#L-603 9/2/81

Memorandum 81-58

Subject: Study L-603 - Probate Code (Renunciation or Disclaimer)

In 1972, the California Legislature enacted detailed provisions, found in Sections 190 to 190.10 of the Probate Code, relating to disclaimer of intestate interests, interests under a decedent's will, interests as beneficiary of a testamentary trust, interests as beneficiary of an inter vivos gift, and other interests. These sections are set out in Exhibit 1 to this memorandum. The Uniform Probate Code also has detailed renunciation (disclaimer) provisions. These are found in UPC Section 2-801, set forth in Exhibit 2 to this memorandum. Exhibit 3 to this memorandum is a letter from Professor Bruce Wolk of the U.C. Davis Law School which deals with tax aspects of disclaimers.

The California disclaimer provisions are closely similar to the UPC provisions, both in substance and in structure. The staff is informed by one of the drafters of the California legislation that early versions of the UPC provisions were available to the California drafters. The California drafters tried to improve the UPC provisions by making them somewhat broader. The following chart indicates the subdivisions of UPC Section 2-801 that correspond to the California Probate Code sections:

Probate Code	UPC § 2-801
§§ 190, 190.1, 190.2	Subd. (a)
§ 190.3	Subd. (b)(1)-(2)
§ 190.4	Subd. (b)(3)
§ 190.5	Subd. (d)(3)
§ 190.6	Subd. (c)
§ 190.7	Subd. (d)(1)
§ 190.8	Subd. (d)(2)
§ 190.9	Subd. (f)
§ 190.10	Subd. (e)

In their analytical article, Professors French and Fletcher compare the California and UPC provisions as follows:

> In general, both permit renunciation of all manner of at-death taking, including by will, by intestacy, and by the exercise of a testamentary power of appointment. The California statute also provides for renunciation of the benefits of inter vivos transactions such as outright gifts, gifts in trust, creations of powers of appointment, and gifts resulting from the exercise of a power. Both the UPC and the California statute provide that spendthrift and similar restrictions are not to prevent renunciation. California, but not the UPC, permits a personal representative of a decedent to renounce that which the decedent could have

> renounced; both permit the guardian of an incompetent to do so. Both specify the effect of renunciation, to consider that the renouncer died before the effective date of the transfer or creation of the interest renounced, and both are careful to provide that the person next in line, as the new taker upon another person's renunciation, can himself similarly renounce. Finally, both the UPC and the California statute have elaborate provisions for the form, timing and other procedure necessary to effect the renunciation.

French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 378-79 (1976).

In its 1973 critique of the Uniform Probate Code, the State Bar was critical of UPC Section 2-801 on the ground that it is "more limited" than Sections 190-190.10 of the Probate Code. State Bar of California, The Uniform Probate Code, Analysis and Critique 58 (1973). In their response to the California critique, the Joint Editorial Board for the UPC said that since the California statute includes disclaimer provisions applicable to testate and intestate succession as the UPC does, California might well elect to "omit 2-801 and avoid repeal of the new California legislation." Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 17 (1974).

The staff has discussed the California and UPC disclaimer provisions with attorneys Matthew S. Rae and Edmond R. Davis of Los Angeles--both probate experts. Both were of the view that the California disclaimer provisions are superior to the UPC provisions and should be retained. Professor Wolk is also of the opinion that the existing California provisions are preferable to the UPC provisions from a tax planning standpoint. See Exhibit 3. The applicable California tax provisions (Rev. & Tax. Code §§ 13409, 15209) have remained unchanged since the California disclaimer provisions were enacted in 1972, so there appear to be no recent developments in state tax law to suggest any revision of the California disclaimer statute.

There is legislation now pending (AB 769, Naylor) which would make some changes in the law relating to the marital deduction and the orphan's deduction, including an amendment to Section 190 of the Probate Code. Also, the State Bar Estate Planning, Probate and Trust Law Section will soon be considering some amendments to the California provisions proposed by the Beverly Hills Bar Association. The staff will follow AB 769, and will keep abreast of any recommendations which may result from the proposal of the Beverly Hills Bar Association. In the meantime, the

staff recommends retaining Probate Code Sections 190-190.10 in preference to UPC Section 2-801.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

CHAPTER 11. DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS

Chapter 11 was added by Stats.1972, c. 990, § 1, urgency, eff. Aug. 16, 1972.

Another Chapter 11 was added by Stats. 1972, c. 439, § 1. See § 186 et seq., ante.

Cross References

Release of discretionary power of appointment, see Civil Code §§ 1388.2, 1389.3.
Two or more donees, see Civil Code §§ 860, 1385.4.

