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DISCLAIMERS IN MISSISSIPPI BY PERSONAL REPRESENTATIVE

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INTRODUCTION

The purpose of this essay is to examine the question of whether under Mississippi law the executor or administrator of a deceased beneficiary's estate can effectively disclaim the interest of the beneficiary. This narrow issue involves consideration of disclaimers in general, common law principles, the Mississippi Code of 1972, as amended, the Internal Revenue Code of 1954, as amended, and, certain interpretative material of the Internal Revenue Code.

A disclaimer has been defined as " '[t]he disavowal, denial, or renunciation of an interest, right, or property imputed to a person or alleged to be his.' "[1] It is " 'a complete and unqualified refusal to accept the rights to which one is entitled.' "[2] There can be no disclaimer after an acceptance of the rights.

Generally, a testamentary beneficiary is entitled to renounce or disclaim a devise or bequest in his favor.[3] This right of disclaimer is based upon the general principle that no one should be forced to take possession against his consent of what is coming to him under another person's will. Although the beneficiary may elect to assent to the inheritance or repudiate it, few beneficiaries disclaim a devise or bequest in the absence of some personal advantage arising from such rejection. However, the benefit may actually inure to another person.

A primary concern is whether the advantage may be transferred to another without adverse transfer tax consequence. A qualified disclaimer by a beneficiary will be treated for federal tax purposes as if the disclaimed interest had never been transmitted to the disclaiming beneficiary.[4] Consequently, the disclaiming beneficiary will not be treated for either gift or estate tax pur-

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1. City Nat'l. Bank & Trust Co. v. United States, 203 F. Supp. 398, 402 (S.D. Ohio 1962) (quoting BLACK'S LAW DICTIONARY 550 (4th ed. 1951)), *aff'd*, 312 F.2d 118 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

2. Parker v. Commissioner, 62 T.C. 192, 199 (1974) (quoting S. Rept. No. 1013, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 334), *acq.* 1974-2 C.B. 4; Treas. Reg. § 20.2055-2(c)(2) (1958); Treas. Reg. § 20.2056 (d)-1(a) (1958); Treas. Reg. § 20.2041-3(d)(6) (1958).

3. 80 AM. JUR. 2D *Wills* §1597 (1975).

4. I.R.C. § 2518 (1976 & Supp. 1981).

poses as having made a gift to the ultimate recipient of the interest by reason of the disclaimer. The disclaiming beneficiary has not transferred anything but has merely refused to accept the devise or bequest under the decedent's will. Conversely, acceptance by the beneficiary of the devise or bequest followed by a disposition in the form of a gratuitous transfer constitutes a gift subject to tax.[5]

As a result of this tax treatment, disclaimers frequently allow postmortem estate planning. For example, a disclaimer may be utilized to increase or decrease the amount of the marital deduction available to a decedent's estate, or an interest which passes to charity because of a disclaimer will be treated as a deductible transfer to charity by the decedent who created the interest rather than the disclaimant. A disclaimer enables an estate planner to evaluate the overall tax consequence of the estate of both spouses. At the death of the first spouse, an advisor may determine that the surviving spouse should not receive any property from the deceased spouse for the family's maximum advantage for tax purposes.

HYPOTHETICAL

As an example, a husband and wife may be involved in an automobile accident in which the husband is killed instantaneously. The wife is injured seriously and dies within a short time of the date of the death of the husband. The husband's will leaves everything to the wife, or in the event she does not survive, to the children. The wife's will leaves everything to the husband, or in the event he does not survive, to the children. With the proper assumption of assets and values for the respective estates, it may be more advantageous, from a tax standpoint, for the children to receive some or all of the property from their father rather than have it pass to their mother and inherit it from her. With good health and the desire to do so, it is clear that the wife may refuse to accept her devise or bequest from the husband. Principles of common law, Mississippi law and the Internal Revenue Code allow a surviving testamentary beneficiary to disclaim the devise or bequest. The question which arises concerns the propriety of a disclaimer by the deceased wife's executor or administrator: May the wife's fiduciary renounce or disclaim, as her personal representative, the interest the wife would have received?

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5. Treas. Reg. § 25.2511-1(c) (1958).

