1982

Jewett v. Commissioner: Unforeseen Crisis of Disclaimers

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Jewett v. Commissioner:
Unforeseen Crisis of Disclaimers

INTRODUCTION

A donee's refusal to accept ownership of property constitutes an indirect gift to a successor in interest subject to federal gift tax liability. However, under section 25.2511-1(c) of the Treasury Regulations, such a refusal is not subject to tax if it is effective under local law and made "within a reasonable time after knowledge of the existence of the transfer." The regulation does not specify what tolls this "reasonable time" requirement. Until recently, virtually all courts tolled the reasonable time for section 25.2511-1(c) purposes when the transfer of control of the property to the beneficiary occurred. In Jewett v. Commissioner, however, the Supreme Court held that the reasonable time requirement tolled at the creation of the original interest, whether the interest was contingent or vested, and notwithstanding when control of the property actually passed to the beneficiary.

This article will discuss the Court's decision in Jewett v. Commissioner. The concept of the common law disclaimer and its statutory development will be summarized. The legislative and judicial history of section 25.2511-1(c) will be examined, and Jewett


5. 102 S. Ct. 1082 (1982).
will be analyzed in light of this background. Specifically, this article will focus on those factors which should have weighed more heavily with the Court: the estate and gift tax scheme, the intent of the drafters of the regulation, the significance of the Tax Reform Act of 1976, and the policy reasons for encouraging consistency in the estate and gift tax laws.6

BACKGROUND

Section 2501 of the Internal Revenue Code7 states the general rule that a tax will be imposed on the transfer of property by gift. The expansive scope of the term “transfer” is set forth in section 2511,8 which provides that “... the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible....”9 The terms are to be construed in “the broadest and most comprehensive sense”10 to include “all property, however conceptual or contingent.”11

In 1958, the Internal Revenue Commission promulgated interpretive regulations which include some exceptions to the general tax rule. Among these is section 25.2511-1(c) of the Treasury Regulations12 which provides that validly executed disclaimers

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6. This discussion will focus only on that part of the Jewett opinion dealing specifically with Treas. Reg. § 25.2511-1(c). The Court also addresses and dismisses a "retroactivity" argument and an argument analogizing the special power of appointment to disclaimers. Id. at 1090. Because these arguments do not address the proper interpretation of the treasury regulation, they are beyond the scope of this article.


8. I.R.C. § 2511 (1976). The current statute was enacted in 1954 and amended in 1976. This enactment was by no means the first federal attempt to address taxation of property transfers. As early as 1924, the Revenue Act of 1924 imposed a tax on the transfer by gift "of any property, whether made directly or indirectly." Revenue Act of 1924, ch. 234, §§ 319, 320, 43 Stat. 253, 313 (1976).


11. Smith v. Shaughnessy, 318 U.S. 176, 180 (1943). The Court here interpreted I.R.C. §§ 1000(b), 1030(b) (1939), which language is substantially the same as that adopted in the 1954 Code.

12. Treas. Reg. § 25.2511-1(c) (1958) provides:

The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if
are exempt from the gift tax. In order to understand the essence of this regulation and its place in the tax scheme, it is helpful to understand the regulation's history.

Disclaimer Prior to Treasury Regulation § 25.2511-1(c)

According to basic property law, a transfer is not complete until it is accepted by the recipient, and, in general, no person can be forced to accept property against his will. Thus, a beneficiary of a trust or will can renounce his gift, provided both that he has not the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.


Many courts and commentators have held that the right to refuse to accept property is an unqualified right, provided that the disclaimant has complied with local law. See, e.g., Cottrell v. Commissioner, 628 F.2d 1127, 1129 (8th Cir. 1980); Hardenbergh v. Commissioner, 198 F.2d 63, 67 (8th Cir.), cert. denied, 344 U.S. 836 (1952); Estate of Rolin v. Commissioner, 68 T.C. 919, 925 (1977), aff'd, 79-1 U.S. Tax Cas. (CCH) ¶ 13,271 (1977); Estate of Dreyer v. Commissioner, 68 T.C. 275, 294 (1977); Estate of Hoenig v. Commissioner, 66 T.C. 471 477 (1976); Seifner v. Weller, 171 S.W.2d 617, 623 (Mo. 1943); Perkins v. Isley, 224 N.C. 793, 798, 32 S.E.2d 588, 591 (1945) and cases cited therein. See also Erbacher, Federal Estate Tax: Minimization by Renunciation of Bequest or Devise, 40 U.M.K.C.L. REV. 170, 178 (1972) [hereinafter cited as Erbacher]; Martin, Perspectives on Federal Disclaimer Legislation, 46 U. CHI. L. REV. 316, 316 (1979) [hereinafter cited as Martin]; Smith, Property and Tax Consequences of Renunciations and Disclaimers, 96 TR. & EST. 744, 744 (1957) [hereinafter cited as Smith]; Note, Availability of Renunciations for Post-Mortem Estate Planning in New York State, 34 ALB. L. REV. 642, 643 (1970) [hereinafter cited as Note, Planning in New York]. See generally 6 PAGE LAW OF WILLS § 49.8 (Bow–Parker ed. 1962); 34A AM. JUR. 2D Federal Taxation ¶¶ 47, 325-47, 339.
already accepted it\(^\text{15}\) and that the rights of third parties are not involved.\(^\text{16}\) Refusal to accept a gift constitutes the common law concept of disclaimer.\(^\text{17}\) In addition, if a beneficiary chooses to disclaim, he must do so through affirmative action in order to rebut the presumption of acceptance which generally attaches to gifts.\(^\text{18}\)

Thus, under the common law, an effectively disclaimed gift is void with regard to the disclaiming beneficiary. The property passes as though the renouncing beneficiary had predeceased the donor. The result is that the property passes to whomever the

\(^{15}\) Estate of Rolin v. Commissioner, 68 T.C. 919, 926 (1977), aff'd, 79-1 U.S. Tax Cas. (CCH) \# 13,271 (1978); Fuller v. Commissioner, 37 T.C. 147, 153 (1961); People v. Flanagin, 331 Ill. 203, 211, 162 N.E. 848, 849 (1928); Perkins v. Isley, 224 N.C. 793, 798, 32 S.E.2d 588, 591 (1945) and cases cited therein. See also Smith, supra note 13, at 744; I A. SCOTT ON TRUSTS \S 36.1 (1967 ed.); 96 C.J.S. Wills \S 1151 n. 27 (1948) and cases cited therein.

\(^{16}\) Estate of Dreyer v. Commissioner, 68 T.C. 275, 293 (1977); In re Kalt's Estate, 16 C.2d 807, 810, 18 P.2d 401, 404 (1940); In re Wilson's Estate, 298 N.Y. 398, 404, 83 N.E.2d 852, 855 (1949); In re Behn's Estate, 201 Misc. 12, 106 N.Y.S.2d 118, 121 (Civ. Ct. 1951). See also Smith, supra note 14, at 744.

Absent collusion or fraud, the motive for the disclaimer has no bearing on its validity if the disclaimer is otherwise effective under local law. See Cotterell v. Commissioner, 628 F.2d 1127, 1131 (8th Cir. 1980); Keinath v. Commissioner, 480 F.2d 57, 66 (8th Cir. 1973); Estate of Dreyer v. Commissioner, 68 T.C. 275, 294 (1977); Estate of Hoenig v. Commissioner, 66 T.C. 471, 477 (1976); Strom v. Wood, 100 Kan. 556, 560, 164 P. 1100, 1101 (1917); Seifner v. Weller, 171 S.W.2d 617, 623 (Mo. 1943); Perkins v. Isley, 224 N.C. 793, 798, 32 S.E.2d 588, 591 (1945). See also 34A AM. JUR., 2D Federal Taxation 47,325 (1982); 96 C.J.S. Wills \S 1151 n.29 (1948) and cases cited therein.

