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DISCLAIMERS OF FUTURE INTERESTS: CONTINUING PROBLEMS AND SUGGESTED SOLUTIONS

Lawrence Newman and Albert Kalter***

I. Introduction

This article will present a brief background of the common law and statutory law relating to disclaimers, the gift, estate and income tax advantages which may be obtained through the use of disclaimers, and the unresolved issues which limit the effective use of disclaimers in estate planning. The focus will then shift to a more detailed consideration of the decision of the Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner,*[1] which, while shedding some light on the developing law, also highlights persisting questions. Finally, attention will be directed to legislative proposals for uniformity and simplification.

The term disclaimer is used in this article to refer to the gratuitous refusal of benefits tendered by testamentary bequest, by intestacy, or by inter vivos gift, and is used interchangeably with the term renunciation. Disclaimers are distinguished from releases, compromises, and elections, which involve surrenders of interests already accepted, exchanges of benefits or the choice of one interest instead of another.

II. Background: Common Law and State Statutes

The common law has long recognized the right of a beneficiary under a will to effectively disclaim an interest which otherwise would pass to him.[2] An effective disclaimer of a testamentary interest generally relates back to the time of the testator's death, preventing title from vesting in the beneficiary.[3] However, a disclaimer of an intestate share is not generally regarded as effective to prevent

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1 480 F.2d 57 (8th Cir. 1973), *rev'g,* 58 T.C. 352 (1972).

2 Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied,* 290 U.S. 641 (1933); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 139 (2d ed. 1953) (cases collected in n.2. p. 774); 6 BOWE-PARKER, PAGE ON WILLS § 49.2 (1962) (cases collected in n.1 pp. 39-40).

3 *See e.g.,* Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied,* 290 U.S. 641 (1933); People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928).

the vesting of title.[4] An attempted disclaimer of an intestate share has accordingly been held to constitute a transfer for gift tax purposes.[5] No logical reason exists for this distinction,[6] and recent statutory enactments have specifically recognized the right of a taker under intestacy to disclaim.[7] Case law in many states has also been uncertain in determining whether a disclaimer must be in writing, or whether an oral declaration is sufficient.[8] Here again, state statutes have made some progress by requiring a written document.[9]

A crucial question often raised relates to the period after death, gift, or other legally significant event[10] within which the disclaimer must be made to be effective. The prevailing case law approach has been to establish a presumption that a gift is accepted.[11] This presumption, although initially rebuttable by a disclaimer, becomes conclusive after acts by the beneficiary inconsistent with his refusal to accept or after passage of an unreasonable length of time.[12] Not surprisingly this approach has led to diverse results as to the effectiveness of a disclaimer within a specific period of time.[13] The situation is further confused by

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4 Hardenbergh v. Comm'r., 198 F.2d 63 (8th Cir. 1952), *cert. denied,* 344 U.S. 836 (1952); Coomes v. Finegan, 233 Iowa 448, 7 N.W.2d 729 (1943); Bostian v. Milens, 239 Mo. App. 555, 193 S.W.2d 797 (1946); T. ATKINSON, *supra* note 2, § 139; PAGE *supra* note 2, § 49.2.

5 *See e.g.,* Hardenbergh v. Comm'r, 198 F.2d 63 (8th Cir. 1952), *cert. denied,* 344 U.S. 836 (1952).

6 PAGE, *supra* note 2, § 49.1; *Disclaimer of Testamentary and Non-Testamentary Dispositions—Suggestions for Model Acts,* 4 REAL PROP., PROB. & TR. J. 658 (1969); Lauritzen, *Only God Can Make an Heir,* 48 Nw. U.L. REV. 568, 569 (1953). *Cf.* Farnum v. Bryant, 34 N.H. 2 (1856).

7 ALASKA STAT. § 13.11.295(a) (Supp. 1973); COLO. REV. STAT. ANN. § 153-5-43 (1963); CONN. GEN. STAT. ANN. § 45-300 (Supp. 1973); FLA. STAT. ANN. § 731.37 (1964); GA. CODE ANN. § 113-824 (1959); HAWAII REV. STAT. § 538-1 (1967); IDAHO CODE, § 15-2-801 (Supp. 1973); ILL. REV. STAT. ch. 3, § 15b (Supp. 1973); IND. ANN. STAT. § 29-1-6-4 (Code Ed. 1972); KAN. STAT. ANN. § 59-2291 (Supp. 1972); LA. CIV. CODE ANN. art. 977 (West 1952); MD. ANN. CODE art. 93, § 9-101 (1969); MICH. STAT. ANN. § 26.1236(1) (Supp. 1973); MINN. STAT. ANN. § 525.532 (1969); MO. ANN. STAT. § 474.490 (Vernon 1956); Laws of Neb., 82d Leg., 1st Sess., Leg. Bill No. 535 (1971); N.Y. EST., POWERS & TRUSTS LAW § 4-1.3 (McKinney 1967); N.C. GEN. STAT. § 29-10 (1966); LAWS OF N.D., 43d Leg., House Bill No. 1040 (1973) (effective July 1, 1975); OHIO REV. CODE ANN. § 2105.061 (Page 1968); R.I. GEN. LAWS ANN. § 34-5-1 (1970); S.D. COMPILED LAWS ANN. § 43-4-29 (Supp. 1973); W. VA. CODE ANN. § 42-4-3 (1966); WIS. STAT. ANN. § 852.13 (1971). *See also,* UNIFORM PROBATE CODE § 2-801.

8 Writing Necessary: Pournelle v. Baxter, 151 Fla. 32, 9 So. 2d 162 (1942); Bryan v. Hyre, 40 Va. (1 Rob.) 94 (1842). Oral disclaimer sufficient: Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied,* 290 U.S. 641 (1933); Coleman v. Burns, 103 N.H. 313, 171 A.2d 33 (1961); Olsen v. Wright, 119 N.J. Eq. 103, 181 A. 182 (1935); Matter of Wilson, 298 N.Y. 398, 83 N.E.2d 852 (1949); Tarr v. Robinson, 158 Pa. 60, 27 A. 859 (1893).

9 Such references to writings are included in nearly all the statutes listed in note 7 *supra.* In some states, however, it is not clear whether the statutory form of written disclaimer is exclusive. *Cf.* Note, *Taxation: Disclaimers Under Federal and Minnesota Law,* 51 MINN. L. REV. 907, 925-26 (1967).