GENERAL DISCLAIMERS VERSUS STATUTORY ELECTION AND RENUNCIATION

The question posed by the hypothetical has been answered both affirmatively and negatively by decisions in jurisdictions outside of Mississippi. A substantial body of law indicates that an executor or administrator may disclaim a bequest. "Unless a contrary intention is indicated by the provisions of the will, the right of acceptance or renunciation is not ended by the death of the devisee or legatee who had such right. Such right may be exercised by his executor or administrator."[6] However, if the will indicates an intention that an acceptance or renunciation power shall be personal to the beneficiary, the intention will be honored.[7] The proposition that the right of renunciation is not ended by the death of the devisee or legatee but may be exercised by his executor or administrator was recognized in *In re Howe*.[8] In that case, a couple made wills leaving their respective estates to the other. An automobile accident killed both spouses, but the wife died a few days after the husband, never regaining consciousness. Within four months after her death, the wife's administratrix tried to renounce the provision in the husband's will. Apparently, the renunciation would have prevented a double estate tax problem. The court held that the right to disclaim may be exercised by the deceased beneficiary's personal representative. However, the court further held that the attempted disclaimer was not timely in this jurisdiction.[9]

The court in *Payne v. Newton*,[10] held that the death of a surviving incompetent widow terminated her right to renounce her husband's will, and thus appears contrary to *Howe*. It may, however, be distinguishable. In *Payne* the widow's right to renounce her husband's will was provided by Section 18-211 of the D. C. Code, as amended, an election and renunciation provision. The statute was silent as to whether the right to renounce continued after the death of the surviving spouse. Although similar, this case differs from a general disclaimer, such as was dealt with in *Howe*, in that it involved a statutory election and renunciation which results in a statutory share being distributable to the re-

6. W. BOWE & D. PARKER, PAGE ON WILLS § 49.5 at 42 (New Revised Treatise 1962).
7. Dyer v. Blair, 62 R.I. 498, 511, 6 A.2d 673, 679 (1969).
8. 112 N.J. Eq. 17, 22, 163 A. 234, 237 (1932); *see also* In re Klosk's Estate, 169 N.Y.L.J. 21 (1973) (holding that, unless a contrary intention is indicated by the provisions of the will, right of acceptance is not ended by the death of the devisee or legatee who has such right but may be exercised by his executor or administrator).
9. 112 N.J. Eq. at 23, 163 A. at 237-38.
10. 323 F.2d 621 (D.C. Cir. 1963).

nouncing spouse in place of the provision in the will. The doctrine of election in connection with testamentary instruments is the principle that one who is given a benefit under a will must choose between accepting such benefit and asserting some other claim he has against the testator's estate or against the property disposed of by the will.[11]

The general disclaimant has no other claim against the testator's estate. A general disclaimer is a renunciation which merely allows a beneficiary to decline to accept the rights to which he is entitled; he receives nothing in its place. This right to renounce needs no statutory authorization.[12] On the other hand, the beneficiary who elects and renounces not only declines to accept what is coming to him but also takes something else in its place. The election is to take under a will or against it. In either event, the beneficiary receives something. This right to elect only exists where it has been granted by statute. Since the statutes vary considerably from jurisdiction to jurisdiction in both their scope and application, they should always be consulted.

The similarity of a general disclaimer and an election and renunciation has resulted in opinions which have intertwined the principles. The courts in some jurisdictions have held that the right to disclaim is personal to the potential disclaimant and may not be exercised by an executor or administrator.[13] These cases have apparently arisen, however, in the context of a personal representative's attempt to exercise the statutory election and renunciation. A number of other cases have allowed a fiduciary to generally disclaim.[14] In addition, it has been held that the court may order a disclaimer on behalf of an incompetent.[15]

Many states have passed specific legislation dealing with disclaimers which contain provisions authorizing or prohibiting disclaimers by executors and administrators. For example, Alaska statutes provide that the right to disclaim does not survive the death

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11. Moore v. Baker, 4 Ind. App. 115, 118, 30 N.E. 629, 629-30 (1892); Kentucky Trust Co. v. Kessell, 464 S.W.2d 275, 276 (Ky. 1971); Lansdale v. Dearing, 351 Mo. 356, 360, 173 S.W.2d 25, 28 (1943); Logan v. Logan, 112 S.W.2d 515, 518 (Tex. Civ. App. 1937).

