

**HB**

**287**

**Representative Jay Ramras**  
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**Chair, Economic**  
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# Alaska State Legislature



## House of Representatives

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**House District 10**

### Fax

To: Leg. Legal

Fax #: (907) 465-2029

Number of pages including cover: 1

From: Jane W. Pierson

Date: March 17, 2010

Re: HJUD CS for HB287

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Today, the HJUD Committee heard HB287 (26-LS1300\E) and passed the bill out of committee with no amendments.

Please go final on the HJUD CS.

Thank you

Representative\_Jay\_Ramras@legis.state.ak.us

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# Alaska State Legislature

## House of Representatives



### Representative Max F. Gruenberg, Jr.

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### EXPLANATION OF CHANGES

Changes between HB 287 and proposed CSHB 287 (26-LS1300E):

- On page 2, lines 6 and 13 of HB 287, the word "explicitly" was removed.
- Under proposed AS 13.70.030(b)(2) (page 2, lines 14-20 of the proposed CS), the original bill allowed for a disclaimer by a "natural guardian" on behalf of a minor child. The proposed CS replaces the phrase "natural guardian" with "an individual having legal custody of a minor child" to conform to language typically used in Alaskan family law. An "individual having legal custody of a minor child" is defined on page 10, lines 25-27.
- Proposed AS 13.70.040(a)(3)(D) on page 3, line 29 through page 4, line 8, provides a default rule for the disposition of a disclaimed property interest. Under the original bill, the default rule was that the disclaimed interest would revert to the benefactor; under the proposed CS, however, the disclaimed interest would instead pass by representation to the descendants of the disclaimant. This change is made to conform to the national Uniform Act.
- Stylistic changes were made on page 7, lines 3, 7, and 28, and page 8, line 4.
- On page 9, line 1, the word "or" was added after "disclaimed;" to clarify that the provisions under subsection (c) are disjunctive.
- On page 9, line 2, "non-judicial foreclosure" was added.
- On page 10, lines 11-13, a section regarding uniformity of application and construction (proposed AS 13.70.150) was added to conform to the national Uniform Act.
- Under proposed AS 13.70.190(6) on page 11, line 6, "a limited liability partnership" was added to the definition of "person."

26-LS1300\E  
Bannister  
3/17/10

**CS FOR HOUSE BILL NO. 287( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-SIXTH LEGISLATURE - SECOND SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES RAMRAS AND GRUENBERG**

**A BILL**

**FOR AN ACT ENTITLED**

**"An Act relating to the adoption of the Uniform Disclaimer of Property Interests Act,  
and to the disclaimer of property rights under the Uniform Probate Code."**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

**\* Section 1.** AS 13 is amended by adding a new chapter to read:

**Chapter 70. Disclaimer of Property Interests.**

**Sec. 13.70.010. Scope.** This chapter applies to disclaimers of any interest in or power over property, whenever created.

**Sec. 13.70.020. Supplemented by other law.** (a) Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.

(b) This chapter does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this chapter.

**Sec. 13.70.030. Power to disclaim; general requirements; when irrevocable.** (a) A person may disclaim, in whole or part, conditionally or

1 unconditionally, any interest in or power over property, including a power of  
2 appointment. A person may disclaim the interest or power even if its creator imposed a  
3 spendthrift provision or similar restriction on transfer or a restriction, prohibition, or  
4 limitation on the right to disclaim. A disclaimer shall be considered to be  
5 unconditional and not subject to modification or revocation unless the disclaimant  
6 provides otherwise in the disclaimer.

7 (b) With court approval, a fiduciary may disclaim, in whole or part, any  
8 interest in or power over property, including a power of appointment. Without court  
9 approval, a fiduciary may not disclaim, in whole or in part, any interest in or power  
10 over property, including a power of appointment, except that

11 (1) a fiduciary may disclaim, in whole or in part, any interest in or  
12 power over property, including a power of appointment, if and to the extent that the  
13 instrument creating the fiduciary relationship grants the fiduciary the right to disclaim;

14 (2) in the absence of a court-appointed guardian, notwithstanding a  
15 provision in AS 13.26 to the contrary, an individual having legal custody of a minor  
16 child may disclaim on behalf of the minor child, in whole or in part, any interest in or  
17 power over property, including a power of appointment, that the minor child is to  
18 receive solely as a result of another disclaimer, but only if the interest or power  
19 disclaimed by the individual having legal custody does not pass, as a result of the  
20 disclaimer, to or for the benefit of the individual having legal custody.

21 (c) To be effective, a disclaimer must be in writing, declare that the writing is  
22 a disclaimer, describe the interest or power disclaimed, be signed by the person  
23 making the disclaimer, and be delivered or filed in the manner provided in  
24 AS 13.70.100.

25 (d) A partial disclaimer may be expressed as a fraction, percentage, monetary  
26 amount, term of years, limitation of a power, or any other interest or estate in the  
27 property.

28 (e) A disclaimer becomes irrevocable when

29 (1) any conditions to which the disclaimant has made the disclaimer  
30 subject are satisfied; and

31 (2) the disclaimer is delivered or filed under AS 13.70.100, or becomes

1 effective as provided in AS 13.70.040 - 13.70.090, whichever occurs later.

2 (f) A disclaimer made under this chapter is not a transfer, assignment, or  
3 release.

4 **Sec. 13.70.040. Disclaimer of interest in property.** (a) Except for a disclaimer  
5 governed by AS 13.70.050 - 13.70.065, the following rules apply to a disclaimer of an  
6 interest in property:

7 (1) the disclaimer takes effect as of the time the instrument creating the  
8 interest becomes irrevocable, or, if the interest arose under the law of intestate  
9 succession, as of the time of the intestate's death;

10 (2) the disclaimed interest passes according to any provision in the  
11 instrument creating the interest providing for the disposition of the interest, should it  
12 be disclaimed, or of disclaimed interests in general;

13 (3) if the instrument does not contain a provision described in (2) of  
14 this subsection, the following rules apply:

15 (A) if the disclaimant is not an individual, the disclaimed  
16 interest passes as if the disclaimant did not exist;

17 (B) if the disclaimant is an individual, except as otherwise  
18 provided in (C) and (D) of this paragraph, the disclaimed interest passes as if  
19 the disclaimant had died immediately before the interest was created, unless  
20 under the governing instrument or other applicable law the disclaimed interest  
21 is contingent on surviving to the time of distribution, in which case the  
22 disclaimed interest passes as if the disclaimant had died immediately before the  
23 time for distribution;

24 (C) if by law or under the instrument, the descendants of the  
25 disclaimant would share in the disclaimed interest by any method of  
26 representation had the disclaimant died before the time of distribution, the  
27 disclaimed interest passes only to the descendants of the disclaimant who  
28 survive the time of distribution;

29 (D) if the disclaimed interest would pass to the disclaimant's  
30 estate had the disclaimant died before the time of distribution, the disclaimed  
31 interest instead passes by representation to the descendants of the disclaimant

1 who survive the time of distribution; if no descendant of the disclaimant  
2 survives the time of distribution, the disclaimed interest passes to those  
3 persons, including the state but excluding the disclaimant, and in the shares as  
4 would succeed to the transferor's intestate estate under the intestate succession  
5 law of the transferor's domicile had the transferor died at the time of  
6 distribution; however, if the transferor's surviving spouse is living but is  
7 remarried at the time of distribution, the transferor is considered to have died  
8 unmarried at the time of distribution;

9 (4) on the disclaimer of a preceding interest, a future interest held by a  
10 person other than the disclaimant takes effect as if the disclaimant had died or ceased  
11 to exist immediately before the time of distribution, but a future interest held by the  
12 disclaimant is not accelerated in possession or enjoyment as a result of the disclaimer.

13 (b) For the purposes of (a)(3) of this section, a disclaimed interest

14 (1) is created at

15 (A) the death of the benefactor; or

16 (B) an earlier time, if any, when the benefactor's transfer of the  
17 interest is a completed gift for federal gift tax purposes; and

18 (2) in a revocable trust is treated as if the interest had been created  
19 under a will.

20 (c) In this section,

21 (1) "benefactor" means the creator of the interest that is subject to a  
22 disclaimer;

23 (2) "future interest" means an interest that takes effect in possession or  
24 enjoyment, if at all, later than the time of its creation;

25 (3) "time of distribution" means the time when a disclaimed interest  
26 would have taken effect in possession or enjoyment.

