

**DISCLAIMERS: USING YOUR REARVIEW MIRROR
TO PLAN**

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I. INTRODUCTION

As the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. No. 107-16, rockets into the sunset effective December 31, 2010, Washington is working on the "reformation" of the estate tax, again. Two of the more widely discussed options are (1) freezing the estate tax exemption ("estate exemption") at the what will be the amount under current law for the year 2009 (\$3.5 million) for 3 years while Congress works on a solution, and (2) continue to increase the estate exemption in the years following 2009 to an amount that will be "permanent." Of course, you will still hear a voice occasionally mention "repeal" in the context of the estate tax, but not as often as you might have 4 years ago.

While Congress thinks about the changes in the current estate tax structure, estate planners have to deal with clients in real time. Granted it would be nice to be able to tell a client what the tax laws will be in the next 10 years, but that is not the only variable with which our clients are concerned. Our clients do not know how much they will have when they die due to options, warrants, the swings in the economic markets and the cost of raising their families, and they worry if what they will leave to their spouse, their partner and/or children will be enough to continue the lifestyle they current enjoy. In this type of environment, even the best drafting may have to be adjusted to deal with the facts as they exist at death.

We need flexibility in our plans to allow our clients to adjust if the facts were not as anticipated. Formulas can change amounts, but only disclaimers can change who will take following a transfer. Disclaimers let you back-up and change the order or the manner of the distributions. The change effectuated by a disclaimer may allow the plan adjust to legislative changes after the document was executed, or effectuate the decedent's intent when thwarted by scrivener's error. These uses are in addition to the standard retrofitting "opportunities" for disclaimers:

- (a) appearance of unknown assets;
- (b) execution by decedent of beneficiary designations inconsistent with the Will or Trust;
- (c) change in the value of assets or circumstances of the beneficiaries; and
- (d) qualification of gifts for the marital and charitable deductions.

This article highlights the use of qualified disclaimers focusing on the law, regulations, and cases after the issuance of T.D. 8744, I.R.B. 1998-7, 20 (Feb. 17, 1998) by the Internal Revenue Service amending the final Treasury Regulations for Section 2518 of the Internal Revenue Code of 1986, as amended (the "Code").

II. THE EFFECT

When a person makes a qualified disclaimer of an interest in property, the interest is treated for transfer tax purposes as if it had never been transferred to the disclaimant. I.R.C. §2518(a). Under Texas law the disclaimer causes the transfer to relate back to the death of the decedent. §37A(a) of the Texas Probate Code as amended by Acts 2007, 80th Leg., eff. Sept. 1, 2007. The so-called "relation-back" doctrine "is based on the principle that a bequest or gift is nothing more than an offer which can be accepted or rejected." Dyer v. Eckols, 808 S.W. 2d 531, 533 (Tex.App.- Houston[14th Dist] 1991,(writ diss'd by agr.). Unlike the applicable credit amount and the annual gift exclusion, there is no dollar limitation on the value of the property disclaimed. The ability to disclaim is not dependent on the identity of the transferor of an interest or the type of property (as long as it is a severable interest) as is required for the marital deduction.

Pursuant to §37A of the Texas Probate Code as amended by Acts 2007, 80th Leg., eff. Sept. 1, 2007 (the "Probate Code") and §112.010(d) of the Texas Trust Code (the "Trust Code"), the disclaimed property is protected from the claims of the disclaimant's creditors. Notwithstanding, however, a federal tax lien is not defeated by a

disclaimer. Drye v. United States, 120 S.Ct. 474 (1999).

III. THE RULES

But there are rules to qualify for this favored treatment. For disclaimers of interests created after December 31, 1976, §2518 of the Code and Treasury Regulations §25.2518, as promulgated by the Internal Revenue Service in final form in 1986, and as amended in 1998, outline the requirements for a “qualified disclaimer” under the federal tax system. Section 2518 of the Code was enacted by the Tax Reform Act of 1976, to codify the common law and the fragmented statutory provisions of the Internal Revenue Code of 1954, as amended, governing disclaimers before January 1, 1977. Thereafter, two other Acts amended the Code as it relates to disclaimers, The Revenue Act of 1978 (regarding spouse’s right to keep an interest), and the Economic Recovery Tax Act of 1981 (allowing certain disclaimers of post-1981 transfers to qualify that failed to meet state law relating to disclaimers). Texas laws that deal with disclaimers are §§37A and 499 of the Probate Code and §112.010 of the Trust Code.

A. Estate Tax Provisions

Section 2518 of the Code is applicable to the treatment of qualified disclaimers for federal gift tax purposes. The companion statute in Chapter 11 of the Code for treating qualified disclaimers under the federal estate tax rules is §2046. Short and to the point, §2046 reads: “For the provisions relating to the effect of a qualified disclaimer for purposes of this chapter, see section 2518.”

In determining a charitable deduction for estate tax purposes §2055 (a) of the Code provides that the termination of a power (that was not exercised) by the death of the donee-holder before the due date of the estate tax return of the grantor, is deemed a qualified disclaimer for the purpose of qualifying a gift to charity for the charitable deduction. This special provision is not applicable to interests in property that would disqualify the charitable deduction.

For purposes of the marital deduction, Treas. Reg. §20.2056(d)-2(a) provides that the effect of

a disclaimer by the surviving spouse of transfers after December 31, 1976 will be determined by §2518 of the Code and the corresponding regulations.

B. Generation-Skipping Transfer Tax Provision

Section 2654 of the Code addresses qualified disclaimers subject to the generation-skipping transfer tax. Not as short as §2046 of the Code, because it covers more than disclaimers, paragraph (c) of §2654 of the Code repeats verbatim the language of §2046 of the Code.

C. Pre-1977 Transfers

The law relating to disclaimers of interests created before January 1, 1977 is summarized in Treas. Reg. §25.2511-1(c)(2). Disclaimers of interests transferred before 1977 must be made in a reasonable time after the disclaimant has knowledge of the transfer, before acceptance of the interests pursuant to an unequivocal and effective disclaimer effective under local law. The determination of the effectiveness of a disclaimer is based on the facts and circumstances in relation to the common law before §2518 of the Code was effective. Practitioners must conduct a careful analysis of the cases to determine the effectiveness of a disclaimer of such interests.

D. State Law

Local law directs how the disclaimed property passes. This is important because disclaimed property must pass without direction by the disclaimant. See Tate v. Siepielski, 740 S.W.2d 92 (Tex. App. – Fort Worth, 1987), where disclaimant attempted (but failed) to assign interest in a qualified disclaimer. For post-1981 transfers, if a disclaimer qualifies under §2518(c)(3) of the Code but is not effective under local law, the disclaimer is nevertheless treated as a qualified disclaimer if the person entitled to the interest has not accepted the interest and timely transfers the entire interest to the person who would have received the interest under a qualified disclaimer. (See Treas. Reg. §25.2518-1(c)(1)(i) for pre-1982 interests.)

1. Decedent's Property

Under §37A of the Probate Code disclaimed property that is receivable from a decedent's estate passes as if the disclaimant predeceased the decedent, unless the decedent's will directs otherwise. Future interests that would otherwise follow a disclaimed interest take effect as if the disclaiming beneficiary had predeceased the decedent. Tex. Prob. Code §37A. (A copy of the statute effective September 1, 2007 is attached.)

2. Trust Interest

A disclaimer of an interest in a trust created in any manner other than by will is governed by §112.010 of the Trust Code. Unless the trust terms provide otherwise, the interest disclaimed passes as if the disclaimant had predeceased the transfer, and a future interest takes effect as if the disclaimant had predeceased the transfer. Tex. Trust Code §112.010(d).

3. If Fail to Comply

Under Texas law, failure to comply with the applicable Texas statute regarding disclaimers renders the disclaimer ineffective except as an assignment to the persons who would have taken if the disclaimer had complied. Tex. Prob. Code §§37A(d); Tex. Trust Code §112.010(e). See Filipp v. Till, ___ S.W.3d ___, (App. 14 Dist. 2006) 2006 WL3258701, for the utilization of a disclaimer known to be defective.

