From "Probate: Back to the Basics" (NCLE) (1998)

"THANKS, BUT NO THANKS"

RENUNCIATIONS & DISCLAIMERS IN NEBRASKA ESTATE PLANNING

> To bed, to bed,
> Says Sleepy-head;
> Let's tarry a while, says Slow.
> Put on the pot,
> Says Greedy-gut,
> We'll sup before we go.
>
> --Nursery Rhyme (1784)

In today's world of greed, it's unusual to find somebody who doesn't want their share of an estate, but that's exactly what renunciations and disclaimers are for--to renounce what would otherwise be yours. A quill in the age of computers.

I. INTRODUCTION

> "**Renunciation.** The act by which a person abandons a right acquired without transferring it to another. See also Disclaimer."

Black's Law Dictionary 1298 (1990)

> "The law is clear that a legatee or devisee is under no obligation to accept a testamentary gift . . . and he may renounce the gift, by which act the estate will descend to the heir or pass in some other direction under the will." People v. Flanagrin, 331 Ill. 203, 162 N.E. 848 (1928).

A. The Topic and its importance.

Renunciations are your mother in estate planning. They clean up the mess you or somebody else made. Somehow, the property isn't going where everybody intended. In comes the renunciation to clean it up. An heir is ungodly rich and couldn't stand another dollar. In comes the renunciation to move the inheritance elsewhere:

> "The right of a beneficiary of an estate or trust to renounce or disclaim his or her beneficial interest is one of the most important post-death tax planning techniques available. It literally permits the rewriting of the estate plan after death to achieve various goals . . . . Because the time frame for a disclaimer is short and the requirements are extremely technical, it should be a high priority consideration for all practitioners after a client's death." Kasner & Whitman, After Death Tax Planning 55 (1990).

In addition, renunciations effectively move property without gift tax consequences. If done correctly, when the property is renounced, it passes without the renouncing party incurring any gift tax liability.

B. Definitions.

In the Uniform Probate Code, adopted in Nebraska, the act of refusing to accept an inheritance is called a "renunciation" (Section 30-2352) but under the Internal Revenue Code, it's called a "disclaimer" (26 U.S.C. 2518).

For our purposes, the words mean the same thing, and will be used interchangeably.

C. The problem.

Essentially, the renunciation problem falls into three categories, two of which resemble the questions you had when you first heard about sex--

(1) How do I do it?
(2) Why would I want to do it? and

(3) What are the tax consequences of doing it? (If you asked this question when you first heard about sex, you're now a CPA and you need to leave.)

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Sex on television can't hurt you . . . unless you fall off.

--Bumper Sticker seen in real life

> There are a number of mechanical devices that increase sexual arousal, particularly in women. Chief among them is the Mercedes-Benz 380SL convertible.

--P. J. O'Rourke

> I was married by a judge.
> I should have asked for a jury.

--Groucho Marx

II. HOW TO DO IT

> "The theory behind the use of disclaimers . . . is that a person should never be forced to accept the burdens of ownership of property without his or her consent." Towson v. Tickell, 116 Eng. Rep. 575, 576-577 (K.B. 1819).

> "It is said that no one can make another an owner of an estate against his consent by devising it to him."

8 Uniform Laws Annotated 449 (1998)

1. Section 30-2352 of the Nebraska Probate Code Analyzed and Dissected

The Nebraska statute allowing renunciations (Section 30-2352), essentially matches Section 2-801 of the Uniform Probate Code. It is long (three pages) and somewhat hard to read (1500 words, long paragraphs and

big fancy syllables). A copy of Section 30-2352 appears as Exhibit "1" to the outline.

A. Who Can Renounce? Section 30-2352(a)(1) allows a renunciation by:

i. a "person" (or a "representative of a deceased, incapacitated, or protected person")

ii. who is an

heir
devisee
person succeeding to a renounced interest
donee
beneficiary under a testamentary or nontestamentary instrument
donee of a power of appointment
grantee
surviving joint owner or surviving joint tenant
beneficiary or owner of an insurance contract
beneficiary or person designated to take pursuant to a power of appointment exercised by a testamentary or nontestamentary instrument
person who has a statutory entitlement to or election with respect to property pursuant to the Nebraska Probate Code
recipient of any beneficial interest under any testamentary or nontestamentary instrument

B. What Can Be Renounced? Again under section 30-2352(a)(1), the renunciation can apply to any "power of appointment", "insurance contract", "property", "beneficial interest", or "assets",

in whole
in part
refer to specific parts
fractional shares
undivided portions
specific assets

C. How to Renounce?

i. The Writing and Its Contents (30-2352(a)(1))

The renunciation must be "a written

instrument of renunciation", and must

a. describe the property or "part thereof or the interest therein renounced";

b. be signed and acknowledged by the person renouncing "in the manner provided for in the execution of deeds of real estate". This is found in Section 76-216, requiring that a grantor "acknowledge the instrument with an acknowledgment as defined in section 64-205"--the regular notary public statute;

c. declare the renunciation and "the extent thereof";

d. declare the renunciation is "an irrevocable and unqualified refusal to accept the renounced interest".

