

**HB**

**287**

# 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.

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*Standing Committees:*

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# Alaska State Legislature

## House of Representatives



**Representative Max F. Gruenberg, Jr.**  
House District 20

Anchorage (Mountain View, Russian Jack, East Anchorage)  
House Minority Assistant Floor Leader

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### EXPLANATION OF CHANGES

Changes between HB 287 and CSHB 287(JUD) (26-LS1300\S):

- 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 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 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(4) on page 10, lines 22-23, "an individual having legal custody of a minor child" was added to the definition of "fiduciary."
- Under proposed AS 13.70.190(6) on page 11, line 6, "a limited liability partnership" was added to the definition of "person."

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH 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-LS1300R)

**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.

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."

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**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

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**CONFIDENTIAL  
ATTORNEY-CLIENT INFORMATION**

November 30, 2009

**Via email to:** <[Rep.Max.Gruenberg@legis.state.ak.us](mailto: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:

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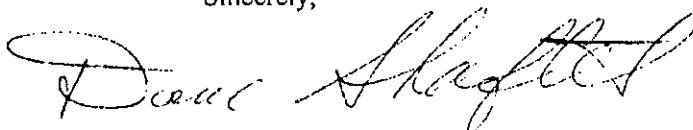
1. AS 13.70.030(a): Allows for conditional disclaimers;
2. AS 13.70.030(b): Requires court approval for a disclaimer by a fiduciary;
3. AS 13.70.030(b): Allows a parent to disclaim for a minor child if the child receives an interest because the parent has disclaimed;
4. AS 13.70.040(a)(3)(D): States 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-LS0615\N" 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.

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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 "accretive portion" of the joint tenancy—that part of the property that the decedent would have received had the tenancy been severed unilaterally. See *Dancy v. 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)(iii) 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)(4) 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.

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.W2d 294 (Tex. Civ. App. 1981); *Estate of Fianga*, 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 Appointments

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.

### Bars 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 *Drye 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.

William P. LaPiana is a professor at The New York Law School in New York City and is Vice Chair of the Probate & Trust Division's Lifetime and Testamentary Charitable Gift Planning (D-1) Committee.

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# FISCAL NOTE

STATE OF ALASKA  
2010 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: HB 287  
(H) Publish Date: 3/4/10

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 Act, and to the disclaimer of property rights under the Uniform Probate Code. RDU Civil  
Sponsor Representative(s) Ramras, Gruenberg Component Commercial and Fair Business  
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>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>	<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 Phone 465-5427  
Division Administrative Services Date/Time 2/26/10 10:00 AM  
Approved by: Daniel S. Sullivan, Attorney General Date 2/26/2010  
Department of Law