27 **Sec. 13.70.050. Disclaimer of rights of survivorship in jointly held**  
28 **property.** (a) On the death of a holder of jointly held property, a surviving holder may  
29 disclaim, in whole or part, the greater of

30 (1) a fractional share of the property determined by dividing the  
31 number one by the number of joint holders alive immediately before the death of the

holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

(b) A disclaimer under (a) of this section takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(c) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

**Sec. 13.70.060. Disclaimer of interest in property held as a tenancy by the entirety.** (a) The survivorship interest in property that is held as a tenancy by the entirety and to which the survivor succeeds by operation of law on the death of the cotenant may be disclaimed as provided in this chapter. For the purposes of this chapter only, the deceased tenant's interest in property held as a tenancy by the entirety is considered to be an undivided one-half interest.

(b) A disclaimer under (a) of this section takes effect as of the death of the deceased tenant to whose death the disclaimer relates.

(c) The survivorship interest in property held as a tenancy by the entirety and disclaimed by the surviving tenant passes as if the disclaimant had predeceased the tenant to whose death the disclaimer relates.

**Sec. 13.70.065. Disclaimer of interest by trustee.** If a trustee who has the power to disclaim under a court order or under the instrument creating the fiduciary relationship disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

**Sec. 13.70.070. Disclaimer of power of appointment or other power not held in fiduciary capacity.** If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) if the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable;

(2) if the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power;

1 (3) the instrument creating the power is construed as if the power  
2 expired when the disclaimer became effective.

3 **Sec. 13.70.080. Disclaimer by appointee, object, or taker in default of**  
4 **exercise of power of appointment.** (a) A disclaimer of an interest in property by an  
5 appointee of a power of appointment takes effect as of the time the instrument by  
6 which the holder exercises the power becomes irrevocable.

7 (b) A disclaimer of an interest in property by an object or taker in default of an  
8 exercise of a power of appointment takes effect as of the time the instrument creating  
9 the power becomes irrevocable.

10 **Sec. 13.70.090. Disclaimer of power held in fiduciary capacity.** (a) If a  
11 fiduciary disclaims a power held in a fiduciary capacity that has not been exercised,  
12 the disclaimer takes effect as of the time the instrument creating the power becomes  
13 irrevocable.

14 (b) If a fiduciary disclaims a power held in a fiduciary capacity that has been  
15 exercised, the disclaimer takes effect immediately after the last exercise of the power.

16 (c) A disclaimer under this section is effective as to another fiduciary if the  
17 disclaimer so provides and the fiduciary disclaiming has the authority to bind the  
18 estate, trust, or other person for whom the fiduciary is acting.

19 **Sec. 13.70.100. Delivery or filing.** (a) Subject to (b) - (d) of this section,  
20 delivery of a disclaimer may be effected by personal delivery, first class mail, or any  
21 other method likely to result in its receipt. A disclaimer sent by first class mail is  
22 considered to have been delivered on the date it is postmarked. Delivery by personal  
23 delivery or any other method is effective on receipt by the person to whom the  
24 disclaimer is to be delivered under this section.

25 (b) In the case of an interest created under the law of intestate succession or an  
26 interest created by will, other than an interest in a testamentary trust,

27 (1) a disclaimer shall be delivered to the personal representative of the  
28 decedent's estate; or

29 (2) if a personal representative is not then serving, it shall be filed with  
30 a court having jurisdiction to appoint the personal representative.

31 (c) In the case of an interest in a testamentary trust,

1 (1) a disclaimer shall be delivered to the trustee then serving, or if a  
2 trustee is not then serving, to the personal representative of the decedent's estate; or

3 (2) if no personal representative is then serving, a disclaimer shall be  
4 filed with a court having jurisdiction to enforce the trust.

5 (d) In the case of an interest in an inter vivos trust,

6 (1) a disclaimer shall be delivered to the trustee then serving;

7 (2) if no trustee is then serving, a disclaimer shall be filed with a court  
8 having jurisdiction to enforce the trust; or

9 (3) if the disclaimer is made before the time the instrument creating the  
10 trust becomes irrevocable, the disclaimer shall be delivered to the settlor of a  
11 revocable trust or the transferor of the interest, or the legal representative of the settlor  
12 or transferor.

13 (e) In the case of an interest created by a beneficiary designation made before  
14 the time the designation becomes irrevocable, a disclaimer shall be delivered to the  
15 person making the beneficiary designation.

16 (f) In the case of an interest created by a beneficiary designation made after  
17 the time the designation becomes irrevocable, a disclaimer shall be delivered to the  
18 person obligated to distribute the interest.

19 (g) In the case of a disclaimer by a surviving holder of jointly held property, or  
20 by the surviving tenant of property held as a tenancy by the entirety, the disclaimer  
21 shall be delivered to the person to whom the disclaimed interest passes, or, if the  
22 person cannot reasonably be located by the disclaimant, the disclaimer shall be  
23 delivered as provided by (b) of this subsection.

24 (h) In the case of a disclaimer by an object or taker in default of exercise of a  
25 power of appointment at any time after the power was created,

26 (1) the disclaimer shall be delivered to the holder of the power or to the  
27 fiduciary acting under the instrument that created the power; or

28 (2) if no fiduciary is then serving, the disclaimer shall be filed with a  
29 court having authority to appoint the fiduciary.

30 (i) In the case of a disclaimer by an appointee of a nonfiduciary power of  
31 appointment,

1 (1) the disclaimer shall be delivered to the holder, the personal  
2 representative of the holder's estate, or to the fiduciary under the instrument that  
3 created the power; or

4 (2) if no fiduciary is then serving, the disclaimer shall be filed with a  
5 court having authority to appoint the fiduciary.

6 (j) In the case of a disclaimer by a fiduciary of a power over a trust or estate,  
7 the disclaimer shall be delivered as provided in (b) - (d) of this section, as if the power  
8 disclaimed were an interest in property.

9 (k) In the case of a disclaimer of a power by an agent, except a power  
10 exercisable by a fiduciary over a trust or estate, the disclaimer shall be delivered to the  
11 principal or the principal's representative.

12 (l) When a disclaimer of an interest in or relating to real property is recorded  
13 in the judicial district where the real property is located, there is a rebuttable  
14 presumption that the disclaimer has been delivered.

15 (m) In this section, "beneficiary designation" means an instrument, other than  
16 an instrument creating or amending a trust, naming the beneficiary of

17 (1) an annuity or insurance policy;

18 (2) an account with a designation for payment on death;

19 (3) a security registered in beneficiary form;

20 (4) a pension, profit-sharing, retirement, or other employment-related  
21 benefit plan; or

22 (5) any other nonprobate transfer at death.

23 **Sec. 13.70.110. When disclaimer permitted, barred, or limited.** (a) A  
24 disclaimer is permitted unless barred under (b) - (f) of this section. A disclaimer is  
25 permitted even though the disclaimant is insolvent.

26 (b) A disclaimer is barred by a written waiver of the right to disclaim.

27 (c) A disclaimer of an interest in property is barred if any of the following  
28 events occurs before the disclaimer becomes effective:

29 (1) the disclaimant accepts the interest sought to be disclaimed;

30 (2) the disclaimant voluntarily assigns, conveys, encumbers, pledges,  
31 or transfers the interest sought to be disclaimed or contracts to assign, convey,

1 encumber, pledge, or transfer the interest sought to be disclaimed; or

2 (3) a judicial sale or a nonjudicial foreclosure sale of the interest  
3 sought to be disclaimed occurs.

4 (d) A disclaimer, in whole or part, of the future exercise of a power held in a  
5 fiduciary capacity is not barred by its previous exercise.

6 (e) A disclaimer, in whole or part, of the future exercise of a power not held in  
7 a fiduciary capacity is not barred by its previous exercise unless the power is  
8 exercisable in favor of the disclaimant.

9 (f) A disclaimer of an interest in or power over property under this chapter is  
10 barred and is not effective

11 (1) to the extent the disclaimant is in arrears in child support payments;  
12 or

13 (2) if the disclaimant is involved in a pending court or administrative  
14 proceeding to establish or modify the disclaimant's child support obligation or to  
15 establish whether the disclaimant is the biological father or mother of a child.