The 1977 volume put out by the committee that drafted the Uniform Probate Code made the procedure sound simple:

"The following simple form would be adequate:

I, John Jones, hereby renounce any and all interest in property given to me by the residuary clause, numbered VII, of the will of Henry Smith dated April 1, 1970, Signed this 8th day of May 1975.

/s/ John Jones, Devisee under the will of Henry Smith"

--1 Uniform Probate Code Practice Manual 141

Of course, real life's a little more complicated. For examples of renunciation documents, see Exhibit "2" at the end of the outline.

ii. <u>Who Gets the Writing</u>?

The renunciation writing must be <u>received</u> by:

the "transferor of the interest";

"the personal representative of a deceased transferor";

"the trustee of any trust in which the interest being renounced exists"; <u>or</u>

"the holder of the legal title to the property to which the interest relates" (30-2352(b)).

In order to be effective for Nebraska

inheritance and estate tax purposes (as well as federal estate tax purposes), the renunciation must be "received" by these persons not later than the date which is 9 months "after the later of (i) the date on which the transfer creating the interest in such person is made, or (ii) the date on which such person attains age twenty-one".

For purposes of an estate, this date would be the date of death of the deceased. The model for Nebraska's law (UPC section 2-801) followed the pattern of the Federal estate tax law, which prescribed the time for filing federal estate tax returns in terms of the decedent's death. 8 Uniform Laws Annotated 451 (1998). By waiting 9 months, the time for filing claims should have gone by, and the p.r. will hopefully know with certainty who is to take the estate.

Within 30 days after receipt, the P.R., trustee, etc., must "attempt to notify" the persons who are now going to get the renounced property, of two things:

The renunciation
The interest or potential interest they're going to receive because of the renunciation.

iii. Where Filed

If "the circumstances which establish the right of a person to renounce an interest arise as a result of the death of an individual," you must file the renunciation in the estate proceedings--if one exists. If none exists, you must file it in the "court of the county" where estate proceedings "would be pending if commenced." 30-2352(b).

If real estate is renounced, you must also file the renunciation with the appropriate register of deeds. 30-23352(b). Note that the Uniform Probate Code made filing with the register of deeds *discretionary*, but Nebraska made it *mandatory*.

Queries: (1) For a "living trust" renunciation, are you required to start an estate proceedings and file the renunciation there? (2) The statute makes it clear the P.R. or trustee must receive the renunciation within the 9 months, but when must it be filed with the Court and the register of deeds? Impliedly, it's argued the 9 months applies here also.

Section 30-2352(c) says that if you didn't file the renunciation "within the time periods" of 30-2352(b), the interest renounced "passes as if the person renouncing had died on the date the interest was renounced." Undoubtedly the IRS would then claim a taxable gift had occurred on the date of the renunciation. _See_, _e.g._, _Estate of Bennett v. Commissioner_, 100 U.S. Tax Ct. Reports 42 (1993)

Query: Can it be argued that if the attempt at renunciation is no good, then the transfer is invalid, and no gift tax consequences occur? As mentioned, Section 30-2352(c) probably is an argument against that position, as is the _Bennett_ case cited above. See further discussion on this point below under "Some Thoughts".

iv. _No-No's_

There are several things you _shouldn't_ do in connection with the renunciation:

a. _Naming Names_. You can't direct where the property goes after the renunciation:

> "The person renouncing shall have no power to direct how the interest being renounced shall pass . . . ." Section 30-2352(c).

The only exception to this relates to a spouse of a deceased, presumably for homestead, etc., or other will provisions:

> "[For a spouse, a renunciation shall] relate only to that statutory provision or that provision of the instrument creating the interest being renounced and shall not preclude the spouse from

> receiving the benefits of the renounced interest which may be derived as a result of the renounced interest passing pursuant to other statutory provisions or pursuant to other provisions of the instrument creating the interest unless such further benefits are also renounced." 30-2352(c).

Query: Does this mean the spouse better specifically renounce the homestead, family allowance and family maintenance also, in order to cover all bases? See Sections 30-2322 (homestead allowance), 30-2323 (exempt property) and 30-2324 (family allowance).

The renounced property "passes as if the person renouncing had predeceased the decedent", or, in cases not involving a decedent, as if the person renouncing "had died prior to the date on which the transfer creating the interest in such person is made." 30-2352(c).

These sections point out the need to remember renunciations when drafting wills and trusts, and setting out what happens to the property if the intended devisee predeceases *or renounces*.

What does the will say happens if the child doesn't survive, etc.? What does the Nebraska Probate Code say happens if the disclaimant doesn't survive? What does the will or trust say happens if the property is disclaimed?

> "Disclaimers have long been recognized as an effective postmortem planning tool to correct drafting errors and provide flexibility to cope with any unanticipated changes that may occur between the time the estate plan is

> prepared and the date of death. To obtain maximum benefit from postmortem disclaimers, documents drafted before death must take into account the effect of such disclaimers. By anticipating the use of these devices, the advisor may provide for the disposition of disclaimed property in the estate planning document, taking into consideration the advantages to both the client and the likely disclaimant. "Estate Plan Should Anticipate the Use of Disclaimers", 21 Estate Planning 89 (March/April 1994).