§ 190. Definitions

As used in this chapter, unless otherwise clearly required by the context:

(a) "Beneficiary" means and includes any person entitled, but for his disclaimer, to take an interest (1) by intestate succession, (2) by devise, (3) by legacy or bequest, (4) by succession to a disclaimed interest, (5) by virtue of an election to take against a will, (6) as beneficiary of a testamentary trust, (7) pursuant to the exercise or nonexercise of a power of appointment, (8) as donee of any power of appointment, or (9) as beneficiary of an inter vivos gift, whether outright or in trust;

(b) "Interest" means and includes the whole of any property, real or personal, legal or equitable, or any fractional part, share or particular portion or specific assets thereof, or any estate in any such property, or power to appoint, consume, apply or expend property, or any other right, power, privilege or immunity relating thereto;

(c) "Disclaimer" means a written instrument which declines, refuses, renounces or disclaims any interest which would otherwise be succeeded to by a beneficiary;

(d) "Disclaimant" means a person who executes a disclaimer on his own behalf or on behalf of another.

(Added by Stats.1972, c. 990, § 1.)

Cross References

Gifts, generally, see Civil Code § 1146 et seq.
Powers of appointment, see Civil Code § 1380.1 et seq.

§ 190.1. Beneficiary; contents of disclaimer

A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this chapter. The disclaimer shall (i) identify the decedent or donor, (ii) describe the property or part thereof or interest therein disclaimed, (iii) declare the disclaimer and the extent thereof, and (iv) be signed by the disclaimant.

(Added by Stats.1972, c. 990, § 1.)

§ 190.2. Infant, incompetent, conservatee or decedent; disclaimer by guardian, conservator or representative

Text of section operative until Jan. 1, 1981

A disclaimer on behalf of an infant, incompetent, conservatee or decedent shall be made by the guardian of the estate of the infant, the guardian of the estate of the incompetent, the conservator of the estate of the conservatee, or the personal representative of the decedent.

(Added by Stats.1972, c. 990, § 1.)

For text of section operative Jan. 1, 1981, see § 190.2, post.

§ 190.2. Infants, incompetent, conservatee or decedent; disclaimer by guardian, conservator or representative

Text of section operative Jan. 1, 1981

A disclaimer on behalf of a minor, conservatee, or decedent shall be made by the guardian of the estate of the minor, the conservator of the estate of the conservatee, or the personal representative of the decedent.

(Added by Stats.1972, c. 990, § 1. Amended by Stats.1979, c. 730, § 97.)

For text of section operative until Jan. 1, 1981, see § 190.2, ante.

§ 190.3. Effectiveness of disclaimer; knowledge of disclaimant; presumptions of reasonable time

A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(a) Except as otherwise provided in subsection (c), a disclaimer shall be conclusively presumed to have been filed within a reasonable time if filed as follows:

(1) In case of interests created by will, within nine months after the death of the person creating the interest, or within nine months after the interest becomes indefeasibly vested, whichever occurs later. Interests resulting from the exercise or nonexercise of a testamentary power of appointment shall be deemed created by the donee of the power for purposes of this chapter.

(2) In case of interests arising from intestate succession, within nine months after the death of the person dying interstate.

(3) In case of interests created by inter vivos trusts, within nine months after the interest becomes indefeasibly vested. Interests resulting from the exercise or nonexercise of a nontestamentary power of appointment shall be deemed created by the donee of the power for purposes of this chapter.

(4) In other cases, within nine months after the first knowledge of the interest is obtained by a person able to disclaim, or within nine months after the interest becomes indefeasibly vested, whichever occurs later.

(b) If the disclaimer is not filed within the time set forth in subsection (a), the disclaimant shall have the burden to establish the disclaimer was filed within a reasonable time after he acquired knowledge of the interest.

(c) A disclaimer shall be conclusively presumed not to have been filed within a reasonable time after the person able to disclaim acquired knowledge of the interest if:

(1) An interest in the property which is in whole or in part sought to be disclaimed has been acquired by a purchaser or encumbrancer for value subsequent to, or concurrently with the creation of the interest sought to be disclaimed and prior to such disclaimer, and

(2) One year has elapsed from the death of the person buying intestate or creating by will the interest sought to be disclaimed, or from the date of the transfer by inter vivos gift, whether outright or in trust.

(Added by Stats.1972, c. 990, § 1. Amended by Stats.1976, c. 860, § 1.)

Cross References

Presumptions, see Evidence Code § 600 et seq.
Conclusive presumptions, see Evidence Code § 620 et seq.

§ 190.4. Filing of disclaimers; place; disclaimers affecting realty

The disclaimer shall be filed as follows:

(a) In case of interests created by will or arising from intestate succession, with the superior court in the county in which the estate of the decedent is administered; if there is no administration, with the superior court in the county in which administration would be proper.