IV. THE DETAILS

A. Section 2518 of the Code

A refusal to accept property will be a "qualified disclaimer" for taxation purposes if:

- (1) the disclaimant or his legal representative makes an irrevocable and unqualified refusal in writing,
- (2) that is received by the transferor, his legal representative, or the holder of the legal title of the property, not later than 9 months after the later of (a) the day the transfer creating the interest is made, or (b) the day the disclaimant turns 21,

(3) provided the disclaimant has not accepted the interest or any of its benefits, and

(4) the property passes, without any direction by the disclaimant, to either (a) the spouse of the decedent, or (b) a person other than the disclaimant.

In the delivery of the written disclaimer to the transferor under the Federal rules, if the due date is a Saturday, Sunday or holiday, then the first succeeding day that is not such a day is the date the disclaimer must be received. Treas.Reg. §25.2518-2(c)(2). Further, delivery of the disclaimer under the Federal law may be by mail or other approved delivery services, provided proof of such can be provided. §7502(f) of the Code.

The Regulations to §2518 of the Code add a "person in possession" to the list of persons to whom delivery of the disclaimer may be made. Treas. Reg. §25.2518-2(b)(2).

If these elements are met, the donee is treated as if the interest had never been transferred to him. I.R.C. §2518(a); Treas. Reg. §25.2518-1(b). If the qualified disclaimer is made by a decedent or the decedent's executor, the value of the disclaimed interest will not be included in the decedent's gross estate for federal estate tax purposes. Id.

The statute permits a disclaimer of an undivided portion of an interest. For purposes of §2518 of the Code, an interest in property includes a power with respect to property. I.R.C. §2518(c)(1),(2).

B. Treas. Reg. §25.2518 - General

The regulations promulgated by the Internal Revenue Service for §2518 of the Code were not finalized until August 6, 1986. But the regulations did not respond to all of the issues that had arisen over disclaimers since §2518 of the Code was added in 1977. Especially troublesome were the disclaimers of joint interests and the application of the rules to any "taxable transfer." The issuance of Action on Decision (AOD) 1990-06 (February 7, 1991) attempted to clarify the joint interest position of

the Internal Revenue Service, but in the process raised more and different concerns. Finally, amendments to the final regulations for §2518 of the Code were issued February 17, 1998, effective December 31, 1997. Specifically, the “new” regulations clarified:

- (1) that §2518 of the Code applies to any transfer, and not just to “taxable transfers;”
- (2) what constitutes a “transfer” for purposes of determining the starting point of the nine month period in which a disclaimer may be made; and
- (3) the rules for disclaiming interests held in joint tenancy with right of survivorship or tenancies by the entirety.

C. Effective Date of Regs.

The introductory provision of Treas. Regs. §25.2518 states the rules are applicable to transfers after December 31, 1976, but paragraph (a)(1) of Section 1 is made applicable for transfers on or after December 31, 1997 by subparagraph (3) of Treas. Regs. 25.2518-1(a).

D. Date of Transfer

The regulations prior to December 31, 1997 (referred to as the “Prior Regulations”) applied to any “taxable transfer.” This phrase was a concept introduced in the legislative history of the Committee Reports, not the statute. The Internal Revenue Service used “taxable transfer,” not “transfer,” throughout the Prior Regulations, which caused confusion and raised questions as to the starting point of the time limit to make a qualified disclaimer. Changes to Treas. Reg. §25.2518 effective for transfers on or after December 31, 1997 (referred to as the “Current Regulations”) clarify the applicability of §2518 of the Code and the Current Regulations to any “transfers creating an interest” regardless of whether a tax was imposed. Under the Current Regulations, a disclaimer must be made no later than nine months after the transfer creating the interest, or the day the disclaimant attains age 21. Treas. Reg. §25.2518-2(c). For inter vivos transfers, the “transfer” occurs when there is a completed gift for federal gift tax purposes. For transfers by a decedent at death or that becomes

irrevocable at decedent’s death, the “transfer” occurs on the date of death of the decedent. Treas. Reg. §25.2518-2(c)(3)(i).

Accordingly, in the following situations, the date of the transfer will be:

- (1) foreign-situs property by nonresident alien decedent – date of decedent’s death;
- (2) inter-vivos transfer included in decedent’s gross estate – date of gift;
- (3) general power of appointment (holder) – date power created;
- (4) interest passing by exercise, release or lapse of general power – date of exercise, release or lapse (holder’s date of death);
- (5) nongeneral power of appointment (as to holder, permissible appointees and takers in default) – date power created;
- (6) life estate and remainder interest, vested or contingent – date interest created; and
- (7) disclaimed interest (successors of) – date interest was created in preceding disclaimant. Treas. Reg. §25.2518-2(c)(3)(i).

Not revised by the Current Regulations were the provisions of Treas. Reg. §25.2518-2(c)(3)(i), sentences 11 and 13, relating to:

- (1) remainder interest of QTIP – date creating the interest (opposed to date interest is subject to tax under §§2044 or 2519 of the Code); and
- (2) recipients of interests under age 21 – date of 21st birthday.

Because the date from which a transferee may make a qualified disclaimer is determined by the type of interest, watch for transfers that create more than one interest.

E. Joint Interests

Probably the most complex provisions of the Prior Regulations were the rules applicable to joint property that were dependent on whether:

- (1) the interests were unilaterally severable

under local law; (2) the consideration furnished by the disclaimant; and (3) the interest included in the estate of the first to die. To simplify, the Current Regulations divide the rules into two categories.

1. Property other than joint bank, brokerage and other investment accounts

Whether the interest is held in joint tenancy with right of survivorship or tenancy by the entirety, for property other than joint bank, brokerage and other investment accounts the following rules apply:

(a) disclaimer of the interest the joint owner acquires upon creation of the tenancy must be made no later than 9 months from the date the tenancy was created;

(b) disclaimer of the survivorship interest must be made no later than 9 months from the date of death of the first joint owner to die;

(c) the interest of the first joint owner to die is deemed to be one-half unless (d) below applies; and

(d) if the surviving joint owner is not a U.S. citizen and the interest was created on or after July 14, 1988, then the survivorship interest that may be disclaimed is any interest includible in the gross estate of the first joint owner to die. Treas. Reg. §25.2518-2(c)(4).

Example 11 of the Treas. Reg. §25.2518-2(c)(5) is of Husband and Wife in a community property state that purchase real property with community funds. Title to the real property is not held as joint tenants with right of survivorship. Upon Husband's death he leaves his interest in the real property to the Wife, which she disclaims within 9 months of Husband's death. If all other requirements (writing, delivery, no acceptance of Husband's interest and no direction) are met, Wife has made a qualified disclaimer of Husband's interest in the real property. Example 10 of the same regulation illustrates that occupation of real property (100%) that has been disclaimed is not acceptance when the occupancy is consistent with the rights of joint tenants under state law.

2. Joint bank, brokerage and other investment accounts

Qualified disclaimer of joint bank, brokerage and other investment accounts are subject to the following rules:

(a) if the co-tenant can withdraw his contributions to the account without the consent of the other co-tenant, the survivorship interest may be disclaimed nine months from the date of death of the first co-tenant to die; and

(b) the surviving co-tenant may not disclaim any consideration furnished by the surviving co-tenant.

The co-tenants of these types of accounts do not have to be spouses. Treas. Reg. §24.2418 - 2(c)(4)(iii).

An example in the Regulations provides that Husband and Wife own an account that the Husband contributed 100% of the funds. At Husband's death the Wife disclaims 40%. The Husband's estate includes 40% of the account as probate assets and 30% as jointly held property includable under §2040(b) of the Code. Treas. Reg. §25.2518-2(c)(5), example (13).

