Disclaimer Trusts in the Post-ATRA Age: Drafting Disclaimers, Clayton QTIPs and OBITs to Overcome Portability Limitations

TUESDAY, JUNE 14, 2016

1pm Eastern    |    12pm Central    |   11am Mountain    |    10am Pacific

Today’s faculty features:

Edwin P. Morrow, III, Esq., Director, Wealth Transfer Planning and Tax Strategies, Key Private Bank Family Wealth Advisory Services, Dayton, Ohio

Jeremiah H. Barlow, JD, WealthCounsel, Madison, Wis.

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.

NOTE: If you are seeking CPE credit, you must listen via your computer — phone listening is no longer permitted.
Agenda (covered in Powerpoint Slides)

- Review of IRC §2518 and treasury regulation requirements
- Comparing, Contrasting and Synthesizing Disclaimer and Clayton QTIP Planning
- Cascading Spousal Disclaimers
- Reducing estates and/or increasing basis w/disclaimers
- Unique Features of Optimal Basis Increase Trusts
- Pre-Mortem “Fixes” to Gifts, including to trusts
- Post Mortem “Fixes” to estate plans via disclaimer
- Post–Mortem “Fixes” to IRA “see through trusts”
- Contrasting Non-Qualified Disclaimers and Releases
- Asset Protection Effects of Disclaimers
- Drafting Tools and Traps to Avoid

Additional Material – Article, Crucial Code Sections, Regulations and Selected Cases and Rulings on Qualified Disclaimers – [bolding and/or bracketed comments added by Ed Morrow]:

Structuring Estates and Trusts and Maximizing the Use of Disclaimers to Increase Basis

IRC § 2046 (estate tax rule regarding qualified disclaimers)
IRC § 2654(c) (GST tax rule regarding qualified disclaimers)
IRC § 2518 (gift tax rule regarding qualified disclaimers, also incorporated into GST and estate tax)
Treas. Reg. § 25.2518-1
Treas. Reg. § 25.2518-2
Treas. Reg. § 25.2518-3
Ohio R.C. § 5815.36 – Ohio’s disclaimer statute
Estate of Christiansen, 136 T.C. No. 1 (2008) (dissenting opinion omitted)
PLR 9043050
PLR 2005-03024
Structuring Estates and Trusts with Disclaimers to Increase Basis:

*Busting the Myths and the Conventional Wisdom on Disclaimers*  

*By Edwin Morrow III, JD, LL.M. (tax), CFP*

As the estate tax affects fewer and fewer taxpayers, and income tax rates have increased, practitioners have naturally focused more on the “step up in basis” as part of estate planning.¹ Many have embraced disclaimer planning as the go-to tool for married couples with near-identical estate plans, to enable more flexibility.

Practitioners debate the merits of relatively new techniques to achieve greater basis adjustments at first death, such as joint exempt step-up trusts (JESTs), upstream optimal basis increase trusts, estate trusts and community property trusts.² What if we could accomplish a greater basis increase for many couples in separate property states without using such trusts? Moreover, there is a continual debate over methods to best reduce trust income tax and achieve a basis adjustment at the surviving spouse’s death, such as whether to utilize a QTIP trust or add various clauses to bypass trusts, such as formula general powers of appointment. What if we could structure trusts post-disclaimer that would maximize this opportunity?

This article will explore two counterintuitive concepts in the area of income tax and qualified disclaimers: first, how married couples can structure accounts and utilize qualified disclaimers in order to maximize the “step up” and minimize the “step down” in basis at the first spouse’s death. Second, we will explore how surviving spouses can retain and use more targeted powers of appointment in trusts subsequent to a disclaimer that enable better ongoing income tax results for the family and further maximize the basis adjustment at the surviving spouse’s death.

---

¹ As the article will later note, “step up” is a misnomer, since it is more accurately described as a basis adjustment to the fair market value at the date of death, or alternate valuation date, which may be a step down as well as a step up (and the adjustment excludes certain assets, such as IC-DISC stock, employer securities to the extent of net unrealized appreciation, assets gifted to the decedent within one year and passing back to the donor, and most ubiquitously, income in respect of a decedent).

² *The Upstream Crummey Optimal Basis Increase Trust* was discussed previously in Estate Planning Review – The Journal, May 2014. For a copy of the comparison chart, and further discussion of many points herein, see the Optimal Basis Increase and Income Tax Efficiency Trust, available at [http://ssrn.com/abstract=2436964](http://ssrn.com/abstract=2436964)
Using Qualified Disclaimers to Maximize Basis at First Death

We don’t normally think of qualified disclaimers in the context of basis planning at the first death. Assets are either in the estate, or they’re not. But surprisingly, married couples have a unique and often overlooked opportunity to use qualified disclaimers to increase their basis in some common situations.

Let’s explore the special disclaimer rules for jointly held bank, brokerage and investment accounts through a hypothetical upper-middle class husband and wife, John and Mary, both U.S. citizens. They have each funded a brokerage account worth $2 million, and have placed each other on the account as joint tenant with right of survivorship. No portion is community property. John’s account consists of Fund X with a value of $1.2 million, basis of $800,000, and Fund Y, with a value of $800,000, basis of $1 million (this is not a model portfolio, only for illustration!). Mary’s account consists of Fund Q with a value of $1.6 million, a basis of $1 million, and Fund Z, with a value of $400,000, basis $500,000. John dies.

Under a typical scenario, John’s estate includes one-half of the value of both accounts ($4 million), or $2 million, and the basis of all of the four funds are stepped down or up 50 percent accordingly (Fund X basis increased by $200,000 to $1 million, Fund Y is decreased by $100,000 to $900,000, Fund Q’s basis is increased by $300,000 to $1.3 million, and Fund Z’s basis is decreased by $50,000 to $450,000). This amounts to a total basis increase to Mary of $350,000, with the total basis for the $4 million of assets now $3.65 million. Should Mary die first, the result to John would be exactly the same.

Now let’s contrast if Mary makes a qualified disclaimer of Fund X. Despite being a joint account, she is permitted to disclaim up to the entire account, because she made no contributions to it. She cannot disclaim any of Funds Q and Z to which she made all the contributions. She could disclaim Fund Y, but as we shall see, this has no income tax advantage to her. Upon disclaimer, Fund X is not merely 50 percent included in John’s gross estate pursuant to Code Sec. 2040 for joint accounts. Because Code Sec. 2518 permitted Mary to disclaim 100 percent of Fund X, it is 100 percent included in John’s gross estate under Code

---

3 Code Secs. 2040 and 1014.
4 Reg. §25.2518-2(c)(4)(iii).
5 Reg. §25.2518-2(c)(4)(iii).
Sec. 2033.\(^6\) Remember that, as a surviving spouse, Mary might still receive the property outright under the will, or might receive the property in a bypass or marital trust through a pour over will clause.\(^7\) The basis in Fund X is now $1.2 million rather than $1 million – an increased basis of $200,000. Mary’s total basis in the four funds is $3.85 million. Should Mary (or her trust) later sell some or all of the shares of Fund X, this creative use of qualified disclaimers may save over $60,000 in tax ($200,000 additional basis times 23.8 percent, plus up to 13.3 percent state income tax).

Any amounts passing to Mary or to a qualifying marital trust can still qualify for the marital deduction and permit the deceased spousal unused exclusion amount to be “ported.”

Let’s reverse the order of deaths in our example. Should Mary die first, John can make a qualified disclaimer of Fund Q. One-hundred percent of Fund Q would thus be included in Mary’s gross estate. Therefore its basis would increase by $600,000 to $1.6 million (an additional $300,000 more basis than had John done nothing and received the assets under survivorship). John’s total basis in the four funds would be $3.95 million. This may save even more than if John had died first—potentially more than $90,000 of income tax.

Note that in these two situations the basis is increased using qualified disclaimers almost as much as it would have been had the accounts been community property. In many cases it could lead to the same or even a much better result than a community property regime. Imagine John were the breadwinner and provided all the funding for the above accounts and died first (not an uncommon scenario). Mary would disclaim Funds X and Q, permitting a full step up in basis to $1.2 million and $1.6 million, yet her keeping Funds Y and Z as joint accounts taxed under Code Section 2040 enables the step down in basis for those funds to be limited (new basis $900,000 and $450,000 respectively), leading to a total basis of $4.15 million – higher than the fair market value at the date of death.

This kind of disclaimer could lead to slightly increased probate costs, of course, which will vary state to state, but this may pale in comparison to the state and federal income tax savings through achieving an increased basis.

---

\(^6\) Reg. §25.2518-2(c)(5), Ex. 12
\(^7\) Reg. §25.2518-2(e)(2).
Note that transfer on death (TOD) accounts do not afford nearly the same tax flexibility. If John and Mary had used TOD designations, only the $2 million of accounts owned by the decedent would be stepped up, leading to less basis under either order of death scenario. If John dies first, basis in his accounts is adjusted to $2 million, but Mary’s remains at $1.5 million. If Mary dies first, basis in her accounts is adjusted to $2 million, but John’s remains at $1.8 million. Either scenario is worse than our targeted qualified disclaimer results.

In our hypotheticals above, we assumed that the funding of the accounts was easily traceable to one spouse or the other. What if John and Mary had one joint account, and John contributed 80 percent of the funds, and Mary 20 percent? This technique may still yield greater basis increase, more so if the higher contributing spouse dies first. If John dies first, Mary can only disclaim the portion attributable to the 80 percent John contributed, and if Mary dies first, John can only disclaim the 20 percent that he did not contribute.8

From a proactive planning standpoint, keeping joint accounts traceable to separate funding yields more post-mortem planning flexibility. Of course, clients don’t always keep immaculate records, and depending on the level of activity in an account, the burden of proving what level of consideration the disclaimant furnished may be difficult – but perhaps worth it.9

Unfortunately, this kind of disclaimer planning cannot be done with other types of joint tenancies, such as real estate, because these forms of ownership, unlike bank, brokerage and investment accounts, usually result in a completed gift since the donor cannot unilaterally reacquire the property (although the gift may qualify for the marital deduction).10 One basis opportunity for such assets that practitioners should keep their eye out for, however, is whether the joint tenancy property was established prior to 1977, which may use a

---
8 Reg. §25.2518-2(c)(5), Ex. 14
9 There is no specific guidance on the “consideration furnished” test under Reg. §25.2518(c)(4)(iii). However, Reg. §20.2040-1(a)(2) contains a rebuttable presumption that the decedent furnished all the consideration for a joint account. It is unclear to what extent this regulation may influence any interpretation of 2518, which contains no analogous presumption.
consideration-furnished test, or potentially whether it may be traceable to community property.\footnote{M. Gallenstein, CA-6, 92-2 ustc ¶60,114, 975 F.2d 286 (1992), see also T. Hahn, 110 TC 140, CCH Dec. 62,606 (1998), acq. IRB 2001-42.}

**Keeping Both Tax and Estate Planning Flexibility for Spouses Post-Disclaimer**

After the rise of portability and the $5.45 million (and increasing) lifetime exclusion amount, many practitioners and clients have embraced disclaimer planning as the go-to tool for married couples with near-identical estate plans (e.g. long-time marriage, all children from current marriage). This usually involves setting up a bypass trust (and potentially marital trust, depending on design, assets and circumstance) that is ONLY funded if the surviving spouse makes a qualified disclaimer of funds that would otherwise be inherited outright.

There are several drawbacks to relying on spousal disclaimer funding – inadvertent disqualification through acceptance or control, limited nine-month window with no extensions (unless the spouse is under age 21), inability to disclaim certain jointly owned assets to the extent contributed by the putative disclaimant, as noted above, and quite simply, the powerful inertia causing a widow/widower to “go with the flow” – especially when the flow is an outright bequest. For this article, however, let’s concentrate on another important drawback of disclaimer planning and how the use of narrowly targeted powers of appointment largely eliminates it.

One of the axioms estate planners are continually taught is that surviving spouses must disclaim a power of appointment granted in a trust they are disclaiming into. Disclaiming such powers, however, removes a tremendous estate, asset protection and income tax planning tool from the surviving spouse’s toolbox. **Moreover, this general rule is wrong.** The disclaimer regulations for surviving spouses are much more nuanced than that:\footnote{Reg. §25.2518-2(e)(2).}

“If the surviving spouse, however, retains the right to direct the beneficial enjoyment of a property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property unless such power is limited by an ascertainable standard.”

Thus, if the surviving spouse is trustee and retains a discretionary spray power not limited by an ascertainable standard, or the right to transfer property by power of appointment...
that does not trigger estate/gift tax, then the disclaimer will not be qualified. However, this still leaves tremendous opportunities for retaining various powers of appointment that ARE “subject to Federal estate and gift tax”. The only reason practitioners have not thought to exploit this exception is our traditional focus on estate and gift tax, and relative blindness to income tax planning. With federal estate and gift taxes affecting far, far less than one percent of the population, we should reexamine this prejudice.

Extrapolating from the above regulation, it is clear that a general power of appointment (GPOA) can be retained by a spouse without tainting a qualified disclaimer, because GPOA transfers are subject to federal gift and estate tax under Code Sec. §2514 or Code Sec. 2041 respectively. Moreover, a limited power of appointment (LPOA) may also be retained, but only if can only be exercised so as to trigger estate or gift tax under Code Sec. 2041(a)(3) and/or Code Sec. 2514(e) (colloquially known as the Delaware tax trap), or is limited by an ascertainable standard. (We tend to think of any powers limited by ascertainable standards as inherently fiduciary, but there is no reason this cap cannot apply to a non-fiduciary power, and the dozens of recently approved incomplete gift, non-grantor trust PLRs all have such powers in the trust). More creatively, targeted collateral LPOAs held by other friendly parties, such as a sibling, could also be included and retained, without this constraint.

A testamentary LPOA may even be retained post-disclaimer in a QTIP trust, since any transfer would be in the surviving spouse’s estate via Code Sec. 2044. The Lassiter holding regarding QTIP trusts also surprises many practitioners—it’s rarely discussed in articles,

---


14 There is authority that an LPOA may be retained by a surviving spouse to the extent the QTIP election is made: H. Lassiter Est., 80 TCM 541, CCH Dec. 54,089(M), TC Memo. 2000-324, p. 70-74, ruled a disclaimer was qualified despite the surviving spouse retaining a testamentary LPOA, because the later transfer at the surviving spouse’s death would be subject to federal estate tax, which is an exception under Reg. §25.2518-2(e)(2), due to the QTIP election: “We therefore conclude that retention of such a testamentary power does not cause the disclaimer of an inter vivos power to fail to satisfy the section 2518 requirement when a QTIP deduction will be taken for the trust to which the powers relate.”

treatises or CLEs, yet it is not a mere fluke private letter ruling that cannot be cited as precedent, it’s a Tax Court case. Be careful, however, to elect QTIP treatment before disclaiming into the trust, rather than after, even if an additional six months may be permitted (important for Clayton\textsuperscript{11} QTIPs), or be clear that any ordinary LPOA is either absent or also disclaimed from any trust over which the QTIP election is not made.

So, while it is true that a disclaiming spouse must disclaim ordinary LPOAs in a bypass trust if funded via disclaimer, a disclaiming spouse may retain narrowly crafted ones.\textsuperscript{12} Appropriately worded powers of appointment are therefore still compatible with and highly complementary to disclaimer planning. Practitioners should consider creative post-mortem planning opportunities in this area—powers to broadly appoint might be partially released or modified prior to disclaimer rather than completely disclaimed, for example. Most states should allow a partial release/nonqualified disclaimer of a testamentary LPOA unless the document forbids it.\textsuperscript{13}

Retention of such powers obtains several important benefits:

1) During the surviving spouse’s lifetime, the spouse’s retention of an LPOA that triggers the Delaware Tax Trap still allows the surviving spouse to shift income to beneficiaries in a lower tax bracket, even if such transfers are taxable gifts.\textsuperscript{14} They should still qualify for the annual gift tax exclusion if the appointive trust grants the beneficiary a presently exercisable general power of appointment (similar to a Crummey power). Note that lifetime powers to appoint to anyone other than the surviving spouse prevent the marital deduction, however, so this ability pertains to bypass type trusts.

2) Such lifetime powers have important non-tax benefits. Non-fiduciary power of appointment holders have no duty whatsoever to appointees, and thus potential appointees are not entitled to reportings, accountings and records as a potential beneficiary under a fiduciary spray power might be. Moreover, in the event that the surviving spouse has any tax liens attach to his or her share of the trust, such non-fiduciary powers may allow a significant method
for the family to benefit from the trust, assuming the appointees do not also have tax liens against them.\textsuperscript{15}

3) Granting a spouse a presently exercisable \textit{general} power of appointment over all the assets has no benefit and several obvious detriments, such as full estate inclusion and destruction of any asset protection. However, limiting the withdrawal power to only ongoing taxable income attributable to certain assets, perhaps with other timing and forfeiture provisions, permits the income attributable to those assets to be taxed under Code Sec. 678 as a beneficiary deemed owner trust. This opens up significant income tax planning opportunities when the surviving spouse is not in highest income tax bracket, especially for special assets such as Code Sec. 179 depreciation and Code Sec. 121 residential capital gains tax exclusion.

4) Post-mortem, testamentary powers that cause estate tax inclusion, such as a testamentary general power of appointment or testamentary limited power of appointment that can only be used to trigger the Delaware tax trap, permit basis increases that an ordinary bypass trust cannot typically obtain at the spouse’s death (and, furthermore, can avoid the potential for basis decreases that are endemic to marital trusts). These powers can be capped to prevent any over-inclusion that may cause a federal or state estate tax, and can be crafted with various consents required so as to prevent unwanted exercise.

5) These testamentary powers have important non-tax benefits by enabling the surviving spouse a “rewrite” power to the extent that a settlor would like to grant his or her spouse the power to adjust the disposition of assets at the survivor’s death. Moreover, they permit the next generation another nine months from the surviving spouse’s death to adjust their own estate plan through a qualified disclaimer of assets. The general rule for qualified disclaimers is that an appointee attaining property from the exercise of a \textit{limited} power of appointment, even if the assets are in the decedent’s estate as a QTIP trust, must disclaim within nine months of the date of the original
creation of the limited power (i.e., the date of gift for inter vivos irrevocable trusts, or the date of the settlor’s death for those funded post-mortem). By contrast, an appointee or beneficiary who is taker in default of a general power is afforded an additional nine-month window after the death of the holder of the testamentary general power of appointment.

To summarize these post-disclaimer options, would your clients prefer a trust design that enables superior tax shifting and savings to the surviving spouse through retention of lifetime powers, superior step up in basis at the surviving spouse’s death, superior spousal dispositive control without the burden of fiduciary obligations, superior asset protection and superior post-mortem planning options for the next generation—or would they prefer to stick with the existing paradigm that generally forbids it? Planning for disclaimers (or, in many cases, using disclaimers to react to the failure to plan) does not mean spouses have to give up all the flexibility of powers of appointment whatsoever—it just requires tailoring them.

Even practitioners who advocate fully funded trusts will eventually run into significant opportunities to use the qualified disclaimer techniques in this article. Trusts that are initially fully funded and are not planned to be “disclaimer” trusts may someday be forced to be, since clients inevitably fail to keep their trust fully funded and over the years will open new accounts without titling them in trust. So, these techniques should be kept in mind both in drafting trust options to anticipate potential disclaimers and in administering estates with joint accounts to maximize basis increases.
26 U.S. Code § 2046 - Disclaimers

For provisions relating to the effect of a qualified disclaimer for purposes of this chapter [chapter 20, the estate tax], see section 2518.

26 U.S. Code § 2654 - Special rules

***

(c) DISCLAIMERS

For provisions relating to the effect of a qualified disclaimer for purposes of this chapter [chapter 26, generation skipping transfer tax], see section 2518.

26 U.S. Code § 2518 - Disclaimers

(a) General rule

For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined. For purposes of subsection (a), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) Other rules. For purposes of subsection (a)—

(1) Disclaimer of undivided portion of interest
A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers

A power with respect to property shall be treated as an interest in such property.

(3) Certain transfers treated as disclaimers. A written transfer of the transferor’s entire interest in the property—

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)),

shall be treated as a qualified disclaimer.
26 C.F.R. § 25.2518-1 Qualified disclaimers of property; in general.

