

1980

Renunciations and Disclaimers under South Carolina Law

Albert L. Moses

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Moses, Albert L. (1980) "Renunciations and Disclaimers under South Carolina Law," *South Carolina Law Review*. Vol. 31 : Iss. 4 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol31/iss4/5>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

RENUNCIATIONS AND DISCLAIMERS UNDER SOUTH CAROLINA LAW

ALBERT L. MOSES*

TABLE OF CONTENTS

I.	INTRODUCTION	668
A.	<i>What Are Renunciations and Disclaimers?</i> ..	668
B.	<i>Benefits of Disclaimers</i>	670
C.	<i>Title Theories</i>	670
II.	APPLICABLE LAW	671
III.	UNINTENDED CONSEQUENCES OF DISCLAIMERS	673
IV.	REQUIREMENTS OF AN EFFECTIVE DISCLAIMER	674
A.	<i>In General</i>	674
B.	<i>Timeliness</i>	674
C.	<i>To Whom Must the Disclaimer Be Delivered?</i>	677
D.	<i>Acceptance of the Gift</i>	677
1.	<i>In general</i>	677
2.	<i>By affirmative action</i>	677
3.	<i>By inaction</i>	680
E.	<i>Effectiveness Under Local Law</i>	681
1.	<i>In general</i>	681
2.	<i>Property interests that may be disclaim- able</i>	682
3.	<i>Property interests that may not be disclaim- able</i>	683
4.	<i>Property dispositions that may be disclaim- able</i>	685
5.	<i>Property dispositions that may not be dis- claimable</i>	685
V.	DEVOLUTION OF DISCLAIMED PROPERTY UNDER LOCAL LAW	686
A.	<i>In General</i>	686

* Member, South Carolina Bar; A.B., Wofford College, 1961; LL.B., University of South Carolina, 1964; LL.M., Georgetown University, 1967. The author is indebted to Professors David H. Means and Herbert Johnson of the University of South Carolina School of Law, and to Donald Dial, Jr., Adele J. Pope, Albert C. Todd, III, and William H. Townsend, all of the Columbia, South Carolina, Bar, for their review and valuable suggestions.

B.	<i>Testate Property</i>	687
1.	<i>The substituted beneficiary</i>	687
2.	<i>Anti-lapse statutes</i>	688
3.	<i>Joint tenancies with right of survivorship</i> ..	689
4.	<i>Class gifts</i>	689
5.	<i>Life estates</i>	689
6.	<i>Residue provisions</i>	690
C.	<i>Intestate Property</i>	690
VI.	EFFECTIVENESS OF STATE-COURT DECISIONS	692
VII.	REVOKING DISCLAIMER	693
VIII.	WHO CAN DISCLAIM?	695
IX.	CONCLUSION	695

I. INTRODUCTION

Conventional wisdom tells us that nothing is more accurate than hindsight. Unfortunately, it is rare indeed when hindsight can accomplish much more than painfully to prepare us for similar future events that usually do not occur. Broad observations of hindsight are as true in the estate planning area as they are in life generally. One of those rare areas in which one can act upon hindsight beneficially is in the renunciation or disclaimer of gifts. In certain instances, if all the factors are present, it is sometimes possible to convert a gift that has unfavorable consequences into a gift with favorable consequences. This article will define and discuss the uses of renunciations and disclaimers in South Carolina generally, and will analyze relevant postmortem pitfalls and opportunities involving their use.

A. *What Are Renunciations and Disclaimers?*

The terms "renunciation" and "disclaimer" are synonymous, but the term "disclaimer" will be used throughout this article because it is the term that is used in the Internal Revenue Code. A disclaimer has been defined by Treasury Department regulations under the Internal Revenue Code as a complete and unqualified refusal to accept the ownership of property.¹ Other

1. Treas. Reg. § 25.2511-1(c) (1958) provides in pertinent part:

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

regulations² note that there is a distinction between a disclaimer of a property interest on the one hand, and the acceptance and subsequent disposal of that interest on the other; the latter action does not constitute a disclaimer. The 1976 Tax Reform Act³ introduced the term "qualified disclaimer"⁴ and provided that

to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), 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.

This regulation was adopted on November 15, 1958, prior to the adoption of I.R.C. § 2518 as a part of the Tax Reform Act of 1976. Except for the fact that § 2518 now imposes a specified rather than a "reasonable" time, the quoted language of the regulation appears to remain an accurate description of a disclaimer.

2. Treas. Reg. § 20.2056(d)-(1) (1958) provides in part: "A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. It is, therefore, necessary to distinguish between the surviving spouse's disclaimer of a property interest and her acceptance and subsequent disposal of a property interest." This regulation was adopted on June 24, 1958, prior to the adoption of § 2518 of the Tax Reform Act of 1976. The quoted language nevertheless remains correct.

3. 1976 Tax Reform Act, Pub. L. No. 94-455, 90 Stat. 1520-1933.

4. I.R.C. § 2518(b). I.R.C. § 2518 has an effective date of January 1, 1977, and applies to disclaimers of interests created on or after that date. H.R. REP. NO. 1380, 94th Cong., 2d Sess. 67, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3356, 3421. Section 2518 provides:

(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 the 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.

with respect to interests created after December 31, 1976, a disclaimer would be recognized for tax purposes only if it was a qualified disclaimer⁵ under applicable provisions of the Internal Revenue Code.

B. *Benefits of Disclaimers*

Succinctly stated, the benefits of disclaimers are those that can be realized by a postmortem shifting of property interests based upon hindsight. Such shifting is normally effected in order to create a tax benefit. For example, individuals frequently use disclaimers to increase the size of the surviving spouse's interest in estate properties in order to increase the amount of the estate tax marital deduction. Alternatively, if a surviving spouse has received property with an aggregate value exceeding the maximum estate tax marital deduction, it may be possible for the surviving spouse using a disclaimer to cause the excess to pass to children or others, thus, reducing the size of the estate without incurring a gift tax liability.⁶

C. *Title Theories*

There are two legal theories regarding the passage of title to disclaimed property. Under one theory, the property is transferred by will or *inter vivos* gift and acceptance is presumed.⁷ If the property is subsequently disclaimed, the disclaimer relates back to the time that the gift was effective and title is considered never to have passed to the disclaimant. Under the other theory, no transfer of title is made until there has been an acceptance and if a disclaimer occurs before acceptance, then title never passed to the disclaimant.⁸ Neither theory has been expressly accepted or rejected by the South Carolina Supreme Court.

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

5. See H.R. REP. NO. 1380, 94th Cong., 2d Sess. 67, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356-3421. But see Private Letter Rulings 7913082, 7849009.

6. A comprehensive discussion of the advantages of disclaimers is found in L. NEWMAN & A. KALTER, POSTMORTEM ESTATE PLANNING 13 (1976).

7. 6 PAGE ON THE LAW OF WILLS § 49.4 (W. Bowe & D. Parker eds. 1962) (citing, *inter alia*, Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945)).

8. 6 PAGE ON THE LAW OF WILLS, *supra* note 7, § 49.4.

