

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Florida Disclaimer of Property Interests Act

New Florida Statutes Chapter 739

Revised: March 13, 2005

I. SUMMARY

The legislative proposal (the “Act”) repeals Florida’s existing statutory disclaimer statutes, Florida Statutes Section 689.21 (governing disclaimers of non-testamentary property interests) and Section 732.801 (governing disclaimers of testamentary property interests). The Act contains, in one chapter, the exclusive mechanism under Florida law for disclaiming an interest in a variety of testamentary and non-testamentary property interests.

The Act is based on the 1999 Uniform Disclaimer of Property Interests Act (“UDPIA”) as promulgated by NCCUSL. The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Section of The Florida Bar (the “Committee”) has made revisions to the UDPIA in order to retain certain desirable features of current Florida statutory disclaimer law not present in the UDPIA. The Committee has also modified certain provisions of the UDPIA that were not consistent with Florida law or which, in the Committee’s opinion, required modification in order to produce a superior statute.

The comments on the sections of the Act are from NCCUSL to the extent that the Committee has retained provisions of the UDPIA verbatim or largely intact. References in the NCCUSL comments to sections of the uniform act have been changed to refer to sections within proposed Chapter 739.

NCCUSL comments are in regular type. *The Committee’s comments are in italics.*

**II. EFFECT OF PROPOSED CHANGES
(SECTION-BY-SECTION ANALYSIS)**

Section 739.101

No comment.

Section 739.102

The definition of “disclaimant” limits the term to the person who would have received the disclaimed property or power if the disclaimer had not been made. The disclaimant is not necessarily the person making the disclaimer; instead, the person making the disclaimer may be a guardian, custodian, or other fiduciary acting for the disclaimant or the personal representative of the disclaimant's estate.

The term “disclaimed interest” refers to the subject matter of a disclaimer of an interest in property and provides a compact term the use of which simplifies the drafting of Section 739.201.

The definition of “disclaimer” expands previous definitions. Prior Uniform Acts provided for a disclaimer of “the right of succession to any property or interest therein” (*Current Section 732.801 is based on the 1978 Uniform Act and uses this terminology*). These previously authorized types of disclaimers are continued by the present language referring to “an interest in . . . property.” The language referring to “power over property” broadens the permissible scope of disclaimers to include any power over property that gives the power-holder a right to control property, whether it be cast in the form of a power of appointment or a fiduciary's management power over property or discretionary power of distribution over income or corpus.

The term “insolvency” has the same meaning in the Act as in the Florida Uniform Fraudulent Transfer Act, Chapter 726 of the Florida Statutes. Existing Florida disclaimer statutes, while barring disclaimers by insolvent disclaimants, did not define the term “insolvent.”

The term “future interest,” is used in Section 739.201(3)(c) in connection with the acceleration rule in that provision.

The term “jointly held property” includes not only a traditional joint tenancy but also other property that is “held,” but may not be “owned,” by two or more persons with a right of survivorship. One form of such property is a joint bank account between parties who are not married to each other which, under the laws of many states, is owned by the parties in proportion to their deposits. This “holding” concept, as opposed to “owning,” may also be true with joint brokerage accounts under the law of some states. *See Treas. Regs. § 25.2518-2(c)(4). Tenants by the entirety property is excluded from the definition of “jointly held property.” Section 739.203 deals exclusively with tenants by the entirety property.*

The term “time of distribution” is used in determining to whom the disclaimed interest passes as provided in 739.201. Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, If B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of

B's remainder is A's death. At that time the trust terminates and B's ownership of the remainder becomes outright ownership of the trust property.

The term “trust” means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. *The Act specifically includes honorary trusts and “pet trusts” under Florida Statutes 737.116 within the meaning of “trust.”*

The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of “trust” is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust is created. Commercial trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. *See* John H. Langbein, “The Secret Life of the Trust: The Trust as an Instrument of Commerce,” 107 Yale L.J. 165 (1997).

Section 739.103

*The Act provides the **exclusive** avenue for disclaiming a power or interest in property. This is different from 689.21 and 732.801, and the UDPIA, all of which provide that the statute does not abridge any common law right to disclaim. NCCUSL included the provision in UDPIA invoking common law to permit adopting states to preserve their common-law bars on disclaimers by insolvent beneficiaries. See Hirsch, “Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act,” 29 Fla. St. Law Rev. 109,115, fn.29. This is not necessary in the Act, which, as in existing Sections 689.21 and 732.801 of the Florida Statutes, explicitly denies insolvents the right to disclaim.*

Incorporation of the common law into the Act, in the manner of the UDPIA, would decodify the statute; to enact the UDPIA would be to enact the common law. That is what Florida’s statutes currently do. However, the Committee believes that to continue this approach would be an inadvisable preservation of an element of substantial uncertainty. Especially because disclaimers under the Act are not time-barred, the Committee believes that the Act should be the exclusive means of disclaimers in Florida.