F. Section 37A of the Probate Code

In Texas, a disclaimer by an individual (or a fiduciary, ad litem, attorney in fact or agent, as permitted) of an interest in property of a decedent is effective when it is:

(1) evidenced by an irrevocable written memorandum acknowledged before a notary public;

(2) that is filed not later than nine months after the death of the decedent, if the property is a present interest, or nine months after the event finally determining the taker of a future interest (unless the disclaimant is a charity or governmental agency;

(3) filed in:

(a) probate court if independent administration and less than one year has expired from the date letters testamentary was

issued, dependent administration, proceedings have been commenced for administration, or application for administration is pending;

(b) county clerk of decedent's residence if administration has been closed, letters testamentary issued more than one year for an independent administration, no will probated or filed for probate, no administration has been commenced, or no application for administration has been filed; or

(c) deed records of county clerk where real property or interest is located if decedent is not resident of Texas;

(4) with copies delivered to the legal representative of the transferor or the holder of the legal title of the property; and

(5) provided the disclaimant, in his individual capacity, has not accepted the property by taking possession or exercising dominion and control of the property.

§37A of the Probate Code requires the notice to be notarized and filed, which are not required under the Federal rules. Unlike the federal statute, there is no comparable Texas requirement that the disclaimed property pass without any direction by the disclaimant. Instead, §37A of the Probate Code states the disclaimed property shall pass as if the disclaimant had predeceased the decedent, unless the will provides otherwise. Another major difference is that §2518 of the Code requires a disclaimer to be filed within 9 months of the *creation of the interest*, opposed to either the decedent's death or the vesting of the interest under the Texas statute.

Under §37A(m) of the Probate Code, a disclaimer by a surviving spouse of a transfer is not a disclaimer of all or any part of any other transfer from the decedent to the surviving spouse. The disclaimed property or interest can pass to the surviving spouse as a result of the disclaimer or other transfer.

Since the Texas statute relates to property law not tax, there are additional provisions for disclaimers by a charitable organization or governmental agency, and for disclaimers of

property from a non-resident decedent. For charitable organizations and governmental agencies the disclaimer must be filed not later the first to occur of the first anniversary of the date the entity receives the notice required by Section 128A of the Probate Code or the expiration of the 6 month period following the filing of the inventory. Tex. Prob. Code §§37A(h).

Property that may be disclaimed under the Probate Code are "all legal and equitable interests, powers, and property, whether present or future, whether vested or contingent, and whether beneficial or burdensome, in whole or in part." Tex. Prob. Code §37A(e). However, burdensome interests can only be disclaimed if such property constitutes a gift which is separate and distinct from undisclaimed gifts. Tex. Prob.Code §37A(l).

G. Section 112.010 of the Trust Code

Under the Trust Code, an effective disclaimer of an interest in a trust is:

(1) an irrevocable and unqualified refusal evidenced by a written memorandum acknowledged before a notary public;

(2) delivered to the trustee, the transferor or his legal representative, not later than nine months after the latest of (a) the day the transfer creating the interest is made, (b) the day the disclaimant turns 21, or (c) if a future interest, the date the interest is indefeasibly vested; and

(3) conditioned upon the fact that the disclaimant has not accepted any benefits from the trust or exercised dominion and control over the interest.

Like the companion provision in the Probate Code, an interest disclaimed under §112.010 of the Trust Code passes as if the disclaimant had predeceased the transfer, unless the instrument provides otherwise.

H. Claims of Disclaimant's Creditors

Neither the Code nor the Treasury Regulations specifically protect the disclaimed interest from the claims of the disclaimant's creditors, but

some protection may be afforded under local law. A disclaimer that is wholly void or is voided by the disclaimant's creditors under local law it is not a qualified disclaimer under §2518 of the Code. Treas. Reg. §25.2518-2(c)(2).

Both §37A of the Probate Code and §112.010 of the Trust Code protect the disclaimed interest that complies with state law from the claims of the disclaimant's creditors. One key case illustrating acceptance of a transfer, and therefore ineligible to be disclaimed is in Badouh v. Hale, 22 S.W. 3d 392 (Tex. 2000), where the transferee pledged the interest she expected to receive under her mother's estate as collateral. The property was subject to the beneficiary's creditors. In Drye v. U.S., 120 S.Ct. 474 (1999), the Supreme Court affirmed the decision of the 8th Circuit Court of Appeals that a federal tax lien would not be thwarted by a disclaimer, and the interest could be attached. Treas. Reg. §25.2518-29(c)(2) states that a disclaimer that is wholly void or is voided by the disclaimant's creditors is not a qualified disclaimer.

V. ILLUSTRATIVE RULINGS AND CASES

The following is a summary of rulings by the Internal Revenue Service and court opinions relating to disclaimers that illustrate the requirements and larger issues relative to this area.

A. Formula Disclaimer

1. Charity Disclaims

Decedent and Spouse, who are residents in Texas, have a joint Will that leaves everything to Spouse outright, except if Spouse remarries, then one-half will pass to the Child, then her issue, but if no descendants, then to the Charity. The interest passing to the Spouse does not qualify for the marital deduction, and the Decedent's estate exemption is not being used to effectively transfer assets to the Child.

Spouse, Child and Charity, in accordance with the requirements of the laws of State X, will execute disclaimers of their respective rights

to receive property under Decedent's will. Spouse will disclaim all amounts she would otherwise be entitled to receive under the will. Child will disclaim all amounts she would otherwise be entitled to receive under Decedent's will and under §38(b) and 45 of the State X Probate Code (pertaining to intestate succession), except for assets with a value equal to the pecuniary amount needed to increase Decedent's taxable estate to the largest amount that will not result in a federal estate tax being imposed on Decedent's estate. Charity will disclaim all amounts it would otherwise be entitled to receive as a result of Child's disclaimer. It is represented that all of the property of the estate constituted the community property of Decedent and Spouse. It is represented that there is no agreement, expressed or implied, between or among the parties, that any of the disclaimants will be compensated or benefitted in any way in consideration for executing the disclaimers. It is also represented that none of the disclaimants have previously accepted the property or any of its benefits.

PLR 200006052. The IRS ruled that the disclaimers qualified under §2518 of the Code and the interest passing to the Spouse qualified for the marital deduction under §2056(b) of the Code.

2. Percentage of Farm

Decedent's will leaves everything to surviving spouse. If surviving spouse predeceases, the residuary passes to trust for son. Surviving spouse proposed to disclaim a percentage of the "Home Farm" using the following formula:

...that percentage of the value of the "Home Farm" as finally determined for federal estate tax purposes such that the remaining undisclaimed percentage of the "Home Farm" and the other undisclaimed assets passing to the Spouse by virtue of Decedent's death will be sufficient to result in the

lowest federal estate tax being imposed upon the estate after allowing for the unified credit and other allowable credits.

The IRS ruled that the disclaimer described by the formula would be a qualified disclaimer. PLR 9646010.

B. Date of Transfer for Joint Tenancy

At Decedent's death he owned as joint tenants with right of survivorship real property, two certificates of deposit and four financial accounts. Spouse did not contribute any funds to the assets. Spouse disclaimed within nine months of date of death and before accepting any benefit or interest in the property disclaimed, all of the real property and CDs, and ½ of the financial accounts. "If the transferor may unilaterally regain the transferor's own contributions of the account without the consent of the other cotenant, such that the transfer is not a completed gift under § 25.2511-1(h)(4), the transfer creating the" Spouse's interest occurs at the Decedent's death. PLR 200618017. Accordingly, the disclaimer qualifies.

C. Acceptance

1. Withdraw and Transfer Not Acceptance

Decedent and surviving spouse owned a brokerage account held as JTWROS. After decedent's death, but before qualifying as executor, surviving spouse withdrew the income from the joint brokerage account and authorized transfer of the joint brokerage account to a new account in his name only. After qualifying as executor, the surviving spouse transferred one-half of the income from the joint brokerage account to an estate account, and one-half of each security in the joint brokerage account to a brokerage account for the estate.

