

# "DISCLAIMERS AND DISCLAIMER TRUSTS"

BY

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## I. WHAT IS A DISCLAIMER?

- A. Refusal to accept an interest in property to which the disclaimant is entitled by virtue of gift, descent, bequest, contract, survivorship, or otherwise.
- B. Statutory Requirements under Internal Revenue Code Section 2518. A "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property that satisfies the following four conditions:
- **FORMAL REQUIREMENTS.** The refusal is made in writing, identifies the interest disclaimed and is signed by the disclaimant or his legal representative;
  - **TIME - 9 MONTHS RULE.** The written refusal is received by the transferor no later than *nine months* after the date on which the transfer creating the interest is made (i.e., 9 months from date of death for testamentary transfers; 9 months from date of "completed gift" for intervivos transfers). For disclaimers of an expectancy under a will, the disclaimer should be delivered to the executor and an executed copy filed with the probate court. For disclaimers of real estate, the disclaimer should be delivered and an executed counterpart filed with the Recorder of Deeds.

Exception for Minors: A beneficiary who is under 21 years of age has until 9 months after his 21st birthday in which to make a qualified disclaimer. Any actions taken with regard to an interest in property by a beneficiary or a custodian prior to the beneficiary's 21st birthday will not be an acceptance by the beneficiary of the interest. (Treasury Regulations Section 25.2518-2(d)(3) and (4), examples (9), (10), and (11).

Example: Grandfather makes a gift of stock to Father as custodian for Grandson under the Illinois Transfer to Minors Act. At the time of the gift, Grandson is 10 years old. Prior to Grandson attaining age 21, income from the custodial account is routinely applied for Grandson's benefit. Grandson can disclaim the custodial account within 9 months after his 21st birthday. If a disclaimer is desired when Grandson is a minor, a guardianship generally needs to be established with the probate court finding under Section 2-7(a) of the Probate Act that the disclaimer "is not materially detrimental to the interests of the ward." (755 ILCS 5/2-7(a))

- **NO ACCEPTANCE OF BENEFITS.** The disclaimant generally cannot accept the interest in property or any of its benefits before making the disclaimer. Acceptance is manifested by an affirmative act that is consistent with ownership of the interest. (Treasury Regulations Section 25.2518-2(d)(1)). Further, Section 2-7(e) of the Probate Act provides that acceptance must be affirmatively proved in order to constitute a bar to acceptance.

(i) Using the property, accepting income generated by the property, pledging the property for a loan, or directing others to act with respect to the property will all constitute acceptance. However, merely taking delivery of an instrument does not constitute acceptance.

Example. An individual who wished to disclaim a residence in which she resides on the date of death is not considered to accept benefits if reasonable rent is paid. PLR 8124118;

(ii) Accepting consideration in return for making a disclaimer is an acceptance.

Example: A is devised certain property under a will. If A disclaims the property it goes to B. If A receives money from B to disclaim the property, A's disclaimer is not a qualified disclaimer;

(iii) Beware "acceptance of benefits" issue if disclaimers are part of an overall Family Settlement Agreement. A disclaimer may not be a "qualified disclaimer" if reciprocal benefits are received by the disclaimant;

(iv) There may be acceptance of one interest in property that will not taint the disclaimer of another interest in the same property (i.e., beneficiary can disclaim income interest in trust, but retain right to receive principal distributions).

- **NO DIRECTION OF BENEFITS.** A disclaimer will not be qualified unless the disclaimed property passes, without any direction on the part of the disclaimant, to a person other than the disclaimant. Regulation Section 25.2518-2(e).

(i) If there is an express or implied agreement that the disclaimed interest in property is to be given to a person specified by the disclaimant, the disclaimer will not be qualified;

(ii) A disclaimer may be disqualified because the disclaimed property drops into a trust in which the disclaimant has an interest which has not been disclaimed;

(iii) Surviving Spouse Exception - In General. The surviving spouse can disclaim property which ultimately passes to a trust for the spouse's benefit. Code Section 2518(b)(4)(A) and Regulation Section 25.2518(2)(e)(2) and (5).