Section 739.104

Subsections (1) and (2) give persons a broad power to disclaim both interests in and powers over property. The ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility

of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. (In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (1) continues the provisions of current law (*and of current Florida law (see F.S. 689.21(7) and 732.802(7))*) by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on a person. This provision follows from the principle behind all disclaimers - no one can be forced to accept property - and extends that principle to powers over property.

Subsection (1) explicitly permits conditional disclaimers. Neither F.S. 689.21 nor F.S. 732.801 contains any explicit provisions either permitting or prohibiting conditional disclaimers.

A conditional disclaimer could be useful when, for example, several persons must all disclaim in order to achieve a desired result, and any one of them would not disclaim unless joined by others. The Act (739.104(2), discussed below) continues present Florida law by not permitting trustees and other fiduciaries to make disclaimers without prior court authorization (assuming that the trust agreement does not grant the trustee this power). Permitting multiple beneficiaries of a trust to arrange among themselves for a series of inter-related disclaimers subject to conditions makes it less important that a trustee have the ability to make a single disclaimer that would have the same result.

A disclaimant might want to condition his or her disclaimer on a desired tax or non-tax outcome. Finally, the general thrust of the Act to increase the flexibility of the disclaimer technique; permitting conditional disclaimers is consonant with this goal.

*To qualify under Code Section 2518, a disclaimer must be an “irrevocable and unqualified refusal by a person to accept an interest in property” Internal Revenue Code (hereafter, the “Code”) §2518(b). It could be argued that a conditional disclaimer would not constitute an “unqualified” refusal to accept the interest sought to be disclaimed, so that a conditional disclaimer cannot be tax-qualified. **The Committee expresses no opinion as to whether a conditional disclaimer can, or cannot, be a tax-qualified disclaimer.***

If by “disclaimer” the Code refers exclusively to the written document evidencing the decision not to accept an interest in property, the inclusion of any condition in the document would disqualify the disclaimer. However, if by “disclaimer” the Code refers to the rejection of the property interest, then a conditional disclaimer need not necessarily fail under Section 2518. As long as the refusal to accept the interest is irrevocable and unconditional upon satisfaction of the condition, the presence of a condition should not, by itself, disqualify the disclaimer. The Committee is, however, unaware of any guidance from the Internal Revenue Service or the courts on this point.

Section 739.104(5) of the Act provides that a conditional disclaimer does not become irrevocable until the condition specified by the disclaimant is satisfied. If the condition is satisfied within the time required by the Code and Regulations, and assuming that the disclaimer otherwise

qualifies, it could be argued that the disclaimer should, at that point, be tax-qualified because it would be irrevocable, as required by the statute.

Practitioners who want to be sure that a disclaimer is unquestionably tax-qualified might not want to take the risk of making the disclaimer conditional, or might want to obtain an advance ruling from the Internal Revenue Service. Note, importantly, that **Section 739.104(1) provides a disclaimer is unconditional unless the disclaimant explicitly provides otherwise in the disclaimer.** On the other hand, for those situations where tax concerns are secondary or are not relevant, explicitly providing for conditional disclaimers makes the disclaimer technique even more flexible.

Subsection (2) permits fiduciaries to disclaim interests in or powers over property under certain circumstances discussed below. The Act is less restrictive than current Florida law, but more restrictive than the UDPIA.

Under the currently-effective Florida disclaimer statutes, a disclaimer of an interest in property may be made for a minor, incompetent or deceased beneficiary only if the court finds that the proposed disclaimer meets the following three-part test:

- (a) the disclaimer is in the best interests of those interested in the estate of the beneficiary for whom the disclaimer is to be made;
- (b) the disclaimer is in the best interests of those who take the beneficiary's interest by virtue of the disclaimer; and
- (c) the disclaimer is not detrimental to the best interests of the beneficiary.

It has been the experience of many practitioners that obtaining court approval for a disclaimer for a minor or incapacitated beneficiary under existing law can be difficult. It can reasonably be argued that a disclaimer is usually detrimental to the best interests of the person on whose behalf the disclaimer is sought to be made since the effect of the disclaimer is to divest the person of funds he or she would receive if the disclaimer were not made. The barriers to securing a court-authorized disclaimer for a minor or incapacitated beneficiary on a timely and cost-efficient basis compromises the flexibility of the disclaimer technique. In many cases, it is only through a series of carefully orchestrated disclaimers that otherwise disastrous estate and post-mortem income taxes are avoided.

