Chapter 10: Property and Conveyancing

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CHAPTER 10

Property and Conveyancing

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DISCLAIMERS

§10.1. Introduction. During the Survey year, the Massachusetts Legislature enacted chapter 191A of the General Laws, entitled "Dis­claimer of Certain Property Interest Act."1 Chapter 191A is a legisla­tive effort to clarify the disclaimer concept by setting forth procedures for an effective disclaimer and delineating the property consequences of a disclaimer. Subsequent to the enactment of chapter 191A, Congress passed the Tax Reform Act of 1976,2 containing specific rules relating to disclaimers for purposes of federal taxation, which may differ significantly from chapter 191A. In light of the usefulness of disclaimers in post-mortem estate planning, it is the purpose of this chapter to explore disclaimers as a planning device and to examine the interrelationship of the federal and state statutes.

§10.2. Disclaimers and Post-Mortem Planning. In post-mortem estate planning, a disclaimer can serve the useful purpose of rectifying prior errors in planning the estate, thereby avoiding adverse tax consequences to the estate and its beneficiaries. The marital deduction, which is allowed where part of a deceased person's estate passes to the surviving spouse,1 is a significant area where disclaimers can be useful. For example, in the event that the surviving spouse has been given property worth less than the maximum amount of the marital deduction,2 someone other than the surviving spouse can make a dis­claimer in favor of the surviving spouse in order to increase the amount of the spouse's property to the maximum allowable for the

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§10.1. 1 G.L. c. 191A, as added by Acts of 1975, c. 573.


§10.2. 1 INT. REV. CODE OF 1954, § 2056.

2 The maximum amount which can be deducted is 50% of the adjusted gross estate. Id. § 2056(c); Treas. Reg. § 20.2056(c)-1 (1958).
marital deduction. Conversely, there may be circumstances under which it is desirable for the surviving spouse to disclaim part or all of the property passing to her. Thus, the surviving spouse may desire to disclaim if the value of the property passing to her exceeds the maximum amount allowable as a marital deduction. In disclaiming the excess amount, the surviving spouse avoids any double taxation that may result from including the excess both in the deceased spouse’s estate and also in the surviving spouse’s estate.

Even in circumstances where the amount of the property passing to the surviving spouse does not exceed the maximum marital deduction, a disclaimer by the surviving spouse may be desirable. Use of the marital deduction may have the effect of postponing, rather than permanently avoiding, the payment of an estate tax. For example, if the surviving spouse dies holding property that qualified for the marital deduction, that property may be includible in her gross estate for estate tax purposes. Therefore, if the surviving spouse has substantial assets independent of those passing from the decedent, a disclaimer by the surviving spouse may be desirable in order to avoid an augmentation of her own gross estate that might be taxed so as to exceed the estate tax savings from the marital deduction on the death of the first spouse.

A disclaimer may also be advisable if a transfer to the surviving spouse is defective so that it does not qualify for the marital deduction. For example, assume that a marital deduction trust is created under the terms of which the surviving spouse is to receive the income for life, and at her death, the surviving spouse has a general power to appoint the remainder, but the trustee has the power to retain unproductive property for an unreasonable period of time. This trust would not qualify for the marital deduction and it may be subject to estate taxation in the deceased spouse’s estate.

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4 For clarity, the surviving spouse is referred to in the female gender.


6 Id.

7 In order to qualify for the marital deduction, property must pass to the surviving spouse outright, to the spouse for life with a remainder at her death to her estate, or to the spouse for life with a general power of appointment. See id. §§ 14.4-14.11, 14.13.


property may be subject to estate taxation in her estate as well. 11

The estate tax charitable deduction 12 may also be affected by a disclaimer. A proper disclaimer of property by a noncharitable beneficiary in favor of a qualified charity results in the property qualifying for the charitable deduction. 13 Furthermore, a disclaimer can be particularly helpful where a remainder interest is left to a charity. In order to qualify for the estate tax charitable deduction, the trust must satisfy the detailed and technical requirements of a charitable remainder trust. 14 If the trust fails to meet this standard, however, a charitable deduction could still be obtained if the noncharitable beneficiaries disclaim their interest and thus cause the charity to receive the property outright. 15

The Tax Reform Act of 1976 16 imposes a new tax on "generation-skipping" transfers. 17 If a trust were created which provided that income was payable to the grantor's widow for life, then to the grantor's child for life, and then to the grantor's grandchildren, this would constitute a generation-skipping trust and a generation-skipping tax may be imposed on the death of the grantor's child. 18 If the grantor's child disclaims his interest, the trust would not be a generation-skipping trust because there would not be two or more generations of beneficiaries which were "younger" than the grantor. 19 Since the grantor's widow is assigned to the same generation as the grantor, 20 there would be only one younger generation beneficiary, 21 and thus the tax would be avoided.

Disclaimers can also be used to avoid income tax liability. For example, a disclaimant may not be required to include future income in

11 INT. REV. CODE OF 1954, § 2041; Treas. Reg. § 20-2041-1(1961). If a person dies holding a general power of appointment with respect to property, the property is includible in his gross estate for federal estate tax purposes. INT. REV. CODE OF 1954, § 2041. This result can be avoided by a disclaimer of the power, since a disclaimer of a general power of appointment is not a taxable release of the power. Id. § 2041(a)(2).