(a) Applicability

(1) In general. The rules described in this section, § 25.2518-2, and § 25.2518-3 apply to the qualified disclaimer of an interest in property which is created in the person disclaiming by a transfer made after December 31, 1976. In general, a qualified disclaimer is an irrevocable and unqualified refusal to accept the ownership of an interest in property. For rules relating to the determination of when a transfer creating an interest occurs, see § 25.2518-2(c)(3) and (4).

(2) Example. The provisions of paragraph (a)(1) of this section may be illustrated by the following example:

Example.

W creates an irrevocable trust on December 10, 1968, and retains the right to receive the income for life. Upon the death of W, which occurs after December 31, 1976, the trust property is distributable to W's surviving issue, per stirpes. The transfer creating the remainder interest in the trust occurred in 1968. See § 25.2511-1(c)(2). Therefore, section 2518 does not apply to the disclaimer of the remainder interest because the transfer creating the interest was made prior to January 1, 1977. If, however, W had caused the gift to be incomplete by also retaining the power to designate the person or persons to receive the trust principal at death, and, as a result, no transfer (within the meaning of § 25.2511-1(c)(2)) of the remainder interest was made at the time of the creation of the trust, section 2518 would apply to any disclaimer made after W's death with respect to an interest in the trust property.

(3) Paragraph (a)(1) of this section is applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

(b) Effect of a qualified disclaimer. If a person makes a qualified disclaimer as described in section 2518(b) and § 25.2518-2, for purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift. Similarly, the value of a decedent's gross estate for purposes of the Federal estate tax does not include the value of property with respect to which the decedent, or the decedent's executor or administrator on behalf of the decedent, has made a qualified disclaimer. If the disclaimer is not a qualified disclaimer, for the 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.

(c) Effect of local law

(1) In general
(i) **Interests created before 1982.** A disclaimer of an interest created in a taxable transfer before 1982 which otherwise meets the requirements of a qualified disclaimer under section 2518 and the corresponding regulations but which, by itself, is not effective under applicable local law to divest ownership of the disclaimed property from the disclaimant and vest it in another, is nevertheless treated as a qualified disclaimer under section 2518 if, under applicable local law, the disclaimed interest in property is transferred, as a result of attempting the disclaimer, to another person without any direction on the part of the disclaimant. An interest in property will not be considered to be transferred without any direction on the part of the disclaimant if, under applicable local law, the disclaimant has any discretion (whether or not such discretion is exercised) to determine who will receive such interest. Actions by the disclaimant which are required under local law merely to divest ownership of the property from the disclaimant and vest ownership in another person will not disqualify the disclaimer for purposes of section 2518(a). See §25.2518-2(d)[1] for rules relating to the immediate vesting of title in the disclaimant.

(ii) **Interests created after 1981.** [Reserved]

(2) **Creditor's claims.** The fact that a disclaimer is voidable by the disclaimant's creditors has no effect on the determination of whether such disclaimer constitutes a qualified disclaimer. However, a disclaimer that is wholly void or that is voided by the disclaimant's creditors cannot be a qualified disclaimer.

(3) **Examples.** The provisions of paragraphs (c) (1) and (2) of this section may be illustrated by the following examples:

**Example (1).**

F dies testate in State Y on June 17, 1978. G and H are beneficiaries under the will. The will provides that any disclaimed property is to pass to the residuary estate. H has no interest in the residuary estate. Under the applicable laws of State Y, a disclaimer must be made within 6 months of the death of the testator. Seven months after F's death, H disclaimed the real property H received under the will. The disclaimer statute of State Y has a provision stating that an untimely disclaimer will be treated as an assignment of the interest disclaimed to those persons who would have taken had the disclaimer been valid. Pursuant to this provision, the disclaimed property became part of the residuary estate. Assuming the remaining requirements of section 2518 are met, H has made a qualified disclaimer for purposes of section 2518 (a).

**Example (2).**

Assume the same facts as in example (1) except that the law of State Y does not treat an ineffective disclaimer as a transfer to alternative takers. H assigns the disclaimed interest by deed to those who would have taken had the disclaimer been valid. Under these circumstances, H has not made a qualified disclaimer for purposes of section 2518 (a) because the disclaimant directed who would receive the property.
Example (3).

Assume the same facts as in example (1) except that the law of State Y requires H to pay a transfer tax in order to effectuate the transfer under the ineffective disclaimer provision. H pays the transfer tax. H has made a qualified disclaimer for purposes of section 2518 (a).

(d) Cross-reference. For rules relating to the effect of qualified disclaimers on the estate tax charitable and marital deductions, see §§ 20.2055-2(c) and 20.2056(d)-1 respectively. For rules relating to the effect of a qualified disclaimer of a general power of appointment, see § 20.2041-3(d).
26 CFR § 25.2518-2 Requirements for a qualified disclaimer.

(a) In general. For the purposes of section 2518(a), a disclaimer shall be a qualified disclaimer only if it satisfies the requirements of this section. In general, to be a qualified disclaimer—

(1) The disclaimer must be irrevocable and unqualified:

(2) The disclaimer must be in writing;

(3) The writing must be delivered to the person specified in paragraph (b) (2) of this section within the time limitations specified in paragraph (c)(1) of this section;

(4) The disclaimant must not have accepted the interest disclaimed or any of its benefits; and

(5) The interest disclaimed must pass either to the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer.

(b) Writing

(1) Requirements. A disclaimer is a qualified disclaimer only if it is in writing. The writing must identify the interest in property disclaimed and be signed either by the disclaimant or by the disclaimant's legal representative.

(2) Delivery. The writing described in paragraph (b)(1) of this section must be delivered to the transferor of the interest, the transferor's legal representative, the holder of the legal title to the property to which the interest relates, or the person in possession of such property.

(c) Time limit

(1) In general. A disclaimer is a qualified disclaimer only if the writing described in paragraph (b)(1) of this section is delivered to the persons described in paragraph (b)(2) of this section no later than the date which is 9 months after the later of—

   (i) The date on which the transfer creating the interest in the disclaimant is made, or

   (ii) The day on which the disclaimant attains age 21.

(2) A timely mailing of a disclaimer treated as a timely delivery. Although section 7502 and the regulations under that section apply only to documents to be filed with the Service, a timely mailing of a disclaimer to the person described in paragraph (b)(2) of this section is treated as a timely delivery if the mailing requirements under paragraphs (c)(1), (c)(2) and (d) of § 301.7502-1 are met. Further, if the last day of the period specified in paragraph (c)(1) of this section falls on Saturday, Sunday or a legal holiday (as defined in paragraph (b) of § 301.7503-1), then the delivery of the writing described in paragraph (b)(1) of this section shall be considered timely if delivery is made on the first succeeding day which is not Saturday, Sunday or a legal holiday. See paragraph (d)(3) of this section for rules applicable to the exception for individuals under 21 years of age.
(3) \textit{Transfer.}\n
(i) For purposes of the time limitation described in paragraph (c)(1)(i) of this section, the 9-month period for making a disclaimer generally is to be determined with reference to the transfer creating the interest in the disclaimant. With respect to inter vivos transfers, a transfer creating an interest occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as transfers creating an interest for this purpose. With respect to transfers made by a decedent at death or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. For example, a bequest of foreign-situs property by a nonresident alien decedent is regarded as a transfer creating an interest in property even if the transfer would not be subject to estate tax. \textbf{If there is a transfer creating an interest in property during the transferor's lifetime and such interest is later included in the transferor's gross estate for estate tax purposes (or would have been included if such interest were subject to estate tax), the 9-month period for making the qualified disclaimer is determined with reference to the earlier transfer creating the interest. In the case of a general power of appointment, the holder of the power has a 9-month period after the transfer creating the power in which to disclaim. If a person to whom any interest in property passes by reason of the exercise, release, or lapse of a general power desires to make a qualified disclaimer, the disclaimer must be made within a 9-month period after the exercise, release, or lapse regardless of whether the exercise, release, or lapse is subject to estate or gift tax. In the case of a nongeneral power of appointment, the holder of the power, permissible appointees, or takers in default of appointment must disclaim within a 9-month period after the original transfer that created or authorized the creation of the power. If the transfer is for the life of an income beneficiary with succeeding interests to other persons, both the life tenant and the other remaindernmen, whether their interests are vested or contingent, must disclaim no later than 9 months after the original transfer creating an interest. In the case of a remainder interest in property which an executor elects to treat as qualified terminable interest property under section 2056(b)(7), the remaindernman must disclaim within 9 months of the transfer creating the interest, rather than 9 months from the date such interest is subject to tax under section 2044 or 2519. A person who receives an interest in property as the result of a qualified disclaimer of the interest must disclaim the previously disclaimed interest no later than 9 months after the date of the transfer creating the interest in the preceding disclaimant. Thus, if A were to make a qualified disclaimer of a specific bequest and as a result of the qualified disclaimer the property passed as part of the residue, the beneficiary of the residue could make a qualified disclaimer no later than 9 months after the date of the testator's death. See paragraph (d)(3) of this section for the time limitation rule with reference to recipients who are under 21 years of age.}

(ii) Sentences 1 through 10 and 12 of paragraph (c)(3)(i) of this section are applicable for transfers creating the interest to be disclaimed made on or after December 31, 1997.

(4) \textit{Joint property}
(i) **Interests in joint tenancy with right of survivorship or tenancies by the entirety.** Except as provided in paragraph (c)(4)(iii) of this section (with respect to joint bank, brokerage, and other investment accounts), in the case of an interest in a joint tenancy with right of survivorship or a tenancy by the entirety, a qualified disclaimer of the interest to which the disclaimer succeeds upon creation of the tenancy must be made no later than 9 months after the creation of the tenancy regardless of whether such interest can be unilaterally severed under local law. A qualified disclaimer of the survivorship interest to which the survivor succeeds by operation of law upon the death of the first joint tenant to die must be made no later than 9 months after the death of the first joint tenant to die regardless of whether such interest can be unilaterally severed under local law and, except as provided in paragraph (c)(4)(ii) of this section (with respect to certain tenancies created on or after July 14, 1988), such interest is deemed to be a one-half interest in the property. (See, however, section 2518(b)(2)(B) for a special rule in the case of disclaimers by persons under age 21.) This is the case regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate under section 2040 and regardless of whether the interest can be unilaterally severed under local law. See paragraph (c)(5), Examples (7) and (8), of this section.

(ii) **Certain tenancies in real property between spouses created on or after July 14, 1988.** In the case of a joint tenancy between spouses or a tenancy by the entirety in real property created on or after July 14, 1988, to which section 2523(i)(3) applies (relating to the creation of a tenancy where the spouse of the donor is not a United States citizen), the surviving spouse may disclaim any portion of the joint interest that is includible in the decedent's gross estate under section 2040. See paragraph (c)(5), Example (9), of this section.

(iii) **Special rule for joint bank, brokerage, and other investment accounts (e.g., accounts held at mutual funds) established between spouses or between persons other than husband and wife.** In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under § 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant. See paragraph (c)(5), Examples (12), (13), and (14), of this section, regarding the treatment of disclaimed interests under sections 2518, 2033 and 2040.

(iv) **Effective date.** This paragraph (c)(4) is applicable for disclaimers made on or after December 31, 1997.

(5) **Examples.** The provisions of paragraphs (c)(1) through (c)(4) of this section may be illustrated by the following examples. For purposes of the following examples, assume that all beneficiaries are over 21 years of age.
Example (1).

On May 13, 1978, in a transfer which constitutes a completed gift for Federal gift tax purposes, A creates a trust in which B is given a lifetime interest in the income from the trust. B is also given a nongeneral testamentary power of appointment over the corpus of the trust. The power of appointment may be exercised in favor of any of the issue of A and B. If there are no surviving issue at B's death or if the power is not exercised, the corpus is to pass to E. On May 13, 1978, A and B have two surviving children, C and D. If A, B, C or D wishes to make a qualified disclaimer, the disclaimer must be made no later than 9 months after May 13, 1978.

Example (2).

Assume the same facts as in example (1) except that B is given a general power of appointment over the corpus of the trust. B exercises the general power of appointment in favor of C upon B's death on June 17, 1989. C may make a qualified disclaimer no later than 9 months after June 17, 1989. If B had died without exercising the general power of appointment, E could have made a qualified disclaimer no later than 9 months after June 17, 1989.

Example (3).

F creates a trust on April 1, 1978, in which F's child G is to receive the income from the trust for life. Upon G's death, the corpus of the trust is to pass to G's child H. If either G or H wishes to make a qualified disclaimer, it must be made no later than 9 months after April 1, 1978.

Example (4).

A creates a trust on February 15, 1978, in which B is named the income beneficiary for life. The trust further provides that upon B's death the proceeds of the trust are to pass to C, if then living. If C predeceases D, the proceeds shall pass to D or D's estate. To have timely disclaimers for purposes of section 2518, B, C, and D must disclaim their respective interests no later than 9 months after February 15, 1978.

Example (5).

A, a resident of State Q, dies on January 10, 1979, devising certain real property to B. The disclaimer laws of State Q require that a disclaimer be made within a reasonable time after a transfer. B disclaims the entire interest in real property on November 10, 1979. Although B's disclaimer may be effective under State Q law, it is not a qualified disclaimer under section 2518 because the disclaimer was made later than 9 months after the taxable transfer to B.

Example (6).

A creates a revocable trust on June 1, 1980, in which B and C are given the income interest for life. Upon the death of the last income beneficiary, the remainder interest is to pass to D. The creation of the trust is not a completed gift for Federal gift tax purposes, but each distribution of trust income to B and C is a
completed gift at the date of distribution. B and C must disclaim each income distribution no later than 9 months after the date of the particular distribution. In order to disclaim an income distribution in the form of a check, the recipient must return the check to the trustee uncashed along with a written disclaimer. **A dies on September 1, 1982, causing the trust to become irrevocable,** and the trust corpus is includible in A's gross estate for Federal estate tax purposes under section 2038. If B or C wishes to make a qualified disclaimer of his income interest, **he must do so no later than 9 months after September 1, 1982.** If D wishes to make a qualified disclaimer of his remainder interest, he must do so no later than 9 months after September 1, 1982.

**Example (7).**

On February 1, 1990, **A purchased real property with A's funds. Title to the property was conveyed to “A and B, as joint tenants with right of survivorship.”** Under applicable state law, the joint interest is unilaterally severable by either tenant. B dies on May 1, 1998, and is survived by A. On January 1, 1999, A disclaims the one-half survivorship interest in the property to which A succeeds as a result of B's death. Assuming that the other requirements of section 2518(b) are satisfied, **A has made a qualified disclaimer of the one-half survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A).** The result is the same whether or not A and B are married and regardless of the proportion of consideration furnished by A and B in purchasing the property.

**Example (8).**

Assume the same facts as in **Example (7)** except that A and B are married and title to the property was conveyed to “A and B, as tenants by the entirety.” Under applicable state law, the tenancy cannot be unilaterally severed by either tenant. Assuming that the other requirements of section 2518(b) are satisfied, **A has made a qualified disclaimer of the one-half survivorship interest (but not the interest retained by A upon the creation of the tenancy, which may not be disclaimed by A).** The result is the same regardless of the proportion of consideration furnished by A and B in purchasing the property.

**Example (9).**

On March 1, 1989, H and W purchase a tract of vacant land which is conveyed to them as tenants by the entirety. The entire consideration is paid by H. **W is not a United States citizen.** H dies on June 1, 1998. **W can disclaim the entire joint interest because this is the interest includible in H's gross estate under section 2040(a).** Assuming that W's disclaimer is received by the executor of H's estate no later than 9 months after June 1, 1998, and the other requirements of section 2518(b) are satisfied, W's disclaimer of the property would be a qualified disclaimer. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

**Example (10).**

In 1986, spouses A and B purchased a personal residence taking title as tenants by the entirety. B dies on July 10, 1998. A wishes to disclaim the one-half undivided interest to which A would succeed by right
of survivorship. If A makes the disclaimer, the property interest would pass under B's will to their child C. C, an adult, and A resided in the residence at B's death and will continue to reside there in the future. A continues to own a one-half undivided interest in the property. Assuming that the other requirements of section 2518(b) are satisfied, A may make a qualified disclaimer with respect to the one-half undivided survivorship interest in the residence if A delivers the written disclaimer to the personal representative of B's estate by April 10, 1999, since A is not deemed to have accepted the interest or any of its benefits prior to that time and A's occupancy of the residence after B's death is consistent with A's retained undivided ownership interest. The result would be the same if the property was held in joint tenancy with right of survivorship that was unilaterally severable under local law.

**Example (11).**

H and W, husband and wife, reside in state X, a community property state. On April 1, 1978, H and W purchase real property with community funds. The property is not held by H and W as jointly owned property with rights of survivorship. H and W hold the property until January 3, 1985, when H dies. H devises his portion of the property to W. On March 15, 1985, W disclaims the portion of the property devised to her by H. Assuming all the other requirements of section 2518 (b) have been met, W has made a qualified disclaimer of the interest devised to her by H. However, W could not disclaim the interest in the property that she acquired on April 1, 1978.

**Example (12).**

On July 1, 1990, A opens a bank account that is held jointly with B, A's spouse, and transfers $50,000 of A's money to the account. A and B are United States citizens. A can regain the entire account without B's consent, such that the transfer is not a completed gift under § 25.2511-1(h)(4). A dies on August 15, 1998, and B disclaims the entire amount in the bank account on October 15, 1998. Assuming that the remaining requirements of section 2518(b) are satisfied, B made a qualified disclaimer under section 2518(a) because the disclaimer was made within 9 months after A's death at which time B had succeeded to full dominion and control over the account. Under state law, B is treated as predeceasing A with respect to the disclaimed interest. The disclaimed account balance passes through A's probate estate and is no longer joint property includible in A's gross estate under section 2040. The entire account is, instead, includible in A's gross estate under section 2033. The result would be the same if A and B were not married.

**Example (13).**

The facts are the same as Example (12), except that B, rather than A, dies on August 15, 1998. A may not make a qualified disclaimer with respect to any of the funds in the bank account, because A furnished the funds for the entire account and A did not relinquish dominion and control over the funds.

**Example (14).**

The facts are the same as Example (12), except that B disclaims 40 percent of the funds in the account. Since, under state law, B is treated as predeceasing A with respect to the disclaimed interest, the 40
percent portion of the account balance that was disclaimed passes as part of A's probate estate, and is no longer characterized as joint property. This 40 percent portion of the account balance is, therefore, includible in A's gross estate under section 2033. The remaining 60 percent of the account balance that was not disclaimed retains its character as joint property and, therefore, is includible in A's gross estate as provided in section 2040(b). Therefore, 30 percent (1/2×60 percent) of the account balance is includible in A's gross estate under section 2040(b), and a total of 70 percent of the aggregate account balance is includible in A's gross estate. If A and B were not married, then the 40 percent portion of the account subject to the disclaimer would be includible in A's gross estate as provided in section 2033 and the 60 percent portion of the account not subject to the disclaimer would be includible in A's gross estate as provided in section 2040(a), because A furnished all of the funds with respect to the account.

(d) No acceptance of benefits

(1) Acceptance. A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in property. However, merely taking delivery of an instrument of title, without more, does not constitute acceptance. Moreover, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. In the case of residential property, held in joint tenancy by some or all of the residents, a joint tenant will not be considered to have accepted the joint interest merely because the tenant resided on the property prior to disclaiming his interest in the property. The exercise of a power of appointment to any extent by the donee of the power is an acceptance of its benefits. In addition, the acceptance of any consideration in return for making the disclaimer is an acceptance of the benefits of the entire interest disclaimed.

(2) Fiduciaries. If a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. Under this rule, for example, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. For example, a fiduciary’s disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class. See paragraph (e) of this section for rules relating to the effect of directing the redistribution of disclaimed property.

(3) Under 21 years of age. A beneficiary who is under 21 years of age has until 9 months after his twenty-first birthday in which to make a qualified disclaimer of his interest in property. Any actions
taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's twenty-first birthday will not be an acceptance by the beneficiary of the interest.