(Under current Florida law, which ties the effectiveness of the disclaimer to a strict 12-month or 9-month post-mortem timeline, the ability under Code Section 2518(b)(2)(B) to extend the time for disclaiming until the disclaimant attains age 21 is unavailable. But see Section 739.401, which specifically removes the time bar for disclaimers .)

Subsection (2) of the Act changes Florida law to make it easier for fiduciaries to disclaim. The Act does not adopt the extremely open-ended approach to fiduciary disclaimers adopted by the UDPIA, that is, fiduciaries can disclaim subject only to the limitations imposed by generally-applicable fiduciary duties.

Under the Act, to the extent that the instrument creating the fiduciary relationship (i.e., the trust instrument or durable power of attorney) explicitly confers upon the fiduciary the power to disclaim, the fiduciary has the power to disclaim an interest in or power over property within the confines of the governing instrument.

*For other fiduciaries proceeding under the Act (i.e., a trustee where the trust instrument is silent), the fiduciary may seek a court order permitting a disclaimer. **The Act intentionally does not incorporate a standard for use in determining whether or not the court should permit the fiduciary to disclaim.** The absence of a specific standard in the statute is intended to give courts more elbow room to allow disclaimers that might not meet the narrowly-drawn standards in the currently-effective Florida disclaimer statutes, but that would be advisable under the totality of the circumstances.*

*A guardian acting on behalf of a ward can only disclaim with court approval. See F.S. 744.441(20). Except in one instance, the proposed statute does not change this requirement. Under the Act, where the interest that a minor child is to receive comes to the child only as a result of another's disclaimer, the proposed statute permits the minor's natural parent to disclaim on behalf of the minor, **without court approval**, but only if, as a result of the disclaimer, the disclaimed interest does not pass to the parent. Even so, this provision is inapplicable if there is a court-appointed guardian serving as to the minor; in that case, chapter 744 would require court approval in order to make the disclaimer on behalf of the minor.*

Subsection (3) sets forth the formal requirements for a disclaimer. The Act departs from current Florida law to provide that disclaimers do not need to be recorded to be valid under state law. But see §§739.301(12) and 739.601 discussed below. To permit the easy recording of disclaimers, however, the written document of disclaimer must be signed, witnessed and acknowledged in the manner of deeds to real estate in Florida. These requirements also effectively preclude the use of email disclaimers, which are permitted by the Act but which the Committee rejects.

Subsection (4) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. However, a disclaimer by a devisee or donee which seeks to “carve out” a remainder or life estate is not a “qualified disclaimer” for transfer tax purposes, Treas. Reg. § 25.2518-3(b).

*Subsection (5) makes the disclaimer irrevocable *both on the satisfaction of any conditions to which the disclaimant makes it subject (see 739.104(1)), and upon the later to occur of (i) delivery or filing; or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest.* A disclaimer must be “irrevocable” in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time significant for tax purposes, a disclaimer under this Act will always meet the irrevocability*

requirement for tax qualification (*but see discussion on conditional disclaimers under subsection(1)*). The interaction of the Act and the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G. The disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable. Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (6) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional “relation back” doctrine of prior Uniform Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

Section 739.201

Subsection (1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts (*and of current Florida law*) on this subject, but with different wording. Previous Acts have stated that the disclaimer “relates back” to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer “relates back,” the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit.

This Act continues the effect of the relation-back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. The definition of “disclaimers” in 739.102(5) and 739.104(6) taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (1) makes the disclaimer effective as of the time the creator cannot revoke the interest.

Subsection (2) allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. “I give to my cousin A the sum of ten thousand dollars (\$10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B.” The provision may also apply to all

disclaimed interests. A residuary clause beginning “I give my residuary estate, including all disclaimed interests to” is such a provision.

Subsection (3)(a) applies if Subsection (2) does not and if the disclaimant is an individual. Because “disclaimant” is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made, this paragraph would apply to disclaimers by fiduciaries on behalf of individuals.

The general rule is that the disclaimed interest passes as if the disclaimant had died immediately before the interest was created. The general rule does not apply, however, to a remainder interest which is contingent to surviving to distribution: a disclaimer of the contingent remainder passes as if the disclaimant had died before the time for distribution defined in Section 739.102.