12 INT. REV. CODE OF 1954, § 2055.

13 Id. § 2055(a). For the requirements of a qualified disclaimer, see id. § 2518, added by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1893. The requirements are also discussed in § 10.4 infra.


15 See note 13 supra.


17 INT. REV. CODE OF 1954, § 2601. A "generation-skipping transfer" means "any taxable distribution or taxable termination with respect to a generation-skipping trust or trust equivalent." Id. § 2611(a). A "generation-skipping trust" is defined as "any trust having younger generation beneficiaries . . . who are assigned to more than one generation." Id. § 2611(b).

18 There is, however, a $250,000 exclusion from the tax on transfers to grandchildren. Id. § 2613(b)(5)-(6).

19 Id. § 2611(b).

20 Id. § 2611(c)(2).

21 The Senate Report specifically states that "a trust established for the benefit of the grantor's spouse, with the remainder outright to the grandchildren, would not be subject to the tax because the intervening generation has no interest in the trust." S. REP. No. 938 (Part II), 94th Cong., 2d Sess. 21 (1976).
his taxable income. In addition, a person other than the grantor of the trust is treated, for income tax purposes, as the owner of any portion of a trust with respect to which such person has a power exercisable solely by himself to vest in himself the corpus or the income from the trust. Such person is not treated as the owner of any portion of the trust, however, if the power referred to has been disclaimed within a reasonable time after the holder of the power first became aware of its existence.

§10.3. The Need for Legislation. A barrier to the effective use of disclaimers in post-mortem planning was the uncertain status of disclaimers under local law resulting in the possible treatment of the disclainer as a gift for gift tax purposes and the possible imposition on the disclainer of gift tax liability. The Treasury Regulations in existence before the Tax Reform Act of 1976 provide:

Where the law governing the administration of the decedent’s estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

To have this effect, the refusal must be unequivocal and effective under the local law and must be made prior to acceptance of the property. Where the local law does not permit such a refusal, the Regulations provide that “any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin.” Thus, in the absence of specific disclaimer legislation, a disclaimer may constitute a taxable gift by the disclainer if, under local law, title is deemed to pass directly to an heir, devisee, or legatee immediately upon the decedent’s death.

To facilitate the attainment of the aforementioned post-mortem planning objectives and the avoidance of adverse gift tax conse-

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22 See Rev. Rul. 64-62, 1964-1 C. B. 221, where an individual making a disclaimer effective under state law of her right to income under a trust was not required under INT. REV. CODE OF 1954, § 652(a) to include in gross income the income accruing to the trust subsequent to her disclaimer. A disclainer may be required, however, to include the income where he had a right to receive or to control the income prior to the disclaimer. See Grant v. Commissioner, 174 F. 2d 891, 892 (5th Cir. 1949); Cleary v. Commissioner, 34 T.C. 728, 739 (1960).


24 INT. REV. CODE OF 1954, § 678(d); Treas. Reg. § 1.678(d)-1(1960).

§ 10.3. 1 See W. SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING § 11.10 (1965, Supp. 1976).


4 Id.

5 Id.

6 See § 10.2 supra.
quences, the Massachusetts Legislature enacted chapter 573 of the Acts of 1975 entitled "Disclaimer of Certain Property Interest Act," which adds a new chapter 191A to the General Laws. Chapter 191A clarifies this area of Massachusetts law by setting forth procedures required for an effective disclaimer and the property consequences of a disclaimer.\(^7\) In the Tax Reform Act of 1976,\(^8\) Congress also established definitive rules relating to disclaimers for purposes of the estate, gift, and generation-skipping transfer taxes.\(^9\) The purpose of this congressional action was to achieve uniform tax treatment in the face of variations in state laws on disclaimers.\(^10\) It would seem that to the extent that the Internal Revenue Code (the "Code") and state law differ on disclaimers,\(^11\) the federal tax statute will govern the federal tax consequences of disclaimers and chapter 191A will control the local property law ramifications of disclaimers. Thus, both the federal and state acts and their national and local interpretations must be analyzed in order to understand fully the effects of a disclaimer.

Even though uniformity is the key objective of the federal statute, with respect to those issues which the Code is silent on the relevancy of state law is unclear. For example, the Code provides that a disclaimer is not effective unless it is irrevocable.\(^12\) The Code does not define the term "irrevocable" but chapter 191A provides that a disclaimer shall be irrevocable if it is executed and filed in accordance with the provisions of that chapter.\(^13\) Until such execution and filing, the disclaimer presumably remains revocable. It could plausibly be contended that this provision of state law governs the revocability of the disclaimer for federal tax purposes. Another area of uncertainty may arise under section 8 of chapter 191A, which section sets forth conditions barring the right to disclaim.\(^14\) The Code provides that, to be effective, the disclaimer must result in the property passing to a person other than the disclaimant.\(^15\) Accordingly, since federal law rarely creates ownership or rights in property, or controls the transferability of those rights, local law must be analyzed in order to determine the recipient of the disclaimed property.\(^16\) Thus, despite the goal of uniformity, local law concepts cannot be totally ignored in making federal estate tax determinations.

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\(^7\) See § 10.4 infra.


\(^9\) INT. REV. CODE OF 1954, § 2518.


\(^11\) See § 10.4 infra.