10 See note 32 *infra.*

11 *See e.g.,* Hardesty v. Corrothers, 31 F. Supp. 365 (N.D. W. Va. 1940); *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940); People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928); Mackey v. Bowen, 332 Mass. 167, 124 N.E.2d 254 (1955); Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943); Matter of Wilson, 298 N.Y. 398, 83 N.E.2d 852 (1949); Roop v. Greenfield, 352 Pa. 232, 42 A.2d 614 (1945).

12 *In re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (1940); Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1941); Blake v. Blake, 147 Ore. 43, 31 P.2d 768 (1934); PAGE, *supra* note 2, § 49.8.

13 Extreme results are represented by *In re* Howe, 112 N.J. Eq. 17, 163 A. 234 (1932), (4 months — too long) and Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943), (16 months—not too long); for further discussion of this case, see text at note 51, *infra. See also,* Brown v.

the fact that case law in some states allows a beneficiary to partially disclaim by accepting one or more interests, or parts of an interest, while rejecting others intended to pass under the same instrument.[14] Recent state statutes have tended to recognize partial disclaimers, and specify a time limit, usually less than one year, for disclaiming.[15]

Another important question arises as to the disposition of property disclaimed by a legatee under a will. At common law the general rule was that the property passed as if the disclaimed legacy or devise had never been made.[16] The more modern approach, indicated by several recent state statutes,[17] is to treat the disclaimed interest under the anti-lapse statutes so that unless the testator has provided otherwise the property passes as if the disclaimant had died just before the testator's death or other event by which the interest would have passed to the disclaimant.[18]

Clearly the most common reasons for a refusal to accept a beneficial legacy are to minimize or avoid the exposure of such assets to the claims of taxing authorities and creditors. It now seems settled that such motives themselves do not invalidate an otherwise effective disclaimer.[19] In the area of creditors' rights some protection is provided by requiring a disclaimer to be free of fraud and collusion.[20] Thus, a disclaimer accompanied by consideration flowing to the disclaimant from one to whom the disclaimed property would pass will not be allowed to frustrate a creditor's claim against the disclaimant.[21] Some statutes are more solicitous of creditors' rights,[22] and the result, if not the rationale, of

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Routzahn, 63 F.2d 914 (6th Cir. 1933), *cert. denied,* 290 U.S. 641 (1933), (no time limit exists in Ohio; disclaimer made eight years after testator's death—effective).

14 *See* Note, *supra* note 9 at 919; Annot., 91 A.L.R. 607 (1934).

15 An example of a "permissive" statute in regard to partial disclaimers is N.Y. EST. POWERS & TRUSTS LAW §§ 3-3.10 and 4-1.3. In regard to time limits, extreme results are represented by HAWAII REV. STAT. § 538-2 (1967) (15 months) and OHIO REV. CODE ANN. § 2105.061 (1968) (60 days).

16 Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943); Dare v. New Brunswick Trust Co., 122 N.J. Eq. 349, 194 A. 61 (1937); *In re* Bute's Estate, 355 Pa. 170, 49 A.2d 339 (1946). Thus, property disclaimed would pass under a residuary clause of the will or, failing that, under the laws of intestacy. If the disclaimant is also an heir, his efforts may ultimately be frustrated by state law which does not recognize the right of an heir to disclaim. Maxwell v. Comm'r., 17 T.C. 1589 (1952). *See* notes 4-7 *supra.*

17 *See e.g.,* COLO. REV. STAT. ANN. § 153-5-43 (1963); FLA. STAT. ANN. § 731.37 (1964); MINN. STAT. ANN. § 525.532 (1969); N.Y. EST., POWERS & TRUSTS LAW § 3-3.10 (McKinney 1967).

18 Ultimate disposition of the property disclaimed thus depends also on the nature of the state's anti-lapse statute. A few statutes provide that if any beneficiary predeceases the testator, the bequest passes to surviving issue of the beneficiary (*See e.g.,* W. VA. CODE ANN. § 41-3-3 (1966)), but most limit this result to cases where the deceased beneficiary was related to the testator. *See e.g.,* IDAHO CODE § 15-2-605 (Supp. 1973). Where the deceased is not so related, or no issue survive the testator, or no anti-lapse provision exists, the common law rule applies. *See* note 16 *supra.* When the disclaimer involves a future interest, additional questions arise. For a discussion of this situation, see notes 92-95 *infra.*

19 *See e.g.,* United States v. McCrackin, 189 F. Supp. 632 (S.D. Ohio 1960); *In re* Estate of Hansen, 109 Ill. App. 2d 283, 248 N.E.2d 709 (1969); Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); *In Re* Krakoff's Estate, 179 N.E.2d 566 (Ohio 1961). *Contra, In Re* Kalt's Estate, 16 Cal. 2d 807, 108 P.2d 401 (Cal. 1940).

20 Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502 (1908).

21 Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502 (1908).

22 *See e.g.,* IND. ANN. STAT. § 29-1-6-4 (Code Ed. 1972): "[N]o such renunciation shall be effective if it is objected to within thirty (30) days by a creditor . . . and if the court finds that the creditor is prejudiced thereby"; MINN. STAT. ANN. § 525.532(5) (1969): "The right to disclaim otherwise conferred by this Section shall be barred if the beneficiary

some cases suggests that courts examine disclaimers more critically when creditors' rights are involved.[23] The position of taxing authorities in regard to disclaimers will be considered in subsequent sections of this article.

III. Use of Disclaimers in Estate Planning

Since an effective disclaimer prevents title from vesting in the disclaimant, it offers a means of reducing the number of transfers and resulting transfer taxes. Consider the case of a testator who leaves property to A with a residuary disposition in favor of B. A, having no use for the property or preferring that B have it, may disclaim. The disclaimer will, at least under the common law, pass the property to B and will serve to avoid the gift tax which would result from a gift to B or the estate tax which would otherwise result on the death of A.[24] Avoidance of the transfer tax is especially attractive where the parties are members of the same family since the disclaimer only rearranges property within the family unit. A disclaimer in favor of a family member in a lower income tax bracket will also produce prospective income tax benefits.[25] And where, as a result of the disclaimer, property passes from a decedent to his surviving spouse or to charity, the estate tax liability will be reduced by reason of the marital or charitable deduction.[26] While these potential planning benefits can hardly be ignored, the use of disclaimers in estate planning is seriously limited at the present time by uncertainties in the law. *Keinath v. Commissioner*,[27] decided by the Court of Appeals for the Eighth Circuit, highlights two of the major problems surrounding the federal tax questions: the interplay of state and federal law and the treatment of future interests.

