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I. INTRODUCTION

Debtors are motivated to renounce or disclaim[1] property to which they become entitled, whether by bequest, devise, or inheritance, in order to shield the property from creditors and avoid taxes.[2] Although the Bankruptcy Reform Act of 1978[3] specifically attempts to prevent the first of these questionable practices, state common law has permitted disclaimers for two reasons. First, because a gift[4] is a two-party

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1. A renunciation is an heir's refusal to accept an estate, either in whole or in part, which devolves to that heir by intestacy. A disclaimer is a devisee's refusal to accept an estate, either in whole or in part, which the devisee becomes entitled to by testate succession; that is, through a will left by the decedent. *See generally* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES (1988) (discussing the concepts of renunciation and disclaimer in greater detail). These terms are used interchangeably throughout this Article. Although heirs and devisees were treated differently under the common law doctrine of descent cast, the doctrine has been supplanted by statute in all but two states. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 596 n.49 (1989). Under this doctrine, property vested in an heir at the death of the decedent regardless of the accompanying burdens. *See infra* notes 4-6 and accompanying text. If an heir wished to refuse the property, by disclaimer or otherwise, the act was deemed a post-inheritance "transfer" and did not relieve the heir of obligations thrust upon him by the inheritance. In contrast, a devisee was allowed to disclaim all interests devised to him. This disclaimer was said to "relate-back" to the date of the testator's death, and the devisee was deemed to have received nothing. *See infra* notes 20-21 and accompanying text.

2. *See, e.g.*, Estate of Oot, 408 N.Y.S.2d 303, 304 (N.Y. Sur. Ct. 1978). Debtors may also have legitimate reasons to renounce or disclaim legacies. For example, one sibling may disclaim her disproportionate share so that all siblings take equal shares in the estate. Where the disclaimant is or has become bankrupt, however, the usual purpose of disclaiming is to defeat creditors.

3. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in various sections of 11 U.S.C.) [hereinafter the Code].

4. In this example, the gift is in the form of a bequest or devise.

transaction, it requires the donee's acceptance as the law does not require a party to accept an unwanted gift.[5] For example, a donee may want to reject a gift of property when the property is encumbered in an amount greater than its fair market value[6] or when accepting the gift would impose a significant tax burden on the recipient. Second, if the law did not allow disclaimers, the testator's property could end up in the hands of the devisee's creditors, thus clearly frustrating the testator's intent.[7]

Litigation arises in both the bankruptcy and state law contexts where a devisee disclaims property when he has outstanding debts that he is otherwise unable to satisfy. The central issue in this litigation is whether the disclaimer is a fraudulent transfer[8] that creditors can set aside.

Part II of this Article discusses the background of disclaimer law. Part III examines post-petition disclaimers, which are prohibited under section 541(a)(5) of the Code.[9] Part IV analyzes pre-petition disclaimers and concludes that, because they may be analogized to general powers of appointment, pre-petition disclaimers are fraudulent transfers under section 548 of the Code.[10]

II. BACKGROUND

The idea that the law should not allow individuals to defraud their creditors by conveying their property is a long-standing proposition.

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5. This principle is derived from English common law. *See, e.g.*, Townson v. Tickell, 106 Eng. Rep. 575, 576-577 (K.B. 1819) ("The law certainly is not so absurd as to force a man to take an estate against his will."); Thompson v. Leach, 86 Eng. Rep. 391, 396 (K.B. 1690) ("[M]an cannot have an estate put into him in spight of his teeth.").

6. *See* UNIF. PROBATE. CODE § 2-609, 8 U.L.A. 1 (1983) [hereinafter U.P.C.] ("A specific devise passes subject to any mortgage interest existing at the date of death . . . ."); CAL. PROB. CODE § 6170 (West 1986) ("A specific devise passes the property devised subject to any mortgage, deed of trust, or other lien existing at the date of death . . . ."). The problem of encumbered property is not at issue in this context because no creditor would demand acceptance where the property had no net value or was subject to a superior claim.

7. In situations where a testator has died having accumulated more liabilities than assets, however, the interests of the devisee, not the testator, should be weighed against those of the creditors because the testator has died, and it is the devisee's interests that are currently at stake.

8. A "fraudulent transfer" occurs when a debtor transfers property to a third party within one year of the date on which the debtor files a petition for bankruptcy. To make a "fraudulent transfer," the debtor must either intend to "defraud" his creditors or must receive property of a disproportionately lesser value in exchange. *See infra* notes 67-70 and accompanying text; *see also infra* part IV.C-G.

9. *See infra* notes 36-65 and accompanying text.

10. *See infra* notes 67-93, 105-89 and accompanying text.

As early as 1571, the Statute of Elizabeth[11] rendered such transfers void. In an early application of this statute, one court noted various "badges of fraud,"[12] which, if present, would render a transfer clearly and "utterly void."[13] Section 7 of the Uniform Fraudulent Conveyance Act codified the essence of the Statute of Elizabeth by providing that "[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."[14] The language of section 548(a) of the Code reflects this history.[15]

In a bankruptcy case, state disclaimer statutes and the Code compose the statutory authority that controls the disposition of disclaimed property. In determining whether to classify a disclaimer as a fraudulent transfer, courts must resolve whether the disclaimant had an interest in the property devised to her and whether the disclaimant transferred that interest through the disclaimer.[16]

A. State Law Cases

With few exceptions,[17] courts applying state law have held that a

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11. Statute of Eliz., 1571, 13 Eliz., ch. 5 (Eng.).

12. Twyne's Case, 76 Eng. Rep. 809, 811 n.B (K.B. 1601); *see also* cases cited *infra* notes 148, 155.

13. *Twyne's Case*, 76 Eng. Rep. at 810 n.B (quoting 13 Eliz., Ch. 5, § 2).

14. UNIF. FRAUDULENT CONVEYANCE ACT § 7, 7A U.L.A. 509 (1985) [hereinafter U.F.C.A.]. The current version of this statute is the UNIF. FRAUDULENT TRANSFER ACT § 4, 7A U.L.A. 652 (1985).

15. The language in § 548 of the Code is nearly identical to that found in § 7 of the U.F.C.A. 11 U.S.C. § 548(a) provides in part:

> The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
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> (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . indebted; or
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> (2)(A) received less than a reasonably equivalent value in exchange for such transfer . . . and
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> (B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer . . . .

11 U.S.C. § 548(a) (1988).

16. Many courts have not reached the second question because if the disclaimant had no interest in the property, there is nothing left to transfer. *See* Jones v. Atchison (*In re* Atchison), 925 F.2d 209, 211 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 178 (1991); *see also infra* note 111 and accompanying text.

17. Courts will set aside a disclaimer if: (1) the disclaimant previously accepted the gift; (2) the disclaimant and the ultimate recipient colluded; or (3) the devisee has caused his creditors to rely on his acceptance. *See generally*, Note, *Right of Creditors of Testamentary Donee to Set Aside His Renunciation*, 37 MICH. L. REV. 1168 (1939); 93 A.L.R.2d 8 (1964). Historically, most state statutes required that the disclaimant make

disclaimer is not a fraudulent transfer[18] even if it frustrates the disclaimant's creditors.[19] Reasoning that under state disclaimer statutes the disclaimer "relates back"[20] to the date of the testator's death, courts have concluded that no property interest vested in the disclaimant and that the property then passed to an alternate taker as if the disclaimant predeceased the testator.[21] As a result, creditors have not been able to attach property that the law deems the debtor not to have, and by operation of law, never had.

B. Bankruptcy Cases

One of the Code's primary policies is fairness to all creditors.[22] By filing a petition for bankruptcy, a debtor avails himself of certain protections set forth in the Code.[23] Thus, courts must be cautious not to extend to debtors greater protection than that to which they are statutorily entitled.