\(^12\) INT. REV. CODE OF 1954, § 2518 (b).

\(^13\) G.L. c. 191A, § 7.

\(^14\) Id. § 8.

\(^15\) INT. REV. CODE OF 1954, § 2518 (b)(4).

\(^16\) See C. Lowndes, R. Kramer & J. McCord, Federal Estate and Gift Taxes § 4.17 (3d ed. 1974), where the authors state: "It is easy to recite the formula here—state law determines the economic substance of rights and their transferability but federal law decides the taxability of these rights and transfers. It may be difficult to apply such a formula in a concrete case."
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Independent of the potential conflicts created by the enactment of the Tax Reform Act of 1976, the Massachusetts Legislature itself created one anomaly. Even though the Massachusetts Estate Tax is a local enactment,17 it is predicated upon the concept of the gross estate as defined in the Code.18 Thus, to the extent that the Code defines disclaimers and their consequences differently from chapter 191A, it would seem that the federal standard will govern disclaimers in relation to their effect for purposes of the Massachusetts Estate Tax.

§10.4. The Federal and State Disclaimer Statutes. Prior to the Tax Reform Act of 1976,1 the federal tax consequences resulting from a disclaimer were prescribed, on an ad hoc basis, only under several specific sections of the Internal Revenue Code (the "Code"). Under the provisions relating to the estate tax charitable and marital deductions, property was deemed to pass from the decedent to the person who receives it by reason of the disclaimer.2 Under the provisions relating to powers of appointment, a disclaimer of a general power of appointment is not treated as a release of the power and, therefore, is not a taxable transfer.3 Under the gift tax regulations, a disclaimer had to be effective under local law in order to avoid the imposition of gift tax liability on the disclaimant.4 Furthermore, the Code did not provide either definitive rules as to what constitutes a "disclaimer" or rules of general application concerning the tax consequences of a disclaimer. Thus, to a great extent, the federal tax consequences of a disclaimer depended upon local law determinations of whether the disclaimant is considered to have held title to the property at any time and whether the disclaimer is effective in passing property to someone else.5 As a consequence, identical refusals to accept property by disclaimants in different states may be treated differently for estate and gift tax purposes.6

In addition, for many of the federal estate and gift tax provisions, no specific time period was prescribed within which a disclaimer had to be made.7 While disclaimers affecting the marital and charitable deductions had to be made before the due date for filing the estate tax return,8 for other tax purposes the disclaimers had to be made within a "reasonable" time after the disclaimant learned of the existence of his interest.9 Thus, the disclaimer provisions of the Tax Re-


2 INT. REV. CODE OF 1954, §§ 2055(a), 2056(d).
3 Id. § 2041(a)(2).
6 Id.
9 See H.R. REP. NO. 1380, 94th Cong., 2d Sess. 66 (1976). In one case, a remainderman, who was aware of his interest, was deemed to have made a disclaimer of his in-

http://lawdigitalcommons.bc.edu/asml/vol1976/iss1/14
form Act of 1976 were designed to provide definitive and uniform rules concerning disclaimers for federal estate and gift tax purposes and to provide uniform standards for determining the time within which a disclaimer must be made.\textsuperscript{10} Congress sought to achieve these objectives by abrogating the specific provisions relating to disclaimers and by adopting rules of general applicability.

The estate, gift, and generation-skipping transfer tax provisions relating to disclaimers are now integrated in section 2518 of the Code. Under section 2518(a), if a person makes a “qualified disclaimer,” it is treated for purposes of those taxes as if the disclaimed interest had never been transferred to the disclaimant.\textsuperscript{11} Code section 2518(b) defines the term “qualified disclaimer” as an irrevocable and unqualified refusal by a person to accept an interest in property, but only if the following four requirements are satisfied: (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 nine months after the later of either the day on which the transfer creating the interest in such person is made, or the day on which such person reaches twenty-one; (3) the disclaimant did not accept the interest or any of its benefits; and (4) as a result of the disclaimer, the interest passes to someone other than the disclaimant, without any direction on the part of the disclaimant.\textsuperscript{12}

Chapter 191A of the General Laws provides a more elaborate and detailed scheme of disclaimers. Like the Code, chapter 191A requires that a disclaimer be in writing.\textsuperscript{13} However, it also explicitly requires that the disclaimer describe the interest being disclaimed and declare the disclaimer and the extent thereof.\textsuperscript{14} It specifically requires that the disclaimer shall be clear and unequivocal and signed by the beneficiary, the beneficiary’s guardian, or the legal representative of a deceased beneficiary’s estate.\textsuperscript{15} It is uncertain, however, whether a disclaimer signed by a minor’s guardian would be effective for federal tax purposes. Since Code section 2518(b) tolls the time for making a disclaimer until after a beneficiary has attained twenty-one years of age, a negative inference might be drawn that a disclaimer could not be made by a minor’s guardian.\textsuperscript{16} Of course, the guardian’s disclaimer

\textsuperscript{11} INT. REV. CODE OF 1954, § 2518(a).
\textsuperscript{12} Id. § 2518(b). Section 2518(c) permits partial disclaimers and also sanctions the disclaimer of powers with respect to property.
\textsuperscript{13} G.L. c. 191A, § 4.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} INT. REV. CODE OF 1954, § 2518(b)(2)(B).
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could still be effective for state property law purposes if the other requisites of chapter 191A are complied with.