\(^{17}\) Brown v. Routzahn, 63 F.2d 914, 917 (6th Cir.), cert. denied, 290 U.S. 641 (1933); In re Kalt's Estate, 16 Cal.2d 807, 810, 108 P.2d 401, 404 (1940). See also T. ATKINSON LAW OF WILLS \S 139 (2d ed. 1953); 6 PAGE, supra note 14, \S 49.2. For an excellent article on tax aspects of disclaimer, see Report, Post Mortem Estate Planning, 34 J. TAX'N 92 (1971)[hereinafter cited as Report]. For articles on disclaimers and their tax treatment, see generally Berall, Using Disclaimers Effectively: An Analysis of a Useful Post-Mortem Tax Planning Tool, 34 J. TAX'N 92 (1971)[hereinafter cited as Berall]; Smith, supra note 13, at 744.

\(^{18}\) Fuller v. Commissioner, 37 T.C. 147, 153 (1961); People v. Flanagin, 331 Ill. 203, 207, 162 N.E. 848, 850 (1928); Strom v. Wood, 100 Kan. 556, 561, 164 P. 1100, 1101 (1917); Mackey v. Bowen, 332 Mass. 167, 170, 124 N.E.2d 254, 256 (1955); Seifner v. Weller, 171 S.W.2d 617,
donor named to succeed the renouncing beneficiary. As are most property rights, however, disclaimers are now creatures of legislative grace. State law governs both the procedural requirements for disclaimers and the passage of property after an effective disclaimer has been made.

The seminal tax case on the doctrine of disclaimers, Brown v. Routzahn, was decided by the Sixth Circuit in 1933. In Brown,


In the three other states, the common law disclaimer has been judicially recognized. See, e.g., Wilmington Trust Co. v. Carpenter, 315 A.2d 625, 629 (Del. Ch. 1974); Coleman v. Burns, 103 N.H. 313, 316, 171 A.2d 33, 35 (1961); Crossman v. Crossman's Estate, 100 Vt. 407, 412, 138 A. 730, 732 (1927).


22. 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933).
the decedent refused to accept a bequest under his wife’s will. His
disclaimer was filed eight years after his wife’s death, but several
weeks before the final distribution of his wife’s estate. Decedent
died shortly after he disclaimed.23

The court held that this disclaimer did not constitute a transfer
in contemplation of death for purposes of the federal estate
tax.24 The court specifically noted that taxing statutes, such as
the federal estate tax, deal with command over property, not title.25
Although decedent was co-executor of his wife’s estate, he never
exercised control over the property as donee. He thus retained the
right to reject the property26 and prevent completion of the gift.
According to applicable Ohio law, a disclaimer could be validly
effected any time prior to final distribution.27 Thus, decedent’s dis-
claimer was valid and timely under state law. For tax purposes,
the disclaimer was ruled a refusal to accept a gift of property rather
than a transfer of an interest in property.28 The Sixth Circuit
determined that the federal tax on transfers is levied on the
transfer of control of property, not on the exercise of a right to
renounce a testamentary gift.29

In 1952, the Eighth Circuit decided Brown’s logical corollary in
Hardenbergh v. Commissioner.30 In Hardenbergh, decedent had

23. 63 F.2d at 915.
24.  Id. at 917. Thus, the disclaimer was not taxable. Had the court found the contrary,
i.e., that the disclaimer did constitute a transfer in contemplation of death, the disclaimer
would have been subject to tax under I.R.C. § 402(c) (1921).
25. 63 F.2d at 917. This prevailing view frequently has been espoused. See Estate of
Sanford v. Commissioner, 308 U.S. 39, 43 (1930); Burnet v. Guggenheim, 288 U.S. 280, 283
(1933); Corliss v. Bowers, 281 U.S. 376, 378 (1930); Chase Nat’l Bank v. United States, 278
U.S. 327, 336 (1929); Saltonstall v. Saltonstall, 276 U.S. 260, 269 (1928); Commissioner v.
Estate of Vease, 314 F.2d 79, 88 (9th Cir. 1963). The estate tax and the gift tax appear in the
same title, and their provisions have been construed similarly. See Estate of Sanford v.
26. The decedent retained control as co-executor, not as donee. Had he died between 1912
(the year of his wife’s death) and 1920 (the year of distribution), the property would have
passed as part of his estate because of the presumption of acceptance. See supra text
accompanying note 18. However, because decedent had exercised his disclaimer, the pre-
sumption fell.
27. 63 F.2d at 916. At that time, Ohio had no time limit for rejection, as long as rejection
was effective prior to distribution. Ohio’s statute now requires a disclaimer to be made, if at
all, within nine months of the later of the effective date of the donative instrument (if the
taker and his interest are both ascertainable at that date) and the date of the occurrence
which renders the taker and his interest to be finally ascertainable. OHIO REV. CODE ANN. §
1339.60(D) (Page 1979).
28. 63 F.2d at 917.
29.  Id.
30. 198 F.2d 63 (8th Cir.), cert. denied, 344 U.S. 836 (1952).
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drafted a will, but died before it was properly executed. After his death the taxpayers, decedent's wife and daughters, attempted to renounce their shares of his estate in order to effect the intent of decedent as evidenced by the will.\(^3\) The court noted that under local law, the decedent's will was invalid. The property therefore passed by intestacy, vesting immediately at the death of the intestate in his heirs. The taxpayers' disclaimers thus were rendered ineffective under local law. The court held that their renunciation was a gratuitous transfer from the taxpayers to the non-disclaiming heir\(^3\) and a gift for tax purposes.\(^3\) Citing with approval the rule of Brown in the context of testate renunciation,\(^3\) the court stated this corollary as the extension of the rule to intestate succession.

**Treasury Regulation § 25.2511-1(c)**

Cognizant of the common use of disclaimers and the adverse impact of the tax laws on disclaimants, the drafters of the Treasury Regulations specifically excepted certain disclaimers from gift taxation.\(^3\) The exception, embodied in section 25.2511-1(c), states in pertinent part: "[a] refusal to accept ownership [of property] does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under local law."\(^3\) This regulation was made retroactive and applied to gifts made after December 31, 1954.\(^3\)

The "reasonable time" requirement of section 25.2511-1(c) is not defined in the Code or in the regulations.\(^3\) Consonant with the rule set out in Brown, taxpayers and estate planners assumed that

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\(^{31}\) According to the terms of the will, the decedent's son would take the entire estate. 198 F.2d at 65.

\(^{32}\) Id. at 67.

\(^{33}\) Id.

\(^{34}\) Id. at 66.

\(^{35}\) Treas. Reg. § 25.2511-1(c) (1958). Absent this exception, the general rule that all gratuitous transfers of property are taxable would apply. See I.R.C. §§ 2501, 2511 (1976).

\(^{36}\) Treas. Reg. § 25.2511-1(c) (1958). For the full text of the regulation, see supra note 12.


the reasonable time was determined by local law.\textsuperscript{39} In 1973, the Eighth Circuit adopted that prevailing view in \textit{Keinath v. Commissioner}.\textsuperscript{40}

In \textit{Keinath}, the taxpayer’s father died testate in 1944, leaving his entire estate in trust. According to the provisions of the trust, the trust income was to go to his widow for life, with a vested remainder subject to divestiture to his two sons. If either son predeceased the widow, that son’s share was to go to his children, \textit{per stirpes}.\textsuperscript{41} In March, 1963, the taxpayer’s mother (the life tenant) died. The taxpayer disclaimed his interest in the trust in May, 1963,\textsuperscript{42} two months after his interest fully vested.

