Enough has been written about the disadvantages of the traditional definitions of income and principal and the uses of the total return trust that it seems wrong to replace the transferor's attempt to give the present beneficiary an interest that can overcome the limitations of the traditional principal and income rule, with an interest rammed into the income-only straightjacket.\(^7\) Perhaps the statute should give the presumptive remaindermen exactly the interest that was disclaimed. Of course, a trustee who was happy enough to exercise discretion on behalf of A might balk at having to deal with a different set of beneficiaries. No trust will fail for want of a trustee, but now the transferor has a trust she did not create, managed by a trustee she did not choose. Finally, when should the statute apply? Arguably, the identity of the remaindermen will be affected by any disclaimer. Even where the remainder is indefeasibly vested, the remainderman's death before the death of the life income beneficiary will pass the remainder through the remainderman's estate to persons who are certainly not the remainderman (putting aside the traditional view that a person's estate is that person).

In short, crafting a provision that will be a useful substitute for the acceleration rule is not a simple task. UDOPIA takes the position that experience and policy point to the acceleration rule as the best solution.\(^8\) Once again, however, the acceleration rule is a default rule, albeit a strong one. Like the old UPC section 2-801 and unlike many state statutes, including the New York statute applied in *In re Estate of Gilbert*,\(^9\) UDOPIA section 6(b)(4) does not condition acceleration on the creator of the disclaimed interest not having "provided otherwise."\(^{10}\) Omission of a provide-otherwise provision eliminates any need to investigate the intent of the creator of the interests, but the omission does not preclude a conscious choice to prevent application of the acceleration rule. The only safe route to overriding the acceleration rule, whatever the applicable disclaimer

\(^7\) If the trust is governed by state law that allows conversion to a unitrust, the straightjacket can be escaped (see, e.g., N.Y. EST. POWERS & TRUSTS LAW § 11-2.4 (McKinney 2003), but it would be less than respectful of the creator of the trust's intent to replace a carefully drafted trust with a statutory substitute that may not function as well, all in the name of preserving that very intent.

\(^8\) See UDOPIA § 6 (amended 2002).

\(^9\) See 592 N.Y.S.2d 224 (applying N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney 2003).

\(^{10}\) See UDOPIA § 6 (amended 2002).
statute provides, is to provide for the disposition of the trust income for the period of the life beneficiary’s natural life in the event the life beneficiary disclaims. The existence of the successor interest will prevent acceleration of the remainder.

The questions about the passing of a disclaimed interest illustrate a second lesson for practitioners: drafting must take the possibility of disclaimers into account. All the passing rules in UDOPIA are default rules and, in some cases, are actually double default rules because they ultimately rely on the default rules of the antilapse statutes. As noted above, antilapse statutes vary from state to state both in substance and in requirements for overriding their provisions. The lesson is that every document should expressly provide for the disposition of a gift should a beneficiary predecease the effective date of the instrument making the gift. In less abstract terms, a will should expressly provide for the disposition of any specific or general bequest should the beneficiary predecease the testator, and the residuary clause should be drafted to make survivorship requirements unambiguous. The same consideration applies to the possibility of disclaimers. Just as the lawyer should ascertain the client’s desires in the event a beneficiary does not survive, so should the lawyer ascertain the client’s desires in the event the beneficiary disclaims. In many cases the result will be the addition of a few words to the will such as the following: “and should X predecease me or disclaim this bequest, I give [the subject of the bequest] to [the alternative taker].” In some cases, such as with the will of Peter Gilbert, disruption of the estate plan can be avoided. Had Mr. Gilbert’s lawyers thought about the possibility that Mr. Gilbert’s son would disclaim his bequest, they could have drafted for that contingency and preserved the trust for the son’s possible issue, assuming, of course, that Mr. Gilbert would have desired that result.