16 (g) A disclaimer of a power over property that is barred by this section is  
17 ineffective. A disclaimer of an interest in property that is barred by this section takes  
18 effect as a transfer of the interest disclaimed to the persons who would have taken the  
19 interest under this chapter had the disclaimer not been barred.

20 **Sec. 13.70.120. Tax qualified disclaimer.** (a) Notwithstanding any other  
21 provision of this chapter, if, as a result of a disclaimer or transfer, the disclaimed or  
22 transferred interest is treated under the provisions of 26 U.S.C. (Internal Revenue  
23 Code) as never having been transferred to the disclaimant, then the disclaimer or  
24 transfer is effective as a disclaimer under this chapter. In this section, "26 U.S.C.  
25 (Internal Revenue Code)" includes 26 U.S.C. as amended, any successor statute to 26  
26 U.S.C. or 26 U.S.C. as amended, and regulations adopted under 26 U.S.C., 26 U.S.C.  
27 as amended, and any successor statute to 26 U.S.C. or 26 U.S.C. as amended.

28 (b) A tax-qualified disclaimer under 26 U.S.C. (Internal Revenue Code) is  
29 subject to the time limits under 26 U.S.C., as amended, even though time limits are not  
30 specified under this chapter.

31 **Sec. 13.70.130. Recording of disclaimer.** If an instrument transferring an

1 interest in or power over property subject to a disclaimer is required or permitted by  
2 law to be filed, recorded, or registered, the disclaimer may be filed, recorded, or  
3 registered as required or permitted by law. Failure to file, record, or register the  
4 disclaimer does not affect its validity as between the disclaimant and persons to whom  
5 the property interest or power passes by reason of the disclaimer.

6 **Sec. 13.70.140. Application to existing relationships.** Except as otherwise  
7 provided in AS 13.70.110, an interest in or power over property existing on the  
8 effective date of this chapter as to which the time for delivering or filing a disclaimer  
9 under law superseded by this chapter has not expired may be disclaimed after the  
10 effective date of this chapter.

11 **Sec. 13.70.150. Uniformity of application and construction.** In applying and  
12 construing this chapter, consideration must be given to the need to promote uniformity  
13 of the law with respect to its subject matter among states that enact it.

14 **Sec. 13.70.190. Definitions.** In this chapter,

15 (1) "disclaimant" means the person to whom a disclaimed interest or  
16 power would have passed had the disclaimer not been made;

17 (2) "disclaimed interest" means the interest that would have passed to  
18 the disclaimant had the disclaimer not been made;

19 (3) "disclaimer" means the refusal to accept an interest in or power  
20 over property and includes a renunciation;

21 (4) "fiduciary" means a personal representative, a trustee, an agent  
22 acting under a power of attorney, a guardian, an individual having legal custody of a  
23 minor child, or another person authorized to act as a fiduciary with respect to the  
24 property of another person;

25 (5) "individual having legal custody of a minor child" means an  
26 individual who, under the law of this state, has legal custody of a minor child as a  
27 matter of law or court decree;

28 (6) "jointly held property"

29 (A) means property held in the name of two or more persons  
30 under an arrangement in which all holders have concurrent interests and under  
31 which the last surviving holder is entitled to the whole of the property;

(B) does not include property held as a tenancy by the entirety;

(7) "person" means an individual, whether the individual is ascertained or unascertained, whether the individual is living or not living, and whatever the basis, including intestacy, for the individual's being entitled to an interest in property; a corporation; a business trust; an estate; a trust; a partnership; a limited liability company; a limited liability partnership; an association; a joint venture; a government; a governmental subdivision, agency, or instrumentality; a public corporation; or any other legal or commercial entity;

(7) "trust"

(A) means

(i) an express trust, charitable or noncharitable, with additions to the express trust, whenever and however created; and

(ii) a trust created under a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust;

(B) does not include a constructive trust or a resulting trust.

**Sec. 13.70.195. Short title.** This chapter may be cited as the Uniform Disclaimer of Property Interests Act.

\* **Sec. 2.** AS 13.12.801 is repealed.

# Alaska State Legislature

## House of Representatives



**Representative Max F. Gruenberg, Jr.**

**Representative Jay Ramras**

### SPONSOR STATEMENT

#### HB 287 – UNIFORM ACT: PROPERTY INTEREST DISCLAIMER

*“An Act relating to the adoption of the Uniform Disclaimer of Property Interests Act, and to the disclaimer of property rights under the Uniform Probate Code.”*

HB 287 is a comprehensive collection of rules outlining the types of property interests eligible for disclaimer, the process by which property interests may be disclaimed, and the effect of a disclaimer on the interest itself.

The Uniform Disclaimer of Property Interests Act was promulgated in 1999 and has already been adopted in 16 other states. There do not appear to be any reported court cases construing this Act. There have been several law review articles discussing the pros and cons of the Uniform Act; Representative Gruenberg would be happy to provide copies of these articles to any interested parties.

# LEGAL SERVICES

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## MEMORANDUM

January 28, 2010

**SUBJECT:** Sectional summary of HB 287 relating to the adoption of the Uniform Disclaimer of Property Interests Act (Work Order No. 26-LS1300\R)

**TO:** Representative Max Gruenberg  
Attn: Gretchen Staff

**FROM:**   
Theresa Bannister  
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

**Section 1.** This bill section creates a new chapter dealing with the disclaimer of property interests. This new chapter is based on the Uniform Disclaimer of Property Interests Act.

**Sec. 13.70.010.** States that AS 13.70 applies to the disclaimer of any interest in property. It does not matter when the disclaimer was created.

**Sec. 13.70.020.** States that, unless displaced by this chapter, the principles of law and equity apply. States that this chapter doesn't limit a person's right to waive, release, disclaim, or renounce an interest in or power over property under another law.

**Sec. 13.70.030.** States that a person may disclaim, in whole or part, conditionally or unconditionally, any interest in, or power over, property, including a power of appointment. Allows the disclaimer even if there is a spendthrift provision, a provision similar to a spendthrift provision, or a restriction, prohibition, or limitation on the right to disclaim. Provides that a disclaimer is unconditional and not subject to modification or revocation, unless the disclaimant expressly provides otherwise in the disclaimer.

Allows, if the fiduciary has court approval, a fiduciary to disclaim, in whole or part, any interest in or power over property. Indicates that, without court approval, a fiduciary may not disclaim, except under certain described circumstances, one of which involves natural guardians. Indicates how to determine who is the natural guardian.

Describes the formal requirements for a disclaimer. The disclaimer must be contained in a writing, declare that it is a disclaimer, describe the interest or power disclaimed, be

signed by the person making the disclaimer, and delivered or filed as required by AS 13.70.100. Indicates how the portion of property disclaimed by a partial disclaimer may be described (e.g., fraction, percentage, amount, term of years, etc.).

Indicates when a disclaimer becomes irrevocable. States that a disclaimer is not a transfer, assignment, or release.

Sec. 13.70.040. Establishes, except for disclaimers governed by sec. 13.70.050 - 13.70.065 (relating to jointly held property, tenancies by the entirety, and trustee disclaimers), four rules that relate to when a disclaimer becomes effective and how a disclaimer passes.

A disclaimer takes effect when the instrument creating the interest becomes irrevocable, or at the intestate's death, if related to intestate succession. The disclaimed interest passes according to a provision in the instrument that created the interest. If there is no provision, the disclaimed interest passes under one of four listed alternatives. Establishes how certain future interests take effect when there is a disclaimer of a preceding interest; clarifies that the disclaimer does not accelerate the possession and enjoyment of a future interest held by the disclaimant.

Sec. 13.70.050. Establishes rules for disclaiming interests in jointly held property. Establishes what interest one surviving holder may disclaim on the death of another holder of jointly held property. Indicates when the disclaimer takes effect. States that the disclaimed interest passes as if the disclaimant predeceased the deceased interest holder.

Sec. 13.70.060. Allows for a disclaimer of a survivorship interest in property held as a tenancy by the entirety. The deceased tenant's interest is considered to be an undivided one-half interest. Indicates when the disclaimer takes effect. States that the disclaimed interest passes as if the disclaimant predeceased the deceased cotenant.