The Internal Revenue Commissioner assessed a $669,797.63 deficiency against the taxpayer in 1969, claiming that petitioner failed to meet the “reasonable time” requirement of section 25.2511-1(c) because the nineteen years from 1944 (the creation of the trust) to 1963 (the taxpayer’s disclaimer) was manifestly unreasonable. The Tax Court agreed.\textsuperscript{43} The Eighth Circuit reversed, however, holding that an unequivocable disclaimer of a vested remainder subject to divestiture, filed within six months of the death of the life tenant, was made within a “reasonable

\textsuperscript{39} Note, however, that in \textit{Jewett v. Commissioner}, 102 S. Ct. 1082 (1982), the Supreme Court stated that since local law often has its own timeliness requirement relative to disclaimer, the “timeliness requirement” contained in Treas. Reg. § 25.2511-1(c) would be superfluous. \textit{Id.} at 1089. The Court refuted its own argument, however, at footnote 17 where it noted that the federal timeliness requirement may have been added to guard against local statutes without timeliness requirements such as that in \textit{Brown v. Routzahn}, 63 F.2d 914 (6th Cir.), cert. denied, 290 U.S. 641 (1933). Such an analysis suggests that the validity of the disclaimer initially rests on local law, but that an additional federal reasonable time requirement might well shorten the amount of time allowable.


\textsuperscript{40} 480 F.2d 57 (8th Cir. 1973).

\textsuperscript{41} \textit{Id.} at 59. \textit{Per stirpes} means the taking from decedent by right of representation. For example, “A” dies, leaving all of his property to his children \textit{per stirpes}. If “A” died, leaving two living children and two grandchildren from one dead child, the two living children each take one third of the estate. The two grandchildren split their dead parent’s share equally, so each gets one-half of one-third, or one-sixth. T. \textit{Atkinson}, \textit{supra} note 17, § 16.

Another method of distribution is “\textit{per capita},” which means “equally.” Thus in the above example, each of the four survivors would take one fourth of decedent’s estate. See 4 \textit{Page}, \textit{supra} note 14, § 36.6.

\textsuperscript{42} 480 F.2d at 59.

\textsuperscript{43} 58 T.C. 352 (1972).
time." This position was affirmed by the Eighth Circuit in 1980.

Recent Disclaimer Developments

In 1976, Congress added a new section to the Internal Revenue Code which specified the elements of a valid disclaimer for federal tax purposes. Most important for this discussion, the new section defined the reasonable time requirement, stating, inter alia, that a disclaimer must be filed with the statutorily designated tax official no later than nine months after the day the transfer creating the interest in such person was made or on which such person attained age twenty-one, whichever occurs first. This statute was made prospective only, to "apply with respect to transfers creating an interest in the person disclaiming made after December 31, 1976."

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In 1980, the Ninth Circuit held in Jewett v. Commissioner that the federal timeliness requirements are separate from and in addi-

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44. 480 F.2d at 64. The court said that remainder interests which are not subject to divestiture should be disclaimed within a reasonable time after the testator's death. Where a remainder interest is subject to divestiture, however, the reasonable time is measured from the death of the life tenant. Id. at 64. For a critique of this position, see N&K, supra note 18, at 840-43; Note, Federal Gift Tax § 2511: Taxation of Vested Remainders, 51 Tex. L. Rev. 1430, 1433 (1973) [hereinafter cited as Note, Federal Gift Tax].


47. There are four requirements: 1) the disclaimer must be written; 2) it must meet specific timeliness requirements; 3) the disclaimant must not have previously accepted such interest or any of its benefits; and 4) as a result of the refusal, the interest must pass to someone other than the disclaimant. I.R.C. § 2518(b)(2)(A)-(B) (1976). Note that this section provides a maximum but no minimum period within which to disclaim. Thus, if state law requires that disclaimers must occur earlier than the nine month period granted by § 2518, the federal period will be lessened as well, since one federal requirement is that the disclaimer must be effective under local law. See Frimmer, Proposed Regs. Under Section 2518 Explain and Expand the Federal Disclaimer Statute, 53 J. Taxn., 266, 267 (1980).

48. I.R.C. § 2518(b)(2)(A)-(B) (1976). Note that this section provides a maximum but no minimum period within which to disclaim. Thus, if state law requires that disclaimers must occur earlier than the nine month period granted by § 2518, the federal period will be lessened as well, since one federal requirement is that the disclaimer must be effective under local law. See Frimmer, Proposed Regs. Under Section 2518 Explain and Expand the Federal Disclaimer Statute, 53 J. Taxn., 266, 267 (1980).


50. 638 F.2d 93 (9th Cir. 1980), aff'g, 70 T.C. 430 (1978).
tion to the timeliness requirement of local law for purposes of section 25.2511-1(c).\footnote{638 F.2d at 95.} In addition, the court stated that the "reasonable time" tolls at the creation of the interest, not after the interest indefeasibly vests.\footnote{Id. at 95.} This decision created a conflict between the circuits,\footnote{The Eighth Circuit had twice previously ruled directly contrary to the Ninth Circuit's Jewett holding. See supra notes 36-45 and accompanying text.} and the Supreme Court granted certiorari in Jewett on June 1, 1981.\footnote{452 U.S. 905 (1981).}

The Facts

Margaret Jewett, the testatrix, died testate on January 14, 1939. Her will created a trust for the benefit of her husband during his lifetime, and thereafter, for the benefit of her son and daughter-in-law (petitioner's parents) during their lifetimes. At the death of the last surviving life tenant, distribution of the remaining corpus was to go to the then living grandchildren of Margaret Jewett and to the then living issue of any deceased grandchild, \textit{per stirpes}.\footnote{70 T.C. 430, 431 (1978).}

In 1972, petitioner's mother, the sole remaining life beneficiary of the trust, was still living. During that year, petitioner executed unequivocable disclaimers of his interest in the trust,\footnote{Petitioner actually exercised two separate disclaimers. In the first he renounced 95\% of his share, in the second, the remaining 5\%. \textit{Id.} at 431-32.} valid under the applicable Massachusetts law. The Commissioner assessed a tax deficiency of approximately $750,000 against petitioner, who filed an action in the Tax Court to recover the assessment. The Tax Court unanimously held that petitioner's disclaimer, made twenty-four years after he reached majority and thirty-three years after creation of his interest, although before the interest indefeasibly vested, was invalid for gift tax purposes. The Tax Court determined that the disclaimer had not been made within a reasonable time after knowledge of the existence of the transfer, as required by section 25.2511-1(c). The court accordingly ruled that petitioner's disclaimers were taxable gifts under sections 2501(a) and 2511(a) of the Internal Revenue Code.\footnote{Id. at 438. The Tax Court relied on its decision in Keinath v. Commissioner, 50 T.C. 352, \textit{rev'd}, 460 F.2d 57 (8th Cir. 1973). The Keinath tax court relied in turn on Fuller v. Commissioner, 37 T.C. 147 (1961), as controlling precedent. In Fuller, the taxpayer received the income from five-eighths of her husband's testamentary trust for many years before she disclaimed. The court refused to allow the disclaimer, because the taxpayer had already...}
The court of appeals affirmed, holding that Jewett did not disclaim within a reasonable time after knowledge of his grandmother's transfer to him of an interest in the trust estate. On certiorari, the United States Supreme Court affirmed the Ninth Circuit decision.