C. When are Disclaimers Barred

The simple question—can I disclaim this interest or not?—does not have an equally simple answer. As might be expected, the answer depends on why the question is being asked. If the goal is to make a tax qualified

91 For a recent example of the difficulties that can arise see Polen v. Baker, 752 N.E.2d 258, 259 (Ohio 2001), where a gift to five named people “equally share and share alike,... or to the survivors thereof” was held by a divided court to be a gift per capita to those who survived the testator, which evidenced an intention to override the anti-lapse statute.
92 See In re Estate of Gilbert, 592 N.Y.S.2d 224.
93 See id. at 224.
disclaimer, the answer must be found in Code section 2518. If the potential disclaimant is not concerned about the tax effects of the disclaimer, the answer must be found in state law, although, as noted below, even that statement must now be qualified.

1. Tax Qualified Disclaimers

A disclaimer may not qualify for favorable tax treatment under Code section 2518 because it is made too late, the disclaimant already has accepted the interest, or the disclaimant has received consideration for the disclaimer. The origin of the time limit has been discussed above. Note that the nine-month period runs from the date of the transfer creating the interest. This means that even the most contingent interest must be disclaimed within nine months of its creation if the disclaimer is to qualify for favorable tax treatment under Code section 2518. The other requirements overlap the state disclaimer statutes to some degree. Because a disclaimer is a refusal to accept, an acceptance will bar a disclaimer. A federal law of acceptance has developed as a result of Code section 2518. The most dramatic single case, perhaps, is Estate of Monroe v. Commissioner in which the Court of Appeals for the Fifth Circuit held that the “no consideration” requirement was limited to bargained-for consideration in a strict contract law sense. The court refused to disqualify disclaimers made of interests in a decedent’s estate when evidence showed that the decedent’s husband, who had made gifts to the disclaimants in the past, led them to understand that they would be provided for or their needs taken into account. In retrospect, the permissive view of the Fifth Circuit,

95 See id. § 2518(b)(3) (2000).
96 See Treas. Reg. § 25.2518-2(d)(1) (as amended in 1997) (stating that the acceptance of consideration for making the disclaimer is an acceptance of the benefits of the disclaimed property).
97 See supra note 7, and accompanying text.
99 Although the Committee Report emphasizes the need for a uniform time period, it fails to state a rationale for the requirement that a beneficiary without knowledge of a transfer must disclaim within nine months.
100 See Treas. Reg. § 25.2518-2(d) (as amended in 1997) and especially the examples at -2(d)(4), which deal with acceptance at length.
101 124 F.3d 699 (5th Cir. 1997).
102 See id. at 708-09; see also Estate of Lute v. United States, 19 F. Supp. 2d 1047 (D. Neb. 1998).
103 See id. at 711-15.
accompanied by language approving the use of disclaimers to avoid transfer taxes and preserve family wealth, foreshadows the shift in attitudes that led to EGTRRA and its (albeit transient) repeal of the estate tax.

2. Non-tax Disclaimers

From the beginning of the modern era of disclaimers with the enactment of Code section 2518, most state disclaimer statutes, as well as the uniform laws, did not exactly track the federal law. Most obviously, the time limit was different. Most of these statutes allowed a beneficiary to disclaim a future interest within nine months of its vesting. This lack of congruity between state and federal law left open the potential for mischief. The nine month period looks like that of federal law, but, of course, when applied to the disclaimer of future interests it is a very different nine-month period. UDOPIA eliminates any time limit for making a disclaimer and section 13 lists acts and events that bar a disclaimer. The most important is section 13(b)(1), which bars the disclaimant from making a disclaimer of an interest the disclaimant has accepted. Whether or not actions by the disclaimant amount to an acceptance is a fact-specific inquiry. When the disclaimant has actually taken possession or formal title to the property, the disclaimer is likely to be barred. An example of this scenario is found in In re Will of Hall. In that South Carolina case, the decedent’s will devised

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104 See, e.g., UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 2(a) (1978) (“An instrument disclaiming a future interest shall be delivered not later than [nine] months after the event that determines that the taker of the property or interest has become finally ascertained and his interest indefeasibly vested.”); see also former UNIF. PROBATE CODE § 2-801(b)(1) (amended 1993), 8 U.L.A. 190 (1998) (requiring that “the disclaimer must be filed, . . . if of a future interest, not later than [nine] months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested”); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(a)(2)(C) (McKinney 1998) (stating “the effective date of a disposition which is of a future estate shall be the date on which it becomes an estate in possession”); N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(b)(2) (McKinney 1998) (requiring filing of the renunciation within nine months of the effective date).