Code section 2518(b) requires that the disclaimer be received by the transferor of the interest.\textsuperscript{17} Chapter 191A has no such requirement, but does require that the disclaimer be filed in the probate court, and if real property is involved, in the registry of deeds.\textsuperscript{18} In addition, a copy of the disclaimer must be served upon the person having custody or control of the property in which an interest is being disclaimed.\textsuperscript{19} Failure to comply with this service requirement does not affect the validity of the disclaimer,\textsuperscript{20} but insulates the person having control or custody of the property from liability for any distribution or other disposition made prior to the delivery to him of a copy of the disclaimer.\textsuperscript{21} Evidently, until the disclaimer is executed and filed in accordance with the provisions of the chapter, the disclaimer remains revocable.\textsuperscript{22} Furthermore, if real property is involved and the disclaimer has not been recorded in the registry of deeds, subsequent bona fide purchasers for value of the realty who have no actual notice of the disclaimer will prevail over other claimants to the disclaimed property.\textsuperscript{23} Code section 2518 has no similar filing, service, and recording requirements.

Code section 2518 and chapter 191A also differ as to the time of filing and executing disclaimers. Under the Code, the disclaimer must be received by the transferor of the interest no later than nine months after the date on which the transfer is made or the date on which the disclaimant reaches twenty-one.\textsuperscript{24} Under chapter 191A, the disclaimer

\begin{footnotesize}
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  \item[17] Id. § 2518(b)(2).
  \item[18] G.L. c. 191A, § 5.
  \item[19] Id. Service can be either delivery in hand or mailing by certified mail to the last known address of the person having custody or possession of the property.
  \item[20] Id.
  \item[21] Id. § 6.
  \item[22] Id. § 7.
  \item[23] Id. § 5.
  \item[24] INT. REV. CODE OF 1954, § 2518(b)(2). Although Code section 2518 requires that disclaimers be made within nine months after the transfer, the congressional history indicates that the term "transfer" is not to be construed in a pure common law sense. Thus, the Conference Agreement Report states:
  
  The conferees intend to make it clear that the 9-month period for making a disclaimer is to be determined in reference to each taxable transfer. For example, in the case of a general power of appointment where the other requirements are satisfied, the person who would be the holder of the power will have a 9-month period after the creation of the power in which to disclaim and the person to whom the property would pass by reason of the exercise or lapse of the power would have a 9-month period after a taxable exercise, etc., by the holder of the power in which to disclaim. Similarly, in the case where a lifetime transfer is included in the transferor's gross estate because he had retained an interest in the property ... the person who would receive an interest in the property during the lifetime of the grantor will have a 9-month period after the original transfer in which to disclaim and a person who would receive an interest in the property on or after the grantor's death would have a 9-month period after the grantor's death in which to disclaim if the other requirements of the provision are satisfied ... .
  
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must be executed and filed no later than nine months "after the event
determining that the beneficiary is finally ascertained as the ben­
eficiary of such interest and that such interest is indefeasibly
vested." The difference between the two provisions is highlighted by
the following example. Where T devises land "to A for life, and then
to B and his heirs if B marries," and B is over twenty-one years of age
at T's death, B would have to disclaim within nine months after T's
death in order for the disclaimer to be effective for federal tax
purposes. For Massachusetts property law purposes, however, it
would appear that B could effectively disclaim his interest within nine
months after B marries C, since B's marriage to C would be the event
that would cause B's interest to become indefeasibly vested.

On the other hand, where T devises land "to A for life, and then to
B and his heirs, but if B fails to marry C, then to D and his heirs,"
and B is over twenty-one years of age at T's death, once again, to be
effective for federal tax purposes, B would have to disclaim within
nine months after T's death. Under the provisions of chapter 191A,
T could effectively disclaim his interest at any time within nine
months after his interest became "indefeasibly vested." Prior to B's
marriage to C, B's interest is not indefeasibly vested; rather, it is vest­
ed subject to total divestment in the event that B fails to marry C. Thus,
during A's life, as long as B has not married C and has not
otherwise accepted any benefits from the property, B could disclaim.
If A's estate terminates and B takes possession of the premises, B's
ability to disclaim would be barred even though he has not as yet
married C and his interest is defeasible. B would be unable to disclaim
in those circumstances since B had accepted an interest in the prop­
erty.

It should also be noted that chapter 191A authorizes any court hav­
ing jurisdiction of the property to grant an extension of time to exe­
cute and file a disclaimer. Thus, while a disclaimer made within
such an extended time period may be effective for local property law
purposes, it will be ineffective for federal tax purposes, since section
2518 of the Code has no provision authorizing extensions.