(4) *Examples.* The provisions of paragraphs (d) (1), (2) and (3) of this section may be illustrated by the following examples:

**Example (1).**

On April 9, 1977, A established a trust for the benefit of B, then age 22. Under the terms of the trust, the current income of the trust is to be paid quarterly to B. Additionally, one half the principal is to be distributed to B when B attains the age of 30 years. The balance of the principal is to be distributed to B when B attains the age of 40 years. Pursuant to the terms of the trust, B received a distribution of income on June 30, 1977. On August 1, 1977, B disclaimed B's right to receive both the income from the trust and the principal of the trust, B's disclaimer of the income interest is not a qualified disclaimer for purposes of section 2518(a) because B accepted income prior to making the disclaimer. B's disclaimer of the principal, however, does satisfy section 2518(b)(3). See also § 25.2518-3 for rules relating to the disclaimer of less than an entire interest in property.

**Example (2).**

B is the recipient of certain property devised to B under the will of A. The will stated that any disclaimed property was to pass to C. B and C entered into negotiations in which it was decided that B would disclaim all interest in the real property that was devised to B. In exchange, C promised to let B live in the family home for life. B's disclaimer is not a qualified disclaimer for purposes of section 2518(a) because B accepted consideration for making the disclaimer.

**Example (3).**

A received a gift of Blackacre on December 25, 1978. A never resided on Blackacre but when property taxes on Blackacre became due on July 1, 1979, A paid them out personal funds. On August 15, 1979, A disclaimed the gift of Blackacre. Assuming all the requirements of section 2518 (b) have been met, A has made a qualified disclaimer of Blackacre. Merely paying the property taxes does not constitute an acceptance of Blackacre even though A's personal funds were used to pay the taxes.

**Example (4).**

A died on February 15, 1978. Pursuant to A's will, B received a farm in State Z. B requested the executor to sell the farm and to give the proceeds to B. The executor then sold the farm pursuant to B's request. B then disclaimed $50,000 of the proceeds from the sale of the farm. B's disclaimer is not a qualified disclaimer. By requesting the executor to sell the farm B accepted the farm even though the executor may not have been legally obligated to comply with B's request. See also § 25.2518-3 for rules relating to the disclaimer of less than an entire interest in property.

**Example (5).**
Assume the same facts as in example (4) except that instead of requesting the executor to sell the farm, B pledged the farm as security for a short-term loan which was paid off prior to distribution of the estate. B then disclaimed his interest in the farm. B's disclaimer is not a qualified disclaimer. By pledging the farm as security for the loan, B accepted the farm.

Example (6).

A delivered 1,000 shares of stock in Corporation X to B as a gift on February 1, 1980. A had the shares registered in B's name on that date. On April 1, 1980, B disclaimed the interest in the 1,000 shares. Prior to making the disclaimer, B did not pledge the shares, accept any dividends or otherwise commit any acts indicative of acceptance. Assuming the remaining requirements of section 2518 are satisfied, B's disclaimer is a qualified disclaimer.

Example (7).

On January 1, 1980, A created an irrevocable trust in which B was given a testamentary general power of appointment over the trust's corpus. B executed a will on June 1, 1980, in which B provided for the exercise of the power of appointment. On September 1, 1980, B disclaimed the testamentary power of appointment. Assuming the remaining requirements of section 2518 (b) are satisfied, B's disclaimer of the testamentary power of appointment is a qualified disclaimer.

Example (8).

H and W reside in X, a community property state. On January 1, 1981, H and W purchase a residence with community funds. They continue to reside in the house until H dies testate on February 1, 1990. Although H could devise his portion of the residence to any person, H devised his portion of the residence to W. On September 1, 1990, W disclaims the portion of the residence devised to her pursuant to H's will but continues to live in the residence. Assuming the remaining requirements of section 2518(b) are satisfied, W's disclaimer is a qualified disclaimer under section 2518 (a). W's continued occupancy of the house prior to making the disclaimer will not by itself be treated as an acceptance of the benefits of the portion of the residence devised to her by H.

Example (9).

In 1979, D established a trust for the benefit of D's minor children E and F. Under the terms of the trust, the trustee is given the power to make discretionary distributions of current income and corpus to both children. The corpus of the trust is to be distributed equally between E and F when E becomes 35 years of age. Prior to attaining the age of 21 years on April 8, 1982, E receives several distributions of income from the trust. E receives no distributions of income between April 8, 1982 and August 15, 1982, which is the date on which E disclaims all interest in the income from the trust. As a result of the disclaimer the income will be distributed to F. If the remaining requirements of section 2518 are met, E's disclaimer is a qualified disclaimer under section 2518(a). To have a qualified disclaimer of the interest in corpus, E must disclaim the interest no later than 9 months after April 8, 1982, E's 21st birthday.

Example (10).
Assume the same facts as in example (9) except that E accepted a distribution of income on May 13, 1982. E's disclaimer is not a qualified disclaimer under section 2518 because by accepting an income distribution after attaining the age of 21, E accepted benefits from the income interest.

Example (11).

F made a gift of 10 shares of stock to G as custodian for H under the State X Uniform Gifts to Minors Act. At the time of the gift, H was 15 years old. At age 18, the local age of majority, the 10 shares were delivered to and registered in the name of H. Between the receipt of the shares and H's 21st birthday, H received dividends from the shares. Within 9 months of attaining age 21, H disclaimed the 10 shares. Assuming H did not accept any dividends from the shares after attaining age 21, the disclaimer by H is a qualified disclaimer under section 2518.

(e) Passage without direction by the disclaimant of beneficial enjoyment of disclaimed interest

(1) In general. A disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant (except as provided in paragraph (e)(2) of this section). If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant shall be treated as directing the transfer of the property interest. The requirements of a qualified disclaimer under section 2518 are not satisfied if—

(i) The disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property or interest in property to another person unless such power is limited by an ascertainable standard); or

(ii) The disclaimed property or interest in property passes to or for the benefit of the disclaimant as a result of the disclaimer (except as provided in paragraph (e)(2) of this section).

If a power of appointment is disclaimed, the requirements of this paragraph (e)(1) are satisfied so long as there is no direction on the part of the disclaimant with respect to the transfer of the interest subject to the power or with respect to the transfer of the power to another person. A person may make a qualified disclaimer of a beneficial interest in property even if after such disclaimer the disclaimant has a fiduciary power to distribute to designated beneficiaries, but only if the power is subject to an ascertainable standard. See examples (11) and (12) of paragraph (e)(5) of this section.

(2) Disclaimer by surviving spouse. In the case of a disclaimer made by a decedent's surviving spouse with respect to property transferred by the decedent, the disclaimer satisfies the requirements of this paragraph (e) if the interest passes as a result of the disclaimer without direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as
directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard. See examples (4), (5), and (6) in paragraph (e)(5) of this section.

(3) **Partial failure of disclaimer.** If a disclaimer made by a person other than the surviving spouse is not effective to pass completely an interest in property to a person other than the disclaimant because—

(i) The disclaimant also has a right to receive such property as an heir at law, residuary beneficiary, or by any other means; and

(ii) The disclaimant does not effectively disclaim these rights, the disclaimer is not a qualified disclaimer with respect to the portion of the disclaimed property which the disclaimant has a right to receive. If the portion of the disclaimed interest in property which the disclaimant has a right to receive is not severable property or an undivided portion of the property, then the disclaimer is not a qualified disclaimer with respect to any portion of the property. Thus, for example, if a disclaimant who is not a surviving spouse receives a specific bequest of a fee simple interest in property and as a result of the disclaimer of the entire interest, the property passes to a trust in which the disclaimant has a remainder interest, then the disclaimer will not be a qualified disclaimer unless the remainder interest in the property is also disclaimed. See § 25.2518-3 (a)(1)(ii) for the definition of severable property.

(4) **Effect of precatory language.** Precatory language in a disclaimer naming takers of disclaimed property will not be considered as directing the redistribution or transfer of the property or interest in property to such persons if the applicable State law gives the language no legal effect.

(5) **Examples.** The provisions of this paragraph (e) may be illustrated by the following examples:

**Example (1).**

A, a resident of State X, died on July 30, 1978. Pursuant to A's will, B, A's son and heir at law, received the family home. In addition, B and C each received 50 percent of A's residuary estate. B disclaimed the home. A's will made no provision for the distribution of property in the case of a beneficiary's disclaimer. Therefore, pursuant to the disclaimer laws of State X, the disclaimed property became part of the residuary estate. Because B's 50 percent share of the residuary estate will be increased by 50 percent of the value of the family home, the disclaimed property will not pass solely to another person. Consequently, B's disclaimer of the family home is a qualified disclaimer only with respect to the 50 percent portion that passes solely to C. Had B also disclaimed B's 50 percent interest in the residuary estate, the disclaimer would have been a qualified disclaimer under section 2518 of the entire interest in the home (assuming the remaining requirements of a qualified disclaimer were satisfied). Similarly, if under the laws of State X, the disclaimer has the effect of divesting B of all interest in the home, both as devisee and as a beneficiary of the residuary estate, including any property resulting from its sale, the disclaimer would be a qualified disclaimer of B's entire interest in the home.

**Example (2).**

D, a resident of State Y, died testate on June 30, 1978. E, an heir at law of D, received specific bequests of certain severable personal property from D. E disclaimed the property transferred by D under the will.
The will made no provision for the distribution of property in the case of a beneficiary's disclaimer. The disclaimer laws of State Y provide that such property shall pass to the decedent's heirs at law in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. Because State Y's law treats E as predeceasing D, the property disclaimed by E does not pass to E as an heir at law or otherwise. Consequently, if the remaining requirements of section 2518(b) are satisfied, E's disclaimer is a qualified disclaimer under section 2518(a).

Example (3).

Assume the same facts as in example (2) except that State Y has no provision treating the disclaimant as predeceasing the testator. E's disclaimer satisfies section 2518 (b)(4) only to the extent that E does not have a right to receive the property as an heir at law. Had E disclaimed both the share E received under D's will and E's intestate share, the requirement of section 2518 (b)(4) would have been satisfied.

Example (4).

B died testate on February 13, 1980. B's will established both a marital trust and a nonmarital trust. The decedent's surviving spouse, A, is an income beneficiary of the marital trust and has a testamentary general power of appointment over its assets. A is also an income beneficiary of the nonmarital trust, but has no power to appoint or invade the corpus. The provisions of the will specify that any portion of the marital trust disclaimed is to be added to the nonmarital trust. A disclaimed 30 percent of the marital trust. (See § 25.2518-3 (b) for rules relating to the disclaimer of an undivided portion of an interest in property.) Pursuant to the will, this portion of the marital trust property was transferred to the nonmarital trust without any direction on the part of A. This disclaimer by A satisfies section 2518 (b)(4).

Example (5).

Assume the same facts as in example (4) except that A, the surviving spouse, has both an income interest in the nonmarital trust and a testamentary nongeneral power to appoint among designated beneficiaries. This power is not limited by an ascertainable standard. The requirements of section 2518 (b)(4) are not satisfied unless A also disclaims the nongeneral power to appoint the portion of the trust corpus that is attributable to the property that passed to the nonmarital trust as a result of A's disclaimer. Assuming that the fair market value of the disclaimed property on the date of the disclaimer is $250,000 and that the fair market value of the nonmarital trust (including the disclaimed property) immediately after the disclaimer is $750,000, A must disclaim the power to appoint one-third of the nonmarital trust's corpus. The result is the same regardless of whether the nongeneral power is testamentary or inter vivos.

Example (6).

Assume the same facts as in example (4) except that A has both an income interest in the nonmarital trust and a power to invade corpus if needed for A's health or maintenance. In addition, an independent trustee has power to distribute to A any portion of the corpus which the trustee determines to be
desirable for A's happiness. Assuming the other requirements of section 2518 are satisfied. A may make a qualified disclaimer of interests in the marital trust without disclaiming any of A's interests in the nonmarital trust.

Example (7).

B died testate on June 1, 1980. B's will created both a marital trust and a nonmarital trust. The decedent's surviving spouse, C, is an income beneficiary of the marital trust and has a testamentary general power of appointment over its assets. C is an income beneficiary of the nonmarital trust, and additionally has the noncumulative right to withdraw yearly the greater of $5,000 or 5 percent of the aggregate value of the principal. The provisions of the will specify that any portion of the marital trust disclaimed is to be added to the nonmarital trust. C disclaims 50 percent of the marital trust corpus. Pursuant to the will, this amount is transferred to the nonmarital trust. Assuming the remaining requirements of section 2518(b) are satisfied, C's disclaimer is a qualified disclaimer.

Example (8).

A, a resident of State X, died on July 19, 1979. A was survived by a spouse B, and three children, C, D, and E. Pursuant to A's will, B received one-half of A's estate and the children received equal shares of the remaining one-half of the estate. B disclaimed the entire interest B had received. The will made no provisions for the distribution of property in the case of a beneficiary's disclaimer. The disclaimer laws of State X provide that under these circumstances disclaimed property passes to the decedent's heirs at law in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. As a result, C, D, and E are A's only remaining heirs at law, and will divide the disclaimed property equally among themselves. B's disclaimer includes language stating that “it is my intention that C, D, and E will share equally in the division of this property as a result of my disclaimer.” State X considers these to be precatory words and gives them no legal effect. B's disclaimer meets all other requirements imposed by State X on disclaimers, and is considered an effective disclaimer under which the property will vest solely in C, D, and E in equal shares without any further action required by B. Therefore, B is not treated as directing the redistribution or transfer of the property. If the remaining requirements of section 2518 are met, B's disclaimer is a qualified disclaimer.

Example (9).

C died testate on January 1, 1979. According to C's will, D was to receive 1/3 of the residuary estate with any disclaimed property going to E. D was also to receive a second 1/3 of the residuary estate with any disclaimed property going to F. Finally, D was to receive a final 1/3 of the residuary estate with any disclaimed property going to G. D specifically states that he is disclaiming the interest in which the disclaimed property is designated to pass to E. D has effectively directed that the disclaimed property will pass to E and therefore D's disclaimer is not a qualified disclaimer under section 2518(a).

Example (10).
Assume the same facts as in example (9) except that C's will also states that D was to receive Blackacre and Whiteacre. C's will further provides that if D disclaimed Blackacre then such property was to pass to E and that if D disclaimed Whiteacre then Whiteacre was to pass to F. D specifically disclaims Blackacre with the intention that it pass to E. Assuming the other requirements of section 2518 are met, D has made a qualified disclaimer of Blackacre. Alternatively, D could disclaim an undivided portion of both Blackacre and Whiteacre. Assuming the other requirements of section 2518 are met, this would also be a qualified disclaimer.

Example (11).

G creates an irrevocable trust on February 16, 1983, naming H, I and J as the income beneficiaries for life and F as the remainderman. F is also named the trustee and as trustee has the discretionary power to invade the corpus and make discretionary distributions to H, I or J during their lives. F disclaims the remainder interest on August 8, 1983, but retains his discretionary power to invade the corpus. F has not made a qualified disclaimer because F retains the power to direct enjoyment of the corpus and the retained fiduciary power is not limited by an ascertainable standard.

Example (12).

Assume the same facts as in example (11) except that F may only invade the corpus to make distributions for the health, maintenance or support of H, I or J during their lives. If the other requirements of section 2518(b) are met, F has made a qualified disclaimer of the remainder interest because the retained fiduciary power is limited by an ascertainable standard.
26 CFR § 25.2518-3 Disclaimer of less than an entire interest.

(a) Disclaimer of a partial interest

(1) In general

(i) Interest. If the requirements of this section are met, the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. For example, if an income interest in securities is bequeathed to A for life, then to B for life, with the remainder interest in such securities bequeathed to A's estate, and if the remaining requirements of section 2518(b) are met, A could make a qualified disclaimer of either the income interest or the remainder, or an undivided portion of either interest. A could not, however, make a qualified disclaimer of the income interest for a certain number of years. Further, where local law merges interests separately created by the transferor, a qualified disclaimer will be allowed only if there is a disclaimer of the entire merged interest or an undivided portion of such merged interest. See example (12) in paragraph (d) of this section. See § 25.2518-3(b) for rules relating to the disclaimer of an undivided portion. Where the merger of separate interests would occur but for the creation by the transferor of a nominal interest (as defined in paragraph (a)(1)(iv) of this section), a qualified disclaimer will be allowed only if there is a disclaimer of all the separate interests, or an undivided portion of all such interests, which would have merged but for the nominal interest.

(ii) Severable property. A disclaimant shall be treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer which would be a qualified disclaimer if such property were the only property in which the disclaimant had an interest. If applicable local law does not recognize a purported disclaimer of severable property, the disclaimant must comply with the requirements of paragraph (c)(1) of § 25.2518-1 in order to make a qualified disclaimer of the severable property. Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.

(iii) Powers of appointment. A power of appointment with respect to property is treated as a separate interest in such property and such power of appointment with respect to all or an undivided portion of such property may be disregarded independently from any other interests separately created by the transferor in the property if the requirements of section 2518(b) are met. See example (21) of paragraph (d) of this section. Further, a disclaimer of a power of appointment with respect to property is a qualified disclaimer only if any right to direct the beneficial enjoyment of the property which is retained by the disclaimant is limited by an ascertainable standard. See example (9) of paragraph (d) of this section.

(iv) Nominal interest. A nominal interest is an interest in property created by the transferor that—
(A) Has an actuarial value (as determined under § 20.2031-7) of less than 5 percent of the total value of the property at the time of the taxable transfer creating the interest,

(B) Prevents the merger under local law or two or more other interests created by the transferor, and

(C) Can be clearly shown from all the facts and circumstances to have been created primarily for the purpose of preventing the merger of such other interests.

Factors to be considered in determining whether an interest is created primarily for the purpose of preventing merger include (but are not limited to) the following: the relationship between the transferor and the interest holder; the age difference between the interest holder and the beneficiary whose interests would have merged; the interest holder's state of health at the time of the taxable transfer; and, in the case of a contingent remainder, any other factors which indicate that the possibility of the interest vesting as a fee simple is so remote as to be negligible.

(2) In trust. A disclaimer is not a qualified disclaimer under section 2518 if the beneficiary disclaims income derived from specific property transferred in trust while continuing to accept income derived from the remaining properties in the same trust unless the disclaimer results in such property being removed from the trust and passing, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent. Moreover, a disclaimer of both an income interest and a remainder interest in specific trust assets is not a qualified disclaimer if the beneficiary retains interests in other trust property unless, as a result of the disclaimer, such assets are removed from the trust and pass, without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent. The disclaimer of an undivided portion of an interest in a trust may be a qualified disclaimer. See also paragraph (b) of this section for rules relating to the disclaimer of an undivided portion of an interest in property.

(b) Disclaimer of undivided portion. A disclaimer of an undivided portion of a separate interest in property which meets the other requirements of a qualified disclaimer under section 2518(b) and the corresponding regulations is a qualified disclaimer. An undivided portion of a disclaimant's separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest in such property and in other property into which such property is converted. A disclaimer of some specific rights while retaining other rights with respect to an interest in the property is not a qualified disclaimer of an undivided portion of the disclaimant's interest in property. Thus, for example, a disclaimer made by the devisee of a fee simple interest in Blackacre is not a qualified disclaimer if the disclaimant disclaims a remainder interest in Blackacre but retains a life estate.

(c) Disclaimer of a pecuniary amount. A disclaimer of a specific pecuniary amount out of a pecuniary or nonpecuniary bequest or gift which satisfies the other requirements of a qualified disclaimer under section 2518 (b) and the corresponding regulations is a qualified disclaimer provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer. Thus, following the disclaimer of a specific pecuniary amount from a bequest or gift, the amount disclaimed and any income attributable to such amount must be segregated
from the portion of the gift or bequest that was not disclaimed. Such a segregation of assets making up the disclaimer of a pecuniary amount must be made on the basis of the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of value changes that may have occurred between the date of transfer and the date of the disclaimer. A pecuniary amount distributed to the disclaimant from the bequest or gift prior to the disclaimer shall be treated as a distribution of corpus from the bequest or gift. However, the acceptance of a distribution from the gift or bequest shall also be considered to be an acceptance of a proportionate amount of income earned by the bequest or gift. The proportionate share of income considered to be accepted by the disclaimant shall be determined at the time of the disclaimer according to the following formula:

See examples (17), (18), and (19) in § 25.2518-3(d) for illustrations of the rules set forth in this paragraph (c).