The Supreme Court Decision: A Closer Look

The only issue before the Court was the determination of the time at which a transfer would be deemed to occur for federal gift tax purposes. Does the transfer occur when the interest is created, as the government contended, or, at a later time, when the interest either vests or becomes possessory, as petitioner contended? The Court held that for federal tax purposes, the transfer occurs at the creation of the interest and that Jewett's attempted disclaimers were therefore taxable transfers.

The majority opinion, written by Justice Stevens, first analyzed the statutory provisions which are interpreted by the treasury regulation. The Court noted that the Internal Revenue Code taxes all gratuitous transfers of or interests in property, no matter how direct or indirect. In order to reach all such transfers, the gift tax was enacted to complement the estate tax. The gift tax ensures that property transferred inter vivos will not escape taxation where, absent the inter vivos transfer, the property would have been subject to the estate tax at the donor's death. The Court stated that inasmuch as the effect of Jewett's disclaimer was to reduce the size of his estate for estate tax purposes, the disclaimer should accepted the benefits from the trust. The Tax Court in Keinath read Fuller as resting upon the taxpayer's acceptance of her interest in the trust, rather than upon her acceptance of the beneficial income from the trust.

Although Keinath was reversed by the Eighth Circuit, the Tax Court persisted in its reliance both on Fuller's reasoning and result. See Cottrell v. Commissioner, 72 T.C. 489, 492 (1979), rev'd, 628 F.2d 1127 (8th Cir. 1980); Jewett v. Commissioner, 70 T.C. 430, 433 (1978), aff'd, 638 F.2d 93 (9th Cir. 1980), aff'd, 102 S. Ct. 1082 (1982). Justice Blackmun's dissent in Jewett finds the Fuller case easily distinguishable on its facts because Jewett never accepted any portion of the trust benefits. Unlike the disclaimer in Fuller, therefore, Jewett's disclaimer was not a transfer of accepted property. The dissent found Fuller to be inapposite authority for the Tax Court's decision. Id. at 1091 (Blackmun, J., dissenting).

58. 638 F.2d 93 (9th Cir. 1980), aff'g, 70 T.C. 430 (1978).
59. 102 S. Ct. 1082 (1982).
60. Id. at 1084.
61. Id. at 1083.
62. Id. at 1086.
63. Gifts effective during the donor's lifetime are inter vivos. Gifts made effective after the donor's death are testamentary. See I A. SCOTT ON TRUSTS § 17 (1976).
be taxed as a gift. In addition, the indirect gift to the natural objects of his bounty which resulted from his disclaimer fell clearly within the scope of the estate and gift tax scheme.64

The Court next focused on the meaning of the word "transfer" as used specifically in section 25.2511-1(c). Although laymen construe "transfer" as a change in the beneficial ownership of existing interests in property, the term is used throughout the gift tax provisions to refer to any gratuitous passage of property. In addition, the Court found that the lack of any reference in the regulation to contingent or future interests supported its conclusion that the relevant transfer occurred at the testator's death rather than at the time when Jewett's interest vested. For these reasons, the Court concluded that the "reasonable time" requirement of section 25.2511(c) tolled when Jewett knew of the existence of the transfer from his grandmother, not at the death of the life beneficiary which preceded the vesting of his interest.66

The dissent,67 written by Justice Blackmun and joined by Justices Rehnquist and O'Connor, emphasized that the federal gift tax deals with the concrete transfer of property by gift.68 A contingent remainderman such as Jewett might never receive the property. For example, such a remainderman could predecease the life beneficiary. This possibility, combined with the monetary impact of the estate and gift tax provisions, had prompted the Commissioner to enact section 25.2511-1(c) which, in Blackmun's view, recognized the common law disclaimer and exempted it from the gift tax.69 Section 25.2511-1(c) also permitted a disclaimer for gift tax purposes as long as the disclaimer was valid under local law and made within a reasonable time after knowledge of the existence of the transfer. The reasonable time, nowhere defined in the Code, was to be determined by the Commissioner, according to justice and fairness under all the circumstances.70

In Blackmun's opinion, the statutory transfer occurred at the death of the life beneficiary, when the property interest passed

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64. 102 S. Ct. at 1086-87.
65. Id. at 1087.
66. Id.
67. Id. at 1091 (Blackmun, J., dissenting).
68. Id. Although not cited by Justice Blackmun, the Supreme Court has previously articulated this proposition. See, e.g., Tyler v. United States, 281 U.S. 497, 503 (1930).
69. 102 S. Ct. at 1091 (Blackmun, J., dissenting).
70. Id.
indefeasibly to Jewett.\textsuperscript{71} Jewett disclaimed before that transfer occurred and thus before his property interest was fixed in quality and quantity. Moreover, he never received any benefit from the trust. The disclaimer, therefore, was made within a reasonable time and should have been exempt from federal gift tax.\textsuperscript{72}

\textbf{ANALYSIS OF THE COURT'S DECISION}

The Court asserted two theories to support its position that the transfer in the regulation refers to the original transfer from the decedent who created the various interests rather than the transfer of the property upon the death of the life tenant. Each of these theories will be addressed.

The Court first asserted that the basic term "transfer" as used throughout the Tax Code refers to any passage of property. The Court stated that the "lack of any reference in the regulation to future interests or contingent remainders, and the consistent focus on transfers effected by the decedent by will or through the laws of intestate distribution, undermines the suggestion that the relevant transfer occurs other than at the time of the testator's death."\textsuperscript{73}

By thus interpreting the regulation, the Court ignored a more plausible reason for the regulation's linguistic emphases. The Code envisions taxation on passage of control over property.\textsuperscript{74} Intestate property passes to a decedent's heirs immediately at the decedent's death. Transfers effected by a will, as a general rule, pass control of the bulk of property at the distribution of the estate. Future interests and contingent remainders, on the other hand, embody passage which is indefinite and contingent, not immediate and definite. Such interests were therefore not the concern of the regulation's drafter.\textsuperscript{75}

Moreover, the breadth of the word "transfer" supports petitioner's position. Although some authorities define the essence of a

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 1087.
\textsuperscript{75} This inference is logical. If the drafters were primarily concerned with the passage of control over property, see supra note 74 and accompanying text, they were not as concerned with events preceding that which passed control over property.
transfer broadly as "the creating of rights in another," others define it as the passage of control over economic benefits of property, rather than any technical change in title.

In addition, whether transfers are subject to an estate or gift tax depends on the terms of the statute imposing the tax, and only transfers within the terms of the statute are subject to the tax. Under different statutes, a future contingent estate may be taxable out of the vested property interest which was transferred, or the estate may not be taxable until actual possession of the property.

The only clear statement which can be made about the term "transfer" in the regulation is that it does not necessarily mean what either of the parties in Jewett had suggested. The language of the statute on its face is far from clear, and the Court's perfunctory analysis provides little clarification.

The Court's second theory suggested that the knowledge requirement of the regulation implies that the transfer occurred at the creation of the interest. The Court explained that anyone to whom assets have been distributed would know about the transfer and that the language must therefore have been "drafted to protect persons who had no knowledge of the creation of an interest." This conclusory interpretation is easily refuted. There may well be instances where an individual does not know that assets have vested in him. For example, lost beneficiaries are somewhat common, particularly where a trust was created long before the vesting of an interest. Section 25.2511-1(c) should protect such an individual. Proper interpretation of the regulation permits the reasonable time requirement for a disclaimer to toll when the disclaimant learns about the transfer. The Court's assertion thus fails to account for alternate feasible analyses.