Sec. 13.70.065. Addresses the situation of a trustee who is allowed, by court order or the fiduciary instrument, to receive property into a trust. States that if the trustee disclaims an interest that would otherwise have become trust property, the interest does not become trust property.

Sec. 13.70.070. Establishes some general rules for disclaimers of a power of appointment or other power not held in a fiduciary capacity. These rules relate to when the disclaimer takes effect, and directs that the instrument creating the power be construed as if the power expired when the disclaimer became effective.

Sec. 13.70.080. Indicates when disclaimers by persons who may or do receive an interest in property through the exercise of a power of appointment take effect.

Representative Max Gruenberg  
January 28, 2010  
Page 3

Sec. 13.70.090. Indicates when a disclaimer takes effect if a fiduciary disclaims a power held in a fiduciary capacity. Indicates the conditions when the disclaimer may be effective as to another fiduciary.

Sec. 13.70.100. Indicates how delivery of a disclaimer may be effected in general and in listed specific situations.

Sec. 13.70.110. Indicates that a disclaimer is permitted unless barred under this section. Permits a disclaimer even if the disclaimant is not solvent. States that a disclaimer is barred by a written waiver of the right to disclaim. States that a disclaimer is barred if certain listed events occur before the disclaimer occurs.

States that a disclaimer of the future exercise of a power held in a fiduciary capacity is not barred by a previous exercise of the power. A disclaimer of the future exercise of a power not held in a fiduciary capacity is not barred by the previous exercise of the power, unless the power is exercisable in favor of the disclaimant.

A disclaimer is barred and not effective to the extent that the disclaimant is in arrears in child support payments, or if the disclaimant is involved in a child support proceeding or in a proceeding to establish paternity of maternity. Indicates that a disclaimer that is barred by this section is ineffective. States that a barred disclaimer takes effect as a transfer of the interest to the persons who would have taken the interest under this chapter if the disclaimer had not been barred.

Sec. 13.70.120. Provides that a disclaimer or transfer is effective as a disclaimer under this chapter if, as a result of the disclaimer or transfer, the disclaimed or transferred interest is treated under federal tax law as never having been transferred to the disclaimant. Provides that a tax-qualified disclaimer under 26 U.S.C. (Internal Revenue Code) is subject to the time limits under 26 U.S.C., as amended, even though time limits are not specified under this chapter.

Sec. 13.70.130. Provides for a disclaimer to be filed, recorded, or registered as required or permitted by law if a transferring instrument (for the interest in or power over property) is required or permitted by law to be filed, recorded, or registered. But a failure to do this does not affect the disclaimer's validity as between the disclaimant and the persons to whom the interest or power passes under the disclaimer.

Sec. 13.70.140. Generally provides that an existing interest or power may be disclaimed after the effective date of this chapter if the time for delivering or filing the disclaimer under law superseded by this chapter has not expired.

Sec. 13.70.190. Defines terms for the new chapter.

Sec. 13.70.195. Gives the chapter the short title of "Uniform Disclaimer of Property Interests Act."

Representative Max Gruenberg  
January 28, 2010  
Page 4

**Section 2.** Repeals AS 13.12.801, which is the current statute that deals with the disclaimer of property interests.

If I may be of further assistance, please advise.

TLB:ljw  
10-045.ljw

# FISCAL NOTE

**STATE OF ALASKA**  
**2010 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 287  
 () Publish Date: \_\_\_\_\_

Identifier (file name): HB287-LAW-CIV-02-26-10 Dept. Affected: Law  
 Title: An Act relating to the adoption of the Uniform Disclaimer of Property Interests RDU Civil  
 Act, and to the disclaimer of property rights under the Uniform Probate Code. Component Commercial and Fair Business  
 Sponsor Representative(s) Ramras, Gruenberg  
 Requester Labor & Commerce Component Number 2717

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2011	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
<b>OPERATING EXPENDITURES</b>								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
<b>TOTAL OPERATING</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>								
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<b>CHANGE IN REVENUES ( )</b>								
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2010) cost: \_\_\_\_\_

**POSITIONS**

Full-time								
Part-time								
Temporary								

**ANALYSIS:** (Attach a separate page if necessary)

The bill allows beneficiaries of intestate, testamentary and nontestamentary (nonprobate) interests to execute a disclaimer of those interests. A disclaimer extinguishes the interest as if that interest had never been granted. The Uniform Disclaimer of Property Interests Act also makes it clearer that trustees and fiduciaries may use disclaimers and that powers of appointment may be disclaimed.

No fiscal impact on Department of Law.

Prepared by: Eileen Donahue, Division Operations Manager  
 Division Administrative Services  
 Approved by: Daniel S. Sullivan, Attorney General  
Department of Law

Phone 465-5427  
 Date/Time 2/26/10 10:00 AM  
 Date 2/26/2010

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Terise n'ha Castriona

Jennifer M. Wright\*

◆ Admitted in AK

● Admitted in CA

• Admitted in TX

+ Admitted in WA

**CONFIDENTIAL  
ATTORNEY-CLIENT INFORMATION**

November 30, 2009

**Via email to: <Rep.Max.Gruenberg@legis.state.ak.us>**

Representative Max Gruenberg

House District 20—Anchorage

716 West Fourth Avenue, Suite 350

Anchorage, AK 99501-2133

**Re: House Bill 201—Uniform Disclaimer of Property Interests Act**

Dear Representative Gruenberg:

Thank you for your interest in sponsoring the Uniform Disclaimer of Property Interests Act. As you know, this act was initially introduced as House Bill 201 in the Twenty-Fifth Legislature by Representative LeDoux. Both Representative LeDoux and you asked our group to review the bill and provide our comments. Our group consists of an informal group of estate and trust attorneys who practice primarily in this area in Alaska. We have been working with the Legislature over the past 12 years to make recommendations that will improve Alaska's estate and trust statutes.

We have reviewed House Bill 201 and various articles which have been written suggesting certain changes to this uniform act. In addition, we have reviewed the recent changes to this uniform act enacted by the State of Florida. It should be noted that of the 12 states which have enacted this uniform act, ten states have enacted changes.

We have recommended the changes summarized below. These changes are contained in "CS For House Bill 201", designated "25-LS0615\N (Bannister) 3/17/08". These changes from the uniform act are as follows:

Representative Max Gruenberg  
November 30, 2009  
Page 2 of 3

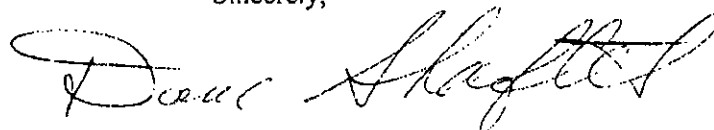
1. AS 13.70.030(a): Allows for conditional disclaimers;
2. AS 13.70.030(b): Requires court approval for a disclaimer by a fiduciary;
3. AS 13.70.030(b): Allows a parent to disclaim for a minor child if the child receives an interest because the parent has disclaimed;
4. AS 13.70.040(a)(3)(D): States that if the statute does not provide for an alternative disposition for an interest or power of appointment disclaimed during the benefactor's lifetime, the interest or power of appointment will revert to the benefactor;
5. AS 13.70.040(b)(1): Clarifies that a disclaimed interest is created at the death of the benefactor or such earlier time, if any, that the benefactor's transfer of the interest is a completed gift for federal gift tax purposes;
6. AS 13.70.040(b)(2): Treats disclaimers of interests in revocable trusts the same as disclaimers of interests in wills;
7. AS 13.70.060: Adds a provision covering disclaimers of property held as tenancy by the entirety;
8. AS 13.70.110(a): States the majority rule that a disclaimer is permitted even though the disclaimant is insolvent;
9. AS 13.70.110(f): States that a disclaimer of an interest or power over property is barred and not effective to the extent that the disclaimant is in arrears in child support payments.
10. AS 13.70.120(b): Adds a notice that the Internal Revenue Code provides time limits for qualified disclaimers;
11. AS 13.70.190: Adds definitions; and
12. AS 13.[ENTIRE STATUTE]: A number of drafting clarifications are added.