Example. A surviving spouse's qualified disclaimer causes the disclaimed property to fall into a Credit Shelter Trust under which distributions may be made to the surviving spouse;

(iv) Surviving Spouse Exception - Beware if the Spouse is trustee or has a power of appointment in the trust receiving the disclaimed interest. The spouse can be trustee with discretionary powers as trustee to benefit himself and others if the discretionary powers are governed by an ascertainable standard (i.e., principal distributed to trust beneficiaries for their "health, education, support, or maintenance").

Example. Husband's living trust establishes both a Marital and Credit Shelter Trust. Wife is an income beneficiary of both trusts and has a testamentary special power of appointment over the Credit Shelter Trust. The provisions of the will specify that any disclaimed portion of the Marital Trust is added to the Credit Shelter Trust. Wife disclaims 30% of the Marital Trust.

The disclaimer will not be qualified unless the Wife also disclaims her special power to appoint the disclaimed interest, since retention of that power would allow her to direct the beneficial enjoyment of the disclaimed property. Accordingly, Wife must also disclaim her power to appoint the disclaimed property passing to the Credit Shelter Trust (see p. A-5 for example of such a clause).

## II. TAX CODE VERSUS ILLINOIS DISCLAIMER LAW

- A. Generally all "Qualified Disclaimers" under Code Section 2518 are valid Disclaimers under Illinois law. The Illinois disclaimer statute is Section 2.7 of the Illinois Probate Act. Non-testamentary interests are also controlled by Section 2.7 pursuant to the Disclaimer Under Nontestamentary Instrument Act, 760 ILCS 25/1.

The Illinois statute does not conflict with the above tax rules and is less rigid. Among other things, Section 2.7 provides that (i) a disclaimer once made is irrevocable; and that (ii) a written waiver of the right to disclaim may be made by any person or his representative.

- B. The most important difference is that under Illinois law there is no 9 month time limit for a valid disclaimer.

However, the timing of disclaimers are subject to a reasonableness standard. As a practical matter, the 9 month standard imposed by Code Section 2518 should be followed to avoid problems.

### III. EFFECTS OF A "QUALIFIED DISCLAIMER"

A. Disclaimant generally presumed to have predeceased the decedent. Unless otherwise provided for in the creating instrument, under Probate Act Section 2.7(d) the disclaimed interest shall pass or descend,

- in the case of a present interest, as if the disclaimant had predeceased the decedent;
- in the case of a future interest, as if the disclaimant had predeceased the event fixing the interest.

B. Governing instrument directs what happens to a predeceased beneficiary. If the deed, will, or trust provides for alternate takers should the disclaimant predecease the transferor, those provisions will control to whom the disclaimed interest passes.

Example: "1,000 shares of my stock in General Motors to my son if he survives me, otherwise to Lake County Bar Association." Result: If the son disclaims his interest, the stock will pass to Lake County Bar Association.

Example: Grandfather has three grandchildren (no great grandchildren) through his only child. Grandfather's will disposes of the residuary estate to "*my descendants per stirpes.*" Result: If son disclaims, his interest will pass to the three grandchildren in equal shares. If two of the grandchildren disclaim their interest in Grandfather's estate, the entire residuary estate will pass to the remaining grandchild.

C. Governing instrument directs what happens to a disclaimed interest.

Example: "1,000 shares of my stock in General Motors to my son if he survives me, otherwise to my son's descendants per stirpes; provided that in the event my son disclaims such interest it shall go to Lake County Bar Association."

D. The Anti-Lapse Statute - Trap for the unwary.  
(Section 4-11 of the Probate Act (755 ILCS 5/4-11))

1. General Rule. Unless the testator expressly provides for otherwise in his will legacies to,

(i) a descendant of the testator who dies before the testator (i.e., the disclaimant) passes to the testator's descendants, *per stirpes*;

(ii) a class, the surviving class members take unless the deceased class member (i.e., the disclaimant) is a descendant of the testator. In that case, descendants of the disclaimant will take the disclaimed share, *per stirpes*.

(iii) If neither of the above rules apply, then the disclaimed share or legacy passes as

part of the residuary estate.

Example. Father provides a specific legacy for a life estate to Wife, remainder to Son. If Son has children, his disclaimer will pass such interest to his children. If Son has no children, his disclaimer will pass such interest to Father's residuary beneficiaries. The legacy will not automatically pass to Wife unless the residuary beneficiaries also disclaim.