105 In fact, the various uniform acts recognized this dichotomy. The placing of the number of months in brackets in the uniform acts (see supra note 104) indicates that the nine-month period was only a suggestion. A legislature enacting a model act could choose a different limit. The 1978 uniform acts contained a provision creating a nine months from the date of transfer rule for disclaimers intended as “qualified disclaimers” under Code section 2518(b)(2) (2000).

106 See UDOPIA § 13 (amended 2002).

107 See id. § 13B(b)(1) (amended 2002).

real estate, including her house, to her daughter for her life, and a remainder to the daughter’s children living at the daughter’s death. The daughter and her siblings were co-executors. Eight months after the decedent’s death, the executors executed a deed conveying the real estate to the daughter and on that same day, the daughter executed a receipt and release acknowledging receipt of the life estate. Shortly thereafter the daughter listed the property for sale with a real estate agent and described herself as the owner. Four days before the nine month anniversary of decedent’s death, the daughter filed a document entitled “disclaimer” with the probate court. South Carolina law incorporates the federal requirements for a qualified disclaimer, including the requirement that the disclaimant not have accepted the property. The court upheld a lower court ruling that the daughter had accepted the property by exercising dominion and control over it, “most notably by listing it for sale in her own name as seller.”

The result in Hall certainly seems justified. Although the daughter may not have used her life estate by living in the house, she acted like an owner in offering the property for sale. Although not cited in the Hall case, the court in In re Estate of Gates, after noting that “legal precedent on these issues is sparse,” defined acceptance in a way that completely comports with the holding in Hall. "Acceptance, as that term has come to be used in both the traditional and the legal senses, connotes an act of voluntarily receiving something or consensually acceding to it. Implicit in the voluntariness of the act is the right and ability to reject that which is proffered.” In Gates, the court did not find an acceptance barring a renunciation (the term used in the New York statutes) where a minor, accused of murdering his father and other family members, was the beneficiary of funds advanced from his father’s estate that were used for

109 See id. at 440.
110 See id.
111 See id.
112 See id.
113 See id.
114 See id. at 441.
115 Id. at 441.
116 See Hall, 456 S.E.2d at 441.
118 Id.
119 Id.
his defense against the murder charges. The advancement was made when no guardian had been appointed for the minor to accept the advancement on the minor's behalf. In fact, the advancement was decided upon by the estate beneficiaries. Furthermore, after a guardian was appointed, "the guardian paid back the advanced sums to the estate in full."

Even when a disclaimant's actions fit the language from Gates, the actions might not amount to an acceptance. In Jordan v. Trower, the decedent's granddaughter, the only beneficiary of his will, disclaimed all of her interest in the decedent's estate. The executors refused to honor the disclaimer, arguing that by accepting $460 from the estate before the will was admitted to probate, the granddaughter was barred from disclaiming. The executors disbursed the money to the granddaughter to enable her to buy clothes to wear to the decedent's funeral and pay other expenses. The court allowed the disclaimer, stating:

In the case at bar, the beneficiary merely received a de minimis sum from the estate prior to the filing of the will for probate. She did not obtain, nor even seek, possession of the property of the estate as a whole and undertook no actions that would indicate an intention to assert an ownership interest in the property of the estate.