Brown v. Routzahn[28] was the first case to recognize that a disclaimer of a testamentary transfer could pass property to another person without imposition of the gift tax. From that case, subsequent cases,[29] Internal Revenue Code provisions,[30] and Treasury Regulations,[31] it seems clear that a disclaimer can be

is insolvent . . . ."; Mo. ANN. STAT. § 474.490 (1956): "[T]he renunciation shall be subject to the rights of creditors. . . ." *Contra*, MD. ANN. CODE art. 93, § 9-101 (1969): "Creditors of the renouncing legatee or heir have no interest in the property renounced. . . ."

23 *See* Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1941); Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917). For further discussion of these cases, see notes 52 and 58-60 *infra*.

24 For the common law system of disposing of disclaimed property, *see* note 16 *supra*. The gift tax is avoided under Treas. Reg. § 25.2511-1(c). The estate tax is avoided because the property will not be part of A's estate at his death. In both cases, the rationale is that A never had any interest in the property.

25 Income tax liability can also be avoided through disclaimer of a power to vest income in oneself. INT. REV. CODE OF 1954 § 678(d).

26 INT. REV. CODE OF 1954 §§ 2056(d)(2) (marital deduction) and 2055(a) (charitable deduction). However, where a full marital deduction is otherwise available, a disclaimer in favor of a surviving spouse will not further reduce the estate tax liability.

27 480 F.2d 57 (8th Cir. 1973), *rev'g*, 58 T.C. 352 (1972).

28 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933).

29 Hardenbergh v. Comm'r., 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952); Maxwell v. Comm'r., 17 T.C. 1589 (1952).

30 INT. REV. CODE OF 1954 §§ 678(d) (disclaimer of power to vest income in oneself), 2041(a)(2) (disclaimer of power of appointment under estate tax), 2056(d)(2) (disclaimer increasing marital deduction under estate tax) and 2055(a) (disclaimer increasing charitable deduction under estate tax).

31 Treas. Regs. §§ 20.2041-3(d)(6), 20.2056(d)-1(b), 25.2511-1(c), and 25.2514-3(c)(5).

effective for federal tax purposes if the disclaimer is: 1) permitted under state law, 2) effective under local law, 3) made within a reasonable time, and 4) unequivocal. By reason of the dependence on state law for effectiveness, federal tax consequences will vary from state to state. Moreover, effectiveness of a disclaimer under state law, while a necessary condition for federal tax purposes, is not alone sufficient. The disclaimer must also be made within a reasonable time in order to be recognized for federal tax purposes. The vagueness of the reasonable time requirement presents an obstacle even in a state which has clear statutory guidelines for determining the validity of a disclaimer.

The treatment of future interests is a closely related problem. Where one wishes to disclaim a future interest, the question is not only how long a period of time is available to disclaim, but also when that period begins to run.[32] Regulation § 25.2511-1(c), which requires that the refusal be made "within a reasonable time after knowledge of the existence of the transfer," makes no special allowance for future interests. A beneficiary might accordingly be required to disclaim a future interest years before it vests or ripens into possession.

It is also appropriate to consider whether the disclaimer should be available as an estate planning technique. Another form of the question is whether taxing authorities should be protected from the consequences of disclaimers to the same extent as, or to a greater extent than, creditors. It has been suggested[33] that *Brown v. Routzahn*,[34] holding that a properly executed disclaimer was not a taxable transfer within the meaning of the federal gift tax statute, may have been wrongly decided. This argument is advanced partly on the basis of the intention of Congress to tax every gratuitous transfer and partly upon the more general proposition that gift and estate taxes should operate in such a way as to minimize rather than protect the accumulation of inherited wealth.[35] Clearly the disclaimer device will be most useful to those of substantial wealth. Furthermore, it is contended that, although the disclaimant's control is limited to a choice between accepting the property or passing it to a substituted taker determined by law, the fact that the substituted taker can usually be determined before the decision to disclaim is made should be enough to impute to the disclaimant sufficient donative intent to bring the transaction within the gift tax statute.[36]

Imposition of a transfer tax would have to be based on the disclaimant's control of the property. Theoretically, an effective disclaimer deprives the disclaimant of possession and enjoyment. It is accordingly questionable whether

32 Some state statutes specify such a starting point in terms that may be susceptible of ambiguous interpretation. *See e.g.*, "the event which would cause . . . [the disclaimant] to become finally ascertained and his interest to become indefeasibly fixed both in quantity and quality." FLA. STAT. ANN. § 731.37(5) (1964); "the event by which the taker or . . . the interest is finally ascertained." GA. CODE ANN. § 113-824(b) (1959); "Any person entitled to a reversion or a remainder in fee in real estate may disclaim . . . within six months after he comes into possession thereof. . . ." R.I. GEN. LAWS ANN. § 34-5-5 (1970). Section 34-5-6 of the Rhode Island statute makes the same provision for personal property. *See* Note, *supra* note 9, at 931-939, finding serious difficulties in construing the phrases "finally ascertained" and "indefeasibly fixed in quantity and quality."

33 *See* Note, *supra* note 32, at 911-12.

34 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933).

35 *See*, JOINT COMM. ON THE ECONOMIC REPORT, 84TH CONG., 1ST SESS., RECOMMENDATIONS FOR REVISION OF FEDERAL ESTATE AND GIFT TAXES 864-65 (1955).

36 *See* Note, *supra* note 9, at 910.

the option to accept or refuse property is a sufficient basis to justify a tax.[37] Finally, it must be realized that a disclaimer will rarely, if ever, achieve tax advantages that could not have been achieved by updating the decedent's will or by inter vivos trust arrangements. The federal law seems clearly settled in favor of recognizing a disclaimer of property as a valid tax avoidance device. Consistent with the case law, the Code provisions and the Regulations previously referred to,[38] Congress, as recently as 1966, amended the Code to permit property disclaimed in favor of a surviving spouse to qualify for the marital deduction.[39]

The debate nevertheless continues. In *Keinath*, the Tax Court, in holding the disclaimer to be subject to the gift tax, stated the view that:

> The exception from taxation for disclaimers was designed to permit a donee to avoid receiving an unwanted gift or bequest . . .; it should not be used as an estate-planning and tax avoidance tool.[40]

The Court of Appeals, holding the disclaimer to be effective for tax purposes, reversed the Tax Court stating:

> [C]omment is in order on the following excerpt of the Tax Court's opinion: [quoting the passage above]. . . . We think in giving full and fair effect to the law of disclaimer that a person's motives are immaterial. . . . Persons have a right to and should consider the tax consequences. . . . There appears to be nothing morally reprehensible or legally wrong for a person who has never received the benefit or income from a bequest, to disclaim that bequest. . . .[41]

IV. The Impact of *Keinath*

Granting that the above language of the Court of Appeals in *Keinath* encourages the use of disclaimers in estate planning, the question remains whether the decision provides any real assistance in clarifying the federal law and future interest issues. The facts of the *Keinath* case can be stated briefly. John H. MacMillan, Sr. died in 1944 and his will disposed of most of his estate in trust, with income to be paid to his widow, Edna, for life. Upon Edna's death, the principal was to be divided equally between the decedent's two sons, John, Jr. and Cargill, with the condition that if either should predecease the widow, his share should be distributed, per stirpes, among his children. John, Jr. and Cargill were designated as the trustees, with the surviving son to become sole trustee if one predeceased the widow.