Section 8 of chapter 191A specifically provides that the right to dis­
claim shall be barred by: (1) a disposition of the interest by the ben­
eficiary before the attempted disclaimer; (2) insolvency of the ben­
eficiary at the time of the attempted disclaimer; (3) a written waiver
of the right to disclaim signed by the beneficiary; or (4) acceptance of

25 G.L. c. 191A, § 3.
27 G.L. c. 191A, § 3.
29 G.L. c. 191A, § 3.
31 G.L. c. 191A, § 3.
such interest by the beneficiary.\textsuperscript{32} Under section 2518 of the Code, only the acceptance of an interest or any of its benefits is referred to as a bar to a qualified disclaimer.\textsuperscript{33} Even in this regard, however, chapter 191A defines “acceptance” by providing that if the beneficiary, having knowledge of the existence of an interest, receives without objection a benefit from such interest, such receipt shall be deemed to constitute acceptance of the interest.\textsuperscript{34} Code section 2518 does not explicitly include knowledge of the existence of the interest as a predicate for an acceptance of an interest. However, the existing Regulations do provide that “[i]n the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent’s property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.”\textsuperscript{35} Thus, there is a strong likelihood that an acceptance will not be deemed to have occurred for tax purposes unless the disclaimant had knowledge of the existence of the interest. Whether this result will follow by application of a federal standard or of state law is not clear.

It is not clear from chapter 191A whether a transfer may limit the capacity of a beneficiary to disclaim. While the statute provides that the right to disclaim shall exist irrespective of an express or implied spendthrift clause or other similar restraint on alienation, it does not explicitly preclude the transferor from specifically prohibiting disposers of interests.\textsuperscript{36} Support for the conclusion that a prohibition against disclaimer would be void is found, however, in section 2 of chapter 191A, which states that a beneficiary may disclaim any interest “[u]nless barred by the provisions of section eight,”\textsuperscript{37} and section 8 does not deal with the transferor’s attempt to preclude disclaimer.\textsuperscript{38} Even though Code section 2518 is silent on this question, a reference to local law is required since the interest must pass to a person other than the disclaimant for the disclaimer to be effective.\textsuperscript{39} Thus, if state law is construed as sanctioning a transferor’s prohibition against disclaimers and hence the interest remains in the disclaimant under state law, the requirement of section 2518 will not be fulfilled, and the disclaimer will be ineffective for federal tax purposes. Alternatively, even if state law would invalidate prohibitions against disposers, it is un-

\textsuperscript{32} Id. \textsuperscript{8}.

\textsuperscript{33} INT. REV. CODE OF 1954, § 2518(b)(3). Since the federal statute is silent with respect to the other three matters, it is not clear whether a disclaimer will be barred for federal tax purposes if the disclaimant has disposed of the interest, waived the right to disclaim, or is insolvent.

\textsuperscript{34} G.L. c. 191A, § 8.

\textsuperscript{35} Treas. Reg. § 25.2511-1(c) (1973).

\textsuperscript{36} G.L. c. 191A, § 9.

\textsuperscript{37} Id. \textsuperscript{2}.

\textsuperscript{38} See text at notes 32-34 supra for discussion of § 8.

\textsuperscript{39} INT. REV. CODE OF 1954, § 2518(b)(4).
certain whether the transferor could impose formalities beyond the statutory requisites for the making of a disclaimer.\textsuperscript{40}

Under Code section 2518, a qualified disclaimer is defined as "an irrevocable and unqualified refusal by a person to accept an interest in property ... ."\textsuperscript{41} Although chapter 191A provides that a disclaimer shall be irrevocable when executed and filed in accordance with its provisions, it does not preclude qualified or conditional disclaimers.\textsuperscript{42} Indeed, chapter 191A states that the disclaimer "shall be effective according to its terms."\textsuperscript{43} Thus, it would appear to be possible to execute a disclaimer which contained conditional terms. For example, if T devises land "to A for life, and then to B and his heirs if B marries C," and B is over twenty-one years of age at T's death, and has not married C, a disclaimer may be filed at any time after the creation of B's interest,\textsuperscript{44} notwithstanding after the time limit under chapter 191A for B's disclaiming is nine months after his interest becomes indefeasibly vested.\textsuperscript{45} If B files a disclaimer after T's death pursuant to which he disclaims his interest only in the event that his gross income is more than $100,000 per year at the time his interest becomes possessory, this disclaimer may be effective according to its terms under the Massachusetts statute.\textsuperscript{46} For that purpose, B will be deemed to have disclaimed if, but only if, his gross income is more than $100,000 per annum. On the other hand, the disclaimer will not be effective for federal tax purposes since it does not constitute an unqualified refusal to accept the interest.\textsuperscript{47}

\textbf{§10.5. Disclaimer of Joint Tenancies and Tenancies by the Entirety.} In the absence of statute, it is doubtful that a surviving joint tenant or tenant by the entirety could disclaim after the death of the deceased tenant. In some jurisdictions, this uncertainty stems from the fact that the survivor receives his interest by operation of law, rather than from the decedent, and that the survivor is deemed to be the owner of the entire property even during the lifetime of the decedent.\textsuperscript{1} Under this theory, the death of the decedent does not result in the survivor gaining any new rights that he could disclaim upon the decedent's death.\textsuperscript{2} Chapter 191A of the General Laws removes any doubt about the validity of a surviving tenant's disclaimer by permitting disclaimers by the survivor except that the survivor may

\textsuperscript{40} See G.L. c. 191A, § 7, which states: "A disclaimer complying with all the applicable requirements of this chapter shall be effective according to its terms .... ."

\textsuperscript{41} INT. REV. CODE OF 1954, § 2518(b).

\textsuperscript{42} G.L. c. 191A, § 7.

\textsuperscript{43} Id.

\textsuperscript{44} Id. § 3.

\textsuperscript{45} Id.

\textsuperscript{46} Id. § 7.