Taken together, Gates and Jordan emphasize the voluntary and knowing aspect of acceptance and Jordan seems to create a de minimis exception for using a small part of interest later disclaimed. Of course, the facts of both cases cannot be ignored. In Gates the disclaimant was a minor and incapable of legally accepting the advance from the estate. The money was clearly used for a most pressing need, and his guardian eventually reimbursed the estate. In Jordan, the disclaimant was twenty years old, did not seek the small distribution from the estate, but accepted

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120 See id. at 198.
121 See id.
122 See id.
123 Id.
125 See id. at 162.
126 See id.
127 Id.
128 See Gates, 596 N.Y.S.2d at 197-98.
129 See id. at 198.
the distribution to enable her to attend the decedent’s funeral.\textsuperscript{130} Her disclaimer would result in the estate passing to her mother as sole heir.\textsuperscript{131} In addition, the disclaimant testified that she made the disclaimer believing that the result reflected the decedent’s true wishes better than the will executed shortly before death. It should be noted that the mother’s caveat to the will (requesting the trustees and executors under the will to relinquish the estate to her as the heir at law) was rejected.\textsuperscript{132}

Perhaps the most extensive application of a broad concept of exercise of dominion amounting to an acceptance is \textit{Badouh v. Hale}.\textsuperscript{133} In \textit{Hale}, the daughter signed a deed of trust and real estate lien note in favor of an attorney who had performed legal services for the daughter for which he had not been paid.\textsuperscript{134} The deed of trust included a provision in which the daughter conveyed “her expectancy in her mother’s home” to secure the note.\textsuperscript{135} Several years later, the mother died with a will that specifically devised her home to the daughter.\textsuperscript{136} To prevent the home from being subject to the daughter’s creditors, the daughter disclaimed her interest in her mother’s estate under Texas Probate Code section 37A.\textsuperscript{137} On a motion for summary judgment, the trial court determined that the daughter’s disclaimer was invalid and ineffective because the daughter had exercised dominion and control over the property when she executed the deed of trust and note in favor of the attorney.\textsuperscript{138} The appellate court reversed and held that the daughter’s disclaimer may be effective and, thus, summary judgment was improperly granted.\textsuperscript{139} The court reasoned that the daughter could not have exercised dominion and control over the property because she was not entitled to the property until the mother’s death.\textsuperscript{140} The Texas statute bars a disclaimer if the beneficiary has accepted the property, and the daughter was not a beneficiary because she had no more than an expectancy.\textsuperscript{141}

\begin{footnotes}
\item[130] See \textit{Jordan}, 431 S.E.2d at 162.
\item[131] See id.
\item[132] See id.
\item[133] See 22 S.W.3d 392 (Tex. 2000).
\item[134] See id. at 393.
\item[135] \textit{Id.} at 394.
\item[136] See id.
\item[137] See id.
\item[138] See id.
\item[139] See \textit{id.} at 395.
\item[140] See \textit{id.} at 394.
\item[141] See \textit{id.} at 393.
\end{footnotes}
The Supreme Court of Texas reversed, and held that the daughter accepted the property because she exercised dominion and control over the property by using her expectancy in the property as collateral. Accordingly, the daughter could not validly disclaim the property. The court rejected the argument that the daughter could not have the status as a beneficiary under Texas Probate Code section 37A until the mother’s death. Section 37A’s definition of beneficiary is non-exclusive and thus is “broad enough to include expectants under a will.”

The application of UDOPIA to the facts of Badouh v. Hale should lead to the same result. UDOPIA section 13(b)(2) bars the disclaimer if “[t]he disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so.” The daughter’s actions with regard to the house certainly amount to encumbering or pledging. The only question is whether the expectancy in the property is the same interest as the property itself. The answer should be yes. The pledge of the expectancy has value only in reference to the property the disclaimant is expecting to receive. In addition, the Texas Supreme Court’s finding that the daughter had accepted the property by exercising dominion and control is equally applicable to an attempted disclaimer under UDOPIA. Finally, the creditor relied on the pledge of the expectancy and, therefore, an argument that the daughter should be estopped from undoing that pledge by rejecting the property can be made under any disclaimer statute.