In 1960 John, Jr. died, survived by three children. In March 1963 the widow died—the trust then being valued at approximately $1,300,000. In May of 1963, Cargill, then sixty-three years of age, signed a disclaimer of his interest in the trust and specified that the disclaimer was not to take effect until filed with

37 *Id.* at 908-909.
38 See notes 28-31 *supra*.
39 Act of Oct. 4, 1966, Pub. L. No. 89-621, 80 Stat. 872 (now INT. REV. CODE OF 1954 § 2056(d)(2)).
40 Keinath v. Comm'r., 58 T.C. 352, 359 (1972).
41 Keinath v. Comm'r., 480 F.2d 57, 65-66 (8th Cir. 1973).

the state court having jurisdiction. He then petitioned that court for an interpretation of the effect of the disclaimer. The Minnesota court, in September 1963, held the disclaimer timely and valid and ruled that Cargill's half of the trust remainder passed to his three children.[42] Cargill died in 1968. After his death the government determined that his attempted disclaimer constituted a gift and assessed gift tax deficiencies of approximately $150,000. The dispute was reduced to the single issue of whether the purported disclaimer was a taxable transfer. The facts were stipulated and Cargill's interest was stated to be a vested remainder subject to divestment if he predeceased his mother.[43]

A. *The Tax Court Opinion*

The Tax Court noted that no decision of the Supreme Court of Minnesota covered these particular facts. Under the *Bosch* doctrine,[44] the lower state court ruling was not binding upon the Tax Court. The Tax Court concluded, however, that even if the disclaimer were effective under Minnesota law, there was a further federal test to be met, the reasonable time test, and Cargill's declaration did not meet this test. These conclusions rested primarily on the Court's decision in *Fuller v. Commissioner*.[45]

Fuller dealt with an attempted partial renunciation of an income interest twenty-five years after its creation, during which time the disclaimant had received income. The state court had held the disclaimer to be effective under state law, but the Tax Court refused to give it effect for gift tax purposes. The opinion relied on the language of the Gift Tax Regulations, § 25.2511-1(c), requiring that a disclaimer, in addition to being effective under state law, be made within a reasonable time and prior to acceptance. Without citing cases, the court in *Fuller* concluded that there had been an acceptance and held the purported disclaimer, twenty-five years after creation of the interest, not to have been made within a reasonable time.

The petitioners in *Keinath* contended that *Fuller* was not conclusive since Cargill had not accepted income or principal from the trust. They further argued that the reasonable time test approved in *Fuller* was no more than dictum. The Tax Court rejected their argument:

> We do not read [*Fuller v. Commissioner*] as resting upon Mrs. Fuller's acceptance of income from the trust but upon her acceptance of her interest in the trust. In addition, Mrs. Fuller's receipt of income was only one fact that we used in testing her conduct against section 25.2511-1(c) . . . to determine whether her disclaimer should be given effect for gift tax purposes.

42 The basis for the disposition is unclear. The Minnesota disclaimer statute passed in 1966 was not applicable to Cargill's 1963 disclaimer. One might have expected application of the prevailing common law approach, treating the legacy as lapsed and passing the property through the residuary clause of John, Sr.'s will or by intestacy. *See* note 16 *supra*. It seems unlikely, without further details concerning the will, that such an approach would have passed Cargill's interest entirely to his children. If the Minnesota court adopted the Minnesota statute's approach as a matter of preexisting common law, other problems are raised, the discussion of which appears at notes 92-94 *infra*.

43 Keinath v. Comm'r., 58 T.C. 352 (1972).

44 387 U.S. 456 (1967).

45 37 T.C. 147 (1961).

> We approved the two-part test of the regulation—that the disclaimer be valid under local law *and* made within a reasonable time after the disclaimant learns of the transfer—and found that Mrs. Fuller failed to satisfy the "reasonable time" part.[46]

The Tax Court, in *Keinath*, was even less receptive to the petitioners' claim that, if the Regulation established a reasonable time test, the reasonable time should not include the time during which the interest remained defeasible. While not directly answering this point, the opinion noted that throughout this period Cargill knew of the interest and its beneficial character, and had been able to disclaim earlier. The opinion of the Tax Court concludes with language, already mentioned, adopting a broad construction of Section 2511 and expressing disfavor with the use of disclaimers as a technique of tax avoidance.

The Tax Court's opinion in *Keinath* thus contains at least two warnings against the use of disclaimers in estate planning. First, that compliance with state law is not alone sufficient—to be recognized for federal tax purposes the disclaimer must, in addition, be made within a reasonable time; and second, that a disclaimer of a future interest is subject to the same criteria as a disclaimer of present interests even though the former may be remote in possession and not indefeasibly vested. Not surprisingly, the decision intensified preexisting efforts to amend the tax law.[47]

B. *The Court of Appeals Decision*

It might have been expected that the appellate court would either agree with the Tax Court's reliance on *Fuller* in applying a federal reasonable time test, or rule that state law controls the issue of the validity of a disclaimer for federal tax purposes. Strictly speaking, it did neither. The latter position was specifically rejected by the Court: ". . . we think the Commissioner has the right in the Treasury Regulations to set forth the conditions under which disclaimers will be recognized."[48] The disagreement with the Tax Court was thus not over the existence of the federal reasonable time standard but over the interpretation of that standard: ". . . we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase 'reasonable time'. . . ."[49] The refusal to rely on *Fuller* was based on the presence of the prior acceptance factor in that case, rendering it unnecessary for the Tax Court to have reached the reasonable time question. The disagreement with the Tax Court hardly seems important since *Fuller* would do little to establish a reasonable time test, standing only for the unsupported assertion that twenty-five years is not a reasonable time.