(d) Examples. The provisions of this section may be illustrated by the following examples:

Example (1).

A, a resident of State Q, died on August 1, 1978. A's will included specific bequests of 100 shares of stock in X corporation; 200 shares of stock in Y corporation; 500 shares of stock in Z corporation; personal effects consisting of paintings, home furnishings, jewelry, and silver, and a 500 acre farm consisting of a residence, various outbuildings, and 500 head of cattle. The laws of State Q provide that a disclaimed interest passes in the same manner as if the disclaiming beneficiary had died immediately before the testator's death. Pursuant to A's will, B was to receive both the personal effects and the farm. C was to receive all the shares of stock in Corporation X and Y and D was to receive all the shares of stock in Corporation Z. B disclaimed 2 of the paintings and all the jewelry, C disclaimed 50 shares of Y corporation stock, and D disclaimed 100 shares of Z corporation stock. If the remaining requirements of section 2518(b) and the corresponding regulations are met, each of these disclaimers is a qualified disclaimer for purposes of section 2518(a).

Example (2).

Assume the same facts as in example (1) except that D disclaimed the income interest in the shares of Z corporation stock while retaining the remainder interest in such shares. D's disclaimer is not a qualified disclaimer.

Example (3).

Assume the same facts as in example (1) except that B disclaimed 300 identified acres of the 500 acres. Assuming that B's disclaimer meets the remaining requirements of section 2518(b), it is a qualified disclaimer.

Example (4).
Assume the same facts as in example (1) except that A devised the income from the farm to B for life and the remainder interest to C. B disclaimed 40 percent of the income from the farm. Assuming that it meets the remaining requirements of section 2518(b), B's disclaimer of an undivided portion of the income is a qualified disclaimer.

Example (5).

E died on September 13, 1978. Under the provisions of E's will, E's shares of stock in X, Y, and Z corporations were to be transferred to a trust. The trust provides that all income is to be distributed currently to F and G in equal parts until F attains the age of 45 years. At that time the corpus of the trust is to be divided equally between F and G. F disclaimed the income arising from the shares of X stock. G disclaimed 20 percent of G's interest in the trust. F's disclaimer is not a qualified disclaimer because the X stock remains in the trust. If the remaining requirements of section 2518(b) are met, G's disclaimer is a qualified disclaimer.

Example (6).

Assume the same facts as in example (5) except that F disclaimed both the income interest and the remainder interest in the shares of X stock. F's disclaimer results in the X stock being transferred out of the trust to G without any direction on F's part. F's disclaimer is a qualified disclaimer under section 2518(b).

Example (7).

Assume the same facts as in example (5) except that F is only an income beneficiary of the trust. The X stock remains in the trust after F's disclaimer of the income arising from the shares of X stock. F's disclaimer is not a qualified disclaimer under section 2518.

Example (8).

Assume the same facts as in example (5) except that F disclaimed the entire income interest in the trust while retaining the interest F has in corpus. Alternatively, assume that G disclaimed G's entire corpus interest while retaining G's interest in the income from the trust. If the remaining requirements of section 2518(b) are met, either disclaimer will be a qualified disclaimer.

Example (9).

G creates an irrevocable trust on May 13, 1980, with H, I, and J as the income beneficiaries. In addition, H, who is the trustee, holds the power to invade corpus for H's health, maintenance, support and happiness and a testamentary power of appointment over the corpus. In the absence of the exercise of the power of appointment, the property passes to I and J in equal shares. H disclaimed the power to invade corpus for H's health, maintenance, support and happiness. Because H retained the testamentary power to appoint the property in the corpus, H's disclaimer is not a qualified disclaimer. If H also disclaimed the testamentary power of appointment, H's disclaimer would have been a qualified disclaimer.
Example (10).

E creates an irrevocable trust on May 1, 1980, in which D is the income beneficiary for life. Subject to the trustee's discretion, E's children, A, B, and C, have the right to receive corpus during D's lifetime. The remainder passes to D if D survives A, B, C, and all their issue. D also holds an inter vivos power to appoint the trust corpus to A, B, and C. On September 1, 1980, D disclaimed the remainder interest. D's disclaimer is not a qualified disclaimer because D retained the power to direct the use and enjoyment of corpus during D's life.

Example (11).

Under H's will, a trust is created from which W is to receive all of the income for life. The trustee has the power to invade the trust corpus for the support or maintenance of D during the life of W. The trust is to terminate at W's death, at which time the trust property is to be distributed to D. D makes a timely disclaimer of the right to corpus during W's lifetime, but does not disclaim the remainder interest. D's disclaimer is a qualified disclaimer assuming the remaining requirements of section 2518 are met.

Example (12).

Under the provisions of G's will A received a life estate in a farm, and was the sole beneficiary of property in the residuary estate. The will also provided that the remainder interest in the farm pass to the residuary estate. Under local law A's interests merged to give A a fee simple in the farm. A made a timely disclaimer of the life estate. A's disclaimer of a partial interest is not a qualified disclaimer under section 2518(a). If A makes a disclaimer of the entire merged interest in the farm or an undivided portion of such merged interest then A would be making a qualified disclaimer assuming all the other requirements of section 2518(b) are met.

Example (13).

A, a resident of State Z, dies on September 3, 1980. Under A's will, Blackacre is devised to C for life, then to D for 1 month, remainder to C. Had A not created D's interest, State Z law would have merged C's life estate and the remainder to C to create a fee simple interest in C. Assume that the actuarial value of D's interest is less than 5 percent of the total value of Blackacre on the date of A's death. Further assume that facts and circumstances (particularly the duration of D's interest) clearly indicate that D's interest was created primarily for the purpose of preventing the merger of C's two interests in Blackacre. D's interest in Blackacre is a nominal interest and C's two interests will, for purposes of making a qualified disclaimer, be considered to have merged. Thus, C cannot make a qualified disclaimer of his remainder while retaining the life estate. C can, however, make a qualified disclaimer of both of these interests entirely or an undivided portion of both.

Example (14).

A, a resident of State X, dies on October 12, 1978. Under A's will, Blackacre was devised to B for life, then to C for life if C survives B, remainder to B's estate. On the date of A's death, B and C are both 8 year old grandchildren of A. In addition, C is in good health. The actual value of C's interest is less than 5
percent of the total value of Blackacre on the date of A's death. No facts are present which would indicate that the possibility of C's contingent interest vesting is so remote as to be negligible. Had C's contingent life estate not been created, B's life estate and remainder interests would have merged under local law to give B a fee simple interest in Blackacre. Although C's interest prevents the merger of B's two interests and has an actual value of less than 5 percent, C's interest is not a nominal interest within the meaning of § 25.2518-3(a)(1)(iv) because the facts and circumstances do not clearly indicate that the interest was created primarily for the purpose of preventing the merger of other interests in the property. Assuming all the other requirements of section 2518(b) are met, B can make a qualified disclaimer of the remainder while retaining his life estate.

Example (15).

In 1981, A transfers $60,000 to a trust created for the benefit of B who was given the income interest for life and who also has a testamentary nongeneral power of appointment over the corpus. A transfers an additional $25,000 to the trust on June 1, 1984. At that time the trust corpus (exclusive of the $25,000 transfer) has a fair market value of $75,000. On January 1, 1985, B disclaims the right to receive income attributable to 25 percent of the corpus.

Assuming that no distributions were made to B attributable to the $25,000, B's disclaimer is a qualified disclaimer for purposes of section 2518(a) if all the remaining requirements of section 2518(b) are met.

Example (16).

Under the provisions of B's will, A is left an outright cash legacy of $50,000 and has no other interest in B's estate. A timely disclaimer by A of any stated dollar amount is a qualified disclaimer under section 2518(a).

Example (17).

D bequeaths his brokerage account to E. The account consists of stocks and bonds and a cash amount earning interest. The total value of the cash and assets in the account on the date of D's death is $100,000. Four months after D's death, E makes a withdrawal of cash from the account for personal use amounting to $40,000. Eight months after D's death, E disclaims $60,000 of the account without specifying any particular assets or cash. The cumulative fair market value of the stocks and bonds in the account on the date of the disclaimer is equal to the value of such stocks and bonds on the date of D's death. The income earned by the account between the date of D's death and the date of E's disclaimer was $20,000. The amount of income earned by the account that E accepted by withdrawing $40,000 from the account prior to the disclaimer is determined by applying the formula set forth in § 25.2518-3(c) as follows:

E is considered to have accepted $8,000 of the income earned by the account. If (i) the $60,000 disclaimed by E and the $12,000 of income earned prior to the disclaimer which is attributable to that amount are segregated from the $8,000 of income E is considered to have accepted, (ii) E does not
accept any benefits of the $72,000 so segregated, and (iii) the other requirements of section 2518 (b) are met, then E's disclaimer of $60,000 from the account is a qualified disclaimer.

Example (18).

A bequeathed his residuary estate to B. The residuary estate had a value of $1 million on the date of A's death. Six months later, B disclaimed $200,000 out of this bequest. B received distributions of all the income from the entire estate during the period of administration. When the estate was distributed, B received the entire residuary estate except for $200,000 in cash. B did not make a qualified disclaimer since he accepted the benefits of the $200,000 during the period of estate administration.

Example (19).

Assume the same facts as in example (18) except that no income was paid to B and the value of the residuary estate on the date of the disclaimer (including interest earned from date of death) was $1.5 million. In addition, as soon as B's disclaimer was made, the executor of A's estate set aside assets worth $300,000 and the interest earned after the disclaimer on that amount in a separate fund so that none of the income was paid to B. B's disclaimer is a qualified disclaimer under section 2518(a).

Example (20).

A bequeathed his residuary estate to B. B disclaims a fractional share of the residuary estate. Any disclaimed property will pass to A's surviving spouse, W. The numerator of the fraction disclaimed is the smallest amount which will allow A's estate to pass free of Federal estate tax and the denominator is the value of the residuary estate. B's disclaimer is a qualified disclaimer.

Example (21).

A created a trust on July 1, 1979. The trust provides that all current income is to be distributed equally between B and C for the life of B. B also is given a testamentary general power of appointment over the corpus. If the power is not exercised, the corpus passes to C or C's heirs. B disclaimed the testamentary power to appoint an undivided one-half of the trust corpus. Assuming the remaining requirements of section 2518(b) are satisfied, B's disclaimer is a qualified disclaimer under section 2518(a).

Individual Retirement Account (IRA); decedent; beneficiary's disclaimer. This ruling discusses whether a beneficiary's disclaimer of a beneficial interest in a decedent's IRA is a qualified disclaimer under section 2518 of the Code even though prior to making the disclaimer, the beneficiary receives from the IRA the required minimum distribution for the year of the decedent's death.

ISSUE

Is a beneficiary's disclaimer of a beneficial interest in a decedent's individual retirement account (IRA) a qualified disclaimer under § 2518 of the Internal Revenue Code even though, prior to making the disclaimer, the beneficiary receives the required minimum distribution for the year of the decedent's death from the IRA?

FACTS

Decedent dies in 2004. At the time of death, Decedent is the owner of an IRA described in § 408(a) with assets having a fair market value of $2,000x. Decedent’s “required beginning date,” as described in § 401(a)(9)(A), occurred prior to 2004, and accordingly Decedent was receiving annual distributions from the IRA prior to the time of death. However, at the time of death, Decedent had not received the required minimum distribution for the 2004 calendar year.

Situation 1: Under the terms of the IRA beneficiary designation pursuant to the IRA governing instrument, Decedent’s spouse, Spouse, is designated as the sole beneficiary of the IRA after Decedent’s death. A, the child of Decedent and Spouse, is designated as the beneficiary in the event Spouse predeceases Decedent. Three months after Decedent’s death, in accordance with § 1.401(a)(9)-5, A-4, of the Income Tax Regulations, the IRA custodian pays Spouse $100x, the required minimum distribution for 2004. No other amounts have been paid from the IRA since Decedent’s date of death.

Seven months after Decedent’s death, Spouse executes a written instrument pursuant to which Spouse disclaims the pecuniary amount of $600x of the IRA account balance plus the income attributable to the $600x amount earned after the date of death. The income earned by the IRA between the date of Decedent’s death and the date of Spouse’s disclaimer is $40x. The disclaimer is valid and effective under applicable state law. Under applicable state law, as a result of the disclaimer, Spouse is treated as predeceasing Decedent with respect to the disclaimed property. As soon as the disclaimer is made, in accordance with the IRA beneficiary designation, A, as successor beneficiary is paid the $600x amount disclaimed, plus that portion of IRA income earned between the date of death and the date of the disclaimer attributable to the $600x amount ($12x).

Situation 2: The facts are the same as in Situation 1, except that, instead of disclaiming a pecuniary amount, Spouse validly disclaims, in the written instrument, 30 percent of Spouse’s entire interest in the principal and income of the balance of the IRA account remaining after the $100x required minimum distribution for 2004 and after reduction for the pre-disclaimer income attributable to the
$100x required minimum distribution ($2x). As soon as the disclaimer is made, in accordance with the beneficiary designation, A is paid 30 percent of the excess of the remaining account balance over $2x.

Situation 3: The facts are the same as in Situation 1, except that A is designated as the sole beneficiary of the IRA after Decedent’s death, Spouse is designated as the beneficiary in the event A predeceases Decedent, and the $100x required minimum distribution for 2004 is paid to A 3 months after Decedent’s death. Seven months after Decedent’s death, A disclaims the entire remaining balance of the IRA account except for $2x, the income attributable to the $100x required minimum distribution paid to A. As soon as the disclaimer is made, in accordance with the IRA beneficiary designation, the balance of the IRA account, less $2x, is distributed to Spouse as successor beneficiary. A receives a total of $102x.

LAW AND ANALYSIS

Section 408(a) provides that the term “individual retirement account” means a trust created or organized in the United States for the exclusive benefit of an individual or his or her beneficiaries, but only if the written governing instrument creating the trust meets certain specified requirements.

Section 408(a)(6) provides that, under regulations prescribed by the Secretary, rules similar to the rules of § 401(a)(9) and the incidental death benefit requirements of § 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit an IRA trust is maintained.

Under § 401(a)(9)(A), a trust will not constitute a qualified trust unless the plan provides that the entire interest of each employee (i) will be distributed to such employee not later than the required beginning date, or (ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary).

Under § 1.408-8, A-1, an IRA is subject to the required minimum distribution rules of § 401(a)(9) and must satisfy the requirements of §§ 1.401(a)(9)-1 through 1.401(a)(9)-9 in the same manner as a plan, except as otherwise specified in § 1.408-8. Under § 1.408-8, A-1, for purposes of applying the rules of §§ 1.401(a)(9)-1 through 1.401(a)(9)-9, the IRA owner is substituted for the employee. Under § 1.408-8, A-3, the term “required beginning date” means April 1 of the calendar year following the calendar year in which the IRA owner attains age 70 1/2.

Under § 1.401(a)(9)-4, A-1, a designated beneficiary is an individual who is designated as a beneficiary either by the terms of the plan or by an affirmative election by the employee (or the employee’s surviving spouse) specifying the beneficiary. A beneficiary designated as such under the plan is an individual who is entitled to a portion of an employee’s benefit, contingent on the employee’s death or another specified event.
Section 1.401(a)(9)-4, A-4, provides that the employee’s designated beneficiary generally will be determined based on the beneficiaries designated as of the employee’s date of death who remain beneficiaries as of September 30th of the calendar year following the calendar year of the employee’s death. Generally, any person who was a beneficiary as of the employee’s date of death, but is not a beneficiary as of that September 30th (e.g., because the person receives the entire benefit to which the person is entitled before that September 30th), is not taken into account in determining the employee’s designated beneficiary for purposes of determining the distribution period for required minimum distributions after the employee’s death. Accordingly, if a person disclaims entitlement to the employee’s benefit by a disclaimer that satisfies § 2518 by that September 30th, thereby allowing other beneficiaries to receive the disclaimed benefit instead, the disclaimant is not taken into account in determining the employee’s designated beneficiary.

Under § 2518(a), if a person makes a qualified disclaimer with respect to any interest in property, then for estate, gift, and generation-skipping transfer tax purposes, the disclaimed interest will be treated as if the interest had never been transferred to the disclaimant. Instead, the interest will be considered as having passed directly from the decedent to the person entitled to receive the property as a result of the disclaimer.

Under § 2518(b), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property, but only if: (1) the refusal is in writing; (2) the writing is received by the transferor of the interest, his or her legal representative, or the holder of the legal title to the property to which the interest relates, not later than the date that is 9 months after the later of — (A) the date on which the transfer creating the interest in the person is made, or (B) the day on which the person attains the age of 21; (3) the person has not accepted the interest or any of its benefits; and (4) as a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—(A) to the spouse of the decedent, or (B) to a person other than the person making the disclaimer.

Section 25.2518-2(d)(1) of the Gift Tax Regulations provides that a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act that is consistent with ownership of the interest in the property. Acts indicative of acceptance include: using the property or the interest in the property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in the property. However, a disclaimant is not considered to have accepted the property merely because, under applicable local law, title to the property vests immediately on the decedent’s death in the disclaimant.

Section 25.2518-3 provides rules regarding the circumstances under which an individual may make a qualified disclaimer of less than the individual’s entire interest in property and may accept the balance of the property. Section 25.2518-3(b) provides that a disclaimer of an undivided portion of a separate interest in property that meets the other requirements of a qualified disclaimer under § 2518(b) and the corresponding regulations is a qualified disclaimer. Under the regulations, each
interest in property that is separately created by the transferor is treated as a separate interest in property. An undivided portion of a disclaimant’s separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in the property and must extend over the entire term of the disclaimant’s interest in the property and in other property into which the property is converted.

Section 25.2518-3(c) provides that the disclaimer of a specific pecuniary amount out of a pecuniary or nonpecuniary bequest or gift can be a qualified disclaimer provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer. Following the disclaimer, the amount disclaimed and any income attributable to that amount must be segregated based on the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of the value changes that may have occurred between the date of transfer and the date of the disclaimer. The regulation further provides that a pecuniary amount that is distributed to the disclaimant from the bequest prior to the disclaimer is treated as a distribution of corpus from the bequest that does not preclude a disclaimer with respect to the balance of the bequest. However, the acceptance of a distribution from the bequest is considered an acceptance of a proportionate amount of the income earned by the bequest. That income must be similarly segregated from the disclaimed amount and cannot be disclaimed. The regulation provides a formula to determine the proportionate share of the income considered to be accepted by the disclaimant, and thus, not eligible to be disclaimed, as follows:

| Total amount of distributions received by the disclaimant out of gift or bequest | X |
| Total value of the gift or bequest on the date of the transfer | Total amount of income earned by the bequest between the date of transfer and the date of disclaimer |

See § 25.2518-3(d), Example 17 (illustrating a beneficiary’s qualified disclaimer of an interest in a brokerage account passing to the beneficiary when, prior to the disclaimer, the beneficiary withdrew a pecuniary amount from the account); see also § 25.2518-3(d), Example 19 (regarding a pecuniary disclaimer funded on a basis that is fairly representative of value changes that occurred between the date of transfer and the date of the disclaimer).

In Situations 1, 2, and 3, the beneficiary’s receipt of the $100x distribution from the IRA constitutes an acceptance of $100x of corpus, plus the income attributable to that amount. Based on the formula contained in § 25.2518-3(c), the amount of income attributable to the $100x distribution that the beneficiary is deemed to have accepted, and therefore cannot disclaim, is $2x computed as follows:

\[
\frac{$100x \text{(distribution)}}{\text{X} \frac{$40x \text{(IRA income from date of death to date of disclaimer)}}{\text{$2000x \text{(date of death value of IRA)}}}}
\]
However, the beneficiary’s acceptance of these amounts does not preclude the beneficiary from making a qualified disclaimer with respect to all or a portion of the balance of the IRA.