A debtor may disclaim a devise during either the post- or pre-petition periods. A change in the language of section 541(a)(5) has resolved

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the disclaimer within a "reasonable time." U.P.C. § 2-801 cmt. b. Currently, however, most state statutes provide specific time limits. For example, both U.P.C. § 2-801(b)(1) and Internal Revenue Code § 2518 (1992) impose a nine-month time limit if the disclaimant wants to avoid a transfer tax. *See infra* notes 142-46 and accompanying text.

18. General Fin. Corp. v. Hansen (*In re* Estate of Hansen), 248 N.E.2d 709, 712 (Ill. App. Ct. 1969); McGarry v. Mathis, 282 N.W. 786, 790 (Iowa 1938); Bradford v. Calhoun, 109 S.W. 502, 504 (Tenn. 1908).

19. *In re* Estate of Scrivani, 455 N.Y.S.2d 505, 509 (N.Y. Sup. Ct. 1982) (holding that a devisee "may freely renounce a testate or intestate disposition for any reason or no reason, even if the renunciation has the effect, or indeed the object, of frustrating creditors"); *see also* Estate of Schiffman, 430 N.Y.S.2d 229, 231 (N.Y. Sur. Ct. 1980) (holding that an insolvent devisee may renounce an inheritance even if otherwise unable to satisfy her creditors' claims).

20. Courts use the legal fiction of relation back when property passes from a decedent to a devisee. This fiction allows the concepts of "offer and acceptance" to co-exist with the common law "notion of instantaneous transfer of title to the grantee." Hirsch, *supra* note 1, at 592. The law of relation back presumes that a devisee has accepted until she either actually accepts or disclaims. *Id.* If the devisee disclaims, the disclaimer "relates back" and "the devisee's 'inchoate' title vanishe[s] retroactively." *Id.*; *see also infra* note 166 and accompanying text. The Seventh Circuit has had occasion to discuss the doctrine of relation back, and has commented that "[a]lthough there is a presumption that a beneficiary accepts a testamentary gift, a valid disclaimer overcomes this presumption and retroactively erases any interest in the beneficiary disclaiming." *Atchison*, 925 F.2d at 211.

21. *See, e.g.*, U.P.C. § 2-801; IND. CODE ANN. § 32-3-2-2 (Burns 1990); N.J. STAT. ANN. § 3A: 25-45 (West 1989).

22. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (explaining that the purpose of the automatic stay provision under § 362 is to protect the interests of all creditors).

23. These protections include the automatic stay on creditors imposed by § 362 and the discharge of indebtedness granted by § 727.

some of the conflict concerning the disposition of assets during the post-petition period. Section 541(a)(5) now defines "property of the estate" to include property which the debtor "becomes entitled to acquire" by bequest, devise or inheritance within 180 days after the filing of a petition.[24] Courts have interpreted this provision to include disclaimed property, thus giving effect to the specific Code language and refusing to respect relation-back provisions in state disclaimer statutes.[25]

Although section 541(a)(5) has settled the law as it pertains to post-petition disclaimers, the law dealing with pre-petition disclaimers is still in dispute. Section 548 empowers a trustee to avoid the transfer of any "interest of the debtor in property" that satisfies the conditions of a fraudulent transfer.[26] The Code, however, does not define "interest," and because there is no federal law of property, state law must govern the definition.[27] Nonetheless, because bankruptcy proceedings operate under federal law, allowing section 541 to define the interest of the debtor would be a better approach and would yield more consistent results. Courts should therefore not allow pre-petition disclaimants to use the state-created legal fiction of relation back to deny creditors the opportunity to satisfy their claims from the disclaimed property.

III. POST-PETITION DISCLAIMERS

In an early bankruptcy case, Justice Story stated that the law presumes acceptance until a contrary intent is shown, at which time a rejection becomes effective.[28] According to Justice Story, however, a debtor who has filed for bankruptcy has "no right to disclaim or renounce [for] . . . . [i]t would be a fraud upon his creditors . . . . As an honest debtor he must desire, that his creditors should derive as much benefit from all his 'rights in property,' as is possible."[29]

The current language of the Code reflects the theory that debtors

24. 11 U.S.C. § 541(a)(5) (1988). See *infra* notes 30, 36-37 for a more thorough discussion of § 541 and its predecessor.

25. *See* cases cited *infra* notes 51, 62, 63.

26. 11 U.S.C. § 548 (1988). Section 548 specifies the conditions under which the Code defines a transfer as fraudulent. *See* 11 U.S.C. § 548(a)(1)-(2) (1988).

27. The Supreme Court has commented that the Bankruptcy Code "does not define what constitutes an interest in property. Absent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law." *Atchison*, 925 F.2d at 210 (citing Butner v. United States, 440 U.S. 48, 55 (1979)). Section 541, however, is a federal provision that may provide a definition of "interest in property" in the disclaimer context. *See infra* notes 56-65, 129-36, 138 and accompanying text.

28. *Ex parte* Fuller, 9 F. Cas. 976, 977 (C.C. Mass. 1842) (No. 5147) (Justice Story's statement was dicta, as there was no actual renunciation in the case.).

29. *Id.*

cannot use post-petition disclaimers to shield assets from creditors. Under section 301, the filing of a bankruptcy petition creates "property of the estate" as defined in section 541.[30] Section 541(a)(1) provides in part that "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[31] The trustee controls all the debtor's incidents of ownership to facilitate an effective liquidation of the debtor's property.[32]

Although the definition of "property" for purposes of a bankruptcy proceeding is a matter of federal law,[33] "the existence and nature of the debtor's interest in property . . . are determined by nonbankruptcy law."[34] Nonetheless, post-petition disclaimer cases[35] indicate that the drafters of the Code may have promulgated a federal law of property. Section 541(a)(5) provides in part that "property of the estate" includes "[a]ny interest in property . . . that the debtor acquires or *becomes entitled to acquire* within 180 days" of the filing of the petition, whether "by bequest, devise, or inheritance," or "as a beneficiary of a life insurance policy or of a death benefit plan."[36] This provision differs from the language of section 70a(2) of the Bankruptcy Act of 1898, which provided that "[a]ll property . . . which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee . . . ."[37]

The vesting requirement gave rise to a result contrary to the Act's

30. 11 U.S.C. § 301 (1988).

31. This provision, which is intended to be construed broadly, is a major departure from the definition of "property of the estate" under § 70a of the Bankruptcy Act of 1898, 30 Stat. 544 (1898) [hereinafter the Act], the predecessor to § 541 of the Code. Under § 541, title to the debtor's property does not vest in the trustee, as it did under § 70a, but instead is included in the estate as an "interest of the debtor." In addition, § 70a(5) vested in the trustee all property that the debtor "could by any means have transferred or which might have been levied upon" by his creditors. *See* 11 U.S.C. § 110(a)(5) (1976). These requirements have been supplanted by the broad language of § 541, thus reducing the need for courts to rely on state law to determine the kind of property that the debtor can transfer or upon which creditors can levy. *See* 4 COLLIER ON BANKRUPTCY ¶ 541.02 [1-2], at 541-10-15 & n.1 (Lawrence P. King ed., 15th ed. 1993).

32. In Chapter 11 and Chapter 13 cases, the court may appoint a trustee to prevent the debtor from misusing or improperly depleting the "property of the estate" where the debtor's business continues to operate. *See* 11 U.S.C. §§ 1104, 1302 (1988).

33. *See infra* notes 119-36 and accompanying text.

34. 4 COLLIER ON BANKRUPTCY ¶ 541.02 [1], at 541-10.1 (Lawrence P. King ed., 15th ed. 1993).

35. *See* cases cited *infra* notes 51, 62-63.

36. 11 U.S.C. § 541(a)(5)(A), (C) (1988) (emphasis added).