12. Perkins v. Isley, 224 N.C. 793, 798, 32 S.E.2d 588, 590 (1945).

13. Cahill v. Eberly, 38 F.2d 539 (D.C. Cir. 1930); Rock Island Bank and Trust Company v. First National Bank, 26 Ill. 2d 47, 185 N.E.2d 890 (1962); Andry Kowski v. Theis, 40 Ill. App. 2d 182, 189 N.E.2d 3 (1963).

14. Perkins v. Phinney, 7 A.F.T.R.2d (P-H) 1753 (W.D. Texas 1961); Estate of Robin v. Commissioner, 68 T.C. 919 (1977), *aff'd*, 588 F.2d 368 (2d Cir. 1978); Estate of Dreyer v. Commissioner, 68 T.C. 275 (1977), *acq.* 1978-1 C.B. 1; Hoenig v. Commissioner, 66 T.C. 471 (1976), *acq.* 1978-1 C.B. 1; In re Estate of Glenn, 258 N.C. 351, 128 S.E.2d 408 (1962); McCrady Estate, 42 Pa. D. & C.2d 519 (1966).

15. *See, e.g.*, Hardy v. Richards, 98 Miss. 625, 54 So. 76 (1911); Delton v. Shaffer, 60 Ill. 2d 451, 328 N.E.2d 257 (1975).

of a beneficiary.[16] In contrast, New York law provides that a renunciation on behalf of a decedent is allowable by the personal representative of such decedent, provided proper court authorization has been obtained.[17]

The legislation in New York provides an illustration of the distinction between a general disclaimer and a statutory election and renunciation. The general disclaimer provision allows a renunciation or disclaimer by the personal representative of a deceased beneficiary.[18] This right is referred to in the statute as a disclaimer.[19] The requirements and rights for an election and renunciation by a surviving spouse are also provided by statute.[20] The election allowed under this section is personal to the surviving spouse with the result that the personal representative of a deceased spouse may not exercise any right on behalf of the beneficiary.[21]

Mississippi's position on the issue is not free from doubt. Mississippi has no general disclaimer statute, although it does have statutes allowing an election and renunciation.[22] The Release of Powers of Appointment Act[23] is related but does not appear to be applicable.[24]

The writer has been unable to find any case directly answering the question posed by the hypothetical. There is no question that Mississippi adheres to the common law rule allowing a general disclaimer. In *Greely v. Houston* the Mississippi Supreme Court indicated that:

> [a] devise or bequest does not become effective until accepted by the devisee or legatee, who has the right to accept or decline it as he may desire; and, when a devisee or legatee refuses to accept a devise or legacy, the property devised or bequeathed to him will be dealt with as if the devise or legacy had not been made.[25]

Further, the Mississippi Supreme Court held in *Parker v. Broadus*,[26] that where a will contains no limitation, all the beneficiaries may renounce the will and divide the property ac-

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16. ALASKA STAT. § 13.11.295(a) (Supp. 1982).
17. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c) (McKinney 1981).
18. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11 (McKinney 1981).
19. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(j) (McKinney 1981).
20. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).
21. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(d)(4) (McKinney 1981).
22. MISS. CODE ANN. §§ 91-5-25 to 91-5-27 (1972 & Supp. 1982).
23. MISS. CODE ANN. §§ 91-15-1 to 91-15-21 (1972).
24. Bishop v. United States, 338 F. Supp. 1336, 1348 (N.D. Miss. 1970), *aff'd mem.*, 468 F.2d 950 (5th Cir. 1972).
25. 148 Miss. 799, 805, 114 So. 740, 742 (1927).
26. 128 Miss. 699, 91 So. 394 (1922).