(b) In case of interests created by an inter vivos trust, with the trustee then acting.

(c) In other cases, with the person creating the interest.

Disclaimers made pursuant to this chapter which affect real property or obligations secured by real property shall be acknowledged and proved, and may be certified and recorded, in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof shall apply to such disclaimers with like effect, without regard to the date when the disclaimer was filed, if at all, pursuant to subdivisions (a) through (c) of this section. Failure to so file a disclaimer which is recorded pursuant to this section shall not affect the validity of any transaction with respect to such real property or obligation secured thereby, and the general laws of this state on recording and its effect shall govern any such transaction.

(Added by Stats.1972, c. 990, § 1.)

Cross References

Administration of estates and probate of wills, jurisdiction, see § 301.
Proof and acknowledgement of instruments, see Civil Code § 1180 et seq.
Recorder, see Government Code § 27201 et seq.
Recording transfers, see Civil Code § 1169 et seq.
Transfer of real property, see Civil Code § 1091 et seq.

§ 190.5. Binding effect on beneficiaries and claimants; waiver

A disclaimer, when effective, shall be binding upon the beneficiary and all persons claiming by, through or under him. A person who, under this chapter, could file a disclaimer, may instead file a written waiver of a right to disclaim and such waiver, when filed, shall be binding upon the beneficiary and all persons claiming by, through or under him.

(Added by Stats.1972, c. 990, § 1.)

§ 190.6. Effect of interest disclaimed

Unless otherwise provided in the will, inter vivos trust, exercise of the power of appointment, or other written instrument creating or finally determining an interest, the interest disclaimed and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, shall descend, go, be distributed or continued to be held as if the beneficiary disclaiming had predeceased the person creating the interest. In every case, the disclaimer shall relate back for all purposes to the date of the creation of the interest.

(Added by Stats.1972, c. 990, § 1.)

Cross References

Death of devisee or legatee of limited interest, effect on remainderman, see § 140.

§ 190.7. Restriction on making disclaimer; acceptance by beneficiary; exception

A disclaimer may not be made after the beneficiary has accepted the interest to be disclaimed. An acceptance does not preclude a beneficiary from thereafter disclaiming all or part of any interest to which he became entitled because another person disclaimed an interest and of which interest the beneficiary or person able to disclaim on his behalf had no knowledge. For the purposes of this chapter, if a disclaimer has not theretofore been filed, a beneficiary has accepted an interest if he, or someone acting on his behalf, (1) makes a voluntary assignment or transfer of, or contract to assign or transfer, the interest or part thereof, or (2) executes a written waiver of the right to disclaim the interest, or (3) sells or otherwise disposes of the interest or any part thereof pursuant to judicial process.

(Added by Stats.1972, c. 990, § 1.)

§ 190.8. Right to disclaim not affected by spendthrift or other restrictions

The right to disclaim shall exist irrespective of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction.

(Added by Stats.1972, c. 990, § 1.)

§ 190.9. Operative effect of chapter

Any interest created prior to the effective date of this chapter which has not been accepted, may be disclaimed on or after August 16, 1972, in the manner provided herein; provided, however, that no interest

which has arisen prior to the effective date of this chapter in any person other than the beneficiary, shall be destroyed or diminished by any action of the disclaimant taken pursuant to this chapter.

(Added by Stats.1972, c. 990, § 1. Amended by Stats.1976, c. 860, § 2.)

§ 190.10. Savings clause

This chapter shall not limit or abridge the presently existing rights of any person to assign, convey, release or disclaim any property or interest therein.

(Added by Stats.1972, c. 990, § 1.)

EXHIBIT 2

Section 2-801. [Renunciation of Succession.]

(a) A person or the representative of an incapacitated or protected person, who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument, or appointee under a power of appointment exercised by a testamentary instrument, may renounce in whole or in part the right of succession to any property or interest therein, including a future interest, by filing a written renunciation under this Section. The right to renounce does not survive the death of the person having it. The instrument shall (1) describe the property or interest renounced, (2) declare the renunciation and extent thereof, and (3) be signed by the person renouncing.

Comment to Subsection (a)

Who May Disclaim: At common law it was settled that the taker of property under a will had the right to accept or reject a legacy or devise (per Abbott, C. J. in Townson v. Tickell, 3 B & Ald 3, 136, 106 Eng.Rep. 575, 576). The same rule prevails in the United States (Peter v. Peter, 343 Ill. 493, 175 N.E. 846 (1931), 75 ALR 890). It is said that no one can make another an owner of an estate against his consent by devising it to him. See, for example, People v. Flanagin, 331 Ill. 203, 162 N.E. 848, (1928) 60 ALR 305:

> "The law is clear that a legatee or devisee is under no obligation to accept a testamentary gift . . . and he may renounce the gift, by which act the estate will descend to the heir or pass in some other direction under the will . . ."