37. *See* 11 U.S.C. § 110(a)(8) (1976). The Act is the predecessor to the Code.

purpose of fairness to creditors.[38] In *In re Detlefsen*,[39] the Eighth Circuit held that property disclaimed after the filing of the petition did not vest in the debtor by virtue of the state relation-back provision.[40] In *Detlefsen*, six and one-half weeks before the debtor filed a voluntary petition for bankruptcy, the debtor's mother died, entitling him to personalty that had been held in trust for his mother.[41] Seven months later, the debtor attempted to disclaim the personalty, so that the property would have passed to his children.[42] The Illinois disclaimer statute then in effect[43] provided that the disclaimer would "relate back for all purposes to the date of death of the decedent, [or] the date of death of the donee"[44] and thus would prevent the devise from vesting in the debtor.[45] The district court found, however, that "permitting state law to provide definition of the language in § 70a, ¶ 2 unduly restricts operation of the section and circumscribes congressional intent."[46] Thus, the court did not allow the debtor to disclaim the property and thereby determine its recipient.[47]

Finding the district court's reasoning unpersuasive, the appellate court reversed, holding that state law defines property interests and that a disclaimant's motive is irrelevant so long as he does not receive a benefit from the disclaimer.[48] The Eighth Circuit found that in enacting section 70a(2), Congress did not intend a trustee to have the power to

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38. *See, e.g.*, Caplinger v. Patty, 398 F.2d 471, 475 (8th Cir. 1968) ("Section 60 of the Bankruptcy Act is designed to give all creditors fair treatment.").

39. Mickelson v. Detlefsen (*In re* Detlefsen), 610 F.2d 512 (8th Cir. 1979), *rev'g* 466 F. Supp. 161 (D. Minn. 1979).

40. *Detlefsen*, 610 F.2d at 518-20.

41. Mickelson v. Detlefsen (*In re* Detlefsen), 466 F. Supp. 161, 162 (D. Minn. 1979).

42. *Id.*

43. ILL. REV. STAT. ch. 110 1/2, § 2-7(e) (1977).

44. *Id.*

45. *Detlefsen*, 466 F. Supp. at 164.

46. *Id.* Accordingly, the district court cited Board of Trade v. Johnson, 264 U.S. 1, 10 (1923) for the proposition that state law "remains subordinate to the federal policies that inhere in the Bankruptcy Act." *Detlefsen*, 466 F. Supp. at 163. The district court further quoted from the Supreme Court's holding in *Johnson* that "'when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them.'" *Id.* (quoting *Johnson*, 264 U.S. at 10). Use of disclaimer in the bankruptcy context frustrates congressional intent because its exercise is so predictable *Id.* at 166 n.7.

47. *Detlefsen*, 466 F. Supp. at 166-67. The district court stated, "[the debtor has] such complete control over the property . . . that it is hard to distinguish him from an owner. It is tempting to make him be just before he is generous." *Id.* at 165-66 n.6. *See also* RESTATEMENT OF PROPERTY ch. 25, p. 1813 (1940). For a discussion of general powers of appointment, see *infra* notes 49-54 and accompanying text.

48. *Detlefsen*, 610 F.2d at 515, 520; *see also supra* note 19.

accept a devise on the debtor's behalf.[49] The court noted, however, that had it decided the case under the Code, it might have reached a different result.[50]

Courts that have reviewed the issue under the Code have in fact reached the different result referred to by the *Detlefsen* court. In *In re Watson*,[51] for example, the debtor disclaimed the death proceeds of her father's life insurance policy two and one-half months after she filed for bankruptcy, with the knowledge that the property would pass to other family members.[52] Concluding that the trustee could set aside the transfer under section 549,[53] the bankruptcy court applied a four-part test.[54] First, there must be a "transfer," which section 101(54) defines as "every mode, direct or indirect, voluntary or involuntary, of disposing of or parting with property or with an interest in property."[55] Citing *In re Peery*,[56] the court concluded that the disclaimer was a voluntary transfer of the right to receive the proceeds.[57]

Second, the *Watson* court inquired whether the disclaimed proceeds constituted "property of the estate."[58] The court reasoned that the language, "becomes entitled to acquire," in section 541(a)(5) clearly avoids any reference to the word "vest," and thus gives the trustee the

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49. *Detlefsen*, 610 F.2d at 520. If the devise had been of realty, however, under § 70a(7) the power would have vested in the trustee as it was a "power in the bankrupt to acquire assignable interests" in real property. *Id.* Thus, the court reasoned that Congress knew how to protect creditors, and its failure to provide similar protection in § 70a(2) gave rise to an inference that it did not intend to override state law. *Id.*

50. *Id.* The new language of the Code "almost certainly" would obviate the problem presented in the case. *Id.* Although the case was decided in 1979, one year after the Code was enacted, the relevant events occurred while the Act was the controlling law.

51. Geekie v. Watson (*In re* Watson), 65 B.R. 9 (Bankr. C.D. Ill. 1986).

52. *Id.* at 10.

53. 11 U.S.C. § 549(a) provides in part:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—
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> (1) that occurs after the commencement of the case; and . . .
>
> (2)(B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a) (1988).

54. *Watson*, 65 B.R. at 11. Part three of the test, whether the transfer occurred after commencement, and part four, whether the court or the Bankruptcy Code authorized the transfer, were not at issue in the case. *Id.*

55. 11 U.S.C. § 101(54) (1988).

56. Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 811 (Bankr. M.D. Tenn. 1984). For a more thorough discussion of *Peery*, see *infra* notes 155-71 and accompanying text.

57. *Watson*, 65 B.R. at 12. For further discussion of the meaning of the word "transfer," see *infra* notes 69, 113-16, 143-46 and accompanying text.

58. *Watson*, 65 B.R. at 11.

"power" to acquire property devised to a debtor.[59] Moreover, the court noted that because section 541(a)(5)(C) "specifically states that the right to receive the proceeds of an insurance policy is an interest in property," the language of the Code grants to the estate and the trustee the power to accept the gift on behalf of the creditors.[60] Therefore, because federal bankruptcy law controls and section 541(a)(5) supersedes the right to renounce, the debtor loses her entire interest once she files a bankruptcy petition, including the power to disclaim.[61]

In two other cases, *In re Lewis*[62] and *In re Cornell*,[63] the courts also relied on the explicit language of section 541 in concluding that a bequest becomes property of the bankruptcy estate.[64] The *Lewis* court held that because "federal law is supreme on this issue [it] . . . requires return of the bequest to the estate."[65] Thus, the language of the Code evidences congressional intent to secure for the trustee the power to accept the devise on behalf of the creditors and to preclude the debtor from exercising the power to disclaim. A more difficult situation arises when the debtor disclaims prior to filing a petition for bankruptcy, and the trustee must proceed on a theory of "fraudulent transfer."

IV. PRE-PETITION DISCLAIMERS

Current case law holds that if a debtor files for bankruptcy prior to disclaiming, the property becomes "property of the estate" by operation

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59. *Id.* at 11-12.

60. *Id.* at 12. It appears that Congress has created a federal law of property, superseding state law and giving someone other than the debtor the power to accept property. Congress does, in fact, have such a power under Article I of the U.S. Constitution. *See Detlefsen*, 610 F.2d at 516 n.14 (citing U.S. CONST. art. I, § 8, cl. 4).

61. *Watson*, 65 B.R. at 12. The court noted that the Illinois disclaimer statute and the legal fiction of relation back do not change the fact that the debtor "became 'entitled to acquire'" the proceeds within the requisite time frame and cannot be used to "defeat the express definition of property of the estate contained in the Bankruptcy Code." *Id. See infra* notes 165-66 and accompanying text.