\textsuperscript{47} INT. REV. CODE OF 1954, § 2518(b).

\textsuperscript{1} See Krakoff v. United States, 439 F.2d 1023, 1026-27 (6th Cir. 1971).

\textsuperscript{2} Id.
not disclaim that portion of the jointly owned property "which is allocable to amounts contributed by him or her to the interest in such property." The statute, however, neither defines this contribution test nor clarifies how the allocation of contributions is to be made. In particular, the statute fails to specify whether the contribution test is to be applied upon the basis of contributions in fact or contributions from a tax perspective.

Section 2040 of the Internal Revenue Code (the "Code"), which deals with the estate taxation of joint tenancies and tenancies by the entirety utilizes a "consideration furnished" test for determining the includibility of an interest in the decedent's gross estate. For example, if A and B are joint tenants and A dies first, the amount includible in A's gross estate hinges upon the percentage of consideration that A furnished for the acquisition of the property. It should be noted, however, that the "consideration furnished" test is not applied in a literal and factual sense. Thus, if the amount that B contributed to the acquisition price originally was given to B by A in an earlier and separate donative transaction, A is deemed to have contributed the entire consideration and B's contribution is treated as zero. In that event, the entire value of the property is includible in A's gross estate for federal estate tax purposes. It is unclear whether chapter 191A would also be construed in such a case as classifying B as a non-contributor and hence entitled to disclaim. Furthermore, it should be noted that chapter 191A should not be construed as authorizing a surviving joint tenant to disclaim more than a one-half interest in the property in all cases, even though the survivor contributed nothing to the acquisition of the property. If the joint tenants had possession of the property prior to the death of the first decedent, the survivor's possession should be deemed an acceptance and bar a disclaimer of his undivided one-half interest, which he owned prior to the death of the first decedent.

Section 2518 of the Code does not explicitly deal with disclaimers of joint tenancies and tenancies by the entirety. In light of the Code's ob-

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3 G.L. c. 191A, § 2.
4 INT. REV. CODE OF 1954, § 2040(a).
6 Id.
7 Such an approach is plausible on the theory that chapter 191A was designed to ameliorate adverse tax consequences. Thus, despite the total inclusion of the jointly held property in the first decedent's gross estate, the survivor's subsequent efforts to transfer such an interest inter vivos or at death may result in such subsequent transfers being subject to gift or estate taxation and a form of double taxation would ensue. This consequence is avoided by permitting the survivor to disclaim. On the other hand, the same justification for disclaimer does not exist where the survivor contributed to the acquisition of the property. In that event, the survivor's contribution is excluded from the first decedent's estate and double taxation of a portion of the property is avoided even without a disclaimer. INT. REV. CODE OF 1954, § 2040(a).
8 G.L. c. 191A, § 8.
jective of uniformity⁹ and the fact that such interests may not be dis­
claimed in some states,¹⁰ it could be argued that it was not intended
for such interests to be disclaimed for federal tax purposes. This view
finds some support in the Tax Reform Act of 1976¹¹ and its amend­
ment of Code section 2040. That amendment provides that in the
event of a joint tenancy or tenancy by the entirety between husband
and wife, one-half of the value of a qualified joint interest may be ex­
cluded from the first decedent's gross estate.¹² A joint interest is “qual­
ified” if the interest was created by the decedent, the decedent's
spouse, or both, and the creation of the tenancy was treated as a gift
for gift tax purposes.¹³ Therefore, this could be viewed as a federal
effort to deal with the tax aspects of joint interests in a pervasive
manner and to pre-empt this tax phase of disclaimers.

Finally, even if Code section 2518 authorizes disclaimers of joint in­
terests, it is unclear on the issue of the time limit for making the dis­
claimer. Normally, under section 2518, the disclaimer must be made
within nine months after the day on “which the transfer creating the
interest in such person” is made.¹⁴ In the case of joint tenancies, it is
not clear whether the transfer is deemed made at the date of the crea­
tion of the joint interest or at the date of the first tenant's death.
Under chapter 191A, however, a disclaimer may be filed within nine
months after the death of the first tenant.¹⁵

§10.6. Effect of Disclaimers. To be effective for federal tax pur­
poses, the disclaimed interest must pass to someone other than the
disclaimant.¹ Since section 2518 of the Internal Revenue Code does
not delineate the persons to whom the property passes as a result of a
disclaimer, this presumably will be determined under state law. Sec­
tion 7 of chapter 191A of the General Laws provides that the interest
“shall pass in the same manner as if the beneficiary had died im­
mediately preceding the event determining that he, she or it is the
beneficiary of such interest and that such interest is indefeasibly
vested,”² unless “such a result would substantially impair the provi­
sions or intent of any instrument, statute or rule of law relating to the
interest in property being disclaimed.”³ This latter phrase indicates
that the transferor of the disclaimed interest can direct that an alter­
native disposition be made of the disclaimed interest by explicitly
manifesting an intent to that effect.

¹⁰ See Krakoff v. United States, 439 F.2d 1023, 1026-27 (6th Cir. 1971).
¹² INT. REV. CODE OF 1954, § 2040(b).
¹³ Id.
¹⁴ Id. § 2518(b)(2).
¹⁵ G.L. c. 191A, § 3.