See Exhibit "3" for examples of possible clauses to use in wills or trusts.

b. When Effective. Don't attempt to say when the renunciation is effective, unless it matches the statute. Section 30-2352(c) says that if you filed the renunciation timely, it "relates back for all purposes to the date of death of the decedent or the date on which the transfer creating the interest in such person is made, as the case may be."

If you failed to file it timely, the same statute says the interest passes as if the person renouncing had died on the date the interest was renounced.

c. Don't Exercise Ownership. Don't let the party renouncing take possession or exercise incidents of ownership over the renounced property (discussed in the tax section below as the "no interest in the property" rule). Examples would be selling the property, receiving income from it, pledging it for a loan, etc.

If the party renouncing does exercise some such right of "ownership", the renunciation is defeated for federal gift and estate tax purposes (Section 2518(b)(3)) and for Nebraska inheritance and estate tax purposes as well (30-2352(d)).

It would seldom be a bad bargain to disclaim all praise on condition of receiving no blame.

Duc. Francois de La Rochefoucauld (1613-1680), Maxims

III. WHY SHOULD I RENOUNCE?

Before talking about specific examples of renunciations, let's review the federal tax set-up on renunciations (called disclaimers) as set out in 12 U.S.C.A. § 2518.

The IRS requirements for a valid "disclaimer" essentially match the Nebraska statute. If successful, the property passes as if the interest had never been transferred to the party renouncing, thereby avoiding gift taxes:

1. The disclaimer must be an "irrevocable and unqualified refusal to accept an interest in property";

2. The refusal must be in writing;

3. It must be received by the transferor, his legal representative or the holder of legal title within 9 months after the later of (a) date on which the transfer was made or (b) the day on which the person making the disclaimer reaches age 21;

4. The refusal must be made without acceptance of the interest and any of its benefits. Acceptance of any consideration in return for making the disclaimer is an

acceptance of the benefits of the interest disclaimed.

5. The interest must pass "without direction of the disclaimant to the decedent's spouse or a person other than the disclaimant."

6. The person making the disclaimer cannot direct the redistribution or transfer of the property to another person. Section 2518(b).

A full copy of Section 2518 of the Code is attached as Exhibit "4".

Specific examples of renunciation ideas follow:

A. <u>Generation-skipping and other reasons to reallocate property.</u>

One of the most common reasons to renounce is because the original recipient of the property doesn't need or want it. They renounce, and the property passes to the next generation, or below, with any gift tax consequences. However, be sure to coordinate this with any Generation-Skipping Tax considerations. 26 U.S.C.A. 2601, et seq. <u>See</u>, <u>generally</u>, Brand & LaPiana, <u>Disclaimers in Estate Planning</u> 122 (American Bar Association Section of Real Property, Probate and Trust Law 1990).

For all of these purposes, a partial interest may be renounced as well. <u>See</u> Section 30-2352(a)(1) ("A person . . . may renounce in whole or in part . . . .") and "Advanced Issues in Disclaimer Planning: Sharpening an Old Tool", 1994 Institute on Estate Planning 14-2, 14-29.

B. <u>Correcting an error in the will.</u>

If you or somebody screwed up, and the will is a mess, a renunciation may fix the problem. For example, assume Dad dies, leaving Mom and the kids, and Mom needs all the assets, but either there's no will, or the will gives the kids some property. The kids could renounce to give Mom the property--assuming no minority problem with the kids, although a "person" is defined under section 30-2352 to

include the representative of a protected person.

C. Avoidance of creditors.

Arguably, a disclaimer could avoid a devisee's creditors. John's aunt dies, leaving him $100,000. He has tons of creditors, and all of the money will go to them if he receives it. Can he disclaim the money, causing it to go to his children--which he hopes will use the money for his old age?

A partial answer was given by the Supreme Court in the case of Hoesly v. State Department of Social Services, 243 Neb. 304, 498 N.W.2d 571 (1993), in which the recipient of state assistance attempted to use 30-2352 to disclaim a C.D. worth $11,000, received by joint tenancy when his dad died. Reviewing Section 30-2352, the Court said that because the father had put all of the money in the C.D., the son had no "present interest" in the C.D. before the father died. However, the Court refused to interpret the renunciation statute further, and held that the son couldn't qualify for public assistance because that statute (section 68-1002(3)), prohibited the son from depriving himself "directly or indirectly of any property whatsoever for the purpose of qualifying for" such assistance.

There are UPC states that hold the "motive" for the renunciation is immaterial, thus allowing a renunciation to avoid taxes or creditors. See, e.g., Estate of Aylsworth, 74 Ill.App.2d 375, 219 N.E.2d 779 (1966) (renunciation upheld to avoid payment of higher inheritance taxes); Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973) (bankruptcy; Estate of Hansen, 109 Ill.App.2d 283, 248 N.E.2d 709 (1969) (judgment creditor).