The UDPIA provides that all interests disclaimed by individuals pass as if the disclaimant had died before the time for distribution. This rule would effectively bar a tax-qualified disclaimer of a vested, non-contingent, remainder. For example, assume that T’s will creates a testamentary trust to pay income to son S for life. At son’s death, the remainder is to pass to grandson GS, whose remainder is not contingent on his surviving S. If GS disclaims, under the UDPIA the disclaimed interest passes as if GS were not living at S’s death. However, because GS actually survived T, GS’ remainder interest vested. GS therefore has full testamentary power over the vested remainder. Thus, under the UDPIA, the remainder interest in the trust disclaimed by GS will pass as directed in GS’s testamentary documents (or, perhaps, via GS’s inter vivos gift). Because, under the UDPIA provision, GS can direct the disposition of the disclaimed vested remainder interest, GS’s disclaimer automatically fails as a tax-qualified disclaimer under Code Section 2518.

The problem discussed above is solved by providing for the disposition of the disclaimed interest as if the disclaimant had died before the interest was created. In the above example, GS’s interest is created at T’s death. GS will be treated as if he had died before T’s death. This, in turn, prevents GS’s remainder interest from vesting. The disclaimed interest will, therefore, pass to GS’s children living at the time of T’s death pursuant to Florida’s anti-lapse statute (732.603), or if none, under the residue of T’s estate. GS no longer has a power to control the disposition of the disclaimed interest.

The statute provides that disclaimed interests are deemed to be created at the death of the grantor or, for disclaimers of interests transferred inter vivos, at such time as the transfer of the interest is complete for federal gift tax purposes. This rule serves to eliminate the need to refer to the common law to determine when the disclaimed interest was “created”

It is necessary in the case of disclaimed interests in pre-June 12, 2003 revocable trusts to adopt a special rule of statutory construction. At common law, an interest in a revocable trust not made contingent upon the beneficiary’s survival is vested subject to divestment by the grantor through amending or revoking the interest. Although there appear to be no cases in Florida on point, at common law a vested interest in a revocable trust can be devised by the holder of the interest if the holder dies before the trust grantor. See, e.g., Baldwin v. Branch, 2004 WL

407157 (Ala. 2004)(reasoning that, in the absence of a statute providing otherwise, a beneficiary's vested interest in a revocable trust is devisable).

For revocable trusts executed prior to June 12, 2003, Section 737.6035, which effectively makes an interest in a revocable trust non-devisable, does not apply. For these trusts, applying the general "time of creation" rule, without more, would bring back the UDPIA result that the Committee has rejected. Because the disclaimant would, if the rule applied, be treated as if he or she died immediately before the creation of the interest, and because 737.6035 does not apply to the trust, the disclaimed interest would at common law be subject to devise by the disclaimant. The Committee avoid this inconsistent result by treating the disclaimed interest in a revocable trust as if the interest had been created in a will. This makes the testamentary anti-lapse statute (§732.603) applicable to the disposition of the disclaimed interest. There is no substantive difference between 732.603 and 737.6035, and the application of the testamentary statute avoids the effective date issue associated with the trust anti-lapse statute.

Beneficiaries' interests in POD accounts and TOD accounts are by statute not transmissible in Florida (655.82(3)(b) (POD accounts) and 711.506 and .507 (TOD accounts)). It is therefore not necessary to adopt a special rule for these assets.

The working of this subsection for present interests given to named individuals is illustrated by the following examples:

Example 1(a). T's will devised "ten thousand dollars (\$10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has lapsed. If the state's antilapse statute applies (*732.603 will apply*), it will direct the passing of the disclaimed interest.

Example 1(b). T's will devised "ten thousand dollars (\$10,000) to my friend, F." F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members (*732.603 will not apply*).

Example 1(c). T's will devised "ten thousand dollars (\$10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise.

Present interests are also given to the surviving members of a class or group of persons. Perhaps the most common example of this gift is a devise of the testator's residuary estate "to my descendants who survive me by representation." Under the system of distribution among multi-generational classes used in common statutes (*including Florida's applicable statutes; see 732.611*), division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). T's will devised "the rest, residue, and remainder of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed, and it passes as if S

had predeceased T. If the one-half the residue passed as if S predeceased, however, his children would take one-half the disclaimed interest and D would take the other half under every system of “representation” that commonly exists. S's disclaimer should have the effect of passing what he would have taken to his children. The second sentence of Subsection (3)(a) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

This provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). Assume the same facts as **Example 2(a)**, but D has predeceased T. T is survived, therefore, by S, S's two children, and D's child. S disclaims. Again, the disclaimed interest is one-half the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of T would have shared equally in T's residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed interest, S's two children would each receive one-third of the one-half while D's child would receive one-third the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. The second sentence of Subsection (3)(a) again applies to insure that S's children receive one-half the residue, exactly the interest S would have received but for the disclaimer.