Example. Father provides a specific legacy for a life estate to Wife, remainder to son if son survives Father. This clause is not covered by the Anti-Lapse statute because it contains an "express contrary provision."

2. Anti-Lapse Statue does not apply to Living Trusts. Section 4-11 of the Probate Act is limited to legacies under a will and its provisions generally do not apply to a lapsed (or disclaimed) gift under a non-testamentary trust.

## IV. EFFECTS OF A "NONQUALIFIED DISCLAIMER"

A Disclaimers not qualifying under Code Section 2518 are generally treated as a gift by the disclaimant.

Example. Grandfather bequests Son \$1 million. Ten months after Grandfather's death, Son disclaims such interest with the result that it is paid to Son's children under the Anti-Lapse statute. Result: Son has made a \$1 million taxable gift to children.

## V. NON-TAX REASONS FOR DISCLAIMERS

\_\_\_\_\_ A. Generosity. i.e., Wealthy sibling does not need money and executes qualified disclaimer so inheritance goes to poorer sibling;

B. To terminate a trust through "acceleration". Section 2-7(d) of the Probate Act creates a presumption in favor of the acceleration of future interests.

Example: Mother sets up trust to pay income to Son for life, with remainder to Son's children who survive him. Son disclaims with two children then living. Unless the trust provides otherwise, the disclaimer will cause the trust to terminate and the two children will receive the property outright (even though Son may subsequently have other children, or one of the two children may die during Mother's lifetime).

C. To "Rewrite" Will or "Rearrange" Disposition of Nonprobate Assets.

Example. Decedent dies with no will. Decedent's brother is named beneficiary of a life insurance policy on Decedent's life. Brother disclaims his interest under the insurance policy so that the insurance proceeds pass by intestacy to Decedent's spouse and children;

Example. Father's living trust gives his residuary estate to his 1st wife, or if she is not living to Son. After 1st wife's death, Father remarries but does not rewrite his trust. After Father's death, Son (who has no children) disclaims his interest in Father's trust, as well as his interest in intestate succession, in order to provide for his stepmother.

D. To "Drop" Real Estate which is Environmentally Damaged.

E. To Avoid Creditors.

1. In general The fact that a disclaimer frustrates a creditor's efforts to reach the disclaimed property does not prevent a disclaimer. People v. Flanagan, 331 Ill. 203, 162 N.E. 848 (1928); Tompkins State Bank v. Niles, 127 Ill. 2d 209, 537 N.E. 2d 274 (1989); In Re Atchison, 101 B.R. 556 (Bankr, S.D. Ill. 1989).

2. Medicaid Planning - Disclaimer does not work to avoid Claim of Department of Public Aid.

In re Estate of Heater, 266 Ill. App. 3d 452, 640 N.E. 2d 654, 203 Ill Dec. 734 (4th Dist. 1994), an elderly person benefitting from Medicaid payment of nursing home bills dies shortly after receiving a \$40,000 inheritance. The administrator of the estate attempts to avoid the reimbursement claim of the Department of Public Aid by petitioning the probate court for leave to disclaim the inheritance. The probate court grants the administrator's petition but is reversed by the Fourth District Court of Appeals. In making its decision the Fourth Circuit expressly ruled that the executor had a fiduciary duty relating to the Department of Public Aid as an "interested party," and that the disclaimer would unfairly deprive such creditor of any payment on its debt. Thus, the disclaimer was denied and the inheritance (as an asset of the probate estate) was subject to the Department of Public Aid's claim.

Observation. Dicta in the Heater opinion suggests that if provisions in the decedent's will authorized the executor to disclaim without court approval, the claim would have been avoided (See Section 2-7(a) of the Probate Act and discussion under Section VIII below).

## **VI. ESTATE TAX PLANNING - USAGE OF "DISCLAIMER TRUSTS"**

A. Typical case (the "overfunded" Marital Deduction)

- Husband and wife have "modest" combined estates under \$1 million, with most asset held jointly. Beneficiary designations of insurance and qualified plans name the surviving spouse as primary beneficiary.
- The attorney explains the estate tax savings of a Credit Shelter Trust designed to shelter the \$600,000 unified credit exemption of the 1st to die;
- The clients do not understand the workings of the Credit Shelter Trust or view it as being too complicated. Furthermore, they do not want to "break up" their joint tenancy assets;
- The clients direct the attorney to draft wills or trusts leaving everything to the surviving spouse.