Of course Nebraska's Uniform Fraudulent Transfer Act, Sections 36-701, et al., is relevant to the question. Cf. Mahlin v. Goc, 249 Neb. 951, 547 N.W.2d 129 (1996) (Creditor of deceased husband could not set aside joint tenancy transfer to wife. Extinguishment of debtor's interest in joint tenancy property upon his death was not a "transfer" to the surviving joint tenant within the meaning of the Uniform Fraudulent Transfer Act.).

For an excellent display of cases from other jurisdictions on this point, see Annot., "Creditor's Right to Prevent Debtor's

Renunciation of Benefit under Will or Debtor's Election to Take under Will", 39 ALR4th 633 (1985).

D. <u>Avoidance of probate in a second estate where two people die closely after each other.</u>

Assume the following facts for husbands and wives, no joint tenancy, and identical wills:

1. Pretend Bill is driving Hilary to the television station, where she'll explain why he was helping the maid unsnap her undergarments. A conspiring Republican pulls alongside them, and Hilary instructs Bill to ram the Lexus. In the ensuing accident, both Bill and Hilary's lights are snuffed out--Bill lasting long enough to explain to the press why it wasn't his fault.

2. Pretend that Ethel drinks cyanide by mistake in a darling ruse cooked up by Lucy to fool Ricky. Fred is so distraught, he pines away to nothing and shortly croaks.

3. Pretend Ronald is showing Nancy his favorite 12 gauge, when it slips, blowing Nancy across the Styx. Ronald is so bummed he also checks out.

In each of these examples, a disclaimer in the estate of the second-to-die could be used to avoid a probate of assets in the second estate, depending on where you wanted the assets to end up.

E. <u>Other Unwanted Devises</u>. Leona Helmsley remarries some poor dimwit, and they have a child. Leona bestows lavish amounts on the child (forgetting to file a gift tax return), but the child dies unexpectedly. Under the child's will, all of the assets are coming back to Leona, who doesn't need or want them. She disclaims the assets, sending the property to her grandchildren pursuant to the child's will.

If done correctly, such a disclaimer has no gift tax consequences for Leona. She will have been able to transfer all of the property to her grandchildren, without the payment of any gift tax or use of her unified credit.

F. <u>Increase of the Marital Deduction</u>. Disclaimers could be used to increase a marital deduction, where needed, if

as a result of the disclaimer the property passing to the spouse qualifies for the marital deduction.

In Private Letter Ruling 83-47-001 (June 23, 1983), the estate was distributed, pursuant to the deceased's will, share and share alike, to the surviving spouse and the children. It was held that a disclaimer by the children would shift the property to the surviving spouse and the property would qualify for the marital deduction. *Query:* Under most will language, could you get this done? For example, what does the common language, "with a share by right of representation to the issue of a deceased child", do to this?

In an *intestate* situation, the IRS also permitted a marital deduction for interests disclaimed by everybody but the surviving spouse. Private Letter Ruling 84-09-089 (November 30, 1983).

Query: Does this same result occur under Nebraska's Probate Code, or does the disclaimed interest go to the <u>children</u> of the disclaimant?

> "Under the rule of this section [30-2352], renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person, taking by representation. For consistency the same rule is adopted for renunciation by a devise [sic]; if the devisee is a relative who leaves issue surviving the testator, the issue will take under section 30-2343; otherwise disposition will be governed by section 30-2344 and general rules of law." Comment to Section 30-2352.

For further discussion, <u>see</u> "Advanced Issues in Disclaimer Planning: Sharpening an Old Tool", 1994 Institute on Estate Planning 14-2 and "The Ever-Expanding Use of Disclaimers

in Estate Planning: An Update", 1990 Institute on Estate Planning 17-1, 17-6.

G. <u>Decrease of the Marital Deduction</u>. Pretend there aren't enough assets to use up the deceased's unified credit, with most or all of the assets going to the surviving spouse. That spouse could disclaim, thereby passing the disclaimed property to qualify for use of the unified credit:

> Jack dies with an estate of $900,000.00, leaving a will that gives all of his property to his spouse, Jackie. She has property of her own, or remarries for money shortly after Jack croaks. Jackie could disclaim up to $625,000 (in 1998), passing that property to their children, and using up Jack's unified credit. This would obviously avoid the taxation of that amount in her estate later.

This problem could easily arise where the will is done for a modest estate but, with growth, is now well above $625,000.00. You could even plan for such a problem in advance by including special language in the will, etc.:

> "1. If, at my death, my wife survives me, I give, devise, and bequeath my entire residuary estate to my wife outright and absolutely.
>
> "2. If my wife survives me and disclaims her interest in any amount or any portion of property which would otherwise have passed to her, then I give, devise, and bequeath that amount or that portion of such property to my trustee hereinafter named, IN TRUST, to be administered pursuant to the provisions hereinafter provided.
>
> "The disclaimer trust would be drafted to contain

> whatever terms (e.g., mandatory income, discretionary income, or principal invasion powers) the client chooses, provided the surviving spouse is not given any powers that would cause the trust to be taxed in her estate upon her death." Isaacs and Edwards, "Estate Plan Should Anticipate the Use of Disclaimers, 21 Estate Planning 89, 90-91 (March/April 1994)

H. <u>Disclaimer of Joint Interests</u>. Section 30-2352(a) specifically allows a renunciation by a joint tenant:

> "A person . . . who is . . . [a] surviving joint owner or surviving joint tenant . . . may renounce . . . ."