Surviving spouse disclaimed the survivorship interest in the joint brokerage account, causing decedent's interest to pass to the residuary trust under the will, which the surviving spouse is a beneficiary.

The Internal Revenue Service reasoned that authorizing the transfer of the joint brokerage account was not acceptance because surviving spouse did not draw on the account or otherwise assert control. Additionally, the withdrawal of the income from the joint brokerage account was not acceptance because none of the funds were used. Further, there was no deemed acceptance by surviving spouse due to local law vesting title immediately at decedent's death. The disclaimer qualifies. PLR 199932042.

2. Disclaimer as to Certain Assets

Decedent and Spouse equally contribute to a brokerage account that is held as joint tenants with rights of survivorship ("Account"). After Decedent's death, Spouse: transferred title of the Account to Spouse's name, directed the sell of certain securities in the Account, and directed the purchase of securities in the Account. Six months after Decedent's death, Spouse hires an attorney, and by the ninth month after Decedent's death, Spouse disclaims Decedent's share in the Account less the assets in Decedent's share that Spouse accepted benefits (including the earning on such assets).

After the disclaimer, the account was divided into three accounts, the TIC Account for assets that could not be evenly divided, the Spouse's Account that held Spouse's share including proceeds from securities sold and those purchased, and the Estate Account. Each of the three accounts held their respective earnings since Decedent's death.

Under Decedent's Will, his residuary estate passes to his revocable trust, the terms of which funds a credit shelter trust with the largest amount that will use in full any estate tax unified credit, then the balance of the residuary goes to the marital deduction trust. Only the credit shelter trust is funded, and the Spouse is to be paid income quarterly and principal distributions to the Spouse and children based on HEMS.

The IRS ruled the disclaimer was qualified. "Acts indicative of acceptance include using the property or the interest in property; accepting income from the property; and directing others to act with respect to the property or interest in property. Merely taking delivery of an

instrument of title, without more, does not constitute acceptance.” PLR 200503024.

D. Transfer Prior to 1977 and Exempt GST Trust

Grandmother died testate before 1977, creating a trust for mom that gave mom a power of appointment. Mom exercised the power in favor of a trust created under mom’s will, of which daughter is a beneficiary.

Daughter decides to disclaim a fraction of the property transferred to said trust. (The date daughter learned of the transfer, the effective date of the disclaimer and the date the disclaimer was delivered to the trustee are not specified in the ruling.)

Referring to Treas. Reg. §25.2511-1(c)(2) and Jewett v. Commissioner, 455 U.S. 305 (1982), the IRS ruled that daughter’s disclaimer was effective because it was made within a reasonable time after she had knowledge of the transfer.

Grandmother’s trust was grandfathered under the GST rules because it was irrevocable on September 25, 1985. The exercise of the power by mom did not cause the trust to be subject to the GST tax. PLR 199945010.

E. Pecuniary Amount by Formula and GST

By her will, grandmother gave specific shares of stock and proceeds of a bank fund to a trust for the benefit of grandson. The residuary estate passed to daughter.

Grandson disclaimed so much of the trust property, valued as of grandmother’s death, that was in excess of grandmother’s available GST exemption, together with the income and increase attributable to the property. The disclaimer was delivered to the executor within nine months of grandmother’s death, and no interest in the trust was accepted by the grandson before the disclaimer. The disclaimed property passed to the residuary estate for the benefit of daughter.

The IRS ruled that the grandson’s disclaimer qualified as a disclaimer of a severable interest.

The disclaimed amount passed to daughter (a non-skip person), so the disclaimed interest is not subject to GST tax. Grandson’s trust has an inclusion ratio of zero for purposes of the GST tax. PLR 200001045.

F. Sever Trust to Qualify for Marital Deduction

Decedent’s will makes a gift of the residuary to a trust for the benefit of surviving spouse and decedent’s descendants. Executor proposes to sever the trust and create two trusts with terms identical to the original trust.

Decedent’s descendants will disclaim their interest as current beneficiaries of one of the trusts, which will be known as the marital trust.

If the proposed disclaimers are delivered within nine months of the decedent’s death, the disclaimers will qualify under §2518 of the Code and the marital trust will satisfy the requirements of §2056(b)(7) of the Code. PLR 199949023.

G. Unqualified Disclaimer Is Addition to Grandfathered GST Trust

Grandfather created a trust that benefitted his wife for her life, then son and his children. After grandfather’s death, son and three of his children enter into a “Disclaimer and Modification of Trust Agreement.” Son attempted to disclaim his interest in the trust in that agreement.

Citing Treas. Reg. §25.2518-2(c)(3), the IRS ruled the son did not disclaim within nine months from the date of the transfer creating his interest, which with respect to grandfather’s inter vivos transfer into trust, was grandfather’s date of death. Son’s disclaimer was not qualified, thus the action by son was treated as a completed transfer subject to gift tax.

Because the interest son disclaimed was subject to gift tax, the value of the interest is treated as an addition to the trust after September 25, 1985, and accordingly a pro rata portion of all subsequent distributions from the trust will be subject to the GST tax. PLR 200001012.

H. No Extension for QTIP Election for Interests Subject to Nonqualified Disclaimer

Attempting to cause a portion of Decedent's estate to pass to the Decedent's children (bypassing the marital deduction trust and the credit exemption trust), disclaimers were executed by two of Decedent's children in their capacity as attorneys-in-fact for the Decedent's spouse. The estate tax return was filed making a QTIP election for the property passing to the marital deduction trust, specifically excluding the disclaimed property. Later it was determined the disclaimers were invalid, so according to the funding formula of the marital deduction trust, the "disclaimed" property was distributed to the marital deduction trust. The executor requested a ruling that the QTIP election covered "disclaimed property," but if not, that an extension of time under Treas. Reg. §301.9100-3 would be granted to make an amended QTIP election.

The IRS concluded that the QTIP election on the estate tax return as filed did not cover the disclaimed property "because the property that was purportedly disclaimed was not among the other specifically listed properties on Schedule M...." As to the request for relief under Treas. Reg. §301.9100-3, the IRS determined the taxpayer was "seeking to change a previously made QTIP election to include additional property" rather than time to make the election. Accordingly, relief was not applicable in this case. PLR 200612001.

I. Fractional Portion Together with Any Income

Decedent's will created a trust for surviving spouse funded with decedent's "remaining stocks, bonds and marketable securities." The trust paid surviving spouse all of the income and so much of the principal as the trustee determined necessary. At surviving spouse's death, the trust estate was to be distributed to decedent's children.

At decedent's death he had an outstanding margin account with a brokerage firm. The executor was reducing the debt by selling

securities, and it was anticipated the margin account would be satisfied.

Surviving spouse proposes to disclaim 2/3 of her interest in the trust, together with the income. The disclaimed amount will pass to the children in accordance with the terms of the trust and local law.

Observing that surviving spouse's disclaimer of undivided fractional portion of her interest in the trust is similar to the qualified disclaimer of a percentage of a beneficiary's interest in a trust described in Example 5 of Treas. Reg. §25.2518-3(b), the IRS determined that the disclaimer will qualify under §2518 of the Code. PLR 200045026.

J. Qualified Plan and QTIP Trust

Decedent named surviving spouse the primary beneficiary of his 401K Plan and the trustee of the QTIP trust created under Decedent's management trust as the contingent beneficiary. The trustee of the QTIP trust is required to pay the net income of the trust, and all the income portion of any installment from any plan, to the surviving spouse. The surviving spouse has a testamentary special power of appointment over the trust.

Surviving spouse proposes to disclaim her interest as the primary beneficiary of the 401K Plan, and the power of appointment. The trustee will segregate the assets of the Plan from the other assets in the QTIP trust. Surviving spouse will not serve as trustee of the QTIP trust. Although local law allows disclaimers up to 12 months from the transfer, surviving spouse will disclaim within the time limitation of §2518 of the Code. The IRS concluded that the disclaimers qualify, and the 401K Plan qualifies for the marital deduction. PLR 200105058.

