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STATE BAR OF MICHIGAN PROBATE AND ESTATE PLANNING SECTION

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The *Michigan Probate and Estate Planning Journal* is aimed primarily at lawyers who devote at least a portion of their practice to matters dealing with wills, trusts, and estates. The *Journal* endeavors to address current developments believed to be of professional interest to members and other readers. The goal of the editorial board is to print relevant articles and columns that are written in a readable and informative style that will aid lawyers in giving their clients accurate, prompt, and efficient counsel.

The editorial board of the *Journal* reserves the right to accept or reject manuscripts and to condition acceptance on the revision of material to conform to its editorial policies and criteria. Manuscripts and letters should be sent to Nancy L. Little, Managing Editor, *Michigan Probate and Estate Planning Journal*, 2125 University Park Drive #250, Okemos, MI 48864, (517) 706-5790, fax (517) 706-0500, e-mail nancy.little@fosterzacklowpc.com.

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Section Web Sites

http://www.icle.org/sections/probate/

http://www.michbar.org/sections/

From the Desk of the Chairperson

By John A. Scott

As I write with the prospect of you all reading this column in short-sleeved shirts and hopefully air-conditioned comfort, it is in fact sweater and jacket weather up here in the Northland. Cherry blossoms have not yet even broken from the buds. Nonetheless, the cockles of my heart have been warmed by a felicitous discovery that I want to share with you. For a long time, I labored under the misapprehension that forms accessible by Adobe Acrobat from a Web site either had to be printed blank or, if they were "fill-in" forms, could only be filled in and printed but couldn't be saved. Other learned and computer-savvy persons agreed that this was a nuisance and limitation on the usefulness of these PDF forms. While I seem to have an alarmingly large collection of ballpoint pens, roller ball pens, and mechanical pencils, I do not own a single pocket protector nor do I wear birth control glasses; thus, my true credentials as a computer geek are suspect at best. Nonetheless, here is what I discovered. You can in fact fill in, save, and print these PDF forms if they have fill-in functionality and if you have Adobe Acrobat 4.0 or higher. While this software is not free (unlike the free Adobe Acrobat Reader, which will NOT allow you to save the documents), the software company is offering a new product at a lower rate than the full Adobe Acrobat called Acrobat Approval 5.0. The company claims this has fill-in and save capabilities. Contact Adobe for more information.

For an example of how the procedure works, go to the Michigan Supreme Court SCAO forms site. You will find this at *http://courts.michigan.gov/scao/courtforms/*. You can go to it directly or you can access it from ICLE's Web site (*http://www.icle.org*) by locating it under their "Links" tab. Once you have their "Links" page open, look in the area called "Forms" for the link to the Michigan Supreme Court SCAO forms. You can fill in these forms on the SCAO Web site; however, with unskilled fingers it is very easy to bounce yourself out of the form and even out of the Web site and have to start all over again. Therefore, saving the form to your own files is the preferred procedure. Note here that saving the form onto your own hard drive without taking special note of where you are putting it is the recipe for disaster. The odds of being able to find it again are low, at best. Therefore, it is recommended that you save it in the specific client folder or some other folder that you will recognize as being the repository for such forms. In order to save it, you will have to follow a rather specific procedure: for example, on the Supreme Court SCAO forms site, find the "Categories of Forms" section; it's about the fifth section from the top; first, click on "Estates – Trusts" under the list of categories of forms. Pick a trial form, such as Application for Informal Probate (pc558.pdf). Here is the first critical step: RIGHT click on the form number (pc558.pdf) that appears on the Estates – Trust page. From the menu that will appear, LEFT click on "Save Target As." From the SAVE window, select the folder that you want to save it in, click on "Save," and exit the SCAO Web site. Reopen the saved file with Acrobat (not with the word-processing program), fill out the form, save it, and print it. For a test of whether this works or not, fill out the first couple of lines of the form, save it, print it, exit and reopen the form and see if the filled-in form survives the exit and reopen. Dah Dahh!!

The same procedure works as well with the IRS fill-in forms. The problem is in locating them. Since they are not under the first set of forms that comes up on the IRS Web site, you need to go to the Web site *http://www.irs.gov/forms_pubs/fillin.html* to get the blank forms that can be filled in. (Please note the underscore between the words "forms" and "pubs.") When you have this Web site open, select the form that you want from the list: one click should highlight it. If it is highlighted, it is selected. Below the window with the list of forms, double-click on the box "Review Selected Files" and up will come the name of the form that you have requested. As before, RIGHT click on the form name and then LEFT click on "Save Target As." Proceed as above and fill out the form using your saved form in the client file.

Armed with information like this, computers and the Internet start acting the way they are supposed to, as obedient and useful helpers as opposed to wicked and mischievous elves.

Yours truly,

John A. Scott, Chair

(As a postscript to our chair's tale of overcoming the challenges of Adobe Acrobat, your editor submits for your consideration a haiku of unknown authorship:

The network has crashed.
I am the Blue Screen of Death.
No one hears your screams. N.L.)

Selected Issues in Drafting Revocable Living Trusts under EPIC (Part 3)

© 2002 by Sebastian V. Grassi, Jr.

This article is part three of a three-part series that highlights 10 select drafting issues that should be considered when drafting a basic revocable living trust for a single person under Michigan's Estates and Protected Individuals Code (EPIC), which went into effect April 1, 2000.[1] The article discusses (i) survivorship and the antilapse rules, (ii) takers of last resort and the State of Michigan, (iii) the apportionment of estate taxes, and (iv) survivorship and the predeceased parent rule. The article also contains examples of sample drafting language for the practitioner's consideration. The article does not discuss marital deduction drafting issues under EPIC.

Part one of the series discussed (i) the liability of a trust for probate estate expenses, claims, and allowances; (ii) the trustee's duty to inform and account; and (iii) the new trust accounting rules. Part two of the series discussed (i) the Prudent Investor Rule, (ii) trustee powers, and (iii) the new definition of the right of representation.[2]

1. **Survivorship and Antilapse Rules.** EPIC imposes a condition of survival on the holder of a future interest under a trust. It requires survival to the date the interest becomes possessory and 120 hours thereafter.[3] If the beneficiary does not survive, EPIC's antilapse rule generally provides for the surviving descendants of the deceased beneficiary to receive the bequest, by right of representation.[4] The antilapse rule cannot be negated by merely stating "to my child, John, if he survives me."[5] In fact, such language (in the absence of an express intent to override the antilapse rule) will result in the imposition of the antilapse rule if John does not survive, and his bequest will be distributed to his surviving descendants by right of representation. A way to avoid the antilapse rule is to explicitly negate the rule.

(A) Drafting example:

*"**Negation of Antilapse Rule.** A gift fails if an individual beneficiary does not satisfy a condition of survival and there is no substitute beneficiary indicated in this trust agreement who satisfies the conditions for taking. The provisions of an antilapse rule shall not apply to preserve a gift for an individual or individuals who are not identified as a substitute or substitutes in this trust agreement."*

2. **Takers of Last Resort and the State of Michigan.** It is not uncommon for a trust to contain a provision that specifies who is to receive the trust estate if all of the contemplated beneficiaries are deceased. These remote contingent beneficiaries are the "takers of last resort." Prior to the adoption of EPIC, it was common for the takers of last resort to be identified as "the settlor's heirs." However, under EPIC §§ 1140 (m) and 2720, the term *heirs* now includes the State of Michigan. In order to exclude the State, the term *heir* should specifically exclude the State of Michigan.

(A) Drafting example:

*"**Alternate Distribution.** If all of the beneficiaries of any trust created under this trust agreement should die before the trust assets have vested in them, Trustee shall distribute all remaining assets of each such trust as follows:*

***(1) One-Half to My Heirs**. One-half (or all, if there are no persons to take under paragraph item (2) below) to my heirs (other than the State of Michigan) who would have taken my estate and such shares as they would have taken it, had I died unmarried and intestate in the state which I was domiciled at the time of my death, determined on the later of my death or the death of the last of such beneficiaries to die; and*

***(2) One-Half to My Spouse's Heirs**. One-half (or all, if there are no persons to take under paragraph item (1) above) to the heirs (other than the State of Michigan) of*

the person to whom I am legally married at the time of my death who would have taken said person's estate and in such shares as they would have taken it, had said person died unmarried and intestate in the state in which I was domiciled at the time of my death, determined on the later of said person's death or the death of the last of such beneficiaries to die.

(3) Balance to Charity. *If there are no persons to take under either paragraph items (1) or (2) above, then all remaining trust assets shall be distributed free of trust to a charitable organization(s) selected by Trustee in memory of myself and my spouse. Trustee is directed to review our prior charitable giving records (if any) to assist Trustee in selecting the charitable organization(s) and the percentage amounts for each charity (if Trustee has selected more than one charitable organization)."*

3. **Apportionment of Estate Taxes Under EPIC.** Unless the governing instrument specifies a different scheme for the apportionment of death taxes under the default rules of EPIC, the residue of the decedent's estate bears taxes subject to the apportionment/recovery rules of IRC §§2206, 2207, 2207A, 2207B and 2603, and EPIC § 3920 (1)(c), which provides for equitable apportionment against property passing by beneficiary designation, survivorship, or intestacy, and to annuities not created under a will or trust.[6] What if the residue is the marital deduction trust under a so-called "reverse pecuniary formula" which funds the credit shelter trust first and leaves the residue to the marital deduction trust? Under EPIC, the marital deduction trust would be responsible for the payment of any federal estate tax attributable to the credit shelter trust, thus reducing the marital deduction amount and resulting in an interrelated (circular) computation.[7] Furthermore, unless the right of recovery of federal estate taxes attributable to the generation-skipping transfer (GST) exempt Reverse QTIP Trust is waived by the surviving spouse's will, EPIC § 3920(7) requires the GST-exempt Reverse QTIP Trust to reimburse the surviving spouse's estate for federal estate taxes attributable to such trust and to do so at the marginal tax rate, thus utilizing (wasting) the original grantor's GST exemption.

(A) An excellent discussion of tax apportionment under EPIC as well as numerous drafting examples are contained in "Tax Apportionment under EPIC" by Thomas F. Sweeney in the Institute of Continuing Legal Education's *10th Annual Drafting Estate Planning Documents Seminar*, which was presented in January 2001. The materials can be viewed online through ICLE's Partnership. Call ICLE at 877-229-4350 or see their Web site at *www.icle.org* for more information.

4. **Survivorship and the Predeceased Parent Rule.** Expanded by the Taxpayer Relief Act of 1997 (TRA 1997), the predeceased parent rule under IRC § 2651(e) is now applicable to GST taxable terminations, taxable distributions and direct skips, and under certain circumstances, includes grand nieces and grand nephews as permissible skip persons vis-à-vis the transferor. (Note: Treasury Regulations have not been updated to reflect TRA 1997. Prior to TRA 1997, only direct skips were eligible for the predeceased parent rule. Thus, Treas Reg § 26.2612-1(f) Example 7, which has not been updated to reflect the changes brought about by TRA 1997, is inaccurate—as concerns the predeceased parent rule.)

(A) If a beneficiary who is a descendant of the transferor (for GST purposes) dies 90 days after the death of the transferor, then the deceased beneficiary's child will "move up" a generation assignment (vis-à-vis the grantor) and be placed in the same generation assignment as his (now deceased) parent was vis-à-vis the transferor.

(B) The 90-day survivorship rule under Treas Reg § 26.2612-1(a)(2)(i) provides, *"A living descendant who dies no later than 90 days after the subject transfer is treated as having predeceased the transferor to the extent that either the governing instrument*

or applicable local law provides that such individual shall be treated as predeceasing the transferor." This survivorship rule expands the predeceased parent rule of IRC § 2651(e) by allowing a grandchild to move up into his parent's generation for GST tax purposes if the parent dies within 90 days of a transferor.

(C) Because EPIC § 2702 imposes only a brief survival period of 120 hours (i.e., 5 days), the statute does not avail itself of the predeceased parent rule. Therefore, it is necessary for the trust (and pourover will) to specifically override EPIC's 120 hour requirement, as is permitted by EPIC § 2702(4)(b), and instead impose a 90-day survival period to take advantage of the predeceased parent rule.

(1) Drafting example:

*"**Survival of Beneficiary.** A living descendant of a transferor who dies no later than 90 days after the subject transfer shall be treated as having predeceased the transferor, as is permitted by Treas Reg § 26.2612-1(a)(2)(i), and no person shall be considered to have survived another or considered to be living upon the death of another if he or she shall die within 90 days after the death of such other."*

Notes

1. MCL 700.1101-700.8102.
2. *See* "Selected Issues in Drafting Revocable Living Trusts under Epic (Part 1)" *Michigan Prob & Est Plan J* Winter 2002, at 2 and "Selected Issues in Drafting Revocable Living Trust under Epic (Part 2)" *Michigan Prob & Est Plan J* Spring 2002, at 2.
3. EPIC §§ 2714 and 2702.
4. EPIC § 2714.
5. EPIC § 2714(c).
6. EPIC §§ 3920 thru 3923.
7. IRC § 2056(b)(4).

Sebastian V. Grassi, Jr., is a partner in the law firm of Grassi & Toering, PLC, located in the Detroit suburb of Troy, Michigan. He is a member of the State Bar of Michigan, the American Bar Association, the Christian Legal Society (where he served on its national Board of Directors), and is a Fellow of The American College of Trust and Estate Counsel. He is also a member of the Probate and Estate Planning Council, which is the governing body of the Probate and Estate Planning Section of the State Bar of Michigan. Sebastian's practice emphasizes business law, estate planning, probate, and real estate.

A prolific author, Sebastian has published over 28 articles on business law, estate planning, and tax matters in the *ACTEC Journal*, *Estate Planning*, the *Journal of Taxation*, the *Journal of Taxation of Estates & Trusts*, the *Michigan Bar Journal*, *Michigan Probate & Estate Planning Journal*, the *Michigan Tax Lawyer*, *The Practical Lawyer*, and *The Practical Tax Lawyer*. A recognized authority in estate planning and business matters, Sebastian is also a frequent lecturer for the State Bar of Michigan's Institute of Continuing Legal Education and serves on its Probate and Estate Planning Advisory Board.

In the 1970's, Sebastian worked in Dhahran, Saudi Arabia as a Special Assistant to the U.S. Army Corps of Engineers Communications Officer.

In 1989, the People's Republic of China invited Sebastian to teach international business law to a group of graduate students in Beijing. (At the time, Sebastian was serving as lead defense counsel for the PRC in an international contract dispute in Detroit federal court.) Sebastian readily agreed, and made the trip. His visit to China coincided with the historic prodemocracy movement and tragic Tianamen Square massacre.

In 1998, the captain of the USS *The Sullivans* invited Sebastian for a three-day, 1200-mile cruise with the ship's crew. While aboard this high-tech guided missile destroyer, Sebastian completed the "Tiger Qualification" program. That training involved navigating and steering the 506-foot, 9-deck warship, and firing some of its weapons. In January 2000, terrorists (linked to Osama bin Laden), tried in a vain attempt to blow up the USS *The Sullivans,* while the ship was refueling in South Yemen. Sadly, just nine months later in October 2000, terrorists attacked the USS *Cole*, *The Sullivans*' sister ship, in a suicide bombing that killed 17 sailors.

On May 6, 2002, at the invitation of the White House, Sebastian and his family (along with five other dignitaries) personally greeted President George W. Bush as he stepped off Air Force One at Detroit Metro Airport. The family's meeting with President Bush was arranged by Michigan's Governor John Engler. President Bush (as well as Governor Engler) seemed to take a special interest in Sebastian's 12-year-old special needs daughter, Laura, who has cerebral palsy and is confined to a wheelchair.

Sebastian can be reached at www.grassiandtoering.com.

Disclaimer Planning after EPIC and the 2001 Tax Act

By Everett R. Zack

I. Introduction

This article provides a general overview of Michigan disclaimer law as embodied in Michigan's Estates and Protected Individuals Code (EPIC), which went into effect on April 1, 2000. The article also discusses various disclaimer strategies that can be employed in light of the Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Tax Act)[1] and the uncertainty of permanent federal transfer tax repeal. The accompanying article on page 35 by Sebastian V. Grassi, Jr., discusses in detail an estate planning technique for modest estates (under two million dollars) that utilizes disclaimers and provides for postmortem flexibility in light of the 2001 Tax Act.

A. State Law

In the early 1990s the Probate and Estate Planning Council appointed a committee to draft a new disclaimer statute for Michigan. That eventually resulted in the passage of 1996 PA 131, the Disclaimer of Succession to Property Interests Act. That Act has been incorporated into EPIC as Part 9 of Article II of EPIC.[2] The current disclaimer legislation is called "Disclaimer of Property Interests Law" and is reproduced in Appendix A.

The disclaimer legislation was intended to accomplish a number of objectives including the following:

- Expand or at least clarify who may make a disclaimer.
- Expand what may be disclaimed.
- Eliminate any fixed time for making a disclaimer.

B. Federal Law

In 1976 the federal law of disclaimer as it pertained to transfer taxes was codified in IRC §2518. This legislation introduced the concept of the "qualified disclaimer." This legislation applies to disclaimers made with respect to transfers done after 1976. For purposes of this article, all transfers are assumed to be post-1976 transfers. IRC §2518 is reproduced in Appendix B.

Treasury Regulations under IRC §2518 have been published and were amended as recently as 1997. Treas Regs §§25.2518-1 through 25.2518-3 are reproduced in Appendix C.

C. Purpose of This Article

This article is not intended to be an exhaustive piece on federal and state disclaimer law. Instead, it is intended to examine the use of disclaimers in a testamentary or estate planning context considering the current transfer taxes as they may change between now and 2011. Using disclaimers to avoid creditors and to eliminate disqualification of an individual for Medicaid eligibility is beyond the scope of this article.

D. Caution

Every disclaimer, regardless of its purpose, should be analyzed under state law and federal transfer tax law.[3]

II. What is a Disclaimer?

There is no definition of a disclaimer under Michigan statutory law. Treas Reg §25.2518-1(a)(1) defines a disclaimer as a refusal to accept the ownership of an interest in property. This definition is consistent with Michigan law but is not broad enough. Under Michigan law a fiduciary may also disclaim a fiduciary power; this right exists even if the governing instrument contains a restriction or limitation on the right of a fiduciary to disclaim a fiduciary power.[4]

A disclaimer is a nonacceptance and is not a transfer. The disclaimant is treated as never

having received the disclaimed interest.[5] Under federal law, the same result is reached:

> . . . the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer.[6]

A disclaimer is said to relate back to the inception of the interest disclaimed. If a beneficiary under the will of a decedent properly disclaims his or her interest in the estate, it is as if the transfer had never been made, and, therefore, it relates back to the date of death. This concept is illustrated in Rev Rul 83-26, 1983-1 CB 234. The husband died in February 1982. The executor made a QTIP election for a trust on the federal estate tax return that was filed in August 1982. The surviving wife perfected a qualified disclaimer in September 1982. The executor argued that the QTIP election precluded the wife from making a qualified disclaimer. The Internal Revenue Service (IRS) held that the disclaimer was valid and relates back to the husband's date of death.

The following chart shows the state requirements for a valid disclaimer and the federal requirements for a qualified disclaimer:

Michigan Requirements	Federal Requirements
No requirement that the disclaimer is irrevocable and unqualified, but the disclaimer must declare the disclaimer and describe the disclaimed interest. MCL 700.2903(1)(b) and (c).	The disclaimer must be irrevocable and unqualified. IRC §2518(b); Treas Reg §25.2518-1(a)(1). It must identify the interest in property disclaimed. Treas Reg §25.2518-2(b)(1).
The disclaimer must be in writing and signed by the disclaimant. MCL 700.2903(1)(a) and (d).	The disclaimer must be in writing and signed by the disclaimant or the disclaimant's representative. Treas Reg §§ 25.2518-2(a)(2) and 25.2518-2(b)(1).
The disclaimer must be delivered as provided in MCL 700.2904, 2905, and 2906. MCL 700.2903(e).	The disclaimer must be delivered to the person specified in Treas Reg §25.2518-2(b)(2). Treas Reg §25.2518-2(a)(3).
The right to disclaim must not have been barred. MCL 700.2910.	The disclaimant must not have accepted the interest disclaimed or any benefits. Treas Reg §25.2518-2(a)(4).
There is no time limit on a disclaimer.	The disclaimer must be delivered within nine months after the later of the date on which the transfer creating the interest in the disclaimant is made, or within nine months after the day on which the disclaimant attains age 21, whichever is later. Treas Reg §25.2518-2(c)(1).
There is no comparable provision. There also is no provision that would permit the disclaimant to direct to whom the disclaimed interest will pass.	The interest disclaimed must pass either to the surviving spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer. Treas Reg §25.2518-2(a)(5).

A form of disclaimer appears in form 1 on page 33.

III. Who May Disclaim?

A. Disclaimer of a Property Interest

A person, or a fiduciary representing a person to whom a disclaimable interest devolves, may disclaim a disclaimable interest.[7] This section, when read in conjunction with the definitions cited below, greatly expands, or at least clarifies, who may make a valid disclaimer.