62. Flanigan v. Lewis (*In re* Lewis), 45 B.R. 27 (Bankr. W.D. Mo. 1984).

63. Cornelius v. Cornell (*In re* Cornell), 95 B.R. 219 (Bankr. W.D. Okla. 1989).

64. *Lewis*, 45 B.R. at 29-30 n.2 (holding that the debtor's disclaimer in favor of his daughter five months after filing his petition was an avoidable transfer under § 549); *Cornell*, 95 B.R. at 221-22 (holding that under § 549 a creditor could set aside a debtor's disclaimer because the debtor's mother died, leaving him property by will, within 180 days from the date of confirmation of the debtor's Chapter 12 plan).

65. *Lewis*, 45 B.R. at 29-30 n.2; *accord Cornell*, 95 B.R. at 222 ("Federal Bankruptcy law, and not state probate or succession law, governs the issue raised herein . . . . The disclaimer filed by debtors thereafter, whether or not valid under Oklahoma law, constituted an unauthorized post-petition transfer of property of the estate which is avoidable by the trustee under 11 U.S.C. § 549."). Section 550 requires the return of the legacy or bequest to the bankruptcy estate by the alternate taker. 11 U.S.C. § 550 (1988).

of section 541(a)(5) and is therefore subject to claims of creditors.[66] It is unclear, however, whether a different result is appropriate when a debtor disclaims during the pre-petition period, that is, prior to filing a petition for bankruptcy, or whether the result should be the same because the pre-petition disclaimer is a fraudulent transfer. For example, if a debtor files for bankruptcy on July 1 and disclaims on July 3, the property is "property of the estate" under section 541(a)(5). Should the result be different if the debtor filed the disclaimer on June 29 or September 1 of the preceding year, or should the result be the same because the pre-petition disclaimer is a fraudulent transfer?

Section 548 defines "fraudulent transfer" and provides two tests for determining whether a transfer is fraudulent.[67] Both tests have two requirements: (1) there must be a "transfer;" and (2) the transfer must be of "an interest of the debtor in property."[68] Two courts have held that the act of disclaiming is itself a "transfer" as defined in section 101(54) of the Code.[69] If the relation-back provision in a state statute prevents the debtor from acquiring an "interest in property," however, then the debtor had nothing to transfer, and the disclaimer cannot have been a fraudulent transfer. Therefore, to determine if a disclaimer is a fraudulent transfer depends on whether "an interest in property" is defined by section 541(a)(5) of the Code or state law.[70]

A. Analogy of Disclaimers to General Powers of Appointment

If a debtor's disclaimer was always considered a fraudulent transfer under state law, every case would yield a consistent result. Currently, however, a majority of states hold that the debtor's motives are irrelevant and allow individuals to disclaim and defeat creditors' claims.[71] One potential solution to this problem is for courts to treat the debtor

66. *See supra* notes 51-65 and accompanying text.

67. For the text of § 548, see *supra* note 15.

68. 11 U.S.C. § 548(a) (1988).

69. *See* Casciato v. Stevens (*In re* Stevens), 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989); Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 81, 814 (Bankr. M.D. Tenn. 1984). Although a disclaimer may not technically be a transfer "directly" to the alternate taker under the will, it is at least a relinquishment of a right to receive property, and that seems to be "a mode, direct or indirect" of parting with an interest in property. One commentator believes it is not a transfer but a denial of a benefit to the debtor. *See*, Dean David Gamin, *Renunciation of Testamentary Benefit as Fraudulent Transfer*, 37 CASE W. RES. L. REV. 148, 164-65 (1986).

70. The disclaimer must, of course, also satisfy the other requirements of a fraudulent transfer. *See* 11 U.S.C. § 548 (1988).

71. *See, e.g.*, Mickelson v. Detlefsen (*In re* Detlefsen), 610 F.2d 512, 515, 520 (8th Cir. 1979); *see also supra* note 48 and accompanying text. A minority of states prohibit insolvent disclaimers by statute. *See infra* notes 140-41.

disclaimant in the same way that they treat a debtor who has a general power of appointment.[72] Generally, creditors have some access to assets subject to a general power of appointment.[73]

Justice Traynor raised the analogy between a disclaimer and a general power of appointment in *In re Kalt's Estate*.[74] In discussing the power associated with a disclaimer, he stated that the power to determine the ultimate disposition of property "is essentially analogous to a general power of appointment under a will."[75] Assets under an unexercised general power of appointment, exercisable inter-vivos,[76] can be subject to claims of the debtor's creditors.[77] In some jurisdictions, this is true only to the extent that other property available to satisfy the debtor's creditors is insufficient.[78] Under common law, creditors could not reach the appointive property because of the distinction between a power and ownership; until the donee exercised the power of appointment,[79] he or she had not accepted sufficient control over the assets to constitute ownership.[80] To protect creditors, however, states have adopted statutes that supplant this distinction.[81] Justice Traynor asserted that a creditor's interest in disclaimed property should receive equal protection.[82]

This analogy seems persuasive; why should we permit the legal fiction of relation back, a fiction created for a different purpose,[83] to enable a devisee to shield assets from creditors through use of a disclaimer? Those unconvinced by the analogy criticize attempts to

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72. A power of appointment is an "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 11.1 (1986). A "general power," as distinguished from a "non-general power," authorizes the recipient or holder of the power to exercise the power in favor of himself, much in the same way that a devisee can accept property left to him under a will. *See* MCGOVERN, *supra* note 1, at § 12.1.

73. *See infra* notes 77-81.

74. Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401 (Cal. 1940).

75. *Id.* at 403.

76. The general power of appointment can be exercised while the holder of the power is alive. In contrast, a testamentary power is exercisable only through the holder's will.

77. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 13.2 (1986); N.Y. EST. POWERS & TRUSTS LAW § 10-7.2 (McKinney 1992).

78. *See* CAL. CIV. CODE § 1390.3 (West 1982); MICH. COMP. LAWS ANN. § 556.123 (West 1988); MINN. STAT. ANN. § 502.70 (West 1990); OKLA. STAT. tit. 60, § 299.9 (1981); WIS. STAT. ANN. § 702.17 (West 1981).

79. The donee could, for example, accept property left under a will.

80. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 13.2 cmt. a (1986).

81. *See supra* notes 76-77 and accompanying text.

82. *Kalt's Estate*, 108 P.2d at 403.

83. *See supra* note 20.

limit the debtor's ability to disclaim.[84] Though they concede that disclaimer constitutes a 'power' to transfer similar to a general power of appointment, they argue that the power is limited because the property descends to the disclaimant or to a person that the disclaimant does not choose.[85] These critics rely on *Estate of Schiffman*,[86] in which the court reasoned that it was the disclaimer statute and the will, rather than the disclaimant, that determined the ultimate recipient of the property.[87] This argument is unpersuasive because the disclaimant does choose the ultimate recipient of the property, he only has to make the choice from a smaller pool of people. The property will pass either to himself or to the alternate taker.[88] In situations involving a post-petition disclaimer, the courts find this "limited power" sufficient to bring the disclaimed assets within the "property of the estate."[89]

The choice of the ultimate recipient of the property, however, is not the crucial factor in concluding that the property subject to a general power of appointment should be included in the debtor's estate. Instead, the debtor's power to appoint the property to himself[90] is the key factor, as it should be in the disclaimer context. This factor gives rise to the different treatment of general and non-general powers of appointment: non-general powers are never subject to the claims of creditors because the holder of the power cannot appoint the property to himself, and the property therefore is not considered his asset.[91] Both the critics[92] and the *Schiffman* court have overlooked the purpose behind this differing treatment.

The Code implicitly provides for the inclusion of general powers of appointment in "property of the estate" as defined in section

84. *See, e.g.*, Gamin, *supra* note 69, at 157.