In such a situation, the first question is, what is the surviving joint tenant disclaiming--all of the asset or just one-half? See Exhibit "7" for a discussion of the latest IRS position.

I. <u>Disclaimer for Income Tax Purposes</u>. A side benefit of the disclaimer could be the saving of income taxes on income which would be generated in the future by the disclaimed property, where the disclaimant is in a high income tax bracket, and the takers of the property by reason of the disclaimer are in low brackets.

Section 2518 is a "transfer tax" provision--not an income tax one. However, disclaimers often are recognized as having an effect in the income tax context:

> "If a disclaimer is qualified, the disclaimant will not be required to include in his or her taxable income future income on disclaimed property. . . . More often, . . . income earned from the date of the transfer is attributed to the taker of the disclaimed property. In particular, where income

> is earned on property which is subject to an estate or trust proceeding and that income is subject to administration, a disclaimer of that property should be effective for income tax purposes." "Advanced Issues in Disclaimer Planning: Sharpening an Old Tool", 1994 Institute on Estate Planning 14-2, 14-4 (Citing Private Letter Ruling 8215056).

Private Letter Ruling 7830022 states there is no triggering of income in respect of decedent upon a disclaimer of the right to such income.

J. Double Disclaimers. If a parent disclaims in favor of children, who then also disclaim in favor of their children, a "double disclaimer" has occurred, which could be used to save additional estate or income taxes. This would remove the assets from both the parents' and childrens' estates, and, if income taxes are a problem, would expand the number of residuary devisees to whom income can be distributed with the resulting income tax savings.

K. Disclaiming of Powers.

A power of appointment is treated as a separate interest in property and may be disclaimed independently from any other interests in that same property which are created separately by the transferor. Treas. Reg. § 25.2518-3(a)(1)(iii). However, a general power of appointment must be disclaimed within 9 months after the power is created. Also, an interest passing as the result of the exercise or lapse of a general power of appointment must be disclaimed within 9 months after the date on which the power i exercised or lapses. Treas. Reg. § 25.2518-2(c)(3).

However, exercise of a power of appointment to any extent by the donee of the power is an "acceptance" of its benefits, thereby disqualifying the disclaimer. Treas. Reg. 25.2518-2(d)(1).

Another possible disclaimer of a "power" is the disclaimer of a "Crummy" power in order to prevent unwanted income, gift and estate tax

problems. See, e.g., "The Ever-Expanding Use of Disclaimers in Estate Planning: An Update", 1990 Institute on Estate Planning 17-1, 17-25.

L. Charitable Deductions.

A renunciation could also be used to save, create or enlarge a charitable deduction:

> "A left property in trust, with income to B and the remainder to charity. If B does not survive A, the property passes to charity outright. Since the trust is not a charitable remainder unitrust or annuity trust, the value of the charity's remainder interest does not qualify for an estate tax charitable deduction. It may be possible to have a state court reform the trust in order to obtain an estate tax deduction for the charity's interest. Alternatively, B can disclaim her income interest, so that the entire property will pass to charity and qualify for a charitable deduction." Isaacs and Edwards, "Estate Plan Should Anticipate the Use of Disclaimers, 21 Estate Planning 89, 92 (March/April 1994)

IV. SOME THOUGHTS

The most obvious problems with disclaimers are the ones you don't see. You think you're using the disclaimer to accomplish one particular result, but something disastrous happens that you find out about 6 months later when you get some innocuous-looking letter from the IRS, commencing "Dear Taxpayer and Soon-to-be Occupant of Cell No. 145".

Here are some examples of this:

1. Not thinking ahead

Suppose you fail to study 30-2352 real hard, and you mistakenly say where you want the renounced property to go, you don't file on time or you fail to file the renunciation with the register of deeds. Undoubtedly, the IRS is going to argue you've not only screwed up the plan, you've given heart failure to your malpractice carrier.

In addition, they're going to claim the party renouncing has "gifted" the renounced property--using up part or all of his or her unified credit. Stated differently, the IRS would argue that the renounced property is considered to have gone to the disclaimant, and then the disclaimer "gave" the property to the ultimate recipient.

Several arguments might be made to show the transfer is invalid, because the renunciation is invalid. However, there are at least two things in the statute against this argument:

a. Section 30-2352(b) says you must give the P.R. the renunciation, and "to be effective for purposes of determining inheritance and estate taxes under articles 20 and 21 of Chapter 77", it has to be received 9 months from the deceased's date of death. Therefore, it is implied that if the renunciation is given after the 9 months passes, the transfer is still effective for all purposes but death taxes.

a. As mentioned above, Section 30-2352(c) says a timely filing of the renunciation passes as if the person renouncing had died prior to the deceased. It then goes on to imply that the transfer is still valid even if not timely filed:

> "[If the transfer is not timely filed,] the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had died on the date the interest was renounced."

In other words, the property still passes, but the effective date is the date of the

renunciation--instead of the deceased's date of death.