K. One for the Debtor

Niece inherited an interest in property under aunt's will. In accordance with Texas law, niece filed a timely disclaimer. Niece owed the IRS nearly \$20,000 at that time.

The court found that "state law determines whether a taxpayer has a property interest to

which a federal lien may attach,” not §6321 of the Code. Under local law, the bequest was an offer which, if disclaimed, was never a property right of the donee to which the federal tax lien could attach. The court held that niece never had a property interest subject to the lien. Leggett v. U.S., 120 F.3d 592 (5th Cir. 1997).

However, the Supreme Court determined in Drye v. U.S., 120 S.Ct. 474 (Dec.7, 1999), that “the absence of any recognition of disclaimer...in the relevant tax collection provisions, contrasts with §2518(a) of the Code, which renders qualifying state-law disclaimers...effective for federal wealth-transfer tax purposes and for those purposes only.”

Finding that the power to channel property by the disclaimer was property subject to the tax lien, and that there was no exception for inheritances under §6334(a) of the Code, the Supreme Court held that state disclaimer law based on the relation back doctrine was inoperative to prevent the federal lien from attaching to the taxpayer's inheritance.

The Court in In Re. Schmidt, 362 B.R. 318, (Bkrcty. W.D. Tex., 2007), determined a debtor in bankruptcy could not disclaim an inheritance after filing her Chapter 7 petition. Once the petition was filed, the Chapter 7 trustee alone had control over the property of the bankruptcy estate, which included the inheritance.

L. Expectation is Not Consideration

Surviving spouse was disturbed when he found out that the 29 specific cash bequests made by his wife under her will would be significantly reduced by death taxes and in some cases GST tax. Determined to reduce the burden, surviving spouse talked to the beneficiaries about executing disclaimers. All 29 disclaimed. In December 1989 and January 1990, surviving spouse made gifts to each of the disclaimants in approximately the same amount as the bequest under his wife's will. The IRS disallowed the marital deduction on the wife's 706 in the amount of the disclaimers, and charged the estate with GST tax, determining the disclaimers were invalid.

Ruling in favor of the IRS, the Tax Court found an implicit agreement between the surviving spouse and the beneficiaries, which was consideration for the disclaimers and thus the disclaimers failed to meet the requirements under §2518 of the Code.

Reversing the Tax Court in part and remanding for further determination, the Fifth Circuit Court of Appeals found that the fact surviving spouse made gifts after the disclaimants renounced their bequests was not consideration that disqualified the disclaimers. “A mere expectation of a future benefit in return for executing a disclaimer will not render it ‘unqualified’.” Monroe v. Commissioner, 124 F.3d 699 (5th Cir. 1998).

M. Expectancy as Security is Acceptance

Daughter signed a deed of trust that included her expectancy of inheritance from her mother. After mother's death, daughter disclaimed her interest in the estate and asserted the property was not subject to the claims of her creditor.

The Court disagreed, holding that by executing the deed of trust, daughter had exercised dominion and control over the property she inherited from her mother, and thus had accepted the interest. The disclaimer was not valid. Badouh v. Hale, 22 S.W.3d 392 (Tex. 2000).

N. Valuation

Surviving spouse disclaimed part of the interest in stock given to her under husband's will. As a result, the surviving spouse had a minority interest in the stock. The Court concluded that the marital deduction would be based on the value of the shares to which the surviving spouse was entitled after the disclaimer. DiSanto v. Commissioner, 78 T.C.M. (CCH) 1220.

O. Intestate

Son died intestate and under state law certain interests passed to son's father. Father disclaimed and the interest passed to son's wife, qualifying for the marital deduction. The IRS

asserted consideration was given by the wife in exchanged for the disclaimer.

The Court found the disclaimer was qualified, and awarded attorneys' fees and costs to the wife. Estate of Lute by Lane v. United States, 19 F. Supp. 2d 1047 (D. Neb. 1998).

P. Retrofitting for Marital Deduction

Decedent died with a 1970 will that was sorely out of date with the decedent's assets, family situation and tax laws. The executor used disclaimers to qualify the gift to the residuary trust for the marital deduction. The Court held the trust qualified. Lassiter v. Commissioner, 80 T.C.M. (CCH) 541 (2000).

Q. Good Intentions

Taxpayer asserts that his handwritten, unsigned schedule of assets and the probate inventory are qualified disclaimers. The attorney for taxpayer drafted a disclaimer, but it remained unsigned and apparently unread by the taxpayer. Taxpayer argues his intent was clear and that the doctrine of substantial compliance should be applied.

The Court found that the statute requires "an irrevocable and unqualified refusal, expressed in writing, to accept an interest in property." Such "a design avoids arguments about undisclosed intentions and unexpressed election of choices." The Court affirmed the Tax Court's decision that taxpayer failed to make a qualified disclaimer. Chamberlin v. Commissioner, No. 00-70291, 2001 U.S. App. LEXIS 10911 (9th Cir. 2001).

R. Assignment

Following the birth of their stillborn child, husband and wife sued the attending physician. During the pendency of the matter wife died intestate. Two years after wife's death, husband disclaimed his interest in wife's cause of action in a document that also "assigned" the interest to the couple's child.

The court hearing the malpractice suit ruled the alleged disclaimer did not meet the requirements of local law because it was not filed within nine months of wife's death, but was effective as an

assignment to the child. Krishnan v. Ramirez, 42 S.W.3d 205 (Tex.App. – Corpus Christi 2001).

S. Disclaimant as Fiduciary of Charity

The subsequent beneficiary of disclaimed property was a charitable foundation of which the disclaimant was a trustee. Concerned that her discretionary power to make distributions of the foundation assets would be deemed an acceptance, the disclaimant and the co-trustees segregated the disclaimed property and amended the terms of foundation to prohibit the disclaimant from exercising any authority over the assets. Citing the regulations, the IRS ruled the disclaimer was valid where the fiduciary only exercised his powers to preserve or maintain the disclaimed assets in the foundation, and had no discretionary power to direct the enjoyed thereof. PLR200149015.

T. Spouse Retains Interest After Two Generations Disclaim

Decedent's Will distributed the residue to inter vivos trust, which at his death funds a marital trust with a pecuniary amount and the balance to a family trust to be distributed outright to the descendants, or if none of the descendants survive, then to Spouse. The surviving family members (children and grandchildren, both adults and minors), gave otherwise qualified disclaimers with "no express or implied agreement between or among the disclaimants or Spouse that the interests proposed to be disclaimed will be given to a person or persons specified by any of the disclaimants." Note the minor grandchildren disclaimed via their guardian appointed by the court. The IRS concluded the disclaimers qualified, and the interest passed to the Spouse qualified for the marital deduction. PLR 200626002.

U. Donor's Advised Fund

Grandchildren propose to disclaim certain interests under Decedent's Will, and such disclaimed interests in accordance with the Will are to be distributed to a Trustee of a sub-fund for each disclaimant grandchild under an agreement establishing a fund. Distinguishing Rev. Rul. 72-552, 1972-2 C.B. 525 regarding

inclusion of interests in a decedent's estate of property the decedent had the power to direct who would possess or enjoy, from the facts of the Ruling by the grandchildren's right to only make advisory recommendations to the Foundation that might be accepted or rejected, the disclaimers were ruled to have qualified. PLR 200518012.

V. IRA Disclaimed by Personal Representative

Husband was owner of an IRA. Wife survived Husband but died shortly thereafter. The personal representative of the Wife's estate disclaimed Wife's interest after securing a judicial reformation of the beneficiary designation for the IRA to name the couple's children as contingent beneficiaries of the IRA. The personal representative was one of the children. The IRS concluded the disclaimer to be valid. PLR 200616041.

For an excellent discussion coupled with samples of the use of an IRA to fund the bypass trust, see Karen Gerstner's "The Pros and Cons of the Bypass Trust as the IRA Beneficiary" presented at the 30th Annual Advanced Estate Planning and Probate Course, June 2006.