- A *person* includes an individual and an entity, but does not include a fiduciary, an estate, or a trust.[8] **NOTE:** The definition does not refer to an adult individual or to a competent individual. However, caution would dictate

that a fiduciary be appointed for a minor or an incompetent adult and that the fiduciary accomplishes the disclaimer.

- A "fiduciary" includes an agent, a conservator, a guardian if no conservator has been appointed, a guardian *ad litem*, a personal representative, a trustee, a probate court acting through a protective order, and a temporary, successor, or foreign fiduciary.[9] **NOTE:** A trustee, with respect to the trust as a whole or with respect to a separate trust established under the governing instrument, may disclaim a disclaimable interest, *but only to the extent that the governing instrument expressly gives the trustee the right to disclaim*.[10] **NOTE:** A custodian under the Michigan Uniform Transfers to Minors Act[11] may not disclaim an interest on behalf of the minor because a custodian is not included in the definition of a "fiduciary."
- An "agent" means an agent or attorney-in-fact acting under a written power of attorney and within the scope of his or her authority.[12] **NOTE:** A provision in a power of attorney granting the agent the authority to do whatever the principal could do, or words of similar effect, includes the authority to disclaim, unless the authority to disclaim is specifically excluded or limited. A power of attorney may limit or prohibit the agent's ability to disclaim on behalf of the principal.[13]

As noted above, a trustee has no authority to disclaim a disclaimable interest that passes to the trust. A trustee has only the power to disclaim what is given to the trustee in the governing instrument.[14] If the trustee has a limited right to disclaim, the trustee may seek relief from the limitations under MCL 700.7402. If the trust agreement is silent on the trustee's right to disclaim, it is not clear that the trustee may obtain relief under MCL 700.7402 since the latter section only refers to relief from restrictions placed on the trustee by the trust instrument or by Part 4 of Article VII of EPIC.

The last sentence of MCL 700.2902(2) states:

> Except for a trust [*sic*, trustee], . . . the right to disclaim a disclaimable interest exists notwithstanding a spendthrift provision or a restriction or limitation on the right to disclaim contained in the governing instrument.

This provision is ambiguous. The provision starts out with the clause, "Except for a trust . . . ." That clause was meant to refer to the trustee of a trust and not to the trust agreement in general. It was the original intent of the committee drafting this legislation to prohibit restrictions on the right of a beneficiary of a trust to disclaim. In other words, in a trust agreement, a trustee has no right to disclaim and may be given a limited or unlimited right to disclaim in the trust agreement. However, a beneficiary of a trust has the right to disclaim notwithstanding any restriction or limitation on the right to disclaim contained in the governing instrument.[15]

A limitation on the right of a surviving spouse to disclaim is contained in MCL 700.2910(3). A surviving spouse who is the beneficiary of a property interest for which a marital deduction is claimed cannot disclaim his or her interest after nine months after the date of death of the deceased spouse. This provision was inserted in the legislation because the committee was concerned that without this limitation, the IRS might take the position that a marital deduction provision in a Michigan will or trust would not qualify for the marital deduction. However, that was not the case in Rev Rul 83-26, 1983-1 CB 234 cited in section II of this article. That limitation appears to no longer be necessary.

An owner of joint property (defined in MCL 700.2901(2)(g) to include property owned by two or more persons with rights of survivorship) may also disclaim. The rules concerning the disclaimer of a joint interest are discussed further under section IV. C. of this article.

B. Disclaimer of a Fiduciary Power

A trustee cannot disclaim property coming into the hands of the trustee unless the trust instrument specifically confers the power of disclaimer upon the trustee. A fiduciary may disclaim a fiduciary power. The governing instrument may not limit the right of a fiduciary to disclaim.[16] A *fiduciary power* means a management power relating to the administration or management of assets similar to those powers granted to a personal representative in MCL 700.3715 and a trustee in MCL 700.7401, and granted by law to a fiduciary or conferred upon a fiduciary in a governing instrument.[17]

C. Disclaimer by a Custodian

A custodian of a UTMA cannot disclaim the account property or the account.

IV. What May Be Disclaimed

A. Disclaimable Interests

The statute gives a person and certain fiduciaries the right to disclaim a disclaimable interest.[18] A "disclaimable interest" includes property, the right to receive or control property, and a power of appointment.[19] The term "property" is broadly defined in MCL 700.2901(2)(i) to include every conceivable type of property. The Reporter's Comment to MCL 700.2901 in *Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin*[20] gives two examples of the right to control property that may be disclaimed. These include the right to remove and replace a trustee and the discretionary authority of a fiduciary to distribute income and principal. Note, however, that a trustee's authority to disclaim is limited to the express authority that is given to the trustee in the governing instrument.[21]

B. Partial Interests

Disclaimable interests may be disclaimed in whole or in part. A person may disclaim a fractional interest or a percentage interest or a limited interest (e.g., a life estate).[22] One may also disclaim one or more of several assets without disclaiming all of the assets. Some examples of partial disclaimers are set out below:

- One may disclaim 50 percent of life insurance proceeds or one-fourth of a retirement benefit.
- A beneficiary of a trust which provides for the distribution of income and principal to the beneficiary and other beneficiaries with remainder to all beneficiaries upon the occurrence of a specified event (e.g., when the youngest beneficiary attains a certain age) may disclaim the current right to income and principal and retain the right to the remainder interest. However, this will not accelerate the beneficiary's right to the remainder.[23]
- A surviving widow who is the current beneficiary of a family trust (remainder to the children upon the death of the widow) may disclaim her interest and this will accelerate the passing of the remainder interest to the children.[24]

See Treas Reg §25.2518-3(a) for the rules dealing with a disclaimer of a partial interest for federal tax purposes.

C. Joint Interests

Disclaiming a joint interest should be approached with some caution. Fortunately, the Michigan statute clarifies what may be disclaimed and the results of that disclaimer. Similarly, the federal estate and gift tax issues associated with the disclaimer have also been clarified, at least since final regulations were promulgated in 1997 and became effective on December 31, 1997.

Definitions are the starting points for analyzing a disclaimer of a joint interest under Michigan law. The definition of "joint property" contained in MCL 700.2901(2)(g) is fairly straightforward:

> Joint property means property that is owned

> by 2 or more persons with rights of survivorship, and includes a tenancy by the entireties in real property, a tenancy in personal property as provided in section 1 of 1927 PA 212, MCL 557.151, a joint tenancy, a joint tenancy with rights of survivorship, and a joint life estate with contingent remainder in fee. For purposes of this part, joint property is considered to consist of a present interest and a future interest. The future interest is the right of survivorship.

The definition of a disclaimable interest under MCL 700.2901(2)(b) contains another important facet of joint property:

> Disclaimable interest does not include an interest retained by or conferred upon the disclaimant by the disclaimant at the creation of the interest. For purposes of this definition, the survivorship interest in joint property is not considered to be an interest retained or conferred upon the disclaimant even if the disclaimant created the joint property.

A owns a parcel of real estate in her name alone. She deeds the real estate to "A and B as joint tenants with rights of survivorship." B may disclaim her entire interest in the parcel of real estate if she does so before she does anything that would bar her right to disclaim. If B exercised this right, B would be giving up the right to the present interest and the future interest. B could also disclaim the present interest and that would convert the interest to a life estate in A with remainder to B. Similarly, B could disclaim the future interest and that would convert the interest to a joint life estate remainder to A.

What if B does something to accept the joint property? For example, assume that A and B rent the property and divide the rent and the expenses. The argument can be made that what B has accepted is her portion of a joint life estate. B may no longer disclaim the present interest. However, B may still disclaim the survivorship interest. If B disclaims the survivorship interest, B has really disclaimed the right to receive A's one-half interest if A dies before B. On the other hand, if A and B join in a mortgage, has B then accepted both the present interest and the future interest? The better argument is that B has simply mortgaged her one-half interest and she may still disclaim the survivorship interest if A dies before B.

The IRS position on the disclaimer of a joint interest has had a checkered past. Fortunately, in 1997 the IRS issued final regulations that have greatly simplified the tax rules pertaining to the disclaimer of joint interests. These regulations distinguish between joint interests in joint bank, brokerage, and investment accounts and joint interests in other assets. See Treas Reg §25.2518-2(c)(4), which is discussed in further detail under section V. C. of this article.

D. Powers of Appointment

A power of appointment may be disclaimed.[25] The Powers of Appointment Act of 1967, MCL 556.111 et seq., defines a power of appointment as follows:

> Power of appointment means a power created or reserved by a person having property subject to his disposition which enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; but it does not include a power of sale, a power of attorney or a power of amendment or revocation.[26]

That Act defines *donee* as the person to whom the power is granted or reserved.[27] An *appointee* is defined as the person to whom an interest in property is designated or transferred by exercise of the power.[28] Presumably these definitions apply to EPIC. A power of appointment usually involves three possible disclaimants: the donee of the power, the appointee, and the taker in default.

E. Disclaim Both Present Interest and Future Interest

Under EPIC, a person needs to disclaim

both his interest in the property as a devisee/beneficiary and as an heir at law of the decedent.[29]

V. How to Perfect the Disclaimer

A. In General

Once the situation has been analyzed, the tax consequences have been determined, and a decision to disclaim has been reached, then the disclaimer must be perfected. This involves three elements: drafting the written disclaimer, determining the time limit for perfecting the disclaimer, and making proper delivery of the written disclaimer.

B. Drafting the Written Disclaimer

Michigan law, MCL 700.2903(1), and the regulations, Treas Reg §25.2518-2, require that the disclaimer is in writing, that it declares the disclaimer (for federal tax purposes it must be irrevocable and unqualified), that it identifies the property being disclaimed, and that it is signed by the disclaimant. A form of disclaimer appears in form 1.

The disclaimer is not required to be acknowledged, but acknowledgment is beneficial if the disclaimer is to be recorded with the register of deeds. Although not necessary, it is helpful to have the name, address, and telephone number of the preparer on the disclaimer.

The following items should be included in the written disclaimer:

- The disclaimant should be identified and it may be helpful to include his, her, or its address. If the disclaimant is disclaiming as a fiduciary, the fiduciary capacity should be identified.
- The disclaimer should recite the disclaimer as being unconditional and unqualified.
- The property interest or fiduciary power being disclaimed should be identified.
- The disclaimant should certify that he, she, or it has not accepted the interest or any benefits from the interest.
- The disclaimant must sign the disclaimer.
- The date of delivery of the disclaimer should be established (e.g., by acknowledgment of receipt by the person or entity to whom the disclaimer is delivered).

C. Time Constraints

The most significant change embodied in the Michigan legislation is the lack of a specific time constraint on the disclaimer. Absent some activity that bars the right to disclaim, a disclaimant may perfect the disclaimer for state law purposes at any time. There are instances—and there will be more in the future as the amount of property that is exempt from federal estate tax increases—where the lack of qualification of the disclaimer as a "qualified disclaimer" for federal tax purposes will not be a detriment.

The most significant time constraint is the one that is imposed for a qualified disclaimer for federal tax purposes. Basically, the disclaimer must be perfected within nine months of the day on which the transfer creating the interest in the disclaimant is made. An exception is made for minors. A minor has until nine months after he or she attains age 21.[30]

A timely mailing of the disclaimer is treated as a timely delivery for federal tax purposes if the mailing requirements of paragraphs (c)(1) and (c)(2) of Treas Reg §301.7502-1 are met. These requirements are as follows:

- The disclaimer is contained in an envelope that is properly addressed.
- The disclaimer is deposited within the prescribed period with the domestic mail service of the U.S. Postal Service and with sufficient postage.

If the last day of the period falls on a Saturday, Sunday, or legal holiday (as defined in Treas Reg §301.7503-1(b)), then delivery is timely if delivery is made on the first succeeding day which is not a Saturday, Sunday, or legal

holiday.[31]

For purposes of this discussion, the date of death of the transferor is the date of the transfer. This rule applies to transfers by will, by trust (in most instances the trust becomes irrevocable on the death of the person establishing), and by beneficiary designation (life insurance policies and retirement benefits). In the case of an irrevocable trust (e.g., an irrevocable life insurance trust), the date of the transfer is the date property is transferred to the trust and not the date of the trust agreement. The date of the transfer is the date on which the gift is a completed gift for gift tax purposes. Note that a beneficiary of an irrevocable life insurance trust may disclaim his or her entire interest in the trust when the first transfer is made, or the beneficiary could simply disclaim that particular transfer without disclaiming future transfers.[32] **DRAFTING NOTE:** Make sure a revocable living trust remains revocable even on disability of the settlor. Give the settlor a testamentary limited power of appointment over trust corpus so there is no completed gift for gift tax purposes if the trust becomes irrevocable as a result of the settlor's disability.

In many instances, joint ownership will give rise to two different dates of transfer. The interest to which the disclaimant succeeds upon creation of the joint interest (i.e., the present interest) must be disclaimed within nine months of the creation of the joint interest.[33] There is an exception for joint bank, brokerage, and investment accounts. If the transferor can unilaterally regain the transferor's contribution to the account so that no completed gift takes place, then the nine months starts to run from the date of death of the transferor.[34] Therefore, in some instances, the survivorship interest may be disclaimed within nine months after the first joint owner dies. Typically, joint bank accounts are set up so that either party may withdraw without the consent of the other party. However, this is not generally the case with brokerage and investment accounts. In most of these accounts, the funds are withdrawable only by both parties, and checks issued by the financial institution are made payable to all the joint owners. When the first joint owner dies, the surviving joint owner has the ability to disclaim the survivorship interest (the right to receive the one-half interest from the deceased joint owner). This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant, regardless of the portion of the property that is included in the decedent's gross estate, and regardless of whether the interest can be unilaterally severed under local law.[35]

A person who succeeds to an interest in property as a result of a disclaimer has nine months from the original transfer in which to disclaim. If A dies on January 1, 2001 and leaves his estate to B, or if B does not survive A, to C, and if B disclaims on August 1, 2001, C must disclaim on or before October 1, 2001.

D. Delivery

A disclaimer must be delivered in order to perfect it.[36] The person to whom the disclaimer must be delivered is obvious in most instances.

- In the case of a property interest arising out of a decedent's estate (a devise in a will or an inheritance by intestate succession), the disclaimer must be delivered after the death of the decedent to the personal representative.[37]
- In the case of a property interest arising out of a trust (a testamentary trust or a living trust), the disclaimer must be delivered to the trustee or one of the trustees if there are multiple trustees. If no testamentary trustee has been appointed, the disclaimer may be delivered to the personal representative of the estate.[38]
- If a fiduciary has not been appointed or cannot be located, the disclaimer may be filed with the probate court that has jurisdiction.[39]
- If the disclaimer arises out of a beneficiary

designation, the disclaimer must be delivered to the payor (the insurance company in the case of a life insurance policy or annuity and the trustee of a retirement plan or the custodian of an IRA).[40]

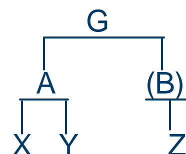
- If the disclaimer arises out of jointly owned property, the disclaimer must be delivered to the person who created the joint property, to a remaining owner who has not disclaimed, or to the person or fiduciary who is entitled to the property in the event of a disclaimer.[41]
- An appointee of property under a power of appointment must deliver the disclaimer to the donee, the personal representative of the donee's estate, or to the fiduciary under the instrument that created the power of appointment.[42]

The disclaimer may be delivered personally, by mail, or by any means reasonably likely to accomplish delivery. In the case of a decedent's estate, a copy of the disclaimer may be filed with the probate court. If real estate is involved, a copy of the disclaimer may be filed with the register of deeds in the county in which the property is located.[43]

VI. What is the Effect of a Disclaimer?

A. Decedent Estate and Testamentary Trust

If the disclaimed interest arises under a will, a testamentary trust, or under the laws of intestacy, and the decedent has not otherwise provided for that interest or for disclaimed interests in general, then the property passes as if the disclaimant died before the decedent.[44] However, if the descendants of the disclaimant would take the disclaimant's share by representation if the disclaimant predeceased the decedent, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the decedent.[45] This latter sentence is illustrated in the Reporter's Comments to MCL 700.2907 in *Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin*[46] as follows:

> The second sentences in subsections (1) and (3) prevent an heir from, for example, using a disclaimer to change the division of an intestate's estate. Consider a situation in which G dies intestate, leaving child A (who has two children, X and Y, G's grandchildren) and a grandchild Z, the only child of B, G's deceased child:
>
> 
>
>
> Under these facts, G's intestate estate is divided into two equal parts: A takes half and B's child, Z, takes the other half. Suppose A makes a disclaimer. If the disclaimer statute merely provided that the "disclaimed interest" devolves as though the disclaimant (A) had predeceased the decedent, then A's one-half interest would not pass only to X and Y but to X, Y, and Z. Under those circumstances, X, Y, and Z would each receive one-third. The second sentences of subsections (1) and (3) prevent this result. X and Y each receive 1/4, and Z receives 1/2.

If a future interest will take effect in possession or enjoyment upon termination of a present interest, then when the holder of the present interest disclaims that interest, the holder of the future interest takes possession as though the disclaimant had predecessed the decedent. For instance, A dies leaving a testamentary trust in which B is entitled to income for life, remainder to C. If B disclaims the income interest, then the trust terminates and the remaining trust property goes to C. If, on the other hand, the trust provided that B is entitled to income until B reaches age 25, and then the trust terminates and the remainder goes to B, B's disclaimer of the income interest when he is 21 will not accelerate the remainder interest. B must still wait until he attains age 25.[47]

Note that MCL 700.2907 recognizes that a governing instrument may determine the effect of a disclaimer. The statute is simply the default

provision.

If a donee of a power of appointment that arises under a will or testamentary trust disclaims, the property subject to the power passes as if the disclaiming donee died before the decedent.[48]

B. Other Governing Instruments

If the disclaimed interest arises under a governing instrument other than a will or a testamentary trust contained in a will (e.g., a living trust, an insurance policy, an IRA, etc.), the disclaimed interest passes as if the disclaimant had died before the time when the interest was entitled to take effect in possession or enjoyment.[49] However, if the descendants of the disclaimant would take the disclaimant's share by representation if the disclaimant died before the interest was entitled to take effect in possession or enjoyment, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the effective date of the instrument.[50] This latter sentence is illustrated in the Reporter's Comments to MCL 700.2907 in *Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin,*[51] which is set forth in the immediately preceding section of this article (VI. A.).

As in the case of disclaimed interests that arise under a will or testamentary trust, if a future interest will take effect in possession and enjoyment upon termination of a present interest, then when the holder of the present interest disclaims that interest, the future interest becomes possessory as though the disclaimant had predeceased the decendent. See the example in section VI. A., immediately preceding this section.[52]

Note that MCL 700.2907 recognizes that a governing instrument may determine the effect of a disclaimer. The statute is simply the default provision. See form 2 on page 33 for a sample provision dealing with disclaimers in a trust context.

If the donee of a power of appointment that arises out of a governing instrument other than a will or testamentary trust disclaims, the property subject to the power passes as if the disclaimant died before the effective date of the agreement.[53] The "effective date of a governing instrument other than a will or testamentary trust" is defined in MCL 700.2901(2)(c) to mean the date on which property right vests or a contract right arises, even though either right is subject to divestment. The Reporter's Comments to MCL 700.2901(c) in *Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin*[54] makes the following observation:

> . . . a governing instrument is effective even if it is still revocable. For example, under this definition, a beneficiary of a revocable, living trust may disclaim his or her interest before the trust becomes irrevocable. This is consistent with the proposition that vested property rights are created when the trust comes into existence, even though those property interests are subject to divestment. The trust comes into existence when the three elements of the definition in section 2901(2)(j) are present, namely, the intent to create a fiduciary relationship, a beneficiary, and property. In a typical revocable, living trust, a trust agreement might be signed, but the trust does not exist (within the definition in subsection (j)) until property is transferred to the trust.

C. Joint Interest

If the disclaimed interest arises out of joint property and the disclaimant is not the only living owner, the disclaimed interest passes to the other surviving joint owners or the other surviving joint owner if there is only one. If the disclaimant is the only surviving joint owner, the disclaimed interest passes to the estate of the last to die of the other joint owners.[55]

VII. What Bars the Right to Disclaim?

A. Time Bar

As indicated above, Michigan no longer has a specific time limit during which a disclaimer must be exercised. The passage of time alone will not give rise to a loss of the right to disclaim.

B. Events

MCL 700.2910 lists the following events that bar the right to disclaim:

- An assignment, conveyance, encumbrance, pledge, or transfer of the property or a contract for such a transaction.
- A written waiver of the right to disclaim.
- An acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.
- A sale of the property under judicial sale.
- The expiration of the permitted applicable perpetuities period.

Presumably any of the above events would also bar the right to make a qualified disclaimer for federal tax purposes.

MCL 700.2910(2) carves out some exceptions. A partial bar does not preclude the disclaimant from disclaiming all or any part of the balance of the property if the disclaimant has received a portion of the property and there still remains an interest that the disclaimant is yet to receive. An income beneficiary of a trust that has received income is not precluded from disclaiming the remaining income payments. An act that bars the right to disclaim a present interest in joint property does not bar the right to disclaim a future interest in joint property. If a joint owner accepts a portion of the rents from the jointly owned property, that owner has accepted the benefits of the present interest, but is not precluded from disclaiming the survivorship interest (i.e., the right to succeed to the other joint owner's interest when that other joint owner dies).