The opinion of the Court of Appeals surveys five decisions,[50] from the courts

46 Keinath v. Comm'r., 58 T.C. 352, 358-59 (1972).
47 COMMITTEE ON ESTATE AND GIFT TAXES, LEGISLATIVE RECOMMENDATION.
48 Keinath v. Comm'r., 480 F.2d 57, 61 (8th Cir. 1973).
49 *Id.* at 61-62.
50 Strom v. Wood, 100 Kan. 556, 164 P. 1100 (1917); Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943); Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1941); Coleman v. Burns, 103 N.H. 313, 171 A.2d 33 (1961); Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945).

of four states, relating to reasonable time. No mention is made of the different points from which the times are calculated or of certain equitable factors (*e.g.*, burdened interests,[51] and creditors' rights[52]) which may have influenced those decisions. At any rate, the survey leads to the unremarkable conclusion that 19 years from the creation of the remainder to the date of disclaimer was not a reasonable period of time, but that 6 months from the date of vesting to the date of disclaimer was reasonable. The court thus proceeded almost as if no independent federal requirement was to be applied. The analysis of state court cases and other authorities is presumably what the Supreme Court of Minnesota would have done to determine the state law validity of a disclaimer not covered by its 1965 statute or case law. The opinion states:

> We hold, therefore, that under the prevailing common law *and, in particular, the jurisdiction of the State of Minnesota*, . . . an unequivocal disclaimer filed within six months . . . [after the death of the life beneficiary] is made within a reasonable time[53] [emphasis added].

One would assume that in a case arising in a state where the effectiveness of disclaimers is defined by statute or case law, the federal courts would still be required to apply the federal reasonable time test. If the *Keinath* survey of state decisions is indeed the federal standard for reasonable time, it is, of course, far too vague. Nothing is said about disclaimers after delays of six months to nineteen years. A case-by-case narrowing of this gap would be too painful for litigants and too burdensome for the courts.

Regarding the dispositive question of the starting point for the commencement of the reasonable time period—a question decided but not discussed by the Tax Court—the Court concluded[54] that the reasonable time period does not start to run until the remainder interest becomes indefeasibly vested—in the *Keinath* case at the death of the widow:

> The appellants maintain, without any refutation by the Commissioner, that all of the authorities who have considered this question have concluded that

51 In *Seifner v. Weller*, 171 S.W.2d 617 (Mo. 1943), the devise of a remainder interest in a farm to the disclaimant was subject to a charge of equalizing shares of siblings in the testator's estate. It appears that the farm proved to be worth less than the value placed on it in the will, so that the disclaimant found the arrangement burdensome. The disclaimer was held effective although not made until 16 months after the death of the life tenant (14 years after the death of the testator) during which period the disclaimant occupied the land.

52 Both *Strom v. Wood*, 100 Kan. 556, 164 P. 1100 (1917) and *Sanders v. Jones*, 347 Mo. 255, 147 S.W.2d 424 (1941), were cases in which the would-be disclaimants of remainder interests sought to avoid the claims of creditors. In *Strom*, the creditor's judgment predated the testator's death and the disclaimer was filed approximately five years after death, but apparently while the life tenant was still alive. In *Sanders*, the disclaimer was filed fifteen months after the testator's death, while the life tenant was still alive. Although the creditors did not seek attachment until the life tenant died, the notes sued on had apparently been due since before the testator's death. Both disclaimers were held to be ineffective. For further discussion of these cases, *see* notes 56-58 *infra*.

53 Keinath v. Commissioner, 480 F.2d 57, 64 (8th Cir. 1973).

54 In its opinion, the Tax Court referred to Page on Wills, the Minnesota disclaimer statute adopted after the *Keinath* disclaimer, and the Model Act on Disclaimers. *See* Page, *supra* note 2, § 49.8; MINN. STAT. ANN. § 525.532(3) (1969); and MODEL ACT TO PROVIDE FOR DISCLAIMER OF SUCCESSION TO REAL AND PERSONAL PROPERTY § 2, 4 REAL PROP., PROB. & TR. J. 658 (1969).

> the time in which a remainder interest subject to divestiture must be disclaimed commences upon the death of the life beneficiary, which in turn allows the remainder interest to be irrevocably fixed not subject to divestment. We have found no contrary authority and think this is the prevailing common law rule. . . .[55]

Without making an exhaustive search of the literature, one can determine that this conclusion considerably oversimplifies even those cases cited in the opinion. In *Strom v. Wood*[56] a disclaimer was held to have been made too late although made before the death of the life tenant, the remainder interest having been subject to partial divestment (to the extent of one-half). Although the *Keinath* decision suggests that the right to disclaim was lost only in regard to the half which was not subject to divestment,[57] this is less than clear from the *Strom* opinion. In *Sanders v. Jones,*[58] another of the cases discussed in the court's survey of reasonable time decisions, the disallowed disclaimer was made before the death of the life tenant, and although the court there did not decide the point, the interest appears to have been subject to divestment. As these cases suggest, the authorities relied on do not generally seem to have taken cognizance of the distinction which the Eighth Circuit appears to be making, namely, that an interest absolutely vested at its creation must be disclaimed within a reasonable time of its creation, while a vested interest subject to divestment (and, presumably, a contingent remainder), need not be disclaimed until after the event which results in absolute vesting. The courts in *Coleman v. Burns,*[59] *Seifner v. Weller*[60] and *In Re Estate of Page*[61] all allow late disclaimers of future interests without indicating that the result would be different if the remainder had absolutely vested. Indeed, it is at least arguable that such was the case in *Seifner.*

The Eighth Circuit's opinion is itself not unequivocal in establishing absolute vesting as the point of commencement of the time period for disclaiming. At one point the opinion states:

> It thus appears from the adjudicated cases that remainder interests that are not subject to divestiture should be disclaimed within a reasonable time after the testator's death, and where the remainder interest is subject to divestiture a disclaimer may be filed within a reasonable time after the termination of the life estate.[62]

However at another point the opinion states a question "[c]entral to this case": "In other words is the reasonable time period calculated from the date the remainderman has the right of *possession or control* of the property or when the trust is established?"[63] As indicated above, some of the cases relied upon hold, or suggest, that the reasonable time period starts at the date of possession, even

55 Keinath v. Comm'r., 480 F.2d 57, 64 (8th Cir. 1973).
56 100 Kan. 556, 164 P. 1100 (1917).
57 Keinath v. Comm'r., 480 F.2d 57, 62 (8th Cir. 1973).
58 347 Mo. 255, 147 S.W.2d 424 (1941).
59 103 N.H. 313, 171 A.2d 33 (1961).
60 171 S.W.2d 617 (Mo. 1943).
61 113 N.J. Super. 582, 274 A.2d 614 (1970).
62 Keinath v. Comm'r., 480 F.2d 57, 63 (8th Cir. 1973).
63 *Id.* at 61. [emphasis added].

where the remainder was absolutely vested at a point earlier in time. The court also quotes *Page* that:

> If the interest is one which will not take effect in immediate possession, even if accepted, it is said that the remainderman . . . has the entire period during which the particular estate lasts, to determine whether he accepts or renounces.[64]

The next section of this article reviews the further question of whether the proposed distinction between absolutely and defeasibly vested interests serves a useful purpose, or whether the required time for disclaimer of all future interests should be postponed until vesting in possession.