Enclosed with this letter is a copy of "CS For House Bill No. 201, 25-LS0615N" and Legal Services' sectional summary, dated March 16, 2007. In our group's opinion, this bill is now ready for reintroduction and passage. It will make a solid improvement to Alaska's estate and trust statutes.

Representative Max Gruenberg  
November 30, 2009  
Page 3 of 3

Thank you very much for your consideration of this legislation.

Sincerely,

A handwritten signature in cursive script, appearing to read "David G. Shaftel". The signature is written in black ink and is positioned above the printed name.

David G. Shaftel

Enclosure: As stated

Uniform Laws Annotated Currentness

Uniform Disclaimer of Property Interests Act (1999) (Last Amended or Revised in 2006)

## GENERAL NOTES

<The Uniform Disclaimer of Property Interests Act (1999), in its Prefatory Note, states that it replaces the 1978 Uniform Disclaimer of Property Interests Act, the 1978 Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and the 1978 Uniform Disclaimer of Transfers under Nontestamentary Instruments Act, and will be incorporated into the Uniform Probate Code to replace UPC § 2-801. Uniform Probate Code § 2-801 was replaced in 2002 by the Uniform Disclaimer of Property Interests Act (1999), which is incorporated into the UPC as Part 11 of Article 2 (§§ 2-1101 to 2-1117).>

<See, also, the Uniform Disclaimer of Property Interests Act (1978).>

## TABLE OF JURISDICTIONS WHEREIN ACT HAS BEEN ADOPTED

Jurisdiction	Laws	Effective Date	Statutory Citation
Arizona	2005, c. 195	8-12-2005	A.R.S. §§ 14-10001 to 14-10018.
Arkansas	2003, c. 610	9-1-2003	A.C.A. §§ 28-2-201 to 28-2-220.
Delaware	2006, c. 302	6-27-2006	12 Del.C. §§ 601 to 617.
District of Columbia	2006, D.C. Law 16-205	3-2-2007	D.C. Official Code, 2001 Ed. §§ 19-1501 to 19-1518.
Florida	2005, c. 108	7-1-2005	F.S.A. §§ 739.101 to 739.701.
Hawaii	2000, c. 43	7-1-2000	HRS §§ 526-1 to 526-16.
Indiana	2003, c. 5	7-1-2003	West's A.I.C. 32-17.5-1-1 to 32-17.5-10-1.
Iowa	2004, c. 1015	3-29-2004 <sup>[FN*]</sup>	I.C.A. §§ 633E.1 to 633E.17.
Maryland	2004, c. 465	10-1-2004	Code, Estates and Trusts, §§ 9-201 to 9-216.
Massachusetts	2008, c. 521	7-1-2011	M.G.L.A. c. 190B, § 2-801.
Nevada	2007, c. 102	5-22-2007	N.R.S. 120.100 to 120.350.
New Mexico	2001, c. 290	7-1-2001	NMSA 1978 §§ 46-10-1 to 46-10-17.
North Dakota	2001, c. 301	8-1-2001	NDCC 30.1-10.1-01 to 30.1-10.1-12.
Oregon	2001, c. 245	1-1-2002	ORS 105.623 to 105.649.
Virginia	2003, c. 253	3-16-2003 <sup>[FN*]</sup>	Code 1950, §§ 64.1-196.1 to 64.1-196.15.
West Virginia	2002, c. 317	7-1-2002	Code, 42-6-1 to 42-6-19.

<sup>[FN\*]</sup> Date of approval.

## DRAFTING COMMITTEE TO REVISE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACTS

HIROSHI SAKAI, 902 City Financial Tower, 201 Merchant Street, Honolulu, HI 96813, *Chair*

# Uniform Disclaimer of ..... ..... Property Interests

By William P. LaPiana

The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Disclaimer of Property Interests Act (UDPIA) on July 29, 1999. The new disclaimer act replaces three uniform acts promulgated in 1978 (the Uniform Disclaimer of Property Interests Act, the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and the Uniform Disclaimer of Transfers under Nontestamentary Instruments Act) and will be incorporated into the Uniform Probate Code (UPC) to replace current UPC § 2-801. UDPIA is the most comprehensive disclaimer statute ever written and is designed to allow every sort of disclaimer that is useful for tax planning purposes.

## Nine Month Time Limit

UDPIA does not include a specific time limit for making any disclaimer and makes no reference to the nine month limit of Code § 2518. At the beginning of the drafting process, the NCCUSL drafting committee decided that the new act would reflect the basic concept underlying all disclaimers: no one can be forced to accept a gift. The only bar to a disclaimer, therefore, should be acceptance of the offer. This decision recognizes that, in almost all jurisdictions, disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant's creditors. In short, the new act is a type of enabling act that prescribes all of the rules for

refusing a proffered interest in or power over property and the effect of that refusal on the power or interest. UDPIA leaves the tax consequences of the refusal to tax law.

The drafting committee also believed that the decision not to include a specific time limit—to “decouple” the disclaimer statute from the time requirement for a qualified disclaimer, under Code § 2518—would reduce confusion. The older uniform acts and almost all the current state statutes (many of which are based on those acts) were drafted in the wake of the passage of Code § 2518 in 1976. That gift tax provision replaced the “reasonable time” requirement of prior law with a requirement that a disclaimer must be made within nine months of the creation of the interest disclaimed, if the disclaimer is to be a “qualified disclaimer”—one that is not regarded as a transfer by the disclaimant.

The statutes that were written in response to Code § 2518 reflected the nine month time limit that Code section established. Under most of these statutes (including the 1978 uniform acts and UPC § 2-801), a disclaimer must be made within nine months of the creation of a present interest. For example, a disclaimer of an outright gift under a will must be made within nine months of the decedent's death, corresponding to the requirement of Code § 2518. A future interest, however, may be disclaimed within nine months of the time that the interest vests in possession or enjoyment.

For example, a remainder contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary. The time limit for disclaimers of future interests does not correspond to Code § 2518, which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest's creation, no matter how contingent it may be.

The nine month time limit of the existing statutes really is a trap. Although it superficially conforms to Code § 2518, its application to the disclaimer of future interests does not. The UDPIA drafting committee hoped that, by removing all mention of time limits, the statute itself would signal that different law sets the requirements for a tax qualified disclaimer.

## Relates Back

UDPIA reads differently from current disclaimer statutes because it abandons the term “relates back.” Courts have interpreted that term to mean that the disclaimer takes effect as a refusal at that time, thus preventing the disclaimant from transferring the interest. UDPIA adopts this interpretation. Rather than using the term “relates back,” however, UDPIA makes disclaimers effective at the time when the offer of the gift is irrevocable. For example, a disclaimer of a gift under a will is “effective” when the will becomes irrevocable at the death of the testator. In addition,

§ 4(f) states that a disclaimer "is not a transfer, assignment, or release." Taken together, the time of effectiveness provisions and § 4(f) clearly state the meaning of a disclaimer as a refusal.

### Disclaimer of Trustee Powers

UDPIA creates rules not only for the disclaimer of interests in property but also for the disclaimer of powers over property. The act includes sections devoted to the disclaimer of powers not held in a fiduciary capacity (powers of appointment) (§ 9) and of powers held in a fiduciary capacity (§ 11). Trustees may have tax motives for surrendering powers. For example, a trust for the primary benefit of a surviving spouse will not qualify for the marital deduction if the trustee has the power to invade principal for others. If the trustee effectively disclaims the power, the trust might then qualify for the marital deduction under Code § 2056. Trustees have, in general, had difficulty disclaiming powers. The courts usually decide that the trustee must accept the trust as created or decline to be trustee. In contrast, UDPIA gives trustees the ability to make such disclaimers. Any disclaimer by a trustee must, of course, comport with the trustee's fiduciary duty.

### Disclaimer of Property Added to Trust

Disclaimers of additions of property to a trust are also the subject of innovative provisions. UDPIA § 5 allows trustees to disclaim property that would otherwise be added to a trust. Such disclaimers have been hampered by the same reasoning that has held back potentially useful disclaimers of fiduciary powers. For example, a trustee might wish to disclaim an addition to a trust that would otherwise lead to the imposition of the generation-skipping transfer tax. Again, any disclaimer of a property interest by a trustee must comport with the trustee's fiduciary duty.