A spouse who is the beneficiary of a property interest for which a marital deduction is claimed cannot disclaim his or her interest after nine months after the date on which the governing instrument containing the transfer is irrevocable.[56]

Treas Reg §25.2518-2(d)(1) contains the following statement:

> Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in the property . . . and directing others to act with respect to the property or interest in property. However, merely taking delivery of an instrument of title, without more, does not constitute acceptance. Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. In the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property.

VIII. What Law Governs

There are no reported Michigan cases dealing with the choice of law with respect to disclaimers. It is reasonably safe to conclude that a disclaimer of a property interest transferred under a will probated in Michigan or transferred pursuant to a trust governed by Michigan law will be governed by Michigan law even if the beneficiary is not a resident of Michigan. But what law will govern if a resident of Michigan disclaims an interest as a beneficiary of an

insurance policy issued by a New York insurance company and the policy provides that New York law governs?

IX. A Suggestion

Much has already been written about how to address the changing federal tax landscape, particularly when and if (a big if) it is repealed. The following technique is offered for a married couple, neither of whom has children by a prior marriage.

The trust for each spouse would contain a provision giving the surviving spouse the right to withdraw all or any portion of the deceased spouse's trust if the right is exercised within eight months of the death of the deceased spouse. See form 3 on page 33 for such a provision. When the first spouse dies, the surviving spouse then has the right to withdraw the trust assets. This may very well be advantageous if the estate tax has been repealed. However, if the tax has not been repealed and the surviving spouse chooses not to exercise the right to withdraw, the right to withdraw should be disclaimed prior to the expiration of the eight-month period since the right to withdraw constitutes a general power of appointment. If the surviving spouse does not disclaim and the eight-month period expires, the spouse has allowed a general power of appointment to lapse. The lapse of a general power of appointment is treated as a release and constitutes a transfer of the property giving rise to gift tax implications.[57]

X. Conclusion

As time carries us through the federal tax law changes over the next several years, and as more yet unknown changes take place, estate planners must plan for flexibility. The judicious and appropriate use of the disclaimer can add significantly to that flexibility. From 1948, when the marital deduction was introduced, to the 1969 Tax Reform Act, the federal transfer tax was relatively stable. Since 1969, the only constant has been change.

Notes

1. Pub L No 107-16, 115 Stat 38 (2001).
2. MCL 700.2901 through 700.2912
3. For a complete discussion of the tax aspects of disclaimers, *see* Wenig, 848 Tax Management Portfolio (BNA), *Disclaimers*.
4. MCL 700.2902(3).
5. MCL 700.2909(2).
6. Treas Reg §25.2518-1(b).
7. MCL 700.2902(1).
8. MCL 700.2901(2)(h).
9. MCL 700.2901(2)(d).
10. MCL 700.2902(1).
11. MCL 554.521 *et seq.*
12. MCL 700.2901(2)(a).
13. MCL 700.2902(2).
14. MCL 700.2902(1).
15. *See* Underwood and Zack, Disclaimer of Property Interests Act: Public Act 131 of 1996, *15 Michigan Prob & Est Plan J*, Spring-Summer 1996, last paragraph of section IV.A. on page 12.
16. MCL 700.2902(3).
17. MCL 700.2901(2)(e).
18. MCL 700.2902(1).
19. MCL 700.2901(2)(b).
20. Institute of Continuing Legal Education, *Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin*, at 128-129 (2002 ed).
21. MCL 700.2902(1).
22. MCL 700.2902(1).
23. MCL 700.2907(4). For federal tax purposes, *see* Treas Regs §§25.2518-2(e)(1)(ii) and 25.2518-3(a)(1).
24. MCL 700.2907(4).
25. MCL 700.2901(2)(b).
26. MCL 556.112(c).
27. MCL 556.112(e).
28. MCL 556.112(f).
29. *See*, Treas Reg §25.2518-2(e)(3)(i) and (ii).
30. IRC §2518(b)(2); Treas Reg §25.2518-2(c).
31. Treas Reg §25.2518-2(c)(2).
32. Treas Reg §25.2518-2(c)(3).
33. Treas Reg §25.2518-2(c)(4).

34. Treas Reg §25.2518-2(c)(4)(iii).
35. Treas Reg §25.2518-2(c)(4)(i).
36. MCL 700.2904 and .2905; Treas Reg §25.2518-2(b)(2).
37. MCL 700.2904(1).
38. MCL 700.2904(1) and 2904(2)(a).
39. MCL 700.2906(2)(a).
40. MCL 700.2904(2)(c).
41. MCL 700.2905(2).
42. MCL 700.2905(1).
43. MCL 700.2906(3).
44. MCL 700.2907(1).
45. MCL 700.2907(1).
46. ICLE, *supra* note 20, at 137.
47. MCL 700.2907(2).
48. MCL 700.2908(2)(a).
49. MCL 700.2907(3)
50. MCL 700.2907(3).
51. ICLE, *supra* note 20, at 137.
52. MCL 700.2907(4).
53. MCL 700.2908(2)(b).
54. ICLE, *supra* note 20, at 129.
55. MCL 700.2908(1)(a).
56. MCL 700.2910(3).
57. IRC §2514(b), (e).

Appendixes

Appendix A: Michigan Law Concerning Disclaimers, as Codified in EPIC*
Appendix B: IRC §2518
Appendix C: Treas Regs §§25.2518-1 through 25.2518-3

* The author wishes to thank Sebastian V. Grassi, Jr., for furnishing a computerized version of the Disclaimer of Property Interests Act in Appendix A.

Forms

Form 1: Disclaimer
Form 2: Trust Provision (Disclaimer)
Form 3: Trust Provision (Spouse's Right)

Appendix A: Michigan Law Concerning Disclaimers, as Codified in EPIC

§ 700.2901. Short title of part; definitions.

Sec. 2901. (1) This part shall be known and may be cited as the “disclaimer of property interests law”.

(2) As used in this part:

(a) “Agent” means an agent or attorney in fact acting under a written power of attorney and within the scope of his, her, or its authority.

(b) “Disclaimable interest” includes, but is not limited to, property, the right to receive or control property, and a power of appointment. Disclaimable interest does not include an interest retained by or conferred upon the disclaimant by the disclaimant at the creation of the interest. For purposes of this definition, the survivorship interest in joint property is not considered to be an interest retained or conferred upon the disclaimant even if the disclaimant created the joint property.

(c) “Effective date of a governing instrument other than a will or testamentary trust” means the date on which a property right vests or a contract right arises, even though either right is subject to divestment.

(d) “Fiduciary” includes, but is not limited to, an agent, a conservator, a guardian if no conservator has been appointed, a guardian ad litem, a personal representative, a trustee, a probate court acting through a protective order under this act, and a temporary, successor, or foreign fiduciary.

(e) “Fiduciary power” means a management power relating to the administration or management of assets similar to those powers granted to a personal representative in section 3715 and a trustee in section 7401, and granted by law to a fiduciary or conferred upon a fiduciary in a governing instrument.

(f) “Governing instrument” means a deed, assignment, bill of sale, will, trust, beneficiary designation, contract, instrument creating or exercising a power of appointment or a power of attorney, or another instrument under which property devolves, a property right is created, or a contract right is created. Governing instrument includes the provable terms of an oral contract or arrangement under which property devolves or a property right is created.

(g) “Joint property” means property that is owned by 2 or more persons with rights of survivorship, and includes a tenancy by the entireties in real property, a tenancy in personal property as provided in section 1 of 1927 PA 212, MCL 557.151, a joint tenancy, a joint tenancy with rights of survivorship, and a joint life estate with contingent remainder in fee. For purposes of this part, joint property is considered to consist of a present interest and a future interest. The future interest is the right of survivorship.

(h) “Person” includes an entity and an individual, but does not include a fiduciary, an estate, or a trust.

(i) “Property” means anything that may be the subject of ownership. Property includes both real and personal property and an interest in property, including a present interest; a future interest; a legal interest; an equitable interest; an interest acquired by testate succession, by intestate or other statutory succession, by succession to a disclaimed interest, or by lapse or release of a power of appointment; or an interest that may be otherwise acquired under a governing instrument.

(j) “Trust” means a fiduciary relationship with respect to property that subjects the person who holds title to the property to equitable duties to deal with the property for the benefit of another person, which fiduciary relationship arises as a result of a manifestation of an intention to create it. Trust includes an express trust, private or charitable, with additions to the trust, whether created by will or other than by will, and includes a trust created by statute, judgment, or decree under which the trust is to be administered in the manner of an express trust. Trust does not include a constructive trust or a resulting trust.

§ 700.2902. Right to disclaim; partial disclaimers; limitation on right to disclaim.

Sec. 2902. (1) A person, or a fiduciary representing a person to whom a disclaimable interest devolves, may disclaim a disclaimable interest in whole or in part. A trustee, with respect to the trust as a whole or with respect to a separate trust that is or will be established under the governing instrument, may disclaim a disclaimable interest, in whole or in part, but only to the extent that the governing instrument expressly gives the trustee the right to disclaim.

(2) A disclaimer may be of a fractional or percentage share or of a limited interest or estate. A provision in a power of attorney granting the agent the authority to do whatever the principal could do, or words of similar effect, includes the authority to disclaim, unless the authority to disclaim is specifically excluded or limited. Except for a trust or a power of attorney, the right to disclaim a disclaimable interest exists notwithstanding a spendthrift provision or a restriction or limitation on the right to disclaim contained in the governing instrument.

(3) A fiduciary may disclaim a fiduciary power. The right to disclaim a fiduciary power exists notwithstanding a restriction or limitation on the right to disclaim contained in the governing instrument.

§ 700.2903. Contents; signature.

Sec. 2903. (1) A disclaimer is not valid unless it complies with all of the following:

(a) Is in writing.

(b) Declares the disclaimer.

(c) Describes the disclaimed interest.

(d) Is signed by the disclaimant.

(e) Is delivered as provided in sections 2904, 2905, and 2906.

(2) If a disclaimable interest is disclaimed by a fiduciary on behalf of the person to whom the disclaimable interest devolves, the disclaimer must be signed by all incumbent fiduciaries. Unless the governing instrument requires otherwise, a disclaimer of a disclaimable interest by a trustee may be signed by less than all incumbent trustees. A disclaimer of a fiduciary power by a fiduciary may be signed by less than all incumbent fiduciaries.

§ 700.2904. Delivery; timing; appropriate persons.

Sec. 2904. (1) Except as provided in section 2905, if a disclaimed interest arises under a will or testamentary trust, or by the laws of intestacy, the disclaimer must be delivered after the death of the owner of the property and before any event described in section 2910. If a disclaimed interest arises under a will or by the laws of intestacy, the disclaimer must be delivered to the personal representative of the deceased owner's estate. If a disclaimed interest arises under a testamentary trust, the disclaimer must be delivered to the trustee of the testamentary trust or, if a trustee has not been appointed, to the personal representative of the deceased owner's estate.

(2) Except as provided in section 2905, if a disclaimed interest arises under a governing instrument other than a will or testamentary trust, the disclaimer must be delivered after the effective date of the governing instrument and before any event described in section 2910. A disclaimer under this subsection must be delivered in 1 of the following manners:

(a) If the disclaimer is made by a beneficiary of a trust, the disclaimer must be delivered to the trustee.

(b) If the disclaimer is made by a donee with respect to a gift from a living donor, the disclaimer must be delivered to the donor of the gift.

(c) If the disclaimer is made by a beneficiary under a beneficiary designation, the disclaimer must be delivered to the payor.

(d) If the disclaimer is made by a trustee with respect to a separate trust that is or will be established under the governing instrument, the disclaimer must be delivered to another incumbent trustee of that trust who has not disclaimed or to all the beneficiaries of that trust who are then living and whose whereabouts are known or reasonably ascertainable.

§ 700.2905. Delivery; disclaimer under power of appointment; disclaimer of joint property or fiduciary power.

Sec. 2905. (1) A disclaimed interest that is subject to, or arises under, an exercise, release, or lapse of a power of appointment, must comply with the following:

(a) A disclaimer by an appointee must be delivered to the donee, to the personal representative of the donee's estate, or to the fiduciary under the instrument that created the power of appointment. The disclaimer by the appointee must be delivered after the exercise of the power of appointment by the donee and before any event described in section 2910.

(b) A disclaimer by a taker in default must be delivered to the donee, to the fiduciary under the instrument that created the power of appointment, or to 1 of the persons entitled to the property in the event of a disclaimer. The disclaimer by a taker in default may be delivered before or after the lapse or release of the power of appointment, and must be delivered before any event described in section 2910.

(2) If the disclaimed interest arises out of joint property, the disclaimer must be delivered after creation of the joint ownership and before any event described in section 2910, to the person who created the joint property, to a remaining owner who has not disclaimed, or to the person or fiduciary entitled to the disclaimed interest in the event of a disclaimer. The barring of the right to disclaim a present interest under section 2910 does not bar the right to disclaim the future interest.

(3) A fiduciary power may be disclaimed at any time, before or after exercise of the power. The disclaimer must be delivered to the person who established the instrument that gave rise to the power or to 1 of the following:

(a) If the fiduciary is a personal representative, to all the devisees under the will who are then living and whose whereabouts are known or reasonably ascertainable.

(b) If the fiduciary is a trustee, to another incumbent trustee who has not disclaimed the power or to all the beneficiaries of the trust who are then living and whose whereabouts are known or reasonably ascertainable.

(c) If the fiduciary is a guardian or conservator, to the interested persons.

(d) If the fiduciary is an agent, to the principal or, if the principal is legally incapacitated, to the principal's presumptive heirs at law.

§ 700.2906. Manner of delivery; filing with court.

Sec. 2906. (1) A disclaimer must be delivered in 1 of the following manners:

(a) By personally handing it to the person to whom it is to be delivered or to a fiduciary representing that person.

(b) By enclosing it in a sealed envelope with first-class postage fully prepaid, addressed to the person to whom it is to be delivered or to a fiduciary representing that person, and depositing the envelope and its contents in the United States mail.

(c) By another means that is reasonably likely to accomplish delivery to the person who is to receive the disclaimer or to a fiduciary representing that person.

(2) If delivery is to be made to a fiduciary, the following apply:

(a) If a fiduciary is not currently serving, the delivery of the disclaimer is made by filing the disclaimer with the probate court that has jurisdiction to entertain proceedings to appoint or qualify the fiduciary.

(b) If the fiduciary cannot be located, the delivery of the disclaimer is made by filing the disclaimer with the probate court that has jurisdiction over the fiduciary.

(3) A copy of a disclaimer may be filed in a probate court where proceedings are pending concerning the disclaimed interest or in a probate court that would have jurisdiction if proceedings were commenced. If the disclaimed interest pertains to real property, a copy of the disclaimer may be recorded in the office of the register of deeds of the county in which the property is located.

§ 700.2907. Disposition of disclaimed interest; effect on future interest.

Sec. 2907. (1) Except as otherwise provided in this section and section 2908, if a disclaimed interest arises under a will or testamentary trust, or by the laws of intestacy, and the decedent has not provided for another disposition of that interest if it is disclaimed or for another disposition of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had predeceased the decedent. However, if by law, or under the will or testamentary trust, the descendants of the disclaimant would take the disclaimant's share by representation if the disclaimant predeceased the decedent, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the decedent.

(2) A future interest that takes effect in possession or enjoyment upon the termination of the disclaimed interest takes effect as if the disclaimant had predeceased the decedent. A future interest that is held by the disclaimant and that takes effect at a time certain is not accelerated and takes effect at the time certain.

(3) Except as otherwise provided in this section and section 2908, if the disclaimed interest arises under a governing instrument other than a will or testamentary trust, and the governing instrument does not provide for another disposition of that interest if it is disclaimed or for another disposition of disclaimed or failed interests in general, the disclaimed interest devolves as if the disclaimant had died before the time when the interest was entitled to take effect in possession or enjoyment. However, if by law or under the governing instrument the descendants of the disclaimant would take the disclaimant's share by representation if the disclaimant predeceased the effective date of the instrument, then the disclaimed interest passes by representation to the descendants of the disclaimant who survive the effective date of the instrument.

(4) A future interest that takes effect in possession or enjoyment at or after the termination of the disclaimed interest takes effect as if the disclaimant had died before the time when the interest was entitled to take effect in possession or enjoyment. A future interest that is held by the disclaimant and that takes effect at a time certain is not accelerated and takes effect at the time certain.

§ 700.2908. Disposition of disclaimed joint interest, power of appointment, trust interest, and fiduciary power.

Sec. 2908. (1) If the disclaimed interest arises out of joint property created by a governing instrument, testamentary or nontestamentary, the following apply:

(a) If the disclaimant is the only living owner, the disclaimed interest devolves to the estate of the last to die of the other joint owners.

(b) If the disclaimant is not the only living owner, the disclaimed interest devolves to the other living joint owners equally or, if there is only 1 living owner, all to the other living owner.

(2) If the donee of a power of appointment disclaims the power of appointment, the property that is subject to the power of appointment devolves as follows:

(a) If the power of appointment arises out of a will or testamentary instrument, as if the donee died before the decedent.

(b) If the power of appointment arises out of a governing instrument other than a will or testamentary trust, as if the disclaimant died before the effective date of the governing instrument.

(3) If all incumbent trustees disclaim a disclaimable interest, and the governing instrument does not provide for another

disposition of the disclaimed interest if it is disclaimed or for another disposition of disclaimed or failed interests in general, then the disclaimed interest devolves as if the trust with respect to which the disclaimer was made never existed. If less than all incumbent trustees disclaim a disclaimable interest and the governing instrument does not provide for another disposition of the disclaimed interest under those circumstances, then the trustee who disclaims is treated as never having had any interest in or power over the disclaimed interest.

(4) If a fiduciary disclaims a fiduciary power, the fiduciary power ceases to exist as of the effective date of the disclaimer. A disclaimer of a fiduciary power by 1 of multiple incumbent fiduciaries is binding only on the fiduciary who disclaims and is not binding on the other incumbent fiduciaries or on successor fiduciaries. A disclaimer of a fiduciary power by all incumbent fiduciaries is binding on all successor fiduciaries, unless the disclaimer states otherwise.

§ 700.2909. Persons bound; effect of disclaimer.

Sec. 2909. (1) A disclaimer, or a written waiver of the right to disclaim, is binding upon the disclaimant or person waiving the right to disclaim, and all persons claiming through or under him or her.

(2) A disclaimer acts as a nonacceptance of the disclaimed interest, rather than as a transfer of the disclaimed interest. The disclaimant is treated as never having received the disclaimed interest.

§ 700.2910. Barring right to disclaim.

Sec. 2910. (1) The right to disclaim property is barred by any of the following events that occur after the event giving rise to the right to disclaim and before the disclaimer is perfected:

(a) An assignment, conveyance, encumbrance, pledge, or transfer of the property, or a contract for such a transaction.

(b) A written waiver of the right to disclaim.

(c) An acceptance of the disclaimable interest or a benefit under the disclaimable interest after actual knowledge that a property right has been conferred.

(d) A sale of the property under judicial sale.

(e) The expiration of the permitted applicable perpetuities period.

(2) The right to disclaim is barred to the extent provided by other applicable law. A partial bar does not preclude the disclaimant from disclaiming all or any part of the balance of the property if the disclaimant has received a portion of the property and there still remains an interest that the disclaimant is yet to receive. An act that bars the right to disclaim a present interest in joint property does not bar the right to disclaim a future interest in joint property.

(3) A spouse who is the beneficiary of a property interest for which a marital deduction is claimed under the internal revenue code of 1986 cannot disclaim his or her interest after 9 months after the date on which the governing instrument containing the transfer is irrevocable.

§ 700.2911. Abolition of common law right.

Sec. 2911. The common law right of disclaimer or renunciation is abolished. This part does not abridge the right of a person to waive, release, disclaim, or renounce property or an interest in property under another statute.

§ 700.2912. Effect on existing property interests.

Sec. 2912. An interest in property that exists on the effective date of this act as to which, if a present interest, the time for delivering a disclaimer under this part has not expired or, if a future interest, the interest has not become indefeasibly vested or the taker finally ascertained, may be disclaimed after the effective date of this act and before any event described in section 2910.

Appendix B: IRC §2518

§ 2518. Disclaimers.

(a) General rule. For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined. For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) Other rules. For purposes of subsection (a)—

(1) Disclaimer of undivided portion of interest. A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers. A power with respect to property shall be treated as an interest in such property.

(3) Certain transfers treated as disclaimers. A written transfer of the transferor's entire interest in the property—

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)),

shall be treated as a qualified disclaimer.

Appendix C: Treas Regs §§25.2518-1 through 25.2518-3

§ 25.2518-1 Qualified disclaimers of property; In general.

(a) Applicability — (1) In general. The rules described in this section, Sec. 25.2518-2, and Sec. 25.2518-3 apply to the qualified disclaimer of an interest in property which is created in the person disclaiming by a transfer made after December 31, 1976. In general, a qualified disclaimer is an irrevocable and unqualified refusal to accept the ownership of an interest in property. For rules relating to the determination of when a transfer creating an interest occurs, see Sec. 25.2518-2(c) (3) and (4).