B. The Disclaimer Trust as the "Solution" to preserve the possibility of estate tax planning upon the death of the first spouse.

1. Will or living trust provides that -

(i) Surviving spouse will receive residuary estate;

(ii) Any property disclaimed by the surviving spouse passes to a "Disclaimer Trust" in which the spouse is a primary beneficiary. Such trust can be a standard Credit Shelter or QTIP Trust. Effectively, the disclaimer diverts assets to nonspousal beneficiaries to utilize the decedent's unified credit.

2. Upon the 1st to die, the surviving spouse has two options:

(i) To keep the property bequeathed to the surviving spouse;

(ii) To disclaim all or any part of the property bequeathed to the surviving spouse (with the disclaimed property "soaking up" the decedent's \$600,000 unified credit);

(iii) Effectively, at the first death the surviving spouse is given a "second look" to determine whether to engage in estate tax planning.

Example. Husband and Wife own joint assets in the amount of \$1.2 million. The attorney explains that (i) without estate tax planning the estate tax on such sum upon the death of the surviving is \$235,000; (ii) with estate tax planning via a Unified Credit Shelter Trust the projected estate tax may be reduced to zero. However, the clients for a variety of reasons do not want to engage in planning for estate taxes. They direct the attorney to draft simple wills (i.e., everything goes to the surviving spouse).

Solution - the Disclaimer Trust. The attorney explains that via a Disclaimer

Trust, the clients can "have their cake and eat it too." Such trust provides that the surviving spouse will receive the residuary estate, yet any property disclaimed by the surviving spouse shall pass to a Credit Shelter Trust where such spouse is a primary beneficiary. In the event of the 1st to die, the surviving spouse can disclaim \$600,000 to the Credit Shelter Trust and reduce to zero a projected estate tax burden of \$235,000.

C. Remember to avoid the following "traps for the unwary"  
(discussed above on page 3)

- if the surviving spouse is the trustee of the Disclaimer Trust, the powers to distribute trust property must be limited by an ascertainable standard (i.e., "health, education, support, or maintenance"); and
- the surviving spouse cannot have a special power of appointment over disclaimed property passing into the Disclaimer Trust.

**D. FORMS**

1. APPENDIX A: OUTRIGHT BEQUEST TO SURVIVING SPOUSE AND DISCLAIMER TRUST, WITH ADULT CHILDREN AS ULTIMATE BENEFICIARIES
2. APPENDIX B: OUTRIGHT BEQUEST TO SURVIVING SPOUSE AND DISCLAIMER TRUST, WITH MINOR CHILDREN AS ULTIMATE BENEFICIARIES
3. APPENDIX C: DISCLAIMER TRUST CLAUSE FOR DISCLAIMER OF MARITAL TRUST IN TRADITIONAL A-B TRUST PLAN

## VII. OTHER TAX PLANNING USES OF DISCLAIMERS

A. To Increase the Marital Deduction. An "underfunded" marital deduction triggering increased estate taxes may be corrected through the use of disclaimers.

Example. Father having a \$2 million estate dies married without a will. His children would receive \$1 million (50%) of the estate under Section 2-1 of the Illinois intestacy statute. However, such inheritance triggers an estate tax of \$153,000. In order to defer (and hopefully avoid) such tax, the children (and their descendants) disclaim \$400,000 to increase the surviving spouse's intestate share and, because of the resulting increased marital deduction, to reduce the tax on Father's estate to zero.