Strictly speaking, the Court's holding that the reasonable time is tolled at the creation of the contingent interest is justifiable. The
gift tax statute taxes the transfer of property by gift. The interpretive regulation states that the definition of the gift encompasses “transactions whereby property or property rights or interests are gratuitously passed.” Therefore, when the regulation permits disclaimers “within a reasonable time after knowledge of the existence of the transfer,” the referenced transfer could well be the transfer from the initial act giving Jewett a contingent remainder. The language of the statute, however, is too broad to be interpreted without the regulations, and the regulations themselves are too ambiguous to be useful absent an understanding of legislative history and judicial interpretation.

Because the plain text of the regulation is not clear as to the meaning of the word transfer, it is appropriate to search the legislative history for the regulation’s proper interpretation. The Court gave insufficient weight to this consideration and dismissed all of the petitioner’s arguments on that subject. The balance of this article will focus on the three major areas of legislative history underlying the regulation. Discussion will then return to the appropriate interpretation of “transfer” for section 25.2511-1(c) purposes to determine whether the Court properly taxed Jewett’s disclaimer.

Estate and Gift Taxes: In Pari Materia

In Jewett v. Commissioner, the Court observed that Jewett waited until he was in his mid-40’s, when he could determine whether he would need the property himself, before attempting to disclaim. The Court asserted that “since the practical effect of petitioner’s disclaimer was to reduce the size of the taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty, the treatment of the disclaimers as taxable gifts is fully consistent with the basic purpose of the statutory scheme.”

The Court apparently agreed with the Commissioner in princi-

85. Id.
86. 102 S. Ct. at 1087.
87. Id. at 1088-89.
88. Id. at 1090-91. The Court’s decision is probably best explained as a reaction against the use of disclaimers as a tax planning device. However, the reason for the disclaimer is irrelevant if it is valid under local law. See supra note 16.
89. 102 S. Ct. at 1086.
ple that any transfer which has the appearance of an estate planning device should be reachable by either the estate tax or the gift tax.90 This principle is consonant with the overall gift and estate tax statutory scheme, as previously announced by the Court.91 The scheme was designed to tax inter vivos gifts of property which otherwise would be subject to estate taxes at the donor’s death.92 The gift tax is thus a corollary to the estate tax, and the two are to be construed in pari materia.93

Treatment of the disclaimer as a taxable gift is consistent with the basic purpose of the statutory scheme, which is to tax transfers of whatever type.94 But the drafters of section 25.2511-1(c) specifically permitted certain disclaimers to be exempt from the transfer tax.95 Because a regulation must be interpreted to “harmonize with and further and not to conflict with the objective of the statute it implements,”96 the theory behind the taxes and the disclaimer must be understood. Such an understanding reveals that no inconsistency inheres in the concept of a disclaimer exemption to the gift tax.

Estate and gift taxes are imposed on the gratuitous transfer of control over the economic benefit of property.97 Thus, construing the two taxes in pari materia effects the individual purpose of each of the taxes. For example, one who gives an inter vivos gift must pay a gift tax because control of the property passes from the donor to a donee. Once the property is given, and out of the control

90. Id.
92. Id. at 44. See also H.R. REP. No. 708, 72d Cong., 1st Sess. 28 (1932); S. REP. No. 655, 72d Cong., 1st Sess. 40 (1932), which stated that the gift tax was designed to reach “those gifts which are not reached for one reason or another by the estate tax.” For a general introduction to estate and gift taxes, see Lowndes, Introduction to Federal Estate and Gift Taxes, 44 N.C.L. REV. 1 (1965) [hereinafter cited as Lowndes].
96. Trustees of Ind. Univ. v. United States, 618 F.2d 736, 739 (Cl. Ct. 1980). See also Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1118 (10th Cir. 1977).
of the donor's estate, the estate can not be taxed on it at the donor's death. Conversely, if the donor transfers the property through a testamentary gift, his estate will be taxed on the transfer of that property at his death because the property remained within his control at his death. The estate tax is imposed on the transfer from the decedent to the beneficiary of all the taxable property over which the decedent had control or in which he had retained an interest at his death.

A disclaimer, on the other hand, can only occur where the donee has refused to accept the gift. As a result of the disclaimer, the disclaimant never obtains the property, and it is treated as though the beneficial interest had never vested in him. The property passes according to the terms of the instrument creating the interest, as it would if the disclaimant predeceased the grantor. It follows that the disclaimant has no power to direct the disposition of the property he has disclaimed.

The essential difference between the estate and gift tax scheme and the disclaimer, then, is the nature of the right which is exercised. The taxes are imposed on the donor who has power and control over the subject property. This power and control passes at the direction of the donor, or, in cases of intestacy, at the direction of the state, to some designated beneficiary. A disclaimer, on the other hand, is the complete and unqualified refusal of the disclaimant to accept a gift and some or all of the rights of ownership to which that gift otherwise entitles him. As a result of the disclaimer, the property passes to whomever is next in line according to the direction of the donor. This latter beneficiary then receives the control and power formerly held by the donor. The disclaimant receives no rights in the property and the transfer is deemed to be between the donor and the ultimate beneficiary.

Because the estate and gift tax scheme envisions imposition of a tax on transfers which effect a change in control over property,

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98. A transfer made within three years of the donor's death is considered "made in contemplation of death," and thus is subject to the federal estate tax under I.R.C. § 2035 (1976).


100. Bel v. United States, 452 F.2d 683, 693 (5th Cir. 1971), cert. denied, 406 U.S. 919 (1972). See also cases cited supra note 15.

101. 1022 S. Ct. at 1093 (Blackmun, J., dissenting). See generally I A. SCOTT ON TRUSTS § 36.1 (1967 ed.).

102. Keinath v. Commissioner, 480 F.2d 57, 60 (8th Cir. 1973).
exempting the indirect transfer by a disclaimant from the transfer tax is fully consistent with the statutory scheme. In fact, treatment of a disclaimer as a taxable gift, as applied by the Court in Jewett, is itself inconsistent with the thrust of the tax scheme.

For example, if a contingent remainderman predeceases a life beneficiary, it is well settled that the property subject to the contingent remainder is not "property" includable in the remainderman's gross estate. Thus, if Jewett had predeceased his mother, his contingent interest in the trust property would neither have come into his estate, nor have been subject to the estate tax.

Similarly, the trust property never comes into the estate of a disclaimant. Jewett disclaimed before accepting the benefits of the property and before exercising any control over it. By disclaiming, Jewett removed himself from the line of beneficiaries, and all the rights of ownership passed around him, not through him.

The disclaimer therefore should not be subject to a gift tax. In both situations, i.e., disclaimer or death of a contingent remainderman, the property passes to others according to the terms of the donor's will, without having been subject to the contingent remainderman/disclaimant's control. The effect of either event on the passage of the property is substantially the same. Yet the Court's position in Jewett would create disparate tax consequences. The Court would tax the one situation (disclaimer) but not the other (donee's death).

There is no theoretical justification for the Court's action in this regard. Its assertion that the estate and gift taxes are to be read in pari materia, while correct, does not negate the exception for disclaimers intended by the drafters and manifested in section 25.2511-1(c). This intent is patently obvious in the legislative history of the regulation.

103. The transfer is indirect because, but for the disclaimer, the resultant beneficiary would not have received the subject property.