The disclaimer of future interests created by will leads to a different problem. The effective date of the disclaimer of the future interest, the testator's death, is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts, the interest passes as if Son had predeceased Father. A problem can arise if at Mother's death, one or more of S's children living at that time have been born after Father's death. It is possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.

The problem illustrated in **Example 3** is solved by the first sentence of Subsection (3)(a). The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half the trust property, at Mother's death. Under Subsection (3)(a) Son is deemed to have died immediately before Mother's death even though under Subsection (1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property he would have received and, as **Examples 2(a)** and **2(b)** show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

*The Act does not work a change to Florida law in this regard. Under both 689.21 and 732.801, the disclaimed interest passes as if the disclaimant had died immediately before the death of the benefactor, or immediately before any other event which causes the disclaimant's interest to be indefeasibly fixed in quality or quantity. In **Example 3**, mother's death is the event which causes son's interest to be indefeasibly fixed in quality or quantity.*

Interests created by revocable lifetime trusts are future interests (*i.e., vested interests subject to divestment by the trust grantor through changing the terms of the trust*) when created, but may or may not be conditioned on surviving the termination of the trust, typically at the Grantor's death.

The following examples illustrate disclaimers of interests created under revocable trusts.

Example 4(a). G's revocable trust directs the trustee to pay "ten thousand dollars (\$10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. *Under the statute, B's interest in the trust is deemed created when the grantor dies. If B disclaims, he is deemed to be deceased at the time his interest was created. Under the special rule of construction discussed above, the disclaimed interest passes as if it had been created under a will; therefore, 733.603 applies, and provides that if B is deceased at the time of the grantor's death, those of his descendants who are living at that time will take per stirpes B's share. If B were G's friend, so that 733.603 did not apply, the disclaimed interest would pass as a part of the trust's residue.*

Example 4(b). G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease G. The analysis applies exactly as it does in **Example 4(a)**, because A is not explicitly required to survive G. *The special rule of construction would make 732.603 applicable to the disclaimed interest, and would operate to make the interest pass per stirpes to A's descendants.*

If the gift under the revocable trust is conditioned on surviving the grantor, the result of the disclaimer is the same as that of a disclaimer of a gift under a will. For example, the result of a disclaimer of an interest in the gift of the residuary estate by representation to the testator's descendants who survive the testator illustrated by **Examples 2(a)** and **(b)** are the same for a gift of the residue of the trust estate by representation to the descendants of the grantor who survive the grantor. Both gifts require survival to the time of distribution (the death of the testator or grantor). In both cases the disclaimant is deemed to predecease the distribution date, and therefore has no gift. The disclaimed interest passes under the second sentence of Subsection (3)(a) only to the disclaimant's descendants. If the distribution date of a gift under a revocable trust is not the Grantor's death but some future time, for example, termination of the trust on the death of a surviving spouse, the situation illustrated by **Example 3** can arise, and the result is the same.

If the designated beneficiary of a life insurance policy disclaims the policy proceeds, he or she will be deemed to have predeceased the insured because the time of distribution is the insured's death. If a contingent beneficiary has been named, the contingent beneficiary will take the

proceeds. If a contingent beneficiary has not been named, the traditional rule (subject, of course, to the terms of the particular policy) is that the proceeds will pass to the insured's estate.

Subsection (3)(b) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because 739.204 applies to disclaimers by trustees of property that would otherwise pass to the trust, Subsection (3)(b) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 739.102(10). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Subsection (3)(c) continues the provision of prior Uniform Acts (*and the rule in Florida, although not explicitly set forth in Florida's existing disclaimer statutes*) on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Subsection (3)(c) are illustrated by the following examples.

Example 5(a). Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (*see Examples 1(a), (b), and (c)*), and, therefore, the time of distribution is Father's death. If the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust comes takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaims her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

As detailed above, Subsection (3)(c) accelerates future interests in possession after a disclaimer (other than future interests held by the disclaimant). The current Florida statutes are silent on this point. Sections 689.21 and 732.801 do provide that a disclaimer relates back "for all purposes" to the death of the benefactor or to the event which causes the disclaimant's interest to become indefeasibly fixed as to quality and quantity. Presumably, "for all purposes" means for purposes of determining when the future interest intended to follow in time the disclaimed interest will take effect in possession.

This interpretation of the current Florida statutory provisions is borne out by Weinstein v. Mackey, 408 So. 2d 849 (3 DCA 1982), in which the court adopted what it referred to as the "general rule." The court stated the rule as follows:

[A] disclaimer of the prior interest indeed accelerates the remainder interest of the existing class members, and, most significantly, 'closes the class' as of that time, eliminating the right of the unborn.