II. APPLICABLE LAW

To achieve the intended result and to be effective, a disclaimer must comply with a variety of statutory and common-law requirements. It must meet the requirements of state property law,⁹ federal estate tax law,¹⁰ federal gift tax law,¹¹ South Carolina estate tax law,¹² and South Carolina gift tax law.¹³

Prior to 1966, the Internal Revenue Service took the position in its regulations¹⁴ that it was not possible to increase the federal estate tax marital deduction through the use of a disclaimer. The theory was that if property passed to a surviving spouse by reason of a disclaimer, such property had not passed to the surviving spouse from the decedent and, therefore, did not qualify for the estate tax marital deduction. The marital deduction statute was amended by Congress in 1966¹⁵ to permit an increase in the marital deduction by a disclaimer. Federal tax law regarding disclaimers was again changed in the Tax Reform Act of 1976.¹⁶ The committee reports for the 1976 Tax Reform Act state that the reason for changing the federal tax laws regarding disclaimers was to achieve uniform treatment.¹⁷ This Congress clearly

9. South Carolina has no statute expressly permitting a disclaimer. Disclaimers of gifts under a will have been permitted in *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976); *Dabney v. Estes*, 262 S.C. 336, 204 S.E.2d 387 (1974); and in *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956).

10. I.R.C. § 2045. This statute provides only: "For provisions relating to the effect of a qualified disclaimer for purposes of this chapter, see § 2518."

11. I.R.C. § 2518.

12. S.C. CODE ANN. §§ 12-15-40, -60 (1976) (incorporating respectively I.R.C. §§ 2031-2044 and §§ 2051-2056, as of December 31, 1975).

13. S.C. CODE ANN. § 12-17-40 (Cum. Supp. 1979) (incorporating I.R.C. §§ 2503, 2511-2517, and the deductions allowed in §§ 2522-2524 inclusive, as of December 31, 1975).

14. Treas. Reg. § 20.2056(d)-1(b) (1958). This regulation has never been rescinded by the Internal Revenue Service, but was superseded by the adoption of I.R.C. § 2056(d)(1) on October 4, 1977. Section 2056(d) was itself repealed by the Tax Reform Act of 1976 and replaced by §§ 2045, 2518.

15. I.R.C. § 2056(d)(1) (1966) (repealed 1976).

16. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (adding I.R.C. §§ 2045, 2518).

17. H.R. REP. No. 1380, 94th Cong., 2d Sess. 67, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356, 3421, describes § 2518 as follows:

The bill provides definitive rules relating to disclaimers for purposes of the estate, gift and generation-skipping transfer taxes. If the requirements of the provision are satisfied, a refusal to accept property is to be given effect for Federal estate and gift tax purposes even if the applicable local law does not technically characterize the refusal as a "disclaimer" or if the person refusing the property was considered to have been the owner of the legal title to the prop-

failed to do.¹⁸

Section 2518 of the Internal Revenue Code, adopted as a part of the 1976 Tax Reform Act, contains the federal estate and gift tax requirements for disclaimers of property. The Revenue Act of 1978 slightly amended section 2518.¹⁹

Before the 1976 Tax Reform Act, the disclaimer provisions in the federal estate and gift tax laws were scattered among many sections of the Internal Revenue Code and regulations.²⁰ Because South Carolina has incorporated certain federal estate and gift tax statutes as of December 31, 1975,²¹ disclaimers for tax purposes in South Carolina must meet the requirements of pre-1976 federal estate and gift tax laws.²²

Finally, to be effective for tax purposes under both state and federal tax laws, the disclaimer must be effective under local property law. In other words, under local property law, when property is disclaimed, the method of disclaiming must effectively reject title to the property.²³ If so, and if the method of disclaiming meets the requirements of estate and federal tax law, then there will be an effective disclaimer for tax and property law purposes.

erty before refusing acceptance of the property.

18. See A. CASNER & R. STEIN, *ESTATE PLANNING UNDER THE TAX REFORM ACT OF 1976*, at 179 (1978) [hereinafter cited as *ESTATE PLANNING*]; J. MCCORD, *1976 ESTATE AND GIFT TAX REFORM* 257 (1977).

19. Pub. L. No. 95-600, § 702(m)(1), 92 Stat. 2763 (adding I.R.C. § 2518(b)(4)(A)).

20. For example, (1) *gifts generally*—Treas. Reg. § 25.2511-1(c) (1958); (2) *powers of appointment*—I.R.C. §§ 2041(a)(2), 2514(b), Treas. Reg. §§ 20.2041-3(d)(6) (1958), 25.2514-3(c)(5) (1958); (3) *marital deduction*—I.R.C. § 2056(d), Treas. Reg. § 20.2056(d)-1 (1958); (4) *charitable deduction*—I.R.C. § 2055(a), Treas. Reg. § 20.2055-2(c) (1958); (5) *right of an individual to vest trust income or principal in himself*—I.R.C. § 678(d), Treas. Reg. § 1.678(d)-1 (1960). All of the disclaimer provisions of these statutes except § 678(d) were repealed by the Tax Reform Act of 1976, which substituted § 2518.

21. See notes 12-13 *supra*.

22. See *id.* However, the changes effected by § 2518 in the federal tax laws concerning disclaimers appear more restrictive than the requirements of prior federal tax laws and, therefore, it would appear that if the requirements of § 2518 are met, the requirements of South Carolina estate and gift tax law will probably also be met.

23. Although it seems to be clear that disclaimers of testate property can be made in South Carolina, e.g., *Bahan v. Citizens and Southern Nat'l Bank of S.C.*, 267 S.C. 303, 277 S.E.2d 671 (1976), there is practically no guidance available regarding how the disclaimer must be made. Presumably, if the requirements of § 2518 are complied with, the disclaimer will be effectively made under South Carolina property law.

III. UNINTENDED CONSEQUENCES OF DISCLAIMERS

The two most common mistakes in the use of disclaimers are failure to meet the requirements of tax statutes and failure to correctly anticipate the devolution of the ownership of the property after it has been disclaimed. Each of these mistakes will be considered in turn.

In some instances, if the disclaimer is effective under state law to vest title to the disclaimed property in someone other than the disclaimant, but fails to meet the tax requirements, then the person who disclaims may be considered to have made a gift to the person who ultimately receives the disclaimed property. For example, in the 1952 case of *Hardenbergh v. Commissioner*,²⁴ the decedent's wife and daughter each attempted to disclaim their intestate share of the decedent's estate, intending that the decedent's son receive it. As a result of the disclaimers, the administrators delivered to the son the property that had been disclaimed. The Internal Revenue Service successfully asserted before the Eighth Circuit that the disclaimers were ineffective and that, because the purportedly disclaimed property had been delivered to the son by an action of the decedent's wife and daughter, the decedent's wife and daughter had made gifts to the decedent's son of their share of the intestate's estate.²⁵ Thus, the decedent's wife and daughter were required to pay a gift tax on the property that they purportedly had disclaimed.

A different problem occurs when the devolution of the disclaimed property following the disclaimer has not been correctly anticipated. For example, assume that B disclaims a testamentary gift from A, believing that the property will be received by C, but under the law the property passes to D. The tragic consequences of this error are sometimes compounded by the fact that the purpose of the disclaimer by B was to get the property to C, the surviving spouse, in order to qualify for marital deduction. Not only does the property devolve into the wrong hands, but the marital deduction, which was the goal of the disclaimer, is not allowed. Careful attention, therefore, must be paid to the requirements of both the tax statutes and the devolutionary rules of local property law.

24. 198 F.2d 63 (8th Cir.), *cert. denied*, 349 U.S. 836 (1952).

25. *Id.* at 66.

IV. REQUIREMENTS OF AN EFFECTIVE DISCLAIMER

A. *In General*

For a disclaimer to be effective, it must meet the requirements of state and federal estate and gift tax laws as well as state property laws. Many of these laws overlap in their requirements, but the most definitive and restrictive statement of requirements is found in section 2518 of the Internal Revenue Code: "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."²⁶ Section 2518 incorporates a new term in the Internal Revenue Code, the "qualified disclaimer."