85. *Id.*

86. 430 N.Y.S.2d 229 (N.Y. Sur. Ct. 1980).

87. *Id.* at 231.

88. Once a will has been admitted to probate, it becomes a matter of public record. The potential disclaimant can therefore determine who will be the alternate taker. In the case of intestate succession, the disclaimant can determine who will be the alternate taker by examining the state intestacy provisions.

89. *See supra* notes 57, 61-63 and accompanying text.

90. To be classified as a general power, the donee of the power must be able to appoint the property to himself, his creditors, his estate, or the creditors of his estate. *See infra* note 93.

91. Section 541(b)(1) removes from the estate only those assets subject to a non-general power of appointment because the holder of a non-general power, the debtor in this context, cannot exercise the power for his own benefit. 11 U.S.C. § 541(b)(1) (1988).

92. *See generally* Gamin, *supra* note 69.

541(b)(1).[93] Because the Code authorizes the trustee to control the property of the estate,[94] the trustee may exercise the debtor's power of appointment in favor of the creditors. In the disclaimer context, the debtor possesses a 'power' which he can exercise for his own benefit. Thus, although the debtor's alternate appointees may consist of a group of one, the disclaiming debtor still chooses, and will choose to deprive his creditors of the benefits of his inheritance or bequest. The Code speaks not in terms of "general powers" but merely "powers," and a disclaimer clearly falls within this category.

B. A Disclaimer as a "Benefit" by Virtue of a Disclaimant's Release From the Obligation of Child Support

Under both section 541 and state disclaimer statutes, a disclaimant is not allowed to "benefit" by virtue of her disclaimer.[95] In the typical disclaimer case, the property passes to the disclaimant's children.[96] States impose a statutory obligation to support one's children financially.[97] Therefore, if the parent can pass property to her children through the use of a disclaimer and thereby be relieved of her child support obligation, she has received a benefit.[98] The majority of states, however, hold a parent liable for child support, notwithstanding, and without resort to, the child's own funds.[99] There are two exceptions to the majority position.[100] First, a parent who is

93. Section 541(b)(1) provides that property of the estate does not include "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1) (1988). Therefore, if the debtor can exercise *a power* in favor of himself, the power is included within property of the estate. *See also* 4 COLLIER ON BANKRUPTCY ¶ 541.21, at p. 541-106-110 (Lawrence P. King ed., 15th ed. 1993); RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 13.6 cmt. c (1986) ("The Bankruptcy estate does include general powers of the [debtor] that are presently exercisable because they inherently are exercisable for the benefit of the [debtor].").

94. 11 U.S.C. § 363(b)(1) (1988).

95. 11 U.S.C. § 541 (1988); U.P.C. § 2-801(d)(1)(iii) (when there is a benefit to the disclaimant, the disclaimer will be set aside).

96. *See, e.g.*, Jones v. Atchison (*In re* Atchison), 925 F.2d 209, 210 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 178 (1991); Hoecker v. United Bank of Boulder, 476 F.2d 838, 841 (10th Cir. 1973); *Stevens*, 112 B.R. at 176.

97. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.2 (2d ed. 1988).

98. *See Detlefsen*, 610 F.2d at 520 ("The fact that the bankrupt is in any case *himself* kept from benefiting at the expense of his creditors still serves to prevent the sort of 'fraud upon the [Code]' with which Congress was concerned . . . ."); *see also supra* notes 39-49 and accompanying text.

99. *See generally* Gary D. Spivey, Annotation, *Income of Child from Other Source As Excusing Parent's Compliance with Support Provisions of Divorce Decree*, 39 A.L.R.3d 1292, 1295 (1971).

100. *See* Jeffrey N. Pennell, *Custodians, Incompetents, Trustees and Others: Taxable*

financially unable to meet her obligation is allowed to use the child's resources to satisfy her support obligation.[101] Disclaimants who are insolvent or bankrupt are particularly likely to fall under this exception. A second exception exists where a trust instrument provides that the trustee should distribute the income and/or principal of the trust in lieu of a parent's support obligation.[102] Moreover, courts in at least one jurisdiction have interpreted a state statute to either partially abate or wholly eliminate a parent's support obligation when a child has her own funds.[103] Thus, when property passes to a debtor's child instead of to the debtor, the debtor receives a benefit, and the disclaimer should be invalid.[104] Even if the debtor's support obligation is not discharged, the debtor has still derived a benefit because her children will enjoy the property. However, courts have not applied this reasoning in the bankruptcy context.

C. Pre-1978 Code Pre-Petition Cases

Currently, courts are split on whether state or federal law should define "interest in property." In the seminal pre-Code case of *Hoecker v. United Bank of Boulder*,[105] the debtor, a devisee under his father's will, disclaimed his interest one week before the state statutory period[106] expired, causing the property to pass to his daughter.[107] The debtor was insolvent except for the property and received no consideration for the disclaimer.[108] He filed for bankruptcy within one year

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Powers of Appointment?, INST. ON EST. PLAN. ¶ 1602.3(b) (1981).

101. *See* Doelp v. Doelp, 281 A.2d 721, 724 (Pa. Super. Ct. 1971) (dicta).

102. *See* Nielsen v. Nielsen, 462 P.2d 512, 517 (Idaho 1969).

103. McElrath v. Citizens & S. Nat'l Bank, 189 S.E.2d 49, 52-53 (Ga. 1972) (interpreting GA. CODE ANN. § 23-2311 (1962) and holding that trust income payable to a child is to be used first to discharge the obligation of support). For example, children may have their own funds where property has been left in trust by a grandparent for the benefit of a grandchild or the child is an independently wealthy actor.

104. *See supra* note 95. A trustee could use this argument to set aside a debtor's disclaimer where the trustee otherwise might not be able to prove collusion. *See, e.g.*, Note, *Renunciation of Testamentary Gift to Defeat the Claims of Devisee's Creditors*, 43 YALE L.J. 1030, 1032 (1934) (stating"[w]hile in a family affair of this nature it would be practically impossible to show the existence of actual collusion among beneficiaries under the will sufficient to estop the renunciation, it is difficult to believe that a tacit understanding of some sort did not exist").

105. 476 F.2d 838 (10th Cir. 1973).

106. The state statutory relation-back provision then in effect treated a disclaimant as predeceased if the disclaimer had been made within six months from the time that the will was admitted to probate. After that period, the disclaimer was treated as a conveyance. *See id.* at 840-41 (discussing COLO. REV. STAT. § 153-5-43 (1963) as amended in 1965).

107. *Id.* at 839.

108. *Id.* These facts meet two of the conditions of a fraudulent transfer under Code § 548(a)(2). *See* 11 U.S.C. § 548(a)(2)(A), (B)(i) (1988).

of that date.[109] The court reasoned that the disclaimer would be deemed a "transfer" if it effectively transferred property from the debtor to his children.[110] However, the court noted that under state law the debtor did not have any interest to transfer because the "right to succession by will of property" exists solely by state statutory enactment, and the state may therefore limit or place conditions upon the debtor's exercise of this right.[111] Thus, relying on the relation-back provision, the court held that there had not been a fraudulent transfer.[112]

In contrast to the majority opinion in *Hoecker*, Judge Holloway's dissent focused on the word "transfer" within the meaning of Bankruptcy Act section 67(d)(2), the bankruptcy statute then in effect.[113] He pointed out that although the majority conceded that the meaning of the word "transfer" was governed by federal law, it nonetheless found no fraudulent transfer because the state legislature clearly intended the disclaimer to relate back and not to operate as a transfer.[114] Judge Holloway noted, however, that "transfer" in the bankruptcy context is used in "its most comprehensive sense."[115] He interpreted the state disclaimer statute as giving the debtor "a limited power . . . to control the passing" of his devise, a power which seemed to be a "'mode, direct or indirect' of . . . parting with [an] interest in the property and hence a transfer."[116] The dissent further stated that for cases arising under the Act, Congress intended to have uniform application of the law in every state.[117] Therefore, as Judge Holloway demonstrated, we should not disfranchise creditors on the

109. *Hoecker*, 476 F.2d at 839.