These few cases show the concept of acceptance is manipulable and its

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142 See id.
143 See id.
144 See id. at 394.
145 Id. at 396. But see In re Estate of Baird, 933 P.2d 1031 (Wash. 1997) (An expectancy could not be disclaimed because, like the Texas statute, RCW 11.86 describes a disclaimer as a refusal by a beneficiary to accept an interest. An expectancy does not make the person who anticipates receiving the property a beneficiary, nor is the expectancy an interest.). The disclaimant in Baird was trying preserve his mother’s estate from a judgment in a personal injury action arising from his brutal assault on his wife, for which he was sentenced to 20 years in prison. See id. at 1032-33. Under UDOPIA § 6(b)(1), the disclaimer of an interest in property becomes effective as of the time the instrument creating the interest becomes irrevocable, in this instance, at the mother’s death. Thus, an “anticipatory” disclaimer simply is not possible under UDOPIA. See UDOPIA § 6(b)(1) (amended 2002).
146 UDOPIA § 13(b)(2) (amended 2002).
147 See Badouh, 22 S.W.3d at 396.
148 See id. at 393.
application is highly dependent on the facts of each case. The resulting uncertainty is magnified by the relative lack of state law precedent in the post-1976 era. Not surprisingly, federal tax rulings on acceptance questions are numerous and, to the extent state and federal standards of acceptance are similar, these rulings may be persuasive in state law situations. Finally, UDOPIA depends on the existing law of acceptance and makes no attempt to codify this still developing area of the law of disclaimers.

3. Disclaimers, Creditors, and Relation Back

As has been noted, even if the sunset provision of EGTRRA is repealed, the gift tax will remain and Code section 2518 still will be relevant for tax planning. But disclaimers are relevant in an additional situation. In some cases, a proper disclaimer will keep the disclaimed property out of the hands of the disclaimant’s creditors. Many cases have held that, absent some statutory provision preventing the result, a proper disclaimer will prevent the disclaimant’s creditors from reaching the disclaimed property. These cases rest on the “relation back” doctrine. Although at common law a creditor’s claim may have attached to the property prior to the disclaimer of an inheritance,\(^{149}\) many courts have held the relation back language means the disclaimer takes effect as a refusal at the time to which it relates back, thus preventing the disclaimant from transferring the interest. It is widely held, in turn, that this lack of transfer keeps the disclaimed property out of the hands of creditors and prevents the disclaimer from being a fraudulent transfer.\(^ {150}\) UDOPIA adopts this interpretation. Rather than using the term “relates back,” however, UDOPIA defines a disclaimer to be a refusal.\(^ {151}\) Section 2(3) sets forth the rules for the time a disclaimer takes effect based upon interest being disclaimed.\(^ {152}\) Section 5(f) states the meaning of the relates back language: “A disclaimer . . . is not a transfer, assignment, or release.”\(^ {153}\) Taken together, those provisions continue the established doctrine that a disclaimer does not transfer the disclaimed

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149 See Coomes v. Finegan, 7 N.W.2d 729, 732-33 (Iowa 1943).
151 See UDOPIA § 2(3) (amended 2002).
152 See id. at § 6(b)(1) (amended 2002) (§§ 6(b)(1) (interests in property), 7(b) (jointly held interests), 9 (powers of appointment), 10 (interests in appointees, objects, or takers in default of powers of appointment) and 11 (powers held in a fiduciary capacity)).
153 Id. at § 5(f) (amended 2002).
Some Property Law Issues in the Law of Disclaimers