### Disclaimer of Interest in Jointly Held Property

The most important new provision dealing with the disclaimer of interests in property is § 7, "Disclaimer of Interest in Jointly Held Property." Although existing statutes usually mention the possibility of disclaiming jointly held property, they do not provide details. Any disclaimer of joint tenancy or tenancy by the entirety property is an anomalous concept in property law terms. At the death of one joint holder, nothing really "passes" to the survivor. The traditional common law view is that the survivor has been "freed of the participation" of the other joint tenant. Nevertheless, courts have interpreted the existing disclaimer statutes as contemplating the disclaimer of at least the "accrue portion" of the joint tenancy—that part of the property that the decedent would have received had the tenancy been severed unilaterally. See *Dancyo Comm'r*, 872 F.2d 84 (4th Cir. 1989); *McDonald v. Comm'r*, 853 F.2d 1494 (8th Cir. 1988); *Kennedy v. Comm'r*, 804 F.2d 1332 (7th Cir. 1986); *In re Estate of Lamoureux*, 412 N.W.2d 628 (Iowa 1987). Holdings such as these, of course, give little help to tenants by the entirety who cannot make a unilateral severance. IRS rulings have generally, albeit reluctantly, followed these cases, allowing the disclaimer of the severable portion. A surviving tenant by the entirety, of course, could not make a qualified disclaimer under these rulings.

The IRS ended the controversy in late 1997 when it promulgated new final regulations under Code § 2518. Treas. Reg. § 25.2518-2(c)(4)(i) allows a surviving joint tenant or tenant by the entirety to disclaim that portion of the tenancy to which he or she succeeds on the death of the first joint tenant (when there are two joint tenants), whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration that the disclaimant furnished. The regulations

also create a special rule for joint tenancies between spouses created after July 14, 1988, when the spouse of the donor is not a U.S. citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includable in the donor spouse's gross estate under Code § 2040, which creates a contribution rule. Thus, the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all of the consideration for the tenancy's creation.

Treas. Reg. § 25.2518-2(c)(4)(ii) also recognizes the unique features of joint bank accounts. The regulations permit the disclaimer by a survivor of that part of the account that the decedent contributed, so long as the decedent could have regained that portion during life by unilateral action. The regulations bar the disclaimer of that part of the account attributable to the survivor's contribution and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

Section 7 was drafted to allow every sort of qualified disclaimer of jointly held property possible under the Treasury Regulations. Section 2(5) defines jointly held property to include joint tenancies and tenancies by the entirety as well as all other sorts of joint arrangements by stating "jointly held property" means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property. A surviving holder of joint property may disclaim the greater of a fractional portion of the property, determined by dividing the number one by the number of joint holders immediately before the death of the holder, giving rise to the opportunity to disclaim, and that portion of the jointly held property not attributable to the contribution of the disclaimant. A surviving spouse who

**"The nine month time limit of the existing statutes really is a trap. Although it superficially conforms to Code § 2518, its application to the disclaimer of future interests does not."**

contributed all the consideration for the purchase of the family home held in joint tenancy could disclaim one-half of the property. Had the surviving spouse contributed nothing, he or she could disclaim as much as all of the property, although a qualified disclaimer would be limited to one-half.

The surviving holder of a joint account who contributed nothing to the account could disclaim the entire account. The disclaimer would be a qualified disclaimer under the regulations so long as the other requirements of Code § 2518 are met. The disclaimant is deemed to have predeceased the last of the other joint holders to die. In the case of spousal joint tenants, the decedent then would be the deemed survivor. The disclaimed portion would pass through his or her estate and could help the estate take advantage of the unified credit.

The provisions of UDPIA dealing with the disclaimer of interests in property, other than disclaimers by trustees, also differ from previous statutes. Section 6 governs all such disclaimers, whether the disclaimed interest was created by will, under intestacy law or by a nontestamentary instrument. The old uniform acts, UPC § 2-801, and almost all state statutes deal separately with disclaimers of testamentary and nontestamentary interests. The separation reflects the need to select a time at which the disclaimant is deemed to have died to determine how the disclaimed interest passes, absent a direction in the instrument. For testamentary interests, the time has always been the death of the decedent. For other interests, the time is

usually when the instrument creating the interest becomes irrevocable.

### Effective Time of Disclaimer

Under UDPIA, unless the instrument provides for the disposition of the disclaimed interest should it be disclaimed or for the disposition of disclaimed interests in general (§ 6(b)(2)), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution of the interest under § 6(b)(3)(A). Section 6(a)(1) defines time of distribution 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 and describe the time at which it is certain to whom property belongs. The terms do not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and of 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. It is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by nontestamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back.

The time of distribution of a future interest is the time when it comes into possession. Previous uniform acts and UPC § 2-801 provided that a disclaimant would be treated as predeceasing the creation of the future interest (for example, the death of the decedent if the interest was in a testamentary trust). That approach leads to an ambiguity. Assume that T's will creates a testamentary trust for A, who is to receive all of 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. The disclaimer must be made within nine months of T's death if it is to be a qualified disclaimer for tax purposes. Under prior acts and UPC § 2-801, the interest passes as if S had predeceased T.

A problem can arise if S is survived by children born after T's death. It is possible to argue that, had S predeceased T, the afterborn child 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. Under § 6(b)(3)(A), however, S is deemed to have died immediately before A's death, even though under § 6(b)(1) the disclaimer is effective as of T's death. There is no doubt, therefore, that S's children living at the time of distribution, whenever born, are entitled to the share of the trust property he would have received.

In the above example, it is clear that S's children should receive exactly what S would have received had he not disclaimed. Section 6(b)(3)(A) ensures that result by requiring that the disclaimed interest pass as if the disclaimant had died. This provision in turn ensures that a disclaimer cannot alter the representational scheme of a multigenerational gift or the intestacy statute. The classic example is the disclaimer by an older generation representative whose children outnumber those of her deceased

"The regulations permit the disclaimer by a survivor of that part of the account that the decedent contributed, so long as the decedent could have regained that portion during life by unilateral action."

sibling. For example, X dies intestate survived by daughter D, her three children and the only child of predeceased son S. D disclaims. Were D deemed simply to have predeceased X, her children could argue that they were entitled to three-fourths of the estate because all the heirs are now in the same generation. Courts have rejected this interpretation of deemed death, taking the position that the disclaimer should only allow the passing of what the disclaimant would otherwise have taken. See, e.g., *Welder v. Hitchcock*, 617 S.W.2d 294 (Tex. Civ. App. 1981); *Estate of Pienga*, 347 N.Y.S.2d 150 (Surr. Ct. 1973). UDPIA agrees with that position.

Preventing the use of a disclaimer to alter the shares of an intestate estate or of a multigenerational gift by limiting the effect of the disclaimer to the disclaimed interest solves one problem but creates another. In the example in the previous paragraph, if the disclaimed interest passes as if D predeceased X, S's child could claim one-fourth of the interest because, once again, all of the heirs would be in the same generation. UDPIA prevents that result by adapting language from UPC § 2-801, providing that if the disclaimant's descendants would have shared in the disclaimed interest had the disclaimant predeceased (in this example with their cousin, S's child), then the interest passes only to the disclaimant's descendants.

The concept of the disclaimer as a deemed death follows the approach that existing statutes take. Just as under those statutes, the result of a disclaimer of an interest created under a will is seldom in doubt under § 6. Even if the will does not provide for

the death of the disclaimant before the testator, the doctrine of lapse and anti-lapse statutes will give a clear answer. The law of lapse as it applies to non-testamentary instruments and the interests they create is far less certain. In the absence of comprehensive lapse provisions like UPC §§ 2-603, 2-706 and 2-707, general principles may dictate the exact result of the disclaimer of an interest created in an instrument other than a will. Unfortunately, the exact application of those general principles to any particular situation may not be obvious.

#### Disclaimers by Corporations and Partnerships

Section 6(b)(3)(B) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because § 8 applies to disclaimers by trustees of property that would otherwise pass to the trust, this paragraph principally applies to disclaimers by corporations, partnerships and the other entities listed in the definition of "person" in § 2(b). A charity, for example, might wish to disclaim property if acceptance of the property would be incompatible with its purposes.