Accordingly, in *Situation 1*, assuming the other requirements of § 2518(b) are satisfied, Spouse’s disclaimer constitutes a qualified disclaimer under § 2518(b) of the $600x pecuniary amount, plus $12x (the IRA income attributable to the disclaimer amount ($600x/$2000x X $40x)).

In *Situation 2*, Spouse disclaims, in accordance with § 25.2518-3(b), an undivided portion (30 percent) of Spouse’s principal and income interest in the remaining IRA account balance, rather than a pecuniary amount as in *Situation 1*. However, as in *Situation 1*, Spouse’s receipt of the $100x distribution also constitutes acceptance of $2x of income deemed attributable to the amount distributed. Spouse may not disclaim any portion of the $2x. Therefore, in *Situation 2*, assuming the other requirements of § 2518(b) are satisfied, Spouse’s disclaimer of 30 percent of Spouse’s entire interest in the principal and income of the balance of the IRA account remaining after the $100x required minimum distribution for 2004 and after reduction for the pre-disclaimer income attributable to that amount ($2x), constitutes a qualified disclaimer to the extent of 30 percent of the remaining IRA account balance after reduction for the $2x of income Spouse is deemed to have accepted (that is, .30 X [value of remaining account balance on date of disclaimer - $2x]).

The results in *Situations 1* and 2 would be the same if the amount disclaimed, plus that portion of the post-death IRA income attributable to the disclaimed amount, is not distributed outright to A, but instead is segregated and maintained in a separate IRA account of which A is the beneficiary as described in § 1.401(a)(9)-8, A-3. See also, § 1.401(a)(9)-8, A-2(a)(2). Separate accounts for A and Spouse may be made effective as of the date of Decedent’s death in 2004, and the 2004 required minimum distribution does not have to be allocated among the beneficiaries of the separate accounts for purposes of the separate account rules under § 1.401(a)(9)-8, A-3.

In *Situation 3*, A disclaims A’s entire principal and income interest in the remaining IRA account balance after the payment of the required minimum distribution for 2004, except for $2x. As in *Situations 1* and 2, A’s receipt of the $100x required minimum distribution also constitutes an acceptance of the $2x of income that is deemed attributable to the required minimum distribution that is distributed. A may not disclaim any portion of the $2x. Therefore, in *Situation 3*, assuming the other requirements of § 2518(b) are satisfied, A’s disclaimer of the entire principal and income balance of the IRA remaining after the payment of the required minimum distribution for 2004, except for $2x (that is, 100% of value of the remaining account balance on the date of the disclaimer, less $2x) constitutes a qualified disclaimer.

In addition, under § 1.401(a)(9)-4, A-4, any person who was a beneficiary of the employee’s benefit as of the date of the employee’s death, but is not a beneficiary as of September 30th of the calendar year following the calendar year of the employee’s death, is not considered a designated beneficiary for purposes of § 401(a)(9). In *Situation 3*, A both received the required minimum distribution amount and timely disclaimed entitlement to the entire balance of the IRA account on or before September 30, 2005. Accordingly, if A is paid the $2x of income attributable to the required
minimum distribution amount on or before September 30, 2005, A will be treated as not entitled to any further benefit as of September 30, 2005, and therefore, A will not be considered a designated beneficiary of the IRA for purposes of § 401(a)(9).

HOLDINGS

A beneficiary’s disclaimer of a beneficial interest in a decedent’s IRA is a qualified disclaimer under § 2518 (if all of the requirements of that section are met), even though, prior to making the disclaimer, the beneficiary receives the required minimum distribution for the year of the decedent’s death from the IRA. The beneficiary may make a qualified disclaimer under § 2518 with respect to all or a portion of the balance of the account, other than the income attributable to the required minimum distribution that the beneficiary received, provided that at the time the disclaimer is made, the disclaimed amount and the income attributable to the disclaimed amount are paid to the beneficiary entitled to receive the disclaimed amount, or are segregated in a separate account.

Further, a person disclaiming his or her entire remaining interest in an IRA will not be considered a designated beneficiary of the IRA for purposes of § 401(a)(9), if the qualified disclaimer is made on or before September 30th of the calendar year following the calendar year of the employee’s death, and if, on or before that September 30th, the disclaimant is paid the income attributable to the required minimum distribution amount, so that the disclaimant is not entitled to any further benefit in the IRA after September 30th of the calendar year following the calendar year of the employee’s death.

DRAFTING INFORMATION

The principal author of this revenue ruling is Susan H. Levy of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Susan H. Levy at (202) 622-3090 (not a toll-free call).
Ohio R.C. § 5815.36 Disclaiming testamentary and nontestamentary succession to real and personal property.

(A) As used in this section:

(1) "Disclaimant" means any person, any guardian or personal representative of a person or estate of a person, or any attorney-in-fact or agent of a person having a general or specific authority to act granted in a written instrument, who is any of the following:

(a) With respect to testamentary instruments and intestate succession, an heir, next of kin, devisee, legatee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a testamentary instrument, or person designated to take pursuant to a power of appointment exercised by a testamentary instrument;

(b) With respect to nontestamentary instruments, a grantee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a nontestamentary instrument, or person designated to take pursuant to a power of appointment exercised by a nontestamentary instrument;

(c) With respect to fiduciary rights, privileges, powers, and immunities, a fiduciary under a testamentary or nontestamentary instrument. Division (A)(1)(c) of this section does not authorize a fiduciary who disclaims fiduciary rights, privileges, powers, and immunities to cause the rights of any beneficiary to be disclaimed unless the instrument creating the fiduciary relationship authorizes the fiduciary to make such a disclaimer.

(d) Any person entitled to take an interest in property upon the death of a person or upon the occurrence of any other event.

(2) "Personal representative" includes any fiduciary as defined in section 2109.01 of the Revised Code and any executor, trustee, guardian, or other person or entity having a fiduciary relationship with regard to any interest in property passing to the fiduciary, executor, trustee, guardian, or other person or entity by reason of a disclaimant's death.

(3) "Property" means all forms of property, real and personal, tangible and intangible.

(B)

(1) A disclaimant, other than a fiduciary under an instrument who is not authorized by the instrument to disclaim the interest of a beneficiary, may disclaim, in whole or in part, the succession to any property by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in this section.
(2) A disclaimant who is a fiduciary under an instrument may disclaim, in whole or in part, any right, power, privilege, or immunity, by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in this section.

(3) The written instrument of disclaimer shall be signed and acknowledged by the disclaimant and shall contain all of the following:

(a) A reference to the donative instrument;

(b) A description of the property, part of property, or interest disclaimed, and of any fiduciary right, power, privilege, or immunity disclaimed;

(c) A declaration of the disclaimer and its extent.

(4) The guardian of the estate of a minor or an incompetent, or the personal representative of a deceased person, whether or not authorized by the instrument to disclaim, with the consent of the probate division of the court of common pleas may disclaim, in whole or in part, the succession to any property, or interest in property, that the ward, if an adult and competent, or the deceased, if living, might have disclaimed. The guardian or personal representative, or any interested person may file an application with the probate division of the court of common pleas that has jurisdiction of the estate, asking that the court order the guardian or personal representative to execute and deliver, file, or record the disclaimer on behalf of the ward, estate, or deceased person. The court shall order the guardian or personal representative to execute and deliver, file, or record the disclaimer if the court finds, upon hearing after notice to interested parties and such other persons as the court shall direct, that:

(a) It is in the best interests of those interested in the estate of the person and of those who will take the disclaimed interest;

(b) It would not materially, adversely affect the minor or incompetent, or the beneficiaries of the estate of the decedent, taking into consideration other available resources and the age, probable life expectancy, physical and mental condition, and present and reasonably anticipated future needs of the minor or incompetent or the beneficiaries of the estate of the decedent.

A written instrument of disclaimer ordered by the court under this division shall be executed and be delivered, filed, or recorded within the time and in the manner in which the person could have disclaimed if the person were living, an adult, and competent.

(C) A partial disclaimer of property that is subject to a burdensome interest created by the donative instrument is not effective unless the disclaimed property constitutes a gift that is separate and distinct from undisclaimed gifts.

(D) The disclaimant shall deliver, file, or record the disclaimer, or cause the same to be done, prior to accepting any benefits of the disclaimed interest and at any time after the latest of the following dates:
(1) The effective date of the donative instrument if both the taker and the taker's interest in the property are finally ascertained on that date;

(2) The date of the occurrence of the event upon which both the taker and the taker's interest in the property become finally ascertainable;

(3) The date on which the disclaimant attains eighteen years of age or is no longer an incompetent, without tendering or repaying any benefit received while the disclaimant was under eighteen years of age or an incompetent, and even if a guardian of a minor or incompetent had filed an application pursuant to division (B)(4) of this section and the probate division of the court of common pleas involved did not consent to the guardian executing a disclaimer.

(E) No disclaimer instrument is effective under this section if either of the following applies under the terms of the disclaimer instrument:

(1) The disclaimant has power to revoke the disclaimer.

(2) The disclaimant may transfer, or direct to be transferred, to self the entire legal and equitable ownership of the property subject to the disclaimer instrument.

(F)

(1) Subject to division (F)(2) of this section, if the interest disclaimed is created by a nontestamentary instrument, including, but not limited to, a transfer on death designation affidavit pursuant to section 5302.22 of the Revised Code, the disclaimer instrument shall be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. If the interest disclaimed is created by a transfer on death designation affidavit pursuant to section 5302.22 of the Revised Code, the disclaimer instrument shall be filed with the county recorder of the county in which the real property that is the subject of that affidavit is located.

(2) If the interest disclaimed is created by a testamentary instrument, by intestate succession, or by a certificate of title to a motor vehicle, watercraft, or outboard motor that evidences ownership of the motor vehicle, watercraft, or outboard motor that is transferable on death pursuant to section 2131.13 of the Revised Code, the disclaimer instrument shall be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument shall be delivered personally or by certified mail to the personal representative of the decedent's estate.

(3) If no proceedings for the administration of the decedent's estate have been commenced, the disclaimer instrument shall be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate might be commenced according to law. The disclaimer instrument shall be filed and indexed, and fees charged, in the same manner as provided by law for an application to be appointed as personal representative to
administer the decedent's estate. The disclaimer is effective whether or not proceedings thereafter are commenced to administer the decedent's estate. If proceedings thereafter are commenced for the administration of the decedent's estate, they shall be filed under, or consolidated with, the case number assigned to the disclaimer instrument.

(4) If an interest in real estate is disclaimed, an executed copy of the disclaimer instrument also shall be recorded in the office of the recorder of the county in which the real estate is located. The disclaimer instrument shall include a description of the real estate with sufficient certainty to identify it, and shall contain a reference to the record of the instrument that created the interest disclaimed. If title to the real estate is registered under Chapters 5309. and 5310. of the Revised Code, the disclaimer interest shall be entered as a memorial on the last certificate of title. A spouse of a disclaimant has no dower or other interest in the real estate disclaimed.

(G) If a donative instrument expressly provides for the distribution of property, part of property, or interest in property if there is a disclaimer, the property, part of property, or interest disclaimed shall be distributed or disposed of, and accelerated or not accelerated, in accordance with the donative instrument. In the absence of express provisions to the contrary in the donative instrument, the property, part of property, or interest in property disclaimed, and any future interest that is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, shall descend, be distributed, or otherwise be disposed of, and shall be accelerated, in the following manner:

(1) If intestate or testate succession is disclaimed, as if the disclaimant had predeceased the decedent;

(2) If the disclaimant is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power;

(3) If the donative instrument is a nontestamentary instrument, as if the disclaimant had died before the effective date of the nontestamentary instrument;

(4) If the disclaimer is of a fiduciary right, power, privilege, or immunity, as if the right, power, privilege, or immunity was never in the donative instrument.

(H) A disclaimer pursuant to this section is effective as of, and relates back for all purposes to, the date upon which the taker and the taker's interest have been finally ascertained.

(I) A disclaimant who has a present and future interest in property, and disclaims the disclaimant's present interest in whole or in part, is considered to have disclaimed the disclaimant's future interest to the same extent, unless a contrary intention appears in the disclaimer instrument or the donative instrument. A disclaimant is not precluded from receiving, as an alternative taker, a beneficial interest in the property disclaimed, unless a contrary intention appears in the disclaimer instrument or in the donative instrument.
(J) The disclaimant's right to disclaim under this section is barred if the disclaimant does any of the following:

(1) Assigns, conveys, encumbers, pledges, or transfers, or contracts to assign, convey, encumber, pledge, or transfer, the property or any interest in it;

(2) Waives in writing the disclaimant's right to disclaim and executes and delivers, files, or records the waiver in the manner provided in this section for a disclaimer instrument;

(3) Accepts the property or an interest in it;

(4) Permits or suffers a sale or other disposition of the property pursuant to judicial action against the disclaimant.

(K) Neither a fiduciary's application for appointment or assumption of duties as a fiduciary nor a beneficiary's application for appointment as a personal representative or fiduciary waives or bars the disclaimant's right to disclaim a right, power, privilege, or immunity as a personal representative or fiduciary or the beneficiary's right to disclaim property.

(L) The right to disclaim under this section exists irrespective of any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(M) A disclaimer instrument or written waiver of the right to disclaim that has been executed and delivered, filed, or recorded as required by this section is final and binding upon all persons.

(N)

(1) The right to disclaim and the procedures for disclaimer established by this section are in addition to, and do not exclude or abridge, any other rights or procedures that exist or formerly existed under any other section of the Revised Code or at common law to assign, convey, release, refuse to accept, renounce, waive, or disclaim property.

(2) A disclaimer is not considered a transfer or conveyance by the disclaimant, and no creditor of a disclaimant may avoid a disclaimer.

(3) This section shall take precedence over any other section of the Revised Code that conflicts with this section.

(O)

(1) No person is liable for distributing or disposing of property in a manner inconsistent with the terms of a valid disclaimer if the distribution or disposition is otherwise proper and the person has no actual knowledge of the disclaimer.
(2) No person is liable for distributing or disposing of property in reliance upon the terms of a disclaimer that is invalid because the right of disclaimer has been waived or barred if the distribution or disposition is otherwise proper and the person has no actual knowledge of the facts that constitute a waiver or bar to the right to disclaim.

(P)

(1) A disclaimant may disclaim pursuant to this section any interest in property that is in existence on September 27, 1976, if either the interest in the property or the taker of the interest in the property is not finally ascertained on that date.

(2) No disclaimer executed pursuant to this section destroys or diminishes an interest in property that exists on September 27, 1976, in any person other than the disclaimant.

(Q) This section may be applied separately to different interests or powers created in the disclaimant by the same testamentary or nontestamentary instrument.

Amended by 129th General Assembly File No.201, HB 479, §1, eff. 3/27/2013.

Amended by 128th General Assembly File No.17, SB 124, §1, eff. 12/28/2009.

Effective Date: 01-01-2007; 2008 HB160 06-20-2008
H was the only legatee of her mother’s will. H disclaimed the portion of the gross estate that had a fair market value of more than $6,350,000. The will provided that any disclaimed portion would pass in part to a charitable foundation and in part to a charitable trust that would pay an annuity to the foundation. H did not disclaim a contingent remainder in the property passing to the charitable trust. On the estate’s tax return, it deducted as charitable contributions the disclaimed property passing to the foundation and—to the extent of the present value of the annuity interest—the disclaimed property passing to the charitable trust. The parties stipulated to a value of the estate higher than that originally reported on the return.

Held: No deduction is allowed for any of the property passing to the trust because the partial disclaimer of that property is not a qualified disclaimer under sec. 2518, I.R.C.
Held, further: The entire value of the property passing to the foundation—including the increased amount passing to the foundation because of the increased valuation of C’s gross estate—is deductible because the disclaimer of that property is a qualified partial disclaimer under section 2518, and because no public policy bars increasing the amount of that deduction.

John W. Porter and J. Graham Kenney, for the estate. Trent D. Usitalo, for respondent.

HOLMES, Judge:1 Helen Christiansen’s will left everything to her only child, Christine Hamilton. The will anticipated that Hamilton would disclaim a part of her inheritance, and directed that any disclaimed property would go in part to a charitable trust and in part to a charitable foundation that Christiansen had established. The trust would last for 20 years, and pay an annuity of 7 percent of the corpus’s net fair market value at the time of Christiansen’s death to the foundation. At the end of the 20 years, if Hamilton were still alive, the property left in the trust would go to her.

The parties settled the issue of the estate’s value—increasing it substantially over what was reported on the estate’s tax return. There are two questions presented. The first is whether the estate can claim a charitable deduction for

1 The Chief Judge reassigned this case to Judge Holmes from Judge Kroupa.
the present value of that 7 percent annuity from the trust to the foundation. This depends on whether Hamilton’s undisclaimed contingent-remainder interest in the trust requires disallowance of that deduction. The second question is whether the estate can claim an increased charitable deduction for the increased value of the disclaimed property passing directly to the foundation.

FINDINGS OF FACT²

Helen Christiansen, a lifelong South Dakotan, led a long and remarkable life. She was one of the first women lawyers in her state and practiced there until the late 1950s, when she married and became a full-time farmer. She and her husband had one child, Christine Christiansen Hamilton. Hamilton remains, as she was when she filed the petition, a South Dakota resident. Her mother was domiciled in the state when she died.

The Christiansens each owned and operated their own farming and ranching businesses in central South Dakota for many years. When her husband died in 1986, Christiansen added his operations to her own. Christiansen’s daughter, like her mother, became well educated, graduating from Smith College and then earning an MBA from the University of Arizona.

And like her mother, she decided on a life back home in South Dakota. She married a

² The parties stipulated to most of the key facts and
exhibits, and insofar as they are relevant to our analysis, we have adopted the trial Judge’s findings of fact on the others.
professor at South Dakota State University, and began helping to run the family farm.

Both Christiansen and Hamilton were deeply involved in their community, and Hamilton to this day serves on the boards of many charitable organizations. She and her mother had also long wanted to use some of their wealth to benefit their home state. The family had already donated parkland to Kimball, South Dakota in 1998, but mother and daughter wanted some way to permanently fund projects in education and economic development. After meeting with a local law firm in the late 1990s, they decided to organize a charitable foundation as part of Christiansen’s estate plan.

The Matson, Halverson, Christiansen Foundation and the Helen Christiansen Testamentary Charitable Lead Trust were at the center of this plan.

Christiansen and Hamilton expected that part of Christiansen’s estate would find its way to the Foundation, and part would find its way to the Trust. The Foundation would fund charitable causes at a rate they hoped would be about $15,000 annually--in the Foundation’s application to the IRS for recognition of exempt status, Hamilton stated:

The initial source of funding for the foundation will be $50,000 from the Helen Christiansen Estate providing a 5 percent income stream annually. Additionally, there will be annual funding from a 7 percent charitable lead annuity trust equaling $12,500.
The Trust has a term of 20 years running from the date of Christiansen’s death, and the Trust agreement provides for payments to the Foundation of 7 percent of the Trust’s initial corpus. Any remaining assets in the Trust at the end of 20 years will go to Hamilton; if she dies before then, they will go to the Foundation. Hamilton and her husband, plus a family friend, are the Foundation’s directors, and by early 2002, the Foundation was qualified as a charitable organization under section 501(c)(3).

Hamilton has contributed some of her own money to the Foundation and it has already begun its work, distributing a total of almost $22,000 through the end of 2004, including a donation for playground equipment to a local city park, and a grant to help buy food and supplies for the “Gathering and Healing of Nations,” a series of bipartisan conferences sponsored

---

3The Trust is a “charitable lead annuity trust.” A charitable trust is one whose beneficiaries are charities. Sec. 2522(a)(2). A charitable lead trust is a charitable trust whose income beneficiaries are charities, but whose remaindermen are not. Sec. 25.2702-1(c)(5), Gift Tax Regs. And a charitable lead annuity trust is a charitable lead trust whose charitable income beneficiary is guaranteed an annuity fixed as a percentage of the trust’s initial assets and paid for a term of years. Sec. 26.2642-3(b), GST Tax Regs.; sec. 25.2522(c)-3(c)(2)(vi), Gift Tax Regs.