cording to a plan different from the one prescribed by the will. In this case, the decedent's will left all his property to two sons. A letter pinned to his will explained that this was being done due to the "meding" (sic) of his girls in general and one in particular. After his death, the beneficiary sons and other children entered into an agreement. The beneficiary sons renounced the will and agreed with the other children that the property should be divided equally among all the children, taking certain advancements into account, to equalize each child's share of the estate. The chancellor's opinion stated that " ' A testator may confer by will upon an heir a larger share of his estate than the law would give, but the testator possesses no potential to compel the heir to accept it, nor may the court do so for him.' "[27] In the writer's opinion, Mississippi law provides a strong implication that a general disclaimer or renunciation will be allowed to rearrange testamentary desires provided there are no limitations in the will and all the beneficiaries or their personal representatives agree. The writer submits that the facts of the hypothetical should allow a general disclaimer by the executor or administrator of the wife's estate. Certainly nothing prohibits this result.

The area of general disclaimers should not be confused with the election and renunciation rights pursuant to Mississippi statute.[28] The statute adopts the principle that a surviving spouse who is a beneficiary under a will is permitted to choose between accepting a benefit or asserting another claim against the estate. In essence, a beneficiary may reject an unsatisfactory provision. The statute allows the beneficiary to elect to refuse the testamentary provision and receive a specified share of the estate. Additionally, the renunciation and election must be completed within 90 days after the probate of the will and is limited to surviving spouses. Further, the spouse's right is a personal right which does not survive the death of the surviving spouse and may not be exercised by his or her executor or administrator.[29] It appears that a stronger argument may be made for restricting the election and renunciation right to the beneficiary personally than for so restricting a general disclaimer right. A determination of what is or what is not "unsatisfactory" may vary between a beneficiary and a deceased beneficiary's fiduciary. The sanctity of the surviving spouse's share of the decedent's estate is at stake, and it should

27. 128 Miss. at 708, 91 So. at 395.

28. MISS. CODE ANN. § 91-5-25 (Supp. 1982).

29. Jenkins v. Borodofsky, 211 So. 2d 874 (Miss. 1968); Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 125 So. 2d 93 (1960); Carter v. Harvey, 77 Miss. 1, 25 So. 862 (1899).

be a personal decision for the spouse. Further, the spouse receives something, whether it is pursuant to the will or a statutory share.

Section 91-5-27 of the Mississippi Code is also similar though inapplicable to general disclaimers. This section provides that in circumstances where a decedent's will makes no provision for the decedent's surviving spouse, the spouse has the right to share in the estate of the decedent as in the case of an unsatisfactory provision. Under this section, a renunciation is not necessary. The will is renounced by operation of law[30] without any affirmative action by the surviving spouse, placing the surviving spouse in the position of one who has renounced an unsatisfactory provision in a will.

In *McBride v. Haynes*,[31] the Mississippi Supreme Court dealt with the situation where a wife's will made no provision for her husband. Three weeks after the wife's death, the husband died without having taken any affirmative action with reference to her will. His personal representative sought a share in the estate of his pre-deceased wife as a matter of law. The court held that failure to make a provision for the surviving husband vested a right in the husband to a share of the deceased wife's estate. Further, that right was exercisable by the executor of the estate of the husband.

It is arguable that when it is not necessary to determine whether a provision is "unsatisfactory," the court may be more liberal in allowing an executor or administrator to exercise rights in regard to sharing in an estate. It is also arguable that allowing an executor or administrator to determine to share in an estate is not unlike, and is authority for, allowing an executor or administrator to determine whether to decline to share in an estate.

Aside from the similarity of the situations, rights under neither Section 91-5-25 nor Section 91-5-27 are the equivalent of general disclaimer considerations. The election and renunciation rights are purely statutory and are limited to particular situations. They are applicable only to a surviving spouse beneficiary who makes an affirmative election to renounce an unsatisfactory provision received under the deceased's will, or for whom the law automatically renounces in the absence of any provision for the surviving spouse. Under either circumstance, a statutorily specified share of the predeceased spouse's estate is received instead of the unsatisfactory or absent provision. A statutorily specified time

30. Bullock v. Harper, 239 So. 2d 925, 926-27 (Miss. 1970); Cain v. Barnwell, 125 Miss. 123, 136, 87 So. 481, 483 (1921).