110. *Id.* at 840-41.

111. *Id.* at 841 (citing Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944)).

112. *Id.* at 841.

113. 11 U.S.C. § 107(d)(2)(a) (1970), the predecessor to Code § 548, provided that "every transfer made . . . by a debtor within one year prior to the filing of a petition . . . is fraudulent . . . if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." Because § 548(a)(2)(A) and § 548 (a)(2)(B)(i) are similar, *Hoecker* is persuasive authority for cases decided under the Code.

114. In the alternative, the majority opinion's language seems to indicate that it decided that the state statute did not create an interest of the debtor in property, and that the debtor therefore had nothing to transfer. *Hoecker*, 476 F.2d at 841.

115. *Id.* at 842 (Holloway, J., dissenting).

116. *Id.* (Holloway, J., dissenting) (quoting COLO. REV. STAT. § 153-5-43(2)(a) (1963) as amended in 1965).

117. *Id.* (Holloway, J., dissenting) (citing McKenzie v. Irving Trust Co., 323 U.S. 365, 369-70 (1945)).

basis of a state provision not originally enacted to yield this result.[118]

D. The Conflict Between Federal and State Law in Defining "Interest of the Debtor in Property"

In his dissent in *Hoecker*, Judge Holloway noted the conflict between state and federal law arising from the Code's failure to define "interest of the debtor in property" as used in section 548.[119] The absence of a definition in the Code has led courts to consult state law for a definition.[120] Giving effect to state relation-back provisions, however, has the effect of circumventing two of the Code's foremost goals: fair treatment of creditors and the prevention of debtor dissipation of the bankruptcy estate.[121]

The Supreme Court has repeatedly held that where there is a conflict between state and federal law, federal law must control.[122] In *Perez v. Campbell*,[123] for example, the Court struck down a state statute that permitted restrictions on driving privileges for those who did not pay auto-accident judgments, even though the debts had been discharged in bankruptcy.[124] The Court reasoned that the state's interest in highway safety was insufficient where the statute frustrated the Code's "fresh start" policy for discharged debtors.[125] Similarly, in *Board of Trade v. Johnson*,[126] the Court held that a seat on the Chicago Board of Trade constituted "property" for the purposes of federal law, stating:

> [W]here the bankrupt [sic] law deals with property rights

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118. *See supra* note 20 and accompanying text.

119. *Hoecker*, 476 F.2d at 842 (Holloway, J., dissenting).

120. *See* Butner v. United States, 440 U.S. 48, 55 (1979) (noting that "[p]roperty interests are created and defined by state law"); *see also* 4 COLLIER ON BANKRUPTCY ¶ 541.02[1], at 541-10.1 (Lawrence P. King ed., 15th ed. 1993) ("[T]he existence and nature of the debtor's interest in property . . . are determined by nonbankruptcy law.") The *Butner* court carved out an exception, however, where "some federal interest [such as that in a bankruptcy proceeding] requires a different result." 440 U.S. at 55.

121. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244-45 (1934) (stating that state law in *Hunt* would have circumvented the federal "fresh-start" policy and holding that "[l]ocal rules subversive [to federal bankruptcy policy] cannot be accepted as controlling the action of a federal court"). Two of the Code's primary goals are treating creditors with like claims similarly, *see In re* 222 Liberty Assocs., 108 B.R. 971, 991 (Bankr. E.D. Pa. 1990), and granting debtors a "fresh start." *See* Grogan v. Garner, 498 U.S. 279, 286 (1991).

122. *See infra* notes 125-33 and accompanying text. *See generally*, David E. Leigh, Note, *Renunciation of a Legacy or Devise as a Fraudulent Transfer under the Bankruptcy Act*, 49 IND. L.J. 290 (1974).

123. 402 U.S. 637 (1971).

124. *Id.* at 656.

125. *Id.* at 645-47, 648, 654 (citations omitted).

126. 264 U.S. 1 (1924).

> which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the [Bankruptcy Act] than the state decisions would give it, federal courts cannot be concluded by them.[127]

Fair treatment of creditors and the maintenance of the debtor's estate are vital policies which the federal courts should support by ignoring state relation-back provisions in cases where debtors file disclaimers during the year prior to filing their bankruptcy petitions.

In *Glosband v. Watts Detective Agency Inc.*,[128] the court looked to the purpose of the Bankruptcy Act to define the term "property."[129] Specifically, the court examined this term "as invoked in the definition of a 'transfer' in the context of former 11 U.S.C. § 107(d)(2)(a)'s proscription of fraudulent transfers."[130] The court noted that "property" in this context "'is necessarily a federal question'"[131] and held that "property" includes "anything of value which but for the transfer might have been preserved for the trustee to the ultimate benefit of the [debtor's] creditors."[132] Property that is subject to the debtor's power to accept or disclaim clearly falls within this definition. Thus, giving effect to the relation-back provision yields a narrower definition of the term "interest in property" than the one that federal courts have given that term as used in section 548.

Furthermore, section 541(a)(1) of the Code is intended to include in the "estate" all property made available to the estate pursuant to other Code sections[133] so that all the debtor's "property" is available to satisfy creditor claims. For example, section 548 empowers the trustee to demand all property that the debtor fraudulently transferred.[134] All property that the trustee recovers pursuant to section 548 becomes

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127. *Id.* at 10 (citing Board of Trade v. Weston, 243 F. 332 (7th Cir. 1917)).

128. 21 B.R. 963 (Bankr. D. Mass. 1981).

129. *Id.* at 971.

130. *Id.* 11 U.S.C. § 107(d) (1970) is the predecessor to 11 U.S.C. § 548 (1988).

131. *Glosband*, 21 B.R. at 971 (quoting McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945)).

132. *Id.*

133. *See* United States v. Whiting Pools, 462 U.S. 198, 205 (1983) (holding that § 542(a) "requires an entity . . . holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee").

134. Technically, § 548 only empowers the trustee to avoid the debtor's fraudulent transfers, whereas § 551 automatically preserves any fraudulently transferred property for the benefit of the estate, and § 550 authorizes the trustee to recover the property from the transferee. 11 U.S.C. §§ 550, 551 (1988). Nevertheless, § 548 gives the trustee the power to ultimately recapture property that the debtor fraudulently transfers.

"property of the estate."[135] Because section 541 specifically sets forth the property that constitutes the estate, including property recovered under section 548, section 541 should control in defining the "interest of the debtor in property" for the purpose of determining which property the debtor "becomes entitled to acquire . . . by bequest, device, or inheritance."[136]

E. Uniformity in Bankruptcy Proceedings

One of the Code's purposes is uniformity in bankruptcy proceedings.[137] Where bankruptcy courts apply state law in the disclaimer context, the Code's goal of uniformity is defeated because the different treatment of disclaimers under state law yields inconsistent results among the jurisdictions.[138] In a probate proceeding, personal property of the decedent generally passes under the laws of the state in which the decedent was domiciled at death. In contrast, real property generally passes under the law of the state in which the property is located.[139] The disclaimer's effectiveness, therefore, may depend upon the laws of more than one state.

Currently, four states have statutory provisions that preclude disclaimers by insolvent beneficiaries,[140] and two states have such rules by court decision.[141] Thus, if a disclaimer affects both property located in one of these six states and property located elsewhere, creditors may be able to reach only part of the property. More importantly, under section 544(b) of the Code, a trustee can set aside any transfer of an interest in property of the debtor that is voidable under applicable state law. Therefore, federal proceedings in which the trustee invokes section 544 will produce divergent results based on the statutory provisions of the particular jurisdiction. To avoid this potential inconsistency, courts should define the phrase "interest of the debtor in

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135. 11 U.S.C. § 541(a)(3)-(4) (1988).