§10.6. ¹ INT. REV. CODE OF 1954, § 2518(b)(4).
³ Id.
§10.7 PROPERTY AND CONVEYANCING

It would be prudent, therefore, for the draftsman to indicate clearly the disposition to be made of property which is subject to a power. For example, under chapter 191A, if a trustee is given the power to spray and sprinkle among the issue of the settlor of the trust, the disclaimer of the power, unlike the disclaimer of other interests, results in the power being extinguished. This result requires the clear-cut manifestation of the transferor's intent as to the disposition of the income in the event of a disclaimer of the power.

Chapter 191A does not explicitly deal with the interrelationship between disclaimers and the anti-lapse statute. Presumably, if T devises property to his child, C, and C disclaims, C's disclaimer should result in C being treated as having died before T. If C leaves issue surviving, C's issue should take the devised property under the anti-lapse statute.

Under chapter 191A, the disclaimer results in the disclaimed interest passing as if the disclaimant had died immediately preceding the event determining that the interest is indefeasibly vested, and the disclaimed interest is deemed never to have vested in the beneficiary. These provisions could have significant effects upon other interests in the property. For example, T devises land "to A for life, and then to the children of B," the disclaimer of A's interest could result in the remainder to B's children being treated as an immediate gift to them and the "class" of B's children would then close at T's death. More troublesome would be the effect of the disclaimer on issues arising under the Rule Against Perpetuities. For example, if T bequeaths property "to A for life, and then to the children of A who attain twenty-five" and A predeceases T, the gift to the children would be valid as written since the children could then be considered lives in being. The gift would be valid since it must take effect, if at all, within the lifetime of the children. Chapter 191A treats the disclaimed interest as passing as if the disclaimant had died immediately preceding the event determining that such interest is indefeasibly vested. It does not, however, explicitly provide that other interests, such as the gift to the children of A in the example, be viewed from the same perspective.

§10.7. Disclaimers and Acceleration. Another major problem left unanswered with respect to disclaimers is whether subsequent in-

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*Id. There is no provision for an alternative taker.
8 Cf. Thompson v. Thornton, 197 Mass. 273, 275, 83 N.E. 880, 880 (1908) ("The death of the life tenant before the testator simply accelerates the time when the devise over becomes operative.").
9 See W. SCHWARTZ, FUTURE INTERESTS AND ESTATE PLANNING § 11.4 (1965).
10 Id.
interests will be accelerated and moved closer to becoming possessory estates. By the great weight of authority, indefeasibly vested remainders are accelerated upon the disclaimer of a prior interest.¹ For example, if T devises property to A for life, then to B and his heirs, and A disclaims, B's interest is accelerated and B is entitled to a present possessory fee simple absolute estate.²

Usually, as long as a future interest is subject to an unsatisfied condition precedent, it is not accelerated upon a disclaimer.³ If an interest is contingent upon surviving a prior taker, however, there is authority that the condition precedent language should be reconstrued, in light of the disclaimer, to mean survival upon termination of the prior estate, regardless of how it ends, and thus acceleration would be permitted.⁴ For example, where T devises property to W for life with a remainder to T's then living children and W disclaims her life estate, the remainder to the children may be accelerated. That such acceleration could occur rests on the ground that "then living children" is reconstrued, in light of the disclaimer, to mean living at the time W's estate terminates, regardless of how it ends.⁵

In some previous cases, there have been statements to the effect that there is no distinction between vested and contingent interests as far as acceleration is concerned.⁶ These cases indicate that the issue of when acceleration occurs hinges upon the presumed intent of the transferor.⁷ In other cases, when the condition precedent involves more than the termination of the prior estate, such as the attainment of a given age,⁸ the passage of time,⁹ or the performance of certain acts,¹⁰ no acceleration will be permitted.

A devise, for example, where T devises property "to W for life, then to A and his heirs, but if A is not living at W's death, to B and

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² See W. Schwartz, Future Interests and Estate Planning § 11.6 (1965).
³ Restatement of Property § 233 (1936). The rationale for this rule is that acceleration of such an interest would frustrate the plan of disposition. Id. comment a.
⁴ See, e.g., Tomb v. Bardo, 153 Kan. 766, 773, 114 P.2d 320, 326 (1941); Eastern Trust & Banking Co. v. Edmunds, 133 Me. 450, 453-54, 179 A. 716, 717 (1935); see contra, e.g., St. Louis Union Trust Co. v. Kern, 346 Mo. 643, 652-54, 142 S.W.2d 493, 497-98 (1940); In re Reighard's Estate, 283 Pa. 140, 144-46, 128 A. 847, 848 (1925).
⁶ See Roe v. Doc, 28 Del. (5 Boyce) 545, 549, 93 A. 373, 375 (1914); Nelson v. Meade, 129 Me. 61, 64, 149 A. 626, 628 (1930).
⁷ See id.
⁹ See Brandenburg v. Thorndike, 139 Mass. 102, 103-04, 28 N.E. 575, 576 (1885).
¹⁰ See Crossan v. Crossan, 303 Mo. 572, 578-80, 262 S.W. 701, 702-03 (1924).
his heirs" and W disclaims her life estate presents two problems: (1) whether A's interest is accelerated; and (2) if A's interest is accelerated, whether A's interest is now indefeasible since he has survived the termination of the prior estate or whether his interest remains defeasible until W's death.\(^{11}\) There is substantial authority that A's interest is accelerated.\(^{12}\) There is a division of authority, however, with respect to whether A's interest becomes immediately indefeasibly vested or remains vested subject to divestment.\(^{13}\)