Both of these statutes are about failures to file the renunciation within the 9 months. However, what if the invalidity isn't for failing to timely file the renunciation, but rather is because you didn't file with the Register of Deeds, or you directed the property to pass to somebody that wouldn't normally get it in a renunciation? Also, there are the many Nebraska cases striking down transfers for failure of consideration, delivery, etc. See, e.g., Moseley v. Zieg, 180 Neb. 810, 146 N.W.2d 72 (1966) (deed was void for failure of delivery).

For IRS purposes, a disclaimer under section 2518 must be valid under state law, as well. This isn't directly spelled out in the statute:

> "[A] disclaimer will not be treated as a qualified disclaimer under section 2518 unless it is effective under applicable local law because State law determines whether or not a property interest has passed." Estate of Bennett v. Commissioner, 100 U.S. Tax Reports 42, 67 (1993).

The argument is that because section 2518 requires that the interest pass without any direction by the disclaimant, state law must determine where it goes, and the passing would have to be valid under that state's law. In the Bennett case, the disclaimers were filed 3 days late under Kansas law. The Court gave its opinion on what happens with invalid disclaimers:

> "Although the Kansas statute does not explicitly indicate the consequences of an improperly filed disclaimer, we think the result would be the same as indicated by section 20-2056(d)-1(b)(2), Estate Tax Regs.: 'If the disclaimer is not a qualified disclaimer, the interest in the property [is] considered as passing from the decedent to the person

> who made the disclaimer as if the disclaimer had not been made." 100 U.S. Tax Reports at 68-69.

2. Not thinking ahead, again

Based on an actual living local court case, suppose Mom dies intestate with a $30,000 house, a mortgage, and 7 children. One son took care of mother most of her life, and the other 6 siblings want him to have the house. The p.r.'s lawyer has the 6 renounce the house, thinking it will go to the son. Instead, the renunciations mean 6/7ths of the house go to the children of the 6. The house is now owned by 120 people, some of whom have died, divorced, gone into bankruptcy or moved to Iowa. Partition? Foreclosure? Shot to the lawyer's head?

3. Estate of Ralph M. Nix, Sr., Deceased, T. C. Memo 1996-109 (1996 Tax Ct. Memo LEXIS 101; 71 TY.C.M. (CCH) 2347 (March 7, 1996).

In this case, Ralph died leaving a wife and a will with a pecuniary disposition formula for the marital deduction:

> "I bequeath to my wife the smallest amount of the assets of my estate that qualify for the marital deduction as will result in the lowest federal estate tax imposed upon my estate, after allowing for the unified credit, and any other credits and deductions allowable to my estate. . . . *In the sole power and discretion of the personal representative, the payment of this amount may be made wholly or partly in cash or property as selected by the personal representative . . . .*" Emphasis added.

The balance of Ralph's estate went to his son, who was also the personal representative.

Ralph's estate was worth about $1.6 million, and his P.R. apparently used the above paragraph to give the wife certain specific

assets, assumedly worth approximately $1 million, since that was the amount needed to avoid the payment of any death taxes after the approximate $600,000 unified credit.

For reasons unknown, the surviving spouse didn't apparently like the assets the son decided to give her, so she disclaimed certain of them worth roughly $394,671.00. The p.r. and the spouse both apparently thought by doing this, the p.r. could give the spouse other assets from the residuary (which went to the son).

The IRS disagreed, and claimed that when the spouse disclaimed, it went to the residuary alright, but no assets could come out to replace the ones she disclaimed. As a result, a surprising deficiency of $191,061 was owed (apparently because the IRS theory gives the son roughly $994,671 ($600,000 unified credit plus the $394,671.00 disclaimed.

The Tax Court laid the problem out as follows:

> "The question presented is whether the disclaimer had the effect of decreasing the marital deduction, and thereby increasing decedent's gross estate, or whether the disclaimer merely resulted in a substitute of certain property for other property, and thereby had no impact on the amounts of the marital deduction or the taxable estate. . . . Petitioner asserts that the calculation of the marital deduction must be made *after* taking into effect the disclaimer." Emphasis added.

To help, the Court gave this example:

> "Assume a decedent died with an estate of $1 million, of which $400,000 was in stock and the balance of $600,000 in cash. The trustee distributes the $400,000 in stock to the surviving spouse and lets the

> $600,000 cash fall into the residue, to take advantage of the unified credit. The surviving spouse disclaims the stock. The Government argues that no marital deduction is allowable, whereas the estate argues that $400,000 of the cash can be given to the surviving spouse as a substitute for the stock, leaving the marital deduction intact."

Examining Ralph's language, the Court decided the IRS wins:

> "First, the statutory language providing that the disclaimant shall be treated as predeceasing the testator as to the disclaimed property [IRC Section 2518] does not deal with the issue at hand; i.e., the manner in which the martial deduction is to be computed *after* giving effect to such disclaimer. . . .
>
> "Second, petitioner's argument makes the marital deduction formula circuitous. We interpret the marital bequest in the will as requiring the following calculation: Step 1--
> the credit equivalent would be determined; step 2--the marital bequest would be based on the excess of the gross estate over the credit equivalent. Under [the taxpayer's] approach, however, the calculation would be performed a second time to take into account, in funding the credit equivalent and the marital deduction, the property disclaimed by the surviving spouse. The effect would be to substitute one property for another in the marital bequest. However, we do not find authority

for this in decedent's will."