Unless otherwise noted, all section references are to the Internal Revenue Code and regulations, and Rule references are to the Tax Court Rules of Practice and Procedure.
by former Senator Tom Daschle and South Dakota State government that brings Indians and non-Indians together.

The problems that gave rise to this case can be traced to some particularly complex wrinkles that Christiansen agreed to as part of her estate planning. The first was to reorganize the Christiansen farming and ranching businesses—which for decades had been run as sole proprietorships—as two limited partnerships: MHC Land and Cattle, Ltd., and Christiansen Investments, Ltd.

Christiansen kept a 99 percent limited-partnership interest in each, with the rest going to Hamilton Investments, L.L.C. Hamilton Investments also became the general partner of both MHC Land and Cattle and Christiansen Investments, and Christiansen's daughter and son-in-law became its members. Such family limited partnerships (or FLPs) are fairly common, though often challenged, estate-planning devices and the structure Christiansen chose is not new to this Court. See Estate of Strangi v. Commissioner, 115 T.C. 478, 484 (2000), revd. on other grounds 293 F.3d 279 (5th Cir. 2002).

In January 2000, Christiansen executed her last will and testament, which named Hamilton personal representative. This is where the second wrinkle showed: Instead of simply dividing

---

4 We note that Christiansen's estate planners therefore did not have the opportunity to review and take account of Walshire v. United States, 288 F.3d 342 (8th Cir. 2002), upholding the validity of the regulation that is key to this case.
her estate among Hamilton, the Foundation, and the Trust, Christiansen’s lawyers wrote the will to pass everything (after payments of any debts and funeral expenses) to Hamilton. But the will also provided that if Hamilton disclaimed any part of the estate, 75 percent of the disclaimed portion would go to the Trust and 25 percent to the Foundation.

Christiansen died in April 2001, and her will was admitted to probate. Hamilton was named personal representative, and as planned, executed a partial disclaimer. The disclaimer’s language is central to this case, and we reproduce the relevant portion here:

A. Partial Disclaimer of the Gift:
Intending to disclaim a fractional portion of the Gift, Christine Christiansen Hamilton hereby disclaims that portion of the Gift determined by reference to a fraction, the numerator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001, less Six Million Three Hundred Fifty Thousand and No/100 Dollars ($6,350,000.00) and the denominator of which is the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001 (“the Disclaimed Portion”). For purposes of this paragraph, the fair market value of the Gift (before payment of debts, expenses and taxes) on April 17, 2001, shall be the price at which the Gift (before payment of debts, expenses and taxes) would have changed hands on April 17, 2001, between a hypothetical willing buyer and a hypothetical willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts for purposes of Chapter 11 of the [Internal Revenue] Code, as
such value is finally determined for federal estate tax purposes.

The $6,350,000 that Hamilton retained was an amount she and her advisers carefully determined would allow the family business to continue, as well as to provide for her and her own family’s future.

But note especially the final phrase: “as such value is finally determined for federal estate tax purposes.” And add to it another shield strapped on to the disclaimer—a “savings clause.” This clause said that to

the extent that the disclaimer set forth above in this instrument is not effective to make it a qualified disclaimer, Christine Christiansen Hamilton hereby takes such actions to the extent necessary to make the disclaimer set forth above a qualified disclaimer within the meaning of section 2518 of the Code.

Consider how these insertions of uncertainty as to the amount actually being donated might come into play should the estate assign an unusually low value to the property being disclaimed. In such a scenario, Hamilton would take (and the estate tax would be paid on) her $6.35 million. But the residue would be divided between the Foundation and the Trust. Should it turn out that the estate underreported that value, Hamilton’s failure to disclaim her remainder interest in the Trust would mean that she would capture much of the value of that underreporting as she herself approached retirement age in 20 years’ time. And if one
took an especially skeptical view of the situation, the final quoted phrase in the disclaimer and the savings clause meant that the Commissioner would face an interesting choice if he thought the estate was lowballing its own value—any success in increasing the value of the estate might only increase the charitable deduction that the estate would claim. Which would presumably reduce the incentive of the Commissioner to challenge the value that the estate claimed for itself.

And that, more or less, is the Commissioner’s view of what was going on here. As we noted, Christiansen owned 99 percent limited-partnership interests in both MHC Land and Cattle and Christiansen Investments when she died. She also owned $219,000 of real property, and over $700,000 in cash and other assets. The estate obtained appraisals of the limited-partnership interests, including a 35 percent discount for being a “minority interest,” and reported on its estate-tax return that the 99 percent limited-partnership interest in MHC Land and Cattle had a fair market value of $4,182,750, and that the 99 percent limited-

---

5 We do note that Hamilton and her husband had no children of their own—Christiansen’s estate plan should not be viewed as a way to keep a great deal of property in the family with only a veneer of charitable intent. But the combination of the Trust, the Foundation, and the disclaimer embodied both charitable and estate-planning purposes. In this case, we analyze the legal consequences of those instruments, not the factual issue of the motivation behind them.
partnership interest in Christiansen Investments had a fair market value of $1,330,700.

The estate’s tax return used these values to report a total gross estate value of slightly more than $6.5 million. When read in conjunction with the disclaimer’s reservation to Hamilton of $6.35 million worth of property, this meant that only $40,555.80 would pass to the Foundation and $121,667.20 to the Trust. The estate deducted the entire amount passing to the Foundation, and the part passing to the Trust that was equal to the present value of 7 percent of $121,667.20 per annum for 20 years. The total came to about $140,000. It is important to note that the estate did not deduct the value of Hamilton’s contingent-remainder interest in the Trust’s corpus. See sec. 20.2055-2(b)(1), Estate Tax Regs.

The Commissioner determined that the fair market values of Christiansen’s 99 percent FLP interests should be increased and that Hamilton’s disclaimer did not “qualify”—a term we discuss later—to make any part of the estate’s property passing to either the Trust or the Foundation generate a charitable deduction. The estate timely filed a petition, and trial was held in St. Paul, Minnesota.

The parties settled the valuation question before trial by stipulating that the fair market value of the Christiansen’s interest in Christiansen Investments was $1,828,718.10, an
increase of more than 35 percent over its reported value. They also agreed that her interest in MHC Land and Cattle was worth $6,751,404.63, an increase of more than 60 percent over its reported value. This means that the total value of the gross estate was $9,578,895.93 instead of $6,512,223.20.

If the disclaimer were applied to this increased value, property with a fair market value of $2,421,671.95 would pass to the Trust and property with a fair market value of $807,223.98 would pass to the Foundation.6 The estate asserts that this increase in value entitles it to an increase in the charitable deduction—both for the entire part passing to the Foundation and also the increased value of the Trust’s annuity interest.

The Commissioner concedes one point—he is now willing to allow the estate the $40,555.80 reported on the return as going to the Foundation. But he still objects to any deduction for the property passing to the Trust, and now he contests any increase in the deduction for the property passing to the Foundation.

OPINION

I. The Disclaimer in Favor of the Trust

We begin with the basics. Under the Trust agreement, the Foundation has the right to guaranteed annuity payments for

---

6 The lawyer hired to handle the estate’s administration testified at trial that he will file a petition with the probate court after the resolution of this case. That petition
will describe what happened here, and only then will he ask the probate court to approve distributions to the beneficiaries.
20-year term of the Trust and, if Hamilton survives that term, she has the right to any trust property then remaining. She thus has a contingent-remainder interest in the Trust’s property.\(^7\)

Hamilton did not disclaim this contingent remainder, which makes her disclaimer a “partial disclaimer.” The Code and regulations’ treatment of partial disclaimers is quite complex, so we begin our analysis with some background on estate-tax deductions, followed by a close reading of the regulation governing partial disclaimers, its exceptions, and the effect of the savings clause on Hamilton’s disclaimer.

A. Deductions and Disclaimers Under the Estate Tax

The Code taxes the transfer of the taxable estate of any decedent who is a U.S. citizen or resident. Sec. 2001(a). The taxable estate is the value of the decedent’s gross estate less applicable deductions. Secs. 2031(a) and 2051. A deduction for bequests made to charitable organizations is one of the deductions allowed in calculating a decedent’s taxable estate. Sec. 2055(a)(2). But Christiansen did not bequeath any of her

\(^7\) We need not decide whether the burden of proof shifts to respondent under section 7491(a) because the case is mostly determined by applying the law to undisputed facts. Where there were disputed facts, both parties met their burden of production, and findings were based on a preponderance of the evidence. See Deskins v. Commissioner, 87 T.C. 305, 322-23 n.17 (1986); Payne v. Commissioner, T.C. Memo. 2003-90. Both parties “have satisfied their burden of production by offering some evidence, * * * [so] the party supported by the weight of the evidence will prevail.” Blodgett v. Commissioner, 394 F.3d 1030, 1039 (8th Cir. 2005), affg. T.C. Memo. 2003-212.
property to the Foundation or the Trust or any other charity. Instead, she left it all to her daughter. And this created the first problem in this case, because charitable deductions are allowed for the value of property in a decedent’s gross estate only if transferred to a charitable donee “by the decedent during his lifetime or by will.” Sec. 20.2055-1(a), Estate Tax Regs. Courts have repeatedly declined to permit deductions where the amount given to charity turned upon the actions of a decedent’s beneficiary or an estate’s executor or administrator. See, e.g., Estate of Engelman v. Commissioner, 121 T.C. 54, 70-71 (2003). And it was Hamilton—not Christiansen—who might be regarded as transferring that property to the Foundation and Trust by executing the disclaimer.

This means that we must turn to section 2518, the Code’s section that governs transfers by disclaimer. Section 2518 is important because a disclaimer that meets that section’s test will cause the bequest to the disclaimant to be treated as if it had never been made. Sec. 2518(a). Without this provision, the Government might serve itself a second helping of tax by treating the disclaimed property as if it went from the estate to the disclaimant followed by a transfer from the disclaimant to another recipient, thus potentially piling gift tax onto estate tax. Walshire, 288 F.3d at 346.
B. Partial Disclaimers

Hamilton’s disclaimer is further complicated because it is a “partial disclaimer.” The Code recognizes and allows partial disclaimers. Sec. 2518(c)(1); sec. 25.2518-3(a), Gift Tax Regs. But, whether partial or full, a disclaimer is a “qualified disclaimer”—meaning that the Code will treat the disclaimed property as if it had never gone to the disclaimant—only if it meets four requirements. Sec. 2518(b). It must be in writing. Sec. 2518(b)(1). It must (with some exceptions not relevant here) be received by the personal representative of the estate no later than nine months after the date of the transfer creating the disclaimant’s interest. Sec. 2518(b)(2). It must not allow the disclaimant to accept the disclaimed property or any of its benefits. Sec. 2518(b)(3). And, finally, the disclaimed interest must pass “without any direction on the part of the person making the disclaimer and * * * to a person other than the person making the disclaimer.” Sec. 2518(b)(4).

It’s the fourth requirement—and only part of the fourth requirement— that the parties are fighting over here: Did Hamilton’s retention of the contingent-remainder interest in the

---

8 The requirement that the disclaimed property pass without any direction on the part of the disclaimant is met here because Christiansen directed in her will that, if Hamilton did disclaim any of the property left to her, the disclaimed portion would be split between the Trust and the Foundation in specified percentages.
Trust’s property mean that the property being disclaimed was not going “to a person other than the person making the disclaimer?” The Commissioner argues that the disclaimed property did not pass (or, to be more precise, pass only) to a person other than Hamilton. See sec. 2518(b)(4); sec. 25.2518-2(e)(3), Gift Tax Regs.

The applicable regulation is section 25.2518-2(e)(3), Gift Tax Regs., and the key provision is this one:

(3) Partial failure of disclaimer. If a disclaimer made by a person other than the surviving spouse is not effective to pass completely an interest in property to a person other than the disclaimant because—

(i) The disclaimant also has a right to receive such property as an heir at law, residuary beneficiary, or by any other means; and

(ii) The disclaimant does not effectively disclaim these rights, the disclaimer is not a qualified disclaimer with respect to the portion of the disclaimed property which the disclaimant has a right to receive * * *

If the regulation stopped here, the estate would win—everyone agrees that the partial disclaimer’s carveout of a contingent remainder means that the estate can’t deduct the value of that remainder interest. But the regulation doesn’t stop there. Instead, it continues:

If the portion of the disclaimed interest in property which the disclaimant has a right to receive is not severable property or an undivided portion of the property, then the...
disclaimer is not a qualified disclaimer with respect to any portion of the property. Thus, for example, if a disclaimant who is not a surviving spouse receives a specific bequest of a fee simple interest in property and as a result of the disclaimer of the entire interest, the property passes to a trust in which the disclaimant has a remainder interest, then the disclaimer will not be a qualified disclaimer unless the remainder interest in the property is also disclaimed.

It’s the language we’ve italicized that seems to resolve this issue. Hamilton: (a) is not a surviving spouse, (b) received a specific bequest of a fee simple interest in her mother’s property under the will, (c) as a result of the disclaimer that property passed to a trust in which Hamilton had a remainder interest, and (d) Hamilton did not disclaim that remainder interest.

The consequences of this “partial failure of disclaimer” are severe: not only does the estate not get a deduction for the value of the remainder interest that might go to Hamilton (which, we again note, it has never claimed), but it doesn’t get a deduction for “any portion” of the property ending up in the Trust. That’s what the sentence immediately preceding the

9 The property going directly to the Foundation under the disclaimer doesn’t have this retained-interest problem, and so its value is entirely deductible as a disclaimer of an “undivided portion of an interest.” Sec. 2518(c)(1); sec. 25.2518-3(b), Gift Tax Regs. (characterizing disclaimer of fractional interest of “each and every substantial interest or right owned by the disclaimant”). This is presumably why the Commissioner has
italicized language says: “If the portion of the disclaimed interest in property which the disclaimant has a right to receive is not severable property or an undivided portion of the property, then the disclaimer is not a qualified disclaimer with respect to any portion of the property.” (Emphasis again added.)

The estate thus has to counterattack by arguing that Hamilton’s remainder interest is either “severable property” or “an undivided portion of the property.” But what do these two terms mean?

C. Severable Property and Undivided Portions

“Severable property” is a defined term. Section 25.2518-3(a)(1)(ii), Gift Tax Regs., states: “Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.” This definition is a bit like the definition of a molecule—“the smallest particle of a substance that retains the properties of that substance.”

Thus, a block of stock can

(...continued)
conceded that the estate’s return position—taking a deduction for the full amount of the property passing to the Foundation—was right. The Commissioner now aims only at the much larger increase in that deduction triggered by the stipulated increase in the value of the gross estate. See infra pp. 22-29.

be disclaimed share by share, but not by a general severance of the right to receive dividends from a right to vote the shares from a right to exercise any preemptive rights. By this definition, Hamilton could disclaim a particular number of partnership units but not, as she did with those passing to the Trust, disclaim their present enjoyment but keep a remainder interest in all of them.  

“An undivided portion of the property” is likewise defined, in section 25.2518-3(b), Gift Tax Regs.:

An undivided portion of a disclaimant’s separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant’s interest in such property and in other property into which such property is converted. A disclaimer of some specific rights while retaining other rights with respect to an interest in the property is not a qualified disclaimer of an undivided portion of the disclaimant’s interest in property. Thus, for example, a disclaimer

11 “Severability” is a concept that shows up as well in two sections of the regulations that govern transfers of remainder interests for the purpose of calculating the amount of charitable deductions for estate and gift taxes. These regulations, sec. 20.2055-2(a), Estate Tax Regs., and sec. 25.2522(c)-3, Gift Tax Regs., both talk about a remainder interest in property as severable if it is “ascertainable”, which in context means “has an ascertainable value.” The definition of “severability” that we have to apply is the one for “severable property,” not “severable interest.” That definition, sec. 25.2518-3(a)(1)(ii), Gift Tax Regs., looks to whether each piece of a property “maintains a complete and independent existence” after severance—not whether each piece is capable of being valued separately.
made by the devisee of a fee simple interest in Blackacre is not a qualified disclaimer if the disclaimant disclaims a remainder interest in Blackacre but retains a life estate.

But for Hamilton’s retaining a remainder interest and giving up present enjoyment instead of the reverse, the example describes this case. The Court of Appeals for the Eighth Circuit explained the distinction by comparing it to horizontal and vertical slices. Disclaiming a vertical slice--from meringue to crust--qualifies; disclaiming a horizontal slice--taking all the meringue, but leaving the crust--does not.

Walshire, 288 F.3d at 347. The only difference that we can see between Walshire and this case is that Walshire disclaimed a remainder interest and kept the income, while Hamilton tried to do the reverse--but no matter how you slice it, the cases are indistinguishable.12

We are left with the conclusion that her disclaimer is “not a qualified disclaimer with respect to any portion of the property.” Sec. 25.2518-2(e)(3), Gift Tax Regs.

The dissent reaches a different result by focusing on a different sort of property--the annuity interest created under the Trust agreement--and asking whether it is severable property. We agree that section 20.2055-2(e)(2)(vi), Estate Tax Regs., allows the severance of a guaranteed annuity interest from a

12 To be technically precise, Hamilton was giving up an annuity interest rather than an income interest, but the distinction makes no difference.
remainder interest, and would allow a deduction for (a transfer of) the value of the annuity interest that the Trust would pay to the Foundation. But the problem for the estate is that this section of the regulations applies only to interests passing from the decedent directly. See sec. 20.2055-2(e)(1), Estate Tax Regs. When the interest is created by operation of a disclaimer, as it was in this case, section 20.2055-2(c)(1) of the estate tax regulations tells us to look to the disclaimer rules: “The amount of a * * * transfer for which a deduction is allowable under section 2055 includes an interest which falls into the bequest, devise or transfer as the result of * * * (i) A qualified disclaimer (see section 2518 and the corresponding regulations for rules relating to a qualified disclaimer).” Because Hamilton’s disclaimer is not, under that regulation, a qualified disclaimer as to any portion of the property passing to the Trust, none of the property transferred to the Trust generates a charitable deduction.

13 The dissent relies on examples 8 and 11 in section 25.2518-(3)(d), Gift Tax Regs., see infra pp. 47-48, as showing that a disclaimant may make a qualified disclaimer of income only, or of corpus only, and keep the rest. This is true--but only if the decedent herself carved out income or corpus interests in her will, not if the disclaimant is trying to do so through the disclaimer. As the regulation carefully notes, “in general, each interest in property that is separately created by the transferor is treated as a separate interest.” Sec. 25.2518-3(a)(1), Gift Tax Regs. (emphasis added). In this case, Hamilton was bequeathed all her mother’s property in fee simple and was, through the disclaimer, trying to carve it up in tax-advantaged ways by herself.
D. **Effect of the Savings Clause**

That leaves the savings clause as the only obstacle to the Commissioner’s prevailing. That clause says that Hamilton—-at the time she signed the disclaimer—-“hereby takes such actions to the extent necessary to make the disclaimer set forth above a qualified disclaimer.” Hamilton argues that she intended to do whatever it took to qualify the transfer to the Trust for the charitable deduction—and if that means she has to disclaim her contingent-remainder interest, then this clause suffices to disclaim it. This would be a paradox, since it was this same partial disclaimer excluding the contingent remainder from its scope that would, on her reading of the savings clause, end up including it after all.

The parties to-and-fro on whether this kind of clause violates public policy, but we don’t think we have to decide this question at that level of generality. The savings clause works in one of two ways. If read as a promise that, once we enter decision in this case, Hamilton will then disclaim her contingent remainder in some more of the property that her mother left her, it fails as a qualified disclaimer under section 2518(b)(2) as one made more than nine months after her mother’s death. See sec. 25.2518-2(c)(3)(i), Gift Tax Regs.

If it’s read as somehow meaning that Hamilton disclaimed the contingent remainder back when she signed the disclaimer, it fails for not identifying the
property being disclaimed and not doing so unqualifiedly, see sec. 2518(b), because its effect depends on our decision. Such contingent clauses—contingent because they depend for their effectiveness on a condition subsequent—are as ineffective as disclaimers as they are for revocable spousal interests, see Estate of Focardi v. Commissioner, T.C. Memo. 2006-56, and gift adjustment agreements, see Ward v. Commissioner, 87 T.C. 78, 110–11 (1986).