(2) Example. The provisions of paragraph (a)(1) of this section may be illustrated by the following example:

Example. W creates an irrevocable trust on December 10, 1968, and retains the right to receive the income for life. Upon the death of W, which occurs after December 31, 1976, the trust property is distributable to W's surviving issue, per stirpes. The transfer creating the remainder interest in the trust occurred in 1968. See Sec. 25.2511-1(c)(2). Therefore, section 2518 does not apply to the disclaimer of the remainder interest because the transfer creating the interest was made prior to January 1, 1977. If, however, W had caused the gift to be incomplete by also retaining the power to designate the person or persons to receive the trust principal at death, and, as a result, no transfer (within the meaning of Sec. 25.2511-1(c)(2)) of the remainder interest was made at the time of the creation of the trust, section 2518 would apply to any disclaimer made after W's death with respect to an interest in the trust property.

(3) Paragraph (a)(1) of this section is applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

(b) Effect of a qualified disclaimer. If a person makes a qualified disclaimer as described in section 2518(b) and Sec. 25.2518-2, for purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift. Similarly, the value of a decedent's gross estate for purposes of the Federal estate tax does not include the value of property with respect to which the decedent, or the decedent's executor or administrator on behalf of the decedent, has made a qualified disclaimer. If the disclaimer is not a qualified disclaimer, for the purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimer is disregarded and the disclaimant is treated as having received the interest.

(c) Effect of local law — (1) In general — (i) Interests created before 1982. A disclaimer of an interest created in a taxable transfer before 1982 which otherwise meets the requirements of a qualified disclaimer under section 2518 and the corresponding regulations but which, by itself, is not effective under applicable local law to divest ownership of the disclaimed property from the disclaimant and vest it in another, is nevertheless treated as a qualified disclaimer under section 2518 if, under applicable local law, the disclaimed interest in property is transferred, as a result of attempting the disclaimer, to another person without any direction on the part of the disclaimant. An interest in property will not be considered to be transferred without any direction on the part of the disclaimant if, under applicable local law, the disclaimant has any discretion (whether or not such discretion is exercised) to determine who will receive such interest. Actions by the disclaimant which are required under local law merely to divest owner-ship of the property from the disclaimant and vest ownership in another person will not disqualify the disclaimer for purposes of section 2518(a). See Sec. 25.2518-2(d)(1) for rules relating to the immediate vesting of title in the disclaimant.

(ii) Interests created after 1981. [Reserved]

(2) Creditor's claims. The fact that a disclaimer is voidable by the disclaimant's creditors has no effect on the determination of whether such disclaimer constitutes a qualified disclaimer. However, a disclaimer that is wholly void or that is voided by the disclaimant's creditors cannot be a qualified disclaimer.

(3) Examples. The provisions of paragraphs (c) (1) and (2) of this section may be illustrated by the following examples:

Example (1). F dies testate in State Y on June 17, 1978. G and H are beneficiaries under the will. The will provides that any disclaimed property is to pass to the residuary estate. H has no interest in the residuary estate. Under the applicable laws of State Y, a disclaimer must be made within 6 months of the death of the testator. Seven months after F's death, H disclaimed the real property H received under the will. The disclaimer statute of State Y has a provision stating that an untimely disclaimer will be treated as an assignment of the interest disclaimed to those persons who would have taken had the disclaimer been valid. Pursuant to this provision, the disclaimed property became part of the residuary estate. Assuming the remaining requirements of section 2518 are met, H has made a qualified disclaimer for purposes of section 2518 (a).

Example (2). Assume the same facts as in example (1) except that the law of State Y does not treat an ineffective disclaimer as a transfer to alternative takers. H assigns the disclaimed interest by deed to those who would have taken had the disclaimer been valid. Under these circumstances, H has not made a qualified disclaimer for purposes of section 2518 (a) because the disclaimant directed who would receive the property.

Example (3). Assume the same facts as in example (1) except that the law of State Y requires H to pay a transfer tax in order to effectuate the transfer under the ineffective disclaimer provision. H pays the transfer tax. H has make a qualified disclaimer for purposes of section 2518 (a).

(d) Cross-reference. For rules relating to the effect of qualified disclaimers on the estate tax charitable and marital deductions, see Secs. 20.2055-2(c) and 20.2056(d)-1 respectively. For rules relating to the effect of a qualified disclaimer of a general power of appointment, see Sec. 20.2041-3(d).

§ 25.2518-2 Requirements for a qualified disclaimer.

(a) In general. For the purposes of section 2518(a), a disclaimer shall be a qualified disclaimer only if it satisfies the requirements of this section. In general, to be a qualified disclaimer —

(1) The disclaimer must be irrevocable and unqualified:

(2) The disclaimer must be in writing;

(3) The writing must be delivered to the person specified in paragraph (b)(2) of this section within the time limitations specified in paragraph (c)(1) of this section;

(4) The disclaimant must not have accepted the interest disclaimed or any of its benefits; and

(5) The interest disclaimed must pass either to the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer.

(b) Writing — (1) Requirements. A disclaimer is a qualified disclaimer only if it is in writing. The writing must identify the interest in property disclaimed and be signed either by the disclaimant or by the disclaimant's legal representative.

(2) Delivery. The writing described in paragraph (b)(1) of this section must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession of such property.

(c) Time limit — (1) In general. A disclaimer is a qualified disclaimer only if the writing described in paragraph (b)(1) of this section is delivered to the persons described in paragraph (b)(2) of this section no later than the date which is 9 months after the later of —

(i) The date on which the transfer creating the interest in the disclaimant is made, or

(ii) The day on which the disclaimant attains age 21.

(2) A timely mailing of a disclaimer treated as a timely delivery. Although section 7502 and the regulations under that section apply only to documents to be filed with the Service, a timely mailing of a disclaimer to the person described in paragraph (b)(2) of this section is treated as a timely delivery if the mailing requirements under paragraphs (c)(1), (c)(2) and (d) of Sec. 301.7502-1 are met. Further, if the last day of the period specified in paragraph (c)(1) of this section falls on Saturday, Sunday or a legal holiday (as defined in paragraph (b) of Sec. 301.7503-1), then the delivery of the writing described in paragraph (b)(1) of this section shall be considered timely if delivery is made on the first succeeding day which is not Saturday, Sunday or a legal holiday. See paragraph (d)(3) of this section for rules applicable to the exception for individuals under 21 years of age.

(3) Transfer. (i) For purposes of the time limitation described in paragraph (c)(1)(i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as transfers creating an interest for this purpose. With respect to transfers made by a

decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax. If there is a transfer creating an interest in property during the transferor's lifetime and such interest is later included in the transferor's gross estate for estate tax purposes (or would have been included if such interest were subject to estate tax), the 9-month period for making the qualified disclaimer is determined with reference to the earlier transfer creating the interest. In the case of a general power of appointment, the holder of the power has a 9-month period after the transfer creating the power in which to disclaim. If a person to whom any interest in property passes by reason of the exercise, release, or lapse of a general power desires to make a qualified disclaimer, the disclaimer must be made within a 9-month period after the exercise, release, or lapse regardless of whether the exercise, release, or lapse is subject to estate or gift tax. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindermen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original transfer creating an interest. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remainderman must disclaim within 9 months of the transfer creating the interest, rather than 9 months from the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age.

(ii) Sentences 1 through 10 and 12 of paragraph (c)(3)(i) of this section are applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

(4) Joint property — (i) Interests in joint tenancy with right of survivorship or tenancies by the entirety. Except as provided in paragraph (c)(4)(iii) of this section (with respect to joint bank, brokerage, and other investment accounts), in the case of an interest in a joint tenancy with right of survivorship or a tenancy by the entirety, a qualified disclaimer of the interest to which the disclaimant succeeds upon creation of the tenancy must be made no later than 9 months after the creation of the tenancy regardless of whether such interest can be unilaterally severed under local law. A qualified disclaimer of the survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law and, except as provided in paragraph (c)(4)(ii) of this section (with respect to certain tenancies created on or after July 14, 1988), such interest is deemed to be a one-half interest in the property. (See, however, section 2518(b)(2)(B) for a special rule in the case of disclaimers by persons under age 21.) This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate under section 2040 and regardless of whether the interest can be unilaterally severed under local law. See paragraph (c)(5), Examples (7) and (8), of this section.

(ii) Certain tenancies in real property between spouses created on or after July 14, 1988. In the case of a joint tenancy between spouses or a tenancy by the entirety in real property created on or after July 14, 1988, to which section 2523(i)(3) applies (relating to the creation of a tenancy where the spouse of the donor is not a United States citizen), the surviving spouse may disclaim any portion of the joint interest that is includible in the decedent's gross estate under section 2040. See paragraph (c)(5), Example (9), of this section.

(iii) Special rule for joint bank, brokerage, and other investment accounts (e.g., accounts held at mutual funds) established between spouses or between persons other than husband and wife. In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under Sec. 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant. See paragraph (c)(5), Examples (12), (13), and (14), of this section, regarding the treatment of disclaimed interests under sections 2518, 2033 and 2040.

(iv) Effective date. This paragraph (c)(4) is applicable for disclaimers made on or after December 31, 1997.

(5) Examples. The provisions of paragraphs (c)(1) through (c)(4) of this section may be illustrated by the following examples. For purposes of the following examples, assume that all beneficiaries are over 21 years of age.

Example (1). On May 13, 1978, in a transfer which constitutes a completed gift for Federal gift tax purposes, A creates a trust in which B is given a lifetime interest in the income from the trust. B is also given a nongeneral testamentary power of

appointment over the corpus of the trust. The power of appointment may be exercised in favor of any of the issue of A and B. If there are no surviving issue at B's death or if the power is not exercised, the corpus is to pass to E. On May 13, 1978, A and B have two surviving children, C and D. If A, B, C or D wishes to make a qualified disclaimer, the disclaimer must be made no later than 9 months after May 13, 1978.

Example (2). Assume the same facts as in example (1) except that B is given a general power of appointment over the corpus of the trust. B exercises the general power of appointment in favor of C upon B's death on June 17, 1989. C may make a qualified disclaimer no later than 9 months after June 17, 1989. If B had died without exercising the general power of appointment, E could have made a qualified disclaimer no later than 9 months after June 17, 1989.

Example (3). F creates a trust on April 1, 1978, in which F's child G is to receive the income from the trust for life. Upon G's death, the corpus of the trust is to pass to G's child H. If either G or H wishes to make a qualified disclaimer, it must be made no later than 9 months after April 1, 1978.

Example (4). A creates a trust on February 15, 1978, in which B is named the income beneficiary for life. The trust further provides that upon B's death the proceeds of the trust are to pass to C, if then living. If C predeceases D, the proceeds shall pass to D or D's estate. To have timely disclaimers for purposes of section 2518, B, C, and D must disclaim their respective interests no later than 9 months after February 15, 1978.

Example (5). A, a resident of State Q, dies on January 10, 1979, devising certain real property to B. The disclaimer laws of State Q require that a disclaimer be made within a reasonable time after a transfer. B disclaims the entire interest in real property on November 10, 1979. Although B's disclaimer may be effective under State Q law, it is not a qualified disclaimer under section 2518 because the disclaimer was made later than 9 months after the taxable transfer to B.

Example (6). A creates a revocable trust on June 1, 1980, in which B and C are given the income interest for life. Upon the death of the last income beneficiary, the remainder interest is to pass to D. The creation of the trust is not a completed gift for Federal gift tax purposes, but each distribution of trust income to B and C is a completed gift at the date of distribution. B and C must disclaim each income distribution no later than 9 months after the date of the particular distribution. In order to disclaim an income distribution in the form of a check, the recipient must return the check to the trustee uncashed along with a written disclaimer. A dies on September 1, 1982, causing the trust to become irrevocable, and the trust corpus is includible in A's gross estate for Federal estate tax purposes under section 2038. If B or C wishes to make a qualified disclaimer of his income interest, he must do so no later than 9 months after September 1, 1982. If D wishes to make a qualified disclaimer of his remainder interest, he must do so no later than 9 months after September 1, 1982.

Example (7). On February 1, 1990, A purchased real property with A's funds. Title to the property was conveyed to "A and B, as joint tenants with right of survivorship." Under applicable state law, the joint interest is unilaterally severable by either tenant. B dies on May 1, 1998, and is survived by A. On January 1, 1999, A disclaims the one-half survivorship interest in the property to which A succeeds as a result of B's death. Assuming that the other requirements of section 2518(b) are satisfied, A has made a qualified disclaimer of the one-half survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A). The result is the same whether or not A and B are married and regardless of the proportion of consideration furnished by A and B in purchasing the property.

Example (8). Assume the same facts as in Example (7) except that A and B are married and title to the property was conveyed to "A and B, as tenants by the entirety." Under applicable state law, the tenancy cannot be unilaterally severed by either tenant. Assuming that the other requirements of section 2518(b) are satisfied, A has made a qualified disclaimer of the one-half survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A). The result is the same regardless of the proportion of consideration furnished by A and B in purchasing the property.

Example (9). On March 1, 1989, H and W purchase a tract of vacant land which is conveyed to them as tenants by the entirety. The entire consideration is paid by H. W is not a United States citizen. H dies on June 1, 1998. W can disclaim the entire joint interest because this is the interest includible in H's gross estate under section 2040(a). Assuming that W's disclaimer is received by the executor of H's estate no later than 9 months after June 1, 1998, and the other requirements of section 2518(b) are satisfied, W's disclaimer of the property would be a qualified disclaimer. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

Example (10). In 1986, spouses A and B purchased a personal residence taking title as tenants by the entirety. B dies on July 10, 1998. A wishes to disclaim the one-half undivided interest to which A would succeed by right of survivorship. If A makes the disclaimer, the property interest would pass under B's will to their child C. C, an adult, and A resided in the residence at B's death and will continue to reside there in the future. A continues to own a one-half undivided interest in the property. Assuming that the other requirements of section 2518(b) are satisfied, A may make a qualified disclaimer with respect to the one-half undivided survivorship interest in the residence if A delivers the written disclaimer to the personal representative of B's estate by April 10, 1999, since A is not deemed to have accepted the interest or any of its benefits prior to that time and A's occupancy of the residence after B's death is consistent with A's retained undivided ownership interest. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

Example (11). H and W, husband and wife, reside in state X, a community property state. On April 1, 1978, H and W purchase real property with community funds. The property is not held by H and W as jointly owned property with rights of survivorship. H and W hold the property until January 3, 1985, when H dies. H devises his portion of the property to W. On March 15, 1985, W disclaims the portion of the property devised to her by H. Assuming all the other requirements of section 2518 (b) have been met, W has made a qualified disclaimer of the interest devised to her by H. However, W could not disclaim the interest in the property that she acquired on April 1, 1978.

Example (12). On July 1, 1990, A opens a bank account that is held jointly with B, A's spouse, and transfers $ 50,000 of A's money to the account. A and B are United States citizens. A can regain the entire account without B's consent, such that the transfer is not a completed gift under Sec. 25.2511-1(h)(4). A dies on August 15, 1998, and B disclaims the entire amount in the bank account on October 15, 1998. Assuming that the remaining requirements of section 2518(b) are satisfied, B made a qualified disclaimer under section 2518(a) because the disclaimer was made within 9 months after A's death at which time B had succeeded to full dominion and control over the account. Under state law, B is treated as predeceasing A with respect to the disclaimed interest. The disclaimed account balance passes through A's probate estate and is no longer joint property includible in A's gross estate under section 2040. The entire account is, instead, includible in A's gross estate under section . The result would be the same if A and B were not married.

Example (13). The facts are the same as Example (12), except that B, rather than A, dies on August 15, 1998. A may not make a qualified disclaimer with respect to any of the funds in the bank account, because A furnished the funds for the entire account and A did not relinquish dominion and control over the funds.

Example (14). The facts are the same as Example (12), except that B disclaims 40 percent of the funds in the account. Since, under state law, B is treated as predeceasing A with respect to the disclaimed interest, the 40 percent portion of the account balance that was disclaimed passes as part of A's probate estate, and is no longer characterized as joint property. This 40 percent portion of the account balance is, therefore, includible in A's gross estate under section 2033. The remaining 60 percent of the account balance that was not disclaimed retains its character as joint property and, therefore, is includible in A's gross estate as provided in section 2040(b). Therefore, 30 percent (1/2x60 percent) of the account balance is includible in A's gross estate under section 2040(b), and a total of 70 percent of the aggregate account balance is includible in A's gross estate. If A and B were not married, then the 40 percent portion of the account subject to the disclaimer would be includible in A's gross estate as provided in section 2033 and the 60 percent portion of the account not subject to the disclaimer would be includible in A's gross estate as provided in section 2040(a), because A furnished all of the funds with respect to the account.

(d) No acceptance of benefits — (1) Acceptance. A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. However, merely taking delivery of an instrument of title, without more, does not constitute acceptance. Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. In the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property. The exercise of a power of appointment to any extent by the donee of the power is an acceptance of its benefits. In addition, the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed.

(2) Fiduciaries. If a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. Under this rule, for example, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. For example, a fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class. See paragraph (e) of this section for rules relating to the effect of directing the redistribution of disclaimed property.

(3) Under 21 years of age. A beneficiary who is under 21 years of age has until 9 months after his twenty-first birthday in which to make a qualified disclaimer of his interest in property. Any actions taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's twenty-first birthday will not be an acceptance by the beneficiary of the interest.

(4) Examples. The provisions of paragraphs (d) (1), (2) and (3) of this section may be illustrated by the following examples:

Example (1). On April 9, 1977, A established a trust for the benefit of B, then age 22. Under the terms of the trust, the current income of the trust is to be paid quarterly to B. Additionally, one half the principal is to be distributed to B when B attains the age of 30 years. The balance of the principal is to be distributed to B when B attains the age of 40 years. Pursuant to the terms of the trust, B received a distribution of income on June 30, 1977. On August 1, 1977, B disclaimed B's right to receive both the income from the trust and the principal of the trust, B's disclaimer of the income interest is not a qualified disclaimer for purposes of section 2518(a) because B accepted income prior to making the disclaimer. B's disclaimer of the principal, however, does satisfy section 2518(b)(3). See also Sec. 25.2518-3 for rules relating to the disclaimer of less than an entire interest in property.

Example (2). B is the recipient of certain property devised to B under the will of A. The will stated that any disclaimed property was to pass to C. B and C entered into negotiations in which it was decided that B would disclaim all interest in the real property that was devised to B. In exchange, C promised to let B live in the family home for life. B's disclaimer is not a qualified disclaimer for purposes of section 2518(a) because B accepted consideration for making the disclaimer.

Example (3). A received a gift of Blackacre on December 25, 1978. A never resided on Blackacre but when property taxes on Blackacre became due on July 1, 1979, A paid them out personal funds. On August 15, 1979, A disclaimed the gift of Blackacre. Assuming all the requirements of section 2518 (b) have been met, A has made a qualified disclaimer of Blackacre. Merely paying the property taxes does not constitute an acceptance of Blackacre even though A's personal funds were used to pay the taxes.

Example (4). A died on February 15, 1978. Pursuant to A's will, B received a farm in State Z. B requested the executor to sell the farm and to give the proceeds to B. The executor then sold the farm pursuant to B's request. B then disclaimed $ 50,000 of the proceeds from the sale of the farm. B's disclaimer is not a qualified disclaimer. By requesting the executor to sell the farm B accepted the farm even though the executor may not have been legally obligated to comply with B's request. See also Sec. 25.2518-3 for rules relating to the disclaimer of less than an entire interest in property.

Example (5). Assume the same facts as in example (4) except that instead of requesting the executor to sell the farm, B pledged the farm as security for a short-term loan which was paid off prior to distribution of the estate. B then disclaimed his interest in the farm. B's disclaimer is not a qualified disclaimer. By pledging the farm as security for the loan, B accepted the farm.

Example (6). A delivered 1,000 shares of stock in Corporation X to B as a gift on February 1, 1980. A had the shares registered in B's name on that date. On April 1, 1980, B disclaimed the interest in the 1,000 shares. Prior to making the disclaimer, B did not pledge the shares, accept any dividends or otherwise commit any acts indicative of acceptance. Assuming the remaining requirements of section 2518 are satisfied, B's disclaimer is a qualified disclaimer.

Example (7). On January 1, 1980, A created an irrevocable trust in which B was given a testamentary general power of appointment over the trust's corpus. B executed a will on June 1, 1980, in which B provided for the exercise of the power of appointment. On September 1, 1980, B disclaimed the testamentary power of appointment. Assuming the remaining requirements of section 2518 (b) are satisfied, B's disclaimer of the testamentary power of appointment is a qualified disclaimer.

Example (8). H and W reside in X, a community property state. On January 1, 1981, H and W purchase a residence with community funds. They continue to reside in the house until H dies testate on February 1, 1990. Although H could devise his portion of the residence to any person, H devised his portion of the residence to W. On September 1, 1990, W disclaims the portion of the residence devised to her pursuant to H's will but continues to live in the residence. Assuming the remaining requirements of section 2518(b) are satisfied, W's disclaimer is a qualified disclaimer under section 2518 (a). W's continued occupancy of the house prior to making the disclaimer will not by itself be treated as an acceptance of the benefits of the portion of the residence devised to her by H.