Such an approach allowed the spouse authority the will never gave her:

> "The will provided the personal representative with the sole power to identify the property to be transferred in satisfaction of the pecuniary marital bequest. To hold for petitioner would be tantamount to giving the surviving spouse the power to pick and choose which property would be used to fund the marital bequest. . . . Section 2518 contemplates a renunciation of a bequest of property, not the swapping of one property for another of equal value."

The Court's opinion was backed up by a regulation holding that if you receive consideration for making the disclaimer, the disclaimer is prevented from qualifying under Section 2518 of the Code. Sec. 25.2518-2(d)(1), Gift Tax Regs.

The case points up the need to see the "picture" of where things will end up after your disclaimer has been made. The other obvious problem the lawyer had in this case was that he was attempting to use the disclaimer statute for something the Court thought it wasn't intended--to fix a distribution of assets the spouse didn't like.

> Here I disclaim all my paternal care,
> Propinquity and property of blood,
> And as a stranger to my heart and me
> Hold thee from this for ever.
>
> Shakespeare, King Lear

IV. CONCLUSION

Read the statutes carefully. Pray you may not need to use them. If required, sit in a quiet room and imagine all the things that are going to happen if you renounce. And now

to end on an upbeat note:

"Plaintiffs Carl and Elaine Miles, owners and promoters of 'Blackie the Talking Cat,' brought this suit in the United States District Court for the Southern District of Georgia, challenging the constitutionality of the August, Georgia, Business License Ordinance. Their complaint alleged that . . . the ordinance violates rights of speech and association.

The partnership between Blackie and the Mileses began somewhat auspiciously in a South Carolina rooming house. According to the deposition of Carl Miles:

> 'Well, a girl come around with a box of kittens, and she asked us did we want one. I said no, that we did not want one. As I was walking away from the box of kittens, a voice spoke to me and said, "Take the black kitten." I took the black kitten, knowing nothing else unusual or nothing else strange about the black kitten. When Blackie was about five months old, I had him on my lap playing with him, talking to him, saying I love you. The voice spoke to me saying, "The cat is trying to talk to you." To me, the voice was the voice of God.' . . . .

Blackie catapulted into public prominence when he spoke, for a fee, on radio and television shows such as 'That's Incredible.' . . . Sadly, Blackie's cataclysmic rise to fame crested and began to subside. The Miles family moved temporarily to Augusta, Georgia, receiving 'contributions' that Augusta passersby paid to hear Blackie talk. After receiving complaints from several of Augusta's ailurophobes [ones who hate or fear cats], the Augusta police--obviously no ailurophiles themselves--doggedly insisted that appellants would have to purchase a business license. Eventually, on threat of incarceration, Mr. and Mrs. Miles acceded to the demands of the police and paid $50 for a business license. . . .

Appellants fail to show any illegal infringement of First Amendment rights of free speech or assembly. . . . Appellants' activities plainly come within the legitimate exercise of the

city's taxing power. This Court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a 'person' and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellants to assert his right just tertii. Blackie can clearly speak for himself." Miles v. City Council of Augusta, Georgia, 710 F.2d 1542 (11th Cir. 1983)

> "[T]o renounce when that shall be necessary and not to be embittered, . . . here is a task for all that a man has of fortitude and delicacy."

"A Christmas Sermon", Robert Louis Stevenson (1850-1894)

***

> "I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defense."

Francis Bacon (1561-1626) upon being charged by
Parliament with corruption in the exercise of
his office (1621).

***

> "Dost thou . . . renounce the devil and all his works, the vain pomp and glory of the world, with all covetous desires of the same, and the sinful desires of the flesh, so that thou wilt not follow, nor be led by them?" *Holy Baptism*, p. 276, The Book of Common Prayer, Protestant Episcopal Church in the United States of America (1789)

***

> "To the University of Oxford I acknowledge no obligation; and she will as cheerfully renounce me for a son, as I am willing to disclaim her for a mother."

Edward Gibbon (1737-1794), Autobiography 36

***

Disclaim *v* -ED, -ING, -S to renounce any claim to or connection with

The Official Scrabble Players Dictionary 158 (2nd Ed. 1990)

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For additional information on renunciations and disclaimers, see:

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3. Linn P. Hart, "Advance Issues in Disclaimer Planning: Shopping on Old Tool", (1994 Institute on Estate Planning), Chapter 14

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EXHIBIT "5"

Renunciation Checklist for an Estate

____ 1. Prepare written renunciation (Section 30-2352(a)(1) & (2).

____ 2. ***Within 9 months*** from date of death, renunciation must be:

____ Received by Personal representative of the Estate or trustee (30-2352(b)). P.R. or trustee signs appropriate receipt, which is filed with in the County Court.