Section 739.202

The various forms of ownership in which “joint property,” as defined in Section 739.102, can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts (*and Florida's two existing disclaimer statutes*) were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable during the life of the joint tenants (*Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir 1986), *McDonald v. Commissioner*, 853 F.2d 1494 (9th Cir 1988), *Dancy v. Commissioner*, 872 F.2d 84 (4th Cir 1989). On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC § 2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, § 25.2518-2(c)(4)(i), allow a surviving joint tenant or tenant by the entireties to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (½ where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988, where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse's gross estate under IRC § 2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy's creation.

The amended final Regulations, § 25.2518-2(c)(4)(iii), also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor's contributions,

and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint names.

These developments in the tax law of disclaimers are reflected in this section of the UDPIA. The provision in the UDPIA allows a surviving holder of jointly held property tenant to disclaim the *greater* of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that is not attributable to the disclaimant's contribution to the jointly held property. *As discussed below, the Act rejects the UDPIA's approach in this area.*

In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC § 2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC § 2518 are met.

F.S. 689.21 does not explicitly address disclaimers of jointly-held assets; instead, it simply authorizes a disclaimer of any property that would pass to a beneficiary under any "nontestamentary instrument of conveyance or transfer."

Section 739.202 of the Act sets forth detailed rules as to what portion of jointly-held property may disclaimed by the surviving joint tenant or tenants. The Committee does not believe that Section 739.202 departs from current Florida law. The provisions of the Act are much more detailed than the current Florida statutes; the new provisions are intended as a guide to practitioners in planning and structuring disclaimers of jointly-held property. They are also intended to distance the Act from the joint-tenancy property disclaimer provisions in the UDPIA

The undesirable results reached by the UDPIA can be illustrated through the following examples.

Fact Pattern I

A and B own a bank account as joint tenants with right of survivorship. Under the terms of the account arrangement, each of them may unilaterally withdraw her contribution without the consent of the other. A contributes \$999 to the account, and B contributes \$1. B dies, and A disclaims her survivorship interest in the account.

Fact Pattern II

A, B and C own Blackacre as joint tenants with right of survivorship. A furnished all of the consideration to acquire the property but cannot unilaterally retake Blackacre. Under Florida law, during the lifetimes of the co-tenants, each joint tenant is deemed to own one-third of the property. B dies, and both A and C disclaim their respective survivorship interests.

The UDPIA reaches a very counterintuitive, almost metaphysical, result in the above scenarios. These results are avoided under the Act.

*In **Fact Pattern I**, under the UDPIA, A can disclaim the greater of (i) one-half of the account; or (ii) all of the account, minus the portion attributable to A's contribution. Because, under the assumed facts, the amount under (i) is the greater, A can disclaim one-half of the account, even though she will be disclaiming property that she already owns.*

*The UDPIA also reaches a bizarre result in **Fact Pattern II**, as set forth in the following example from NCCUSL's comments:*

Example 1. A, B, and C are joint tenants with right of survivorship in Blackacre. A dies. B then disclaims 1/3 of the property under subsection (a)(1) (one divided by three, the number of joint holders immediately before A's death). B is deemed to have predeceased A, which would leave A and C as the surviving joint owners of the 1/3 disclaimed. Since A is now dead, C is the sole owner of the 1/3 B disclaimed and C and the joint tenancy as an entity are tenants in common in Blackacre. If B predeceases C, C will be the sole owner of Blackacre in fee simple. If C predeceases B, B will own 2/3 of Blackacre outright and 1/3 of Blackacre will pass through C's estate. *See, Cortelyou v. Dinger*, 62 Misc.2d 1007, 310 N.Y.S.2d 764 (1970); 2 American Law of Property, § 6.2.

Under the UDPIA, A can disclaim the greater of (i) one-third of Blackacre; or (ii) all of the property, less what A contributed to acquire it. Because (i) is the greater, A can disclaim one-third of the property. This is so notwithstanding that A would receive only a one-sixth interest in Blackacre (one-half of B's one-third) if A did not disclaim.

*Again under a UDPIA disclaimer in **Fact Pattern II**, if both A and C were to disclaim their interests in Blackacre, after the disclaimers they would, together, own one-third of the property, and each of them would own one-sixth. The other two-thirds of the property will pass to B's estate. It is hard to see how A and C would not be treated as having made a gift to B's estate if, as a result of the disclaimer, each of them has less than when they started.*

*As to **Fact Pattern I**, Treasury Regulations §25.2518-2(c)(4)(iii) provides as follows:*

*In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held in a mutual fund), if a transferor may unilaterally regain the transferor's own contribution of the account without the consent of the other co-tenant, such that the transfer is not a completed gift under Section 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased co-tenant **The surviving joint***

tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant. (emphasis added)

See also Treasury Regulations §25.2518-2(c)(5), Examples (12) and (13).