31. 247 So. 2d 129 (Miss. 1971).

period is allowed for the renunciation and election for an unsatisfactory provision; and, the law automatically renounces in the absence of a provision as though it were within the time period.

In contrast, the general disclaimer or renunciation is not limited to a surviving spouse beneficiary, is not necessarily limited under Mississippi law to a specified time period for application, is not limited to a situation where the provision is unsatisfactory, has no application where a beneficiary receives no provision, and does not necessarily allow a disclaiming beneficiary a specified share or any share at all of the decedent's estate. In essence, a general disclaimer or renunciation appears to be a complete deviation from an election and renunciation rather than a nuance.

FEDERAL ESTATE AND GIFT TAX PROVISIONS

The ultimate conclusion to the question posed in the hypothetical must take into account federal estate and gift tax provisions. Prior to the Tax Reform Act of 1976,[32] several courts had held that a deceased beneficiary's executor or administrator could make a valid disclaimer for the deceased beneficiary.[33]

As a general proposition, a personal representative acts in the place of a decedent. Federal tax law recognizes the fiduciary relationship and defines the rights and obligations of a fiduciary. Section 6903 (a) of the Internal Revenue Code provides that upon proper notice, a fiduciary assumes the powers, rights, duties and privileges of the person in whose place he acts. Section 7701 (a) (6) of the Internal Revenue Code provides that the term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person. Once the relationship is established, the fiduciary is entitled to do anything the decedent could have done.

A recent case illustrating this concept is *Gunther v. United States*.[34] Mr. Gunther received a distributive share from a profit sharing plan. Under section 402(a)(5) of the Internal Revenue Code, he had a right to elect to rollover his distribution into an individual retirement account within 60 days of receipt. Unfortunately, he died before the end of the 60-day period. A bank was appointed executor of his estate and the executor opened the in-

32. Pub. L. No. 94-455, 90 Stat. 1520; Pub. L. No. 94-528, § 2(a)-(c), 90 Stat. 2483; Pub. L. No. 94-568, § 3(a), 90 Stat. 2697 (codified as amended in scattered sections of 26 U.S.C.).

33. Perkins v. Phinney, 7 A.F.T.R.2d (P-H) 1753 (W.D. Texas 1961); Estate of Robin v. Commissioner, 68 T.C. 919 (1977), *aff'd*, 588 F.2d 368 (2d Cir. 1978); Estate of Dreyer v. Commissioner, 68 T.C. 275 (1977), *acq.* 1978-1 C.B. 1; Hoenig v. Commissioner, 66 T.C. 471 (1977), *acq.* 1978-1 C.B. 1.

34. 51 A.F.T.R.2d (P-H) 1314 (W.D. Mich. 1982), 2 Estate & Gift Taxes FED. TAXES (P-H) ¶ 148,564 (1982).

dividual retirement account on the decedent's behalf and deposited the money from the profit sharing plan.

The Internal Revenue Service refused to recognize the transaction as a valid rollover pursuant to section 402(a) (5), claiming the right to rollover is personal to the employee and cannot be exercised by anyone else. The estate maintained that Section 6903(a) gave the executor all the powers, rights, duties and privileges of the decedent. As a result of this, the estate maintained that the executor had the authority to rollover the distributive share into an individual retirement account just as the decedent could have done had he lived. The district court, Western District of Michigan, Southern Division held for the taxpayer and against the position of the Internal Revenue Service. This decision would appear to be analogous to the question of this essay and would be authority for the proposition that the executor or administrator of a deceased beneficiary's estate can effectively disclaim the interest of the beneficiary.

The Tax Reform Act added Internal Revenue Code Section 2518[35]and Section 2046[36] in an attempt to achieve uniform treatment of disclaimers. The provisions were intended to clarify procedures to be followed to effectively disclaim property so that the disclaimant would not be treated as the owner of the interest for gift and estate tax purposes.[37] Section 2518 (a) provides that a qualified disclaimer with respect to an interest in property shall be given effect as if the interest had never transferred to the disclaimant. Section 2518 (b) defines a qualified disclaimer and Section 2046 incorporates these provisions for estate tax purposes. These amendments apply to interests created by transfers made after December 31, 1976.