B. To "Cure" Defects in Poorly Drafted Marital Trusts  
(Regulation Section 20.2056(d)-1)



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C. To "Cure" Defects in Poorly Drafted Charitable Trusts  
(Regulation Section 20.2055(a))

- D. For Generation Skipping Tax Purposes. A disclaimer may be used to create a direct skip for generation-skipping tax purposes;
- E. Subchapter S Qualification. A disclaimer may be used to qualify a trust owning closed held stock as a qualified Subchapter S trust (QSST) so that an S election can be made by the shareholders;
- F. Corporate Stock Redemption. A disclaimer may be used to permit a stock redemption that will qualify the proceeds for exchange treatment under Code Sections 302 or 303;
- G. For Special Use Valuation Purposes. A disclaimer may be used to qualify farm real estate for special use valuation under Code Section 2032(A);
- H. To Permit Use of Alternate Valuation. A disclaimer may be used to qualify for alternate valuation under Code Section 2032, by creating a small taxable estate through disclaimer of part of the marital deduction gift;
- I. To Facilitate A Residential Rollover For a Surviving Spouse who wants to Sell the Marital Home and Buy a Smaller House

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Example. Husband and Wife own a marital home worth \$600,000 with a cost basis of \$100,000. If Husband dies, the Wife's basis in the residence is \$350,000 [1/2 \$600,000 "stepped up" basis (\$300,000) plus 1/2 \$100,000 cost basis (\$50,000)] resulting in capital gains of \$250,000. If Wife disclaims Husband's 1/2 of the residence and buys a home at \$300,000, she will be able to "roll-over" her entire gain under Code Section 1034 and avoid all capital gain taxes.

The above relief is available because Section 1034 requires that the purchase price of the new home (\$300,000) equals or exceeds the adjusted sales price of the old home (\$300,000). Without the disclaimer, Section 1034 is inapplicable because the entire \$600,000 sale price of the old home would have been attributed to her. Alternately, even if a Section 1034 rollover is not made, under the \$125,000 exclusion of Section 121, all capital gains are avoided if the purchase price is \$175,000 or less (\$175,000 minus \$50,000 basis minus \$125,000 exclusion equals zero gain).

## VIII. SPECIAL RULES

### \_\_\_\_A. JOINT PROPERTY

1. Real Estate held in Joint Tenancy Where a joint tenant has the right to sever the real estate joint tenancy or cause the property to be partitioned under state law, the surviving joint tenant can disclaim:

- the entire joint tenancy within 9 months of the creation of the tenancy;
- 50% of the joint tenancy (i.e., the "survivorship interest") within 9 months of the death of the joint tenant.

In such case, the disclaimed survivorship interest passes to the estate of the deceased joint tenant. If, however, more than one joint tenant survives, then such interest would pass to the other surviving joint tenants not disclaiming;

2. Real Estate held in Tenants by the Entirety - Since there is no right to partition tenancy by the entirety property, such interest can only be disclaimed within 9 months of the creation of the tenancy;

3. Nonspousal Revocable Joint Accounts - the "Completed Gift" Rule. Where the joint tenancy in personal property is revocable (i.e., a joint bank account where one tenant furnishes all of the proceeds), no completed gift occurs to the donee joint tenant until such time as the donee joint tenant accepts benefits from the transfer (i.e., by making a withdrawal) or the tenancy becomes irrevocable (i.e., the donor dies). Accordingly, at the death of the donor joint tenant the donee joint tenant has 9 months to disclaim the entire account. However, if the donee tenant has received benefits from the account, arguably only the survivorship portion can be disclaimed.

Example. B transfers \$10,000 to a bank account held jointly by B and C. Both B and C can withdraw funds at any time, but C never exercises his right of withdrawal or receives benefit from such account. The gift is not completed to C. When B dies, it appears that C can disclaim the entire interest. If C made withdrawals from the account, it appears that C can disclaim only the 50% survivorship interest.

Example. If B and C are married, it appears that C can disclaim only the 50% survivorship interest.

### \_\_\_\_B. QUALIFIED PLAN BENEFITS

1. In order to "soak up" the decedent's \$600,000 Unified Credit, the Surviving Spouse disclaims qualified plan benefits in order to divert funds to children or Credit Shelter Trust.

2. Under certain circumstances, disclaimers can be utilized to permit a Surviving Spouse to "Roll-Over" Qualified Plan Benefits into his or her IRA.

Example. Qualified plan benefits are payable to Husband's estate. Wife as executor uses those benefits to fund a testamentary trust. Wife and all other trust beneficiaries disclaim their interest under such trust. This causes the benefits to pass through intestacy to Wife and children. Children disclaim their intestate share. As a result, Wife becomes sole beneficiary and is entitled to rollover the benefits. PLR 9450041.