Under the rule permitting the disclaimer of testate successions, the disclaimed interest related back to the date of the testator's

death so that the interest did not vest in the grantee but remained in the original owner as if the will had never been executed (People v. Flanagin, *supra*).

Unlike the devisee or legatee, an heir had no common law power to prevent passage of title to himself by disclaimer. "An heir at law is the only person in whom the law of England vests property, whether he will or not," declares Williams on Real Property, and adds, "No disclaimer that he may make will have any effect, though, of course, he may as soon as he pleases dispose of the property by ordinary conveyance." (Williams on Law of Real Property 75 [2d Am.Ed.1857]. See also 6 Page on Wills [Bowe-Parker Revision] Section 49.1.)

The difference between testate and intestate successions in respect to the right to disclaim, has produced a number of illogical and undesirable consequences. An heir who sought to reject his inheritance was subjected to the Federal gift tax on the theory that since he could not prevent the passage of title to himself, any act done to rid himself of the interest necessarily involved a transfer subject to gift tax liability [Hardenberg v. Com'r, 198 F.2d 63 (8th Cir.) cert. denied, 344 U.S. 863, (1952) aff'g 17 T.C. 166 (1951); Maxwell v. Com'r, 17 T.C. 1589 (1952). See Lauritzen, Only God Can Make an Heir, 48 NWL Rev. 568; Annotation 170 ALR 435]. On the other hand, a legatee or devisee who rejected a legacy or devise under the will incurred no such tax consequences [Brown v. Routzahn, 63 F.2d 914 (6th Cir.) cert. denied, 290 U.S. 641 (1933)].

Subsection (a) places an heir on the same basis as a devisee or legatee and provides that he and others upon whom successions may devolve, have the full right to disclaim in whole or in part the passage of property to them, with the same legal consequences applying in all such cases.

Successive disclaimers are permitted by the express inclusion of "person succeeding to a disclaimed interest" among those who may disclaim.

Beneficiary: The term beneficiary is used in a broad sense to include any person entitled, but for his disclaimer, to possess or enjoy an equitable or legal interest, present or future, in the property or interest, including a power to consume, appoint, or apply it for any purpose or to enforce the transfer in any respect.

Subsection (a) extends the right to disclaim to the representative of an incapacitated or protected person. This accords with the general rule that the probate or surrogate court in the exercise of its traditional jurisdiction over the person and estate of a minor or incompetent may authorize or direct the guardian, conservator or committee to exercise the right on behalf of his ward when it is in the ward's interest to do so. Davis v. Mather, 309 Ill. 284, 141 N.E. 209 (1923).

On the other hand, absent a statute, the general rule is that the right to disclaim is personal to the person entitled to exercise it, and dies with him in the absence of fraud or concealment or conflict of interest of his representative, even though the time within which the right might have been

utilized has not expired and even though he may be incompetent. Rock Island Bank & Trust Co. v. First Nat. Bank of Rock Island, 26 Ill.2d 47, 185 N.E.2d 890 (1962), 3 ALR 3d 114. Subsection (a) adopts this position by stating that the right to disclaim does not survive the death of the person having it.

The Act makes no provision here or elsewhere, for an extension of time to disclaim or other relief from a strict observance of the statutory requirements for disclaimer and the time limitations for expressing the right of disclaimer applies to persons under disability as well as to others.

What May be Disclaimed: Subsection (a) specifies that the "succession" to any property, real or personal or interest therein, may be disclaimed, and it is immaterial whether it derives by way of will, intestacy, exercise of a power of appointment or disclaimer. It would include the right to renounce any survivorship interest in the community in a community property state. *Cf.* U. S. v. Mitchell, 403 U.S. 190 (1971), rev'g 430 F.2d (5th Cir. 1970), aff'g 51 T.C. 641 (1969).

Future Interests: Subsection (a) contemplates the disclaimer of future interests by reference to "beneficiary under a testamentary instrument" and "appointee under a power of appointment." The time for making such a disclaimer is dealt with in Subsection (b).

Partial Disclaimer: The status of partial disclaimers has been uncertain in many states. The result has often turned on whether the gift is "severable" or constitutes a "single, aggregate" gift [Olgesby v. Springfield Marine Bank, 395 Ill. 37, 69 N.E.2d 269 (1946); Brown v. Routzahn, *supra*]. Subsection (a) makes it clear that a partial, as well as a total, disclaimer is permitted.