The first requirement for a qualified disclaimer is that it constitute an "irrevocable and unqualified refusal by a person to accept an interest in property."²⁷ This requirement traditionally has been part of the definition of disclaimers.²⁸

The second requirement for a qualified disclaimer is that it be in writing.²⁹ This requirement is commonly found in statutes under local laws that permit disclaimers³⁰ and is also found in the Uniform Probate Code.³¹ A proposed form of written disclaimer is set forth at the end of this article as an appendix.

B. *Timeliness*

The third requirement is that the disclaimer be delivered within a nine-month period.³² If the disclaimant is twenty-one years of age or older when the interest in property is created, the nine-month period begins on the date that the interest in the property being disclaimed was created. The determination of the date on which the interest is created, however, is based upon the rules governing completed gifts. Congressional committee reports provide: "For purposes of this requirement, a transfer is considered to be made when it is treated as a completed transfer for

26. I.R.C. § 2518(a).

27. I.R.C. § 2518(b).

28. J. McCORD, *supra* note 18, at 246.

29. I.R.C. § 2518(b)(1).

30. See J. McCORD, *supra* note 18, at 246.

31. UNIFORM PROBATE CODE § 2-801(a).

32. I.R.C. § 2518(b)(2).

gift tax purposes with respect to inter vivos transfers or upon the date of the decedent's death with respect to testamentary transfers."³³

What are some examples of incomplete gifts? Two of the most common examples are the revocable trust³⁴ and the joint bank account.³⁵ Even irrevocable trusts are incomplete gifts if the grantor retains the power to alter or amend the trust by changing the beneficiaries.³⁶

If the disclaimant is under twenty-one when the interest is created, then the disclaimer must be delivered within nine months after the later of the dates upon which (a) the interest is created (and has become a completed gift) or (b) the disclaimant attains the age of twenty-one.³⁷

Once the nine-month period begins to run, it is not delayed or deferred because the donee or beneficiary is not aware that the transfer has been made.³⁸ Nor does the nature of the interest as future or contingent affect the running of the nine-month period, once it has begun.³⁹ It is clear that the statute was intended to apply to future interests because the committee reports⁴⁰ refer to and disapprove the result in the case of *Keinath v. Commissioner*,⁴¹ which involved a bequest of a life estate to the decedent's widow, remainder to his two sons. The widow survived the decedent and died nineteen years later. Within several months of her death, one of her two sons who was independently wealthy disclaimed his remainder interest, causing that interest to pass to his children. The Eighth Circuit Court of Appeals held that the disclaimer was timely because the period of time began to run for the son only when his remainder interest became possessory. Measured by that standard, the disclaimant renounced sev-

33. H.R. REP. NO. 1380, 94th Cong., 2d Sess. 67, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356, 3421.

34. See Treas. Reg. § 25.2511-2(b) (1958).

35. See Treas. Reg. § 25.2511-1(h)(4) (1958).

36. See Treas. Reg. § 25.2511(2) (1958) for a description of the kinds of gifts that are complete and those that are incomplete for gift tax purposes. Also, for a detailed discussion of the timing problems created by § 2518(b)(2), see J. McCORD, *supra* note 18, at 247-50.

37. I.R.C. § 2518(b)(2).

38. J. McCORD, *supra* note 18, at 248.

39. *Id.*

40. H.R. REP. NO. 1380, 94th Cong., 2d Sess. 66, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356, 3420.

41. 480 F.2d 57 (8th Cir. 1973), *rev'g*, 58 T.C. 352 (1972).

eral months after rather than nineteen years after receiving the disclaimed property. Section 2518(b)(2) has overturned the *Keinath* case, and it is now clear that a future interest must be disclaimed within nine months of the time that the transfer becomes a completed gift and not within nine months of the time that the interest becomes possessory. The same rule would seem to apply to contingent gifts even though the contingency has not occurred.⁴²

In addition to the nine-month period imposed by tax law, local law also is said to impose its own time limitations for disclaimers, which is said to be a "reasonable time." The only reference to time limitations for disclaimers in South Carolina seems to be the case of *Watson v. Wall*,⁴³ which mentions that the disclaimer took place within the administration year. In *Bahan v. Citizens & Southern National Bank*⁴⁴ the disclaimer was made more than six months after the decedent's death. The question of timeliness was not raised in any of the pleadings and was not commented on by the court. The court apparently assumed that the period of time within which the disclaimer was made was reasonable. It also may be that whether the time is reasonable depends upon whether the delay in disclaiming works any injury to third parties.⁴⁵

The application of section 2518(b)(2) to powers of appointment has created some special problems. The conference report provides:

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.⁴⁶

42. J. McCORD, *supra* note 18, at 253.

43. 229 S.C. 500, 93 S.E.2d 918 (1956).

44. 267 S.C. 303, 226 S.E.2d 671 (1976).

45. L. NEWMAN & A. KALTER, *supra* note 6, at 43 (citing, *inter alia*, *Crumpler v. Barfield & Wilson Co.*, 114 Ga. 570, 40 S.E. 808 (1902)).

46. H.R. REP. NO. 1515, 94th Cong., 2d Sess. 623-24 reprinted in [1976] U.S. CODE

Suppose that the power is a special rather than a general power of appointment and the exercise of the special power is, therefore, not a taxable transfer. In such a case, if the special power is exercised more than nine months after it is created, the person to whom the property passes may be unable to effectively disclaim for tax purposes.⁴⁷

C. *To Whom Must the Disclaimer Be Delivered?*

Section 2518⁴⁸ requires that a written disclaimer be delivered to the transferor of the interest, his legal representative, or the holder of legal title to the property to which the interest relates. Since the statute permits the disclaimer to be delivered to the transferor of the interest, it is clear that the disclaimer statute is intended to apply to lifetime gifts.⁴⁹ The term "legal representative" undoubtedly means executor or administrator and the term "holder of the legal title to the property to which the interest relates" probably includes a trustee. It is also noteworthy that these persons are described in the alternative.⁵⁰ Thus, if T appoints A his executor and devises property to B in trust for C, it would appear that C can deliver his disclaimer either to A, his executor, or to B, his trustee. Similarly, if D gives property to X in trust for Y, Y's disclaimer can be delivered to D, as donor, or to X, as trustee.

D. *Acceptance of the Gift*

1. *In general.*—Section 2518⁵¹ requires that the disclaimant must not have accepted the interest in the disclaimed property or any of its benefits. Acceptance of property can be express or implied.⁵² Acceptance of an interest which would be beneficial is sometimes said to be presumed,⁵³ while acceptance of an interest which would be burdensome is said not to be presumed.⁵⁴

2. *By affirmative action.*—Acceptance of property involves,

CONG. & AD. NEWS 4118, 4262.

47. See generally J. McCORD, *supra* note 18, at 249.

48. I.R.C. § 2518(b)(2).

49. J. McCORD, *supra* note 18, at 247.

50. *Id.*

51. I.R.C. § 2518(b)(3).

52. 6 PAGE ON THE LAW OF WILLS, *supra* note 7, § 49.6, (citing *King v. Skellie*, 79 Ga. 147, 3 S.E. 614 (1887)).

53. 6 PAGE ON THE LAW OF WILLS, *supra* note 7, § 49.7.