### C. **DISCLAIMERS BY FIDUCIARIES**

1. Judicial Weighing of Interests. Section 2.7(a) of the Probate Act provides that "The court may approve the disclaimer by a representative of a decedent if it finds that the disclaimer benefits the estate as a whole and those interested in the estate generally even if the disclaimer alters the distribution of the property, part or interest disclaimed". But see Estate of Heater, supra, where the court denied such a disclaimer presumably because it did not benefit a creditor as an "interested" party in the estate .

Solution: Section 2.7(a) provides that a testator, may, in a will, authorize his or her executor to disclaim without court approval. Accordingly, if such a provision is in a will, the disclaimer is not subject to judicial review.

2. Does Disclaimer "rewrite" the instrument in a manner contrary to the intent of the Decedent?
3. Disclaimant as Fiduciary of Disclaimed Interest. Actions taken by a disclaiming executor/trustee in a fiduciary capacity to preserve or maintain the disclaimed property is not treated as an acceptance. For example, an executor who is also a beneficiary may direct the general maintenance of a piece of rental real estate owned by the estate and nevertheless disclaim his interest therein (Regulation Section 25.02518-2(d)(2)).

### D. **DISCLAIMER OF UNDIVIDED PORTIONS**

1. Fractional Disclaimer. A devisee of real estate may disclaim 1/2 of the fee interest;
2. Disclaimer of Severable Property. A legatee of 100 shares of stock, may disclaim 50 shares;
3. Asset in Trust Rule. A beneficiary cannot disclaim income/principal from a certain asset in trust. Rather, a disclaimer of some percentage of the entire trust must be made. (Regulation Section 25.2518-(3)(a)(2));
4. Formula Disclaimers are Permissible.

**APPENDIX A:**

**OUTRIGHT BEQUEST TO SURVIVING SPOUSE AND  
DISCLAIMER TRUST, WITH ADULT CHILDREN AS ULTIMATE BENEFICIARIES**

(Note: This Form is adapted from Form 111, optional clause #8, appearing in The Northern Trust Company Will & Trust Forms Book)

**FOURTH:** All the residue of my estate, wherever situated, including lapsed legacies, but expressly excluding any property over which I may have power of appointment at my death, I give to my wife if she survives me. For purposes of this will, my wife shall be deemed to have survived me if the order of our deaths cannot be proved.

If my wife survives me and disclaims any part or all of my residuary estate, the disclaimed property shall be held as a separate trust, designated the "Disclaimer Trust", unless my wife also disclaims her interest in the Disclaimer Trust. The Disclaimer Trust shall be held by my wife, as trustee, and disposed of as hereinafter provided.

If my wife does not survive me, I give my residuary estate in equal shares to such of my children as shall be living at my death, except that the then living descendants of a deceased child of mine shall take per stirpes the share which the child would have received if living. If a descendant is a minor, payment may be made for the benefit of the descendant to a custodian under a Uniform Transfers or Gifts to Minors Act.

**FIFTH:** The Disclaimer Trust shall be held and disposed of as follows:

**SECTION 1:** Commencing with my death the trustee shall pay the income from the Disclaimer Trust in convenient installments, at least quarterly, to my wife during her lifetime.

The trustee may also pay to my wife such sums from principal as the trustee deems necessary or advisable from time to time for her health and maintenance in reasonable comfort, and for the health, support in reasonable comfort, and education (including postgraduate) of any child of mine who may be dependent upon her, considering the income of each of them from all sources known to the trustee. No payment made for a child of mine shall be charged against the share hereinafter provided for the child or his or her descendants. The trustee may not use trust property to satisfy her legal obligations.

**SECTION 2:** Upon the death of my wife the trustee shall distribute the Disclaimer Trust in equal shares to such of my children as shall then be living, except that the then living descendants of a deceased child of mine shall take per stirpes the share which the child would have received if living. If a descendant is a minor, payment may be made for the benefit of the descendant to a custodian under a Uniform Transfers or Gifts to Minors Act.