Acceleration will not be permitted if the transferor is found to have manifested a contrary intent.\(^{14}\) Such a contrary intent has been found to exist where the transferor has created other interests to exist concurrently with the disclaimed interest.\(^{15}\) If all of the succeeding interests, and all of the prior interests, except the disclaimed one, exist in the same persons, however, acceleration is permitted.\(^{16}\) For example, a testator devises property to trustees in trust for the support of his widow and two minor children, A and B, and on the death of the widow, one-third of the income is to be paid to A, one-third of the income is to be paid to B, and one-third of the income to an adult child, C. If W disclaims her interest under the will, it is likely that the testator did not desire that acceleration take place upon a disclaimer by W since others were to share the life estate concurrently with W. Thus, upon W's disclaimer, C does not become entitled to a third of the income.\(^{17}\)

Acceleration is also not permitted when the disclaimer of a prior interest causes a substantial distortion of the benefits receivable by other beneficiaries.\(^{18}\) In such circumstances, the interest that was disclaimed will be sequestered to compensate the disappointed distributees.\(^{19}\)

\(^{11}\) This latter problem can be verbalized as one of accelerating divesting contingencies. W. Schwartz, *Future Interests and Estate Planning* § 11.8 (1965, Supp. 1976).

\(^{12}\) See id.

\(^{13}\) For authority that the interest becomes immediately indefeasibly vested, see Keen v. Brooks, 186 Md. 543, 547, 47 A.2d 67, 69 (1946); Young v. Eagon, 131 N.J. Eq. 574, 576-77, 26 A.2d 180, 182 (1942); Albright v. Albright, 192 Tenn. 326, 334-35, 241 S.W.2d 415, 418-19 (1951); Restatement of Property § 231, comment h (1936). For authority that the interest remains subject to divestment, see Hasemeier v. Welke, 309 Ill. 460, 463-64, 141 N.E. 176, 177-78 (1923); Parker v. Ross, 69 N.H. 213, 215, 45 A. 576, 577 (1897).


\(^{18}\) See id.

\(^{19}\) See *Restatement of Property* § 234(a) (1936). As used in the Restatement, sequestration denotes that a disclaimed interest is "subjected to judicial management and is distributed as the testator manifestly would have desired if he had had in mind the [disclaimer]." Id. comment a.
example, where a testator devises property to his widow, W, for life, with a remainder to B and his heirs and W disclaims the share given her under the will and elects to take her statutory forced share which is satisfied out of other assets, W's election works a hardship upon the legatees and devisees whose interests are being sacrificed to pay her. W's election in such circumstances also may cause a serious distortion of the testator's scheme of disposition. If so, the life estate disclaimed by the wife should be sequestered and the income earned should be paid to the disappointed legatees and devisees to offset the loss they have suffered by the widow's action. Only if they have been compensated for their loss before the death of W can acceleration of the remainder take place. Upon the death of W, however, B and his heirs will be entitled to take possession, even if the residuary legatees and devisees have not yet been fully compensated.

It is difficult to lay down precise rules as to when a "substantial distortion" has occurred. It clearly does not occur if the decedent's entire estate is given to W for life with a remainder to other persons in fee simple absolute since there is no distortion of the relative amounts received by the various distributees. There is, however, greater uncertainty when the widow's elective share is satisfied out of residuary legacies and devises. It has been contended that acceleration should occur and sequestration should be precluded since sequestration would violate the rule requiring residuary legacies and devises to be abated before specific legacies and devises. On the other hand, the failure to sequester the renounced interest may give the nonresiduary legatees more than the transferor intended to give them at the expense of the residuary legatees.

When sequestration occurs, the property is subject to judicial control and management, and the assets are distributed in a manner which will most nearly effectuate the transferor's intent. A few courts have adopted the alternative remedy of accelerating the remainder and imposing a charge on the property to compensate disappointed legatees. Although seldom used, this remedy may be more desirable than sequestration since it avoids the expense of having the court administer the disclaimed interest. Furthermore, it avoids subsequent litigation as to the valuation of various interests if the widow subsequently outlives her expected life span. Thus, a charge

21 To the effect that acceleration could then take place, see Meeks v. Trotter, 133 Tenn. 145, 158, 180 S.W. 176, 179 (1915).
23 See Note, 61 Harv. L. Rev. 850, 855 (1948).
25 Id.
26 See Restatement of Property § 235 (1936).
settles the problem of determining the ratio of distribution at the outset.\(^{28}\)

**§10.8. Conclusion.** Although disclaimers may be useful post-mortem planning devices, they cannot realize their full beneficial potential until the issues presented in this chapter have been clarified. In particular, there is a pressing need for a determination of whether federal or state law shall be applicable for federal tax purposes. Either Congress, in its alleged quest for uniformity, should legislate a detailed statutory scheme relating to disclaimers, or it should specifically indicate the extent to which state law is to be applicable. If the latter alternative is chosen, it behooves the local Legislature to fill in the gaps in the current statute.

\(^{28}\) See Cummins, *The Effect on Future Interests of a Widow's Election Against the Will*, 37 *Dicta* 293, 303-04 (1960).