Subsection (2) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (3) provides that the disclaimed interest passes as if the disclaimant had predeceased the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed.

If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (1) results in one-half the home passing through the decedent's estate (*subject to special provisions necessary in Florida because of the status of the property as "homestead; see Section 739.203, discussed below*). The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount. *The result is the same under the special tenants by the entirety Section, 739.203.*

Section 739.203

This section preserves the changes made to 689.21, effective May 6, 2002, that clarified both the ability of a surviving spouse to disclaim a survivorship interest in tenants by the entirety property and the special features of a disclaimer of tenants by the entirety homestead property.

Section 739.204

Section 739.204 deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees.

Pursuant to 739.104(2), a trustee may only disclaim property to be received by a trust if the governing instrument permits or if the trustee obtains a court order authorizing the disclaimer.

Section 739.205

Section 739.205 provides rules for disclaimers of powers which are not held in a fiduciary capacity.

The most common non-fiduciary power is a power of appointment. Section 739.104(1) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 739.205 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer effects only the holder of the power and will not effect other aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

Section 739.206

Section 739.206 governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment.

At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

Section 739.206 provides rules for disclaimers by all of these persons: subsection (1) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (2) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (1) therefore, makes the disclaimer effective as of the time the instrument exercising the power-giving the interest to the disclaimant-becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 739.201. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 739.205.

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of

appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (1) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 739.201(1). If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 739.201(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. *See Restatement, Second, Property (Donative Transfers) § 18.5.* The *Restatement, Second, Property (Donative Transfers)*, §18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. *See Restatement, Second, Property (Donative Transfers) §11.2, Comments c and d.* The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (2) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 739.201. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as **Example 1**, except A disclaims before D's death and D's will does not exercise the power. Under subsection (2) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 739.201(1). If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 739.201(2)), the interest passes and under Section 739.201(3) and A is deemed to have died immediately before D's death which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in **Example 1**. If A does predecease D, he would have received nothing and there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.

Example 2(b). The facts are the same as in **Example 2(a)** except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if she predeceased D and the result is the same as in **Example 1**.

In addition, if all the objects and takers in default disclaim before the power is exercised the

power of appointment is destroyed. See Restatement, Second, Property (Donative Transfers) § 12.1, Comment g.

Section 739.207

Section 739.207 governs disclaimers by fiduciaries of powers held in their fiduciary capacity.

Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. (But see 737.402(4)(a)). A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in *Cleveland v. U.S.*, 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶ 13,766 (C.D.Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each state relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power, but yet preserve the possibility of another trustee exercising the power, would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

Under Section 739.104(2), a fiduciary disclaimer under this Section can, absent authorization in the instrument creating the fiduciary relationship, occur only with prior court approval.

Section 739.301

The rules set forth in Section 739.301 are designed so that anyone who has the duty to distribute the disclaimed interest will be notified of the disclaimer. For example, a disclaimer of an interest in an decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only when there is no one person or entity to whom delivery can be made.

Because delivery, and not recording, is required in order to effectively disclaim, the Act adopts a "mailbox rule" for the effectiveness of delivery of disclaimers delivered via first class mail. Actual receipt is required for the effectiveness of a delivery of a disclaimer delivered in any other fashion (i.e., hand delivery).

As noted above, the Committee explicitly rejects the UDPIA's authorization of e-mail or other electronic disclaimers. Under 739.301(12), delivery will be presumed as to a properly-recorded disclaimer of an interest in real estate. This is to enable those interested in the disclaimed interest to rely on the disclaimer without having to prove effective delivery under another provision of this section.

Section 739.401

The 1978 Act (*and 732.801, which is based on the 1978 Act*) required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a “reasonable” time.

This Act specifically rejects a time requirement for making a disclaimer (*emphasis added*). Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

Section 739.402

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts, *and those in 689.21 and 732.801*. Subsection (1) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (2)(a) will necessarily be determined by the courts based upon the particular facts. (*See Leipham v. Adams*, 77 Wash.App. 827, 894 P.2d 576 (1995); *Matter of Will of Hall*, 318 S.C. 188, 456 S.E.2d 439 (Ct.App. 1995); *Jordan v. Trower*, 208 Ga.App. 552, 431 S.E.2d 160 (1993); *Matter of Gates*, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); “What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest,” 93 ALR 2d 8).