interest by making a disclaimer.\footnote{See id.}

A few courts, however, have held otherwise. In 1940 the California Supreme Court invalidated a disclaimer as a fraudulent transfer when done to defraud a creditor, although the holding was later overturned by statute.\footnote{Compare In re Estate of Kalt, 108 P.2d 401, 404 (Ca. 1940) (invalidating legatees' renunciation of interest in estate when they were made to defeat creditor's judgment) with CAL. PROB. CODE § 283 (2003) (stating disclaimers by beneficiaries are not fraudulent transfers).} A more recent example is the Ohio case of Stein v. Brown.\footnote{See 480 N.E.2d 1121 (Ohio 1985).} In Brown a residuary legatee disclaimed his bequest while a wrongful death action was pending against him.\footnote{See id. at 1121.} He had previously transferred the family home to his spouse for the sum of one dollar.\footnote{See id.} The court held that a potential tort claimant was a creditor under the Ohio version of the Uniform Fraudulent Conveyance Act and that the facts showed the disclaimer was made with actual intent to defraud.\footnote{See id. at 1123-24.} The disclaimer was therefore a fraudulent conveyance as against the tort claimant and was to be ignored.\footnote{But see Nielsen v. Cass County Soc. Serv. Bd., 395 N.W.2d 157, 159 (N.D. 1986) ("Absent an express statutory provision to the contrary, a renunciation is not treated as a fraudulent transfer of assets, and the renouncer's creditors [including social services agency] cannot on that ground claim any rights to the renounced property."). North Dakota later overturned the Nielson decision by enacting N.D. CENT. CODE § 50-24.1-02 (2002).} The Supreme Court of Alabama reached the same conclusion in Pennington v. Bigham.\footnote{See 512 So. 2d 1344 (Ala. 1987).} Pennington had obtained a default judgment against Bigham and filed a certificate of judgment with the probate court.\footnote{See id. at 1345.} About a year later, Bigham's father died intestate and Bigham disclaimed all his interest in his father's estate.\footnote{See id.} The court analyzed the disclaimer in light of the law of fraudulent conveyances and held the disclaimer constituted a transfer to Bigham's son (who took as his grandfather's heir), and because nothing in the record indicated that Bigham executed the disclaimer for any other reason than to keep the property from his creditor, the disclaimer was void.\footnote{See id. at 1346-47.}
In addition to the case law described above, some states have statutes that bar disclaimers by an insolvent disclaimant. Oregon has a statute that bars a disclaimer when the disclaimant is indebted to the state for fraudulently obtained public assistance. The Oregon statute, adopted when the state adopted UDOPIA, is indicative of one trend in the law of disclaimers—the protection of public revenues. Even in states where the relation back doctrine prevents creditors from reaching disclaimed property, the doctrine will not prevent a disclaimer from being treated as a transfer of assets for purposes of Medicaid qualification. Disclaimers by recipients or potential recipients of Medicaid have led to litigation with results that generally favor the state. The outcome of these cases often turns on whether a state statute created the medical assistance program and whether the litigation involves a redetermination of eligibility or an attempt to recover reimbursement for assistance already provided.

One of the earliest cases involving disclaimers and public assistance was decided by the Connecticut Supreme Court in 1980. In State v. Murtha, the sister of the decedent was the beneficiary of one-third of the residuary estate under the decedent’s will. The sister received medical benefits under Title XIX of the Social Security Act for eleven years prior to the decedent’s death. She disclaimed her interest in the residue. The Connecticut statute that established state participation in the federal program and prohibited disposition of property by a recipient of aid without the permission of state authorities was on the books when the disclaimer statute was enacted. The court applied canons of statutory construction assuming that the legislature enacts statutes with due regard to consistency with existing statutes, and stating that repugnancy is to be avoided. In doing so, the court found the usual language that disclaimers relate back to the date of the decedent’s death “must be considered as operative only when there is no bar to the disclaimer” such as that

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167 See 427 A.2d 807 (Conn. 1980).
168 See id. at 808.
170 See Murtha, 427 A.2d at 807-08.
171 See id. at 807-08.
172 See id. at 808.
173 See id. at 808-09.
174 Id. at 809.
contained in the medical assistance statute.\footnote{175} The disclaimer, therefore, was invalid and the disclaimant’s eligibility for aid could be reassessed.\footnote{176} However, the disclaimed property could not be taken by the state as reimbursement for benefits already properly paid because federal law prohibits states from placing liens on the property of recipients of aid.\footnote{177}

The holding in Murtha is unsurprising. Given the enormous financial demands of the Medicaid program, courts are unlikely to look favorably on attempts to create or maintain eligibility by deliberately rejecting assets that could be used to pay for care. In fact, the federal Medicare Assistance Handbook defines a transfer to include the waiver of an inheritance.\footnote{178} Several other states have followed Connecticut in refusing to recognize disclaimers in the Medicaid context.\footnote{179}