136. 11 U.S.C. § 541(a)(5)(A) (1988).

137. *See* U.S. CONST. art. I, § 8, cl. 4.

138. *See Butner*, 440 U.S. at 55 ("Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, [and] to discourage forum shopping.").

139. *See generally* MCGOVERN, supra note 1.

140. FLA. STAT. ANN. § 732.801(6)(a) (West Supp. 1993); LA. CIV. CODE ANN. art. 1021 (West 1982); MASS. GEN. LAWS ANN. ch. 191A, § 8(2) (West Supp. 1993); MINN. STAT. ANN. § 525.532 (Subdiv. 6) (West Supp. 1993).

141. *Cf.* Stein v. Brown, 480 N.E.2d 1121, 1123 & n.1 (Ohio 1985) (dicta, as the court invalidated the beneficiary's disclaimer based on its finding of actual intent to defraud creditors); Butcher v. Butcher (*In re* Estate of Reed), 566 P.2d 587, 591 (Wyo. 1977) (finding actual intent to defraud). For a more thorough discussion of *Stein* and *Butcher*, see *infra* notes 148-50, 151-53.

property," as used in section 548, by reference to section 541.

One context in which state disclaimer law has been wholly preempted by federal legislation is section 2518 of the Internal Revenue Code ("I.R.C."). To avoid gift tax consequences to the disclaimant, the disclaimant must meet certain I.R.C. requirements, regardless of the effectiveness of the disclaimer under state law.[142] In *McDonald v. Commissioner*,[143] the Eighth Circuit Court of Appeals explained the application of the gift tax to a disclaimer by stressing that a disclaimer, "*which is an indirect transfer*, would fall within the encompassing language of the gift tax statute."[144] Given the striking similarity between the relevant definitions of "transfer" in the I.R.C. and the Bankruptcy Code,[145] courts should interpret the word "transfer" as it applies to disclaimers in the bankruptcy context in the same way that the Eighth Circuit construed "transfer" in the tax context. Giving effect to the legal fiction of relation back in all bankruptcy cases provides the debtor with too great an opportunity to abuse her right to disclaim property.[146]

The I.R.C. provides the taxpayer nine months from the date of transfer to disclaim the gift and avoid taxation. Courts should interpret the Bankruptcy Code as doing the same with respect to fraudulent transfers in section 548, except that the time frame for disclaiming should be one year instead of nine months. Specifically, if a disclaimer is executed more than one year prior to the date on which a petition is filed, courts should treat the disclaimant as predeceased. In this situation, the disclaimer is not a fraudulent transfer, and the property does not become "property of the estate." If the debtor disclaims an interest during the year prior to the date on which the petition is filed, however, the courts should classify the disclaimer as a fraudulent transfer, just as the transfer would be subject to gift tax if the taxpayer

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142. 26 U.S.C. § 2518 (1988).

143. 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989).

144. *Id.* at 1499 (emphasis added). In discussing the treatment of similar terms under the I.R.C., the court further stated:

> Federal gift tax is imposed "on the transfer of property by gift." 26 U.S.C. § 2501(a)(1). The scope of this tax is broad, applying "whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." 26 U.S.C. § 2511(a). Moreover, in construing the gift tax provisions, "[t]he terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangable [sic] value."

Id. (citations omitted).

145. Compare 11 U.S.C. § 101(54) (1988) with the definition of "transfer" in the I.R.C. set forth in *McDonald*.

146. *See supra* notes 93-104 and accompanying text.

executed a disclaimer more than nine months after the date of transfer. The federal government's policy of uniformity in the area of federal taxation should also apply to federal bankruptcy proceedings. Current case law, however, is split on this issue.

F. State Cases

Although the majority of state cases permit a disclaimer regardless of motive or the presence of creditors,[147] two cases decided under state law have held that disclaimers are ineffective where a debtor is liable to creditors. In *Stein v. Brown*,[148] a drunk driver who was sued for wrongful death disclaimed a bequest under his brother's will of approximately $100,000 . Relying on *In re Kalt's Estate,*[149] the Ohio Supreme Court held that the "power to vest title in another is the equivalent of a transfer of that property" and thus set aside the disclaimer under the state fraudulent conveyances statute.[150] Similarly, in *In re Estate of Reed*,[151] the Wyoming Supreme Court, also relying on *In re Kalt's Estate*, held that a disclaimer executed on the same day that a court entered a judgment against the disclaimant could be set aside as a fraudulent transfer. Like the *Stein* court, the *Reed* court focused on the timing of the disclaimer and on evidence that the disclaimant received no consideration for its execution.[152] From these "badges of fraud," the court found sufficient circumstantial evidence to establish the disclaimant's actual intent to defraud the judgment creditor.[153] Thus, in an effort to act equitably, some courts circumvent the majority position by identifying how the disclaimant's actions demonstrate "fraudulent intent" and declare the disclaimer a transfer.[154] Although the results in *Stein* and *Reed* were indeed equitable under the circumstances, in the absence of Code policy, they are difficult to justify in light of state relation-back provisions.

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147. *See supra* notes 18-19.

148. 480 N.E.2d 1121, 1122 (Ohio 1985).

149. Kalt v. Youngworth (*In re* Kalt's Estate), 108 P.2d 401 (Cal. 1940); *see also supra* notes 74-82.

150. *Stein*, 480 N.E.2d at 1123. In a bankruptcy case relying on *Stein*, the court in McGraw v. Betz (*In re* Betz), 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987), held that a post-petition disclaimer by a debtor could be set aside under state law.

151. Butcher v. Butcher (*In re* Estate of Reed), 566 P.2d 587, 590-91 (Wyo. 1977).

152. *Id.* at 590.

153. *Id.* at 591. Some state statutes specifically prohibit disclaimers in cases in which a creditor has already levied against the disclaimant's inheritance. *See, e.g.*, N.J. STAT. ANN. § 3B:9-9(a) (West Supp. 1993).

154. *See, e.g., Reed*, 566 P.2d at 590.

G. Cases Under the Code

An early Code case, *In re Peery*,[155] was the first to take a position contrary to *Hoecker* and hold that a pre-petition disclaimer could be a fraudulent transfer.[156] In *Peery*, the debtor received a devise of real estate worth $168,000 under his grandfather's will.[157] Substantially indebted to the plaintiff bank, the debtor disclaimed the property six days after the bank filed a collection action and ten months before he filed a Chapter 7 petition.[158]

The *Peery* court applied a four-part test to determine whether a disclaimer was a fraudulent transfer. First, the court inquired whether the devise was "property of the debtor."[159] This question, the court reasoned, was determined by state law, which defined an "interest in property" as "the right to control, direct or receive a testamentary distribution."[160] Second, the court asked whether there had been a "transfer of property."[161] In looking to section 101(41),[162] the court reasoned that the disclaimer was a "completely voluntary transfer" of the right to receive the distribution.[163] Third, the court examined whether the transfer occurred within one year of the filing for bankruptcy.[164] The debtor argued that the relation-back provision in the state statute controlled, and that the one-year period should therefore be measured from the date of the testator's death instead of from the date on which the debtor disclaimed.[165] The court disagreed, stating that for bankruptcy purposes, the state legislature does not regulate the date of transfer.[166] Thus, the *Peery* court held that

155. Nashville City Bank & Trust Co. v. Peery (*In re* Peery), 40 B.R. 811 (Bankr. M.D. Tenn. 1984).

156. *Id.* at 812-13, 816.

157. *Id.* at 812.

158. *Id.* at 812-13.

159. *Id.* at 813.