____ Filed in the Estate County Court proceedings (30-2352(b))

____ Filed with the appropriate Register of Deeds if real estate is renounced (30-2352(b)).

____ 3. P.R. or trustee gives notice to "recipients or potential recipients of the renounced interest" ***within 30 days*** of the P.R.'s or trustee's receipt of the renunciation. This notice tells of "the renunciation and the interest or potential interest such recipient shall receive as a result of the renunciation." (30-2352(e)). Have each "recipient" sign a receipt, showing they received this information and file this

with the County Court.

____ 4. File appropriate Certificates of Service in the County Court Estate Proceedings to show proper deliveries of the renunciation.

____ 5. Things to file with the Court:

Renunciation (30-2352(b))
Receipt by P.R. or trustee, showing they received renunciation (30-2352(b))
Notice by P.R. or trustee to recipients of the property
Receipts from recipients of the renounced interest, showing they received information required by 30-2352(e)
Certificate of Service, showing you did all of this
Petition for Court Approval?

____ 6. Things to file with the Register of Deeds:

Renunciation (30-2352(b))

EXHIBIT "6"

Possible Disclaimer Powers to Include in a Power of Attorney:

A. Power to Disclaim, Renounce, Release or Abandon Property Interests:

"To renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts (including the right to alter, amend, revoke or terminate) and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent may take into account such matters as shall include but shall not be limited to any reduction in estate or inheritance taxes on my estate, and the effect of such renunciation or disclaimer upon persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument."

B. Prohibition on Power to Benefit Agent:

"My Agent shall be prohibited (except as specifically authorized in this instrument) from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to cause such assets to pass in any one calendar year directly or indirectly to my Agent or his or her estate, (c) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others (excluding those whom I am legally obligated to support).

COMMENT: Since an agent is some sort of a fiduciary, it may be somewhat doubtful that an agent, without the express consent of the principal, could take action that is primarily for the benefit of the agent rather than the principal. Nevertheless, it may be prudent to include such a restriction as protection against any assertion that the agent has a general power of appointment over the principal's assets. It also prohibits the exercise of the power in any way that will benefit the agent, except as expressly provided in the instrument. The lawyer should be satisfied, however, if the agent is given power to make gifts to the agent, that this provision does not conflict in any way with that power."

Clauses and Comments from "Drafting the Durable Power of Attorney, A Systems Approach" 124-25; 167-68 (McGraw-Hill Book Company 1987)

EXHIBIT "7"

Disclaimers of Joint Tenancies

On December 31, 1997, the IRS released final amendments to the regulations covering disclaimers of jointly-held property (62 CFR 68183). Essentially the question is, "When does the 9 months start to run--when the joint tenancy was created, or at the date of death of one of the joint tenants?" The following discussion relates to disclaimers made on or after December 31, 1997:

A. Significance of Identifying "the Transfer". The main idea in the Regulations is the identification of "the transfer" creating the

joint interest being disclaimed. This is important because the type of transfer determines (1) the date on which the 9 month period begins to run, and (2) whether the joint tenant can make a qualified disclaimer, depending on who provided the consideration for the joint property.

B. Two Different Rules.

The Regulations set up two different rules for two different kinds of property:

1. *"Joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund)"*.

For any of these accounts, "if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant", then it shouldn't be a completed gift. Under those circumstances, "if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death."

However, the surviving joint tenant can't disclaim "any portion of the joint account attributable to consideration furnished by that surviving joint tenant." The consideration question is obviously important because the survivor can disclaim that portion of the account supplied by the deceased cotenant--not merely one-half.

Nebraska section 30-2722 says that during the lifetime of joint account holders, that account "belongs to the parties in proportion to the net contribution of each to the sum on deposit, unless there is clear and convincing evidence of a different intent." If the parties are married, the "net contribution" is presumed to be equal.

"Net contribution" is defined to be the "sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party . . . ."

Therefore, it appears the Nebraska Probate Code would meet the IRS requirements under the new Regs., and the time for disclaiming such a joint account should commence at the date of death--not the date the account was created.

2. *"Other" joint property*.

As to all joint property other than the joint bank accounts, etc., mentioned above, in most situations the new Regs. essentially allow the disclaimer of <u>one-half</u> of the property within 9 months of the death of the first co-owner. The Regs.' analysis essentially separates the creation of such a joint ownership into two steps:

A. The transfer upon the creation (or an addition) from the cotenant supplying the consideration to the other cotenant of a <u>one-half</u> lifetime interest in the consideration; and

B. The transfer of the remaining one-half survivorship interest upon the death of the first cotenant to die, from the deceased to the survivor.

For the "lifetime" one-half interest, the disclaimer must be made within 9 months from the date of the "creation" of the interest--or when the property was <u>originally</u> transferred.

For the "survivorship" one-half interest, the disclaimer must be made no later than "9 months after the death of the first joint tenant to die."

Both of these rules apply "regardless of whether such interest can be unilaterally severed under local law."

One possible planning tool is the fact that the "survivorship" interest can be disclaimed by the surviving joint tenant, even if the disclaimant furnished the consideration. The disclaimer is permitted,

> "regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate under section 2040 . . . ." Section 25.2518-2(c)(4)(i).