V. The Need for Legislation

The disagreement between the Tax Court and the Court of Appeals illustrates the confused state of the law on disclaimers and explains the general hesitancy in the utilization of disclaimers. While the reversal of the Tax Court's decision in *Keinath* creates a more hospitable environment for the use of disclaimers and sheds some light on the law, important questions remain. The major questions facing the Court of Appeals in *Keinath* were the length of the reasonable time period and the point at which that time period commences. To the first question, only a limited answer is given, with no clear guidelines to be applied in other situations. To the second question the answer seems more definitive, but the opinion seems equally consistent with an alternative answer, and no reasoned basis is given for choosing one over the other. The continuing existence of this type of confusion presents a situation ripe for legislative consideration. Legislative action also promises benefits in other areas, where the common law of disclaimer seems unclear or irrational. Attention here, however, will be limited to the problems raised by *Keinath*.

As noted earlier, a number of states have passed statutes in recent years establishing time requirements. Both Model and Uniform Acts have been proposed embodying such a feature. The state statutes that have been enacted establish periods from two to fifteen months;[65] the Model Act proposes ten months,[66] and the Uniform Act would establish six months as the reasonable time for disclaiming an interest.[67] If state law alone were determinative of the issue of reasonable time, the problem of providing a definitive federal time period for disclaiming an interest would be solved in those states having disclaimer statutes. The Uniform Act would then be aimed at reaching those states which had not acted, and conforming the state laws so that federal tax consequences would not depend on domicile. Obviously, such a goal is desirable. The time

64 *Id.* at 63.
65 See note 15 *supra.*
66 MODEL ACT TO PROVIDE FOR DISCLAIMER OF SUCCESSION TO REAL AND PERSONAL PROPERTY § 2, 4 REAL PROP., PROB. & TR. J. 658 (1969).
67 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT AND UNIFORM DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT.

period of the Uniform Act attempts a reasonable compromise—long enough for careful consideration and planning but not so long as to raise the risk of conduct which is inconsistent with a rejection of the property.[68] It seems clear, however, that a Uniform Act would not necessarily settle the reasonable time question, even in regard to disclaimers of present interests. As discussed earlier, the Court of Appeals opinion in *Keinath* may be read as being ambiguous as to the present existence of an independent federal standard, but clearly recognizes the power of the Commissioner to impose such a standard.[69] Even under current law, the federal courts would presumably be free to use the reasonable time language of Regulation § 25.2511-1(c) to refuse to recognize a disclaimer effective under state law.[70]

This problem, combined with the inherent problems and delay in the enactment of a Uniform Disclaimer Act by the states, suggests that reform should be pursued through the federal system. There is currently under study a proposal for the amendment of the Internal Revenue Code which would establish a nine-month disclaimer period.[71] Federal amendments would not eliminate differences in state laws or the consequences of disclaimers in matters other than federal taxation (such as state inheritance taxes). The proposal for amendment of the Internal Revenue Code would, however, make federal taxation independent of the state of domicile by recognizing a disclaimer under certain circumstances for federal tax purposes even if it was not effective under state law.[72] The proposal for federal legislation would supersede Regulation § 25.2511-1(c), which provides that a disclaimer must be effective under state law. This approach may raise some problems. For example, if a state court holds that a disclaimer, which meets the standards of the proposed federal amendment, is ineffective under state law, what is to become of the property? If the disclaimant enters into possession and enjoyment, the disclaimer should not be given effect for federal tax purposes and the property should remain subject to estate and gift taxes. Federal tax relief should not be extended where the disclaimant transfers the property to someone of his choice for here control over the disposition of the property has been exercised, a feature which is incompatible with the concept of a tax effective disclaimer.[73] The federal proposal[74] accordingly provides that an attempted disclaimer which meets the federal requirements will be given effect for federal tax purposes, even if it is ineffective under state law, unless the disclaimant accepts the property or exercises proprietary control. The proposed amendment excludes the exercise of control which is necessary to effectuate a transfer of the disclaimed

68 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REPORT OF COMMITTEE ON DISCLAIMER OF GIFTS AND BEQUESTS (Aug. 1972). Since the federal estate tax return is not required to be filed until nine months after the decedent's death, a nine-month period would seem equally reasonable.

69 See note 48 *supra*.

70 For a discussion of situations in which the federal courts might be inclined to follow a state timeliness requirement, see Note, *supra* note 9, at 916-17.

71 COMMITTEE ON ESTATE AND GIFT TAXES, LEGISLATIVE RECOMMENDATION.

72 *Id.*

73 COMMITTEE ON ESTATE AND GIFT TAXES, *supra* note 71, at 5; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 68.

74 COMMITTEE ON ESTATE AND GIFT TAXES, *supra* note 71, at 8 (requiring the disclaimant to execute "appropriate documents effective under applicable state law to ensure that he has no interest in or title to the property").

property to the persons who would have been entitled to the property had the disclaimant predeceased the prior holder of the property. An attempted disclaimer will not be effective under the proposal if the disclaimant retains the property or gives it to someone other than the person who would have taken the property had the disclaimant predeceased the prior holder of the property.

A less desirable solution would be to include in the federal statute a requirement that the disclaimant tender the property to the court having jurisdiction (*e.g.*, the probate court) as a gift to the person or persons who would have taken if the disclaimer had been effective. This seems unsatisfactory since the state court might well decline to determine the recipient, the disclaimer having already been held ineffective under state law. A provision for the use of the federal courts to dispose of the property, according to state law, as if the disclaimer had been effective, would raise questions concerning federal power and the proper role of the federal courts. Continuance of the present requirement that a disclaimer be effective under state law would leave in effect all of the variations and uncertainties which exist under the present state laws. Precise standards by which residents of all states could accurately determine the federal tax consequences of a disclaimer of property would appear to be the benefit and purpose of a federal statute.