VI. ATTORNEY'S RESPONSIBILITY

In New Jersey, an attorney was found not to have a duty to advise the surviving spouse regarding post-mortem planning in relation to her husband's estate. The court held the attorney's responsibilities were limited to representation of the surviving spouse in her capacity as executor of the estate pursuant to the retainer agreement. Fitzgerald v. Linnus, 765 A.2d 251 (N.J. Super. Ct. App. Div. ____).

VII. CONCLUSION

By trade, an estate planner is a "forward thinker." But occasionally, the planner must consider what would have happened "if only...." The time to look back to what might have been is brief (unless you have a pre-1977 transfer, then the time period is limited to what is "reasonable"). When a transfer is effectuated by death, gift or renunciation, calculate the result of the transfer as originally planned, as well as the result if the beneficiary did not accept. By the use of a disclaimer to "back-up" and make the transfer as if the original recipient had deceased the transferor, you will have a different, and presumably better result for your clients.

ARTICLE 3. DISCLAIMERS

SECTION 3.01. Section 37A, Texas Probate Code, is amended to read as follows:

Sec. 37A. MEANS OF EVIDENCING DISCLAIMER OR RENUNCIATION OF PROPERTY OR INTEREST RECEIVABLE FROM A DECEDENT. (a) Persons Who May Disclaim. Any person, or the guardian of an incapacitated person, the personal representative of a deceased person, or the guardian ad litem of an unborn or unascertained person, with prior court approval of the court having, or which would have, jurisdiction over such guardian, personal representative, or guardian ad litem, or any independent executor of a deceased person, without prior court approval, or an attorney in fact or agent appointed under a durable power of attorney authorizing disclaimers that is executed by a principal, who may be entitled to receive any property as a beneficiary and who intends to effect disclaimer irrevocably on or after September 1, 1977, of the whole or any part of such property shall evidence same as herein provided.

(b) Effective Date of Disclaimer. A disclaimer evidenced as provided by this section [~~herein~~] shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant.

(c) Effect of Disclaimer. Unless the decedent's will

provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent and a future interest that would otherwise take effect in possession or enjoyment after the termination of the estate or interest that is disclaimed takes effect as if the disclaiming beneficiary had predeceased the decedent.

(d) Ineffective Disclaimer. Failure to comply with the provisions of this section [hereef] shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent.

(e) Definitions. The term "property" as used in this section shall include all legal and equitable interests, powers, and property, whether present or future, whether vested or contingent, and whether beneficial or burdensome, in whole or in part. The term "disclaimer" as used in this section shall include "renunciation." In this section "beneficiary" includes a person who would have been entitled, if the person had not made a disclaimer, to receive property as a result of the death of another person by inheritance, under a will, by an agreement between spouses for community property with a right of survivorship, by a joint tenancy with a right of survivorship, or by any other survivorship agreement, account, or interest in

which the interest of the decedent passes to a surviving beneficiary, by an insurance, annuity, endowment, employment, deferred compensation, or other contract or arrangement, or under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual.

(f) Subsequent Disclaimers. Nothing in this section shall be construed to preclude a subsequent disclaimer by any person who shall be entitled to property as a result of a disclaimer.

(g) Form ~~[The following shall apply to such disclaimers,~~

~~[(a) Written Memorandum]~~ of Disclaimer ~~[and Filing Thereof]~~. In the case of property receivable by a beneficiary, the disclaimer shall be evidenced by a written memorandum, acknowledged before a notary public or other person authorized to take acknowledgements of conveyances of real estate.

(h) Filing of Disclaimer. Unless the beneficiary is a charitable organization or governmental agency of the state, a written memorandum of disclaimer disclaiming a present interest shall be filed not later than nine months after the death of the decedent and a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested.

If the beneficiary is a charitable organization or a governmental agency of the state, a written memorandum of disclaimer disclaiming a present or future interest shall be filed not later than the first anniversary of the date [~~nine months after~~] the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later. The written memorandum of disclaimer shall be filed in the probate court in which the decedent's will has been probated or in which proceedings have been commenced for the administration of the decedent's estate or which has before it an application for either of the same; provided, however, if the administration of the decedent's estate is closed, or after the expiration of one year following the date of the issuance of letters testamentary in an independent administration, or if there has been no will of the decedent probated or filed for probate, or if no administration of the decedent's estate has been commenced, or if no application for administration of the decedent's estate has been filed, the written memorandum of disclaimer shall be filed with the county clerk of the county of the decedent's residence, or, if the decedent is not a resident of this state but real property or an interest therein located in this state is

disclaimed, a written memorandum of disclaimer shall be filed with the county clerk of the county in which such real property or interest therein is located, and recorded by such county clerk in the deed records of that county.

(i) ~~[(b)]~~ Notice of Disclaimer. Unless the beneficiary is a charitable organization or governmental agency of the state, copies of any written memorandum of disclaimer shall be delivered in person to, or shall be mailed by registered or certified mail to and received by, the legal representative of the transferor of the interest or the holder of legal title to the property to which the disclaimer relates not later than nine months after the death of the decedent or, if the interest is a future interest, not later than nine months after the date the person who will receive the property or interest is finally ascertained and the person's interest is indefeasibly vested. If the beneficiary is a charitable organization or government agency of the state, the notices required by this section shall be filed not later than the first anniversary of the date ~~[nine months after]~~ the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later.

(j) ~~[(e)]~~ Power to Provide for Disclaimer. Nothing herein

shall prevent a person from providing in a will, insurance policy, employee benefit agreement, or other instrument for the making of disclaimers by a beneficiary of an interest receivable under that instrument and for the disposition of disclaimed property in a manner different from the provisions hereof.

(k) [~~(d)~~] Irrevocability of Disclaimer. Any disclaimer filed and served under this section shall be irrevocable.

(l) [~~(e)~~] Partial Disclaimer. Any person who may be entitled to receive any property as a beneficiary may disclaim such property in whole or in part, including but not limited to specific powers of invasion, powers of appointment, and fee estate in favor of life estates; and a partial disclaimer or renunciation, in accordance with the provisions of this section, shall be effective whether the property so renounced or disclaimed constitutes a portion of a single, aggregate gift or constitutes part or all of a separate, independent gift; provided, however, that a partial disclaimer shall be effective only with respect to property expressly described or referred to by category in such disclaimer; and provided further, that a partial disclaimer of property which is subject to a burdensome interest created by the decedent's will shall not be effective unless such property constitutes a gift which is separate and distinct from undisclaimed gifts.

(m) [~~(f)~~] Partial Disclaimer by Spouse. Without limiting

Subsection (l) [~~(e)~~] of this section, a disclaimer by the decedent's surviving spouse of a transfer by the decedent is not a disclaimer by the surviving spouse of all or any part of any other transfer from the decedent to or for the benefit of the surviving spouse, regardless of whether the property or interest that would have passed under the disclaimed transfer passes because of the disclaimer to or for the benefit of the surviving spouse by the other transfer.

(n) [~~(g)~~] Disclaimer After Acceptance. No disclaimer shall be effective after the acceptance of the property by the beneficiary. For the purpose of this subsection [~~section~~], acceptance shall occur only if the person making such disclaimer has previously taken possession or exercised dominion and control of such property in the capacity of beneficiary.

(o) [~~(h)~~] Interest in Trust Property. A beneficiary who accepts an interest in a trust is not considered to have a direct or indirect interest in trust property that relates to a licensed or permitted business and over which the beneficiary exercises no control. Direct or indirect beneficial ownership of not more than five percent of any class of equity securities that is registered under the Securities Exchange Act of 1934 shall not be deemed to be an ownership interest in the business of the issuer of such securities within the meaning of any statute, pursuant thereto.

SECTION 3.02. Section 37B(b), Texas Probate Code, is amended to read as follows:

(b) The assignment may, at the request of the assignor, be filed as provided for the filing of a disclaimer under Section 37A(h) [~~37A(a)~~] of this code. The filing requires the service of notice under Section 37A(i) [~~37A(b)~~] of this code.