**APPENDIX B:**

**OUTRIGHT BEQUEST TO SURVIVING SPOUSE AND  
DISCLAIMER TRUST, WITH MINOR CHILDREN AS ULTIMATE BENEFICIARIES**

(Note: This Form is adapted from Form 105, optional clause #7, appearing in The Northern Trust Company Will & Trust Forms Book)

**FOURTH:** All the residue of my estate, wherever situated, including lapsed legacies, but expressly excluding any property over which I may have power of appointment at my death, I give to my wife if she survives me. For purposes of this will, my wife shall be deemed to have survived me if the order of our deaths cannot be proved.

If my wife survives me and disclaims any part or all of my residuary estate, the disclaimed property shall be held as a separate trust, designated the "Disclaimer Trust", unless my wife also disclaims her interest in the Disclaimer Trust. The Disclaimer Trust shall be held by my wife, as trustee, and disposed of as hereinafter provided. If my wife is unable or unwilling to act as trustee, the trustees hereinafter named in this instrument shall act as trustee of such trust.

If my spouse does not survive me, I give my residuary estate to the "Family Trust" to be held and disposed of as hereinafter provided.

**FIFTH:** The Disclaimer Trust shall be held and disposed of as follows:

**SECTION 1:** Commencing with my death the trustee shall pay the income from the Disclaimer Trust in convenient installments, at least quarterly, to my wife during her lifetime.

The trustee may also pay to my wife such sums from principal as the trustee deems necessary or advisable from time to time for her health and maintenance in reasonable comfort, and for the health, support in reasonable comfort, and education (including postgraduate) of any child of mine who may be dependent upon her, considering the income of each of them from all sources known to the trustee. No payment made for a child of mine shall be charged against the share hereinafter provided for the child or his or her descendants. The trustee may not use trust property to satisfy her legal obligations.

**SECTION 2:** Upon the death of my wife the Disclaimer Trust shall be distributed to the trustee, to be held and disposed of as hereinafter provided for the Family Trust.

**SIXTH:** The Family Trust shall be held and disposed of as follows:

**SECTION 1:** Until the time hereinafter fixed for distribution, the trustee may pay so much or all of the income and principal of the Family Trust to any one or more of my children and the descendants of a deceased child of mine from time to time living, in equal or unequal proportions and at such times as the trustee deems best, considering the needs, other income and means of support, and best interests of my children and those descendants, individually and as a group, and any other circumstances and factors which the trustee deems pertinent, adding to principal any income not so paid. No payment of income or principal to a child or other descendant of mine shall be charged against the share hereinafter provided for the child or descendant or his or her ancestor or

descendants.

**SECTION 2:** If upon or whenever after the death of the survivor of my wife and me there is no living child of mine under the age of 25 years, the trustee shall distribute the Family Trust in equal shares to such of my children as shall then be living, except that the then living descendants of a deceased child of mine shall take per stirpes the share which the child would have received if living, subject to postponement of possession as provided below.

**SECTION 3:** Each share of the Family Trust which is distributable to a beneficiary who has not reached the age of 21 years shall immediately vest in the beneficiary, but the trustee shall (a) establish with the share a custodianship for the beneficiary under a Uniform Transfers or Gifts to Minors Act, or (b) retain possession of the share as a separate trust, paying to or for the benefit of the beneficiary so much or all of the income and principal of the share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, adding to principal any income not so paid, and distributing the share to the beneficiary when he or she reaches the age of 21 years or to the estate of the beneficiary if he or she dies before receiving the share in full.

**APPENDIX C:**

**DISCLAIMER TRUST CLAUSE FOR DISCLAIMER OF  
MARITAL TRUST IN TRADITIONAL A-B TRUST PLAN**

(Note: This Form is adapted from 4.17 of DRAFTING  
WILLS AND TRUST AGREEMENTS (Ill. Inst. For CLE, 1990)

E. If my wife survives me but disclaims any part of all of the property that would otherwise be held in the Marital Trust, I give such disclaimed property (reduced by all additional estate, inheritance or generation-skipping taxes incurred by reason of such disclaimer, which taxes shall be paid from such disclaimed property) to the trustee of the Residuary Trust under SECTION THREE to be administered as a part thereof for the benefit of those persons, including my wife, referred to thereunder.

*[If the surviving spouse is given a limited power of appointment over the Residuary Trust, the following may then be added:*

, except that my wife shall not have a power to appoint any property passing to the Residuary Trust by reason of such disclaimer.