The Tax Reform Act of 1976 attempted to resolve many problems in the disclaimer area. A principal problem was how quickly the recipient of an interest must disclaim in order to avoid gift tax liability. The House Ways and Means Committee was particularly disturbed by cases as *Keinath v. Commissioner*, where the court found that a remainderman could disclaim his interest in a trust upon the death of the life tenant, even though this oc-

35. Pub. L. No. 94-455, tit. XX, § 2009(b)(1), 90 Stat. 1520, 1893.

36. Pub. L. No. 94-455, tit. XX, § 2009(b)(2), 90 Stat. 1520, 1893-4, *amended by* Pub. L. No. 97-34, tit. IV, § 403(d)(3)(A)(i), 95 Stat. 172, 304 renumbering as I.R.C. § 2046.

37. *See* H.R. REP. NO. 1380, 94th Cong. 2d Sess. 65-68 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3356, 3419-22; S. CONF. REP. NO. 1236, 94th Cong., 2d Sess. 623-24 (1976); General Explanation, *Id.* at 589-92.

curred 19 years after the death of the grantor.[38] This problem was dealt with by including in the definition of qualified disclaimer a definite time period within which the disclaimer must be made.

The term "qualified disclaimer" means an irrevocable and unqualified refusal to accept an interest in property, if:

(1) the refusal is in writing, and

(2) such writing is received by the transferor, his legal representative, or the holder of the legal title to the property no later than nine months after the latter of the day on which the transfer creating the interest is made or the day the disclaimant attains the age of twenty-one. The legislative history indicates that for purposes of the disclaimer provisions, the transfer creating an interest must be a taxable one. The nine-month period is to be determined in reference to each taxable transfer.[39] Each potential recipient can disclaim within nine months after the creation of his interest.

(3) The disclaimant must not have accepted the interest or any of its benefits. Acceptance of any consideration for disclaiming an interest will be considered an acceptance of the benefit of the interest.

(4) As a result of the disclaimer, the interest must pass to another person without any direction on the part of the disclaimant. Many practitioners believed that this requirement tied the disclaimer provision back to state law, requiring that an attempted disclaimer be sufficient under state law to cause the property to pass to a third party without any action on the disclaimant's part. Thus an ineffective disclaimer under local law would be an effective disclaimer under federal estate and gift tax law. However, the House Ways and Means Committee report indicated that when the requirements of the federal disclaimer provisions are satisfied, the refusal to accept the property would be given effect for federal estate and gift tax purposes even though state law did not characterize the refusal as a disclaimer or if the person refusing the property was considered to have been the owner of the property before refusing acceptance of the property.[40]

The Revenue Act of 1978 amended Section 2518 by providing that when a surviving spouse refuses to accept an interest in prop-

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38. 480 F.2d 57, 62-63 (8th Cir. 1973). In determining if the disclaimer had been made within a reasonable time, the court used the death of the life tenant as the commencement of the time period for disclaiming the remainder interest.

39. H.R. CONF. REP. No. 1515, 94th Cong., 2d Sess. 623 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4118, 4262.

40. H.R. CONF. REP. No. 97-201, 97th Cong., 1st Sess. 190-91 (1981).

erty, the disclaimer will be valid although the surviving spouse receives an income interest with respect to the property if the income interest does not result from any direction by the surviving spouse and the disclaimer is otherwise qualified.[41] This amendment was in direct response to the problem of a surviving spouse disclaiming an interest in property under the marital deduction provision of a will with the result that the property passed to a trust in which the spouse had an income interest. Under the 1976 Act, the disclaimed interest must pass to a person other than the person making the disclaimer. It was considered unclear as to whether a disclaimer was valid when the surviving spouse disclaimed and yet participated as an income beneficiary in a residual type trust.