#### Acceleration of Future Interests

Section 6(b)(4) continues the approach taken in prior uniform acts and UPC § 2-801 that provides for the acceleration of future interests on the making of a disclaimer. For example, Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then

living, by representation. If S disclaims his life income interest in the trust, the remainder will immediately become possessory in S's descendants determined as of Father's death, just as if S really had not survived. It is immaterial that the actual situation at S's death might be different, with different descendants entitled to the remainder.

#### Disclaimers of Powers of Appointment

Section 9 deals with disclaimers by holders of powers of appointment and § 10 with disclaimers by appointees, permissible appointees and takers in default. A properly disclaimed power ceases to exist as of the time the disclaimer becomes effective, which in turn depends on what sort of power is involved and whether or not it has been exercised. If a holder disclaims a power before exercising it, the disclaimer takes effect at the time that the instrument creating the power became irrevocable and the disclaimer destroys the power. If the holder has exercised the power, the disclaimer takes effect immediately after the last exercise of the power. The power ceases to exist from that time forward, unless the power is a presently exercisable general power of appointment. Once exercised, such a power cannot be disclaimed. This is the only provision in UDPIA that makes a specific act sufficient to bar a subsequent disclaimer.

Section 10 makes a disclaimer by an appointee take effect as of the time that the instrument by which the holder exercises the power becomes irrevocable. Disclaimers by objects and takers in default take effect as of the time the instrument creating the power becomes irrevocable. The effect of the disclaimer is the same as that of any disclaimer of an interest of property under § 6. The disclaimed interest will pass according to the explicit provisions of the instrument exercising or creating the power or under the default rule of

§ 6(b)(3)(A) which deems the disclaimant to have predeceased the time of distribution.

### Delivery

The delivery provisions of § 12 are designed to ensure that the disclaimer reaches the person or entity having the responsibility to distribute the disclaimed interest. UDPIA does not require filing the disclaimer with a court unless there is no person or entity to whom delivery can be made. For example, a disclaimer of an interest in a decedent's estate must be filed with the court having the authority to appoint the personal representative only if no personal representative is serving at the time.

### Bar to Disclaimers

Section 13 of UDPIA is captioned "When Disclaimer Barred or Limited."

Like existing statutes, this section recognizes that a waiver of the right to disclaim, as well as an assignment, conveyance, encumbrance, pledge, transfer or judicial sale of the interest sought to be disclaimed, will bar a disclaimer. In addition, the past exercise of a general power of appointment bars a disclaimer of the power. The section also includes three novel provisions. First, subsection (e) states that other law can bar or limit a disclaimer. This provision recognizes situations such as the cases holding that disclaimers are transfers in the context of Medicaid qualification or issues in dealing with federal tax liens. (The Supreme Court has granted certiorari in *Drvo v. U.S.*, 119 S. Ct. 1453 (1999), to resolve the tax lien question.) Second, subsection (f) provides that a disclaimer barred by § 13 takes effect as a transfer of the interest disclaimed to those who would have taken the interest had the disclaimer not been barred. This provision eliminates the

ambiguity that would otherwise be caused by an ineffective refusal to accept property. Third, subsection (g) provides that any disclaimer that meets the requirements for a qualified disclaimer under Code § 2518 is a valid disclaimer under UDPIA.

### Conclusion

UDPIA recognizes that disclaimers have a wide variety of uses. The act provides rules for all of those potential uses, while leaving policy questions on the effect of a proper refusal of property or rejection of a power to other law.

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# Keeping Current PROBATE

**Keeping Current**—Probate offers a look at selected recent cases, rulings and regulations, literature and legislation. The editors of *Probate & Property* welcome suggestions and contributions from readers.

## CASES

• **TAX APPORTIONMENT:** Will provision prevails over statutory apportionment. The decedent's will directed that all death taxes be paid from the residue and defined death taxes to include all estate, inheritance and succession taxes "which are assessed by reason of my death." In *Peterson v. Mayse*, 993 S.W.2d 217 (Tex. Ct. App. 1999), the court held that the apportionment clause overrode the statutory apportionment rule.

• **EQUITABLE ADOPTION:** Proof must be by clear and convincing evidence. In *Williams v. Estate of Pender*, 738 So. 2d 453 (Fla. Dist. Ct. App. 1999), the court required clear and convincing evidence of each of the five elements of equitable adoption: 1) agreement to adopt, 2) performance by the natural parents by surrender of custody, 3) performance by child by living in the home of the foster parents, 4) partial performance by the foster parents by taking the child into their home and treating the child as their own and 5) intestacy of the foster parents. For a similar holding, see *Welch v. Wilson*, 516 S.E.2d 35 (W. Va. 1999).

• **REPUBLICATION BY CODICIL:** Post-marriage codicil republishes premarital will. A testator executed his will and married his wife later that day. He subsequently adopted his wife's child. After the adoption the testator executed two codicils. His wife alleged that the will was revoked by a state statute providing that a subsequent marriage and birth or adoption of a child revokes a premarital will. The court in *In re Estate of Wells*, 983 P.2d 279 (Kan. Ct. App. 1999), held the will effective because it was republished by codicil after the marriage and adoption.

• **ATTORNEY'S FEES:** Executor's undue influence precludes payment from estate. A will was denied probate because the executor exercised undue influence over the decedent. That executor moved for payment of his lawyer's fees from the estate, but the court denied the fee application. In *re Estate of Herbert*, 979 P.2d 1133 (Haw. 1999).

• **DOMICILE:** Decedent's intent outweighs physical location of property. The decedent's estate was administered in Massachusetts. An after-death survey of the decedent's property revealed that 11% of the property, including his house, was actually located in Connecticut. The court in *Bernier v. DuPont*, 715 N.E.2d 442 (Mass. App. Ct. 1999), held that the decedent intended to reside in Massachusetts and Massachusetts courts had jurisdiction based on the decedent's domicile.

• **PRETERMITTED CHILD:** Nonmarital child entitled to forced share. A decedent's will was executed before the birth of his child. Although the child's mother was married to someone else at the time of the child's birth, the court held that the child qualified as a pretermitted child because there was clear and convincing evidence of paternity overcoming the presumption that the mother's husband was the child's father. In *re Matter of Wilkins*, 691 N.Y.S.2d 878 (N.Y. Surr. Ct. 1999).

## RULINGS AND REGULATIONS

• **GST TAX:** Failure to allocate exemption on Schedule R excused under substantial compliance doctrine. PLR 199937026.

• **INCOME TAX BASIS:** Beneficiary not estopped from claiming a stepped up basis greater than the fair market value of the asset shown on the estate tax return. TAM 199933001.

• **MARITAL DEDUCTION:** Savings clause in deceased spouse's will sufficient to support interpretation limiting distribution to surviving spouse consistent with marital deduction rules. TAM 199932001.

• **POWER OF APPOINTMENT:** Trustee's power to amend a trust determined not to be a general power because the trustee had no beneficial interest in the trust and the grantor's intent was to benefit the trustee's children. FSA 199830026.

• **VALUATION:** Special valuation rules of Code § 2701 may apply to formation of a partnership. TAM 199933002.