EXAMPLE

DISCLAIMER BY SPOUSE OF
ACCOUNTS HELD JTWROS

NO. 11111-P

ESTATE OF	§	IN THE COUNTY COURT AT
	§	
ADAM SMITH,	§	LAW NO. 1 OF
	§	
DECEASED	§	MONTGOMERY COUNTY, TEXAS

MEMORANDUM OF PARTIAL DISCLAIMER

WHEREAS, ADAM SMITH (hereinafter referred to as the "Decedent"), a resident of Montgomery County, Texas, died on September 1, 2003;

WHEREAS, the Last Will and Testament of the Decedent dated October 1, 1990 (hereinafter referred to as the "Will") was admitted to probate in this cause;

WHEREAS, the Decedent owned, as community property with his wife, EVE SMITH, the following accounts, which accounts were each styled "Adam Smith or Eve Smith, POD (payable upon death)":

ACME National Bank Account #9999; and

ACME National Bank Account #1010;

WHEREAS, in addition to the above-mentioned accounts, there may be other accounts or property owned by the Decedent and his wife, EVE SMITH, which are styled in the names of the Decedent and his wife, EVE SMITH, together (and without any other names on such accounts or property) with rights of survivorship, in joint tenancy with right of survivorship, or as JTWROS, POD (payable on death) or some other account or asset styling whereby the account or asset, upon the Decedent's death, would pass to the Decedent's wife outright (by reason of such account or asset registration) rather than pursuant to the terms of the Decedent's Will (hereinafter the two accounts described above and any other accounts or assets registered in a manner described in this paragraph [and in the names of the Decedent and his surviving wife,

EVE SMITH, together, and not with or in the name(s) of any other individual(s)] are hereinafter referred to collectively as the "Accounts");

WHEREAS, EVE SMITH has not previously accepted, taken possession of or exercised dominion and/or control of the Accounts which are the subject of this partial disclaimer, or any of their benefits;

WHEREAS, under the foregoing facts and circumstances, if EVE SMITH had predeceased the Decedent, the Decedent's community property interest in the Accounts would have become assets of the Decedent's Estate to pass pursuant to the terms of the Decedent's Will, subject to the community property interest of EVE SMITH in the Accounts;

WHEREAS, the undersigned, EVE SMITH, has been informed that the Decedent's community property interest in the Accounts are to pass to her outright pursuant to the designations, registrations or other agreements or documentation relating to such Accounts, and she has elected to disclaim her survivorship interest in the Decedent's community property interest in the Accounts, the affect of which is to pass the Decedent's community property interest in the Accounts to the Decedent's Estate, to be distributed pursuant to the terms of the Decedent's Will;

WHEREAS, EVE SMITH does not disclaim any interest in the Accounts which she might receive as a beneficiary under the Decedent's Will and of his Estate or the trust(s) created under the Decedent's Will except as provided in this Memorandum of Partial Disclaimer; and

WHEREAS, a copy of this Memorandum of Partial Disclaimer is being presented to EVE SMITH, as Independent Executrix of the Decedent's Estate in accordance with the requirement of notice prescribed by Section 37A of the Texas Probate Code, receipt of which is acknowledged below;

NOW, THEREFORE, in consideration of the premises, and realizing that the Independent Executrix of the Decedent's Estate will rely on this partial disclaimer in the administration of the Decedent's Estate and further realizing that others will rely on this partial disclaimer, I, EVE SMITH, do hereby make the following partial disclaimer:

I, EVE SMITH, do:

1. hereby irrevocably disclaim, renounce, waive and release, without qualification, all of my survivorship interest to the Decedent's community property interest in the Accounts;

2. intend that the property interests disclaimed herein pass as if I had not survived the Decedent for purposes of such Accounts' registrations; that is, to the Decedent's Estate to be distributed pursuant to the terms of the Decedent's Will;

3. hereby irrevocably disclaim, renounce, waive and release, without qualification, all of my rights to the income and other benefits allocable to the Decedent's community property interest in the Accounts and all other property disclaimed above, in my capacity as named survivor or party on the Accounts; and

4. hereby declare that this is a partial disclaimer and renunciation, relating only the Decedent's community property interest in the Accounts disclaimed under paragraphs 1 and 3 above, and shall in no way impair or affect the other property interests passing to me under the Decedent's Will; moreover, this partial disclaimer shall not impair or affect any beneficial interest in the Accounts which I may have as a beneficiary of the Decedent's Estate or of the trust(s) created under the Decedent's Will, except that I also irrevocably disclaim, renounce, waive and release, without qualification, my special power of appointment over such Accounts (or their future changes, mutations, income and/or increases) as such special power of appointment is provided for under section 6.3 of the Decedent's Will, as well as my veto power relating to such Accounts (or their future changes, mutations, income and/or increases) as provided for under section 6.2 of the Decedent's Will.

IN WITNESS WHEREOF, this partial disclaimer is executed by the undersigned on this the 1st day of May, 2004.

EVE SMITH

THE STATE OF TEXAS §
 §
COUNTY OF MONTGOMERY §

BEFORE ME, the undersigned authority, on this day personally appeared EVE SMITH, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this 1st day of May, 2004.

Notary Public, State of Texas

RECEIPT

I, EVE SMITH, Independent Executrix of the Estate of ADAM SMITH, Deceased, do hereby acknowledge receipt of the foregoing Memorandum of Partial Disclaimer on this 1st day of May, 2004.

EVE SMITH, as Independent Executrix of the
Estate of ADAM SMITH, Deceased

ACKNOWLEDGEMENT

I, EVE SMITH, sole Trustee of all trusts arising under the above-described Last Will and Testament of ADAM SMITH, do hereby acknowledge receipt of the foregoing Memorandum of Partial Disclaimer on this 1st day of May, 2004, and do hereby agree and confirm that the proceeds of Accounts (as defined above) received by me as Trustee will be allocated and administered as set forth above and in accordance with the terms of the Decedent's Will and the foregoing Memorandum of Partial Disclaimer.

EVE SMITH, Trustee under the
Last Will and Testament of Adam Smith,
Deceased

EXAMPLE

DISCLAIMER BY SPOUSE
OF INSURANCE PROCEEDS

NO. _____

ESTATE OF	§	IN PROBATE COURT NO. 1
EVE SMITH,	§	
	§	OF
DECEASED	§	
	§	HARRIS COUNTY, TEXAS

MEMORANDUM OF DISCLAIMER

Notice is taken of the following facts:

1. EVE SMITH (the "Decedent"), a resident of Harris County, Texas, died on December 11, 2006.
2. The Last Will and Testament of the Decedent dated January 2, 2005 (the "Will") was admitted to probate in this cause. ADAM SMITH was appointed the Independent Executor (the "Executor") of the Estate of the Decedent on December 30, 2006, and having duly qualified on January 2, 2007, continues to serve in that capacity.
3. The Decedent was the insured of two life insurance policies issued by Acme Life Insurance Company, policy number 3333 and policy number 4444 (collectively the "Policies"), that were owned by the Trustee of the Eve Smith 2000 Family Trust (the "Trust") created under agreement dated January 2, 2000, between the Decedent as Grantor and ADAM SMITH as Trustee (the "Trustee").
4. The primary beneficiary of the Policies is the Decedent's husband, ADAM SMITH (referred to herein in his individual capacity as "Smith"), who survived the Decedent.
5. The contingent beneficiary of the Policies (in the event Smith failed to survive the Decedent) is the Trustee of the Trust.

6. Smith has not previously accepted any of the benefits of the Policies or taken possession of or exercised dominion and/or control of the Policies that are the subject of this Disclaimer.

7. Decedent had no interest in the Policies at her death, having made an irrevocable gift of the Policies in 2000 to the Trust.

8. Having been informed that he is the named individual beneficiary of the Policies, Smith has elected to disclaim his individual beneficial interest in the proceeds of the Policies.