Discretionary administrative and investment powers under a trust have been held to constitute a "severable" interest and subject to partial disclaimer. Estate of Harry C. Jaecker, 58 T.C. 166, CCH Dec. 31,356 (1972).

Method of Disclaiming: In many states no satisfactory case law has existed as to the form and manner of making disclaimers of devises or legacies under wills. See Annotation 93 ALR2d 8—What Constitutes or Establishes Beneficiary's Acceptance of Renunciation of Bequest or Devise. Because certainty of titles and the expeditious administration of estates makes definiteness desirable in this area, Subsection (a) requires a disclaimer to (i) describe the property or interest disclaimed; (ii) declare the disclaimer and the extent thereof; and (iii) be signed by the disclaimant.

(b) (1) An instrument renouncing a present interest shall be filed not later than [9] months after the death of the decedent or the donee of the power.

(2) An instrument renouncing a future interest may be filed not later than [9] months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested.

(3) The renunciation shall be filed in the [probate] court of the county in which proceedings have been commenced for the administration of the estate of the deceased owner or deceased donee of the power or, if they have not been commenced, in which they could be commenced. A copy of the renunciation shall be delivered in person or mailed by registered or certified mail to any personal representative, or other fiduciary of the decedent or donee of the power. If real property or an interest therein is renounced, a copy of the renunciation may be recorded in the office of the [Recorder of Deeds] of the county in which the real estate is situated.*

** If Torrens system is in effect, add provisions to comply with local law.*

Comment to Subsection (b)

Time for Making Disclaimer: At common law, no specific time evolved within which disclaimer had to be made. The only requirement was that it be within a "reasonable" time (In re Wilson's Estate, 298 N.Y. 398, 83 N.E.2d 852 (1949); Ewing v. Rountree, 228 F.Supp. 137 (D. C.Tenn.1964). As a result, divergent holdings were reached by the courts (Brown v. Routzahn, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933). Subsection (b) fixes a definite time for filing of disclaimers. This approach follows the pattern of the Federal estate tax law which prescribed the time for filing estate tax returns in terms of the decedent's death. The time allowed should overlast the time for filing claims and contesting the will and enable the executor or administrator to know with certainty who the takers of the estate will be. On the other hand, it should not be so long as to work against an early determination of the acceptance or rejection of succession to an estate, or increase the risk of inadvertent acceptance of the benefits of the property, creating an estoppel. In the case of future interests the disclaimer period should run from the time the takers of the interest are finally ascertained and their interests indefeasibly fixed. Seifner v. Weller, 171 S.W.2d 617 (Mo. 1943). For the consequence of selecting too short a period, see Brodhag v. U. S., 319 F.Supp. 747 (S.D.W.Va., 1970) involving a 2-month period fixed by West Virginia law.

In the case of future interests it should be noted that the person need not wait until the occurrence of the determinative event before filing a disclaimer, but may do so at any time after the death of the decedent or donee, so long as it is made "not later than" the prescribed period.

Federal Gift Tax Implications: Disclaimers have significance under the Federal gift tax law. Section 2511(a) of the Internal Revenue Code imposes a gift tax upon the transfer of property by gift whether the transfer is in

trust or otherwise, and whether the gift is direct or indirect. The Treasury regulations under this section state that where local law gives the beneficiary, heir or next-of-kin an unqualified right to refuse to accept ownership of property transferred from a decedent, whether by will or by intestacy, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a "reasonable time" after knowledge of the existence of the transfer.

A "reasonable time" for gift tax purposes is not defined in the Code or regulations. It has been held that the courts will look to the law of the states in determining the question, (Brown v. Routzahn, 63 F.2d 914 (6th Cir.) cert. denied, 290 U.S. 641 (1933)), not conclusively, but as relevant and having probative value (Keinath v. C.I.R., 480 F.2d 57 (8th Cir. 1973), rev'g 58 T.C. 352 (1972)), and that an unequivocal disclaimer filed within 6 months of the determinative event is made within a "reasonable time." It has been held, further, that as regards future interests, the "reasonable time" period runs from the termination of the preceding estate or interest, and not from the time the transfer was made, Keinath v. C.I.R., *supra*.

Place of Filing Disclaimer: Subsection (b) requires a disclaimer to be filed in the probate court. If real property or an interest therein is involved, a copy of the disclaimer may also be recorded in the office of the recorder of deeds or other appropriate office in the county in which the real estate is situated. If the Torrens system is in effect, appropriate provisions should be added to comply with local law.

Notice: A copy of the disclaimer is required to be delivered in person or mailed by registered or certified mail to the personal representative or other fiduciary of the decedent or of the donee of the power as the case may be.