54. *Id.*

among other things, receipt, use, enjoyment, dominion and/or control over it.⁵⁵ It has other meanings as well. The committee reports applicable to section 2518 provide: "In addition, the acceptance of any consideration in return for making the disclaimer is to be treated as an acceptance of the benefits of the interest disclaimed."⁵⁶

The pitfalls created by the requirement that a disclaimant not have accepted property prior to disclaiming it are well illustrated in the case of *Krakoff v. United States*.⁵⁷ Anna and Abraham Krakoff, husband and wife, were joint signatories on several bank accounts and owned shares of stock jointly with right of survivorship. Under local law, upon the death of a joint owner of a bank account, the survivor was entitled to the proceeds. About three months after Abraham's death, Anna executed disclaimers of her interest in the joint bank accounts and the stock. As a result of Anna's disclaimer a probate court in Ohio held that the property passed under the will to Anna and the four surviving children,⁵⁸ with the children receiving two-thirds of the disclaimed property and Anna receiving one-third.

The Internal Revenue Service, however, successfully asserted that the disclaimers were ineffective. The issue raised by the Service was not whether the disclaimer was timely but whether Anna had accepted her interest in the stock and joint bank accounts before disclaiming them. Anna stipulated⁵⁹ that prior to her husband's death she knew of the existence of the joint bank accounts and of the shares of stock owned jointly, that she had signed the bank signature cards for the opening of the accounts, and that she had endorsed dividend checks from the shares of stock held jointly. Based in part on that stipulation, the court held that Anna could not disclaim her interest in the joint stock or the joint bank accounts because she had previously accepted them.⁶⁰ The court further held that the two-thirds interest received by the children constituted a gift from Anna

55. *Id.* § 49.6. "It is sufficient if the devisee or legatee performs acts which show his intention to accept at that time." *Id.*

56. H.R. REP. NO. 1380, 94th Cong., 2d Sess. 67 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356, 3421.

57. 313 F. Supp. 1089 (S.D. Ohio), *aff'd*, 439 F.2d 1023 (6th Cir. 1971).

58. Estate of Krakoff, 18 Ohio App. 2d 116, 179 N.E.2d 566 (1961).

59. 439 F.2d at 1026.

60. *Id.*

upon which she would be required to pay a gift tax.⁶¹

"Acceptance" in the *Krakoff* case appears to be based upon affirmative acts by Anna, such as signing the signature cards, making deposits and endorsing dividend checks. If the court was correct in holding that the signing of a signature card on a joint bank account is sufficient evidence of acceptance, then it would seem that a joint bank account could never be disclaimed because a signature card will always be required by the bank at which the account is located. The *Krakoff* case is a clear example of the troublesome questions that accompany a disclaimer of nontestamentary gifts.⁶²

61. *Id.* at 1028.

62. The federal court in *Krakoff* found that, under Ohio law, each joint depositor was presumed rebuttably to be a co-owner of the account. 439 F.2d at 1026. This rule may differ from the South Carolina rule. The South Carolina courts have not held that a non-contributing joint depositor is a co-owner, at least during the life of the contributing depositor. In *Smith v. Planters Savings Bank*, 124 S.C. 100, 117 S.E. 312 (1923), the court held that a joint deposit (the funds in which were conceded to have belonged to the decedent co-depositor) belonged to the decedent's estate and that the surviving co-depositor had a mere power of attorney to withdraw the funds on deposit, which power was revoked on the death of the decedent. The case was decided prior to the adoption of S.C. CODE ANN. § 34-11-10 (1976), permitting banks to pay the proceeds of a joint account to either co-depositor, whether or not the other co-depositor is living. In *Hawkins v. Thaxton*, 224 S.C. 445, 79 S.E.2d 714 (1954), the court permitted the payment of joint account proceeds to a surviving co-depositor, based on the contractual relationship among the depositors and the depository and a rebuttable presumption (that arose by virtue of § 34-11-10) that the decedent intended the survivor to have and retain the funds on deposit after the decedent's death. While the court may have implied that the co-depositors were co-owners by stating that during the time both depositors were alive "both were entitled to possession . . ." of the passbook, the court also observed that the "case is not concerned with the rights of the parties with respect to a deposit while both live." In *Austin v. Summers*, 237 S.C. 613, 118 S.E.2d 684 (1961), involving one contributing joint depositor and two non-contributing co-depositors, the court did not refer to the two non-contributing co-depositors as "owners" of the account until after the death of the contributing joint depositor. The court also held that when one joint depositor, following the death of another joint depositor (who furnished all the funds), withdrew all of the account proceeds, she was accountable to the other surviving joint depositors for half of the funds withdrawn. These cases may indicate that during the life of a contributing joint depositor, a non-contributing joint depositor has a right to withdraw funds but remains accountable and, therefore, is not a co-owner of the account. If this is the law in this state, the *Krakoff* case is inapplicable because there was no property right to accept until the death of the contributing joint depositor. The nature of the interest of a non-contributing joint depositor prior to the death of a contributing depositor, however, is not clear. In view of the lack of South Carolina decisions dealing with renunciations of joint accounts, there may be a risk that the *Krakoff* case would be held applicable, with the result that a disclaimer more than nine months after the account was created might be ineffective on the grounds that there had been an acceptance by the non-contributing co-depositor. In such event, a renunciation might result in a gift and a gift tax liability.

The question of acceptance is essentially different from the question of timeliness. The timeliness question concerns when the property must be disclaimed: within the nine-month period from the time that the interest was created or, in the case of minors, nine months from age twenty-one.⁶³ In the *Krakoff* case, the bank account, for example, did not involve a completed gift and so even if the *Krakoff* case had arisen after the effective date of section 2518 of the 1976 Tax Reform Act, the nine-month time limitation would not have run out. It would seem that but for her prior acceptance, Anna's disclaimer should have been effective. Notwithstanding that fact, however, the *Krakoff* case may be authority for the principle that a gift may be accepted for tax purposes before it is completed for tax purposes.

3. *By inaction.*—A more troublesome question is whether and to what extent acceptance can be based upon inaction. The gift tax regulations provide: "In 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 transfer."⁶⁴

If the philosophy embodied in the regulation is extended beyond instances of property received from a decedent under his will, the result can be troublesome indeed. For example, after the death of the insured, can the beneficiary of a life insurance policy disclaim if he has been the beneficiary for many years? Can the beneficiary of an unfunded revocable *inter vivos* insurance trust disclaim after the settlor's death if he has been a beneficiary of the trust for a long period of time?⁶⁵ In either of these cases, has there been an acceptance by the inaction of the bene-

63. I.R.C. § 2518(b)(4).

64. Treas. Reg. § 25.2511-1(c) (1958). In *Larisey v. Larisey*, 93 S.C. 450, 77 S.E. 129 (1913), the court observed in dictum: "In the absence of evidence to the contrary, it will be presumed that the donee of valuable unencumbered property, conveyed without condition, will accept the gift." *Id.* at 453, 77 S.E. at 130.

65. *But see Rolin v. Comm'r*, 68 T.C. 919, *aff'd*, 588 F.2d 368 (2d Cir. 1968). The tax court held that Mrs. Rolin could disclaim her interest in the *inter vivos* trust because she never accepted it during her lifetime. The trust was created by Mr. Rolin in 1958 and, at that time, Mrs. Rolin was made a beneficiary, but was to receive no benefits therefrom unless she survived her husband. Mr. Rolin died in 1968 and Mrs. Rolin died about four months later, never having received any trust benefits. *See also* Treas. Reg. § 20.2056(d)-1 (1958) (I.R.C. § 2056(d) having been repealed by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520); Finnell, *Disclaimers and the Marital Deduction: A Need for Adequate State Legislation*, 21 U. FLA. L. REV. 1, 35 (1968); notes 2 & 14 *supra*.

property passes under a residue clause to the wife. Despite the requirement that the disclaimed property must pass to a person other than the disclaimant, a special exception exists when the spouse is concerned.⁷⁰ Thus, in the case described above, the wife would have disclaimed a life interest and received a fee simple interest that would have qualified for the estate tax marital deduction. Her disclaimer in this instance would have been a qualified disclaimer.