9. Under the foregoing facts and circumstances, the proceeds from the Policies will pass and be distributed to the Trustee of the Trust.

10. A copy of this Memorandum of Disclaimer is being delivered in accordance with Section 37A of the Texas Probate Code to the Trustee, to the Acme Life Insurance Company, and to the Executor, the receipt of which is acknowledged.

NOW, THEREFORE, in consideration of the premises, and realizing that the insurance company and others will rely on this Disclaimer, I, ADAM SMITH, in my individual capacity do hereby:

A. irrevocably disclaim, renounce, waive and release, without qualification, all of my individual rights and interests, and any income therefrom, as the primary individual beneficiary of the Policies;

B. state and declare that this Disclaimer relates only to the interests in the Policies disclaimed under paragraph A above, and shall in no way impair or affect any property interests which I may have as a beneficiary under the Trust, or as a beneficiary of the Decedent's estate or of the trusts created under the Decedent's Will, or any fiduciary rights or powers I may have as the Trustee of the Trust.

IN WITNESS WHEREOF, this Disclaimer is executed by the undersigned in his individual capacity only, on this the _____ day of _____, 2007.

ADAM SMITH

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared ADAM SMITH, an individual known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN under my hand and seal of office this _____ day of _____, 2007.

Notary Public, State of Texas

RECEIPT

I, ADAM SMITH, in my capacities as the Independent Executor of the Estate of EVE SMITH, Deceased, and as the Trustee of the EVE SMITH 2000 FAMILY TRUST, do hereby acknowledge receipt of the foregoing Memorandum of Disclaimer on this _____ day of _____, 2007.

ADAM SMITH, Independent Executor of the
Estate of Eve Smith, Deceased and Trustee of
the EVE SMITH 2000 FAMILY TRUST

EXAMPLE

DISCLAIMER BY SON OF
ACCOUNTS HELD JTWROS

NO. 3

ESTATE OF	§	IN THE PROBATE COURT NO. 1
DORIS SMITH,	§	
	§	OF
	§	
DECEASED	§	HARRIS COUNTY, T E X A S

MEMORANDUM OF PARITAL DISCLAIMER

WHEREAS, DORIS SMITH (hereinafter referred to as the "Decedent"), a resident of Harris County, Texas, died on January 1, 2006;

WHEREAS, the Last Will and Testament of the Decedent dated February 2, 2002 (hereinafter referred to as the "Will") was admitted to probate in this cause;

WHEREAS, the Decedent was survived by ADAM SMITH;

WHEREAS, the Decedent held funds in the following accounts with ADAM SMITH as joint tenants with right of survivorship: (i) Washington Mutual Account #5555, (ii) Washington Mutual Certificate of Deposit #7777, and (iii) Washington Mutual Certificate of Deposit #8888 (the "Accounts");

WHEREAS, no portion of the Accounts was contributed by ADAM SMITH;

WHEREAS, ADAM SMITH has been informed that the Accounts will pass to him outright pursuant to the terms of the account agreements, and he has elected to disclaim his survivorship interest in the Accounts;

WHEREAS, ADAM SMITH has been informed that pursuant to Article IV of the Will, if ADAM SMITH survives the Decedent, all of the Decedent's residuary estate will pass to him as the beneficiary of Decedent's residuary estate, and he has elected to partially disclaim his interest in the Decedent's residuary estate, that portion solely

comprised of the Accounts, the affect of which is to pass that disclaimed portion of the Decedent's residuary estate as if ADAM SMITH had predeceased the Decedent;

WHEREAS, ADAM SMITH has not previously accepted, taken possession of, or exercised dominion or control over any of the assets which are the subject of this Partial Disclaimer or any of their benefits; and

WHEREAS, a copy of this Partial Disclaimer is being presented to ADAM SMITH, as Independent Executor of the Decedent's estate, in accordance with Section 37A of the Texas Probate Code, receipt of which is acknowledged below, and this Partial Disclaimer shall be filed in the Estate of Doris Smith, Deceased, in Cause No. 3 in the Probate Court No. 1 of Harris County, Texas.

NOW, THEREFORE, in consideration of the premises, and realizing that the Independent Executor and the beneficiaries of the Decedent's estate will rely on this partial disclaimer in the administration of the Decedent's estate, and further, realizing that other persons will rely on this Partial Disclaimer, I, ADAM SMITH, do hereby:

1. irrevocably disclaim, renounce, waive, release, and refuse to accept, without qualification, all of my rights and interests that I may have as the joint tenant with right of survivorship of the Accounts pursuant to the account agreements;
2. irrevocably disclaim, renounce, waive, release, and refuse to accept, without qualification, all rights and interests in that portion of the Decedent's residuary estate comprised of the Accounts that I may have as a Beneficiary pursuant to Article IV of the Will;
3. irrevocably disclaim, renounce, waive, release, and refuse to accept, without qualification, all of my rights to the income and other benefits allocable to the assets disclaimed under paragraphs 1 and 2 above; and
4. declare that this is a partial disclaimer and renunciation, relating only to the property disclaimed under paragraphs 1,2 and 3 above, and shall in no way impair or affect any other property interests passing to me under the Decedent's Will or otherwise.

IN WITNESS WHEREOF, this Partial Disclaimer is executed on this the 1st day of August, 2006.

ADAM SMITH

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared ADAM SMITH, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office _____ of August, 2006.

Notary Public in and for
the State of Texas

RECEIPT

I, ADAM SMITH, Independent Executor of the Estate of Doris Smith, Deceased, received a copy of the foregoing Partial Disclaimer on this the _____ day of August, 2006.

ADAM SMITH, Independent Executor of
the Estate of Doris Smith, Deceased

KRISTI N. ELSOM

Fizer, Beck, Webster, Bentley & Scroggins
kelsom@fizerbeck.com

Professional

- Board Certified in Estate Planning and Probate by the State of Texas
- Texas Academy of Probate and Trust Lawyers
- State Bar of Texas and Houston Bar Association
- Houston Estate and Financial Forum
- Houston Business and Estate Planning Council

Education

- Juris Doctor, Southern Methodist University, School of Law – 1983
- Bachelor of Business Administration, Magna Cum Laude, Southern Methodist University, Cox School of Business – 1979

Career History

- Fizer, Beck, Webster, Bentley & Scroggins, Houston, Texas 2002 - present
- Stubbeman, McRae, Sealy, Laughlin, & Browder, Inc., Midland, Texas – 1983 to 2002

Publications

- *Secure Your Mask First*, Fall 2005 Dispatch - Council for Resource Development
- *The Yin and Yang of Disclaimers*, May/June 2002 Probate & Property – Received Excellence in Writing Award for Best Over-all Article

Recent Speaking Engagements

- South Texas College of Law Estate Planning Seminar–September, 2007, Houston, TX
- Travis County Bar Estate Planning Seminar – March, 2007, Austin, TX
- Midland Business and Estate Council – October, 2005, Midland, TX
- Southern Arizona Estate Planning Council – September, 2005, Tucson, AZ
- Council for Resource Development, National Conference – December, 2004, Washington, D.C.
- Texas Association of Community College Foundations – 2004 Symposium, Austin, TX
- Brazosport College Foundation – Estate Planning Seminar – 2003 - 2007, Brazosport, TX
- South Texas College of Law, Wills & Probate Institute – September, 2002, Houston, TX
- Tax Alliance Conference, Houston, Texas - May, 2002, Houston, TX
- Midland College Foundation Inc. and Midland Memorial Foundation Annual Estate Planning Seminar – May, 2002, Midland, TX
- State Bar of Texas, Advanced Drafting: Estate Planning & Probate Course – November, 2001, Dallas, TX
- Bank One: “*Women’s Matters Series*” – September, 2000, Fort Worth, TX

Personal

- Married to Bruce
- Two four-legged children-Jake and Yoda
- Black Belt Tae Kwon-Do