The most equitable alternative appears to be the approach of recognizing for federal tax purposes a disclaimer which is ineffective under state law where the form of disclaimer complies with federal standards and the disclaimant transfers the property to the person who would have been entitled to the property had the disclaimant predeceased the prior holder. This approach is not completely free of uncertainty for the disclaimant is still required to determine the taker under state law. It is, however, hoped that passage of an amendment to the Internal Revenue Code, recognizing the disclaimed property as a tax-free transfer, would give impetus to serious consideration of the Uniform Disclaimer Act which would substantially eliminate the question of substituted takers by making effective disclaimers which meet standards similar to the federal requirements.

Nearly all of the same factors are present in a consideration of the other major issue in *Keinath,* namely the standard for determining the commencement of the reasonable time period in the case of a future interest. It seems clear that this question is also subject to both state and federal answers, and as discussed above, neither state nor federal law change alone would be entirely satisfactory.[75]

In the language of property law, future interests are divided into the categories of 1) contingent, 2) vested subject to divestment, and 3) absolutely (or indefeasibly) vested, depending on the existence of a condition precedent, a condition subsequent, or no condition, respectively.[76] The distinction between a contingent future interest and one vested subject to divestment is more one of form

75 State law provisions, more liberal than those recognized in *Keinath,* might fail to meet the federal reasonable time test of TREAS. REG. § 25.2511-1(c), while federal provisions might not be effective under state law if the disclaimant is unable to dispose of the property in the manner prescribed by the state statute. *See* notes 69-74 *supra.*

76 *See e.g.,* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 114-18 (1962). For purposes of this discussion, it is not necessary to recognize the distinction established between remainders vested subject to partial divestment and remainders vested subject to complete divestment.

than of substance, with courts preferring to construe ambiguous language as creating a vested interest.

The Illinois[77] and Minnesota[78] statutes, among others, adopt as the starting point for the disclaimer period the event by which "the taker has become finally ascertained and his interest has become indefeasibly fixed both in quality and quantity."[79] The words "quality" and "quantity" are, however, ambiguous. One commentary on the Minnesota statute has suggested that not only is the standard not equivalent to "indefeasibly vested," but that it is not susceptible of any reasonable interpretation consistent with other sections of the Act.[80]

The Eighth Circuit, in the *Keinath* decision, draws a distinction between remainders which are vested subject to divestment and remainders absolutely vested. It would have the time period commence with the testator's death if the interest was absolutely vested and with the irrevocable vesting of the interest if the interest was not absolutely vested. As discussed earlier, the distinction between "absolutely vested" and "vested subject to divestment" is not generally supported by the limited law[81] on disclaimers of future interests or by the Eighth Circuit's reasoning in the *Keinath* opinion. Because a contingent remainder is very much like a remainder vested subject to divestment and because the former is, if anything, more speculative than the latter, it seems safe to assume that the Eighth Circuit would allow postponement of a contingent remainder as well.

There have also been suggestions which would make possession the point at which the disclaimer period would commence.[82] This would have the effect of allowing even an "absolutely vested" remainder to be disclaimed within a period of time after the life tenant's death rather than after the testator's death. The Uniform Act and the proposed federal amendment would establish as the starting point of the disclaimer period the event which determines the taker of the property and renders his interest indefeasible.[83]

For practical reasons, it might seem preferable to dispense with indefeasibility and absolute vesting as the standard and to allow disclaimers to be made within a specified time after the interest vests in possession and enjoyment. The most obvious advantage would be simplicity. Construction problems and uncertainty in planning would be minimized. Secondly, a standard of indefeasibility or absolute vesting could be circumvented by creating a vested remainder subject to unlikely divestment. For example, the non-existence of the divesting condition may not be ascertainable until the time when the interest becomes possessory. In such instance the remainder would be absolutely vested in fact, but subject to divestment in law. Suppose a testator wished C, the intended recipient of a future interest, to retain the right to disclaim, but to have maximum

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77 ILL. REV. STAT. ch. 3, § 15b (Supp. 1973).
78 MINN. STAT. ANN. § 525.532 (1969).
79 *See e.g.,* MODEL ACT TO PROVIDE FOR DISCLAIMER OF SUCCESSION TO REAL AND PERSONAL PROPERTY § 2, *supra* note 6, at 664.
80 *See* Note, *supra* note 9, at 931-37.
81 See notes 56-61 *supra.*
82 COMMITTEE ON ESTATE AND GIFT TAXES, *supra* note 71, at 7.
83 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 67, § 2.

control for as long as possible. Could not a well-advised testator word the disposition so as to provide a life estate for W, with the remainder passing to C, but if great-grandchildren of C are living at W's death, then to G? C could now wait until W's death to disclaim since the remainder is formally subject to divestment.[84] C's possession would still depend on surviving W, but he would now retain the option of disclaiming the remainder interest, free of estate and gift taxes, until termination of W's life estate only because of the existence of a condition which is extremely unlikely to occur.

It seems unreasonable to base the test of timeliness on indefeasibility unless the designations "absolutely vested" and "subject to divestment" have sufficient other significance to justify different disclaimer time requirements. The question, thus, is whether a remainder's character as absolutely vested has any impact on its ownership or control. A hypothetical situation may help to point out some of the considerations. Consider the following situation, not materially different from the facts in *Keinath*. Testator wishes, through his will, to provide for his wife, W, during her lifetime, and then to pass the family wealth to his only child, C, at W's death. In the event C should die before W, testator wishes the estate to pass to C's only child, G. The will might be drawn in three different ways:

1. Income to W for life, remainder to C if C survives W, otherwise to G.
2. Income to W for life, remainder to C; but if C should predecease W, then to G.
3. Income to W for life, remainder to C.

The first formulation would be construed as passing to C a contingent remainder, the second, a vested remainder subject to divestment, and the third, an absolutely vested remainder.[85] Under the *Keinath* or "indefeasible" test, C could postpone his disclaimer under formulations 1 and 2, but not under 3. Obviously, if C survives W, his subsequent enjoyment of the property is completely unaffected by the form of the will provision. To ascertain any differences we must consider the period during the life of W, the income beneficiary. While W is alive, C may dispose of his interest by sale or gift.[86] He may also formally accept the interest. His right to disclaim after acceptance is barred in all instances.[87] The only consequence of the choice between formulations 1, 2, and 3 would be in the monetary value of the interest (greater for 3 than for 1 or 2). C may also wish to consider the possibility that he will predecease W. Under

84 It may be argued that where the divesting condition is very unlikely (not clearly related to any express or implied intent of the testator, or obviously added to allow postponement of the disclaimer), the Commissioner and the courts could look beyond the form to the substance and hold the disclaimer ineffective under the time limitation. While this may well be so, such an approach would only increase estate planning uncertainty, since the factual criteria for a court's decision would be difficult to formulate.