II. The Disclaimer in Favor of the Foundation

In the notice of deficiency, the Commissioner had no problem with the possibility of an increased charitable deduction for property going directly to the Foundation:

In the event that it is determined that the “partial disclaimer” * * * is a “qualified disclaimer” then the transfer reported as passing to the [Foundation] * * * is in an amount that cannot be ascertained with certainty at this time. However, when the other issues are finally resolved, this calculation can be made and a deduction allowed for the proper amount.

Not content with denying the estate a deduction for any portion of the disclaimed property passing to the Trust, the Commissioner now challenges the increased charitable deduction that the estate seeks (because the parties have agreed on a much higher value of the gross estate) for the transfer of property to the Foundation directly. This would have the remarkable effect of greatly increasing the estate tax due because more valuable
property is passing to a charity, even though Hamilton is keeping no interest at all in that property.

The Commissioner has two arguments: (1) that any increase in that amount was contingent on a condition subsequent; i.e., the Commissioner’s challenge to the value of the gross estate, and
(2) that the disclaimer’s adjustment phrase--that the fair market value of the disclaimed property will be “as such value is finally determined for federal estate tax purposes”--is void as contrary to public policy.

A. The Contingency of the Amount Transferred to the Foundation

The Commissioner argues that the deductibility of a “testamentary charitable contribution hinges upon whether the amount that the charity will receive is ascertainable at the decedent’s date of death.” And he can point to section 20.2055-2(b)(1), Estate Tax Regs., which states that if

as of the date of a decedent’s death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.

The first problem with this argument is that the transfer of property to the Foundation was not a “testamentary charitable contribution”--it was the result of a disclaimer. And disclaimers are in a special category, governed not by section
20.2055-2(b)(1), but by section 20.2055-2(c). All disclaimers are by definition executed after a decedent’s death, but under section 2518 the transfer that a qualified disclaimer triggers relates back to the date of death, and the interest disclaimed passes as if it had been a bequest in the decedent’s will. As we’ve already noted, see supra note 9, the disclaimer regulation characterizes the property going directly to the Foundation as a qualified disclaimer of an "undivided portion of an interest" because Hamilton didn’t keep any remainder interest. See sec. 2518(c)(1); sec. 25.2518-3(b), Gift Tax Regs.

The Commissioner argues, however, that the increased charitable deduction like the one the estate is claiming here--for “such value [as has through settlement been] finally determined for federal estate tax purposes”--is contingent not just because it depended on a disclaimer, but because it occurred only because the IRS examined the estate’s return and challenged the fair market value of its assets. We disagree.

The regulation speaks of the contingency of “a transfer” of property passing to charity. The transfer of property to the Foundation in this case is not contingent on any event that occurred after Christiansen’s death (other than the execution of the disclaimer) --it remains 25 percent of the total estate in excess of $6,350,000. That the estate and the IRS bickered about the value of the property being transferred doesn’t mean the
transfer
itself was contingent in the sense of dependent for its occurrence on a future event. Resolution of a dispute about the fair market value of assets on the date Christiansen died depends only on a settlement or final adjudication of a dispute about the past, not the happening of some event in the future.

Our Court is routinely called upon to decide the fair market value of property donated to charity--for gift, income, or estate tax purposes. And the result can be an increase, a decrease, or no change in the IRS’s initial determination. The Commissioner finally argues that the disclaimer’s adjustment clause is void on public policy grounds because it would, at the margins, discourage the IRS from examining estate tax returns because any deficiency in estate tax would just end up being offset by an equivalent additional charitable deduction.

It is true that public policy considerations sometimes inform the construction of tax law as they do other areas of law. For example, section 178 of the Restatement (Second) of Contracts (1981) has a multifactor test for when a promise or a contractual

14 The estate also quite pointedly notes that the Government itself uses the contested phrase: The charitable annuity trust regulations make an interest determinable even if the amount to be paid is expressed “in terms of a fraction or a percentage of the net fair market value, as finally determined for Federal estate tax purposes, of the residue of the estate on the appropriate valuation date.” Sec. 20.2055-2(e)(2)(vi)(a), Estate Tax Regs.; see also, e.g., sec. 26.2632-1(b)(2), (d)(1) GST Regs.; Rev. Proc. 64-19, 1964-1 C.B. (Part
1) 682.
term is unenforceable because of public policy considerations, and lists numerous illustrations in the comments ranging from illegality to unreasonable restraints on trade. Other casebook examples disallow deductions for fines, *Tank Truck Rentals, Inc.* v. Commissioner, 356 U.S. 30, 36 (1958), or bribes, *Rugel v. Commissioner*, 127 F.2d 393, 395 (8th Cir. 1942), affg. 1941 WL 9990 B.T.A. 1941. But *Commissioner v. Tellier*, 383 U.S. 687, 694 (1966), warns us of the narrowness of this aid in statutory construction--the public policy being frustrated must be shown by a governmental declaration, and the frustration that would be caused by allowing the contested deduction must be severe and immediate. Our caution has deep roots: "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail." E. Allan Farnsworth, *Contracts*, 326 (3d ed. 1999), citing Burrough, J., in *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (Ex. 1824).

The disclaimer in this case involves a fractional formula that increases the amount donated to charity should the value of the estate be increased. We are hard pressed to find any fundamental public policy against making gifts to charity--if anything the opposite is true. Public policy encourages gifts to charity, and Congress allows charitable deductions to encourage

The Commissioner nevertheless analogizes the contested phrase to the one analyzed in Commissioner v. Procter, 142 F.2d 824 (4th Cir. 1944). In Procter v. Commissioner, a Memorandum Opinion of this Court dated July 6, 1943 (1943 WL 9169), the Fourth Circuit was faced with a trust indenture clause specifying that a gift would be deemed to revert to the donor if it were held subject to gift tax. Id. at 827. The court voided the clause as contrary to public policy, citing three reasons:

(1) The provision would discourage collection of tax, (2) it would render the court’s own decision moot by undoing the gift being analyzed, and (3) it would upset a final judgment.

This case is not Procter. The contested phrase would not undo a transfer, but only reallocate the value of the property transferred among Hamilton, the Trust, and the Foundation. If the fair market value of the estate assets is increased for tax purposes, then property must actually be reallocated among the three beneficiaries. That would not make us opine on a moot issue, and wouldn’t in any way upset the finality of our decision in this case.

We do recognize that the incentive to the IRS to audit returns affected by such disclaimer language will marginally decrease if we allow the increased deduction for property passing
to the Foundation. Lurking behind the Commissioner’s argument is the intimation that this will increase the probability that people in Hamilton’s situation will lowball the value of an estate to cheat charities. There’s no doubt that this is possible. But IRS estate-tax audits are far from the only policing mechanism in place. Executors and administrators of estates are fiduciaries, and owe a duty to settle and distribute an estate according to the terms of the will or law of intestacy. See, e.g., S.D. Codified Laws sec. 29A-3-703(a) (2004).

Directors of foundations—remember that Hamilton is one of the directors of the Foundation that her mother created—are also fiduciaries. See S.D. Codified Laws sec. 55-9-8 (2004). In South Dakota, as in most states, the state attorney general has authority to enforce these fiduciary duties using the common law doctrine of parens patriae. Her fellow directors or beneficiaries of the Foundation or Trust can presumably enforce their observance through tort law as well. And even the Commissioner himself has the power to go after fiduciaries who misappropriate charitable assets. The IRS, as the agency charged with ruling on requests for charitable exemptions, can discipline


16 See for example Zastrow v. Journal Communications, Inc., 718 N.W.2d 51, 63 (Wis. 2006), where the Supreme Court of Wisconsin held that a breach of the fiduciary duty of loyalty
is always an intentional tort.

The IRS also has the power to impose intermediate sanctions for breach of fiduciary duty or self-dealing. See sec. 4958.

We therefore hold that allowing an increase in the charitable deduction to reflect the increase in the value of the estate’s property going to the Foundation violates no public policy and should be allowed.

Decision will be entered under Rule 155.

Reviewed by the Court.

COLVIN, COHEN, WELLS, FOLEY, VASQUEZ, THORNTON, MARVEL, HAINES, and GOEKE, JJ., agree with this majority opinion.

HALPERN, J., did not participate in the consideration of this opinion.
HAINES and GOEKE, JJ., concurring: We join in the majority opinion but write separately to elaborate on why Hamilton’s remainder interest in the trust and the foundation’s 20-year annuity are not severable property for purposes of qualifying the disclaimer with respect to the portion of the disclaimed property that will pass to the trust.

Because disclaimers result in gratuitous transfers of property, the gift tax generally applies to transfers resulting from disclaimers. See sec. 2511(a). Section 2518 provides an exception which allows a disclaimant to avoid the second transfer tax for a transfer of an interest in property resulting from a qualified disclaimer. Walshire v. United States, 288 F.3d 342, 349 (8th Cir. 2002). A disclaimer is not a qualified disclaimer if the disclaimant has accepted the interest or any of its benefits, sec. 2518(b)(3), or if the interest passes to the disclaimant and the disclaimant is not the surviving spouse of the decedent, sec. 2518(b)(4).

Although section 2518(b)(3) disqualifies a disclaimer if the disclaimant has accepted the interest or any of its benefits, section 2518(c) permits a putative transferee to make a qualified disclaimer of an undivided portion of an interest in property provided the disclaimer meets the requirements of section 2518(b); i.e., a disclaimer of an undivided interest will not be disqualified just because the disclaimant has retained the remaining undivided portion of the property. The
transferee,
however, is not allowed “to partition the interest bequeathed to him in any manner he chooses” and make a qualified disclaimer of a part of the interest. Walshire v. United States, supra at 347 (a disclaimer of an undivided portion of an interest in property “requires a vertical division of the property”). To do so would ignore the limitation in section 2518(c) that only an “undivided portion” of an interest may be disclaimed. Id. Section 25.2518-3(b), Gift Tax Regs., specifically disqualifies a disclaimer of a remainder interest by the transferee of a fee simple interest.

Section 2518 allows a transferee to make a qualified disclaimer only of all or an undivided portion of an interest in property, but it does not require all interests in property given to the transferee to be treated as one interest; e.g., if T devises Blackacre and Whiteacre to A, A may keep Whiteacre and make a qualified disclaimer of Blackacre. Sec. 25.2518-2(e)(5), Example (10), Gift Tax Regs.

Section 25.2518-3, Gift Tax Regs., provides guidance in identifying separate interests in property for which qualified disclaimers may be made and allows a transferee of property to make a qualified disclaimer of all or an undivided portion of any separate interest in the property even if the disclaimant has another interest in the same property. Section 25.2518-3(a)(1)(i) and (ii), Gift Tax Regs., recognizes that a transferor may transfer separate interests in the same property.
(separate transferor-created interests) or an interest in severable property that comprises multiple property interests which may be severed (severable property interests). Generally, each separate transferor-created interest and each severable property interest is treated as a separate property interest.

Id.

Section 25.2518-3(a)(1)(ii), Gift Tax Regs., defines severable property as “property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence.” For example, if under A’s will B is to receive “personal effects consisting of paintings, home furnishings, jewelry, and silver”, B may make a qualified disclaimer of the paintings and retain the furnishings, jewelry, and silver. Sec. 25.2518-3(d), Example (1), Gift Tax Regs. Section 25.2518-3(c), Gift Tax Regs., allows a disclaimer of a specific pecuniary amount to qualify under section 2518. In effect the regulation treats a disclaimer of a specific pecuniary amount as a disclaimer of a severable property interest.

The distinction between qualified disclaimers of separate transferor-created interests and qualified disclaimers of severable property is subtle, as shown by the following examples. Assume T devised the income from a farm to A for life, then to B for life, with the remainder interest to A’s estate. A’s life estate and remainder interest in the farm are separate transferor-created interests. A could make a qualified
disclaimer of all or an undivided portion of either the income interest or the remainder. See sec. 25.2518-3(a)(1)(i), Gift Tax Regs. Although the life estate and the remainder are separate transferor-created interests, neither is severable property. Thus, A could not make a qualified disclaimer of the income from the property for a term of years. Sec. 25.2518-3(a)(ii), Gift Tax Regs.

By contrast, assume T devised a fee simple in the farm to A. Neither a life estate nor a remainder interest in the farm is a separate transferor-created interest, nor are they severable property interests. See sec. 25.2518-3(b), Gift Tax Regs. Thus, A could make a qualified disclaimer of all or an undivided portion of the farm but could not retain a life estate and make a qualified disclaimer of the remainder. See id.; see also Walshire v. United States, supra at 349.

If the farm consists of 500 acres of land and 500 head of cattle, the farm is severable property with respect to the land and the cattle; i.e., if the cattle are severed from the land, the existence of the cattle will be complete and independent of the land and the existence of the land will be complete and independent of the cattle. Thus, A could retain the land and make a qualified disclaimer of the cattle or retain the cattle and make a qualified disclaimer of the land. Further, the land and the cattle each may be divided into two or more parts, each
of which, after severance, would maintain a complete and independent existence. Thus, A could make a qualified disclaimer of 300 identified acres of the 500 acres, see sec. 25.2518-3(d), Example (3), Gift Tax Regs., and a qualified disclaimer of 300 head of the cattle, see id. Example (1).

Christensen bequeathed to Hamilton a fee simple in the estate property, and Hamilton disclaimed a pecuniary amount of $3,228,904.98. As a result of Hamilton’s disclaimer, under the terms of Christensen’s will, $2,421,671 (75 percent of the pecuniary amount) passes to the trust and $807,233.98 (25 percent of the pecuniary amount) passes to the foundation. Under the terms of the trust, the foundation receives a 20-year annuity, valued at $1,987,515. Both Hamilton and the foundation receive contingent remainders, the values of which total $434,156.

Hamilton’s disclaimer is not effective to pass the entire disclaimed property to a person other than herself because she has the right to receive a contingent remainder of the trust by means of Christensen’s will. However, the foundation’s interest in the disclaimed property and the trust’s interest in the disclaimed property are separate undivided interests. Hamilton retains no interest in the amount that passes outright to the foundation. Therefore, Hamilton’s disclaimer is a qualified disclaimer with respect to the $807,233.98 that passes outright to the foundation.
Hamilton did not disclaim her right to receive the remainder of the portion of the disclaimed property that passes to the trust. Consequently, the disclaimer is not a qualified disclaimer with respect to Hamilton’s contingent remainder interest. See sec. 25.2518-2(e)(3), Gift Tax Regs.

Hamilton’s contingent remainder is an interest in the $2,421,671 portion of the disclaimed property that passes to the trust. That contingent remainder is not an undivided portion of the disclaimed property that passes to the trust. Consequently, unless Hamilton’s remainder interest is a severable property interest, her disclaimer is not a qualified disclaimer with respect to the entire interest passing to the trust. See id.

In order to be treated as severable property, the foundation’s guaranteed annuity and Hamilton’s remainder, after severance, must maintain “a complete and independent existence.” See sec. 25.2518-3(a)(1)(ii), Gift Tax Regs. In the dissenting portion of his opinion, Judge Swift posits that in assessing whether the interests have a separate and independent existence, one key factor is whether each interest, taken separately, has an ascertainable value. Judge Swift quotes the first sentence of section 20.2055-2(a), Estate Tax Regs., which provides:

\[\text{"[I]ndependent" is defined as: “not requiring or relying on something else (as for existence, operation, efficiency): not contingent: not conditioned”. Webster’s Third New International Dictionary 1148 (2002).}\]
If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. * * *

Judge Swift concludes that because the foundation’s annuity interest is presently ascertainable, it is severable from Hamilton’s remainder interest for purposes of qualifying Hamilton’s disclaimer under section 2518.

Whether an interest has an ascertainable value is not the proper standard to apply in determining whether that interest is severable for purposes of making qualified disclaimers under section 2518. Indeed, the present values of annuities, life estates, terms of years, remainders, and reversionary interests are all ascertainable for purposes of transfer taxes on the basis of recognized valuation principles. See, e.g., sec. 20.2031-7, Estate Tax Regs. The second sentence of section 20.2055-2(a), Estate Tax Regs., following the sentence quoted by Judge Swift, provides:

Thus, in the case of decedents dying before January 1, 1970, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. * * *

A remainder following a life estate or a term of years is ascertainable and thus “severable” as the term is used in section 20.2055-2(a), Estate Tax Regs. However, a remainder following a
life estate or a term of years or an annuity is not severable as the term is used for purposes of determining whether a disclaimer is a qualified disclaimer under section 2518. Sec. 25.2518-3(d), Example (2), Gift Tax Regs.

In the dissenting portion of her opinion, Judge Kroupa argues that the foundation’s annuity interest in the trust and Hamilton’s remainder interest in the trust are independent because the foundation can do nothing to affect the contingent remainder and Hamilton can do nothing to affect the annuity. Control by the “holder” of the beneficial interest is not relevant; the holder of the income interest in a trust and the holder of the remainder interest in that trust generally cannot affect each other’s interest; yet those interests are not severable.

Although it is possible for the trustee of a trust to affect either the income interest or the remainder through investment decisions, the trustee has a fiduciary duty to balance the interest of the income beneficiary with that of the remainderman in making investment decisions. During the life of the income beneficiary or the term of years, the distribution of the income (usually cash dividends and/or interest) to the income beneficiary does not diminish the value of the remainder interest. Similarly, the gain or loss that might accrue in the corpus is not affected by the income earned and distributed to
the income beneficiary. Essentially, the income beneficiary gets the fruit during his life or term, and the remainderman gets the tree at the end of the life or term.

By contrast, where the present interest is a fixed annuity, the annuitant may receive only income, only corpus, or a combination of income and corpus, depending on the amount of income, if any, the trust investments have produced. Furthermore, that mixture may change in any given year. The value of the annuity is computed on the assumption that the trust assets will produce income equal to an assumed interest rate.

See sec. 20.2031-7(d)(2)(iv)(A), Estate Tax Regs. The fixed annual payment may be greater than or less than the anticipated income. In the event the investments produce less income than expected, the corpus of the trust may be depleted beyond the expectations of the parties, reducing the value of the remainder interest. Conversely, in the event the investments produce more income than expected, the corpus of the trust may grow beyond the expectations of the parties, increasing the value of the remainder.

In this way, the remainder is entirely dependent on the annuity in that it is affected by the amounts distributed to the annuitant, and by the source of those distributions, either from income or corpus. In contrast, a remainder interest is less dependent on an income interest as the payments to the income
beneficiary will never include corpus. Thus, an annuity interest and a remainder interest are more dependent on each other than an income interest and a remainder interest.

While the values of an annuity interest and a remainder interest may be ascertained, if separated they do not maintain a complete and independent existence in the way that 300 head of cattle are independent of the remaining 200. Therefore, the annuity interest and the remainder interest are not severable within the meaning of section 25.2518-3(a)(1)(ii), Gift Tax Regs.

Section 25.2518-2(e)(3), Gift Tax Regs., provides that if the portion of the disclaimed property which the disclaimant has a right to receive (Hamilton’s remainder interest) is not severable property or an undivided portion of property, the disclaimer is not qualified with respect to any portion of the property (the $2,421,671 that passes to the trust). As explained above, Hamilton’s remainder interest is not severable property or an undivided portion of property. Therefore, the disclaimer is not a qualified disclaimer with respect to the $2,421,671 passing to the trust.

COHEN, FOLEY, THORNTON, MARVEL, WHERRY, and HOLMES, JJ., agree with this concurring opinion.
Dear * * *

Donor = * * *
B = * * *
A = * * *

LEGEND:

A = * * *
B = * * *
Donor = * * *

This is in response to your letter dated February 1, 1990, in which you requested a ruling letter on a proposed qualified disclaimer under section 2518 of the Internal Revenue Code. Specifically, you request rulings (1) that a proposed disclaimer executed by A will constitute a qualified disclaimer as the term is defined in section 2518 of the Code, (2) that the effect of the disclaimer by A relates back to the date of the gift, and (3) that the effect of the disclaimer by A will be that the donor and A will be treated as if the securities were never transferred and neither the original gift nor the disclaimer will result in gift tax to A or the donor.