Example (9). In 1979, D established a trust for the benefit of D's minor children E and F. Under the terms of the trust, the trustee is given the power to make discretionary distributions of current income and corpus to both children. The corpus of the trust is to be distributed equally between E and F when E becomes 35 years of age. Prior to attaining the age of 21 years on April 8, 1982, E receives several distributions of income from the trust. E receives no distributions of income between April 8, 1982 and August 15, 1982, which is the date on which E disclaims all interest in the income from the trust. As a result of the disclaimer the income will be distributed to F. If the remaining requirements of section 2518 are met, E's disclaimer is a qualified disclaimer under section 2518(a). To have a qualified disclaimer of the interest in corpus, E must disclaim the interest no later than 9 months after April 8, 1982, E's 21st birthday.

Example (10). Assume the same facts as in example (9) except that E accepted a distribution of income on May 13, 1982. E's disclaimer is not a qualified disclaimer under section 2518 because by accepting an income distribution after attaining the age of 21, E accepted benefits from the income interest.

Example (11). F made a gift of 10 shares of stock to G as custodian for H under the State X Uniform Gifts to Minors Act. At the time of the gift, H was 15 years old. At age 18, the local age of majority, the 10 shares were delivered to and registered in the name of H. Between the receipt of the shares and H's 21st birthday, H received dividends from the shares. Within 9 months of attaining age 21, H disclaimed the 10 shares. Assuming H did not accept any dividends from the shares after

attaining age 21, the disclaimer by H is a qualified disclaimer under section 2518.

(e) Passage without direction by the disclaimant of beneficial enjoyment of disclaimed interest — (1) In general. A disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant (except as provided in paragraph (e)(2) of this section). If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant shall be treated as directing the transfer of the property interest. The requirements of a qualified disclaimer under section 2518 are not satisfied if —

(i) The disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property or interest in property to another person unless such power is limited by an ascertainable standard); or

(ii) The disclaimed property or interest in property passes to or for the benefit of the disclaimant as a result of the disclaimer (except as provided in paragraph (e)(2) of this section).

If a power of appointment is disclaimed, the requirements of this paragraph (e)(1) are satisfied so long as there is no direction on the part of the disclaimant with respect to the transfer of the interest subject to the power or with respect to the transfer of the power to another person. A person may make a qualified disclaimer of a beneficial interest in property even if after such disclaimer the disclaimant has a fiduciary power to distribute to designated beneficiaries, but only if the power is subject to an ascertainable standard. See examples (11) and (12) of paragraph (e)(5) of this section.

(2) Disclaimer by surviving spouse. In the case of a disclaimer made by a decedent's surviving spouse with respect to property transferred by the decedent, the disclaimer satisfies the requirements of this paragraph (e) if the interest passes as a result of the disclaimer without direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard. See examples (4), (5), and (6) in paragraph (e)(5) of this section.

(3) Partial failure of disclaimer. If a disclaimer made by a person other than the surviving spouse is not effective to pass completely an interest in property to a person other than the disclaimant because —

(i) The disclaimant also has a right to receive such property as an heir at law, residuary beneficiary, or by any other means; and

(ii) The disclaimant does not effectively disclaim these rights, the disclaimer is not a qualified disclaimer with respect to the portion of the disclaimed property which the disclaimant has a right to receive. If the portion of the disclaimed interest in property which the disclaimant has a right to receive is not severable property or an undivided portion of the property, then the disclaimer is not a qualified disclaimer with respect to any portion of the property. Thus, for example, if a disclaimant who is not a surviving spouse receives a specific bequest of a fee simple interest in property and as a result of the disclaimer of the entire interest, the property passes to a trust in which the disclaimant has a remainder interest, then the disclaimer will not be a qualified disclaimer unless the remainder interest in the property is also disclaimed. See Sec. 25.2518-3 (a)(1)(ii) for the definition of severable property.

(4) Effect of precatory language. Precatory language in a disclaimer naming takers of disclaimed property will not be considered as directing the redistribution or transfer of the property or interest in property to such persons if the applicable State law gives the language no legal effect.

(5) Examples. The provisions of this paragraph (e) may be illustrated by the following examples:

Example (1). A, a resident of State X, died on July 30, 1978. Pursuant to A's will, B, A's son and heir at law, received the family home. In addition, B and C each received 50 percent of A's residuary estate. B disclaimed the home. A's will made no provision for the distribution of property in the case of a beneficiary's disclaimer. Therefore, pursuant to the disclaimer laws of State X, the disclaimed property became part of the residuary estate. Because B's 50 percent share of the residuary estate will be increased by 50 percent of the value of the family home, the disclaimed property will not pass solely to another person. Consequently, B's disclaimer of the family home is a qualified disclaimer only with respect to the 50 percent portion that passes solely to C. Had B also disclaimed B's 50 percent interest in the residuary estate, the disclaimer would have been a qualified disclaimer under section 2518 of the entire interest in the home (assuming the remaining requirements of a qualified disclaimer were satisfied). Similarly, if under the laws of State X, the disclaimer has the effect of divesting B of all interest in the home, both as devisee and as a beneficiary of the residuary estate, including any property resulting from its sale, the disclaimer would be a qualified disclaimer of B's entire interest in the home.

Example (2). D, a resident of State Y, died testate on June 30, 1978. E, an heir at law of D, received specific bequests of certain severable personal property from D. E disclaimed the property transferred by D under the will. The will made no provision for the distribution of property in the case of a beneficiary's disclaimer. The disclaimer laws of State Y provide that such property shall pass to the decedent's heirs at law in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. Because State Y's law treats E as predeceasing D, the property disclaimed by E does not pass

to E as an heir at law or otherwise. Consequently, if the remaining requirements of section 2518(b) are satisfied, E's disclaimer is a qualified disclaimer under section 2518(a).

Example (3). Assume the same facts as in example (2) except that State Y has no provision treating the disclaimant as predeceasing the testator. E's disclaimer satisfies section 2518 (b)(4) only to the extent that E does not have a right to receive the property as an heir at law. Had E disclaimed both the share E received under D's will and E's intestate share, the requirement of section 2518 (b)(4) would have been satisfied.

Example (4). B died testate on February 13, 1980. B's will established both a marital trust and a nonmarital trust. The decedent's surviving spouse, A, is an income beneficiary of the marital trust and has a testamentary general power of appointment over its assets. A is also an income beneficiary of the nonmarital trust, but has no power to appoint or invade the corpus. The provisions of the will specify that any portion of the marital trust disclaimed is to be added to the nonmarital trust. A disclaimed 30 percent of the marital trust. (See Sec. 25.2518-3 (b) for rules relating to the disclaimer of an undivided portion of an interest in property.) Pursuant to the will, this portion of the marital trust property was transferred to the nonmarital trust without any direction on the part of A. This disclaimer by A satisfies section 2518 (b)(4).

Example (5). Assume the same facts as in example (4) except that A, the surviving spouse, has both an income interest in the nonmarital trust and a testamentary nongeneral power to appoint among designated beneficiaries. This power is not limited by an ascertainable standard. The requirements of section 2518 (b)(4) are not satisfied unless A also disclaims the nongeneral power to appoint the portion of the trust corpus that is attributable to the property that passed to the nonmarital trust as a result of A's disclaimer. Assuming that the fair market value of the disclaimed property on the date of the disclaimer is $ 250,000 and that the fair market value of the nonmarital trust (including the disclaimed property) immediately after the disclaimer is $ 750,000, A must disclaim the power to appoint one-third of the nonmarital trust's corpus. The result is the same regardless of whether the nongeneral power is testamentary or inter vivos.

Example (6). Assume the same facts as in example (4) except that A has both an income interest in the nonmarital trust and a power to invade corpus if needed for A's health or maintenance. In addition, an independent trustee has power to distribute to A any portion of the corpus which the trustee determines to be desirable for A's happiness. Assuming the other requirements of section 2518 are satisfied. A may make a qualified disclaimer of interests in the marital trust without disclaiming any of A's interests in the nonmarital trust.

Example (7). B died testate on June 1, 1980. B's will created both a marital trust and a nonmarital trust. The decedent's surviving spouse, C, is an income beneficiary of the marital trust and has a testamentary general power of appointment over its assets. C is an income beneficiary of the nonmarital trust, and additionally has the noncumulative right to withdraw yearly the greater of $ 5,000 or 5 percent of the aggregate value of the principal. The provisions of the will specify that any portion of the marital trust disclaimed is to be added to the nonmarital trust. C disclaims 50 percent of the marital trust corpus. Pursuant to the will, this amount is transferred to the nonmarital trust. Assuming the remaining requirements of section 2518(b) are satisfied, C's disclaimer is a qualified disclaimer.

Example (8). A, a resident of State X, died on July 19, 1979. A was survived by a spouse B, and three children, C, D, and E. Pursuant to A's will, B received one-half of A's estate and the children received equal shares of the remaining one-half of the estate. B disclaimed the entire interest B had received. The will made no provisions for the distribution of property in the case of a beneficiary's disclaimer. The disclaimer laws of State X provide that under these circumstances disclaimed property passes to the decedent's heirs at law in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. As a result, C, D, and E are A's only remaining heirs at law, and will divide the disclaimed property equally among themselves. B's disclaimer includes language stating that "it is my intention that C, D, and E will share equally in the division of this property as a result of my disclaimer." State X considers these to be precatory words and gives them no legal effect. B's disclaimer meets all other requirements imposed by State X on disclaimers, and is considered an effective disclaimer under which the property will vest solely in C, D, and E in equal shares without any further action required by B. Therefore, B is not treated as directing the redistribution or transfer of the property. If the remaining requirements of secton 2518 are met, B's disclaimer is a qualified disclaimer.

Example (9). C died testate on January 1, 1979. According to C's will, D was to receive 1/3 of the residuary estate with any disclaimed property going to E. D was also to receive a second 1/3 of the residuary estate with any disclaimed property going to F. Finally, D was to receive a final 1/3 of the residuary estate with any disclaimed property going to G. D specifically states that he is disclaiming the interest in which the disclaimed property is designated to pass to E. D has effectively directed that the disclaimed property will pass to E and therefore D's disclaimer is not a qualified disclaimer under section 2518(a).

Example (10). Assume the same facts as in example (9) except that C's will also states that D was to receive Blackacre and Whiteacre. C's will further provides that if D disclaimed Blackacre then such property was to pass to E and that if D disclaimed Whiteacre then Whiteacre was to pass to F. D specifically disclaims Blackacre with the intention that it pass to E. Assuming the other requirements of section 2518 are met, D has made a qualified disclaimer of Blackacre. Alternatively, D could disclaim an undivided portion of both Blackacre and Whiteacre. Assuming the other requirements of section 2518 are

met, this would also be a qualified disclaimer.

Example (11) G creates an irrevocable trust on February 16, 1983, naming H, I and J as the income beneficiaries for life and F as the remainderman. F is also named the trustee and as trustee has the discretionary power to invade the corpus and make discretionary distributions to H, I or J during their lives. F disclaims the remainder interest on August 8, 1983, but retains his discretionary power to invade the corpus. F has not made a qualified disclaimer because F retains the power to direct enjoyment of the corpus and the retained fiduciary power is not limited by an ascertainable standard.

Example (12). Assume the same facts as in example (11) except that F may only invade the corpus to make distributions for the health, maintenance or support of H, I or J during their lives. If the other requirements of section 2518(b) are met, F has made a qualified disclaimer of the remainder interest because the retained fiduciary power is limited by an ascertainable standard.

§ 25.2518-3 Disclaimer of less than an entire interest.

(a) Disclaimer of a partial interest — (1) In general — (i) Interest. If the requirements of this section are met, the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. For example, if an income interest in securities is bequeathed to A for life, then to B for life, with the remainder interest in such securities bequeathed to A's estate, and if the remaining requirements of section 2518(b) are met, A could make a qualified disclaimer of either the income interest or the remainder, or an undivided portion of either interest. A could not, however, make a qualified disclaimer of the income interest for a certain number of years. Further, where local law merges interests separately created by the transferor, a qualified disclaimer will be allowed only if there is a disclaimer of the entire merged interest or an undivided portion of such merged interest. See example (12) in paragraph (d) of this section. See Sec. 25.2518-3(b) for rules relating to the disclaimer of an undivided portion. Where the merger of separate interests would occur but for the creation by the transferor of a nominal interest (as defined in paragraph (a)(1)(iv) of this section), a qualified disclaimer will be allowed only if there is a disclaimer of all the separate interests, or an undivided portion of all such interests, which would have merged but for the nominal interest.

(ii) Severable property. A disclaimant shall be treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer which would be a qualified disclaimer if such property were the only property in which the disclaimant had an interest. If applicable local law does not recognize a purported disclaimer of severable property, the disclaimant must comply with the requirements of paragraph (c)(1) of Sec. 25.2518-1 in order to make a qualified disclaimer of the severable property. Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.

(iii) Powers of appointment. A power of appointment with respect to property is treated as a separate interest in such property and such power of appointment with respect to all or an undivided portion of such property may be disclaimed independently from any other interests separately created by the transferor in the property if the requirements of section 2518(b) are met. See example (21) of paragraph (d) of this section. Further, a disclaimer of a power of appointment with respect to property is a qualified disclaimer only if any right to direct the beneficial enjoyment of the property which is retained by the disclaimant is limited by an ascertainable standard. See example (9) of paragraph (d) of this section.

(iv) Nominal interest. A nominal interest is an interest in property created by the transferor that —

(A) Has an actuarial value (as determined under Sec. 20.2031-7) of less than 5 percent of the total value of the property at the time of the taxable transfer creating the interest,

(B) Prevents the merger under local law or two or more other interests created by the transferor, and

(C) Can be clearly shown from all the facts and circumstances to have been created primarily for the purpose of preventing the merger of such other interests.

Factors to be considered in determining whether an interest is created primarily for the purpose of preventing merger include (but are not limited to) the following: the relationship between the transferor and the interest holder; the age difference between the interest holder and the beneficiary whose interests would have merged; the interest holder's state of health at the time of the taxable transfer; and, in the case of a contingent remainder, any other factors which indicate that the possibility of the interest vesting as a fee simple is so remote as to be negligible.

(2) In trust. A disclaimer is not a qualified disclaimer under section 2518 if the beneficiary disclaims income derived from specific property transferred in trust while continuing to accept income derived from the remaining properties in the same trust unless the disclaimer results in such property being removed from the trust and passing, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent. Moreover, a disclaimer of both an income interest and a remainder interest in specific trust assets is not a qualified disclaimer if the beneficiary retains inter-

ests in other trust property unless, as a result of the disclaimer, such assets are removed from the trust and pass, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent. The disclaimer of an undivided portion of an interest in a trust may be a qualified disclaimer. See also paragraph (b) of this section for rules relating to the disclaimer of an undivided portion of an interest in property.

(b) Disclaimer of undivided portion. A disclaimer of an undivided portion of a separate interest in property which meets the other requirements of a qualified disclaimer under section 2518(b) and the corresponding regulations is a qualified disclaimer. An undivided portion of a disclaimant's separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest in such property and in other property into which such property is converted. A disclaimer of some specific rights while retaining other rights with respect to an interest in the property is not a qualified disclaimer of an undivided portion of the disclaimant's interest in property. Thus, for example, a disclaimer made by the devisee of a fee simple interest in Blackacre is not a qualified disclaimer if the disclaimant disclaims a remainder interest in Blackacre but retains a life estate.

(c) Disclaimer of a pecuniary amount. A disclaimer of a specific pecuniary amount out of a pecuniary or nonpecuniary bequest or gift which satisfies the other requirements of a qualified disclaimer under section 2518 (b) and the corresponding regulations is a qualified disclaimer provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer. Thus, following the disclaimer of a specific pecuniary amount from a bequest or gift, the amount disclaimed and any income attributable to such amount must be segregated from the portion of the gift or bequest that was not disclaimed. Such a segregation of assets making up the disclaimer of a pecuniary amount must be made on the basis of the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes that may have occurred between the date of transfer and the date of the disclaimer. A pecuniary amount distributed to the disclaimant from the bequest or gift prior to the disclaimer shall be treated as a distribution of corpus from the bequest or gift. However, the acceptance of a distribution from the gift or bequest shall also be considered to be an acceptance of a proportionate amount of income earned by the bequest or gift. The proportionate share of income considered to be accepted by the disclaimant shall be determined at the time of the disclaimer according to the following formula:

$$\frac{\text{Total amount of distributions received by the disclaimant out of the gift or bequest}}{\text{Total value of the gift or bequest on the date of transfer}} \times \text{Total amount of income earned by the gift or bequest between date of transfer and date of disclaimer}$$

See examples (17), (18), and (19) in Sec. 25.2518-3(d) for illustrations of the rules set forth in this paragraph (c).

(d) Examples. The provisions of this section may be illustrated by the following examples:

Example (1). A, a resident of State Q, died on August 1, 1978. A's will included specific bequests of 100 shares of stock in X corporation; 200 shares of stock in Y corporation; 500 shares of stock in Z corporation; personal effects consisting of paintings, home furnishings, jewelry, and silver, and a 500 acre farm consisting of a residence, various outbuildings, and 500 head of cattle. The laws of State Q provide that a disclaimed interest passes in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. Pursuant to A's will, B was to receive both the personal effects and the farm. C was to receive all the shares of stock in Corporation X and Y and D was to receive all the shares of stock in Corporation Z. B disclaimed 2 of the paintings and all the jewelry, C disclaimed 50 shares of Y corporation stock, and D disclaimed 100 shares of Z corporation stock. If the remaining requirements of section 2518(b) and the corresponding regulations are met, each of these disclaimers is a qualified disclaimer for purposes of section 2518(a).

Example (2). Assume the same facts as in example (1) except that D disclaimed the income interest in the shares of Z corporation stock while retaining the remainder interest in such shares. D's disclaimer is not a qualified disclaimer.

Example (3). Assume the same facts as in example (1) except that B disclaimed 300 identified acres of the 500 acres. Assuming that B's disclaimer meets the remaining requirements of section 2518(b), it is a qualified disclaimer.

Example (4). Assume the same facts as in example (1) except that A devised the income from the farm to B for life and the remainder interest to C. B disclaimed 40 percent of the income from the farm. Assuming that it meets the remaining requirements of section 2518(b), B's disclaimer of an undivided portion of the income is a qualified disclaimer.

Example (5). E died on September 13, 1978. Under the provisions of E's will, E's shares of stock in X, Y, and Z corporations were to be transferred to a trust. The trust provides that all income is to be distributed currently to F and G in equal parts until F attains the age of 45 years. At that time the corpus of the trust is to be divided equally between F and G. F disclaimed the income arising from the shares of X stock. G disclaimed 20 percent of G's interest in the trust. F's disclaimer is not a qualified disclaimer because the X stock remains in the trust. If the remaining requirements of section 2518(b) are met, G's disclaimer is a qualified disclaimer.

Example (6). Assume the same facts as in example (5) except that F disclaimed both the income interest and the remainder interest in the shares of X stock. F's disclaimer results in the X stock being transferred out of the trust to G without any direction on F's part. F's disclaimer is a qualified disclaimer under section 2518(b).

Example (7). Assume the same facts as in example (5) except that F is only an income beneficiary of the trust. The X stock remains in the trust after F's disclaimer of the income arising from the shares of X stock. F's disclaimer is not a qualified disclaimer under section 2518.

Example (8). Assume the same facts as in example (5) except that F disclaimed the entire income interest in the trust while retaining the interest F has in corpus. Alternatively, assume that G disclaimed G's entire corpus interest while retaining G's interest in the income from the trust. If the remaining requirements of section 2518(b) are met, either disclaimer will be a qualified disclaimer.

Example (9). G creates an irrevocable trust on May 13, 1980, with H, I, and J as the income beneficiaries. In addition, H, who is the trustee, holds the power to invade corpus for H's health, maintenance, support and happiness and a testamentary power of appointment over the corpus. In the absence of the exercise of the power of appointment, the property passes to I and J in equal shares. H disclaimed the power to invade corpus for H's health, maintenance, support and happiness. Because H retained the testamentary power to appoint the property in the corpus, H's disclaimer is not a qualified disclaimer. If H also disclaimed the testamentary power of appointment, H's disclaimer would have been a qualified disclaimer.

Example (10). E creates an irrevocable trust on May 1, 1980, in which D is the income beneficiary for life. Subject to the trustee's discretion, E's children, A, B, and C, have the right to receive corpus during D's lifetime. The remainder passes to D if D survives A, B, C, and all their issue. D also holds an inter vivos power to appoint the trust corpus to A, B, and C. On September 1, 1980, D disclaimed the remainder interest. D's disclaimer is not a qualified disclaimer because D retained the power to direct the use and enjoyment of corpus during D's life.

Example (11). Under H's will, a trust is created from which W is to receive all of the income for life. The trustee has the power to invade the trust corpus for the support or maintenance of D during the life of W. The trust is to terminate at W's death, at which time the trust property is to be distributed to D. D makes a timely disclaimer of the right to corpus during W's lifetime, but does not disclaim the remainder interest. D's disclaimer is a qualified disclaimer assuming the remaining requirements of section 2518 are met.