The second part of the requirement is that the disclaimant cannot have controlled the subsequent devolution of the disclaimed property. Stated another way, the disclaimant cannot disclaim in favor of some other person. The disclaimant must exercise no control whatever over the subsequent devolution of the property after it has been disclaimed.⁷¹ As will be evident later,⁷² the effectiveness of a disclaimer under local law may depend upon either the nature of the property interest being disclaimed or the method of disposition of the property to the disclaimants.

2. *Property interests that may be disclaimable.*—It is well established that certain kinds of disclaimers are permitted under South Carolina property law.⁷³ Nevertheless, it does not necessarily follow that it is possible to disclaim property interests of all kinds. Three South Carolina cases have dealt with the effectiveness of disclaimers of devises and have permitted such disclaimers.⁷⁴ Two of those cases also dealt favorably with the effectiveness of disclaimers of personal property.⁷⁵ The latest of those cases⁷⁶ went even further and permitted a disclaimer of a portion but not all of the property passing under the residue provision of a decedent's will. In the *Bahan* case, the decedent's surviving spouse disclaimed (1) \$150,000 out of \$532,000 cash passing

70. I.R.C. § 2518(b)(4)(A).

71. Thus, the use of a quitclaim deed by a disclaimant to "insure" that he did not have title to the disclaimed property could be fatal. Such a deed would be evidence of an intent to receive and dispose of property, rather than an intent to reject it.

72. See text in Part IV.E.2.

73. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976); *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956). See also *Dabney v. Estes*, 262 S.C. 336, 204 S.E.2d 387 (1974).

74. See cases cited in note 73 *supra*.

75. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976); *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956).

76. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976).

under the residue clause, (2) thirty shares out of eighty and one-half shares of stock in the Bahan Textile and Machinery Company, Inc.; and (3) all of the decedent's one-quarter undivided interest passing to her in a certain parcel of real property.⁷⁷

The *Bahan* case is instructive because of the variety of property and interests in property permitted to be disclaimed. For example, *Bahan* establishes a testamentary disclaimant's right under local law to pick and choose property passing under a single item of a will, accepting certain items of property and rejecting other items, as evidenced by the disclaimer of some but not all of the cash passing under the will and the disclaimer of some but not all the stock of a particular corporation.

3. *Property interests that may not be disclaimable.*—Although the general rule is that a donee has the right to accept or reject a gift of any kind of property, if the donee or legatee attempts to accept an interest in part of the property and reject the balance, problems arise. In some cases the courts have refused to permit partial disclaimers on the ground that the gift was not severable.⁷⁸

The *Bahan* case⁷⁹ has resolved in South Carolina some of the local law problems of partial disclaimers by permitting certain kinds of partial disclaimers. Other problems remain to be resolved. For example, although the court found in the *Bahan* case that the disclaimer of a one-fourth undivided interest in certain real property was effective, such one-fourth interest was the entire interest owned by the decedent and the disclaimer by the decedent's spouse did not create a fractional interest when none existed before. The question therefore remains whether, for example, B, a devisee of Blackacre under A's will, could disclaim an undivided one-half interest as tenant in common and thus create a fractional share interest when none had existed previously.⁸⁰ Or, given the same example, could B disclaim a remain-

77. Warrant of Appraisement for the Estate of Edward F. Bahan, Deceased (on file, Office of the Probate Judge, Greenville County, S.C., in apartment 1274, file 24). It has been suggested that a partial disclaimer of this kind might not have been effective under § 2518. See J. McCORD, *supra* note 18, at 253.

78. See, e.g., *Bailey v. McLain*, 215 N.C. 150, 1 S.E.2d 372 (1939). See also 6 PAGE ON THE LAW OF WILLS, *supra* note 18, § 49.10.

79. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976).

80. See J. McCORD, *supra* note 18, at 255.

der interest in Blackacre, retaining a life interest?⁸¹ In addition, the effectiveness of certain kinds of partial disclaimers may also be questionable under applicable provisions of federal tax laws. Section 2518 treats the problem as follows: "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."⁸²

The first problem encountered in section 2518(c)(1) is whether a remainder interest in property that has been disclaimed (a life interest having been accepted) can constitute an "undivided portion of an interest." The answer would seem to be negative, thus, such a disclaimer may be ineffective for tax purposes, even if it is effective under local law.⁸³ If that problem is overcome, section 2518(c)(1) provides that the disclaimer of an undivided portion must meet the requirements of section 2518(b). One of the provisions of section 2518(b) prohibits the disclaimant from accepting the interest "or any of its benefits." It is difficult to understand how B can disclaim a remainder interest in Blackacre and accept a life estate without having accepted any of Blackacre's benefits.

Notwithstanding the problems of attempting to disclaim a remainder and retain a life interest, what is permitted under section 2518(c)(1) dealing with undivided portions? Does section 2518(c)(1) permit only the kind of disclaimer made by Mrs. Bahan (who received a one-fourth undivided interest in real property and disclaimed it) or does it mean that, in the example posited above, B, the devisee of Blackacre, could disclaim a one-half undivided interest therein, thus creating a fractional interest in himself (and the taker by reason of the disclaimer) when none previously existed (or was even intended by the testator)? It has been suggested⁸⁴ that section 2518(c)(1) permits a disclaimant to create an undivided interest under a disclaimer because section 2518(c)(1) was unnecessary to permit the kind of disclaimer made by Mrs. Bahan when she received and disclaimed a one-quarter interest in real property. However, in view of the "undi-

81. The Internal Revenue Service has refused to rule on this question. See Private Letter Rulings 7922018, 7913082.

82. I.R.C. § 2518(c)(1).

83. In Private Letter Ruling 7922018, the Internal Revenue Service refused to rule on this question, even though accepting a life interest was permitted under local law.

84. J. McCord, *supra* note 18, at 255.

vided portion" language of section 2518(c)(1), the effectiveness for tax purposes of a disclaimer of a specific sum out of a larger cash bequest or a specific number of shares of stock out of a larger block seems subject to question.⁸⁵

4. *Property dispositions that may be disclaimable.*—Voluntary dispositions or transfers of property generally seem to be disclaimable. Cases in South Carolina permitting testamentary disclaimers have been discussed previously.⁸⁶ South Carolina cases dealing with *inter vivos* gifts describe such gifts in terms of agreements regarding which acceptance is required to complete the gift.⁸⁷ Implicit in these cases is the premise that if acceptance is required to make the gift complete, the donee is free not to accept the gift. With the possible exception of partial disclaimers, all kinds of voluntarily transferred property interests seem to be disclaimable and it is frequently the method of disposition or transfer to the potential disclaimant that impairs the possibility of disclaiming.

5. *Property dispositions that may not be disclaimable.*—Under the common law, intestate property could not be disclaimed.⁸⁸ The rationale for such different treatment of intestate property is based upon the fact that title to intestate property passes by operation of law and an heir or distributee of intestate property is said to be unable to prevent the passage of title to property received by operation of law.⁸⁹ The rule is said to have its origin in feudal times and was based upon a policy that nothing should be allowed to defeat the passage of title to the legitimate heir.⁹⁰

The Supreme Court of South Carolina has never expressed an opinion on the effectiveness of a disclaimer of intestate property. In the *Bahan* case the disclaiming spouse not only disclaimed certain portions of the property passing to her by will, but fearing that her disclaimer would result in an intestacy or

85. *Id.*

86. See cases cited at note 73 *supra*.

87. *Lynch v. Lynch*, 201 S.C. 130, 21 S.E.2d 569 (1942); *Ott v. Ott*, 182 S.C. 35, 188 S.E. 789 (1898).