104. See generally Berall, supra note 16; Holzman, supra note 17; Kay, supra note 21; Lowndes, supra note 92; Report, supra note 17. The Court held the opposite, that "treatment of the disclaimers as taxable gifts is fully consistent with the basic purpose of the statutory scheme." 102 S. Ct. at 1087. For support of this position, see generally Kay, supra note 21; Martin, supra note 14; Note, Federal Gift Tax, supra note 44.


106. 102 S. Ct. at 1093 (Blackmun, J., dissenting).
Original Draft versus Final Regulation

The original draft of the regulation, published on January 3, 1957, provided in pertinent part:

The renunciation of a vested property interest [of one] in whom title immediately vests upon a decedent’s death constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand, the renunciation of a gift, if under local law title does not immediately vest, is not a gift if the renunciation is made within a reasonable time after knowledge of the existence of the interest.

The final version of the regulation, published on November 15, 1958, provided in pertinent part:

(c) ... Where the law governing the administration of the decedent’s estate gives a beneficiary a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

Purporting to follow the intent of the drafters, the Court asserted that the change from “interest” in the original draft to “transfer” in the final regulation was made to properly distinguish between Brown v. Routzahn and Hardenbergh v. Commis-
The two cases the regulation was intended to codify. The original draft emphasized the distinction as one of contingent as opposed to vested interests. The Commissioner ultimately determined, however, that the real difference rested in the validity of the disclaimer under the local law of the two jurisdictions. The language at the beginning of the regulation thus was changed to reflect the Commissioner's distinction, and the language at the end was altered to achieve parallel structure with the substituted language at the beginning.

The Court asserted that the Commissioner did not intend, as Jewett contended, to change the timing of the taxable event. Rather, consonant with the estate and gift tax scheme, the taxable event occurred at the time of the transfer of property interests from the decedent. This construction enabled the Court to interpret the language “within a reasonable time after knowledge of the existence of the transfer” as though the words “from the decedent” were appended.

The Court's construction is visibly flawed. There is no logical connection between the change in the regulation which reflected the Commissioner's understanding of the proper distinction between Brown and Hardenbergh, and the change in regulatory language from “interest” to “transfer.” The proper distinction between these cases, as reflected by a memorandum from the Commissioner to the Secretary of the Treasury which accompanied his final draft of the regulation, and accurately noted by the Court, turned on whether state law permits disclaimers. The tolling point for measurement of the reasonable time, whether from creation of the interest or from the transfer, was unrelated to the issue of legality under state law. Thus, this construction cannot aid in construing the intent of the drafters respecting the specific change in language from “interest” to “transfer.”

The only material generated by the IRS explaining the language change between the draft and the final versions was a list of criticisms of the proposed regulations from the Office of Chief Counsel.

113. 198 F.2d 63 (8th Cir), cert. denied, 344 U.S. 836 (1952).
114. Memo to Secretary, supra note 111. The Court's assertion regarding Brown and Hardenbergh was made in response to petitioner's argument. See infra text accompanying notes 123-30.
115. Memo to Secretary, supra note 111.
116. 102 S. Ct. at 1088.
117. Memo to Secretary, supra note 111.
118. Id., which states in relevant part: “The proper distinction between the two cases turns on the question of whether under the applicable state law a beneficiary or heir can or
of the IRS. This list stated, *inter alia*, that “the renunciation rule should not depend on testacy v. intestacy.” Thus, the thrust of the change in language from “interest” to “transfer” in section 25.2511-1(c), given so much weight by both the government and petitioner in *Jewett*, was frankly not the focus of the drafters.

Comparison of the actual language of the respective regulations may illuminate the intent of the drafters. The word “interest” in the original version encompassed both contingent and vested interests. Had the final regulation retained the “interest” language, Jewett’s disclaimer would be taxable because he knew of his contingent interest thirty-three years prior to his disclaimer. Thirty-three years certainly violates any “reasonable time” requirement.

In contrast, the word “transfer” may suggest a narrower concept, namely, a change in control or benefit of property. Control of the property never passed to Jewett; thus his disclaimer could not be a transfer. This construction of the regulation does not require that Jewett be taxed on his disclaimer, because he still had not received a transfer of property. This construction is consistent with the overall scheme of the estate and gift taxes, as interpreted by the courts since the regulation was promulgated.

Such a construction comports with the intent of the drafters to maintain then current law, as manifested by a Technical Memorandum issued by the Commissioner’s Technical Planning Division. This memorandum clearly indicated that the IRS followed *Brown* before 1958, and intended to codify *Brown* in section 25.2511-1(c).

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cannot refuse to accept ownership of the property which passed from the decedent....” The Ohio statute permitted the disclaimer in *Brown*, 63 F.2d at 916, but Minnesota intestacy law did not permit the disclaimer in *Hardenburgh*, 198 F.2d at 67.


120. See supra notes 97-99 and accompanying text.

121. A technical memorandum is a form of legislative history with respect to a treasury regulation, often citing the reasons for a regulation, which constitutes the working law of the IRS. *See Taxation with Representation Fund v. Commissioner*, 646 F.2d 666, 669 (D.C. Cir. 1981).

122. Technical Memorandum from the Director, Technical Planning Division, to the Director, Special Technical Services Division of the Internal Revenue Service (written sometime between May 25, 1956 and October 11, 1957) [hereinafter cited as Tech. Memo]. For the text of this Tech. Memo, see Halbach brief, supra note 119, at app. 9. The Halbach estate asserted its interest in this case as an amicus because it was litigating the same issue with the Commissioner. The bulk of the amicus brief discussed technical material obtained from the Commissioner pursuant to a Freedom of Information Act request. The government took over one year to respond to the request and then did so only as a result of litigation.
The Technical Memorandum was issued pursuant to receipt of a so-called “Proposed Ruling”\textsuperscript{123} by the Director of the Technical Planning Division some time in 1956. The proposed ruling specifically provided, \textit{inter alia}, that a renunciation of an inheritance or legacy under a will constituted a taxable “transfer” for gift tax purposes, regardless of property law title considerations.\textsuperscript{124} Upon receipt of this proposed ruling, the Technical Planning Division recommended the proposed ruling be withheld. The Director explained that the IRS had previously followed \textit{Brown} and \textit{Hardenbergh}, and that adoption of the proposed ruling would change the position of the IRS in this regard. Although such a change had been contemplated by the drafters, the Director explained, such a change in position might prompt Congress to pass legislation ordering that all disclaimers be exempt from the gift tax.\textsuperscript{125} It was therefore determined that “the prior position of the Service with respect to cases coming within the \textit{Brown} v. \textit{Routzahn} decision should not be changed.”\textsuperscript{126}

The Technical Memorandum emphasized that the distinction between \textit{Brown} and \textit{Hardenbergh} narrowly turned on whether a disclaimer could be made under applicable state law.\textsuperscript{127} This distinction was intended to be preserved under the regulation. In addition, however, the Technical Planning Division Director indicated that not only the distinctions, but the broader rulings of the decisions were to be retained.\textsuperscript{128}

The Ninth Circuit noted as recently as 1963 that the \textit{Brown} decision established that “... the federal tax on transfers ... is levied on the transfer of property, not on the exercise of a right to renounce testamentary gifts.”\textsuperscript{129} This position lends support to the proposition that the difference in the plain meaning of the words

\textsuperscript{123} The internal procedure of the IRS provides that letters may be issued in response to taxpayer requests for rulings on the consequences of a particular situation. These answers are called Letter Rulings. If the Commissioner feels that a Letter Ruling is of general public interest, he may publish it as a Revenue Ruling. When a ruling is ready to be issued prior to the promulgation of pertinent pending regulations, it must be cleared by the Technical Planning Division (author of the regulations) prior to release. The text of this proposed ruling is found in Halbach brief, \textit{supra} note 119, at app. 7.