Example (12). Under the provisions of G's will A received a life estate in a farm, and was the sole beneficiary of property in the residuary estate. The will also provided that the remainder interest in the farm pass to the residuary estate. Under local law A's interests merged to give A a fee simple in the farm. A made a timely disclaimer of the life estate. A's disclaimer of a partial interest is not a qualified disclaimer under section 2518(a). If A makes a disclaimer of the entire merged interest in the farm or an undivided portion of such merged interest then A would be making a qualified disclaimer assuming all the other requirements of section 2518(b) are met.

Example (13). A, a resident of State Z, dies on September 3, 1980. Under A's will, Blackacre is devised to C for life, then to D for 1 month, remainder to C. Had A not created D's interest, State Z law would have merged C's life estate and the remainder to C to create a fee simple interest in C. Assume that the actuarial value of D's interest is less than 5 percent of the total value of Blackacre on the date of A's death. Further assume that facts and circumstances (particularly the duration of D's interest) clearly indicate that D's interest was created primarily for the purpose of preventing the merger of C's two interests in Blackacre. D's interest in Blackacre is a nominal interest and C's two interests will, for purposes of making a qualified disclaimer, be considered to have merged. Thus, C cannot make a qualified disclaimer of his remainder while retaining the life estate. C can, however, make a qualified disclaimer of both of these interests entirely or an undivided portion of both.

Example (14). A, a resident of State X, dies on October 12, 1978. Under A's will, Blackacre was devised to B for life, then to C for life if C survives B, remainder to B's estate. On the date of A's death, B and C are both 8 year old grandchildren of A. In addition, C is in good health. The actual value of C's interest is less than 5 percent of the total value of Blackacre on the date of A's death. No facts are present which would indicate that the possibility of C's contingent interest vesting is so remote as to be negligible. Had C's contingent life estate not been created, B's life estate and remainder interests would have merged under local law to give B a fee simple interest in Blackacre. Although C's interest prevents the merger of B's two interests and has an actual value of less than 5 percent, C's interest is not a nominal interest within the meaning of Sec. 25.2518-3(a)(1)(iv) because the facts and circumstances do not clearly indicate that the interest was created primarily for the purpose of preventing the merger of other interests in the property. Assuming all the other requirements of section 2518(b) are met, B can make a qualified disclaimer of the remainder while retaining his life estate.

Example (15). In 1981, A transfers $ 60,000 to a trust created for the benefit of B who was given the income interest for life and who also has a testamentary nongeneral power of appointment over the corpus. A transfers an additional $ 25,000 to the trust on June 1, 1984. At that time the trust corpus (exclusive of the $ 25,000 transfer) has a fair market value of $ 75,000. On January 1, 1985, B disclaims the right to receive income attributable to 25 percent of the corpus.

$$\frac{\$25{,}000 \text{ (1984 transfer)}}{\$100{,}000 \text{ (Fair market value of corpus immediately after the 1984 transfer)}} = 25\%$$

Assuming that no distributions were made to B attributable to the $ 25,000, B's disclaimer is a qualified disclaimer for purposes of section 2518(a) if all the remaining requirements of section 2518(b) are met.

Example (16). Under the provisions of B's will, A is left an outright cash legacy of $ 50,000 and has no other interest in B's estate. A timely disclaimer by A of any stated dollar amount is a qualified disclaimer under section 2518(a).

Example (17). D bequeaths his brokerage account to E. The account consists of stocks and bonds and a cash amount earning interest. The total value of the cash and assets in the account on the date of D's death is $ 100,000. Four months after D's death, E makes a withdrawal of cash from the account for personal use amounting to $ 40,000. Eight months after D's death, E disclaims $ 60,000 of the account without specifying any particular assets or cash. The cumulative fair market value of the stocks and bonds in the account on the date of the disclaimer is equal to the value of such stocks and bonds on the date of D's death. The income earned by the account between the date of D's death and the date of E's disclaimer was $ 20,000. The amount of income earned by the account that E accepted by withdrawing $ 40,000 from the account prior to the disclaimer is determined by applying the formula set forth in Sec. 25.2518-3(c) as follows:

$$\frac{\$\ 40{,}000}{\$\ 100{,}000} \times \$\ 20{,}000 = \$\ 8{,}000$$

E is considered to have accepted $ 8,000 of the income earned by the account. If (i) the $ 60,000 disclaimed by E and the $ 12,000 of income earned prior to the disclaimer which is attributable to that amount are segregated from the $ 8,000 of income E is considered to have accepted, (ii) E does not accept any benefits of the $ 72,000 so segregated, and (iii) the other requirements of section 2518 (b) are met, then E's disclaimer of $ 60,000 from the account is a qualified disclaimer.

Example (18). A bequeathed his residuary estate to B. The residuary estate had a value of $ 1 million on the date of A's death. Six months later, B disclaimed $ 200,000 out of this bequest. B received distributions of all the income from the entire estate during the period of administration. When the estate was distributed, B received the entire residuary estate except for $ 200,000 in cash. B did not make a qualified disclaimer since he accepted the benefits of the $ 200,000 during the period of estate administration.

Example (19). Assume the same facts as in example (18) except that no income was paid to B and the value of the residuary estate on the date of the disclaimer (including interest earned from date of death) was $ 1.5 million. In addition, as soon as B's disclaimer was made, the executor of A's estate set aside assets worth $ 300,000 and the interest earned after the disclaimer on that amount in a separate fund so that none of the income was paid to B. B's disclaimer is a qualified disclaimer under section 2518(a).

Example (20). A bequeathed his residuary estate to B. B disclaims a fractional share of the residuary estate. Any disclaimed property will pass to A's surviving spouse, W. The numerator of the fraction disclaimed is the smallest amount which will allow A's estate to pass free of Federal estate tax and the denominator is the value of the residuary estate. B's disclaimer is a qualified disclaimer.

Example (21). A created a trust on July 1, 1979. The trust provides that all current income is to be distributed equally between B and C for the life of B. B also is given a testamentary general power of appointment over the corpus. If the power is not exercised, the corpus passes to C or C's heirs. B disclaimed the testamentary power to appoint an undivided one-half of the trust corpus. Assuming the remaining requirements of section 2518(b) are satisfied, B's disclaimer is a qualified disclaimer under section 2518(a).

Form 1

DISCLAIMER
BY
[NAME OF DISCLAIMANT]

I, [NAME OF DISCLAIMANT AND ADDRESS IF APPROPRIATE], am a beneficiary of [IDENTIFY WILL, TRUST, ETC.]. [DECEDENT] died on [DATE OF DEATH].
I disclaim my interest in [DESCRIBE DISCLAIMED INTEREST]. This disclaimer is irrevocable and unqualified.
I certify that I have not received or accepted the interest disclaimed or any of its benefits, expressly or impliedly.
I intend that this disclaimer is a qualified disclaimer within the meaning of section 2518 of the Internal Revenue Code of 1986, as amended, and the Regulations promulgated with respect to that section. I also intend that this disclaimer is a valid disclaimer under MCL 700.2901 et seq., the Michigan Disclaimer of Property Interests Law.

Dated: , 2002
[NAME OF DISCLAIMANT]

RECEIPT BY [IDENTIFY RECIPIENT]

I, [NAME OF RECIPIENT], a [IDENTIFY STATUS OF RECIPIENT], acknowledge receipt of a signed copy of this Disclaimer.

Dated: , 2002
[NAME OF RECIPIENT]

Prepared by:
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Form 2

Trust Provision (Disclaimer)
Disclaimer. My spouse, or my spouse's agent under a power of attorney, or my spouse's conservator, or the personal representative of my spouse's estate shall have the right to disclaim all or any part of my spouse's benefits under this paragraph 3.3. Any part of trust A that is disclaimed shall become part of trust B. Any part of trust B that is disclaimed shall pass to the beneficiaries described in paragraph 3.4 as if my spouse had died. All disclaimers of an interest in trust A must be "qualified disclaimers" under federal tax law. All disclaimers shall be delivered in writing to Trustee and shall be effective on the date received by Trustee.

Form 3

Trust Provision (Spouse's Right)
Spouse's Right. My spouse shall have the right to receive free from trust all or any portion of the property that otherwise would have been held by Trustee under this agreement after my death, but only by filing, with the court which has (or would have had if my estate were probated) domiciliary jurisdiction of my estate, a writing evidencing exercise of that right. The writing shall make specific reference to this provision of this agreement, be signed by my spouse personally, and shall be filed with the court after my death and not later

than 5:00 pm, current local time, one month prior to the initial due date for filing the federal estate tax return in my estate. Failure of my spouse to file the writing shall constitute an irrevocable disclaimer of any rights under this paragraph.

My spouse may exercise this right to receive property free from trust if, and only if, the property, or the remaining property, which Trustee is to continue to hold in trust under this agreement, would be free from federal estate tax in my spouse's estate if my spouse were to die immediately after exercise of the right.

Everett R. Zack of Foster Zack & Lowe, P.C., Okemos, practices in the areas of business planning, estate and trust administration, estate planning, and taxation. He has served on the board of directors of the Ingham County Bar Association and is a former chair of the Probate and Estate Planning Section of the State Bar of Michigan; he is currently serving on its council. Mr. Zack is on the State Probate Rules Committee and is a Fellow of the American College of Trust and Estate Counsel. He is a former editor of *ACTEC Studies* and has authored several articles for the *Michigan Probate and Estate Planning Journal*. He is a coauthor of *Informal Estate Proceedings in Michigan* (ICLE 2000 & Supps) and a contributor to *Michigan Estate Planning Handbook* (ICLE rev ed 2000 & Supps) and *Attorney Fee Agreements in Michigan* (ICLE 2d ed 2002). Mr. Zack is listed in *The Best Lawyers in America*.

Marital Deduction Disclaimer Trust Planning after the 2001 Tax Act

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Introduction

Prior to the scheduled repeal of the federal estate tax and the generation-skipping transfer (GST) tax in 2010, the Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Tax Act)[1] provides for a phased-in increase in the federal estate tax applicable exclusion amount and the GST exemption. The federal gift tax applicable exclusion has been increased in 2002 to $1,000,000 permanently, subject to the sunset (repeal) provision of the 2001 Tax Act. As the applicable exclusion amount for federal estate taxes increases to $3,500,000 in 2009, care needs to be taken in the use of traditional reduce-to-zero marital deduction formula clauses, which in modest estates (generally under two million dollars of combined wealth between the spouses) may result in the marital deduction trust being "under-funded" or in the trust receiving no funding. One way to deal with this issue in a modest estate is to consider, in appropriate circumstances, the use of a marital deduction disclaimer trust. The marital deduction disclaimer trust concept envisages the residue of the decedent's estate being left outright to the surviving spouse who then determines the appropriateness of disclaiming part of the bequest. The disclaimed bequest generally devolves to a credit shelter trust for the benefit of the surviving spouse and the decedent's children.

This article should be read in conjunction with the article authored by Everett R. Zack, "Disclaimer Planning After EPIC and The 2001 Tax Act," which begins on page 5. That article discusses in detail the applicable state and federal law pertaining to disclaimers.

This article is divided into two sections. The first section describes a marital deduction estate planning technique that utilizes qualified disclaimers by the surviving spouse. Section two of the article discusses some of the potential adverse tax consequences (and ways to avoid them) if the surviving spouse serves as a trustee over the disclaimed property. Sample drafting language is provided for the practitioner's consideration. As with any sample language, its appropriateness and efficacy will have to be determined in light of a client's particular situation.

Section 1
Drafting the Marital Deduction Disclaimer

1.1 Outright to Surviving Spouse with Right to Disclaim to Credit Shelter Trust. In instances where the combined estates of the husband and wife are less than the current estate tax applicable exclusion amount, an alternative to the traditional reduce-to-zero marital deduction formula is for the decedent to leave the residue of his or her estate outright to the surviving spouse. The surviving spouse can then disclaim whatever interests or amounts the spouse determines to be appropriate. Unlike the QTIP election, which provides the fiduciary at least 15 months (based on a six-month extension to file the decedent's federal estate tax return) to determine the appropriateness and amount of the marital deduction, the qualified disclaimer rules under IRC §2518 provide the surviving spouse with only nine months to determine the appropriateness and the amount to be disclaimed. Furthermore, the surviving spouse cannot disclaim property if he or she has accepted any benefits from that property—a potential trap. State law should be consulted to determine who can exercise a disclaimer on behalf of an incompetent or subsequently deceased surviving spouse. Property disclaimed by the surviving

spouse under IRC §2518 may be held in further trust for the surviving spouse, such as a QTIP marital deduction trust or a credit shelter trust, or may be distributed to other beneficiaries (either outright or in trust), as predetermined by the decedent and as specified in the decedent's governing instrument.

Because the surviving spouse cannot have any discretion as to who receives the disclaimed property, the surviving spouse cannot hold a power of appointment, either as a beneficiary or as a trustee over the disclaimed property, other than a "5x5" right of withdrawal [2] or a power limited by an ascertainable standard.[3]

1.2 IRS Rules Concerning Disclaimers. Federal law concerning the estate and gift tax consequences of qualified disclaimers is contained in IRC §2518, which sets forth the rules that must be followed for a disclaimer to be "qualified" and gift tax-free by the disclaimant. IRC §2518 applies to taxable transfers made after December 31, 1976 that create an interest in the person attempting to disclaim the interest.[4]

1.3 State Law Concerning Disclaimers. With the exception of the rule described in IRC §2518(c)(3) concerning certain transfers being treated as if they were qualified disclaimers, a disclaimer must be valid under applicable state law in order to be valid under IRC §2518. Michigan's statutory law governing disclaimers is contained in EPIC §§2901 – 2912.[5] The common law right of disclaimer has been abolished in Michigan.[6]

1.4 *Drafting example of disclaimable bequest to spouse:*

***"Marital Bequest to Surviving Spouse with Right to Disclaim**. After first satisfying all of my just debts and approved claims against my estate, the expenses of the administration of my estate, and the payment of any specific devises contained in this trust agreement or under my will, if I am survived by my spouse, Trustee shall distribute the remaining trust property to my spouse, outright and free of trust; provided however, my spouse, or my spouse's agent under a power of attorney, or my spouse's conservator, or the executor of my spouse's estate, or, if my spouse has no probate estate, the trustee of any trust created by my spouse containing one-third or more in value of my spouse's assets, or any other person permitted by law, shall have the right, to the extent permitted by law, to disclaim all or any part of this marital bequest. Any property or amount of this marital bequest that is disclaimed shall become part of the Family Trust [i.e., Credit Shelter Trust]. To the extent permitted by law, disclaimers under this paragraph may be either "qualified" disclaimers or nonqualified disclaimers[7] under federal tax law, provided, however, if the disclaimer is not a qualified disclaimer under IRC §2518; then and in that event, any property (or interest therein) disclaimed by my spouse in the first instance shall instead be distributed to the Children's Trust [i.e., Descendants' Trust], which shall be administered in all regards as if my spouse had predeceased me. A disclaimer shall become effective upon the first to occur: (i) as provided by law, or (ii) upon written notice to Trustee. If the Family Trust contains a power of appointment, exercisable by my spouse, either as a beneficiary or as a trustee over the disclaimed property (other than those powers permitted by IRC §2518, to wit, an inter vivos "5x5" withdrawal right limited to the dollar and percentage amounts set forth in IRC §§2041(b)(2)(A) and (B) and 2514(e)(1) and (2)) (as is permitted by Treas Reg §25.2518-2(e)(5), example 7) and powers limited by an ascertainable standard (as is permitted by Treas Reg §25.2518-2(e)(2)), then and in that event, any interest in the marital bequest that is disclaimed, shall not be allocated to the Family Trust, but shall instead be allocated to*

a new, separate trust to be known as the "Disclaimer Trust," the provisions of which are identical to those of the Family Trust, including trusteeship, except that my spouse shall neither possess nor exercise any powers prohibited by IRC §2518 or applicable Treasury Regulations, either as beneficiary or as a trustee over the Disclaimer Trust, either during lifetime or on death."

1.5 Disclaimers Exercisable by Surviving Spouse's Agent. When utilizing a spousal disclaimer approach, it may be helpful to grant the surviving spouse's agent under a durable power of attorney the authority to execute qualified disclaimers on behalf of the surviving spouse.

(A) Drafting example of power of attorney's authority to disclaim:

*"**Disclaim Property.** My attorney-in-fact acting under this durable power of attorney is authorized and empowered to execute and deliver disclaimers, either partial or complete, of any rights or interest I now or hereafter may have, if my attorney-in-fact deems it probable that no gift taxes will be imposed on me on account of such disclaimer; provided however, my attorney-in-fact may not disclaim assets to which I would otherwise be entitled if such disclaimer would result in such assets passing directly to my attorney-in-fact or his or her estate."*

1.6 Apportionment of Estate Taxes. Whenever a spousal disclaimer approach is utilized, provision needs to be made concerning the apportionment of estate taxes attributable to the disclaimed property that does not qualify for the marital deduction. Since the outright bequest to the surviving spouse constitutes the residue of the settlor's estate, care must be taken to ensure that any estate taxes attributable to the disclaimed property are generally not apportioned against the residue. Many estate tax apportionment clauses routinely apportion taxes to the residue of the grantor's estate, as do the default provisions of EPIC.[8] Such a provision could impair the marital deduction (to the extent of the estate taxes apportioned against it). It may be appropriate to specifically apportion to the disclaimed property any federal estate taxes attributable to that property.

(A) Drafting example:

*"**Estate Taxes to be Paid from and Charged to Estate.** Except as provided in the below subparagraph entitled, "**Payment of Death Taxes From Property**," I direct that all federal estate taxes (including interest and penalty thereon), which shall become payable with respect to any property, or interest therein, whether such property or interest passes under this will, my revocable living trust agreement or otherwise, and which is properly includable in my estate for any such taxation purposes by any domestic or foreign taxing authority, shall be charged to and paid out of that portion of my estate which is not included in a gift qualifying for the marital or charitable deduction. Except as provided in the below subparagraph entitled, "**Payment of Death Taxes From Property**," my personal representative shall not seek recovery or reimbursement from, or apportionment between or among the recipients of any such property or interest. Subject to the foregoing, federal estate taxes shall be paid from the residue of my estate and not from any trust that qualifies for the federal estate tax marital deduction.*

(1) Payment of Death Taxes from Property. *Federal estate taxes (computed on an incremental/marginal basis) and interest and penalty thereon, shall be borne by and paid out of the property to which the tax is attributable, as concerns any disclaimer by a beneficiary (to the extent the*

disclaimed property does not otherwise qualify for the marital or charitable deduction)."

1.7 Beware the Spendthrift Clauses. In the absence of state law to the contrary, a spendthrift provision in a trust will generally be construed to prohibit a disclaimer. Although EPIC §2902(2) (as clarified in Everett R. Zack's article, which begins on page 5) permits a disclaimer even if there is a spendthrift clause, it does not hurt to include the following language in a spendthrift clause, particularly if the client and his or her estate plan may migrate to another state.

(A) Drafting example:

"This spendthrift provision shall not restrict the exercise of a disclaimer."

1.8 Estate Plan Closing Letter and Reminder to Client. Because of the nine-month time limit on qualified disclaimers and the prohibition of the surviving spouse's acceptance of benefits from the disclaimable property, it may be appropriate to include a reminder in your closing letter to the clients of the need to be vigilant about this form of marital deduction planning.

(A) Drafting example:

"Dear Mr. and Ms. Client:

As I mentioned in our initial conference and at the execution of your estate plan, the living trust plan that you have chosen leaves all of your estate outright to your surviving spouse and does not provide any self-initiating estate tax or generation-skipping transfer tax benefits or savings. Your trust does, however, permit your surviving spouse to make "qualified" disclaimers that may result in estate tax benefits or savings; however, "qualified" disclaimers must be made within a short period of time after your demise and the surviving spouse must not have accepted any benefits from the property that he or she desires to disclaim. Disclaimers should only be done after consultation with competent tax counsel. At a later date, you may want to consider revising your living trust so as to automatically provide for self-initiating estate tax benefits or savings (rather than relying on your surviving spouse to affirmatively make "qualified" disclaimers)."

Section 2
Tax Sensitive Powers Regarding the Beneficiary-Trustee

An overview of the tax issues surrounding a beneficiary serving as trustee is necessary to appreciate the possible pitfalls that may make an otherwise qualified disclaimer "nonqualified" for IRC §2518 purposes if the surviving spouse serves a trustee over the disclaimed property and the trustee powers have not been reduced to nongeneral powers or made into powers subject to an ascertainable standard.

2.1 Estate Tax Issues and the Beneficiary-Trustee. Beneficiary-trustee's power to make discretionary distributions to him or herself as a trust beneficiary without the limitation of an ascertainable standard constitutes a general power of appointment ("the prohibited power").[9]

(A) Examples of ascertainable standards:[10]

- Support
- Support in reasonable comfort
- Maintenance
- Maintenance in health and reasonable comfort
- Support in his/her accustomed manner of living
- Education, including college and professional education
- Health
- Health, education, support and maintenance
- Medical, dental, hospital and nursing expenses and expenses of invalidism

(B) If the beneficiary-trustee holds the prohibited power and dies, the trust property will be included in his or her estate.[11]

(C) The appointment of a cotrustee (including an independent cotrustee) to serve with the beneficiary-trustee does not protect the beneficiary-trustee unless:(i) the consent of the cotrustee is required for any discretionary distributions, **and** (ii) the cotrustee has a substantial adverse interest.[12] Alternatively, the power to make discretionary distributions can be vested exclusively in the independent cotrustee (who need not have a substantial adverse interest). This will prevent attribution of the prohibited power to the beneficiary-trustee.