160. *Peery*, 40 B.R. at 813. The court explained that under Tennessee law, the right to receive real property by testamentary distribution attaches on the date of the testator's death. *Id.* Looking to Code § 541, the court also noted that the meaning of "property" under the Code was intended to be "virtually all encompassing." *Id.* at 813-14 n.4 (citing United States v. Whiting Pools, 462 U.S. 198, 204 (1982)). *See also* case cited *supra* note 128.

161. *Peery*, 40 B.R. at 814.

162. The term "transfer" is currently defined by 11 U.S.C. § 101(54) (1988). See *supra* note 55 and accompanying text for a discussion of the Code's definition of "transfer."

163. *Peery*, 40 B.R. at 814 (citing Schaefer v. Fisher, 242 N.Y.S. 308, 314 (N.Y. Sup. Ct. 1930)).

164. *Id.*

165. *Id.*

166. *Id.* at 815. The court stated:

although "[r]enunciation may be 'effective' for purposes of state law as of the date of the testator's death . . . the 'transfer' of the debtor's rights and interests for purposes of the Bankruptcy Code took place on the date of the renunciation."[167]

Finally, to determine whether the debtor intended to defraud his creditors, the court inquired whether various "badges" of fraud were present.[168] The court considered, *inter alia*, the timing of and absence of consideration for the disclaimer, the relationship between the debtor and the transferee, and the existence of a collection suit against the debtor.[169] From these various "badges" of fraud, the court concluded that the debtor intended to defraud his creditors[170] and that the debtor's pre-petition disclaimer was therefore a fraudulent transfer.[171]

In *In re Stevens*,[172] the United States District Court for the Southern District of Texas reached the same result. The court held that the disclaimer constituted a "transfer" and that the transfer occurred on the date of the disclaimer,[173] even though Texas law holds that property devised by will vests immediately in the devisee upon the date of death.[174] Although this holding apparently put state and federal bankruptcy law at odds, there was no actual conflict: federal bankruptcy law determined whether the debtor had transferred that interest,[175] whereas in both *Peery* and *Stevens*, state law merely determined that the debtor had an "interest in property" that he had the power to transfer. The majority of states, including Tennessee,[176] now provide that property does not vest in the devisee upon the death of the testator but is subject to disclaimer.[177] Therefore, unless federal policy

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> The Tennessee relation back statute does not erase the fact of a transfer of the debtor's vested rights at the time of the renunciation. Instead, relation-back is a legal fiction which defines the *consequences* of having property rights vest at death and then revest in others after a valid renunciation. Although relation-back may have significant nonbankruptcy effects . . . [l]egal fictions created for other purposes by state law cannot be used to defeat the express limitations periods created by the Bankruptcy Code.

Id.

167. *Peery*, 40 B.R. at 815.

168. *Id.*

169. *Id.* at 815-816.

170. *Id.* at 816.

171. *Id.*

172. Casciato v. Stevens (*In re* Stevens), 112 B.R. 175, 177-78 (Bankr. S.D. Tex. 1989).

173. *Id.* at 177 (citing *Peery*, 40 B.R. at 814).

174. *Id.* at 177.

175. *Id.*

176. *See supra* note 156 and accompanying text.

177. *See* Gamin, *supra* note 69, at 153 n.40.

prevails in future decisions, the *Stevens* case may be the lone exception to the majority rule.[178]

In contrast, in *In re Atchison*,[179] the Seventh Circuit Court of Appeals held that since the Code does not define "interest of the debtor in property," its definition must come from applicable state law.[180] The court further looked to state law, and specifically to the Illinois relation-back provision,[181] and concluded that the debtor did not have an interest that could be subject to a transfer.[182] The *Atchison* court discounted *Peery* because in that case, the court had looked to state law for a definition of interest in property, but had ignored the relation-back provision and treated it instead as a statute of limitations.[183] Noting that the Illinois statute provides that a disclaimer relates back for "all purposes," the court held that the "relation-back doctrine favors the right of beneficiaries to reject a gift over competing interests."[184] This analysis, however, fails to account for the interests of unsecured creditors. Only a debtor's assets which are not already subject to a security interest can satisfy unsecured creditors' claims. If courts ignore a disclaimer by the debtor during the year prior to the filing of a petition, as they ignore post-petition disclaimers,[185] unsecured creditors may have access to additional assets to satisfy their claims.[186]

A majority of the states, including Illinois, have abolished the doctrine of descent cast and now subject all property passing to a devisee or heir to the recipient's right to disclaim.[187] The courts therefore must

178. New Hampshire and Mississippi also may not follow the majority rule. In those states, if property is inherited, the doctrine of descent cast may treat the property as vesting in the heir prior to the heir's execution of a disclaimer, thus giving rise to a transfer. Hirsch, *supra* note 1, at 596 n.49.

179. Jones v. Atchison (*In re* Atchison), 925 F.2d 209 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 178 (1991).

180. *Id.* at 210 (citing Butner v. United States, 440 U.S. 48, 55 (1978)).

181. ILL. COMP. STAT. ch. 755, § 5/2-7(d) (1993).

182. *Atchison*, 925 F.2d at 211 (citing Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973)). Although *Hoecker* was decided under the Act, Congress did not make any substantive changes to the fraudulent transfer section when it enacted the Code in 1978. *Compare* 11 U.S.C. § 548(a) (1988) *with* 11 U.S.C. § 107(d)(2) (1976).

183. *Atchison*, 925 F.2d at 211.

184. *Id.* The court further observed that permitting the disclaimer to relate back to the testator's death "does not unfairly prejudice creditors." *Id.* However, the court overlooked the general proposition that state law should be disregarded where some federal interest, such as the protection of creditors under the Code, requires a different result.

185. *See supra* notes 51-65 and accompanying text.

186. The *Atchison* decision is also troubling because the disclaimed property passed to the disclaimant's children. *See supra* notes 95-104 and accompanying text.

187. *See supra* note 1.

choose between allowing state law to control, as in *Atchison*, or treating the power to disclaim as an interest in property,[188] and ignoring the legal fiction of relation back in federal bankruptcy proceedings.[189] A power to disclaim is a substantial property interest, and when it is used to shield property from creditors, courts should recognize that a fraudulent transfer has occurred so that the disclaimed property may be recovered for the estate and used to satisfy the claims of creditors.

V. CONCLUSION

In enacting section 541(a), Congress intended to capture *all* interests of the debtor, including "powers" to satisfy claims of creditors. Courts have held that disclaimers are voidable as post-petition transfers because the power to disclaim or accept a devise is included in "property of the estate" and is exercisable only by the trustee.[190] Section 548 seems to embody a goal similar to that of section 541(a): the prevention of the dissipation of the debtor's assets. The only difference between the two provisions is that at the time of a pre-petition disclaimer there is no property of the estate and no trustee. It does not make sense to assume that a debtor is entitled to certain property devised to him, to have that entitlement disclaimed, and to pretend that there has been no transfer in spite of the debtor's efforts.

On the other hand, had Congress intended to capture this particular power under section 548, it could have done so by referring to section 541 in section 548 for the definition of "interest in property." Even in the absence of such a definition, however, courts should rule in favor of creditors and should not permit debtors to shield their assets through the use of disclaimers.

188. Defining an interest in property pursuant to 11 U.S.C. § 541 protects the creditor because Congress intended this provision to be read expansively. It includes property over which the debtor has a general power of appointment. *See supra* notes 74-79 and accompanying text.

189. *See supra* notes 155-60, 166 and accompanying text.

190. In all Chapter 13 cases and some Chapter 11 cases, a debtor-in-possession may continue to operate a business that, along with the debtor's personal assets, is included in the bankruptcy estate. It is presumed that judicial mechanisms will compel the debtor to accept the devise or inheritance.