88. 6 PAGE ON THE LAW OF WILLS, *supra* note 18, § 49.1.

89. *Id.*

90. For a brief explanation of the development of this rule, see Heckerling, *Disclaimer—A Useful Postmortem Estate Planning Tool*, THE TAX ADVISER 182 n.5 (March 1970). A more detailed explanation is found in Lauritzen, *Only God Can Make an Heir*, 48 NW. U.L. REV. 568 (1953).

partial intestacy, she also disclaimed her interest in any resulting intestacy as well.⁹¹ Observing that it did not reach the question of intestate disclaimers since it found no intestacy was created, the court expressed no opinion on the validity of disclaimers of intestate property.⁹²

While it is clear under the common law that an heir cannot disclaim intestate property, is that common-law rule now applicable in this state? Until this question is squarely presented to and answered by the Supreme Court of South Carolina, the answer is unknown, but it seems unlikely in view of the great weight of authority from other jurisdictions that the South Carolina court would take a different position.⁹³

V. DEVOLUTION OF DISCLAIMED PROPERTY UNDER LOCAL LAW

A. *In General*

If an *inter vivos* gift is disclaimed, it is an ineffective gift and title to the property never leaves the donor. If the *inter vivos* gift is in trust, and there are substitute beneficiaries, it is possible that a disclaimed gift may devolve to the substitutes. Property transfers caused by death will always effect a change in the title to the property, even when the first taker rejects or disclaims it. Because the devolution of property following a disclaimer is frequently of prime importance to the potential dis-

91. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 306, 227 S.E.2d 671, 672 (1976).

92. *Id.*

93. See Brief of Appellant at 10, *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976). In their brief to the Supreme Court of South Carolina, attorneys for the plaintiff-appellant, Mrs. Bahan, presented an interesting argument. They cited S.C. CONST. art. X, § 5 (1790): "The legislature shall, as soon as may be convenient, pass laws for the abolition of the rights of primogeniture and for giving an equitable distribution of the real estate of intestates." Such an act was adopted in 1791 and provided that "[w]hen any person . . . shall die without disposing [of real estate] by will, the same shall be distributed in the following manner . . ." 5 STATUTES AT LARGE OF SOUTH CAROLINA 162, Act No. 1489 (1791). S.C. CODE ANN. § 21-3-20 (1976) is the current statute of descent and distribution. The brief asserted that in view of the "abolishment of common law concepts," the court must construe the "Statutes of Descents and statutory provisions ancillary thereto . . ." to determine the effectiveness of a disclaimer of an intestate interest. The brief then cited the statute on advancements, S.C. CODE ANN. § 21-3-60 (1976), as an indication that variations from the Statute of Descents were permitted. The brief concluded that since the applicable common-law principles had been abolished, there was no reason not to permit the disclaimer of an intestate interest. However, the Supreme Court of South Carolina did not reach the question. 267 S.C. at 307, 227 S.E.2d at 672.

claimant and, in many cases, is critical with respect to a desired tax benefit, a familiarity with some of the more common rules of devolution and variations therefrom is essential.

B. *Testate Property*

If property under a will provision is disclaimed, whether or not it becomes intestate property may depend upon the nature of the property interest given, the presence or absence of other will provisions, and the existence and applicability of remedial state statutes.

1. *The substituted beneficiary.*—It is not uncommon for a testator to make a gift under his will to a beneficiary and to further provide that if the beneficiary does not survive, the gift passes to another beneficiary. These were the facts of the *Bahan*⁹⁴ case. Mr. Bahan's will bequeathed the residue of his estate to his wife if she survived him, but if she did not, then to his adopted son. Mrs. Bahan disclaimed a portion of the residue and one of the issues presented to the court was whether the disclaimed property became intestate property or passed to the substitute beneficiary, the adopted son. The court found that the disclaimed property passed to the adopted son even though the gift to the son was conditioned upon Mrs. Bahan's death prior to the decedent, Mr. Bahan.⁹⁵ In fact, Mrs. Bahan survived Mr. Bahan. The court observed that although death was the only express provision applicable to a lapse of the residuary gift to Mrs. Bahan, "the language clearly shows that the testator intended to dispose therein of 'all the remainder of my estate, including both real and personal property.'"⁹⁶ Based upon this finding, the court concluded:

It is unreasonable to assume that, having disposed of the entire remainder of the estate to his wife and in the event of her death to the adopted son, that testator intended that any of his estate should pass to these same persons as intestate property Although a lapse of the residuary estate by . . . disclaimer was not expressly anticipated by the testator, a possible lapse in the event of the death of the wife was contemplated, resulting

94. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 227 S.E.2d 671 (1976).

95. *Id.* at 310, 227 S.E.2d at 674.

96. *Id.* (quoting without citing testator's will).

in the designation of the adopted son to receive the estate. We agree . . . that the testator intended for the adopted son to receive the residuary estate in the event the wife failed to take for any reason.⁹⁷

The same rationale could have been applied, but was not, in a case involving the South Carolina Bastardy Act.⁹⁸ In *Ray v. Tate*⁹⁹ the testator died leaving surviving lawful children but bequeathing his entire estate to his mistress. His will further provided that if the mistress did not survive him, his entire estate was to pass to the niece of the mistress. The testator's children, pursuant to the Bastardy Act,¹⁰⁰ had the excess over twenty-five percent of the gift to the mistress declared void. In this manner, the question of the devolution of the excess was presented. The supreme court held that the niece of the mistress did not take the excess because the gift to her was conditioned upon the death of the mistress prior to the testator, which did not occur.¹⁰¹ The court held that the excess over twenty-five percent of the gift to the mistress became intestate property and passed to the children of the testator.¹⁰²

2. *Anti-lapse statutes.*—Another problem in predicting the devolution of property after a disclaimer arises out of the application of South Carolina's anti-lapse statute.¹⁰³ Under the anti-lapse statute, if a testator bequeaths or devises property to a child and the child predeceases the testator leaving issue, the property bequeathed or devised to the predeceased child passes instead to that child's issue. The question is, does the anti-lapse statute apply when instead of dying the child disclaims the property?

The anti-lapse statute is conditioned upon the death of the child prior to the testator. It would seem that since the statute is in derogation of the common law, it should be narrowly construed.¹⁰⁴ The statute therefore should not apply to a disclaimer.

97. *Id.*

98. S.C. CODE ANN. § 21-7-480 (1976).

99. 272 S.C. 472, 252 S.E.2d 568 (1979).

100. S.C. CODE ANN. § 21-7-480 (1976).

101. 272 S.C. at 476, 252 S.E.2d at 570.

102. *Id.*

103. S.C. CODE ANN. § 21-7-470 (1976).

104. *Major v. Nat'l Indem. Co.*, 267 S.C. 517, 229 S.E.2d 849 (1976); *Powell v. Greenwood County*, 189 S.C. 463, 1 S.E.2d 624 (1939).

3. *Joint tenancies with right of survivorship.*—The nature of an interest given under a will can also affect its devolution in the event of a disclaimer. More specifically, the devolution of an interest as a joint tenant differs from the devolution of an interest as a tenant in common if one of several such beneficiaries predeceases the testator or disclaims.