(1) Drafting example:

*"**Power to Make Discretionary Distributions Vested in Independent Trustee.** The power to make discretionary distributions of principal or income shall be vested exclusively in (and be exercisable only by) the independent trustee. If the incumbent trustee is not an independent trustee, the incumbent trustee may appoint an independent trustee to serve as cotrustee with the incumbent trustee. The independent trustee so appointed shall serve concurrently with the appointing trustee until the appointing trustee resigns, dies, or becomes incapacitated and is succeeded by a successor trustee."*

(D) **Caution:** An ascertainable standard is rendered unascertainable for a beneficiary-trustee "if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or nonexercise of a power . . . ."[13]

(1) Examples of powers that negate an ascertainable standard include the following:

(a) The trustee's exercise or nonexercise of powers and discretions in good faith shall be conclusive and binding on all interested parties.

(b) The trustee shall exercise his or her powers in his or her uncontrolled discretion.[14]

(2) It may be desirable to limit the beneficiary-trustee's power.

(a) Drafting example:

*"**Limitation of Trustee's Powers.** No beneficiary-trustee (other than me, as settlor) who is a beneficiary of the trust in question shall possess any power or discretion that is "conclusive," "sole," "absolute," or "uncontrolled" with respect to the exercise or nonexercise of such power or discretion under that trust; and such beneficiary-trustee's power or discretion in that regard shall at all times be exercised or not exercised in a reasonable manner, be limited by a reasonably definite standard, and shall be subject to review and judicial scrutiny."*

2.2 Gift Tax Issues and the Beneficiary-Trustee. The gift tax consequences of a beneficiary-trustee's discretionary distributions to another beneficiary of the same trust are as follows:

(A) If the beneficiary-trustee exercises the prohibited power by making a distribution to another beneficiary of the same trust that the beneficiary-trustee is also a beneficiary thereof, the distribution will constitute a gift by the beneficiary-trustee.[15]

(1) To avoid the gift problem, the beneficiary-trustee's power to distribute property to other beneficiaries of the same trust should be limited to an ascertainable standard.[16]

(a) Drafting example:

*"**Limitation of Trustee's Powers.** To the extent a beneficiary-trustee (other than me, as settlor) has the authority to make discretionary distributions of income and/or principal to another beneficiary from a trust that such beneficiary-trustee is then also a then-current trust beneficiary thereof, the discretionary distributions shall be limited by an ascertainable standard related to the distributee beneficiary's health, education, support*

and maintenance in the manner of living to which the distributee beneficiary has been accustomed, considering the resources otherwise available to the distributee beneficiary."

2.3 Income Tax Issues and the Beneficiary-Trustee. The income tax consequences of a beneficiary-trustee's ability to make distributions to him or herself, even if limited by an ascertainable standard, are as follows:

(A) If a beneficiary-trustee has the sole power, to vest trust corpus or income to him or herself, the beneficiary-trustee will be treated as the owner of that trust property for income tax purposes.[17]

(1) Exceptions.

(a) If the beneficiary-trustee's power to withdraw or distribute trust property can only be exercised in conjunction with a co-trustee or other third party (who need not be adverse—such as the beneficiary-trustee's spouse).

(i) IRC §678 applies only to powers exercisable solely by the beneficiary-trustee. It does not apply to jointly exercisable powers.

(ii) It may be desirable to limit the beneficiary-trustee's power.

Drafting example:
"Limitation of Trustee's Powers. *At any time during a period where there is more than one trustee, no trustee (other than me, as settlor) who is also a beneficiary of any trust created under this trust agreement shall exercise any power solely by himself or herself as would cause such beneficiary-trustee to be treated as an owner of any portion of the trust under IRC §678 (a). "*

2.4 Distributions that Discharge a Trustee's Personal Legal Obligations.

(A) Irrespective of the fact that a beneficiary-trustee's power to distribute trust property to him or herself is limited by an ascertainable standard, a trustee's ability to discharge his or her personal legal obligations constitutes a general power of appointment to the extent of that obligation (i.e., the ability of the trustee to discharge his or her personal legal obligations is considered a power of appointment exercisable in favor of the trustee or his or her creditors).[18] This rule applies to both beneficiary-trustees and nonbeneficiary-trustees (i.e., to all individual trustees).

(1) An ascertainable standard does not protect the trustee in this instance since the ascertainable standard exception relates to the health, education, support and maintenance of the power holder.

(2) An independent cotrustee can however, make distributions to any beneficiary a cotrustee is obligated to support. The independent cotrustee, by definition, will not possess a general power of appointment (concerning the discharge of personal legal obligations) since the distributions will be discharging the legal obligations of the other trustee(s) and not those of the independent cotrustee.

(3) In Michigan, a parent's obligation of support does not include a child's college expenses.[19]

(a) A divorce decree requiring the payment of a child's college expenses should not be considered a support obligation for purposes of IRC §2041.[20]

(4) However, a parent may (arguably) be required to support an indigent or disabled child under Michigan's Poor Law.[21]

(5) Use an *Upjohn* clause to prohibit a trustee from making any distributions that would have the effect of discharging the trustee's personal legal obligations.[22]

(a) Drafting example:
"Limitation of Trustee's Powers. *Notwithstanding any provision herein to the contrary, no trustee (other than me, as settlor) shall have the power to use or apply trust property (i) for the support and maintenance of anyone the trustee is obligated to support and maintain, or (ii) for the purpose of directly or indirectly discharging the per-*

sonal legal obligations of the trustee."

(B) The ability of a trustee to use trust property for the "super support" (i.e., beyond the requirements of legal support) should not constitute a general power of appointment.

(1) In Priv Ltr Rul 9030005, the IRS ruled that a beneficiary-trustee's power to distribute corpus to her children for "travel, camping trips, theater, ballet, music lessons, special schooling or instruction to enrich their lives . . . and college and postgraduate education expenses" did not constitute a general power of appointment.

(C) The income tax consequences of a trustee's power to distribute trust property to discharge a personal legal obligation are as follows:

(1) Sole power to distribute trust property to discharge the trustee's personal legal obligation (other than a personal legal obligation to support a dependent) causes the trustee to be treated as the owner of the trust property for income tax purposes.[23]

(2) Mere possession by a trustee (as sole trustee or cotrustee) of the power to distribute trust property to discharge the trustee's personal legal obligation of support of a dependent does not in and of itself result in any adverse income tax consequences, except to the extent the income or principal is actually used or applied by the trustee.[24](However, mere possession of the power may result in adverse estate tax consequences, as discussed above.)

(3) A trustee's use of trust property to discharge another person's legal obligation will cause the trust property (that is so used), to be taxed, for income tax purposes, to the person whose legal obligation is discharged (i.e., the person whose legal obligation is discharged is treated as though the trust property were distributed directly to him or her).[25]

2.5 Overly Broad Discretionary Powers Over Investments and Principal-Income Matters.

(A) Although *State Street Trust Co v United States*, 263 F2d 635 (1st Cir 1959) involved a settlor-trustee of an irrevocable trust, the principles of that case could conceivably apply to a beneficiary-trustee under the appropriate set of facts. The rule to be gleaned from *State Street* is that an overly broad combination of discretion over investments and the allocation of receipts and expenditures could arguably constitute a general power of appointment under IRC §2041 by enabling the beneficiary-trustee to favor one beneficiary over another by investing in wasting assets or allocating all receipts to income.

(B) Although *State Street* has been distinguished by later cases from the First Circuit, the Regulations have reserved the right to apply *State Street* rationale (in seemingly extreme cases).

(1) Treas Reg §20.2041-1(b)(1) states:

"The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment" (emphasis added).

(2) ***Practice point***: Make sure that the grant of trustee power clause in the governing instrument states that the trustee must exercise his or her powers in a fiduciary capacity.

(a) Drafting example:

*"**Limitation of Trustee's Powers.** Trustee*

must exercise his or her powers solely in a fiduciary capacity and shall possess no powers that would otherwise permit the enlarging or shifting of beneficial interests (except as an incidental consequence of the discharge of such fiduciary duties)."

2.6 Power to Terminate Trust. The power of a beneficiary-trustee to terminate a trust in his or her sole discretion may be a power to affect the beneficial enjoyment of the trust property or its income and could constitute a general power of appointment for estate and gift tax purposes.[26]

(A) **Practice point**: Do not give the beneficiary-trustee sole authority to terminate a trust. Rather, vest the authority in an independent trustee, or require judicial approval with objective criteria as the basis for termination.

(B) ***Drafting example***:

"Termination of Trust. *If at any time the size of any trust created under this trust agreement is so small that the trust is uneconomical to administer, or if for any other reason in the opinion of the independent trustee, the trust is no longer necessary, impractical, or inappropriate to continue for any reason under the current circumstances, including changes in economic and factual circumstances or changes in federal, state, or local rules of law (tax or otherwise), including permanent repeal of the federal estate and/or generation-skipping transfer tax, or it would not be in the best interests of some or all of the beneficiaries for the trust to continue, such trustee may, without prior or subsequent court approval, terminate part or all of the trust and distribute part or all of the trust funds, as the case may be:(i) to my spouse if the trust is a marital deduction trust, (ii) to or for the benefit of the primary beneficiary for whom the trust was established, if there is such a beneficiary, or in the absence of a primary beneficiary to the person(s) to whom Trustee then must or may pay the trust's current income, in proportion to their interest(s) in trust income; however, if there is more than one beneficiary to whom current income could be paid but the interests are indefinite, Trustee shall distribute the trust assets to or for the benefit of the beneficiaries who are my descendants, by right of representation, or if no descendant of mine is a beneficiary, to all then-living income and then-living residuary beneficiaries of the trust equally, or (iii) in such other manner or amount(s) as a court of competent jurisdiction may direct, in order to carry out my intentions. Upon such termination, the rights of all other persons who might otherwise have an interest as succeeding life tenant or in a remainder, shall cease. Prior to terminating a trust hereunder, Trustee may request and shall be entitled to be held harmless and receive appropriate indemnification from the beneficiaries who are going to receive a terminating distribution. Trustee shall not terminate a trust if it would prevent an existing bequest from qualifying (or continuing to qualify) for the marital or charitable deduction, or impair the status or qualification of a trust that holds shares of stock in a Subchapter S corporation, or would impair a beneficiary's unexercised right of withdrawal that has not yet lapsed or would otherwise impair a qualified family-owned business interest deduction taken under IRC §2057."*

2.7 Limitations on a Trustee's Power to Avoid Adverse Estate, Gift, and Income Tax Treatment. The below-described "**Limitation on Trustee Powers**" is an omnibus savings clause that automatically reduces a tax-sensitive power held by a beneficiary-trustee into a safe nongeneral power. Consideration should be given to including this clause in your trust agreement.

(A) Drafting example:

*"**Limitation on Trustee Powers.** Notwithstanding any provision herein to the contrary, no trustee (other than me) shall have the power to use or apply trust property (i) for the support and maintenance of anyone the trustee is obligated to support and maintain, or (ii) for the purpose of directly or indirectly discharging the personal legal obligations of the trustee. At any time during a period where there is more than one trustee, no trustee (other than me) who is also a beneficiary of any trust created under this agreement shall exercise any power solely by himself or herself as would cause such beneficiary-trustee to be treated as an owner of any portion of the trust under IRC §678 (a). No trustee (other than me) who is also a beneficiary of any trust created under this agreement shall have the power, as then-acting trustee of such trust, to make discretionary distributions to him or herself except to the extent necessary for such trustee's health, education, support, and maintenance as described in IRC §§2041 and 2514 (concerning powers of appointment and ascertainable standards) and such beneficiary-trustee shall exercise its trustee powers solely in a fiduciary capacity and shall not possess or exercise any powers that would otherwise permit that beneficiary-trustee to enlarge or shift any of the beneficial interests under that trust (except as an incidental consequence of the discharge of such fiduciary duties); and to the extent such beneficiary-trustee (other than me) has the authority to make discretionary distributions of income and/or principal to another beneficiary from a trust that such beneficiary-trustee is then also a then-current trust beneficiary thereof, the discretionary distributions shall be limited by an ascertainable standard related to the distributee beneficiary's health, education, support and maintenance in the manner of living to which the distributee beneficiary has been accustomed, considering the resources otherwise available to the distributee beneficiary. Furthermore, no beneficiary-trustee (other than me) who is a beneficiary of the trust in question shall possess any power or discretion that is "conclusive," "sole," "absolute" or "uncontrolled" with respect to the exercise or nonexercise of such power or discretion under that trust; and such beneficiary-trustee's power or discretion in that regard shall at all times be exercised or not exercised in a reasonable manner, be limited by a reasonably definite standard, and shall be subject to review and judicial scrutiny."*

2.8 Surviving Spouse as Trustee of Credit Shelter (Disclaimer) Trust. The surviving spouse may serve as trustee of a trust that contains property that the surviving spouse disclaimed pursuant to IRC §2518. Because IRC §2518 prohibits the surviving spouse from holding a power to direct the disposition of the disclaimed property, the surviving spouse must not be granted any powers over the disclaimed trust property, either as a trust beneficiary or as a trustee of the trust, that violate IRC §2518. In this regard, Treasury Regulations permit the surviving spouse to serve as trustee of the trust that contains the disclaimed property provided the surviving spouse holds no powers of appointment or discretion over the trust property.[27] Thus, the surviving spouse can serve as sole trustee over the credit shelter trust, which is the repository for the disclaimed property, if the credit shelter trust contains mandatory distributions (i.e., no discretion on the part of the trustee) or ascertainable standards for distributions of principal and/or income[28]

(A) Drafting example:

*"**Credit Shelter Trust.** Trustee shall hold the Credit Shelter Trust for the following purposes:*

(1) Income. *Trustee shall pay all the net*

income to or for the benefit of my spouse until death, at least annually.

(2) Principal. *If the trust's net income and other assets reasonably and readily available to my spouse are insufficient to maintain the health, education, support, and maintenance of my spouse in my spouse's accustomed manner of living at the time of my death, Trustee shall use that portion of principal necessary to enable my spouse to maintain that standard of living. Furthermore, an independent trustee may, in its sole and absolute discretion, distribute such amounts of principal to or for the benefit of my spouse and my then-living descendants, in such amounts and proportions (with no requirement as to equality or any pro rata scheme of distribution) as the independent trustee shall determine (including the terms and conditions thereof), after giving due consideration to the needs of my spouse, who is the primary and preferred beneficiary of the Credit Shelter Trust. If possible, the independent trustee shall consult with my spouse concerning any proposed distributions.*

(3) Residue. *At my spouse's death, the remaining Credit Shelter Trust property, together with any income of the Credit Shelter Trust not distributed during my spouse's lifetime, shall be distributed to, and be administered under the provisions of the paragraph entitled **"Descendants' Trust**."*

(4) Trustees. *The following persons shall serve, in priority of the order listed, as the trustee of the Credit Shelter Trust:*

- *my spouse, provided however, if any property has passed to the Credit Shelter Trust as a result of my spouse having made a disclaimer and such trust either (a) permits my spouse as a trustee to make discretionary distributions of income and/or principal not limited by an ascertainable standard or (b) contains a power exercisable by my spouse as a trustee that is not permitted under IRC §2518 or applicable Treasury Regulations, then and in that event, my spouse shall not be permitted to serve as a trustee or cotrustee of the trust in question.*
- *«AltTrustee2» of «AltTrst2Address»*
- *«AltTrustee3» of «AltTrst3Address»*
- *«AltTrustee4» of «AltTrst4Address»"*

2.9 Use of Independent Trustee.

(A) An independent trustee is defined in IRC §§672(c) and 674(c).

(B) Use of an independent trustee avoids the imputation of the trustee's powers to the beneficiary. Thus, a beneficiary can remove an incumbent trustee and replace that trustee with an independent trustee without fear of the IRS treating the beneficiary's power of removal and replacement as an impermissible power.[29]

(1) Drafting examples:

*"**Independent Trustee Defined.** An "Independent Trustee" means a person who is not related or subordinate (within the meaning of IRC §672 (c)) to me or to any beneficiary with respect to the trust in question."*

*"**Removal of Trustee.** At any time after Settlor's death, the then-surviving adult beneficiaries who are sui juris and then eligible to receive current income from the trust, acting by unanimous written consent, may remove the trust's trustee, for reasonable cause, and may, in the absence of a nominated successor trustee then willing or able to serve or continue to serve as trustee, appoint a successor trustee(s), who is an independent trustee; provided, no person, acting alone, may remove or name a trustee of a trust that would be included in that person's gross estate solely by reason of this right of removal or appointment."*

(C) An independent trustee can possess tax-sensitive powers without adverse tax consequences.

(D) Appropriate in second-marriage situations.

(E) Appropriate for QDOT trusts.

2.10 Spouse and Independent Trustee as Co-Trustees.

(A) Always appropriate, if desired by the client.

(B) Especially appropriate in second-marriage situations.

(C) However, all discretionary powers and all tax-sensitive powers must be exclusively vested in the independent trustee.

(1) ***Drafting example:***

*"**Power to Make Discretionary Distributions Vested in Independent Trustee**. The power to make discretionary distributions of principal or income not limited by an ascertainable standard shall be vested exclusively in (and exercisable only by) an independent trustee. If the incumbent trustee is not an independent trustee, the incumbent trustee may appoint an independent trustee to serve as cotrustee with the incumbent trustee. The independent trustee so appointed shall serve concurrently with the appointing trustee until the appointing trustee resigns, dies or becomes incapacitated and is succeeded by a successor trustee (as nominated under this trust agreement)."*

Conclusion

The 2001 Tax Act and its surrounding uncertainty, the increasing applicable exclusion amount for federal estate tax purposes, and the eventual return to a one-million-dollar applicable exclusion amount in 2011 create new challenges and opportunities for the estate planning attorney. For modest estates where there is a harmonious marriage situation and typically no children or beneficiaries from a prior marriage, the marital deduction disclaimer trust provides an uncomplicated estate planning technique with some postmortem flexibility. The technique should only be used where the spouses feel comfortable with leaving the residue of their estate outright to the surviving spouse.

Notes

1. Pub L No 107-16 (2001), 115 Stat 38 (2001)
2. Treas Reg §25.2518-2(e)(5), example 7.
3. Treas Reg §25.2518-2(e)(2).
4. Treas Reg §25.2518-1(a). *See* Everett R. Zack's article on page 5 for more detail on the requirements of IRC §2518.
5. MCL 700.2901-.2912.
6. EPIC §2911. *See* Everett R. Zack's article for more detail on the requirements of disclaimers under Michigan law.
7. EPIC §2910(3) does not permit nonqualified disclaimers of property that have been elected/deducted for the marital deduction. This oversight may be corrected in future legislation.
8. EPIC §§3920 -3923.
9. IRC §§2041(b)(1)(A) and 2514(c)(1).
10. Treas Reg §20.2041-1(c)(2) and §25.2514-1(c)(2).
11. IRC §2041.
12. Treas Reg §20.2041-3(c)(2).
13. Treas Reg §25.2511-1(g)(2).
14. *Estate of Friedman*, 94 Cal App 3d 667, 156 Cal Rptr 597 (1979); *Independence Bank Waukesha (NA) v United States*, 761 F2d 442 (7th Cir 1985).
15. IRC §2514.
16. Treas Reg §25.2511-1(g)(2).
17. IRC §678(a)(1).
18. Treas Reg §20.2041-1(c)(1).
19. *Smith v Smith*, 433 Mich 606, 447 NW2d 715 (1989).
20. *See, e.g., Aussie v Aussie*, 182 Mich App 454, 452 NW2d 859 (1990).
21. MCL 401.1-.9.
22. *Upjohn v United States*, 72-2 USTC Par12,888 (WD Mich 1972).

23. Treas Reg §1.678(a)-1(b).
24. Treas Reg §1.678(c)-1.
25. Treas Reg §1.662(a)-4.
26. Treas Reg §§ 20.2041-1(b)(1) and 25.2514-1(b)(1).
27. Treas Reg § 25.2518-2(e)(1)(i).
28. Treas Reg § 25.2518-2(e)(2) and Treas Reg § 25.2518-2(e)(2) examples (11) and (12). 29. Rev Rul 95-58, 1995-2 CB 191.

Sebastian V. Grassi, Jr., is a partner in the law firm of Grassi & Toering, PLC, located in the Detroit suburb of Troy, Michigan. He is a member of the State Bar of Michigan, the American Bar Association, the Christian Legal Society (where he served on its national Board of Directors), and is a Fellow of The American College of Trust and Estate Counsel. He is also a member of the Probate and Estate Planning Council, which is the governing body of the Probate and Estate Planning Section of the State Bar of Michigan. Sebastian's practice emphasizes business law, estate planning, probate, and real estate.