The addition in this Act of the word “voluntary” to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (*See Troy v. Hart*, 116 Md.App. 468, 697 A.2d 113 (1997), *Estate of Opatz*, 554 N.W.2d 813 (N.D. 1996); *Frances Slocum Bank v. Martin*, 666 N.E.2d 411 (Ind.App. 1996); *Brown v. Momar, Inc.*, 201 Ga.App. 542, 411 S.E.2d 718 (1991); *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 130 Ill.Dec. 207, 537 N.E.2d 274 (1989)). *Sections 689.21 and 732.801 already refer to “voluntary” actions*. An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may work an estoppel. *See Hale v. Bardouh*, 975 S.W.2d 419

(Tex.Ct.App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest, and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (2)(c) continues a provision from the earlier Acts (*and in current Florida law*) and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (3) rephrases the rules of Section 739.207 governing the effect of disclaimers of powers held in a fiduciary capacity.

Subsection (4) is applicable to powers of appointment which can be disclaimed under Section 739.205. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (5) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. (***The Committee did not adopt the UDPIA provision***). Under the UDPIA, a disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

Neither F.S. 689.21 nor F.S. 732.801 explicitly addresses the effect of a barred disclaimer. Both statutes bar the right to disclaim under certain circumstances; this suggests, but does not clearly provide, that a disclaimer that is attempted under circumstances when a disclaimer is barred is void ab initio.

Both current Florida statutes contain provisions exculpating the fiduciary or other person in custody of the property from liability from acting in reliance on a barred disclaimer unless the fiduciary or other person has actual knowledge of the facts giving rise to the bar. Presumably, these provisions merely protect the trustee from liability, and do not touch on the rights inter se of the barred disclaimant and the person to whom the trustee distributes the “disclaimed” property.

The UDPIA provision, while perhaps resolving questions relative to the disposition of an interest subject of a botched disclaimer more clearly than the Florida statutes, is something of a double whammy: not only did the disclaimant screw up the disclaimer, as a penalty for his transgressions he is also forced into making a transfer that could have negative and unintended transfer tax consequences to him.

The Committee believes that its changes to the UDPIA both bring clarity to Florida law and work a more equitable result. The proposed provision explicitly states that a botched (or “barred”) disclaimer is ineffective, a nullity. The failed disclaimer does not automatically result in a taxable transfer; instead, the would-be disclaimant retains the property sought to be disclaimed. This is consistent with the Treasury Regulation §25.2518-1(b), which provides as follows:

If the disclaimer is not a qualified disclaimer, for purposes of the federal estate, gift and generation-skipping transfer tax provisions, the disclaimer is disregarded and the disclaimant is treated as having received the interest.

The disclaimant now has a choice: he can choose to keep the property that he sought to disclaim, or if he chooses, he may make the transfer anyway and bear the tax consequences. Under the UDPIA, the disclaimant is denied this choice.

The proposed statute includes, largely verbatim, the exculpatory provisions presently in the Florida statutes. The UDPIA has no exculpatory provisions for fiduciaries acting in reliance on disclaimers that later turn out to be barred. The “automatic transfer” provisions of the UDPIA arguably make such provisions less important, which may explain why they were omitted from the uniform act.

Section 739.501

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC § 2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if it does not otherwise meet the Act's more specific requirements.

Section 739.601

*Disclaimers, even those touching on real estate, no longer need to be recorded to be effective **as between the disclaimant and those taking the disclaimed interest**. However, an un-recorded disclaimer affecting an interest in real estate will not provide constructive notice to any persons outside of the disclaimer.*

Section 739.701

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Uniform Acts, allow the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. (732.801 so provides.) Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X cannot disclaim the general devise, irrespective of the application of Section 739.402 of the Act, because the nine months allowed under prior law have run. The contingent

remainder, however, may be disclaimed so long as it is not barred under Section 739.402 without regard to the nine month period of prior law.

Section 731.201

The proposed change to this Section is simply to add new chapter 739 of the Florida Statutes to the chapters to which the general definitions of Section 731.201 apply.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal (i.e., the Act) by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

Adoption of this legislative proposal (i.e., the Act) by the Florida Legislature should not have a direct impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution. The Act will provide a clearer, better organized and more flexible framework governing the ability of Florida residents to make disclaimers of property interests and powers.

VII. OTHER INTERESTED PARTIES

Other groups which may have an interest in the legislative proposal would include the Tax Section of The Florida Bar, the Florida Institute of Certified Public Accountants, and the Trust Division of the Florida Bankers Association.

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