(c) Unless the decedent or donee of the power has otherwise provided, the property or interest renounced devolves as though the person renouncing had predeceased the decedent or, if the appointment exercised by a testamentary instrument, as though the person renouncing had predeceased the donee of the power. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as though the person renouncing had predeceased the decedent or the donee of the power. A renunciation relates back for all purposes to the date of the death of the decedent or the donee of the power.

Comment to Subsection (c)

Devolution of Disclaimed Property: When a beneficiary disclaims his interest under a will, the question arises as to what happens to the rejected interest. In People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928), 60 ALR 305, the court, quoting the New York case of

Burritt v. Sillman, 13 N.Y. 93 (1855) said that the disclaimed property will "descend to the heir or pass in some other direction under the will." From this, it may be assumed that the court meant that if the decedent left no will, the renounced interest passed according to the rules of descent, but if he left a will, it passed according to its terms.

It has been generally thought that devolution in the case of disclaimer should be the same as in the case of lapse, which is controlled by sections of the probate law. Subsection (c) takes this approach. It provides that unless the will of the decedent or the donee of the power has otherwise provided, the disclaimed interest devolves as if the disclaimant had predeceased the decedent or the donee of the power. In every case the disclaimer relates back to the date of the death of the decedent or of the donee. The provision that the disclaimer "relates back", codifies the rule that a renunciation of a devise or legacy relates to the date of death of the decedent or donee and prevents the succession from becoming operative in favor of the disclaimant. See In re Wilson's Estate, 298 N.Y. 398, 83 N.E.2d 852 (1949). Also, Bouse, for use of State v. Hull, 168 Md. 1, 176 A. 645 (1935).

Acceleration of Future Interests: If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Subsection (c) provides that remainder interests are accelerated, the second sentence specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the deceased owner or deceased donee of the power. Thus, if T. leaves his estate in trust to pay the income to his son for life, remainder to his son's children who survive him, and S. disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or that one or more of the living children may die during their father's lifetime.

Effect of Death or Disability of Person Entitled to Disclaim: The effect of death of a person entitled to disclaim, including one under disability, is discussed under Subsection (a). A guardian or conservator of the estate of an incapacitated or protected person may disclaim for the ward. Subsection (b) makes no provision for an extension of time or for other relief in case of disability from the observance of the statutory requirements for effective disclaimer. The intent is that the period for disclaimer applies to a person under disability as well as to others, and includes a court which purports to act on behalf of one under disability in the absence of fraud, misconduct or other unusual circumstances. Pratt v. Baker, 48 Ill.App.2d 442, 199 N.E. 2d 307 (1964).

Rights of Creditors and Others: As regards creditors, taxing au-

thorities and others, the provision for "relation back" has the legal effect of preventing a succession from becoming operative in favor of the disclaimant. The relation back is "for all purposes" which would include, among others for the purpose of rights of creditors, taxing authorities and assertion of dower. It is immaterial that the effect is to avoid the imposition of a higher death tax than would be the case if the interest had been accepted: Estate of Aylsworth, 74 Ill.App.2d 375, 219 N.E.2d 779 (1966) [motive for the disclaimer is immaterial]; People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928), 60 ALR 305; Cook v. Dove, 32 Ill.2d 109, 203 N.E.2d 892 (1965) [upholding for inheritance tax the right of appointees to take by default rather than under the power-holder's exercise of power]; Matter of Wolfe's Estate, 179 N.Y. 599, 72 N.E. 1152 (1904); eff'g 89 App.Div. 349, 83 N. Y.Supp. 949 (1903); Brown v. Routzahn, 63 F.2d 914 (6th Cir.), cert. denied 290 U.S. 641 (1933); In re Stone's Estate, 132 Ia. 136, 109 N.W. 455 (1906); Tax Commission v. Glass, 119 Ohio St. 389, 164 N.E. 425 (1929); U. S. v. McCrackin, 189 F.Supp. 632 (S. D.Ohio 1960).

Similarly, numerous cases have held that a devisee or legatee can disclaim a devise or legacy despite the claims of creditors: Hoecker v. United Bank of Boulder, 476 F.2d 838 (CA 10, 1973), aff'g 334 F.Supp. 1080 (D.Colo.1971) (bankruptcy); U. S. v. McCrackin, *supra* (Federal income tax liens); Shoonover v. Osborne, 193 Ia. 474, 187 N.W. 20 (1922); Bradford v. Calhoun, 120 Tenn. 53, 109 S.W. 502 (1908); Carter v. Carter, 63 N.J.Eq. 726, 53 A. 160 (1902); Estate of Hansen, 109 Ill.App.2d 283, 248 N.E.2d 709 (1969) (judgment creditor); 37 Mich.L. Rev. 1168; 43 Yale L J 1030; 27 ALR 477; 133 ALR 1428. A creditor is not entitled to notice of the disclaimer (In re Estate of Hansen, 109 Ill.App.2d 283, 248 N. E.2d 709 (1969)).