## LITERATURE

- **Asset protection trusts.** Recent articles discussing asset protection trusts include David Aronofsky, *Montana's Foreign Capital Depository Act: A Financial Pie in the Rocky Mountain Sky or a Sensible New Assets Attraction Approach?*, 32 Vand. J. Transnat'l L. 711 (1999); Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts*, 32 Vand. J. Transnat'l L. 739 (1999); Gideon Rothschild et al., *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 32 Vand. J. Transnat'l L. 763 (1999); Amy Lynn Wagenfeld, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows*, 32 Vand. J. Transnat'l L. 831 (1999).
- **Attorney-client privilege.** For a discussion of the posthumous application of the privilege, see Forrest Shea Browning, Swidler & Berlin v. United States: *A Grave Decision—When Does Attorney-Client Privilege Have a Life of its Own?*, 22 Am. J. Trial Advoc. 671 (1999).
- **Body disposition.** Jennifer E. Horan recommends a functional approach to family status for same-sex couples when disposing of remains in *"When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. Race, Gender & Just. 423 (1999).
- **Charitable trusts.** Recent articles include: Jonathan Gopman and Daniel Mielnicki, *New Perspectives in Planning with Testamentary Charitable Lead Annuity Trusts*, Tr. & Est. 46 (June 1999); Paula Kilcoyne, *Charitable Trusts - Donor Standing Under the Uniform Management of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 W. New Eng. L. Rev. 131 (1999); Conrad Teitell, *Charitable Remainder Trusts—Final Regulations*, Tr. & Est. 36 (Aug. 1999).
- **Conservation easements.** For a review of conservation easements benefits, see Brenda J. Brown's *Land Preservation Provides Estate Tax Benefits: Section 2031(c)*, 17 UCLA J. Envtl. L. & Pol'y 117 (1998).
- **Contracts to make a will.** Jason Thomas King recommends a constructive trust remedy rather than enforcing a promise to make a will in *Lifetime Remedies for Breach of a Contract to Make a Will*, 50 S.C. L. Rev. 965 (1999).
- **Defamation after death.** Raymond Iryami discusses the history and recent developments related to the departed's reputation rights in *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 Fordham Intell Prop. Media & Ent. L.J. 1083 (1999).
- **Family-owned businesses.** Recent articles focusing on family-owned businesses include: Shannon E. O'Brien, *Estate Tax Treatment of Family-Owned Businesses: The Evolution of Internal Revenue Code Section 2057*, 67 UMKC L. Rev. 495 (1999); Sebastian V. Grassi Jr., *Drafting for the Family-Owned Business Deduction*, 90 J. Tax'n 358 (1999); and Neil E. Harl, *The Family-Owned Business Deduction: Still in Need of Repairs*, Drake J. Agric. L. 59 (Spring 1999).
- **Foreign trust taxation.** Donald D. Kozusko and Stephen K. Vetter question Respect for "Form" as "Substance" in *U.S. Taxation of International Trusts*, 32 Vand. J. Transnat'l L. 675 (1999). Carlyn S. McCaffrey & Elyse G. Kirschner discuss foreign trusts and the requirements they impose in *Learning to Live with the New Foreign Nongrantor Trust Rules*, 32 Vand. J. Transnat'l L. 555 (1999).
- **Limited liability companies.** For a review of limited liability companies, see Thomas W. Jacobs and Thomas J. Callahan, *What Tax Lawyers Need to Know About Single Member Limited Liability Companies*, Prac. Tax Law. 7 (Summer 1999).
- **Long-term care insurance.** Robert D. Hayes, Nancy G. Boyd and Kenneth W. Hollman stress the importance of advising elderly clients to purchase insurance packages in *What Attorneys Should Know About Long-Term Care Insurance*, 7 Elder L.J. 1 (1999).
- **Medicaid.** Omar N. Ahmad provides an overview of the Medicaid program and discusses the "income-first" rule in *Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant, History and Developments, 1965-1998*, 20 J. Legal Med. 251 (1999).
- **Negligent trust situs.** A possible new tort is discussed in Michael J. Myers and Rollyn H. Samp, *South Dakota Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage*, 44 S.D. L. Rev. 662 (1998).
- **Omitted spouse.** David E. Wagner explores South Carolina's omitted spouse statute in *The South Carolina Probate Code's Omitted Spouse Statute and In Re Estate of Timmerman*, 50 S.C. L. Rev. 979 (1999).
- **Professional athletes.** For a view of estate planning for the professional athlete, see Joseph D. Wright's *Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in a New Millennium*, 6 Sports Law J. 27 (1999).
- **Professional responsibility.** The Judge Advocate General's School shares its experience in *TJAGSA Practice*

Note: *Wills and Professional Responsibility Notes*, Army Law. 30 (July 1999).

- **Purpose trusts.** Adam J. Hirsch reviews the purpose trust provisions of the UPC in *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 Fla. St. U. L. Rev. 913 (1999).

- **QTIP election.** June R. Kitagawa examines Code § 2056 in *QTIP Election Invalid Where the Will Allowed Reduction in the Surviving Spouse's Interests: Estate of Rinaldi v. United States*, 52 Tax Law. 617 (1999).

- **Qualified retirement plan.** Louis S. Harrison shares his methods for minimizing at-death transfers of tax-deferred assets in *Creative and Strategic Estate Planning for Transfer of Qualified Retirement Assets*, 87 Ill. B.J. 480 (1999).

- **Tax liens on inherited property.** Andrew J. Lawrence recommends strategies in *State Law Disclaimer Did Not Prevent the Attachment of Federal Tax Liens to Inherited Property: Drye Family 1995 Trust v. United States*, 52 Tax Law. 627 (1999).

- **Tax returns.** Glen A. Yale shares his instructions and checklist in *Obtaining Information to Complete the Form 706*, Prac. Tax Law. 29 (Summer 1999).

- **Trust companies.** Anne Luke Boozer, Hal Pennington and William W. Rodgers discuss the trust industry in *Case Study: A Trust Culture That Works*, Tr. & Est. 28 (Aug. 1999).

- **Trust taxation.** Robert T. Danforth offers *A Proposal for Integrating the Income and Transfer Taxation of Trusts* in 18 Va. Tax Rev. 545 (1999).

- **Trusts.** For an overview of recent developments, see Edward C. Halbach, Jr., *Significant Trends in the Trust Law of the United States*, 32 Vand. J. Transnat'l L. 531 (1999).

- **Undue influence.** Brian Alan Ross argues that a woman's testamentary choices are often overruled as punishment for her challenging traditional gender roles in *Undue Influence and Gender Inequity*, 19 Women's Rts. L. Rep. 97 (1997).

- **Uniform prudent investor Act.** Martin D. Begleiter shares the results of his study in *Does the Prudent Investor Need the Uniform Prudent Investor Act - An Empirical Study of Trust Investment Practices*, 51 Me. L. Rev. 28 (1999).

- **Valuation of lottery winnings.** Ja Lee Kao focuses on *Valuing Future Lottery Winnings for Estate Tax Purposes: Estate of Shackelford v. United States*, 52 Tax Law. 609 (1999).

- **Viatical settlements.** Miriam R. Albert's proposal for decreasing fraudulent viatical settlements is found in *The Future of Death Futures: Why Viatical Settlements Must be Classified as Securities*, 19 Pace L. Rev. 345 (1999).

- **Will contests.** Ronald Chester examines mediation as an alternative to will contests in *Less Law, But More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 Duq. L. Rev. 173 (1999).

## LEGISLATION

- **California authorizes nonprofit charitable corporations to be appointed as trustees under specified circumstances.** 1999 Cal. Legis. Serv. ch. 424.

- **California creates statewide registry for guardians and conservators.** 1999 Cal. Legis. Serv. ch. 409.

- **California establishes presumption that transfer of community and quasi-community property to a revocable trust is an agreement that those assets retain their character.** 1999 Cal. Legis. Serv. ch. 263.

- **California revises creditor claims procedures.** 1999 Cal. Legis. Serv. ch. 263.

- **Illinois prohibits discrimination of recipients of donated organs based on potential donee's disability.** 1999 Ill. Legis. Serv. P.A. 91-345.

- **Illinois requires reporting of charitable trust for the benefit of a minor or a disabled person to the person's parent or guardian.** 1999 Ill. Legis. Serv. P.A. 91-620.

- **New York revises estate tax apportionment statute relating to qualified terminable interest property.** 1999 N.Y. Legis. ch. 380.

- **North Carolina clarifies the circumstances under which an agent may make gifts under a durable power of attorney.** N.C. Laws S.L. 1999-385.

- **Ohio revises probate laws, including will revocation and bonding requirements.** 1999 Ohio Legis. file 71.

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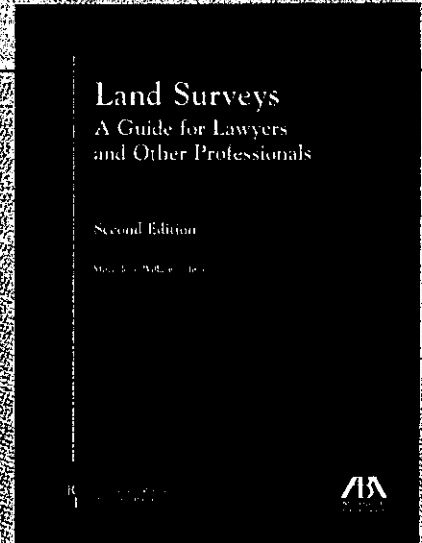
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