Under the applicable South Carolina statute,¹⁰⁵ the common-law form of ownership known as joint tenancy with right of survivorship has been modified to remove the right of survivorship. The statute, by its express terms, does not apply if the right of survivorship has been expressly provided for in the instrument that created the joint tenancy.

Thus, assume that A's will in Item III leaves Blackacre to B and C as joint tenants with right of survivorship and in Item VII leaves the residue of the estate to D. If B predeceases A, B dies owning an interest as joint tenant with a right of survivorship. Consequently, as surviving tenant, C, who survives A, takes the entire interest in Blackacre under his right of survivorship. The interest does not lapse and does not pass under the residue clause to D. Presumably, a disclaimer by B would have a similar result.

4. *Class gifts.*—Similar problems arise upon the disclaimer of a class gift by a member of the class. Do the other members of the class take the disclaimed property or is it considered property undisposed of and does it, therefore, pass under a residue clause, or as intestate property if there is no residue clause? The question is further complicated by the anti-lapse statute¹⁰⁶ (if the class is a class of the testator's children) since it is not known whether the anti-lapse statute applies to class gifts.¹⁰⁷

5. *Life estates.*—Disclaiming life estates also involves substantial complexities. A basic question is whether, upon the disclaimer of a life estate, remainders are accelerated. The general rule seems to be that when the disclaimed life estate is followed by a vested remainder, the remainder is accelerated.¹⁰⁸ In other instances, such as when contingent remainders exist, accelera-

105. S.C. CODE ANN. § 21-3-50 (1976).

106. S.C. CODE ANN. § 21-7-470 (1976).

107. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140, at 782 (2d ed. 1953). See Annot., 56 A.L.R.2d 948 (1957).

108. Key v. Weathersby, 43 S.C. 414, 21 S.E. 824 (1895); 2A R. POWELL, THE LAW OF REAL PROPERTY ¶309[5] (P. Rohan ed. 1977).

tion may not be permitted.¹⁰⁹

6. *Residue provisions.*—It is an accepted rule of will construction in South Carolina and elsewhere that the courts presume a testator did not intend to die intestate or partially intestate; as a result, residue provisions are construed to avoid partial or complete intestacies.¹¹⁰ Thus, if a testator has given the residue of his estate to two persons, and one predeceases him, it seems reasonable to assume that he probably intended for the survivor to take all of the property passing under the residue provision. Such a construction would seem to be in accord with the presumption against intestacy or partial intestacy.¹¹¹ Nevertheless, unless there are express provisions for substituted beneficiaries, or the anti-lapse statute applies, or the residuary legatees constitute a class, there will be a lapse and a resulting intestacy or partial intestacy.¹¹²

Similarly, when there are two or more residuary beneficiaries and one disclaims, in the absence of a class gift, the application of the anti-lapse statute, or a substituted beneficiary, intestacy will result. A general residue provision, however, will prevent intestacy or partial intestacy with respect to property disclaimed in preceding provisions of the will.¹¹³

C. *Intestate Property*

A disclaimer of property under a will may not achieve anything if it creates an intestacy and as a result the disclaimed property is routed back to the disclaiming party by operation of law. In the *Bahan*¹¹⁴ case, because of uncertainty as to whether the disclaimed property would pass by intestacy or to the substituted beneficiary, Mrs. Bahan disclaimed not only her testate, but her intestate interest as well. Because the court found no intestacy was created,¹¹⁵ it did not rule upon the question of dis-

109. *Burkhalter v. Breeden*, 162 S.C. 64, 160 S.E. 165 (1931); 2A R. POWELL, *supra* note 108, ¶310.

110. *Watson v. Wall*, 229 S.C. 500, 516, 93 S.E.2d 918, 926 (1956).

111. *Id.*

112. *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956); *Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946).

113. *Watson v. Wall*, 229 S.C. 500, 517, 93 S.E.2d 918, 927 (1956).

114. *Bahan v. Citizens & Southern Nat'l Bank of S.C.*, 267 S.C. 303, 306-07, 227 S.E.2d 671, 672 (1976).

115. *Id.*

claimers of intestate property. However, in considering whether or not to disclaim property, the potential disclaimant should determine whether the disclaimer will create an intestacy and, if it does, whether the taker under the intestacy statutes will be a satisfactory recipient (*i.e.*, someone other than the disclaimant). Additionally, if the disclaimed property will be returned to the disclaimant under the intestacy statute, the potential disclaimant must then consider whether to test the nondisclaimability rule of intestate property in the South Carolina courts.

In some cases, the testate disclaimant may be satisfied to have the disclaimed property returned to him as intestate property because it may be freed from certain restrictions, contingencies, or obligations. For example, a surviving spouse's testamentary life estate, which would constitute a "terminable interest" (and would not qualify for the estate tax marital deduction), under some circumstances can be disclaimed by the surviving spouse and the remainderman, resulting in an intestate share for the surviving spouse that is not terminable and which will qualify for the estate tax marital deduction. This procedure is permitted by section 2518(b)(4), but only as to a surviving spouse.

Persons who wish to test the rule of nondisclaimability of intestate property should consider carefully the pattern of the intestacy statute.¹¹⁶ For example, assume that A dies intestate leaving a wife and two adult children. The children desire that their mother take the entire estate and they disclaim, believing this to be the result in the case of a disclaimer of their interests. Even assuming the effectiveness of the children's disclaimer of intestate property under local law, however, the mother would not receive the property disclaimed by them unless the following persons did not survive the decedent: (1) lineal descendants of the children; (2) parents of the decedent; (3) brothers and sisters of the whole blood or the half blood; (4) children of whole blood brothers and sisters; and (5) lineal ancestors.¹¹⁷ On the other hand, if the wife should (and effectively could) disclaim her intestate share, under the intestacy statute the children would take her entire interest.¹¹⁸

116. S.C. CODE ANN. § 21-3-20 (1976).

117. *Id.* § 21-3-20(6) (1976).

118. *Id.* § 21-3-20(1), (7) (1976).

VI. EFFECTIVENESS OF STATE-COURT DECISIONS

Because the devolutionary result and tax effect of a disclaimer are so dependent upon state law, a correct analysis of state law is absolutely critical to any consideration of whether a disclaimer should be made. For this reason, a potential disclaimant will sometimes resort to a declaratory judgment in order to under local property and tax laws. If a declaratory judgment is to be obtained, the disclaimant should be aware of the influence of state-court decisions in federal tax matters. In the *Bosch*¹¹⁹ case the United States Supreme Court announced the rule that state-court decisions on matters of local law would not be binding upon the federal courts in tax matters unless such decisions had been made by the state's highest court.¹²⁰ In order to bind the Internal Revenue Service under this rule, it seems necessary to successfully appeal any declaratory judgment to the Supreme Court of South Carolina.

Notwithstanding the *Bosch* case, however, Revenue Ruling 73-142¹²¹ indicated that the decisions of lower courts, insofar as they have a prospective application, will be respected by and binding on the Service. Under the facts of the revenue ruling, a decedent created a trust reserving the right to remove or discharge the trustee at any time and with no express limitation on appointing himself as trustee. In the trust instrument, the trustee had the unrestricted power to withhold distribution of income or principal and to apportion between income and principal, notwithstanding any rules of law to the contrary which would apply in the absence of overriding trust provisions. Ordinarily, the decedent's right to appoint himself as trustee and to exercise the powers described above would be sufficient to include the value of the trust property in the decedent's gross estate for federal estate tax purposes under section 2036(a)(2) and possibly also under section 2038. Before his death, however, the decedent, in a nonadversary action, obtained a lower state-court ruling that the power to appoint a new trustee could be exercised only once and that such power did not include the right to appoint himself as trustee. The revenue ruling observed that the

119. *Commissioner v. Bosch*, 387 U.S. 456 (1967).