Proposed treasury regulations, published in the Federal Register on July 22, 1980, provide guidelines for the treatment of disclaimers made before the effective date of the 1976 Act and disclaimers of post-1976 interests.[42] These proposed regulations apparently recognize case law that had established that a fiduciary could disclaim a decedent's interest in property prior to the Tax Reform Act of 1976. Proposed regulation section 25. 2518-(d) (1) (ii) indicates that a fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retained a power to allocate enjoyment of that interest among members of a designated class.[43]

Due to the recent vintage of Section 2518, very few cases have been decided or rulings issued interpreting the section.[44] None appear to be directly applicable to the question posed by the hypothetical. A 1979 letter ruling provides some interpretative information. Technical Advice Memorandum 7937011[45] denied that a purported disclaimer made by a Montana executor of a deceased legatee's interest in the estate of her father, who was a resident of Iowa, was a qualified disclaimer. The conclusion of the letter ruling was that the disclaimer was not valid under local law. Under Iowa law, the right to disclaim was personal and terminated on the death of the legatee.[46] The rationale of this ruling would apparently not be violated when an executor or ad-

41. Pub. L. No. 95-600, tit. VII, § 702(m)(l), 92 Stat. 2763, 2935 (codified at I.R.C. § 2518(b)(4) (Supp. 1981)).
42. 45 Fed. Reg. 48922 (1980).
43. *Id.* at 48927.
44. 1 Estate & Gift Taxes FED. TAXES (P-H) ¶ 125,182 (1982).
45. LTR 7937011 (May 31, 1979).
46. IOWA CODE ANN. § 633.704(3), *amended by* IOWA CODE ANN. § 633.704(3)(c) (Supp. 1982-83).

ministrator disclaimed a beneficiary's interest when it is not prohibited by local law.

Recent legislation amends the disclaimer provision. The Economic Recovery Tax Act of 1981 amended Section 2518 by adding a new paragraph (3) to subsection (c) which provides that a written transfer of the transferor's interest in property to the person who would have received the property had there been an effective disclaimer will be treated as a valid disclaimer for federal estate and gift tax purposes if the transfer is timely and the transferor has not received any of the interest or its benefits.[47] The intention of this amendment is that local law will be applicable to determine the identity of the transferor, but the transfer does not otherwise need to satisfy the requirements of a local disclaimer law. Therefore, a written transfer of the transferor's entire interest in property to a transferee who would have received the property had a qualified disclaimer been made is treated as a qualified disclaimer for estate and gift tax purposes. The fact that under local law the transfer is not considered a disclaimer will not prevent it from being a qualified disclaimer for federal estate and gift tax purposes. This legislation untied the disclaimer provision from state law for transfers made after 1981.

CONCLUSION

Existing disclaimer statutes adopt or prohibit disclaimers by an executor or administrator. Although Mississippi has no general disclaimer statute, the Mississippi Supreme Court adheres to the common law rule allowing a general disclaimer. The court has been liberal in allowing beneficiaries to rearrange testamentary desires provided there are no limitations and all the beneficiaries agree. The next logical step, therefore, would be to allow a deceased beneficiary's executor or administrator to act on his behalf. The Mississippi Supreme Court should allow a general disclaimer by the executor or administrator of the wife's estate in the hypothetical.

Internal Revenue Code Section 2518, as amended, still does not specifically address the question posed by the hypothetical: namely, whether an administrator or executor can disclaim his deceased beneficiary's devise or bequest. There does not appear to be anything in the legislative considerations which indicates that Congress intended to change existing common law, which

47. Pub. L. No. 97-34, tit. IV, § 426(a), 95 Stat. 172, 318 (codified at I.R.C. § 2518(c)(3) (Supp. 1981)).

generally provides that the right of acceptance or renunciation is not ended by the death of the devisee or legatee who had such right. Additionally, proposed regulations under the pre-1981 disclaimer provisions apparently reflect that a fiduciary can disclaim a decedent's interest in property.

In an effort to bring clarity and predictability to the estate and gift tax consequences of disclaimers by executors and administrators, the Mississippi legislature should address statutory general disclaimers and this question in particular. Further, the regulations of the Treasury Department should do likewise.

A practitioner drafting a will with a disclaimer provision should consider including language enabling a deceased beneficiary's personal representative to disclaim on behalf of the beneficiary's estate should the circumstance present itself. Under any circumstance, a disclaiming fiduciary should act with the ratification and approval of all the beneficiaries or their representatives and preferably with court approval. A general disclaimer by a personal representative should be precluded when it is clearly the intention of the testator that such disclaimer should be personal to the beneficiary.