(d) (1) The right to renounce property or an interest therein is barred by (i) an assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor, (ii) a written waiver of the right to renounce, (iii) an acceptance of the property or interest or benefit thereunder, or (iv) a sale of the property or interest under judicial sale made before the renunciation is effected.

(2) The right to renounce exists notwithstanding any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(3) A renunciation or a written waiver of the right to renounce is binding upon the person renouncing or person waiving and all persons claiming through or under him.

Comment to Subsection (d)

Bars to Disclaimer—Waiver—Estoppel: It may be necessary or advisable to sell real estate in a decedent's estate before the expiration of the period permitted for disclaimer. In such case, the possibility of a disclaimer being filed within the period, could be a deterrent to sale and delivery of good title. Subsection (d) expressly authorizes an heir, devisee, legatee or other person entitled to disclaim, to indicate in writing his intention to "waive" his right of disclaimer, and thus avoid any delay in the completion of a sale or other disposition of estate assets. The written waiver bars the right of the person subsequently to disclaim the property or interest therein and is binding on persons claiming through or under him.

Similarly, Subsection (d) provides that various acts of a person entitled to disclaim in regard to property or an interest therein, such as making an assignment, conveyance, encumbrance, pledge or transfer of the property or interest, or a contract therefor, bars the right of the person to disclaim and is binding on all persons claiming through or under him.

Spendthrift Provisions: The existence of a limitation on the interest of an heir, legatee, devisee or other disclaimant in the nature of a spendthrift provision or similar restriction is expressly declared not to affect the right to disclaim. Without this provision, there might be a question as to whether the beneficiary of a spendthrift trust can disclaim under the statute (Griswold, Spendthrift Trust [2d Ed.] Section 524, p. 603). If a person who is under no legal disability wishes to refuse a beneficial interest under a trust, he should not be powerless to make an effective disclaimer even though the intended interest once accepted by him would be inalienable. (Scott on Trusts, Section 337.7, p. 2683, 3d Ed.)

When a beneficial interest is accepted by a beneficiary, he cannot thereafter disclaim or release it (*Griswold, supra*, Section 534, p. 603, note 48). As to what conduct amounts to an acceptance, see In Re Wilson's Estate, 298 N.Y. 398, 83 N.E.2d 852 (1949).

Judicial Sale: The section provides that the right to disclaim is barred by a sale of the property or interest under a judicial sale. Judicial sales are ordered in many different types of proceeding such as foreclosure of mortgage or trust deed, enforcement of lien, partition proceedings and proceedings for the sale of real property of a decedent or ward for certain purposes. Probate laws frequently permit a representative to mortgage or pledge property of the decedent or ward in certain circumstances. Execution sales are made pursuant to a writ to satisfy a money judgment. Subsection (d) has the effect of providing that the making of a judicial sale for the account of the heir, devisee, or beneficiary, bars him from renouncing the property or interest. To be distinguished from a judicial sale, is a taking pursuant to eminent domain, which is considered to be a taking of property without the owner's consent and unrelated to his obli-

gations or commitments. The right to disclaim the proceeds of a condemnation action if otherwise timely and in accordance with the Act, should not, therefore, be barred under this section.

(e) This Section does not abridge the right of a person to waive, release, disclaim, or renounce property or an interest therein under any other statute.

Comment to Subsection (e)

Subsection (e) provides that the right to disclaim under the law does not abridge the right of any person to waive, release, disclaim or renounce any property or interest therein under any other statute. The principal statutes to which this provision is pointed are those dealing with spousal renunciations and release of powers.

Being a codification of the common law in regard to the renunciation of the property, the Act is intended to constitute an *exclusive remedy* for the disclaimer of testamentary successions apart from those provided by other statutes, and supplants the common law right to disclaim.

(f) An interest in property existing on the effective date of this Section as to which, if a present interest, the time for filing a renunciation under this Section has not expired, or if a future interest, the interest has not become indefeasibly vested or the taker finally ascertained, may be renounced within [9] months after the effective date of this Section.

Comment to Subsection (f)

Subsection (f) deals with the application of the Act to property interests under instruments or in estates in existence on the effective date. If the interest is a present one and the filing time has not expired, the holder is given a full period after enactment within which to disclaim the interest. If the interest is a future one, the holder is given a full period after the interest becomes indefeasibly vested or the takers finally ascertained, after enactment in which to disclaim it. If T dies in 1960 trusteeing his estate to W for life, remainder to such of T's sons as are living at W's death and W dies in 1975, the Act permits a son to disclaim his remainder interest after it ripens even though it arises under an instrument predating the effective date of the Act. The application of statute to pre-existing instruments in like situations finds support in cases such as Will of Allis, 6 Wis.2d 1, 94 N.W.2d 226, (1959), 69 ALR2d 1128.