\textsuperscript{124} Id.

\textsuperscript{125} E.g., disclaimers invalid under local law, such as those in \textit{Hardenbergh}. See Tech. Memo, \textit{supra} note 122.

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Commissioner v. Estate of Vease, 314 F.2d 79, 88 (9th Cir. 1963). Seventeen years later, the Ninth Circuit taxed Jewett’s disclaimer, 638 F.2d 93 (9th Cir. 1980), \textit{reh’g denied}, Feb. 18, 1981.
"transfer" and "interest" suggests the drafters' intent to tax only the former. If so, the Court's holding in Jewett disregards the intent of the drafters of section 25.2511-1(c) and the decision in Brown, which the regulation was intended to codify.

The Significance of the Tax Reform Act of 1976

As further justification for its decision, the Court asserted that I.R.C. § 2518, entitled "Disclaimers" and added to the Code by the Tax Reform Act of 1976, sheds no light on the interpretation of section 25.2511-1(c). The Court insisted, therefore, that its decision in Jewett was based solely on section 25.2511-1(c) without reference to section 2518. By taking this stance, the Court ignored the congressional understanding of section 25.2511-1(c) which is elucidated in the legislative history to section 2518.

In its discussion of the proposed section 2518, the House Ways and Means Committee Report first noted that under section 25.2511-1(c), a disclaimer must comply with local law in order to be

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130. See supra text accompanying note 120.
131. The Tax Reform Act of 1976 added section 2518 to the Internal Revenue Code. This section provides that a qualified disclaimer is "an irrevocable and unqualified refusal by a person to accept an interest in property" and lists four requisites of a qualified disclaimer. I.R.C. § 2518 (1976). See supra notes 46-49 and accompanying text. Several law review articles were written about the proposed interpretive Treas. Reg. § 25.2518. See, e.g., Donovan and Reid, supra note 17; Frimmer, Proposed Regs Under Section 2518 Explain and Expand the Federal Disclaimer Statute, 53 J. TAX'N 266 (1980); Martin, supra note 14; Wenig, supra note 17; Note, Proposed Disclaimer Regulations Concentrate on Meshing with State Law, 53 J. TAX'N 243 (1980). See generally 34A AM. JUR. 2D Disclaimers ¶¶ 47, 325-47,339 (1981). There was considerable discontent with the 1976 Act, however, and Congress returned to the drawing boards. The result was the Economic Recovery Tax Act of 1981 (ERTA). ERTA apparently buttresses some of the adverse impact of the Tax Reform Act of 1976. ERTA provides that "certain transfers" will be treated as disclaimers. Thus, even absent the fulfillment of the requirements for an effective disclaimer under the 1976 Act, the transfer of a transferor's entire interest in property to one who would have received it if there had been a disclaimer will be treated as a valid disclaimer for federal transfer tax purposes. Such a transfer, however, must be timely made and the transferor may not have accepted any of the transfer's benefits. Local law will be applicable to determine the identity of the transferee, but the transfer need not satisfy the local disclaimer requirements. Moreover, the disclaimant's direction of the transfer is not an acceptance. H.R. REP. No. 201, 97th Cong., 1st Sess. 191 (1981). See generally How to Disclaim After ERTA 81, 1 ESTATE PLANNING IDEAS § 1 (1982).

The general purpose of ERTA, however, was to provide the uniformity in disclaimer law which the 1976 Act did not achieve. See generally 3 FED. EST. & GIFT TAX REP. (CCH) ¶ 12,445 (1981).
132. 102 S. Ct. at 1090.
133. Id.
valid for gift tax purposes.\textsuperscript{135} The report cited Keinath v. Commissioner\textsuperscript{136} as indicative of the proper interpretation of section 25.2511-1(c). It noted, however, that under the 1954 Code, the Keinath situation might prompt a different result in different jurisdictions, depending upon applicable local law.\textsuperscript{137}

Because the tax consequences under section 25.2511-1(c) varied according to local law, the House report stated that the new section 2518 was intended to provide a uniform standard within which to evaluate the timeliness of a disclaimer for federal tax purposes.\textsuperscript{138} The statute specifically applies to “transfers creating an interest in the person disclaiming made after December 31, 1976.”\textsuperscript{139} As to all transfers made prior to January 1, 1977, “the rules relating to disclaimers under [the then] present law, including the period within which a disclaimer must be made, are to continue to apply to disclaimers made after December 31, 1976”\textsuperscript{140}

The Supreme Court correctly asserted in Jewett that new laws do not necessarily change prior law.\textsuperscript{141} But as the dissent points out,\textsuperscript{142} it is anomalous for the Court to state that the above legislative history for section 2518 of the Tax Reform Act of 1976 casts no light on the proper interpretation of section 25.2511-1(c). On the contrary, the legislative history suggested that the Keinath decision properly reflected the law under section 25.2511-1(c), expressed congressional dissatisfaction with the law so written, and stated Congress’ further intent to change that law prospectively.\textsuperscript{143} The Court’s interpretation of section 25.5211(c) in Jewett thus disregarded congressional interpretation of that regulation.

THE MEANING OF TRANSFER: A MATTER OF POLICY

The most important concept in estate planning, undermined by Jewett, is certainty in the tax laws.\textsuperscript{144} Certainty is critical, and, as

\begin{footnotesize}
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\item \textsuperscript{135} Id. at 66, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 3420. See also Frimmer, Using Disclaimers in Post Mortem Estate Planning: 1976 Law Leaves Unresolved Issues, 48 J. TAX’N 322, 323 (1978).
\item \textsuperscript{136} 480 F.2d 57 (8th Cir. 1973).
\item \textsuperscript{138} Id. at 67, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 3356, 3421.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. at 68, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 3356, 3422.
\item \textsuperscript{141} 102 S. Ct. at 1090 (citing Knetsch v. United States, 364 U.S. 361, 367 (1960)).
\item \textsuperscript{142} 102 S. Ct. at 1094. (Blackmun, J., dissenting).
\item \textsuperscript{143} See, e.g., Haddad, supra note 17, at 673.
\item \textsuperscript{144} Rasquin v. Humphreys, 308 U.S. 54, 56 (1939); Cottrell v. Commissioner, 628 F.2d
\end{itemize}
\end{footnotesize}
a general rule, tax statutes are therefore interpreted consistently.\textsuperscript{145} Congress recognized the need for consistency when it incorporated section 7805 into the Revenue Code.\textsuperscript{146} Section 7805 gives the Secretary of the Treasury discretion to prescribe the extent to which rules and regulations are to be given retroactive effect.\textsuperscript{147} The courts have curbed this discretion, however, and imposed a duty on the IRS to avoid inequitable results.\textsuperscript{148} Exercise of the Secretary's discretion towards that end includes considering the "totality of the circumstances surrounding the handing down of a ruling."\textsuperscript{149}

In the ill-fated proposed ruling, sent to the Technical Planning Division for approval pending promulgation of the final section 25.2511-1(c),\textsuperscript{150} the IRS explicitly stated that "under the authority contained in section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to the date of this bulletin."\textsuperscript{151} The proposed ruling would have changed the interpretation of section 25.2511-1(c) as drastically as the Court changed it in \textit{Jewett}.