The same states that refuse to recognize disclaimers in the Medicaid context recognize the relation back doctrine as applied outside of the public assistance context. The Supreme Court of Nebraska made the point explicitly in \textit{Essen v. Gilmore}.\footnote{180} The court’s opinion in \textit{Essen} reaffirms the majority view of the operation of the relation back doctrine.\footnote{181} Because by statute the disclaimer relates back to the time of the creation of the disclaimed interest, the disclaimant never has the interest, never transfers the interest, and therefore cannot possibly make a fraudulent transfer by making the disclaimer.\footnote{182} The facts of the case are paradigmatic. The Essens obtained a judgment against the Gilmores in July of 1996.\footnote{183} Mr. Gilmore’s mother died in September 1997, and he executed a disclaimer four months later.\footnote{184} In the meantime, the Essens filed a petition to satisfy

\footnote{175}See \textit{id.; accord} \textit{Dep’t. of Income Maint. v. Watts}, 558 A.2d 998, 1001-02 (Conn. 1989).
\footnote{176}See \textit{Murtha}, 427 A.2d at 810.
\footnote{177}See \textit{id}.
\footnote{180}See 607 N.W.2d 829 (Neb. 2000).
\footnote{181}See \textit{id}.
\footnote{182}See \textit{id.} at 833.
\footnote{183}See \textit{id.} at 832.
\footnote{184}See \textit{id}.
their judgment out of Mr. Gilmore's share of his mother's estate.\footnote{See id.} A judgment in the lower court for the creditors was reversed on the law because the debtor must acquire rights in the property transferred before there can be a fraudulent transfer.\footnote{See id. at 832-34.} The court held that because the disclaimer related back, the disclaimant never had rights in the property and did not make a transfer.\footnote{See id. at 834.} The court also held an earlier Nebraska case, \textit{Hoesly v. State},\footnote{See 498 N.W.2d 571.} which affirmed the disqualification of a recipient of public assistance because he disclaimed his interest in his father's estate, is inapposite to the situation in \textit{Essen}.\footnote{See \textit{Essen}, 607 N.W.2d at 835.} The older case was decided on the basis of the public assistance statute which provided a specific rule about disclaimers applicable to the specific context.\footnote{See id.}

The \textit{Essen} opinion reminds us that disclaimers need not have the same effect in every situation. Just as traditional property law's "inherent nature" of a joint tenancy or a tenancy by the entirety should not answer the question of whether a surviving joint tenant or tenant by the entirety can disclaim, so the relation back doctrine does not mean the same thing in every context. It is not surprising, then, that in a recent Supreme Court case, the relation back doctrine failed once again.

The facts of \textit{Drye v. United States}\footnote{See 528 U.S. 49 (1999).} are straightforward. Mr. Drye failed to pay his taxes resulting in outstanding federal tax liens, in the words of Code section 6321, on all of his "property and rights to property."\footnote{Id. at 49 (citing I.R.C. § 6321 (2000)).} His mother died intestate, and he made a valid disclaimer under state law of all his interest in her estate.\footnote{See id.} Justice Ginsburg noted in \textit{Drye} that disclaimed inheritances are not among the list of exempt property in Code section 6334(a) and disclaimers are not recognized in any of the tax collection provisions, contrasting with the explicit recognition of qualified disclaimers in Code section 2518.\footnote{See id.} The opinion goes on however, trying to identify the state law right that constitutes "property or a right to property" under federal law and counters the taxpayer's conten-
tion that he had only a right to accept or reject a gift.\textsuperscript{195} The opinion states that the disclaimant had the right to channel the inheritance to the next taker and to determine who takes the disclaimed property.\textsuperscript{196} “This power to channel the estate’s assets warrants the conclusion that Drye held ‘property’ or a ‘right[ ] to property’ subject to the Government’s liens,”\textsuperscript{197} Justice Ginsburg wrote, and just to make sure, repeated the statement: “The control rein [Drye] held under state law, we hold, rendered the inheritance ‘property’ or ‘rights to property’ belonging to him within the meaning of section 6321, and hence subject to the federal tax liens that sparked this controversy.”\textsuperscript{198}

Justice Ginsburg’s sweeping language calls into question the entire relation back doctrine. Indeed, the opinion expressly rejects the argument that by disclaiming the disclaimant is not directing the passing of the property. The rejection of a death time gift cannot restore the status quo ante because, unlike the donor of a lifetime gift, the decedent cannot make a decision about the rejected property. Thus, even though the disclaimed property passes according to a statute that references the deceased donor’s arrangements (or depends on the intestacy statute), the disclaimant “inevitably exercises dominion over the property.”\textsuperscript{199} Exercising dominion, of course, means acceptance, and if one followed the reasoning of Drye to its bitter end, it is impossible to disclaim so long as disclaimer is barred by acceptance.