120. *Id.* at 462-66.

121. Rev. Rul. 73-142, 1973-1 C.B. 405.

decree appeared to be contrary to the decisions of the highest court of the state. The revenue ruling adverted to the *Bosch* case, but observed, in effect, that the lower-court ruling was the "law of the case" and therefore binding upon the parties. The ruling concluded:

In this case the lower court had jurisdiction over the parties and over the subject matter of the proceeding. Thus, the time for appeal having elapsed, its judgment is final and conclusive as to those parties, regardless of how erroneous the court's application of the state law may have been. Consequently, after the time for appeal had expired, the grantor-decedent did not have the power to appoint himself as successor trustee. The aforesaid rights and powers which would otherwise have brought the value of the trust corpus within the provisions of sections 2036 and 2038 of the Code were thus effectively cut off before his death.

Unlike the situation in *Bosch*, the decree in this case was handed down before the time of the event giving rise to the tax (that is, the date of the grantor's death). Thus, while the decree would not be binding on the government as to questions relating to the grantor's power to appoint himself as trustee prior to the date of the decree, it is controlling after such date since the decree, in and of itself, effectively extinguished the power. In other words, while there may have been a question whether the grantor had such a power prior to the decree, there is no question that he did not have the power thereafter.

Accordingly, it is held that the value of the property transferred to the *inter vivos* trust is not includible in the grantor-decedent's gross estate under § 2036 or § 2038 of the Code.¹²²

Under the foregoing ruling, the prospective effect of lower-court decisions which define the rights of potential disclaimants may be respected by the government.

VII. REVOKING DISCLAIMER

In view of the many subtle pitfalls which lie in wait for the disclaimant, it is surprising that there are not more decisions regarding the right of the disclaimant, with the approval of the courts, to set aside disclaimers improvidently given. A disclaimer is essentially the exercise of an election by a recipient of

122. *Id.* at 406.

property not to take the property. The traditional rule on revoking elections is illustrated by the case of *Libbey v. Frost*¹²³ and deals with elections rather than disclaimers. The court in that case held an election made with full knowledge of the facts would not be set aside.¹²⁴

Nevertheless, a somewhat different rule has developed regarding the revocation of disclaimers. The general rule appears to permit the revocation of a disclaimer unless, after the disclaimer has been made but prior to its revocation, there was a change of position.¹²⁵ The case of *Job Haines Home For Aged People v. Keene*¹²⁶ illustrates the principle. However, an election that causes a substantial change of position cannot be revoked subsequently. In *Mahaney v. Mahaney*¹²⁷ the court said it would permit the revocation of a disclaimer because the disclaimant made it "under a misunderstanding as to his rights . . ."¹²⁸

The English case of *In re Young*¹²⁹ is an illustration of the permissible revocation of a disclaimer of a legacy. The plaintiff in that case, entitled to income for life, at first rejected the legacy and then retracted her rejection. The court permitted the retraction, commenting: "Why should not the disclaimer of a legacy be withdrawn if there has been no change of position among the parties interested?"¹³⁰

If a tax benefit has been obtained by reason of a disclaimer, the government arguably would be an interested party that would have changed its position. Accordingly, the disclaimer would appear to have become irrevocable, thus satisfying the irrevocability requirement of section 2518.

The cases discussed indicate that in instances of an improvidently given disclaimer, prompt action to revoke it may in some cases at least prevent matters from worsening.

123. 98 Me. 288, 56 A. 906 (1904). See 80 AM. JUR. 2d *Wills* § 1634 (1975).

124. 98 Me. at 291, 56 A. at 907.

125. 1 A. SCOTT, *TRUSTS* § 36.1 (3d ed. 1967); G. BOGERT, *TRUSTS AND TRUSTEES* § 170 (2d rev. ed. 1979).

126. 87 N.J. Eq. 500, 101 A. 512 (1917).

127. 91 N.J. Eq. 473, 110 A. 15 (1920).

128. *Id.* at 475, 110 A. at 16.

129. [1913] 1 Ch. 272.

130. *Id.* at 274. See also *In re Cranstoun's Will*, [1949] 1 Ch. 871, in which the court followed the case of *In re Young* and complained of the "scanty material available on this principal of renunciation" *Id.* at 873.

VIII. WHO CAN DISCLAIM?

If the proposed recipient of a gift is *sui juris*, the disclaimer of property should be made by the disclaimant personally. But what is the result if the proposed recipient is deceased, incompetent, or has appointed an agent? Some states by statute permit a disclaimer by a personal representative.¹³¹ Without such statutory authority, the right to disclaim in a representative capacity is not so clear. In one case decided after the adoption of section 2518, but involving facts all of which occurred before that date,¹³² the United States Tax Court observed that under the common law of New York the right of renunciation is not a personal one and, therefore, the renunciation of interest in a trust by the decedent's executors was valid. The decision also was based in part upon language in the trust permitting the disclaimer by the decedent or her executors and language in the decedent's will authorizing her executors to disclaim.

The question remains, however, whether in South Carolina a disclaimer by a personal representative of a decedent can be effected. One imminent authority has stated rather unequivocally that "unless a contrary intention is indicated by the provisions of the will, the right of acceptance or renunciation is not ended by the death of the devisee or legatee who had such right."¹³³ Other authorities are less certain.¹³⁴ If the right to renounce is not a personal right, it may be also delegable under a durable power of attorney to another in order to provide for the possible incapacity of the principal.¹³⁵

IX. CONCLUSION

Any study of the statutes and cases dealing with disclaimers leads to a number of conclusions, prominent among which are the following: (1) the relevant tax laws in many instances are uncertain in application and the relevant property laws are virtually nonexistent in South Carolina; (2) the rewards of dis-

131. See, e.g., GA. CODE ANN. § 113-824(a) (1975). See also L. NEWMAN & A. KALTER, *supra* note 6, at 25.

132. 68 T.C. 275 No. 81 (1977).

133. 6 PAGE ON THE LAW OF WILLS, *supra* note 7, § 49.5.

134. L. NEWMAN & A. KALTER, *supra* note 6, at 24, 38.

135. Moses & Pope, *Estate Planning, Disability and the Durable Power of Attorney*, 30 S.C.L. REV. 511, 537 (1979).

claiming can be enormous; (3) the disclaimer traps are horrendous and frequently well concealed; (4) a good, comprehensive South Carolina disclaimer statute would be extremely helpful; and (5) the lawyer's best tool in the area is "a constant feeling of sheer terror."¹³⁶

136. Statement attributed to Charles H. Randall, Professor of Law, University of South Carolina School of Law (taken only slightly out of context).

STATE OF SOUTH CAROLINA)
) DISCLAIMER
COUNTY OF _____)

COUNTY OF _____)

WHEREAS, the Decedent died on _____, 19____,

WHEREAS, the undersigned is entitled to receive under

WHEREAS, the undersigned desires to disclaim his interest

WHEREAS, the undersigned has not accepted the Property

NOW, THEREFORE, this disclaimer of the Property:

WITNESSETH:

The undersigned, for himself and his heirs, without receipt of any consideration of any kind therefore, hereby renounces,

IN WITNESS WHEREOF, the undersigned, for himself and his heirs, has executed and delivered this Disclaimer to the Dece-

[CONTINUED]

WITNESSES:

[name], Disclaimant

Acknowledgement of Receipt

The undersigned (executor/administrator) of the (Will/ Estate) of _____ acknowledges receipt of the within Disclaimer this ____ day of _____, 19____.

,