The proposed ruling was never issued, because the regulation which was issued retained rather than changed the law.\textsuperscript{152} But the Commission's use of section 7805 to change the interpretation of section 25.2511-1(c) indicated the Commissioner's awareness that the ruling represented a change from prior law, and that such a change must be prospective in application in order to avoid unfairness.\textsuperscript{153} In fact, when the disclaimer law was congressionally codified in 1976,\textsuperscript{154} the change was made prospective only.\textsuperscript{155}

\begin{itemize}
\item 145. \textit{See} Rasquin v. Humphreys, 308 U.S. 54, 56 (1939). \textit{See also} Cottrell v. Commissioner, 628 F.2d 1127, 1131 (8th Cir. 1980).
\item 146. I.R.C. § 7805(b) (1976).
\item 147. Id.
\item 150. \textit{See supra} text accompanying notes 123-26.
\item 151. \textit{See} Halbach brief, \textit{supra} note 119, at app. 7.
\item 152. Tech. Memo, \textit{supra} note 122.
\end{itemize}
in keeping with the spirit of section 7805.

In contrast to congressional consensus that consistency in the tax laws is important, the Court’s position in Jewett encouraged the Commissioner to take inconsistent positions at the expense of taxpayers. Although the Commissioner intended to retain then current law when he promulgated section 25.2511-1(c) in 1958, he now seeks to change it. In addition, the Commissioner has expressly stated his refusal to follow appellate court decisions, even though those decisions accurately reflect the intent of the drafters and comport with previously accepted principles of law.

By permitting the Commissioner to change his interpretation of the law midstream, the Court effectively treated the estate and gift tax scheme as though it were the income tax scheme. Taxpayers expect changes in income tax law. Therefore, they must determine each year when they fill out their returns whether changes have occurred since the previous year. Estate planning, on the other hand, does not occur annually. Taxpayers must necessarily rely on precedent. Courts strive to retain conformity in interpretation of estate and gift tax laws. Yet Jewett upheld a disharmonious court of appeals decision and permitted the Commissioner to reinterpret his regulation.

The effects of this decision go beyond the $750,000 Jewett paid on property he never received. Jewett allowed the Commission to assess retroactively deficiencies on virtually all disclaimers ever exercised which have previously been deemed effective. The Jewett decision thus propels taxpayers into confusion and compels estate planners to work at their own peril.

The thrust of the Court’s argument revolved around its expansive reading of the word “transfer.” The Court (and the Commissioner) asserted that Jewett controlled the disposition of the property by retaining the right to disclaim for thirty-three years.

156. See supra notes 121-28 and accompanying text.
157. See, e.g., Halbach v. Commissioner, 71 T.C. 141 (1978); Jewett v. Commissioner, 70 T.C. 430 (1978), aff’d, 638 F.2d 93 (9th Cir. 1980); Keinath v. Commissioner, 58 T.C. 352, rev’d, 480 F.2d 57 (8th Cir. 1973).
158. See Ltr. Rul. 7806080 (Nov. 14, 1977) in which the IRS expressly stated that it would not follow the Keinath decision to dispose of cases outside of the property of the Eighth Circuit. See also Bromberg, supra note 144, at 65.
159. See Cottrell v. Commissioner, 628 F.2d 1127, 1131 (8th Cir. 1980).
160. Disclaimers do not result in taxable gifts. Therefore, disclaimants may not have filed gift tax returns on the property disclaimed. The statute of limitations does not begin to run until the gift tax return is filed. Thus, property disclaimed at any earlier time could not be assessed if no gift tax return had been filed.
161. 102 S. Ct. at 1089 (quoting Jewett v. Commissioner, 70 T.C. 430, 438 (1978)). This is
Gratuitous relinquishment of such control constituted a transfer subject to the gift taxes.

Broadly speaking, this analysis is correct. All disclaimers are technically indirect transfers of control because, by refusing to accept, the disclaimant permits someone else to take. But the Commission itself narrowed this expansive concept of control with regard to disclaimers when it promulgated section 25.2511-1(c). There it recognized that a disclaimer does not constitute relinquishment of control, because the disclaimer is exercised before control over the property itself ever takes effect. Thus, the reasonable time governing the effectiveness of the disclaimer should have been measured from the transfer which occurred at the death of the life beneficiary. Instead, the court measured that time period from the death of the testator, in order to tax the transfer with which the Court was really concerned: that flowing from the disclaimant.

When the Commissioner determined that Jewett's disclaimer was a taxable gift, he did so because the disclaimer had the effect of decreasing Jewett's taxable estate. The Commissioner should have been precluded from doing this by his own regulation, which recognized a disclaimer if certain requirements were met. Jewett had met those requirements. The subsequent refusal of the Supreme Court at this juncture to permit Jewett's disclaimer disregards the drafters' intent and congressional understanding of Treasury Regulation section 25.2511-1(c).

CONCLUSION

The Supreme Court should never have granted certiorari in Jewett v. Commissioner. The perceived conflict had already been resolved, albeit prospectively, by the passage of section 2518
of the Internal Revenue Code. Although the Ninth Circuit created a conflict among the circuits,\textsuperscript{167} the conflict could have resolved itself either by an en banc reversal or by the failure of any other court to follow Jewett’s improper result.

Alternatively, the conflict could have been permitted to stand. The rule against perpetuities\textsuperscript{168} ensures that instruments creating future interests must vest in the last beneficiary within twenty-one years after the death of a life in being at the time such instrument was created. Thus, with the passage of time, the problem which arose in Jewett would cease to arise.

Having taken the case, the Court disregarded legislative history and judicial precedent. The Court failed to appreciate the importance of stability in the gift tax area, as well as the significance of the broader tax scheme. Consequently, after Jewett, only two avenues remain for taxpayers with property interests created by an instrument prior to January 1, 1977. A taxpayer may either avoid disclaiming altogether, since it is obvious the Commissioner intends to assess a tax on such disclaimers, or a taxpayer may hope that Congress will legislatively reverse the Court’s decision by passing legislation which will clarify the confusion engendered by Jewett v. Commissioner.\textsuperscript{169}

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\textsuperscript{167} Compare Jewett v. Commissioner, 638 F.2d 93 (9th Cir. 1980) with Cottrell v. Commissioner, 628 F.2d 1127 (8th Cir. 1980) and Keinath v. Commissioner, 480 F.2d 57 (8th Cir. 1973).

\textsuperscript{168} Discussion of the rule against perpetuities is beyond the scope of this article. For an excellent general explanation of the operation of the rule, see Leach, \textit{Perpetuities: The Nutshell Revisited}, 78 \textsc{Harv. L. Rev.} 973 (1965); Leach, \textit{Perpetuities in a Nutshell}, 5 \textsc{Harv. L. Rev.} 638 (1938).

\textsuperscript{169} Perhaps in anticipation of the Supreme Court’s decision, Senators Symms and Wallop introduced a bill in the United States Senate on November 30, 1981. The bill permitted disclaimers of an interest in property created by transfers made prior to November 14, 1958 (the date the regulation was promulgated) if the disclaimer was made within nine months following enactment of the bill, or within nine months following the disclaimant’s knowledge of his interest (but no later than December 31, 1991). S. 1983, 97th Cong., 1st Sess. (Dec. 16, 1981). The hearing on the bill by the Estate and Gift Tax Subcommittee of the Senate Finance Committee was held on May 27, 1982.

One possibility which always remains, of course, is that the Court will reverse itself in some subsequent case. It has done so before. See Helvering v. Hallock, 309 U.S. 106 (1940).