A's grandmother transferred securities to A. You represent that A has not exercised any dominion or control over the securities, or accepted any of the benefits of the securities. The securities were transferred from A's grandmother, the donor, to A on the books of the bank on December 12, 1989.

On December 18, 1989, the donor died. She died testate. The will provided that the remainder of her estate was left to the trustee of a trust which was established in September of 1989. Pursuant to the terms of the trust, the donor was to receive income for life. After her death, the trustee was to pay all expenses, claims, and death taxes relating to the donor's estate, and not satisfied out of her probate estate and the remainder was to be divided into two equal funds.

The first fund was to be divided into three portions each of which shall be a separate trust estate for the benefit of three grandchildren, B's children. A is one of B's children.

A proposes to make a qualified disclaimer under section 2518 of the Code of the inter vivos gift of the securities made by his grandmother to him on December 12, 1989. You represent that the taxpayer will unqualifiedly and irrevocably refuse to accept the inter vivos gift of the securities. The refusal will be in writing and will be delivered to the legal representative of the donor not later than nine months after the date of the transfer of the securities on the books of the bank. The taxpayer has not accepted the securities, or any of the benefits of the securities, and has not exercised dominion or control over the securities.

Section 2501 of the Code imposes a tax on the gratuitous transfer of property. Section 2511 provides that the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect.

Section 2518(a) of the Code provides that if a qualified disclaimer is made with respect to any interest in property, estate, gift or generation-skipping taxes shall apply as if the interest had never been transferred to such person. Under section 2518(b) of the Code, “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if:

(1) such refusal is in writing;
(2) such writing is received by the transferor of the interest, his legal representative, or the holder of legal title to the property to which the interest related not later than the date which is 9 months after the later of --
   (A) the date on which the transfer creating the interest in the disclaimer is made, or
   (B) the day on which such person attains age 21;
(3) such person has not accepted the interest or any benefits; and
(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either --
   (A) to the spouse of the decedent, or
   (B) to a person other than the person making the disclaimer.

Section 25.2518-2(c)(3) of the Gift Tax Regulations provides, in part, that the nine month period for making a disclaimer generally is to be determined with reference to the taxable transfer creating the interest in the disclaimant. Section 25.2518-2(d)(1) of the regulations provides that a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of the benefits prior to making the disclaimer. Section 25.2518-2(e) of the regulations provides that a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant.

It is clear from section 25.2518-2(c)(3) that the nine month period is determined with reference to the taxable transfer creating the interest in the disclaimant. Congress intended that a nine month period for making a disclaimer be determined “in reference to each taxable transfer.” Conference Committee Report, H.R. 10612, 94th Congress.

A prerequisite for a qualified disclaimer is that the disclaimer must be in writing and the writing must identify the interest in property disclaimed. In this case, A proposes to execute a written disclaimer of the gift of securities. For the disclaimer to qualify under section 2518, the disclaimer must be made within nine months of the date of the taxable transfer. Here, the transfer occurred when the securities were transferred to A on the banks books. Therefore, A must execute his disclaimer within nine months of the date of the transfer.

In order for A's disclaimer to constitute a qualified disclaimer, A must not have accepted any interest or benefits from the disclaimed property. Assuming A has accepted no interest or benefits in the disclaimed property, his disclaimer will satisfy the requirements of section 2518(b)(3) of the Code.
Section 25.2518-2(e) of the regulations requires that the disclaimed interest pass without any direction on the part of the disclaimant to a person other than the disclaimant. Under the laws of state X, the securities will revert to the donor. However, due to the donor's intervening death, the securities will be returned to the donor's estate and then pass to a trust for the benefit of the disclaimant, A. However, A is permitted a nine month period to disclaim the gift regardless of the donor's intervening death. The effect of the disclaimer is that the securities revert back to the donor as of December 12, six days before the donor died. If the donor had lived, the disclaimer would be effective regardless of the provision in the donor's will that bequeaths the residuary of donor's estate to a trust for the benefit of A. The donor's intervening death does not change the result.

Consequently, if the proposed disclaimer is written as submitted and is filed within nine months of the original transfer, the disclaimer will be a qualified disclaimer under section 2518(b).

This letter is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides it may not be used or cited as precedent.
In Re:  

Legend  

Date 1 =  
Husband =  
Wife =  
Date 2 =  
g =  
Date 3 =  
Date 4 =  
Applicable State Law 1=  
Applicable State Law 2=  
Date 5 =  
Date 6 =  
Date 7 =  
Date 8 =  

Dear  :  

This is in response to your letter dated September 23, 2003, and subsequent submissions, in which you request a ruling that Wife’s disclaimer of her survivorship interest in Wife and Husband’s joint brokerage account will be a qualified disclaimer for purposes of § 2518 of the Internal Revenue Code.
Facts

The facts submitted and representations made are as follows:

On Date 1, Husband and Wife opened a joint account with rights of survivorship (Brokerage Account). Each spouse contributed equally to the Brokerage Account during their joint lives. Each spouse could unilaterally withdraw his or her contribution and direct investment and distribution of assets from the account.

On Date 2, Husband died. At Husband’s date of death, the Brokerage Account held unit investment trusts, corporate bonds, municipal bonds, certificates of deposit, and approximately $q in cash.

Shortly after Husband’s death, Wife’s stockbroker advised her that the Brokerage Account could not be held under the social security number of a deceased individual. Accordingly, on Date 3, approximately one month after Husband’s death, Wife directed the stockbroker to transfer title in the Brokerage Account to Wife’s name.

During the eight months after Husband’s death, Wife directed the stockbroker to sell certain securities in the Brokerage Account and to purchase other securities for the account. During this period, Wife also withdrew certain amounts of cash from the account.

Approximately six months after Husband’s death, Wife engaged a law firm to review Husband and Wife’s estate plan. At the law firm’s advice, on Date 4, in the ninth month after Husband’s death, Wife executed a written disclaimer in which Wife disclaimed “her beneficial survivorship interest in [Husband’s] share in [the Brokerage Account].” The disclaimed interest represented Husband’s share of the Brokerage Account less the assets in that share (and earnings on those assets since Husband’s death) in which Wife accepted benefits. The disclaimer was recorded on Date 5, within nine months of Husband’s death and a copy was sent to the stock broker on Date 6.

Under Applicable State Law 1, as a result of Wife’s disclaimer, Wife is treated as predeceasing Husband with respect to the disclaimed property. Consequently, the disclaimed property is treated as passing to Husband from the Brokerage Account by right of survivorship. After the disclaimer, on Dates 6 and 7, the law firm directed the stock broker to establish and fund three accounts, the TIC Account, the Wife’s Account, and the Estate Account. The TIC Account held assets that could not be evenly divided. This account did not include any proceeds from the securities sold in the eight months following Husband’s death or any of the securities purchased during that period. Wife and Husband’s estate held the TIC Account as tenants in common. The remaining assets in the Brokerage Account were divided between the Wife’s Account, held in Wife’s name, and the Estate Account, held in the name of Husband’s estate, as follows. The Wife’s Account held assets attributable to Wife’s contributions to the Brokerage Account and also held assets attributable to Husband’s contributions with respect to
which Wife directed sales or purchases after Husband’s death; that is, any proceeds from the securities sold in the eight months following Husband’s death as well as the securities purchased during that period. The Estate Account held assets attributable to Husband’s contributions with respect to which Wife made no withdrawals and directed no sales or purchases after Husband’s death. Each of the three accounts also held the earnings from the date of Husband’s death on the assets placed in each account. The Estate Account and the estate’s one-half interest in the TIC Account represent the disclaimed interest.

Under Husband’s Will, his residuary estate, including the disclaimed property, i.e., the assets held in the Estate Account and the estate’s one-half interest in the TIC Account, (after the payment of debts, expenses, and taxes and a bequest of tangible personally) passed to the trustee under Husband’s revocable trust agreement. That agreement provides for the establishment of a credit shelter trust funded with the largest amount needed to permit Husband’s estate to use in full any estate tax unified credit. The balance of Husband’s residuary estate passes to a marital trust. Under the terms of the credit shelter trust, the net income is to be paid to Wife at least quarterly for life. During Wife’s life, the trustee must also distribute to any among Wife and Husband’s children such amounts of principal as the trustee deems necessary or advisable for such beneficiaries’ health, education, maintenance, or support. Wife has the noncumulative right during her life to withdraw annually principal equal to the greater of $5,000 or 5 percent of the market value of the principal on the first day of the calendar year of the withdrawal. At Wife’s death, the remaining assets of the credit shelter trust will be combined with the remaining assets of the marital trust and distributed in specified amounts to Husband’s sons or their issue. Wife and Husband’s two sons are named as cotrustees of any trusts created after Husband’s death. Wife may never serve as the sole trustee. At Husband’s death, the value of his residuary estate was only sufficient to fund the credit shelter trust. The marital trust was not established. Wife died on Date 8.

Under Applicable State Law 2, an individual who is both a trustee and beneficiary of a trust cannot participate in trustee decisions about making any distributions to that individual as beneficiary of the trust.

You have requested a ruling that Wife’s disclaimer of her survivorship interest in the Brokerage Account is a qualified disclaimer under § 2518.

Law and Analysis

Section 2046 provides that disclaimers of property interests passing upon death are treated as provided under § 2518. Section 2518 provides that, if a person makes a qualified disclaimer with respect to any interest in property, the disclaimed interest is treated as if it had never been transferred to the person making the qualified disclaimer for purposes of the federal estate, gift, and generation-skipping transfer tax provisions.
Under § 2518(b), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property, but only if --

1) the refusal is in writing,

2) the writing is received by the transferor of the interest or his legal representative no later than 9 months after the date on which the transfer creating the interest in the person making the disclaimer is made, or the date on which the person making the disclaimer attains age 21,

3) the person making the disclaimer has not accepted the interest or any of its benefits, and

4) as a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either to the decedent's spouse or to a person other than the person making the disclaimer.

Section 25.2518-2(c)(4)(iii) of the Gift Tax Regulations provides that in the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other co-tenant, such that the transfer is not a completed gift under § 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. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased co-tenant, the disclaimer must be made within 9 months of the co-tenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant.

Section 25.2518-2(d)(1) provides that a qualified disclaimer of property cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting income from the property; and directing others to act with respect to the property or interest in property. Merely taking delivery of an instrument of title, without more, does not constitute acceptance. Further, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. See Example 6 of § 25.2518-2(d)(4).

Section 25.2518-2(d)(2) provides that, if a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary
powers to preserve or maintain the disclaimed property shall not be treated as acceptance of such property or any of its benefits. Thus, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. The regulation refers to § 25.2518-2(e) for rules relating to the effect of directing the redistribution of disclaimed property.

Section 25.2518-2(e)(1) provides that a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant (except as provided in paragraph (e)(2)). The requirements of a qualified disclaimer under § 2518 are not satisfied if -- (i) The disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property or interest in property to another person unless such power is limited by an ascertainable standard); or (ii) The disclaimed property or interest in property passes to or for the benefit of the disclaimant as a result of the disclaimer (except as provided in paragraph (e)(2)).

Under § 25.2518-2(e)(2), a disclaimer made by a decedent’s surviving spouse with respect to property transferred by the decedent may be a qualified disclaimer if the interest passes as a result of the disclaimer without direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to federal estate and gift tax (whether as a trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard.

Under § 25.2518-3(a)(1)(i), the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. Section 25.2518-3(a)(1)(ii) provides that a disclaimant shall be treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer which would be a qualified disclaimer if such property were the only property in which the disclaimant had an interest. Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.

In the present case, Husband and Wife each contributed equally to the Brokerage Account prior to Husband’s death. Each spouse could unilaterally withdraw his or her contributions from the Brokerage Account at any time prior to his or her death. Thus, each spouse’s contributions to the account were incomplete gifts until Husband’s death. Consequently, under § 2518-2(c)(4)(iii), the transfer creating Wife’s survivorship
interest in Husband's share of the Brokerage Account occurred at Husband's death; and
under § 2518(a), Wife had 9 months after his death to disclaim any part of her
survivorship interest in Husband's share.

Within nine months after Husband's death, Wife executed a written disclaimer in
which she disclaimed her survivorship interest in Husband's share of the Brokerage
Account. As a result of Wife's disclaimer, Wife is treated as predeceasing Husband with
respect to the disclaimed property which, consequently, is treated as passing to
Husband by right of survivorship from the Brokerage Account. After the disclaimer, the
disclaimed assets (and the earnings on those assets since Husband's death) were
placed in the Estate Account and the estate's share of the TIC Account. The following
assets (and the earnings on the assets since Husband's death) were segregated from
the disclaimed property and held in Wife's Account or in Wife's share of the TIC
Account: assets attributable to Wife's contributions to the Brokerage Account; any cash
proceeds obtained from the sale of certain securities directed by Wife and not used to
obtain more securities; and securities that Wife directed the broker to purchase in the
eight months following Husband's death. See, § 25.2518-2(c)(4)(iii) and § 25.2518-
2(d)(1).

After Husband's death, acting on advice from her stockbroker, Wife transferred
title in the Brokerage Account to her name. This action did not result in an acceptance
by the Wife of Husband's share in the Brokerage Account because under § 2518-
2(d)(1), the mere transfer of title of the Brokerage Account to Wife's name is not treated
as an acceptance by Wife of Husband's interest in the Brokerage Account or as
benefiting Wife for purposes of § 2518(b)(3).

Under § 25.2518-3(a)(1)(ii), Wife's disclaimer of the assets held in the Estate
Account and the estate's one-half share of the TIC Account may be a qualified
disclaimer even though Wife withdrew cash from the account during the eight months
following Husband's death. The cash and securities are severable assets. Wife may
accept and benefit from the cash withdrawals and make a qualified disclaimer with
respect to the remaining assets in the Brokerage Account. See, § 25.2518-3(d),
Example 17.

Under § 25.2518-2(d)(1), Wife is treated as accepting the proceeds obtained
from the sale of the securities that she directed the stockbroker to sell and is treated as
accepting or benefiting from the securities held in the Brokerage Account that she
directed the stockbroker to purchase during the eight months following Husband's
death. These assets were transferred to Wife's Account. Accordingly, Wife may not
make a qualified disclaimer of such property. Wife did not disclaim these assets.
Further, as stated above, the securities are severable assets. Wife may make a
qualified disclaimer with respect to certain securities while accepting the benefit of other
securities in the account. See § 25.2518-3(a)(1)(ii).
Under Applicable State Law 1, as a result of Wife’s disclaimer, Wife is treated as predeceasing Husband with respect to the disclaimed property. Consequently, the disclaimed property is treated as passing to Husband from the Brokerage Account by right of survivorship. Therefore, the disclaimed assets in the Estate Account and the disclaimed one-half of the TIC Account passed under the terms of Husband’s Will into Husband’s residuary estate and then, under Husband’s revocable trust agreement to a credit shelter trust. Thus, for purposes of § 25.2518-2(e)(1), the disclaimed property passed to the credit shelter trust without any direction by Wife.

During Wife’s life, the trustee of the credit shelter trust was to pay her the entire net income at least quarterly and was to distribute to any among Wife and Husband’s children such amounts of principal as the trustee deemed necessary for a beneficiary’s health, education, maintenance, or support. During her life, Wife also had a noncumulative “5 or 5” power over the trust principal. Although Wife held the power as cotrustee to distribute principal from the credit shelter trust to Husband’s children, this power was limited by an ascertainable standard. For purposes of § 25.2518-2(e)(1) and (2), Wife is not treated as directing the beneficial enjoyment of the disclaimed property due to her interests as a beneficiary of the credit shelter trust or her power as cotrustee of that trust. See, Examples 4, 5, 6, and 7 of § 25.2518-2(e)(5).

We note that, under Applicable State Law 2, although named as cotrustee, Wife could not participate as a trustee in making any distributions to herself as beneficiary of the credit shelter trust and, thus, for purposes of § 25.2518-2(d)(2), could not be deemed to have accepted any part of the disclaimed property in her role as cotrustee.

Accordingly, we rule that Wife’s disclaimer of her survivorship interest in the Brokerage Account, i.e., the assets held in the Estate Account and the estate’s one-half share in the TIC Account, is a qualified disclaimer under § 2518.
Except as specifically ruled herein, we express no opinion on the federal tax consequences of the disclaimer under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

_________________________
Lorraine E. Gardner
Senior Counsel, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for section 6110 purposes

cc:
Dear: 

This is in response to your request dated July 21, 2015, submitted by your authorized representative, in which you request rulings allowing Taxpayer A to rollover a portion of Taxpayer B's inherited individual retirement account (IRA) that has been assigned to Taxpayer A by a state court as her community property interest.
The following facts and representations have been submitted under penalties of perjury in support of the ruling requested:

Decedent and Taxpayer A were married in 2004 and lived in State A, a community property state. Taxpayer B is the child of Decedent and Taxpayer A. Decedent named Taxpayer B as the sole beneficiary of his three IRAs. Decedent died on Date 1.

After Decedent’s death, Taxpayer A filed a claim against Taxpayer C, the estate of Decedent, for Taxpayer A’s one-half interest in the community property Decedent and Taxpayer A owned. Taxpayer A and Taxpayer C negotiated a settlement under which Taxpayer A’s community property interest in the estate was valued at Amount 1. A state court in State A approved the settlement and ordered that the custodian of the IRAs “assign [Amount 1] of the inherited IRA for [Taxpayer B] to [Taxpayer A] as a spousal rollover IRA.”

Based on the foregoing facts and representations, you have requested rulings that:

1) Amount 1 of the IRA of Decedent naming Taxpayer B as sole beneficiary should be classified as Taxpayer A’s community property interest; then
2) Taxpayer A may be treated as a payee of the inherited IRA for Taxpayer B; then
3) The custodian of the inherited IRA for Taxpayer B can distribute Amount 1 to Taxpayer A in the form of a surviving spouse rollover IRA; and
4) The distribution of Amount 1 from the inherited IRA for Taxpayer B to Taxpayer A will not be considered a taxable event.

Section 408(d)(1) provides that “any amount paid or distributed out of an individual retirement plan shall be included in the gross income of the payee or distributee.”

Section 408(d)(3) permits rollovers by “the individual for whose benefit the [IRA] is maintained.” Section 408(d)(3)(C) provides that rollovers are not permitted from inherited IRAs. Section 408(d)(3)(C)(ii) defines inherited IRAs as IRAs where (i) the individual for whose benefit the IRA is maintained acquired the IRA by reason of the death of another individual, and (ii) such individual was not the surviving spouse of such other individual.

Section 408(g) provides that § 408 “shall be applied without regard to any community property laws.”

In regard to the first ruling request, whether an amount of the inherited IRA for Taxpayer B is classified as Taxpayer A’s community property interest is a matter of state property law and not a matter of federal tax law. Accordingly, we decline to issue the requested ruling.

In regard to the second, third, and fourth ruling requests, Taxpayer B was the named beneficiary of the IRA of Decedent and the IRA has been retitled as an inherited IRA for
Taxpayer B. Section 408(g) provides that section 408 shall be applied without regard to any community property laws, and, therefore, section 408(d)’s distribution rules must be applied without regard to any community property laws. Accordingly, because Taxpayer A was not the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A’s community property interest, Taxpayer A may not be treated as a payee of the inherited IRA for Taxpayer B and Taxpayer A may not rollover any amounts from the inherited IRA for Taxpayer B (and therefore any contribution of such amounts by Taxpayer A to an IRA for Taxpayer A will be subject to the contribution limits governing IRAs). Additionally, because Taxpayer B is the named beneficiary of the IRA of Decedent and because we disregard Taxpayer A’s community property interest, any “assignment” of an interest in the inherited IRA for Taxpayer B to Taxpayer A would be treated as a taxable distribution to Taxpayer B. Therefore, the order of the state court cannot be accomplished under federal tax law.

This ruling letter expresses no opinion on the property rights of the parties under state law, and only provides a ruling on the federal tax law impact on the specific facts presented.

The ruling contained in this letter is based upon information and representations submitted by the taxpayers and accompanied by a penalties of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Additionally, no opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited by others as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

Cathy Pastor
Senior Counsel,
Qualified Plans Branch 4
(Tax Exempt & Government Entities)