85 1 L. Simes and A. Smith, The Law of Future Interests § 147 (2d ed. 1956), (distinguishing between formulations 1 and 2). Formulation 3 passes an absolutely vested remainder because possession is subject only to the preceding estate. Formulation 2 is equivalent to the situation in *Keinath,* where the remainder was vested subject to divestment.

86 At least under the prevalent modern view, remainders, whether they be vested or contingent, are freely alienable. *See* 4 L. Simes and A. Smith, *supra* note 85, §§ 1854-59.

87 Disposition of an interest by sale or gift is an "acceptance" of the property comparable to that arising through use and enjoyment. Even in the case of a transfer without consideration, there can be no subsequent disclaimer, since the donor has exercised control over the property. See note 73 *supra.*

formulations 1 and 2, C would have no control over the disposition of the property; but under formulation 3, C's future interest would pass according to the provisions of his will or according to the laws of intestacy. Thus, a remainder which is indefeasible does provide its owner with the significant power to control the disposition of the property upon his death.[88] In addition, a person possessing an indefeasible interest knows the full extent of his interest. Thus, having the disclaimer period begin when the interest becomes indefeasible would seem to be reasonable.

The proposed rule allowing disclaimers to be made after the interest has become indefeasible suggests one additional question concerning the disposition of the disclaimed interest. Modern disclaimer statutes, as noted earlier, take an anti-lapse approach.[89] Under the indefeasible interest rule proposed here, an effective disclaimer may be made many years after the testator's death. In such case, disposition of the property as if the disclaimant had predeceased the testator may be complicated; the substituted taker, being determined as of the time of the testator's death, may have died in the intervening years, and the administration of his estate may have long been terminated. At least one state appears to have attempted to solve this problem by considering the disclaimant to have died immediately before the event by which the interest became "indefeasibly fixed both in quantity and quality,"[90] *i.e.*, the event which commences the disclaimer period. There appear to be two problems with this approach. First, anti-lapse statutes usually provide only for the situation where a beneficiary dies before the testator.[91] Presumably, this problem could be corrected by amending the anti-lapse statute to deal specifically with disclaimers of future interests. A more serious problem is that this scheme is inconsistent with the theoretical basis of disclaimers relating back in every regard to the testator's death.[92]

88 Of course, the actual exercise of such power bars any disclaimer. It might be argued that a devise or bequest of the future interest, being revocable, should not operate as an acceptance until the remainderman's death, but the better view would seem to be to treat this as a waiver of the right to disclaim. Even if C dies intestate, or does not mention the interest in his will, the interest would be considered accepted at C's death, at least in those states which do not recognize the right of an executor or administrator to disclaim. *Cf.* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM ACTS, *supra* note 67, § 1: "The right to disclaim does not survive the death of the person entitled to disclaim . . . ." with MINN. STAT. ANN. § 525.532(2), which allows an executor or administrator to disclaim within the time and in the manner that the beneficiary could have disclaimed if alive.

89 See notes 17-18 *supra*.

90 MINN. STAT. ANN. § 525.532(5) (1969).

91 MINN. STAT. ANN. § 525.203 (1965) provides that: "If a devise or bequest be made to a child or other blood relative of the testator who dies before the testator leaving issue who survive the testator, such issue shall take the same estate which such devisee or legatee would have taken if he had survived, unless a different disposition be made or required by the will." Thus, § 525.203 does not cover the application of § 525.532(5) to the *Keinath* facts, since Cargill is considered to have died immediately before his mother, and after the testator. Section 525.532(5) can be read as requiring that the property be distributed to the disclaimant's heirs, determined as of the time of the event by which the interest became indefeasibly fixed in quantity and quality. This interpretation is less likely to accomplish generation skipping and may produce different results from the anti-lapse approach in use in other states. The heirs approach would explain the *Keinath* result (*see* note 42 *supra,*) only if Cargill was not married at the time of the life tenant's death.

92 See note 3 *supra*. *See also*, Note, *supra* note 9, at 918-19, n.72, suggesting that the relation-back doctrine is necessary to save disclaimers from state law which vests ownership of intestate (and, in some states, testate) shares in the beneficiaries immediately upon the decedent's death. In circumstances where title vests immediately, the Minnesota approach (*see* note 90 *supra*), to the *Keinath* facts would, by not relating back to the testator's death, permit

If the proposal for postponement of the disclaimer time period until the interest has become indefeasible is adopted, it would seem preferable for state law to retain the provision that disclaimed property passes as if the disclaimant predeceased the testator. Other considerations support this conclusion. It is usually assumed that where, as in *Keinath,* a disclaimer of a future interest is not required to be made until the termination of the life estate, the beneficiary may also disclaim during the life estate.[93] In such a situation, relating the disclaimer back to the testator's death allows an immediate determination of the alternative takers, to the advantage of both the disclaimant and the trustee of the life estate. Moreover, when a beneficiary of a future interest has for many years postponed his decision to disclaim and alternative takers have died in the interim, complicated problems of disposition may be minimized by the disinclination of the beneficiary to disclaim and pass the property to individuals of more remote relationship.

VI. Summary

The opinions in *Keinath*[94] portray the best and the worst features of current disclaimer law: the potential usefulness of the device in estate planning, and the remaining difficulties in the law.

Because both local property interests and federal tax consequences are involved, neither state nor federal statutory change alone seems sufficient. As a first step, amendment of the Internal Revenue Code is proposed, which would assure that 1) disclaimers would be given effect for federal tax purposes if made within a specified period of time, and 2) in the case of future interests, the disclaimer period would not commence until the interest has become indefeasible. In addition, to foster uniformity in the tax treatment of domiciliaries of different states, disclaimers would be recognized for federal tax purposes where state law does not recognize disclaimers meeting the federal standard. Explicit federal standards should serve to encourage the states to adopt the Uniform Act, conforming effectiveness standards and disposition provisions, so that the federal tax consequences will not only be clearly foreseeable, but will be identical from state to state.

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a period of vested ownership which is inconsistent with the theory of disclaimer. This shortcoming is consistent with the interpretation in note 91 *supra,* that the interest would have to pass to the disclaimant's heirs (like other property owned at death) rather than by the antilapse statute.

93 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 67, at 8. *Accord,* Coleman v. Burns, 103 N.H. 313, 171 A.2d 33 (1961).

94 480 F.2d 57 (8th Cir. 1973), *rev'g,* 58 T.C. 352 (1972).