A prolific author, Sebastian has published over 28 articles on business law, estate planning, and tax matters in the *ACTEC Journal*, *Estate Planning*, the *Journal of Taxation*, the *Journal of Taxation of Estates & Trusts*, the *Michigan Bar Journal*, *Michigan Probate & Estate Planning Journal*, the *Michigan Tax Lawyer*, *The Practical Lawyer*, and *The Practical Tax Lawyer*. A recognized authority in estate planning and business matters, Sebastian is also a frequent lecturer for the State Bar of Michigan's Institute of Continuing Legal Education and serves on its Probate and Estate Planning Advisory Board.

In the 1970's, Sebastian worked in Dhahran, Saudi Arabia as a Special Assistant to the U.S. Army Corps of Engineers Communications Officer.

In 1989, the People's Republic of China invited Sebastian to teach international business law to a group of graduate students in Beijing. (At the time, Sebastian was serving as lead defense counsel for the PRC in an international contract dispute in Detroit federal court.) Sebastian readily agreed, and made the trip. His visit to China coincided with the historic prodemocracy movement and tragic Tianamen Square massacre.

In 1998, the captain of the USS *The Sullivans* invited Sebastian for a three-day, 1200-mile cruise with the ship's crew. While aboard this high-tech guided missile destroyer, Sebastian completed the "Tiger Qualification" program. That training involved navigating and steering the 506-foot, 9-deck warship, and firing some of its weapons. In January 2000, terrorists (linked to Osama bin Laden), tried in a vain attempt to blow up the USS *The Sullivans,* while the ship was refueling in South Yemen. Sadly, just nine months later in October 2000, terrorists attacked the USS *Cole*, *The Sullivans*' sister ship, in a suicide bombing that killed 17 sailors.

On May 6, 2002, at the invitation of the White House, Sebastian and his family (along with five other dignitaries) personally greeted President George W. Bush as he stepped off Air Force One at Detroit Metro Airport. The family's meeting with President Bush was arranged by Michigan's Governor John Engler. President Bush (as well as Governor Engler) seemed to take a special interest in Sebastian's 12-year-old special needs daughter, Laura, who has cerebral palsy and is confined to a wheelchair.

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Departments

Ethics, Unauthorized Practice of Law, and Image—Developments

Ramon F. Rolf, Jr.

The Probate and Estate Planning Council=s Ethics, Unauthorized Practice of Law, and Image Committee continues to work on several projects and track developments. Our Section=s members have indicated that these issues are important. An update on developments follows:

Definition of the Practice of Law:

A definition of the practice of law has been proposed by the State Bar of Michigan=s Unauthorized Practice of Law Committee. The definition was to be submitted to the Michigan Supreme Court for review and hopefully for the Court=s favorable action. However, the Board of Commissioners has tabled this proposal.

Attorney Grievance Committee and Unauthorized Practice of Law (UPL) Issues:

The Attorney Grievance Committee has dismissed several grievances against Michigan lawyers who have partnered with questionable will and trust kit organizations. In addition to selling will and trust kits, these organizations aggressively sell financial products with an emphasis on annuity contracts. The State Bar is dialoging with and attempting to educate the Attorney Grievance Committee on the problem and the risks to the public.

State Bar Pamphlet:

The State Bar is in the final drafting stages of producing a pamphlet on trust kits. Copies of the pamphlet when completed can be obtained from the State Bar. The pamphlet will be placed on the State Bar=s Web site.

Radio Ad:

A radio ad addressing the will and trust kit organizations ran in November 2001 on 68 stations statewide. Each station ran the ad 52 times. What did we learn from running the radio ad? First, the radio ad addresses only one piece of the problem. Estate planning articles written for local newspapers and participation by estate and probate lawyers in "Ask the Lawyer" programs are all excellent ways to educate the public. In running the ad, it was discovered that the print media was extremely hesitant to write a story on the subject of will and trust kits. The reporters viewed the ad as State Bar public relations. They requested names of "victims." Victims generally do not want to be interviewed by a newspaper reporter and then receive unwanted publicity. In my opinion, the ad was a good first step. It is difficult to get market penetration with our message (will and trust kits present a risk to the public) without more significant expenditure of advertising dollars. A radio ad is something that our Section and the State Bar should consider every three to five years.

Preparing Legal Documents in Mortgage Transactions is UPL

The Michigan Court of Appeals in *Dressel vs Ameribank* (247 Mich App 133, 635 NW2d 328), held that banks (and presumably other financial instititutions) preparing mortgage documents for a separate fee "cross the threshold of providing services for the bank=s own benefit and engaging in a business where profit is made . . . without the requirement of licensure from the State Bar." The Court=s opinion provides a good analysis of prior unauthorized practice of law cases in Michigan.

Lawyers Partnering with Will and Trust Kit Marketers Do So at Their Peril

A recent Ethics Opinion, RI-325, provides an excellent source of guidance to attorneys who have or who are considering partnering with will and trust kit organizations and other financial organizations. Highlights of the opinion include the following:

- A lawyer may not enter into a lawyer-client relationship under circumstances where the lawyer=s obligations to third parties prevents the lawyer from exercising independent professional judgments.
- A lawyer may not assist another in the commission of the unauthorized practice of law.
- A lawyer may not engage in a venture with nonlawyers in which the nonlawyers will most likely engage in the unauthorized practice of law, make materially false and misleading statements, and conduct in-person solicitation of legal business.
- A lawyer may not give anything of value to a person for recommending the lawyer=s services other than paying the reasonable cost of advertising or communication.

Ramon F. (Fred) Rolf, Jr., is the chair of the Section=s Ethics, Unauthorized Practice of Law, and Image Committee. He is a member of the Midland/Saginaw firm of Currie Kendall Polasky Meisel PLC. He is a past president of the Northeastern Michigan Estate Planning Council. Mr. Rolf is a Fellow of the American College of Trust and Estate Counsel.

Probate & Estate Planning Council Q & A

By Patricia Gormely Prince & Randall J. Soverinsky

How has EPIC changed the way in which parents can nominate a guardian for their minor children ?

The Revised Probate Code (MCL 700.422) allowed the parent of an unmarried minor child to appoint a guardian for that child in the parent's will. EPIC has added an alternative method for appointing a guardian for an unmarried minor child. Specifically, MCL 700.5202(1) states that the parent of an unmarried minor child may appoint a guardian for the minor by will or by another writing signed by the parent and attested to by at least two witnesses.

Which is the preferred way to name a guardian for an unmarried minor child—in a will or in a separate writing?

From a purely legal standpoint, either method will work. From a practical standpoint, it is advisable to name the same person using both methods.

Naming a guardian in a will is the safest approach. If the will is prepared by an attorney, it will likely be executed properly and be admitted to probate. On the other hand, if a client nominates a guardian in a separate writing and does not seek professional assistance when doing so, there is a greater likelihood of execution errors that could result in the appointment being ineffective. Therefore, at a minimum, a parent should nominate a guardian in his or her will.

Nonetheless, it is advantageous to also name the same guardian in a separate writing in case the parent becomes incapacitated. This is because a will does not take effect and cannot be admitted to probate until the parent's death.

What is the procedure to effectuate the appointment of a guardian for a minor child made in a parent's will or other writing?

MCL 700.5202(2) states that if both parents are dead or incapacitated or if the surviving parent is incapacitated or has no parental rights, the parental appointment of a guardian will become effective when the guardian's acceptance is filed in: (a) the court in which the nominating instrument is probated; or (b) in the case of a non-testamentary nominating instrument, in the court at the place where the minor resides or is present.

Are there any other changes in this area that I should be aware of?

Yes. MCL 700.5202(4) requires the guardian, upon acceptance of his or her appointment, to give written notice of his or her acceptance to the minor and to the person having the minor's care or the minor's nearest adult relative.

There was no such requirement under prior law.

Does the minor have any say in regards to his or her parent's choice for guardian?

Yes. MCL 700.5203 states that a minor who is 14 years of age or older may prevent a parental appointment of a guardian or cause it to terminate by filing a written objection to the appointment before it is accepted or within 28 days after its acceptance. The written objection must be filed with the court in which the nominating instrument is filed.

When faced with such an objection, the court may still appoint the parental nominee or another suitable person in a proper proceeding.

Revised Probate Code §700.423 was virtually identical to EPIC §700.5203. Under the Revised Probate Code provision, however, the minor had to file his or her objection within 30 days of the guardian's acceptance.

Patricia Gormely Prince of Patricia Gormely Prince, P.C., Farmington Hills, Michigan, practices in the area of probate and estate planning. She is a former chair of the Probate and Estate Planning Section of the State Bar of Michigan, a member of the Women Lawyers Association of Michigan, and of the Real Property, Probate and Trust Law Section of the American Bar Association. Ms. Prince is a past managing editor of the *Michigan Probate and Estate Planning Journal*. She is a supplement author for Lawyers Cooperative Publishing Company and contributes to several ICLE publications.

Randall J. Soverinsky of Patricia Gormely Prince, P.C., Farmington Hills, Michigan, practices in the areas of estate planning and estate administration. He is a member of the Probate and Estate Planning and Real Property Law Sections of the State Bar of Michigan. Mr. Soverinsky is a contributor to *Trust Administration in Michigan* (ICLE 1999) and *Michigan Probate Litigation* (ICLE 2001). He has also written articles for the *Michigan Bar Journal*.

Digest of Michigan Probate Opinions

Elaine Cohen

Opinion number: 2000-13
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of Son OK Greer
Summary: The court must uphold an administrative decision if substantial evidence from the record reasonably supports the findings of fact and the administrative law judge's decision is not contrary to law. On this appeal of an order relative to an assessment of costs for care pursuant to MCL 33.1800 et seq., the court found that the petitioner's savings account for his sons' education constituted savings for prospective expenses that did not come within the confines of the one-year expense limitation. The court also found no statute or case law in support of the petitioner's position that he should receive a credit of the possible medical coverage reimbursement against his portion of the expenses. However, the court agreed that the administrative law judge erred in not accepting the higher-valued vehicle as an appropriate expense and granted the petitioner's claim to credit the cost of the higher-priced vehicle against his portion of the expenses.
Subjects: Administrative Appeals, Assessment of Costs for Care.
Cases cited: 44 Mich App 83, 60 Mich App 61, 81 Mich App 601, 345 Mich 528
MCLs cited: 24.306 et seq., 330.1800 et seq.
MSAs cited: 3.560(206) et seq., 14.800(800) et seq.

Opinion number: 2001-11
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of James D. Litsch, Deceased
Summary: The Michigan real estate of a nonresident decedent who dies intestate passes according to the intestate distribution scheme of the State of Michigan, not to that of the other state (in this case, Missouri).
Subjects: Determination of Heirs, Intestate Succession, Nonresident Decedents
MCLs cited: 700.21, 700.106, 700.184
MSAs cited: 27.5021, 27.5106, 27.5184
Other cites: Missouri Statute 474.040

Opinion number: 2001-12
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of the Michael Kachuba Trust and the Ruth Kachuba Trust
Summary: Michael and Ruth Kachuba each executed a trust. Both trusts directed that upon their deaths, the remaining property was to be held in a discretionary spendthrift trust for their only child. At her death, the remaining property was to go to her issue or, if none, half the property was to be distributed to the Macomb Association for Retarded Citizens. Both trusts were silent as to the distribution of the other half. At the time of the petition, the child was a 48-year-old woman with developmental disabilities who had no children and was unlikely to ever have any, and the cotrustees sought construction of the trusts. The court held that the failure to name a beneficiary constituted an omission, not a patent ambiguity, and the omitted property should be treated as intestate property of Michael Kachuba and Ruth Kachuba, respectively, under the Revised Probate Code rules of intestate succession that were in effect when they died.
Subjects: Construction, Determination of Heirs, Intestate Succession, Transition Rule, Trusts
Cases cited: 121 Mich App 527, 128 Mich App 87, 152 Mich App 660, 196 Mich App 326, 239 Mich 274
MCLs cited: 700.106, 700.1302, 700.2103, 700.2503, 700.8101
MSAs cited: 27.5106, 27.11302, 27.12103,

27.12503, 27.18101

Opinion number: 2001-13
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of Geraldine L. Beach, Revocable Living Trust
Summary: In the absence of an ambiguity, the court may not look outside the four corners of the trust to construe it. In this case, the trust as originally executed provided for gifts to cousins "who survived the settlor . . . the share of a deceased cousin descending to his/her issue by right of representation." An amendment to the trust changed that portion of the trust to provide for gifts to "settlor's cousins who survive settlor." As the settlor died on July 17, 2000, the rules of EPIC applied. The court held that there was no ambiguity in the trust. The portion devised to the cousins constitutes a class gift, but the clear intent of the settlor was to abrogate the antilapse statute. Therefore, the share that would have been distributed to a cousin who predeceased the settlor is added to the pro rata share of the surviving cousins.
Subjects: Antilapse Statute, Construction, Transition Rule,Trusts
Cases cited: 121 Mich App 527, 152 Mich App 660, 182 Mich 699, 324 Mich 264, 405 Mich 702, 417 Mich 237
MCLs cited: 700.2714, 700.8101
MSAs cited: 27.12714, 27.18101
Other cites: *EPIC with Reporter's Commentary*, comment to MCL 700.8101.

Opinion number: 2001-14
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of Oliver Collins, Deceased
Summary: The decedent died without wife or issue. His will, drafted when he was married with two stepsons, bequeathed everything to them. He never drafted a new will after his divorce. The decedent was survived by a stepfather, who had adopted him when he was 20, and a brother. The stepfather signed a settlement agreement with the decedent's former stepsons rescinding his rights in the estate for $1,000. The court held that the decedent's stepsons are not heirs and have no standing because the decedent's will was revoked by his and their mother's divorce. Because they are not successors to the decedent's estate, their settlement agreement with the decedent's stepfather must be set aside. The decedent's stepfather is an heir, because he legally adopted the decedent, and his status as an heir excludes the decedent's brother as heir.
Subjects: Agreements to Alter Interests, Determination of Heirs, Intestate Succession, Revocation by Divorce, Transition Rule, Wills
Cases cited: 580 F Supp 421, 313 Mich 402, 320 Mich 674
MCLs cited: 700.2103, 700.2807, 700.3914, 700.8101, 710.60
MSAs cited: 27.12103, 27.12807, 27.13914, 27.18101, 27.3178(555.60)

Opinion number: 2001-15
County: Wexford
Judge: Kenneth L. Tacoma
Name: In the Matter of the Estate of Leslie A. Jager, Deceased
Summary: The personal representative published notice to creditors, and the State of Michigan filed a claim for unpaid taxes in an amount that did not match the amount of tax liens of record. The personal representative attempted to sell the real estate, and the closing agent refused to disburse the proceeds of the sale unless the tax liens of record held by the State of Michigan and the U.S. Department of Treasury were discharged or declared null and void by the court. The court held that the probate claims procedure cannot be used to defeat the claim of governmental entities to taxes.
Subjects: Claims, Tax Liens
Cases cited: 57 F Supp 410, 363 Mich 396

MCLs cited: 700.1303, 700.3801
MSAs cited: 27.11303, 27.13801
Other cites: MCR 2.605, 2.105, and 5.306; 31 USCA 191; 31 USC 3713;
Secondary Authority: *Michigan Probate Litigation*, §6.12

Opinion number: 2001-16
County: Macomb
Judge: James F. Nowicki
Name: In the Matter of: Mary S. Irwin, Revocable Trust
Summary: In the absence of an ambiguity, the court may not look outside the four corners of the trust to construe it. In this case, the trust provided for payment of education expenses of the settlor's grandniece and/or grandnephew if they "choose to attend" Carnegie Mellon University (CMU). The settlor's grandnephew applied to CMU, but upon being denied admission, enrolled at the University of Pittsburgh. The petitioners alleged that the trust language was ambiguous because the grandnephew chose to attend CMU but they did not choose to accept him; therefore, he should be entitled to a portion of the trust for any educational purposes. The court held that the trust was not ambiguous. The settlor intended to provide for the college education of the beneficiaries only if they attended CMU.
Subjects: Construction, Trusts
Cases cited: 121 Mich App 527, 152 Mich App 660, 405 Mich 702, 417 Mich 237

Opinion number: 2001-17
County: Wexford
Judge: Kenneth L. Tacoma
Name: In the Matter of Milo H. Eldred, Deceased
Summary: The decedent had entered into a prenuptial agreement with his wife that provided that if he predeceased her, she would have the right to use and occupy his house as long as she continued to live there and remain a surviving spouse. The decedent's subsequently executed will gave his wife the use and possession of the house for her life provided that she paid the taxes, assessments, insurance, and all other expenses related to the house. These expenses exceeded the wife's means and she argued that the party's intent in the prenuptial agreement was to give her a home to live in and, since the decedent was aware of her limited financial means, the financial means to live there. The court noted that the will could not alter the contract rights created in the prenuptial agreement by imposing additional duties and liabilities on her. However, the will could grant her greater rights than the prenuptial agreement. The court allowed the wife's testimony to be considered over the parole evidence rule objection because the disputed terms were not addressed in the prenuptial agreement, but her testimony was too vague to support her position. Accordingly the party's rights had to be determined by reference to the rights of life tenants and remainder beneficiaries under Michigan law. A life tenant is required to pay the taxes and expenses of care and maintenance of the estate, but insurance premiums must be allocated according to the party's respective insurable interests.
Subjects: Evidence, Life Estates, Prenuptial Agreements, Wills
Cases cited: 95 Mich App 527, 104 Mich App 584, 323 Mich 322, 342 Mich 702, 416 Mich 681
Other cites: MRE 601
Secondary Authority: *Michigan Civil Jurisprudence*, "Life Estates, Remainders, and Reversions," §23.

Opinion number: 2001-18
County: Wayne
Judge: Freddie G. Burton, Jr.
Name: In the Matter of the Estate of Barbara L. Fogel, Deceased
Summary: The decedent had designated her husband as beneficiary of her Roth IRA and had designated the Melvin and Barbara Fogel Living Trust as beneficiary of her IRC 457 Plan.

Subsequently, the decedent executed a holographic will devising the proceeds of the Roth IRA and the 457 Plan to her four children. The court found that the beneficiary designations within the retirement plans control their distribution and granted summary disposition on that issue. The court noted that a directive in a decedent's will concerning a nontestamentary asset is ineffective. The court denied the daughter's motion to compel discovery as it related to the attorney's, since only the husband could waive the privilege as to communications concerning his and the decedent's estate plan. The court also denied the motion to compel as it related to interrogatories to the husband seeking information about the husband's finances (no bearing on the decedent's assets or intent) and decedent's bank balances (otherwise available to the personal representative). The court granted the motion in part and ordered the husband to turn the decedent's income tax records over, as those were in the husband's control.
Subjects: Attorney-Client Privilege, Discovery, Retirement Benefits, Summary Disposition, Wills
Cases cited: 53 Mich App 13, 135 Mich App 336, 136 Mich App 150, 137 Mich App 76, 161 Mich App 584, 162 Mich App 88, 167 Mich App 112, 176 Mich App 615, 178 Mich App 345, 184 Mich App 81, 189 Mich App 334, 191 Mich App 215, 194 Mich App 580, 198 Mich App 335, 203 Mich App 374, 208 Mich App 447, 210 Mich App 568, 213 Mich App 521, 215 Mich App 379, 226 Mich App 108, 227 Mich App 614, 224 Mich 504, 290 Mich 219, 306 Mich 392, 313 Mich 666, 384 Mich 276
MCLs cited: 700.6101
MSAs cited: 27.16101
Other cites: MCR 2.116, 2.302, 2.309, and 2.313

Opinion number: 2002-1
County: Wayne
Judge: Freddie G. Burton, Jr.
Name: In the Matter of the Estate of Stefan Feher, Deceased
Summary: The decedent executed a trust and pourover will on January 8, 1992. The trust was funded on the same day. The trust left the bulk of the estate to the St. George Romanian Orthodox Cathedral. The trust instrument provided that the trust could be revoked by delivering a written amendment to the trustees during the settlor's lifetime. On January 30, 1992, the decedent signed another will, leaving the bulk of his estate to another beneficiary, Korda. The court held that the January 8 will and trust were validly executed and were not the product of undue influence, lack of capacity, forgery or fraud. The court also held that the January 30 will did not operate to revoke the trust. Therefore, the court granted the trustee's motion for partial summary disposition.
Subjects: Fraud, Summary Disposition, Trusts, Wills
Cases cited: 104 Mich App 243, 114 Mich App 171, 128 Mich App 427, 136 Mich App 150, 146 Mich App 342, 167 Mich App 112, 191 Mich App 215, 194 Mich App 580, 203 Mich App 374, 204 Mich App 122, 204 Mich App 333, 204 Mich App 392, 210 Mich App 568, 213 Mich App 521, 214 Mich App 577, 222 Mich App 120, 252 Mich 674, 281 Mich 554, 417 Mich 638, 441 Mich 433
Other cites: MCR 2.112 and 2.116; 76 Am Jur 2d Trusts §97; 2 Restatement of Trusts 2d §330, Comment j

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SCHEDULE OF MEETINGS OF THE PROBATE AND ESTATE PLANNING SECTION

Date	**Place**
September 27, 2002	Grand Rapids, location TBA