COMMENT TO SECTION 2-801

The above text, consists of Sections 1 through 6 of Uniform Disclaimer of Transfers By Will, Intestacy or Appointment Act of 1973, redesignated as subsections (a) through (f).

The Comments following each subsection are the Official Comments to the 1973 statute. The word "renunciation" has been substituted for "disclaimer" because the original Section 2-801 used the term "renunciation" and several cross-references to this term appear in other sections of this Code. It is the view of the Joint Editorial Board that the terms "renunciation" and "disclaimer" have the same meaning.

The principal substantive difference between original Section 2-801 and the 1973 replacement therefor is that the former permitted renunciation by the personal representative of a person who might have renounced during his lifetime. Under the new uniform act, which is now the official text of Section 2-801, the right to renounce terminates upon the death of the person who might have renounced during his lifetime. Also, the original version was less precise than the present version in the important provisions of subsection (b) which govern the time for renunciation.

(The balance of the comment is the same as the original comment to Section 2-801.)

This section is designed to facilitate renunciation in order to aid postmortem planning. Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes not expressed in a properly executed will.

Under the rule of this section, renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person, taking by representation. For consistency the same rule is adopted for renunciation by a devisee; if the devisee is a relative who leaves issue surviving the testator, the issue will take under Section 2-605; otherwise disposition will be governed by Section 2-606 and general rules of law.

The section limits renunciation to nine months after the death of the decedent or if the taker of the property is not ascertained at that time, then nine months after he is ascertained. If the personal representative is concerned about closing the estate within that nine months period in order to make distribution, he can obtain a waiver of the right to renounce. Normally this should be no problem, since the heir or devisee cannot renounce once he has taken possession of the property.

The presence of a spendthrift clause does not prevent renunciation under this section.

EXHIBIT 3

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

OFFICE OF THE DEAN
SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

August 31, 1981

Robert J. Murphy III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D2
Palo Alto, California 94306

Dear Bob:

Please forgive my delay in responding to your letter concerning the disclaimer provisions of the California Probate Code.

Since 1976 the Internal Revenue Code has contained a specific provision, §2518, dealing with the validity of disclaimers for federal estate, gift, and generation-skipping transfer tax purposes. Section 2518 is in general much narrower than typical state disclaimer statutes. For example, under Probate Code §190.3 a disclaimer is effective under California law if "filed within a reasonable time after the person able to disclaim acquires knowledge of the interest." Under §2518, knowledge is irrelevant; instead a general nine-month time limit is adopted, with a special exception for persons under 21, for whom the nine-month period begins to run only when they reach 21. Another significant difference is the treatment of interests resulting from the exercise or nonexercise of powers of appointment. Under Probate Code §190.3(a) the time period under state law for disclaiming interests resulting from the exercise or nonexercise of a special power of appointment runs from the date of exercise (or lapse) of the power by the donee. Under §2518, the holder of a special power, permissible appointees, or takers in default of appointment must disclaim within a nine-month period after the creation of the power. Prop. Reg. §25.2518-2(c)(2).

There is no logical reason for California to narrow its disclaimer statute to conform to the federal rule. However if a disclaimer would be acceptable under §2518, but not under California law, the California law in that case would be limiting the tax planning ability of its citizens. Fortunately, the California statute is quite broad. In particular, it permits disclaimers of inter vivos transactions, which are also permitted under §2518. The California statute is thus preferable, from a tax planning viewpoint, to the Uniform Probate Code in this regard.

The importance of a state's disclaimer law has been greatly diminished by an amendment to §2518 contained in the recent Economic Recovery Tax Act of 1981. Under newly added §2518(c)(3), a disclaimer may still be able to qualify for federal tax purposes, even if it is ineffective under local law. All that is required is that the individual timely (i.e., within the usual nine-month period) transfer the property to the person or persons who would have otherwise received the property had the transferor made an effective disclaimer under local law. Of course, the transferor in all cases cannot have accepted the interest or any of its benefits. Thus local law will be applicable to determine the identity of the transferee, but the transfer need not satisfy any requirements of the local disclaimer statute. For this reason there appears to be no need to alter the California Disclaimer statute to increase the availability of the federal disclaimer statute.

I hope this rather brief analysis will be of some use. Please feel free to contact me if you have any questions.

Sincerely,

Bruce Wolk

Bruce Wolk
Associate Dean

BW:oln