From one point of view, it would have been much better if the Drye opinion had taken a different approach, under which the question would be whether any provision recognizing the disclaimer in the tax lien context is analogous to the recognition in the transfer tax context given by Code section 2518. The answer is obviously “no.” In the absence of such recognition, would the federal government have to recognize a state law disclaimer in the context of a tax lien? Jewett v. Commissioner suggests the answer to that question also is “no.”\textsuperscript{200} Jewett involved a husband who “executed disclaimers of a contingent interest in a testamentary trust 33 years after that interest was created, but while it was still contingent.”\textsuperscript{201}

\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} Id. at 61.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} See 455 U.S. 305 (1982).
\textsuperscript{201} See id. at 306.
Justice Stevens' majority opinion in *Jewett* clearly states that the gift tax reaches indirect transfers and that Jewett had no right to disclaim without tax consequences absent the concession in the regulation, which then governed this area. The analogy would be that because lien provisions are designed to reach all property interests, and there is a statutory list of exempt interests, the disclaimer will not avoid the lien, absent a recognition of disclaimers in the statute or regulations.

The simple question serving as the heading for this Section—when are disclaimers barred?—is better expressed: when may a disclaimer be effective? Even as restated, this question does not have a simple answer. The concept of acceptance is far from clearly defined. Few statutes address the relationship between disclaimers and the disclaimant’s debts generally, but most of the law in the area involves public assistance and rests, at least in part, on specific statutory provisions. Finally, the United States Supreme Court’s latest pronouncement on the effect of a disclaimer calls into question the idea that disclaimed property passes from the donor to the ultimate recipient without, in some metaphorical sense, touching the disclaimant. Therefore, the property law meaning of a disclaimer is far from clear.

**III. CONCLUSION**

This brief excursion through some of the property law questions that arise in the law of disclaimers paints an unsettling picture. While the workings of tax qualified disclaimers are fairly well established, other

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202 See id. at 319.
204 See infra text accompanying notes 199-200. *Drye* held that the disclaimant had sufficient property interests in the disclaimed property for the federal tax lien to attach. 528 U.S. 49. However, the effect of the reasoning in *Drye* on other legal questions is far from settled. *See In re Kloubec*, 247 B.R. 246 (Bankr. N.D. Iowa 2000), aff’d, 268 B.R. 173 (N.D. Iowa 2001) (holding that *Drye* stood for the proposition that state law could not control a federal statute and refusing to recognize the validity in a bankruptcy proceeding of a pre-petition disclaimer, although other courts had done so). The district court affirmed the bankruptcy court without deciding on the relevance of *Drye*, holding that the disclaimer was invalid because the disclaimant had encumbered the disclaimed interest. *Id. See also In re Faulk*, 281 B.R. 15 (Bankr. W.D. Okla. 2002) (reviewing cases on disclaimers, held that *Drye* was not relevant to the role of pre-petition disclaimers in part because in *Drye* the federal tax lien had been filed before the disclaimer); *In re Nistler*, 259 B.R. 723 (Bankr. D. Ore. 2001) (same).
205 The effect of the reasoning in *Drye* on other legal questions is far from settled.
aspects of the law are not so well settled. Despite UDOPIA's effort to answer some of the open questions, especially with regard to what can be disclaimed, it neither attempts to codify the law of acceptance as a bar to a disclaimer nor attempts to clarify the law of the insolvent disclaimant. The policy issues involved in determining what may be disclaimed are far from settled, as the variation among the law of the states suggests. Finally, the *Drye* case has called into question the very rationale of the disclaimer. Future development of disclaimer law awaits further events.